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## Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use

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# Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use

*Reed D. Benson\**

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## I. INTRODUCTION

In the United States, the law governing the allocation and use of water resources—“water law”—is primarily state law. The states, particularly in the West,<sup>1</sup> have jealously guarded their water allocation authority against real or imagined federal interference,<sup>2</sup> and the federal government has largely (though not entirely) let them make their own decisions regarding water rights.<sup>3</sup> These are true statements, widely or even universally accepted. If asked to explain them, however, many students of water law would surely offer a broader statement about the federalism of water—that is, that the federal government has consistently deferred to the states in matters relating to the control and use of water resources. That statement is conventional wisdom, and it too is widely accepted.<sup>4</sup>

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<sup>1</sup>For the purposes of this Article, “the West” and “the western states” refer to the seventeen contiguous states from the High Plains to the West Coast. These states are largely arid or semiarid, and they allocate rights to the use of surface water primarily under the doctrine of prior appropriation. See *infra* notes 54–59 and accompanying text (discussing water rights in western states).

<sup>2</sup>This phenomenon is certainly not new. See, e.g., B. Abbott Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1, 1–8 (1964) (discussing politics of states’ rights and western water development); Frank J. Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 751–58 (1980) (comparing water law of western states with federal water law). Recently, the Western Governors’ Association issued the following policy statement in the context of discussing reauthorization of the Federal Clean Water Act: “In the implementation of Clean Water Act provisions, *the states should retain primary jurisdiction over related water resource allocation decisions*, including how to most appropriately balance state water resource needs with Clean Water Act objectives.” W. GOVERNORS’ ASS’N, POLICY RESOLUTION 05–10: WATER QUALITY ISSUES IN THE WEST 2 (2005) (emphasis added), available at <http://www.westgov.org/wga/policy/05/CWA.pdf>.

<sup>3</sup>See FRANK J. TRELEASE, NAT’L WATER COMM’N, FEDERAL-STATE RELATIONS IN WATER LAW 9–11 (1971) (describing federal government as having limited role in matters of water allocation, leaving most issues to states).

<sup>4</sup>Such comments are “typically accepted as an ultimate truth.” Amy K. Kelley, *Staging a Comeback—Section 8 of the Reclamation Act*, 18 U.C. DAVIS L. REV. 97, 117 n.98 (1984). I must admit that, in the past, I accepted this conventional wisdom too readily. See Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 375 (1997) (“In enacting laws that affect water, Congress has shown great deference to state laws and state control over water allocation.”).

Perhaps the strongest legal support for the conventional wisdom of deference may be found in two Supreme Court opinions, both handed down on the same day in 1978 and authored by then–Associate Justice Rehnquist. In *California v. United States*,<sup>5</sup> the Court declared that the history of federal-state relations over irrigation development in the West “is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.”<sup>6</sup> And in *United States v. New Mexico*,<sup>7</sup> the Court offered an even more sweeping statement: “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.”<sup>8</sup> Justice Rehnquist supported these statements with excerpts from statutes, legislative history, and other congressional materials.<sup>9</sup>

Nonetheless, some leading commentators have questioned the conventional wisdom of federal deference to states in water resource matters. For example, Professor Amy Kelley contends that this picture of deference is at best oversimplified; in criticizing the Court’s statement in *California v. United States*,<sup>10</sup> she wrote: “There are virtues in simplicity, but the history of federal-state relations over western waters certainly is not reducible to a consistent thread. A more accurate description is that the field is a concoction of Byzantine politics and legalistic archaeology.”<sup>11</sup> Professor David Getches has even called the concept of federal deference to state water law a “myth.”<sup>12</sup>

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<sup>5</sup>438 U.S. 645 (1978). This case interpreted a provision of the 1902 Reclamation Act, ch. 1093, 32 Stat. 388, 388 (codified as amended in scattered sections of 43 U.S.C. from § 371 to § 498), under which the federal government built many projects throughout the West for irrigation and other purposes. See *infra* notes 210–24 and accompanying text (discussing reclamation laws and U.S. Bureau of Reclamation projects).

<sup>6</sup>*California*, 438 U.S. at 653.

<sup>7</sup>438 U.S. 696 (1978).

<sup>8</sup>*Id.* at 702. This case addressed a U.S. government claim for reserved water rights on national forest lands located in New Mexico. See *id.* at 697–98. For an explanation of reserved water rights, see *infra* notes 134–59 and accompanying text.

<sup>9</sup>See *New Mexico*, 438 U.S. at 702 n.5 (referring to list of “37 statutes in which Congress has expressly recognized the importance of deferring to state water law”); see also *California*, 438 U.S. at 656–70 (discussing 1902 Reclamation Act and judicial review of nineteenth-century and early-twentieth-century congressional activity).

<sup>10</sup>*California*, 438 U.S. at 653.

<sup>11</sup>Kelley, *supra* note 4, at 117 (internal quotation marks and citations omitted). She continued:

[O]ne can dig up substantial support for almost any hypothesis. While conceding numerous instances of congressional deferral to state law, one commentator determined that “one can draw a comparable list of occasions on which Congress chose *not* to defer to state law.” Moreover, some statutes only “show that Congress had generally *recognized* state water law, not that it had *deferred* to it . . . and in . . . others Congress subjected only private parties and not federal agencies to state law.”

How much of this conventional wisdom is fact, and how much is myth? This question is not merely academic. To the contrary, the extent of federal deference to state water law bears directly on a variety of ongoing issues in the courts, the federal agencies, and the Congress. A few recent examples follow.

*In the courts.* In 2001 the Supreme Court raised questions about the application of the Clean Water Act (“CWA”)<sup>13</sup> to small intrastate water bodies that are unconnected to larger rivers or lakes, based, in part, on what it deemed significant constitutional questions raised by such an assertion of jurisdiction.<sup>14</sup> Although the Court was vague as to the precise nature of those constitutional questions, it stated that asserting federal jurisdiction over activities affecting such waters “would result in a significant impingement of the States’ traditional and primary power over land and water use.”<sup>15</sup> The Court also relied on a CWA provision stating the policy of Congress to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.”<sup>16</sup> Thus, the Court justified a narrow reading of the CWA based partly on a general notion of traditional state power over water use and a CWA saving clause recognizing this power. This case, commonly known as *SWANCC*, has raised questions about the scope of the CWA that remain unresolved despite a flurry of litigation in the lower federal courts.<sup>17</sup>

In another recent Supreme Court case, *South Florida Water Management District v. Miccosukee Tribe of Indians*,<sup>18</sup> known as *Miccosukee*, the government and numerous amici argued, based largely on the states’ traditional water allocation authority and on CWA provisions recognizing that authority, that a CWA permit should not be required for a project that pumps polluted water from one location to another without adding any pollutants.<sup>19</sup>

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*Id.* at 117–18 (quoting Bruce A. Machmeier, Note, *Federal Acquisition of Non-Reserved Water Rights after New Mexico*, 31 STAN. L. REV. 885, 909–10 (1979)).

<sup>12</sup>See David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States’ Role?*, 20 STAN. ENVTL. L.J. 3, 6 (2001).

<sup>13</sup>33 U.S.C. §§ 1251–387 (2000).

<sup>14</sup>*Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001). The Court held that the “Migratory Bird Rule” was illegal as a basis for jurisdiction under CWA section 404, finding no intent in the statute or legislative history for such a broad jurisdictional reach. *Id.*

<sup>15</sup>*Id.* The Court did not explain this statement, except to quote a sentence from a single cited case relating to land use: *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). *Solid Waste Agency*, 531 U.S. at 174. Thus, the Court made no attempt to define “traditional and primary” state power over water use, or to explain the constitutional significance of that power for purposes of federal regulatory jurisdiction.

<sup>16</sup>*Id.* (citing 33 U.S.C. § 1251(b) (2000)).

<sup>17</sup>See Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 860–79 (2003) (discussing cases interpreting *SWANCC* and scope of CWA).

<sup>18</sup>541 U.S. 95 (2004).

<sup>19</sup>*Id.* at 105–08.

Although *Miccosukee* involved a drainage project,<sup>20</sup> the western states recognized that the case could result in the requirement of a CWA permit for many water supply projects that move water from one location to another.<sup>21</sup> Eleven western states filed an amici brief<sup>22</sup> arguing that requiring permits for such projects would be “contrary to the deference historically shown by Congress and this Court to the states in matters of water allocation and use,” and would constitute an “unwarranted intrusion on state sovereignty . . . in the face of a clear directive from Congress that it intended to respect the ability of states to control and manage their water resources.”<sup>23</sup> Even the U.S. government argued in favor of deference to state water law,<sup>24</sup> although these arguments evidently failed to persuade the Court.<sup>25</sup>

*In the federal agencies.* In the wake of the *Miccosukee* decision, the Environmental Protection Agency (“EPA”) issued an interpretive ruling that would exempt water transfer projects from CWA permitting requirements.<sup>26</sup> In

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<sup>20</sup>In *Miccosukee*, the project in question pumped water containing certain pollutants from a canal to a remnant Everglades wetland area to prevent flooding in populated areas. *Id.* at 99–101.

<sup>21</sup>An earlier Court of Appeals decision, *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), required a permit for a similar water supply project in New York. *Id.* at 489.

<sup>22</sup>Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner at 1, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004) (No. 02-626) (signed by attorneys general of Colorado, Hawaii, Idaho, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah, and Wyoming).

<sup>23</sup>*Id.* at 5, 7. In a separate brief, Idaho’s governor made the same argument in more florid prose: “The dichotomy presented by the instant case is that the delicately calculated equipoise of state-federal cooperation under the Clean Water Act . . . has been destabilized by the holding below.” Brief of Idaho Governor Dirk Kempthorne as Amicus Curiae in Support of Petitioner at 11, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004) (No. 02-626).

<sup>24</sup>The Unites States’ brief cited CWA section 101(g), which states in part: “‘It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by’” the CWA. Brief for the United States as Amicus Curiae Supporting Petitioner at 25 n.11, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004) (No. 02-626) (quoting 33 U.S.C. § 1251(g) (2000)). The Unites States argued that requiring permits for water projects creates “considerable tension with that congressional policy, because it could impose substantial obstacles to the operation of state water allocation systems,” and could affect “an array of major water projects in the western United States, where projects such as California’s Central Valley Project move vast quantities of water among and within various bodies of water in order to meet a wide range of agricultural and other needs.” *Id.*

<sup>25</sup>See *Miccosukee*, 541 U.S. at 108 (stating that National Pollutant Discharge Elimination System (“NPDES”) program may be “necessary to protect water quality” in spite of state water laws). The Court unanimously held that permits may be required for projects that move polluted water from one water body to another without adding pollutants, *id.* at 105, but remanded for a determination of certain factual issues, *id.* at 111–12, and declined to address the federal government’s novel legal argument (the “unitary waters theory”) for avoiding the permit requirement. *Id.* at 109.

<sup>26</sup>Memorandum from Ann R. Klee, Gen. Counsel, U.S. Env’tl. Prot. Agency, and Benjamin H. Grumbles, Assistant Adm’r for Water, U.S. Env’tl. Prot. Agency, on Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers to Regional

this ruling, the EPA struggled to reconcile its position with the *Miccusukee* opinion,<sup>27</sup> never mentioning the Court's statement that "it may be that such permitting authority is necessary to protect water quality."<sup>28</sup> The crux of this ruling was that "subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights,"<sup>29</sup> and the EPA argued that this result would be contrary to congressional intent as expressed in certain provisions of the CWA.<sup>30</sup>

In 2003 the U.S. Department of the Interior ("Interior")—home of such diverse entities as the Bureau of Reclamation, the Fish and Wildlife Service, the Bureau of Indian Affairs, and the National Park Service—released a policy statement called *Water 2025: Preventing Crises and Conflict in the West*.<sup>31</sup> As its title indicates, *Water 2025* emphasizes the prevention of "crises" over water supply in the West, but it specifically identifies only two such "crises": the water disputes in the Klamath and Rio Grande basins,<sup>32</sup> both of which pitted traditional water users against the needs of fish protected by the Endangered Species Act ("ESA").<sup>33</sup> The document focuses on water supply problems in the West, identifies certain "realities" that drive such problems, and suggests certain principles and tools for resolving them.<sup>34</sup> Although much of *Water 2025* is vague, the following statement is not: "Since 1866, federal water law and policy has deferred to the states in the allocation and administration of water within their boundaries. This policy will be honored and enhanced by *Water 2025*."<sup>35</sup> Thus, the Interior has stated without qualification that federal law defers to state water law, and has pledged fealty

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Administrators 3 (Aug. 5, 2005) [hereinafter U.S. Env'tl. Prot. Agency Memorandum], available at [http://www.epa.gov/ogc/documents/water\\_transfers.pdf](http://www.epa.gov/ogc/documents/water_transfers.pdf). The interpretive memo stated that it confirmed the agency's longstanding practice and concluded that "Congress intended for water transfers to be subject to oversight by water resource management agencies . . . rather than permitting programs under . . . the CWA." *Id.*

<sup>27</sup>*Id.* at 13–15.

<sup>28</sup>*Miccusukee*, 541 U.S. at 108.

<sup>29</sup>U.S. Env'tl. Prot. Agency Memorandum, *supra* note 26, at 6. Specifically, this interpretation would exempt such projects from the pollution discharge permitting program (NPDES) under CWA section 402.

<sup>30</sup>*Id.* at 5–7 (citing Clean Water Act §§ 101(b), 101(g), 510(2) (current version at 33 U.S.C. §§ 1251(b), (g), 1370(2) (2000))).

<sup>31</sup>BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, WATER 2025: PREVENTING CRISIS AND CONFLICT IN THE WEST (2003), available at <http://www.doi.gov/water2025/Water2025.pdf> [hereinafter WATER 2025]. Originally released in May 2003, *Water 2025* was still featured prominently on the Interior's home page more than two years later. The August 2005 update is available at: <http://www.doi.gov/water2025>.

<sup>32</sup>U.S. Env'tl. Prot. Agency Memorandum, *supra* note 26, at 10.

<sup>33</sup>16 U.S.C. §§ 1531–44 (2000 & Supp. III 2003).

<sup>34</sup>For a full summary and critique of *Water 2025*, see Reed D. Benson, *The Interior Department's Water 2025: Blueprint for Balance, or Just Better Business as Usual?*, 33 ENVTL. L. REP. 10,837, 10,837–47 (2003).

<sup>35</sup>WATER 2025, *supra* note 31, at 3.

to that policy without mentioning any potential conflicts posed by Interior's obligations under the ESA or other federal laws.

Another recent case of agency deference to state water laws involves the issue of "bypass flows" on national forest lands. Water users with dams, ditches, or other facilities in a national forest require a special use permit from the U.S. Forest Service, and the agency has sometimes required that the permittee bypass a certain amount of water past its dam or diversion to maintain a minimum flow downstream.<sup>36</sup> Water users and some states, notably including Colorado, have challenged the existence and exercise of this authority,<sup>37</sup> but in 2003 two different cases in the lower federal courts confirmed that the Forest Service may impose bypass flows on permittees possessing water rights under state law.<sup>38</sup> Early in 2005, however, the Forest Service essentially promised not to impose bypass flows in Colorado unless necessary to comply with the ESA.<sup>39</sup> The letter containing this promise never mentions the word "deference," but it refers repeatedly to "the authority of states to allocate water," and indicates that the Forest Service "recognizes its responsibility to cooperate with states, to the maximum extent possible, to manage water resources consistent with state law and avoid[] unnecessary conflicts between federal and state law."<sup>40</sup> The letter did not explain the source or nature of this "responsibility."<sup>41</sup>

*In Congress.* The 108th Congress saw bills introduced in both houses that would have sharply restricted federal authority over water.<sup>42</sup> Although neither bill mentioned any environmental law, both were motivated primarily by federal environmental laws, particularly the ESA, and these statutes' perceived threats to state water allocation power and state-authorized water

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<sup>36</sup>See generally *Trout Unlimited v. U.S. Dep't of Agric.*, 320 F. Supp. 2d 1090, 1095–98 (D. Colo. 2004) (challenging Forest Service decision not to impose bypass flows on special use permit for water supply facilities in Colorado, despite environmental benefits of bypass flows). Where threatened or endangered species are present, the Forest Service may need to impose bypass flows in order to avoid jeopardy to the species as required by the ESA. See *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1084–85 (9th Cir. 2003).

<sup>37</sup>See *Trout Unlimited*, 320 F. Supp. 2d at 1102. Interveners, including Colorado, argued against federal authority to impose bypass flows, primarily because "exercise of this authority by the Forest Service would contradict the repeated and explicit decisions by Congress to defer to and respect state authority over water allocation and use." *Id.*

<sup>38</sup>See *id.* at 1105–06; *County of Okanogan*, 347 F.3d at 1084–85.

<sup>39</sup>Letter from Mark Rey, Under Sec'y of Agric. for Natural Res. and Env't, to Wayne Allard, U.S. Senator 2 (Jan. 19, 2005) (on file with author).

<sup>40</sup>*Id.* at 1.

<sup>41</sup>Instead, the letter identified several ways in which the Forest Service was cooperating with Colorado to avoid imposing bypass flow requirements on water users. *Id.* at 1–2. The letter also promised cooperation "to further improve [Forest Service] policies and, if necessary, seek improvements to existing law to more fully integrate federal management of water resources into the framework of state law." *Id.*

<sup>42</sup>See H.R. 2603, 108th Cong. (2003); S. 561, 108th Cong. (2003).

uses.<sup>43</sup> H.R. 2603 would have prevented the U.S. Interior Secretary from taking any action “so as to abrogate, injure or otherwise impair any right to the use of any quantity of water” established under certain other laws or contracts.<sup>44</sup> S. 561 would have gone even further, subjecting the U.S. government “to all procedural and substantive laws of the State relating to the allocation, adjudication, appropriation, acquisition, use, and exercise of water rights to the same extent as a private person,”<sup>45</sup> and even delegating “to each State the authority to regulate water, including the authority to regulate water in interstate commerce.”<sup>46</sup> Sponsors of S. 561 characterized the bill not as a major cession of federal power to the states, but as a continuation of the long tradition of deference.<sup>47</sup>

These few examples show that today’s federal-state clashes over water—and resulting arguments about deference—often arise over disputes regarding the application of the federal environmental laws, particularly the CWA and the ESA. But while the context may be relatively new, the conflict between the federal and state governments over water is at least a century old. Consider the words of the eminent water scholar Frank Trelease:

When [federal] and state law clash, when gaps appear, when federal law upsets that which state law has set up, . . . then there is federal-state conflict in the field of water rights. There is confusion, uncertainty, bad feeling, jealousy and bitterness. To a substantial degree, this is what exists today.<sup>48</sup>

He wrote those words in 1971, before the enactment of either the CWA or the ESA. For decades, the states have battled the United States over issues such

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<sup>43</sup>Representative Stevan Pearce (R-N.M.), primary sponsor of H.R. 2603, announced in introducing the bill: “We cannot let the ESA control the rights of our state or those of our farmers and ranchers.” Press Release, Rep. Stevan Pearce, Pearce Unveils Legislation to Balance ESA & Constitutional Rights (June 25, 2003) (on file with author). Senator Mike Crapo (R-Idaho), primary sponsor of S. 561, stated that the ESA, “the Clean Water Act, the Federal Land Policy Management Act, and wilderness designations have all been vehicles used to erode State sovereignty over water.” Press Release, Sen. Mike Crapo, Crapo Pushes to Protect State Water Rights (Mar. 7, 2003) (on file with author).

<sup>44</sup>H.R. 2603, 108th Cong. § 1 (2003). The bill would also have prevented the Interior from claiming “title or other rights to water in a State, other than for Indian Reservation lands, absent specific direction of law.” *Id.*

<sup>45</sup>S. 561, 108th Cong. § 3 (2003).

<sup>46</sup>*Id.* § 4.

<sup>47</sup>“For nearly 150 years, Congress has recognized and deferred to the states the authority to allocate and administer water within their borders. The Supreme Court has confirmed that this is an appropriate role for the states.” Press Release, Sen. Mike Crapo, *supra* note 43; *see also* Press Release, Sen. Pete Domenici, Domenici Wants Feds to Follow State Law When Seeking to Purchase or Lease Water (Mar. 10, 2003) (on file with author) (“I have long been a believer in the dominance of state water laws, particularly when the federal government is active in water management in any given state.”).

<sup>48</sup>TRELEASE, *supra* note 3, at 11.

as the construction and licensing of dam projects and the acquisition of water rights for federal and tribal lands.

Professor Trelease's statement casts doubt on the conventional wisdom: if deference to state law were truly a uniform and overriding federal policy, why would there be such fear and loathing in the West over the federal role in water matters? The answer is that the conventional wisdom is largely myth. It is certainly true that Congress has enacted many statutes with provisions recognizing state water allocation authority, and that the Supreme Court has sometimes given great weight to these provisions individually or cumulatively. But it is also true that federal law affects water resources in a variety of ways, and on the whole it displays nothing like a consistent pattern of deference to state authority over water. To the contrary, Congress and the Supreme Court have generally refused to cede control over water to the states if there was a potential conflict with an important national interest such as navigation, hydropower development, federal reclamation policy, or more recently, environmental protection.

This Article seeks to separate the myth from the reality of federal deference to state water allocation authority. Section I briefly addresses background principles of state water law and federal constitutional law, and Section II traces the early history of deference prior to 1910. Section III analyzes three federal statutory schemes and Supreme Court cases applying them, suggests that each represents a different level of federal deference, and distills a few principles for analyzing deference under federal statutes. Section IV addresses deference issues arising in the context of the CWA and the ESA, applying the principles identified in the previous section. Section V concludes with some points regarding the future of federal deference to states in water resource matters.

## II. BACKGROUND BASICS: STATE WATER LAW AND FEDERAL CONSTITUTIONAL POWER

This Article focuses on Acts of Congress and decisions of the U.S. Supreme Court relating to the authority of state governments to allocate water. As such, it does not emphasize the particulars of state water allocation law, nor does it go into detail regarding the federal government's constitutional powers with respect to water. This section identifies a few general principles of state water law and U.S. constitutional law only to the extent necessary to provide context for the ensuing discussion of federal statutes and case law relating to deference.

A. *The Great Divide in Water Law: Riparianism in the East,  
Appropriation in the West*

In the first half of the nineteenth century, before any states were formed in today's West, American water law was based on the common-law doctrine of riparian rights. For purposes of this Article, suffice it to say that the riparian doctrine allows a person owning land along the bank of a natural river or stream to use the water flowing past the riparian property, but such use must not cause material harm to other owners along the same stream.<sup>49</sup> Many old cases contain language suggesting that riparian owners could not change a stream's natural flow in any way, but even after the doctrine evolved to recognize a right of "reasonable use" that allowed some alteration, the rules limiting water use to riparian lands and prohibiting harm to fellow riparians prevented uses that would significantly diminish downstream flows.<sup>50</sup>

Prior appropriation, by contrast, had its origins in western mining camps where prospectors developed—mostly in the absence of any kind of governmental authority—their own rules for staking claims and resolving conflicts. A basic principle of these rules was that the first person to establish a claim enjoyed a better right than one who arrived later. The prospectors not only staked claims to the lands they sought to mine, but also to the water needed to work these mining claims effectively. Thus, they applied the principle of priority based on seniority ("first in time, first in right") to water as well as land claims.<sup>51</sup> In the primordial prior appropriation case of *Irwin v. Phillips*,<sup>52</sup> the California Supreme Court relied on this rule of the camps to decide a water dispute between mining claimants.<sup>53</sup>

The court in *Irwin* declined to apply the common-law rule not because it found the riparian doctrine unsuited to the West and its economic activities, but because both claimants were squatters on the public domain, and thus neither could claim water rights based on land ownership.<sup>54</sup> The riparian doctrine soon came to be viewed as unsuited to the arid West, however, largely because it generally authorized water use only on lands adjacent to the stream,

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<sup>49</sup>A. DAN TARLOCK ET AL., *WATER RESOURCES MANAGEMENT* 111–22 (5th ed. 2002).

<sup>50</sup>*See* Cal. Or. Power v. Beaver Portland Cement Co., 295 U.S. 142, 157 (1935) (explaining that need for diversion and consumption of water made common-law riparian rule unsuited to West).

<sup>51</sup>*See* DONALD J. PISANI, *TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY 1848–1902*, at 12–24 (1992) (discussing water use practices, customs, and rules of early California mining camps).

<sup>52</sup>5 Cal. 140 (1855).

<sup>53</sup>*See id.* at 140–47. Regarding the mining camps, the California court noted that while there were "many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed" that they had essentially become settled law, including "the rights of those who, by prior appropriation, have taken the waters from their natural beds" for mining purposes. *Id.* at 146.

<sup>54</sup>*Id.* at 145–46.

and because it disfavored any significant alteration of the natural flow. Such restrictions would have severely limited irrigation and mining, both of which required diverting substantial quantities of water for use on lands that could be far removed from the streambed, changing downstream flows to the potential detriment of lower riparian owners.<sup>55</sup> In the latter half of the nineteenth century, the territories and states of the Intermountain West adopted prior appropriation by statute and constitution, as well as by judicial decision.<sup>56</sup>

Under classic prior appropriation, a person who diverts water from a particular source and applies that water to a “beneficial use” (for example, irrigation or industry) receives a permanent right to use water for that purpose.<sup>57</sup> Most appropriative rights entitle the user to a specific quantity of water, but if at any time there is insufficient water to supply everyone with a water right from that source, newer rights are shut off in order to satisfy the older ones.<sup>58</sup> Especially during dry seasons and dry years, the exercise of water

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<sup>55</sup>See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446–50 (1882). In this well-known case involving a water dispute between an appropriator and a landowner claiming riparian rights, the Colorado Supreme Court rejected the idea that riparian rights were part of Colorado law prior to 1876 when the state constitution enshrined the appropriation doctrine of water rights. *Id.* at 446. The court found the common-law riparian doctrine “inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith.” *Id.* at 447.

<sup>56</sup>California, however, continued to recognize riparian rights as well as appropriative rights. See *Lux v. Haggin*, 10 P. 674, 735 (Cal. 1886) (noting that riparian rights were not abrogated by other state water laws). This gave rise to a mixed system of water rights often called the “California Doctrine.” See *Willey v. Decker*, 73 P. 210, 214 (Wyo. 1903). The states of the Great Plains (from North Dakota to Texas) and the West Coast all started out recognizing riparian rights, but, for the most part, these states have now made the switch to prior appropriation. See GEORGE A. GOULD ET AL., *CASES AND MATERIALS ON WATER LAW* 9 (7th ed. 2005). At the end of the nineteenth century, the Supreme Court summarized this trend in a single lengthy sentence:

Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes.

*United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899).

<sup>57</sup>See Roy Whitehead, Jr. et al., *The Value of Private Water Rights: From a Legal and Economic Perspective*, 9 ALB. L. ENVTL. OUTLOOK J. 313, 318 (2004) (explaining that “prior appropriation doctrine is based on the idea that the first person to put water to a beneficial use has a superior right”).

<sup>58</sup>For a summary of these and other basic prior appropriation principles, see JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 98–99 (3d ed. 2000).

rights can, and often does, dry up streams in the West. Classic prior appropriation did not protect water left flowing in its natural course, and although several states have revised this aspect of their water laws over the past fifty years, many streams in the West still suffer the effects of dewatering caused by the use of preexisting water rights, to the detriment of both water quality<sup>59</sup> and native fish and wildlife.<sup>60</sup>

### *B. Federal Constitutional Powers regarding Water*

It is axiomatic that the federal government has only those powers enumerated in the U.S. Constitution.<sup>61</sup> The Supreme Court has identified several constitutional sources of federal authority over water,<sup>62</sup> the most important being the Commerce Clause<sup>63</sup> and the Property Clause.<sup>64</sup>

Congress's power under the Commerce Clause to protect and promote navigation has been recognized since the early days of the nation,<sup>65</sup> but beyond navigation, federal authority over water was sharply disputed during the first half of the twentieth century.<sup>66</sup> In the wake of the New Deal,

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<sup>59</sup>See Reed D. Benson, *Pollution without Solution: Flow Impairment Problems under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 201–07 (2005) (discussing water quality problems associated with artificially low flows caused by water uses and other human activities).

<sup>60</sup>See Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319, 348 (1996) (finding that counties in West with greatest amount of irrigated agriculture also have highest number of endangered fish species).

<sup>61</sup>See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 87 (1907) (stating that “Government of the United States is one of delegated, limited, and enumerated powers” (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883))).

<sup>62</sup>For a full discussion of constitutional authority in this area, see Amy K. Kelley, *Constitutional Foundations of Federal Water Law*, in 4 WATERS AND WATER RIGHTS § 35-1, §§ 35-1 to 35-74 (Robert E. Beck ed., 1991 & Supp. 2004).

<sup>63</sup>See U.S. CONST. art I, § 8, cl. 3 (giving Congress power “to regulate Commerce with foreign Nations, and among the several States”).

<sup>64</sup>See U.S. CONST. art. IV, § 3, cl. 2 (giving Congress power “to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States”).

<sup>65</sup>See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190–93 (1824).

<sup>66</sup>See, e.g., *Fed. Power Comm'n v. Union Elec. Co.*, 381 U.S. 90, 102–10 (1965) (discussing debates in Congress leading up to enactment of Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, 1063–64 (codified as amended at 16 U.S.C. §§ 791(a)–828(c) (2000)), and indicating disagreement over whether federal power over water was limited to navigation); *Arizona v. California*, 283 U.S. 423, 452–58 (1931) (upholding Boulder Canyon Project Act, ch. 42, §1, 45 Stat. 1057, 1057 (1928) (current version at 43 U.S.C. §§ 617–617t (2000)), as proper exercise of Congress's power over navigation despite Arizona's argument that navigation was “a mere subterfuge and false pretense” for real purposes of project, and noting that “the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power”); *Kansas v. Colorado*, 206 U.S. 46, 86–92 (1907) (acknowledging federal power to protect navigation on interstate Arkansas River, but otherwise questioning federal

however, the Supreme Court announced that the commerce power was broad enough to cover a wide range of water-related activities and interests, such as controlling floods and promoting the development of water power resources.<sup>67</sup> Federal jurisdiction was not limited to those waters meeting the traditional test of navigability,<sup>68</sup> but extended (at least) to their nonnavigable tributaries.<sup>69</sup> By the mid-1960s, it was clear that the Commerce Clause justified federal authority over seemingly any water-related activity with a connection to commerce, “quite without regard to the federal control of tributary streams and navigation.”<sup>70</sup>

The Property Clause is another major source of federal authority over water, particularly in the West where the U.S. government still owns a high percentage of the land.<sup>71</sup> The Supreme Court in 1899 indicated that the federal government had a right, “as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.”<sup>72</sup> Thus, the Property Clause provides the constitutional foundation for the reserved rights doctrine by which water rights are created by implication when the federal government designates land for a particular purpose.<sup>73</sup> The Supreme Court has also found authority in

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power to assert interest in river’s waters for purposes of promoting irrigation of arid lands in West).

<sup>67</sup>See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426–28 (1940) (upholding federal authority to attach conditions unrelated to navigation in issuing license for hydropower project).

<sup>68</sup>See *id.* at 404–19 (discussing and applying definition of navigability for purposes of determining Federal Power Act jurisdiction). The term “navigable” has many legal meanings, and one must always consider the context in which it is being used. See *Kaiser Aetna v. United States*, 444 U.S. 164, 170–71 (1979) (questioning whether “navigable waters” has any fixed meaning).

<sup>69</sup>See *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–35 (1941) (upholding authorization of multipurpose dam project located on nonnavigable portion of Mississippi River tributary despite arguments that its flood control and hydropower elements were beyond congressional authority).

<sup>70</sup>*Union Elec. Co.*, 381 U.S. at 94; see also *Kaiser Aetna*, 444 U.S. at 174 (“[A] wide spectrum of economic activities ‘affect’ interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved.”).

<sup>71</sup>In the eleven Intermountain and West Coast states, an average of 46% of the land is federal, ranging from 29.5% in Washington to 86.5% in Nevada. See *United States v. New Mexico*, 438 U.S. 696, 699 n.3 (1978) (citation omitted). These percentages exclude Indian Reservations and other tribal lands. *Id.*

<sup>72</sup>*United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899); see also *Kansas v. Colorado*, 206 U.S. 46, 92 (1907) (citing Property Clause as potential source of limited federal power over water in West).

<sup>73</sup>See *Winters v. United States*, 207 U.S. 564, 577 (1908) (stating that where Congress established Indian reservation by treaty, “[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be”); see also *United States v. New Mexico*, 438 U.S. 696, 698 (1978) (affirming that, in setting aside Gila National Forest, federal government reserved waters).

the Property Clause for other federal activities relating to water, including the reclamation program for promoting irrigation in the western states,<sup>74</sup> the requirement of a federal license for a hydropower project located on federal reserved lands (even if the river to be impounded is nonnavigable),<sup>75</sup> and even the sale of hydropower generated by operation of a federal dam.<sup>76</sup>

Although less important than the Commerce and Property Clauses in relation to the West, other constitutional provisions provide some federal authority over water. Such provisions include the Treaty Clause,<sup>77</sup> the clause authorizing Congress to provide for national defense,<sup>78</sup> and the General Welfare Clause and spending power.<sup>79</sup>

### C. *Constitutional Protection of State Power over Water?*

Over the years, the states have advanced a variety of arguments to the effect that the Constitution somehow prevents the federal government from intruding on their sovereignty over water.<sup>80</sup> Although the Supreme Court has

<sup>74</sup>See *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294–95 (1958) (stating that congressional authority for reclamation projects flows not only from General Welfare Clause, but also Property Clause).

<sup>75</sup>*Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 442–46 (1955).

<sup>76</sup>*Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 330–40 (1936).

<sup>77</sup>U.S. CONST. art. VI, cl. 2; see also *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405, 425–26 (1925) (upholding federal power to regulate diversion of water from Great Lakes, based in part on “treaty obligations to a foreign power”).

<sup>78</sup>U.S. CONST. art I, § 8, cl. 1; see also *Ashwander*, 297 U.S. at 326–30 (upholding authorization of Wilson Dam, facility constructed largely to generate hydropower from Tennessee River, based in part on finding that project was “adapted to the purposes of national defense”).

<sup>79</sup>U.S. CONST. art I, § 8, cl. 1; see also *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 738–39 (1950) (upholding authorization of Friant Dam on San Joaquin River based on “the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement”).

<sup>80</sup>See Goldberg, *supra* note 2, at 8–21 (discussing, and dismissing, variety of such arguments). After giving examples of “the efforts of persons in responsible positions to use states’ rights notions as if they were serious legal arguments,” *id.* at 2, Goldberg explained the title of his article, *Interposition—Wild West Water Style*:

Thus the ghost of John C. Calhoun still stalks the land crying the doctrine of interposition. Calhoun, like his successors, contended that the tenth amendment overrode the supremacy clause, that the relationship between the states and the nation was one of compacts among independent sovereigns, and that the United States should cede all of its public domain to the states. There are, however, major differences between old-fashioned interposition and its modern manifestation. Calhoun believed that the states did or should have the right to do as they pleased when disaffected with national policies. The wild west water version of interposition is improved and augmented: not only should the states have the right to do as they please, but they should be able to do it with federal property and at federal expense. Further, wild west water interposition is not always a constitutional argument . . .

sometimes hinted that such limitations may exist,<sup>81</sup> it has never held that state authority over water resources precludes the exercise of federal power.

One such “states’ rights” argument is based on the equal footing doctrine, under which new states are admitted to the Union on the same basis as the original thirteen and thereby acquire title to the beds and banks of navigable waters within their jurisdiction.<sup>82</sup> In opposing claims for reserved water rights for federal and tribal lands along the Colorado River, Arizona argued that its admission to the Union had stripped the United States of any power to reserve waters for such lands.<sup>83</sup> The Court found no support for this argument in the equal footing cases cited by Arizona,<sup>84</sup> saying that they “involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands” under the Property Clause.<sup>85</sup>

In other cases, the states argued vigorously that the construction of a federal project or the assertion of federal regulatory jurisdiction would impermissibly trample on their authority over water resources. For example, challengers argued in vain that the Constitution could not support a federal hydropower license containing conditions unrelated to the protection of downstream navigation because this exercise of power would be “attended by the same incidents which attend the exercise of the police power of the states.”<sup>86</sup> Oklahoma argued that construction of the Federal Denison Dam would work a “direct invasion and destruction” of the state’s sovereign and proprietary rights, including its rights to control its water resources, in

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*Id.* at 3 (citations omitted).

<sup>81</sup>See *First Iowa Hydro-Electric Coop. v. Fed. Power Comm’n*, 328 U.S. 152, 171 (1946) (finding in legislative history of 1920 Federal Power Act “a determination to avoid unconstitutional invasion of the jurisdiction of the States”); *Kansas v. Colorado*, 206 U.S. 46, 92 (1907) (explaining that Property Clause may give federal government some authority over water in arid West, but does “not mean that its legislation can override state laws in respect to the general subject of reclamation”); see also *supra* notes 14–17 and accompanying text (discussing Supreme Court’s remarks in *SWANCC* regarding states’ “traditional and primary power” over water and land use (quoting *Solid Waste Auth. of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001))).

<sup>82</sup>Harrison C. Dunning, *Sources of the Public Right*, in 4 *WATERS AND WATER RIGHTS* § 30-5, §§ 30-5 to 30-6 (Robert E. Beck ed., 1991 & Supp. 2004).

<sup>83</sup>*Arizona v. California*, 373 U.S. 546, 597–600 (1963). This argument was similar to one advanced in the foundational reserved rights case of *Winters v. United States*, 207 U.S. 564 (1908), in which irrigators claiming water rights under state law contended unsuccessfully that Montana’s 1889 admission to the Union repealed any reservation of water for the Fort Belknap Indian Reservation, created the previous year. *Id.* at 577.

<sup>84</sup>*Arizona*, 373 U.S. at 597 (citing *Shively v. Bowlby*, 152 U.S. 1, (1894); *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, (1845)).

<sup>85</sup>*Id.* at 597–98.

<sup>86</sup>*United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 427 (1940). The Court responded simply, “[t]he Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.” *Id.*

violation of the Tenth Amendment.<sup>87</sup> The Court answered that the Tenth Amendment does not deprive the federal government of authority to take actions pursuant to its enumerated powers, and that because construction of the dam was a valid exercise of Congress's commerce power, "there is no interference with the sovereignty of the state."<sup>88</sup>

In fact, the Constitution does not necessarily preserve state water allocation authority even in the absence of a conflicting exercise of federal power. In *Sporhase v. Nebraska*,<sup>89</sup> the Court struck down a state statute limiting groundwater exports as imposing an impermissible burden on interstate commerce<sup>90</sup> even though Congress had not established any relevant federal program.<sup>91</sup> The Court also rejected Nebraska's argument that Congress had impliedly authorized such statutes by consistently deferring to state water allocation laws, finding that Congress had shown no intent "to remove federal constitutional constraints on such state laws."<sup>92</sup>

In sum, the constitutional arguments aimed at limiting federal authority over water have not succeeded. Broad federal power to override state laws regarding water resources can hardly be questioned.<sup>93</sup> Where the U.S. government asserts authority over water resources, the major legal questions nearly always turn on federal intent, not federal power.<sup>94</sup> Although Congress has largely left water allocation choices to the states, it has done so because of

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<sup>87</sup>Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 512, (1941).

<sup>88</sup>*Id.* at 534.

<sup>89</sup>458 U.S. 941 (1982).

<sup>90</sup>*Id.* at 957, 960. The Court initially determined that groundwater is an article of commerce, and upheld federal authority to regulate it: "Ground water overdraft is a national problem and Congress has the power to deal with it on that scale." *Id.* at 954. Justices Rehnquist and O'Connor dissented on this threshold question. *See id.* at 961 (Rehnquist, J., dissenting).

<sup>91</sup>*Id.* at 960.

<sup>92</sup>*Id.* at 958-60.

<sup>93</sup>Professor Trelease, certainly an advocate of state authority over water, squarely acknowledged this point:

The preemptive effect of congressional regulation and the supremacy clause would certainly allow Congress to take over the quantitative management of ground water for legitimate federal purposes. Two of the westerners on the Court, Justices Rehnquist and O'Connor, were outraged by the "gratuitous" and "unnecessary" ruling [in *Sporhase v. Nebraska*, 458 U.S. 941 (1982),] that Congress had power to regulate ground water. While I find the exercise of that power unlikely, and contrary to my notions of the competences and proper spheres of state and federal governments, I have no doubt of its existence. Congress could step in and find national solutions for any number of problems . . . and the quasi-sovereignty of a state does not prevent a federal resolution of a national problem.

Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 378 (1985).

<sup>94</sup>*See, e.g.,* United States v. New Mexico, 438 U.S. 696, 698 (1978) (explaining that determining existence of reserved rights for federal lands "is a question of implied intent and not power").

policy choices and not because of any constitutional infirmity.<sup>95</sup> The following sections focus on the choices made by Congress, and the interpretations of the Supreme Court, on the question of deference to state authority over water allocation.

### III. EARLY WATER FEDERALISM: STATES TAKE THE LEAD, BUT WITHIN FEDERAL LIMITS

While the West was still at its wildest, the U.S. government let the states take the lead in matters of water allocation. Congress effectuated this policy initially through inaction and later through provisions of statutes relating to the use and disposition of federal lands. The states did not, however, gain total hegemony. Before the turn of the twentieth century, the Supreme Court had announced clear federal limits on state powers with respect to water, and by 1908 it had identified three distinct areas where federal law would control the use of water resources.

#### A. Nineteenth-Century Congressional Deference

The U.S. government was the dominant landowner in the early American West, but when the gold rush brought thousands of would-be miners to California in the mid-1800s, they staked their claims on the public domain with little or no federal interference. When these squatters began squabbling over water, the federal government had established no law or policy regarding control of this water.<sup>96</sup> In *Irwin v. Phillips*,<sup>97</sup> the California Supreme Court was forced to determine the water rights of public domain miners with no input

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<sup>95</sup>Members of Congress certainly have debated the constitutional limits of federal power, particularly in the first half of the twentieth century. *See, e.g.*, *California v. United States*, 438 U.S. 645, 669–70 (1978) (noting debates regarding 1902 Reclamation Act); *Fed. Power Comm'n v. Union Elec. Co.*, 381 U.S. 90, 111–23 (1965) (Goldberg, J., dissenting) (quoting debates regarding 1920 Federal Power Act).

<sup>96</sup>Professor Kelley has summarized these origins as follows:

All of the original states adopted the riparian rights doctrine as their method of water rights allocation, and the federal government, having no substantial landholdings, had no interest and nothing to say. In the western states, matters developed differently. The federal government had, and still retains, significant public lands; but miners and settlers who were quite literally trespassers arrived and started using the waters long before the United States decided what it wished to do with its lands or waters.

Amy K. Kelley, *Federal-State Relations in Water*, in 4 *WATERS AND WATER RIGHTS* § 36-1, § 36-10 n.21 (Robert E. Beck ed., 1991 & Supp. 2004) (citations omitted).

<sup>97</sup>5 Cal. 140 (1855).

from the landlord, and noted that the United States had tacitly assented to “free and unrestrained occupation of the mineral region.”<sup>98</sup>

In 1866 Congress enacted a statute regarding public land mining claims that protected the “possessors and owners” of rights to use water “whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, law, and the decisions of courts.”<sup>99</sup> In 1870 Congress amended this statute by providing that “all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by” the 1866 statute.<sup>100</sup> The Supreme Court would interpret the 1866 statute as accepting the validity of local customs, statutes, and case law regarding water appropriations, and as “rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one.”<sup>101</sup>

Congress spoke more definitively to water rights in the Desert Land Act of 1877,<sup>102</sup> essentially a Homestead Act tailored to the states and territories of the arid West.<sup>103</sup> This statute allowed settlers to obtain a patent to 640 acres of land, but provided that the rights to use water on this land “shall depend upon bona fide prior appropriation,” and that any waters beyond those actually appropriated for these lands, “together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.”<sup>104</sup> Decades later, the Supreme Court interpreted this provision to mean that any federal land patents issued in the desert-land states after the date of this statute carried no common-law riparian rights to water whether the patent was issued under the Desert Land Act or another federal statute.<sup>105</sup> More importantly, from

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<sup>98</sup>*Id.* at 146.

<sup>99</sup>Mining Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified as amended at 43 U.S.C. § 661 (2000)). The Act also provided that “the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed,” and that any person constructing such a ditch or canal would be liable to “any settler on the public domain” for injury or damage caused by the construction. *Id.*

<sup>100</sup>Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (current version at 43 U.S.C. § 661 (2000)).

<sup>101</sup>*United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 705 (1899) (quoting *Broder v. Water Co.*, 101 U.S. 274, 276 (1879)).

<sup>102</sup>ch. 107, § 1, 19 Stat. 377, 377 (codified at 43 U.S.C. § 321 (2000)).

<sup>103</sup>*See Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 157 (1935) (explaining purposes of Desert Land Act).

<sup>104</sup>Desert Land Act of 1877 § 1, 19 Stat. at 377.

<sup>105</sup>*Cal. Or. Power Co.*, 295 U.S. at 156–58. The Desert Land Act applied to the states of California, Oregon, Nevada, and later, Colorado, and to the territories of Arizona, Dakota, Idaho, Montana, New Mexico, Utah, Washington, and Wyoming. *Id.* at 156. In the Court’s view, the

the standpoint of federalism, the Court found that in passing the Desert Land Act, Congress had effectively severed the water from the public domain and ceded its control to the western states and territories.<sup>106</sup>

As the owner of the public domain, the government possessed the power to dispose of the land and water thereon together, or to dispose of them separately. . . . Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.<sup>107</sup>

In the years following the Desert Land Act, Congress continued to leave matters of water allocation to the western states,<sup>108</sup> and by the late nineteenth century, the states may have believed that their authority over water resources was entirely free of federal limitation or control—but they would soon learn otherwise.

*B. The Rio Grande Dam Case: Identifying Limits on State Water Authority*

In *United States v. Rio Grande Dam & Irrigation Co.*,<sup>109</sup> the federal government sued to block construction of a private irrigation dam on the Rio Grande in New Mexico, alleging that it would destroy navigability of the river below the dam.<sup>110</sup> The Supreme Court acknowledged that the Rio Grande was not navigable within New Mexico,<sup>111</sup> but assumed “that defendants are

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common-law riparian rights doctrine, “by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings” for small family farms. *Id.* at 157. The Court believed that successful agriculture in the arid West required “transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation.” *Id.* at 158.

<sup>106</sup>Twenty years later, in another case arising in Oregon, the Court clarified (or perhaps narrowed) this holding. In *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), the Court held that the Desert Land Act applied only to the “public domain,” that is, lands available for sale and disposition, and not to federal reservations, that is, lands withdrawn from settlement and designated by the government for a particular purpose. *Id.* at 448.

<sup>107</sup>*Cal. Or. Power Co.*, 295 U.S. at 162. Later in the opinion, the Court hinted, without explanation, that Congress may have ceded control of these waters even earlier: “[F]ollowing the act of 1877, if not before, all non-navigable water then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named.” *Id.* at 163–64.

<sup>108</sup>From the 1870s through the end of the century, however, Congress certainly did explore and debate the potential role for water resource development in the West (especially for irrigation), as well as the federal government’s role in promoting such development. See PISANI, *supra* note 51, at 127–33, 251–54, 273–85.

<sup>109</sup>174 U.S. 690 (1899).

<sup>110</sup>*Id.* at 692.

<sup>111</sup>*Id.* at 698.

intending to appropriate the entire unappropriated flow of the Rio Grande at the place where they propose to construct their dam, and that such appropriation will seriously affect the navigability of the river where it is now navigable.”<sup>112</sup> The issue was whether the United States had the power to prevent such an impact.

The Court stated that in enacting the 1866 and 1870 mining statutes and the 1877 Desert Land Act,<sup>113</sup> Congress had “recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow.”<sup>114</sup> But it rejected the notion that Congress had “meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States.”<sup>115</sup> The Court instead applied an 1890 statute that prohibited “the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters” subject to U.S. jurisdiction.<sup>116</sup> The Court remanded the case with instructions to determine whether the proposed dam would substantially diminish the capacity of the currently navigable portion of the Rio Grande, and if it would, to enter a decree preventing that result.<sup>117</sup>

In dicta, the *Rio Grande Dam* opinion indicated that navigation is not the only federal constraint on state water allocation authority. The Court confirmed that each state has the right to choose prior appropriation over the common-law riparian approach,<sup>118</sup> but also identified two significant limitations on this right. One was the federal power to protect navigability, which decided the case.<sup>119</sup> The Court also stated a second limitation: unless specially authorized by Congress, “a State cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the

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<sup>112</sup>*Id.* at 702.

<sup>113</sup>The Court also quoted an 1891 statute, Act of March 3, 1891, ch. 561, § 18, 26 Stat. 1095, 1101–02, granting a right of way through federal public lands and reservations in favor of “any canal or ditch company formed for the purpose of irrigation” for its water storage and distribution facilities, and providing that this privilege “shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.” 174 U.S. at 705–06 (internal quotation marks and citations omitted).

<sup>114</sup>*Id.* at 706.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.* at 707 (quoting Rivers & Harbors Act, ch. 907, §10, 26 Stat. 426, 454 (1890) (codified as amended at 33 U.S.C. § 403)). The Court noted that Congress, in passing this statute, had not affected any prior statutes regarding appropriation of water from nonnavigable streams, but had only affirmed that any obstruction that would affect navigability would require the consent of the U.S. government. *Id.* at 708.

<sup>117</sup>*Id.* at 710.

<sup>118</sup>*Id.* at 702–03.

<sup>119</sup>*Id.* at 703.

beneficial uses of the government property.”<sup>120</sup> The Court further stated that states are free to make their own rules regarding water allocation, and that, “[s]o far as those rules have only a local significance, *and affect only questions between citizens of the State*, nothing is presented which calls for any consideration by the Federal courts.”<sup>121</sup> With these statements, the *Rio Grande Dam* Court foreshadowed two areas of significant federal involvement in western water allocation.

*C. Further Judicially Created Federal Limitations on State Water Allocation Authority*

*1. Allocation of Interstate Waters*

When Kansas sued Colorado in 1901, alleging excessive depletion of the waters of the interstate Arkansas River by its upstream neighbor, the Supreme Court first had to confirm that it had jurisdiction over such an action.<sup>122</sup> The Court then addressed the applicability of federal law to the controversy between the states, in part because Colorado and its water users<sup>123</sup> maintained that Colorado had an absolute right to control and allocate the waters within its boundaries even if its water use fully depleted a river to the detriment of a downstream state.<sup>124</sup> One party argued that every western state was an independent nation with respect to its natural resources, that federal involvement in interstate streams would wipe out state control, and that since 1866, Congress had consistently recognized each western state’s right to control water allocation within its own boundaries.<sup>125</sup>

The Court rejected Colorado’s assertion that it had a right to appropriate the entire flow of the Arkansas River, as well as any suggestion that Kansas could insist on the river’s undiminished natural flow, because either of these “extreme” positions would cause too much injury and dislocation in the other state.<sup>126</sup> Since the states were not truly independent nations and thus could not settle their differences by treaty or by force, the Court stated that it was the proper forum for justiciable disputes between

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<sup>120</sup>*Id.*

<sup>121</sup>*Id.* at 704 (emphasis added).

<sup>122</sup>*Kansas v. Colorado*, 206 U.S. 46, 81–84 (1907).

<sup>123</sup>The Colorado Fuel and Iron Company and certain irrigation companies were defendants in the case, along with the State of Colorado. *Id.* at 76.

<sup>124</sup>*Id.* at 78. Colorado’s primary argument, however, was that its use of water from the Arkansas River was not harming Kansas at all, *id.* at 62–64, and ultimately, the Court denied relief after finding that the harm to Kansas had been relatively minor and localized. *Id.* at 112–18.

<sup>125</sup>*Id.* at 78–79. The Colorado Fuel and Iron Company advanced these arguments, and also declared: “This right to the waters lies at the foundation of the existence of the arid States.” *Id.* at 78.

<sup>126</sup>*Id.* at 98.

them.<sup>127</sup> Where “the action of one State reaches, through the agency of natural laws, into the territory of another State,” the Court said that it seeks to “recognize the equal rights of both and at the same time establish justice between them.”<sup>128</sup> Thus, the Court ruled that interstate common law would govern disputes between the states over the allocation of interstate waters,<sup>129</sup> and announced the fundamental principle of equitable apportionment.<sup>130</sup>

Colorado, at least, continued to argue for a state’s absolute right to appropriate all the waters of an interstate river regardless of any potential harm in the downstream state. The Court, in *Wyoming v. Colorado*,<sup>131</sup> made short work of this argument, stating that this position had been “adjudged untenable” in the Arkansas River case, and that “[f]urther consideration satisfies us that the ruling was right.”<sup>132</sup> The Court restated this point in a 1938 decision in which it held that the federal law of equitable apportionment limits the rights of water users even if they hold valid appropriations under state law because a state cannot award rights to water in excess of its equitable share.<sup>133</sup>

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<sup>127</sup>*Id.* at 99–100.

<sup>128</sup>*Id.* at 97–98.

<sup>129</sup>*Id.* at 98. The case established this important limit on state water allocation authority even though the Court did not necessarily endorse the idea of broad federal power over water resources. The Court did note that the Commerce Clause gives Congress “extensive control over the highways, natural or artificial, upon which such commerce may be carried.” *Id.* at 85. The Court quoted *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), regarding federal limitations on the states, and noted the Property Clause as another potential source of federal authority regarding water in the arid West. *Kansas*, 206 U.S. at 86, 88–89. But it also insisted that the federal power over water was limited to those enumerated powers in the Constitution, and questioned whether any of the enumerated powers justified the recently enacted national program for arid lands reclamation. *Id.* at 87–93. It also stated flatly, “Congress cannot enforce either rule[, i.e., riparian rights or prior appropriation,] upon any State,” *id.* at 94, but emphasized that there is nonetheless “power which can take cognizance of the controversy and determine the relative rights of the two States”—the federal judicial power to resolve interstate disputes. *Id.* at 95.

<sup>130</sup>Although the Court denied relief in this decision, it noted that Kansas could return if Colorado increased its depletion of the waters of the Arkansas River and, as a result, “the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.” *Id.* at 118. In later cases, the Court refined the equitable apportionment doctrine and applied it to allocate the water of interstate rivers among competing states. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 617–54 (1945) (allocating North Platte River among Colorado, Nebraska, and Wyoming).

<sup>131</sup>259 U.S. 419 (1922).

<sup>132</sup>*Id.* at 466.

<sup>133</sup>*See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102–03, 108 (1938). Colorado and New Mexico had entered into a compact dividing the waters of the La Plata River and, in administering this compact, Colorado water officials had sometimes prevented the ditch company from taking water to which it would have been entitled in the absence of the compact. *Id.* at 95–96. According to the Court, the ditch company’s claim was based on the

premise that at the time the Compact was made Colorado was absolutely entitled to at least 58 ¼ cubic feet of water per second regardless of the amount left for New

## 2. *Federal Reserved Rights*

A year after *Kansas v. Colorado*,<sup>134</sup> the Supreme Court decided a case that established the reserved water rights doctrine, perhaps the most significant feature of federal common law regarding the West's water resources. Unlike the equitable apportionment doctrine and the federal navigation power, the reserved rights doctrine did not merely limit state authority to allocate water. Rather, it recognized new water rights resulting from the federal government's designation of specific lands for a particular purpose, and these water rights were based on principles of federal law, not the prior appropriation doctrine favored by the western states.

*Winters v. United States*<sup>135</sup> pitted irrigators who had appropriated water under Montana law against the tribes of the Fort Belknap Reservation.<sup>136</sup> Congress had established the reservation in 1888, based on a treaty between the United States and the tribes, and had admitted Montana into the Union the following year.<sup>137</sup> The irrigators, who had obtained federal patents to lands located along the Milk River above the Reservation, began diverting substantial amounts of water from the river around 1900—before the downstream reservation had begun using much water.<sup>138</sup> Under Montana's law of prior appropriation, then, the irrigators would have obtained a senior water right that would have effectively deprived the tribes of the reservation's major source of water.<sup>139</sup>

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Mexico. . . . [However,] whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decision of either State can be conclusive.

*Id.* at 110 (citations omitted).

<sup>134</sup>206 U.S. 46 (1907).

<sup>135</sup>207 U.S. 564 (1908).

<sup>136</sup>*Id.* at 565–70. The Court indicated that the Fort Belknap Reservation was established for the Blackfoot, Blood, Gros Ventre, Piegan, and River Crow Tribes. *Id.* at 567.

<sup>137</sup>*Id.* at 577.

<sup>138</sup>*Id.* at 568–69.

<sup>139</sup>Because prior appropriation principles would have favored the irrigators, the United States initially claimed "riparian and other rights" for the reservation. *Id.* at 567. Before the Supreme Court, however, the United States argued that in making their treaty with the United States, the tribes

did not thereby cede or relinquish to the United States the right to appropriate the waters of Milk River necessary for their use for agricultural and other uses upon the reservation, but retained this right, as an appurtenance to the land which they retained, . . . and the right thus retained and vested in them under the agreement of 1888.

*Id.* at 573. Thus, the United States claimed an 1888 priority date for reservation water rights that would be senior to the irrigators' claims under state law. *Id.* at 573–74.

The treaty establishing the Fort Belknap Reservation said nothing about water, but the Court held that it had impliedly reserved the waters needed for irrigation of the reservation's arid lands, which would otherwise be nearly worthless for agriculture.<sup>140</sup> The Court found that to interpret the agreement otherwise would have been contrary to its purpose of converting the tribes from a "nomadic and uncivilized people" to a "pastoral and civilized" one.<sup>141</sup> The irrigators argued that their lands, too, would not support agriculture without irrigation, and that the Court therefore should infer that the treaty had ceded the necessary water along with the land.<sup>142</sup> The Court resolved this "conflict of implications" by applying a rule of construction that ambiguities in Indian treaties are to be resolved in favor of the tribes, noting that the rule was particularly appropriate for deciding between "two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."<sup>143</sup>

The irrigators then raised a key federalism argument: that Montana had acquired full and exclusive power to allocate its waters upon statehood.<sup>144</sup> When Congress admitted Montana to the Union in 1889, "upon an equal footing with the original States,"<sup>145</sup> they contended, Congress effectively made all the water available for appropriation by Montana citizens under state law, and impliedly repealed any earlier reservation of water in favor of the tribes.<sup>146</sup> The Court rejected this argument with little discussion, but addressed both congressional power and intent.<sup>147</sup> As for the former, the Court stated flatly: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."<sup>148</sup> On the latter point, the Court stated that "it would be extreme to believe that within a year [after approving the treaty creating the Fort Belknap Reservation,] Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste."<sup>149</sup> Thus, the Court confirmed that Congress had the power to reserve waters needed to fulfill the purposes of federal reservations, and that water rights that had been so reserved in the Montana Territory prior to statehood survived Montana's admission to the Union.<sup>150</sup>

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<sup>140</sup>*Id.* at 576.

<sup>141</sup>*Id.*

<sup>142</sup>*Id.* at 570–71.

<sup>143</sup>*Id.* at 576–77.

<sup>144</sup>*Id.* at 577.

<sup>145</sup>*Id.* (quoting appellants, *Winters*, et al.).

<sup>146</sup>*Id.*

<sup>147</sup>*Id.*

<sup>148</sup>*Id.* at 577 (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702 (1898)). The Court also cited *United States v. Winans*, 198 U.S. 371 (1905), a case involving tribal treaty rights to hunt and fish. *Winters*, 207 U.S. at 577.

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

For nearly half a century, the *Winters* doctrine was commonly thought to apply only to Indian lands,<sup>151</sup> but the Supreme Court's 1955 opinion in *Federal Power Commission v. Oregon*,<sup>152</sup> indicated that the United States had the power to reserve water any time it designated lands for a particular federal purpose.<sup>153</sup> The Supreme Court confirmed, in *Arizona v. California*,<sup>154</sup> that reserved water rights are not limited to Indian lands, but may be established by implication when the federal government designates land for other specific purposes.<sup>155</sup> The Court, over Arizona's objections, also upheld the federal government's power to reserve waters after Arizona became a state<sup>156</sup> and to establish reserved water rights by executive order.<sup>157</sup> The Court would ultimately restrict the scope of federal reserved rights in *United States v. New Mexico*,<sup>158</sup> recognizing implied reserved rights only where water is

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<sup>151</sup>“At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law.” Frank J. Trelease, *Federal Reserved Water Rights since PLLRC*, 54 DEN. L.J. 473, 475 (1977).

<sup>152</sup>349 U.S. 435 (1955).

<sup>153</sup>*Id.* at 437–52. This case involved a federal license for development of a private hydropower dam on Oregon's Deschutes River. *Id.* at 437–38. The State of Oregon argued that the Federal Power Commission had no jurisdiction over the waters of the nonnavigable Deschutes in light of the policies established by Congress in the 1866 mining statute, Mining Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified as amended at 43 U.S.C. § 661 (2000)), the 1870 mining statute, Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (current version at 43 U.S.C. § 661), and the Desert Land Act, ch. 107, § 1, 19 Stat. 377, 377 (codified at 43 U.S.C. § 321). *Fed. Power Comm'n*, 349 U.S. at 446–47. The Supreme Court rejected this argument, finding those statutes inapplicable because they applied only to the “public domain”—those lands open for disposition and sale—whereas the site of the proposed hydropower dam had been reserved by the federal government for the purpose of hydropower development. *Id.* at 448. The Court held that the mining statutes and Desert Land Act were not relevant to a case involving “the use of waters on *reservations* of the United States.” *Id.* (emphasis added).

<sup>154</sup>373 U.S. 546 (1963).

<sup>155</sup>*Id.* at 601. The Supreme Court's discussion of the applicability of *Winters* to federal nontribal reservations was remarkably brief, noting only that the Special Master had determined that “the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests.” *Id.* The Court further stated that it “agree[d] with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements” of two national wildlife refuges, a national forest, and the Lake Mead National Recreation Area. *Id.* The Court's cursory explanation on this point is in stark contrast to its forty-five-page discussion of the law and history of attempts to allocate the waters of the lower Colorado River. *Id.* at 550–95.

<sup>156</sup>*Id.* at 597–98. The Court stated that states gain title to the beds and banks of navigable waters upon admission to the Union, but that the federal government did not thereby lose its Commerce Clause power to regulate navigable waters or its Property Clause power to regulate public lands. *Id.* The Court had not reached this issue in *Winters* because the reservation in that case predated Montana statehood.

<sup>157</sup>*Id.* at 598.

<sup>158</sup>438 U.S. 696 (1978). The Court called the reserved rights doctrine “an exception to Congress's explicit deference to state water law in other areas.” *Id.* at 715.

necessary to fulfill the primary purposes of the reservation<sup>159</sup>—but even here the Court stated at the outset that the establishment of reserved rights by the U.S. government was “a question of implied intent and not power.”<sup>160</sup>

#### *D. Analysis*

The nineteenth-century policy of federal deference to state and territorial water laws is easy to understand in light of the interests of both levels of government in that era. The states sought to promote economic development (and attract settlers) by putting water to work in farming, ranching, mining, and other economic uses.<sup>161</sup> The federal government was very supportive of these development efforts in the arid but sparsely populated West, “not only because, as owner, it was charged through Congress with the duty of disposing of the lands, but because the settlement and development of the country in which the lands lay was highly desirable.”<sup>162</sup> So long as the national and state governments had substantially the same primary interest in the region’s water resources, deference could be expected, especially given the West’s continuing opposition to federal control over water use.<sup>163</sup>

From 1898 to 1908, the Supreme Court clearly identified limits on state water allocation authority, but its decisions did not greatly “federalize”

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<sup>159</sup>*Id.* at 702.

<sup>160</sup>*Id.* at 698; *see also* *Cappaert v. United States*, 426 U.S. 128, 140 (1976) (holding that presidential proclamation establishing Devil’s Hole National Monument created express (not implied) reserved right to preserve water level in underground cavern).

<sup>161</sup>Western state and territorial water law in the latter half of the nineteenth century was primarily geared toward local economic interests. “[T]he fledgling legal system pandered to localism in a vain effort to appease or balance [competing interests]. Decentralized water laws suited the western economy of the 1860s and 1870s, an economy in which the needs of miners and stockmen were as important as those of farmers.” PISANI, *supra* note 51, at 33. In the development of water law during this period, “[t]he private search for wealth still mattered far more than building stable communities—though, of course, most westerners thought the two objectives overlapped.” *Id.* at 68.

<sup>162</sup>*Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 157 (1935). The Court continued:

To these ends, prior to the summer of 1877, Congress had passed the mining laws, the homestead and preemption laws, and, finally, the Desert Land Act. It had encouraged and assisted, by making large land grants to aid the building of the Pacific railroads and in many other ways, the redemption of this immense landed estate.

*Id.*; *see also* *Getches*, *supra* note 12, at 6 (pointing out that “[i]n the era of western expansion, national economic and social policy favored development” of the West, and deference to state water allocation posed no conflict with this policy).

<sup>163</sup>*See* PISANI, *supra* note 51, at 64 (noting, under heading “The Specter of Federal Authority,” that water law reforms in western states and territories were “designed in part to discourage the federal government from asserting or reasserting its own water rights and to prevent it from exercising control over all rights”).

western water law in practice. The *Rio Grande Dam* holding regarding federal navigability power would have limited relevance in the arid West given the region's dearth of navigable waterways—particularly after the 1902 Reclamation Act<sup>164</sup> established irrigation development as the dominant federal water policy in the West. The federal doctrine of equitable apportionment was limited to interstate rivers, and the federal government would become directly involved only where one state sued another in the U.S. Supreme Court. *Winters* created reserved water rights under federal law, but for many years these water rights were commonly thought to be limited to Indian reservations,<sup>165</sup> and in any event such water rights have limited practical effect until asserted and confirmed through adjudication or settlement.<sup>166</sup> Moreover, in enacting the Reclamation Act—certainly the major western water policy statute of this era, and perhaps of any era—Congress showed considerable deference to state water laws.<sup>167</sup> Thus, despite their setbacks in the Supreme Court, the western states retained their lead role in water allocation.

Nonetheless, the decisions in *Rio Grande Dam*, *Kansas v. Colorado*, and *Winters* were very significant for at least two reasons. First, they established that federal law had not entirely ceded the field of water allocation to the western states despite the water rights language in the 1866 and 1870 mining acts and the 1877 Desert Land Act. Second, they represented a recognition that there are important national interests in the West's waters that the federal government must protect. Understanding that unchecked state authority over water allocation could affect navigable waterways, the federal government's reserved lands, and the rights of neighboring states, the Supreme Court began developing federal water law necessary to protect these interests. The following section discusses how Congress adopted this approach—partial deference to the states, limited as needed to protect national interests—in twentieth-century statutes.

#### IV. DEGREES OF DEFERENCE: THREE FEDERAL STATUTORY SCHEMES RELATING TO WATER USE

In numerous statutes, Congress has stated a policy of respect for state water allocation authority and water rights established under state law. Indeed,

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<sup>164</sup>See *infra* notes 209–224 and accompanying text (describing reclamation statutes).

<sup>165</sup>See *supra* note 151–53 and accompanying text (stating that *Winters* doctrine was thought to only apply to Indian lands until 1955).

<sup>166</sup>See Reed D. Benson, *Can't Get No Satisfaction: Securing Water for Federal and Tribal Lands in the West*, 30 ENVTL. L. REP. 11,056, 11,057 (2000); see also Trelease, *supra* note 3, at 758, 769 (noting that reserved water rights, thus far, had few, if any, practical effects on water users with rights established under state law).

<sup>167</sup>See *infra* note 222 and accompanying text (describing evidence of Congress's deference to states in Reclamation Act by requiring federal government to move forward, conforming with state law).

the Supreme Court has cited a list of “37 statutes in which Congress has expressly recognized the importance of deferring to state water law”<sup>168</sup>—an impressive factoid, certainly, but one that fails to capture the complexity of the issue. In reality, the degree of deference actually provided by these statutes varies tremendously, partly because of distinctions in statutory text, but also because of differences in Supreme Court interpretation. This section discusses three federal statutory schemes—each conferring a different degree of deference on state water rights and water allocation authority—not to suggest that there are three distinct levels of deference, but to illustrate the variability in the statutes and the cases interpreting them.

#### A. High Deference: The McCarran Amendment

In 1952 Congress enacted the McCarran Amendment<sup>169</sup> (“McCarran”), authorizing the United States to be “joined as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source.”<sup>170</sup> McCarran subjected the United States to the jurisdiction of state courts conducting general stream adjudications—large, complex cases involving all water users in a particular river system in which the court comprehensively determines the existence and the elements (such as priority date, purpose, quantity, etc.) of existing rights to use water in that river system.<sup>171</sup> Such an adjudication could be heard in federal court,<sup>172</sup> or state

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<sup>168</sup>United States v. New Mexico, 438 U.S. 696, 702 n.5, (citing *Hearing on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the S. Comm. on Interior and Insular Affairs*, 88th Cong. 302–10 (1965) (App. B, supplementary material submitted by Sen. Kuchel)). The quoted words are those of the Court.

<sup>169</sup>66 Stat. 560, 560 (1952) (codified as amended at 43 U.S.C. § 666(a) (2000)).

<sup>170</sup>The crucial section of McCarran reads:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

*Id.*

<sup>171</sup>See TARLOCK ET AL., *supra* note 49, at 303–05 (explaining process and expected results of general stream adjudications).

<sup>172</sup>See *Nevada v. United States*, 463 U.S. 110, 116–18 (1983) (chronicling thirty-one-year history of *Orr Ditch* adjudication of Truckee River system in U.S. District Court for District of Nevada).

court, or a combination of both,<sup>173</sup> but the western states wanted all the claims and parties in state court. In order to subject all potential water claimants to state court jurisdiction, however, the states needed consent to join the United States, and Congress provided it in McCarran.<sup>174</sup>

In a series of cases beginning in 1971, the Supreme Court interpreted McCarran very favorably to the states,<sup>175</sup> giving the statute a remarkably broad sweep. In the first case, the Court addressed the issue of whether the consent to join the United States extended to federal claims for reserved water rights. It was not inherently obvious that McCarran covered such claims, given both the language of the statute<sup>176</sup> and the common impression at the time of enactment that only Indian reservations carried reserved rights,<sup>177</sup> but a unanimous Supreme Court held that it did, finding the statute “all-inclusive.”<sup>178</sup>

The decision in *Colorado River Water Conservation District v. United States*<sup>179</sup> was more remarkable. The case arose from Colorado, where the United States filed reserved right claims for both Indian reservations and other federal lands in federal court only to have the federal court dismiss the suit in favor of an adjudication that was later filed in state court.<sup>180</sup> The Court

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<sup>173</sup>See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 824–25 (1976) (Stewart, J., dissenting).

<sup>174</sup>The following piece of legislative history explains the perceived need for the statute:

In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water users claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

S. REP. NO. 82-755, at 4–5 (1951).

<sup>175</sup>The western state attorneys general filed amicus briefs in all three cases. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 547 (1983); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809 (1976); *United States v. Dist. Court in and for the County of Eagle*, 401 U.S. 520, 521 (1971).

<sup>176</sup>McCarran applies “where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise.” 43 U.S.C. § 666(a) (2000). The United States argued that this text showed an intent to cover only appropriative rights, but the Court rejected that argument, based largely on the words “or otherwise.” *County of Eagle*, 401 U.S. at 524.

<sup>177</sup>See *supra* note 151 and accompanying text (discussing impression under *Winters* that only Indian lands carried reserved rights).

<sup>178</sup>*County of Eagle*, 401 U.S. at 524.

<sup>179</sup>424 U.S. 800 (1976).

<sup>180</sup>*Id.* at 805–06.

first determined that McCarran had not stripped the federal courts of jurisdiction over federal water right claims, finding no support for this result in the text or legislative history.<sup>181</sup> As for the propriety of dismissing the federal case in favor of the state adjudication, the Court found that no form of the abstention doctrine supported the federal court's dismissal.<sup>182</sup> Rather than allow both the federal and state adjudications to proceed concurrently,<sup>183</sup> however, the Court upheld the dismissal based on "a number of factors [that] clearly counsel[ed] against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system."<sup>184</sup> The Court stated that unified proceedings including all claimants are particularly important in the water rights context, and that McCarran "bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals."<sup>185</sup>

Because the federal court litigation included *Winters* doctrine claims filed by the United States on behalf of Indian lands, the Court also faced the issue of McCarran's applicability to tribal water right claims. McCarran itself made no mention of Indian water rights, and the United States argued that given the federal government's trust responsibility to tribes, only the express consent of Congress should subject Indian rights to state court jurisdiction.<sup>186</sup> Moreover, another federal statute prohibited state court jurisdiction to adjudicate ownership or possession of any property—specifically including water rights—belonging to any Indian or Indian tribe and held in trust by the United States.<sup>187</sup> The Court in *Colorado River*, however, stated that this general statute was trumped by McCarran's special consent to jurisdiction.<sup>188</sup> The Court also asserted that "Indian interests may be satisfactorily protected under regimes of state law," and that McCarran "in no way abridges any substantive claim on

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<sup>181</sup>*Id.* at 807–09.

<sup>182</sup>*Id.* at 813. It called the abstention doctrine "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)).

<sup>183</sup>"Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* at 817 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

<sup>184</sup>*Id.* at 819. Beyond the policy of McCarran, the Court found other factors to weigh significantly in favor of dismissal, including a lack of proceedings in the federal case, the three-hundred-mile distance between the state court and the U.S. District Court in Denver, and the federal government's own participation in state adjudications elsewhere in Colorado. *Id.* at 820.

<sup>185</sup>*Id.* at 819. Three justices dissented, arguing that the majority had offered no justification for dismissing the federal case. *See id.* at 821, 826 (Stewart, J., dissenting).

<sup>186</sup>*Id.* at 812.

<sup>187</sup>*See* 28 U.S.C. § 1360(b) (2000).

<sup>188</sup>424 U.S. at 812 n.20.

behalf of Indians under the doctrine of reserved rights.”<sup>189</sup> Perhaps most importantly, however, the Court found that McCarran’s “underlying policy” required a construction subjecting tribal claims to state court jurisdiction.<sup>190</sup> Given that McCarran was intended to be an “all-inclusive” statute for water right adjudications,<sup>191</sup> and “bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights would enervate the Amendment’s objective.”<sup>192</sup>

The Supreme Court reaffirmed its sweeping interpretation of McCarran—and reemphasized the overriding importance of the statute’s policy of providing a single adjudication forum—in *Arizona v. San Carlos Apache Tribe*.<sup>193</sup> The issue once again was whether tribal water right claims were subject to state court jurisdiction, but this case presented two wrinkles not present in the earlier decision: the claims had been filed in federal court by the tribes themselves and not by the United States on behalf of the tribes, and the Arizona courts were arguably barred from asserting jurisdiction over the tribes by language in the federal enabling act granting Arizona statehood.<sup>194</sup> On the

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<sup>189</sup>*Id.* at 812–13. The Court had already determined that tribal rights were within the terms of McCarran based on a rather unconvincing analysis of the statutory text and *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971), discussed above. *Colo. River*, 424 U.S. at 810. The Court first quoted selectively from McCarran as providing consent in those situations where “the United States is the owner . . . by appropriation under state law, by purchase, by exchange, or otherwise,” thus creating an impression that “otherwise” refers to various potential forms of U.S. ownership. *Id.* It then characterized *Eagle County* as holding that McCarran covers all water rights where the United States is “‘otherwise’ the owner.” *Id.* (citing *Eagle County*, 401 U.S. at 524). The Court then made the final leap, stating that although *Eagle County* “did not involve reserved rights on Indian reservations, viewing the government’s trusteeship of Indian rights as ownership, the logic” of that case clearly extends to such rights. *Id.* The first flaw of the Court’s rationale appears when key words of the statute are restored—“the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise,” indicating that “or otherwise” refers to the various means by which the United States may be acquiring water rights, not any potential form of U.S. ownership. *Id.* (emphasis added). *Eagle County*, in turn, refers not to water rights otherwise owned by the United States, but “water rights which the U.S. has ‘otherwise’ acquired,” whether they be appropriative rights, riparian rights, or reserved rights. 401 U.S. at 524. Thus, neither the text of McCarran nor the logic of *Eagle County* necessarily extends to Indian reserved water rights where the United States holds the right in trust for a tribe.

<sup>190</sup>*Colo. River*, 424 U.S. at 810.

<sup>191</sup>*Id.* (quoting *Eagle County*, 401 U.S. at 524).

<sup>192</sup>*Id.* at 811.

<sup>193</sup>463 U.S. 545, 550–51 (1983).

<sup>194</sup>The case actually involved tribal claims from both Montana and Arizona. *Id.* at 553. The Court indicated that both the Montana and Arizona enabling acts and the constitutions of the two states all contained substantially identical language, whereby the citizens of the state “‘agree and declare that they forever disclaim all right and title to . . . all lands . . . owned or held by any Indian or Indian tribes; . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.’” *Id.* at 556 (quoting Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 677, 677 (admitting Montana to Union)). The Court noted that this issue did not arise in *Colorado River* because Colorado is one of the few western states without such a provision in its enabling act. *Id.* at 549.

latter point, the Court stated that it would “work the very mischief that our decision in *Colorado River* sought to avoid” if certain states could not gain jurisdiction over tribal water right claims under McCarran, and found no indication that Congress intended to treat some western states differently than others in addressing the “general problem” of water right adjudications.<sup>195</sup> Regarding state court jurisdiction over claims filed directly by the tribes, the Court noted that the arguments against it had “a good deal of force”—for example, state courts may be a hostile forum for tribes, Indian water right claims are based on federal rather than state law, and tribal water rights could be determined in federal court and then simply incorporated into state adjudication decrees.<sup>196</sup> Remarkably, the Court acknowledged that the western states could not realistically be expected to always display a “cooperative attitude” toward tribes and their water rights, and remarked that “adjudication of those rights in federal court instead might in the abstract be practical, and even wise.”<sup>197</sup> Despite all this, the tribes lost, and the Court explained that

the most important consideration in any federal water suit concurrent to a comprehensive state proceeding[] must be the “policy underlying the McCarran Amendment,” and, despite the strong arguments raised by the respondents, we cannot conclude that water rights suits brought by Indians and seeking adjudication only of Indian rights should be excepted from the application of that policy or from the general principles set out in *Colorado River*.<sup>198</sup>

In short, McCarran’s underlying *policy*, even more than its actual text,<sup>199</sup> proved to be stronger than any legal or policy argument advanced by the United States or the tribes in these three cases.

Despite these victories for the states, for two major reasons McCarran cannot be viewed as a complete triumph of state authority to determine the water rights held by the United States and tribal governments.

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<sup>195</sup>*Id.* at 564. The Court concluded that “whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed” by McCarran. *Id.*

<sup>196</sup>*Id.* at 566–67.

<sup>197</sup>*Id.* at 568–69.

<sup>198</sup>*Id.* at 570 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 820 (1976)). The Court went on to emphasize that it was not retreating from general legal principles regarding state jurisdiction over tribes and tribal lands and regarding the federal courts’ “virtually unflagging obligation” to exercise their jurisdiction. *Id.* at 570–71. “But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.” *Id.* at 571.

<sup>199</sup>As stated by Justice Stevens, one of three dissenters in *San Carlos Apache*, “[a]lthough it is customary for the Court to begin its analysis of questions of statutory construction by examining the text of the relevant statute, one may search in vain for any textual support for the Court’s holding today.” *Id.* at 573 (Stevens, J., dissenting) (citation omitted).

First, the statute's waiver of immunity stops well short of giving western states and traditional water users everything they have wanted in terms of jurisdiction over water right claims. It applies only to a narrow class of cases—general stream adjudications<sup>200</sup>—and not to any water rights controversy involving the federal government,<sup>201</sup> or even to any federal claim of water rights.<sup>202</sup> It does not eliminate federal court jurisdiction over water right claims,<sup>203</sup> nor does McCarran's policy (as interpreted by the Court) necessarily *require* federal courts to abstain in favor of state court proceedings.<sup>204</sup> Finally, McCarran does not allow a state that charges filing fees against all water right claimants in order to finance its adjudication to require payment of such fees by the United States.<sup>205</sup>

Second, and more importantly, McCarran is not substantive law. This means that state courts have jurisdiction to adjudicate federal and tribal water right claims, but must apply the federal law of reserved water rights. In *Cappaert*, the Court rejected Nevada's argument that McCarran is "a substantive statute, requiring the United States to perfect its water rights in the state forum like all other land owners."<sup>206</sup> The Court has stressed repeatedly

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<sup>200</sup>The question of whether a particular state adjudication is "McCarran sufficient" has been extensively litigated. *See, e.g.,* *United States v. Oregon*, 44 F.3d 758, 762–73 (9th Cir. 1994) (rejecting federal and tribal arguments against sufficiency of Oregon's Klamath Basin adjudication under McCarran).

<sup>201</sup>In *Dugan v. Rank*, 372 U.S. 609 (1963), California irrigators sued to enjoin the United States from storing and diverting water at the Bureau of Reclamation's Friant Dam, arguing that these operations would interfere with the plaintiffs' existing water rights downstream on the San Joaquin River. *Id.* at 610–11, 614–15. The Court held that the McCarran Amendment did not apply to this action, "a private suit to determine water rights" solely between the plaintiffs and the United States and, thus, the federal government could not be joined in the suit. *Id.* at 618. "In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to the appropriative and prescriptive rights asserted." *Id.* at 618–19.

<sup>202</sup>Thus, the United States—claiming a reserved right to protect water levels in the underground pool at Devil's Hole National Monument—obtained an injunction in federal court against an irrigator with a water right permit issued under Nevada law over Nevada's arguments that McCarran required the United States to perfect its water rights in a state forum. *Cappaert v. United States*, 426 U.S. 128, 143–46 (1976).

<sup>203</sup>*Colo. River*, 424 U.S. at 807–08.

<sup>204</sup>*See id.* at 820 (listing factors relevant to determining whether abstention is appropriate in particular case).

<sup>205</sup>*United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 8–9 (1993). A unanimous Court rejected Idaho's argument that the statute "requires the United States to comply with *all* state laws applicable to general water right adjudications," *id.* at 6, because it found that Idaho's filing fees were equivalent to court costs, and McCarran's final proviso states that "[n]o judgment for costs shall be entered against the United States" in any such suit. *Id.* at 8 (internal quotations omitted). The Western Governors' Association has asked for federal legislation to overturn this holding. W. GOVERNORS' ASS'N, POLICY RESOLUTION 04–09: FEDERAL NON-TRIBAL FEES IN GENERAL WATER ADJUDICATIONS 1 (2004), *available at* <http://www.westgov.org/wga/policy/04/water-adjudications.pdf>.

<sup>206</sup>426 U.S. at 146 (citation omitted).

that its decisions applying McCarran “in no way change[] the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law.”<sup>207</sup> The Court in *Cappaert* also noted that Congress had never enacted any of several bills that would have required at least some federal water uses to obtain water rights exclusively under state law rather than under the federal law of reserved rights.<sup>208</sup>

In sum, McCarran and the Court’s decisions applying it establish high, but not absolute, deference to state water allocation authority. McCarran applies, however, only to one significant but narrow area of law: the forum for general stream adjudications.

### *B. Medium Deference: The Reclamation Laws*

#### *1. Reclamation Statutes*

The reclamation laws are a series of statutes under which Congress authorized the U.S. Bureau of Reclamation (“USBR”) to build and operate hundreds of water projects in seventeen western states.<sup>209</sup> The original grand design of the reclamation program was that the federal government would construct water projects and supply water to farmers who would ultimately pay back a portion of the costs of the projects, but subsidized water would be available only to resident farmers on modest-sized (160 acre) tracts.<sup>210</sup> The USBR had a busy twentieth century, constructing more than six hundred dams and a vast array of other water-related infrastructure,<sup>211</sup> and today USBR projects supply water to twenty percent of western farmers for irrigation of ten million acres.<sup>212</sup> In general, these projects deliver irrigation water under a

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<sup>207</sup>Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (noting that Court had also emphasized this point in *Colorado River*, 424 U.S. at 813).

<sup>208</sup>426 U.S. at 145. The Court noted that these bills had been introduced since its decision in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), and were still being offered in the early 1970s. *Cappaert*, 426 U.S. at 145. For an extensive discussion of the substance, rationale, and history of these bills up to the mid-1960s, see Eva H. Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted “Clarifying Legislation”*, 20 RUTGERS L. REV. 423, 446–512 (1966).

<sup>209</sup>As noted below, some reclamation statutes are generally applicable, while many are specific to a particular project. The generally applicable statutes are codified in Title 43 of the U.S. Code, beginning at section 371. Most of the project-specific statutes were never codified.

<sup>210</sup>See Amy K. Kelley, *Federal Reclamation Law*, in 4 WATERS AND WATER RIGHTS § 41-1, §§ 41-2 to 41-3 (Robert E. Beck ed., 1991 & Supp. 2004).

<sup>211</sup>This infrastructure includes over 60,000 miles of water supply canals, pipelines, and laterals; 268 major pumping plants; and over 17,000 miles of drains. U.S. BUREAU OF RECLAMATION, U.S. DEP’T OF INTERIOR, ACREAGE LIMITATION AND WATER CONSERVATION RULES AND REGULATIONS: FINAL ENVIRONMENTAL IMPACT STATEMENT 3 (1996) [hereinafter U.S. BUREAU OF RECLAMATION].

<sup>212</sup>U.S. Bureau of Reclamation, Bureau of Reclamation—About Us, <http://www.usbr.gov/main/about> (last visited March 6, 2006) [hereinafter Bureau of

contract between the USBR and an irrigation district or other water supply organization, which in turn delivers water to individual farms.<sup>213</sup> The nation's largest water wholesaler,<sup>214</sup> the USBR is clearly the most important federal entity involved in water management, supply, and use in the West.

Reclamation statutes are of two basic types: first, the 1902 Reclamation Act<sup>215</sup> and later statutes of general applicability that set national policy for the entire USBR program,<sup>216</sup> and second, project-specific statutes that may, for example, authorize the construction of a new project,<sup>217</sup> or address the operation, management, and purposes of an existing project.<sup>218</sup> Most USBR projects operate subject to both the general reclamation statutes and those that pertain to a particular project, although Congress may exempt a particular project from one or more features of the general laws.<sup>219</sup> "In broad terms, generally applicable laws address matters such as contracts, payment requirements, acreage limits, and disposal of excess lands, while project authorizing acts specify such things as individual project purposes, limitations on irrigated acreage for the project, federal spending, and repayment terms [for that project]."<sup>220</sup>

From the standpoint of federal-state water relations, the most significant provision of these statutes is section 8 of the 1902 Reclamation Act, which reads:

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 rights acquired thereunder, and

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Reclamation—About Us]. USBR projects also generate enough hydropower for six million homes and provide public water supply for about thirty-one million people, *id.*, although more than eighty percent of water from these projects goes to irrigation. U.S. BUREAU OF RECLAMATION, *supra* note 211, at 2.

<sup>213</sup>For a brief explanation of these contracting arrangements, see Benson, *supra* note 4, at 371–72, 391–94.

<sup>214</sup>Bureau of Reclamation—About Us, *supra* note 212.

<sup>215</sup>ch. 1093, 32 Stat. 388, 388 (codified as amended in scattered sections of 43 U.S.C. from § 371 to § 498).

<sup>216</sup>Examples of general reclamation laws after 1902 include section 9 of the 1939 Reclamation Project Act, ch. 418, 53 Stat. 1187, 1193 (codified as amended at 43 U.S.C. § 485(h) (2000)), and the 1982 Reclamation Reform Act, Pub. L. No. 97-293, 96 Stat. 1263, 1263 (codified as amended at 43 U.S.C. §§ 390aa to 390zz-1 (2000)).

<sup>217</sup>*See, e.g.*, Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156, 156 (authorizing Secretary of Interior to construct San Luis Unit of Central Valley Project).

<sup>218</sup>The best-known example of a statute that addresses various aspects of a preexisting project is the 1992 Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV, 106 Stat. 4706, 4706.

<sup>219</sup>*See, e.g.*, Bryant v. Yellen, 447 U.S. 352, 378–79 (1980) (noting that Boulder Canyon Project Act exempted recipients of Boulder Canyon Project water from acreage limitations provided in general reclamation laws).

<sup>220</sup>Benson, *supra* note 4, at 417.

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.<sup>221</sup>

Section 8 must be regarded as Congress's single most important statement of deference to the western states in water resource matters. While the nineteenth century statutes had tacitly acknowledged the legitimacy and ultimately the primacy of state water laws, section 8 affirmatively required the U.S. government "to proceed in conformity with" such laws, and imposed this duty in the important context of the federal reclamation program.<sup>222</sup> Moreover, the Supreme Court's strongest articulation of the federal policy of deference to states in water matters came in *California v. United States*,<sup>223</sup> a case that turned on section 8.<sup>224</sup> It may therefore surprise the reader to see the reclamation laws described as providing medium deference. But a review of the statutes and relevant cases—even *California v. United States*—shows that this label is appropriate.

## 2. Section 8 Deference Cases through *Arizona v. California*

For fifty years after the 1902 Act there was relative harmony over the USBR's compliance with state water law, apparently because the United States made a point of respecting state water laws and existing water rights established under them.<sup>225</sup> When the Court first seriously considered section 8 in 1950, the case did not involve conflict between federal and state law.<sup>226</sup>

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<sup>221</sup> ch. 1093, § 8, 21 Stat. 338, 390 (codified at 43 U.S.C. §§ 372, 383 (2000)).

<sup>222</sup>*Id.*

<sup>223</sup> 438 U.S. 645 (1978).

<sup>224</sup>*Id.* at 645–46.

<sup>225</sup> According to the Supreme Court, the USBR offered the following statement (apparently, in 1944) regarding its approach to section 8:

"The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently, through the 42 years since the 1902 act, been zealous in maintaining compliance with Section 8 of the 1902 act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the

By the late 1950s, however, conflicts arose over differences between California water law and certain key provisions of the general reclamation statutes. The first of these conflicts to reach the Supreme Court was *Ivanhoe Irrigation District v. McCracken*,<sup>227</sup> involving a dispute over section 5 of the 1902 Act, prohibiting a landowner from using project water to irrigate more than 160 acres of land.<sup>228</sup> The California Supreme Court had held that this acreage limitation was contrary to California water law,<sup>229</sup> and that because section 8 required the USBR to follow state water law, the section 5 acreage limitation was invalid.<sup>230</sup> The U.S. Supreme Court unanimously reversed, emphasizing that for fifty years the acreage limitation had been a major element of the reclamation program, helping implement Congress's basic policy of distributing the program's benefits to the greatest number of people.<sup>231</sup> The Court stated that it was not "passing generally" on the effect of section 8, but then did exactly that: it read this provision as applying to federal acquisition of water rights, but not to the operation of federal projects.<sup>232</sup> "We read nothing in [section] 8 that compels the United States to deliver water on conditions imposed by the State."<sup>233</sup>

Five years after *Ivanhoe*, the Supreme Court endorsed its reading of section 8 in two different cases. *City of Fresno v. California*<sup>234</sup> arose from a conflict between a provision in the general reclamation laws providing a preference for irrigation uses<sup>235</sup> and a state statute providing a preference for municipal uses.<sup>236</sup> Fresno argued that section 8 required the federal preference to give way to California's, and although the Court dismissed the case on

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West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws."

United States v. Gerlach Live Stock Co., 339 U.S. 725, 740–41 n.15 (1950) (quoting Regional Director, Region II, Bureau of Reclamation).

<sup>226</sup>*Gerlach* addressed whether the USBR had to compensate owners of existing water rights that were injured by the USBR's construction of Friant Dam in California. *Id.* at 728.

<sup>227</sup>357 U.S. 275 (1958).

<sup>228</sup>*See id.* at 277 n.2 (citation omitted) (quoting section 5's acreage limitation for water rights on private land).

<sup>229</sup>*See id.* at 288 (citation omitted) (explaining California court's rationale regarding acreage limitation and state water law).

<sup>230</sup>*Id.*

<sup>231</sup>*See id.* at 292 (stating that Congress did not intend section 8 to invalidate national policy).

<sup>232</sup>*Id.* "Without passing generally on the coverage of [section] 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended [section] 8 to override the repeatedly reaffirmed national policy of [section] 5." *Id.*

<sup>233</sup>*Id.*

<sup>234</sup>372 U.S. 627 (1963).

<sup>235</sup>Congress established this requirement in section 9(c) of the 1939 Reclamation Project Act, ch. 418, 53 Stat. 1187, 1192–93 (codified at 43 U.S.C. § 485h(c) (2000)).

<sup>236</sup>372 U.S. at 628 (citing CAL. WATER CODE § 1460 (West 1943)).

sovereign immunity grounds,<sup>237</sup> it upheld the federal irrigation preference and cited *Ivanhoe* with approval.<sup>238</sup> The Court in *Arizona v. California*<sup>239</sup> primarily construed the project-specific Boulder Canyon Project Act (as explained below),<sup>240</sup> but also addressed section 8's general directive.<sup>241</sup> The Project Act stated that the general reclamation laws would govern the project except as otherwise provided, and also contained a provision similar to section 8 that preserved states' rights and authorities over "waters within their borders."<sup>242</sup> The Court held that these provisions did not subject the United States to state laws in allocating water from the Boulder Canyon Project, primarily because *Ivanhoe* had already rejected "the argument that [section] 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law."<sup>243</sup> Thus, these decisions give limited significance to section 8,<sup>244</sup> but the Court changed course significantly in the next case applying this statute.

### 3. *California v. United States*<sup>245</sup>

The USBR obtained a water right from California for its proposed New Melones Dam on the Stanislaus River,<sup>246</sup> but the state attached twenty-five conditions to the permit for the dam, including a requirement that USBR have a specific plan for use of the water before impounding the full 2.4 million acre-feet requested.<sup>247</sup> California, supported by fifteen other western states as amici,<sup>248</sup> argued that section 8 required the USBR to accept such conditions imposed under state law.<sup>249</sup> The United States argued otherwise, but unlike

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<sup>237</sup>*Id.* at 629.

<sup>238</sup>*Id.* at 630.

<sup>239</sup>373 U.S. 546 (1963).

<sup>240</sup>*See infra* notes 273–82 and accompanying text (discussing how Court gave little deference to state law in regard to Boulder Canyon Project and accompanying federal water contracts).

<sup>241</sup>*Arizona*, 373 U.S. at 561.

<sup>242</sup>*Id.* at 585 (citing Boulder Canyon Project Act § 18, 43 U.S.C. § 617 (2000)).

<sup>243</sup>*Id.* at 586; *see also id.* (noting that this point had been decided in *Ivanhoe* and reaffirmed in *Fresno*). The Court also quoted *Ivanhoe*'s interpretation of section 8 as applying only to water right acquisition and not water project operations. *Id.* (quoting *Ivanhoe*, 357 U.S. at 291).

<sup>244</sup>*See generally* Joseph L. Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49, 81 (1964) (discussing limited significance of section 8 as interpreted by courts).

<sup>245</sup>438 U.S. 645 (1978).

<sup>246</sup>New Melones Dam, part of the Central Valley Project, was authorized for purposes of flood control, irrigation, municipal and industrial use, power, recreation, water-quality control, and protection of fish and wildlife. *Id.* at 651.

<sup>247</sup>*Id.* at 652. Other conditions were imposed to protect water quality, fish, and wildlife; to provide a preference for water users in the local basin; to reserve the State's jurisdiction to impose further conditions as needed to ensure "beneficial use" of waters; and for other purposes. *Id.* at 652 n.8.

<sup>248</sup>*Id.* at 646.

<sup>249</sup>*Id.* at 672.

*Ivanhoe* and *Fresno*, it could point to no specific congressional directive that conflicted with California's conditions.<sup>250</sup>

By a six to three majority,<sup>251</sup> the Court sided with California, upholding states' authority to impose conditions on USBR projects so long as they are "not inconsistent" with congressional directives.<sup>252</sup> According to the majority, section 8 and its legislative history make it "abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law"; anything less would "trivialize the broad language and purpose of [section] 8."<sup>253</sup> The Court remanded the case for a determination of whether congressional directives relating to New Melones Dam actually conflicted with any of the specific permit conditions imposed by California.<sup>254</sup> As for *Ivanhoe* and its other section 8 cases, the Court trashed some of their dicta,<sup>255</sup> but did not overrule their holdings.<sup>256</sup>

The *California v. United States* majority opinion is also notable for its extended—albeit selective<sup>257</sup>—discussion of early congressional deference to western state water laws, both generally<sup>258</sup> and in the context of the 1902 Reclamation Act.<sup>259</sup> Relying heavily on the 1902 Act's legislative history, the Court found that Congress had extended deference to state water laws because of its established practice of doing so, because of potential "legal confusion that would arise if federal water law and state water law reigned side by side in the same locality," and because of doubts regarding congressional power to override states in water allocation matters.<sup>260</sup> The United States argued that statutes since 1902 had created so many federal requirements applicable to USBR projects that there was no longer any room for state controls on project operations or uses.<sup>261</sup> The Court, however, put a deferential spin even on these

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<sup>250</sup>*Id.* at 673.

<sup>251</sup>Justice White dissented, joined by Justices Brennan and Marshall. *See id.* at 679 (White, J., dissenting).

<sup>252</sup>*Id.* at 674.

<sup>253</sup>*Id.* at 675.

<sup>254</sup>*Id.* at 679. On remand, the United States failed to show that any of the twenty-five permit conditions actually conflicted with federal law. *United States v. Cal. State Water Res. Control Bd.*, 694 F.2d 1171, 1182 (9th Cir. 1982).

<sup>255</sup>The majority attacked what it called the dictum of *Ivanhoe* in which the Court stated that section 8 applies only to the acquisition of water rights needed for construction or operation of a reclamation project, and that nothing in section 8 compels the USBR to deliver water on conditions set by the state. *California*, 438 U.S. at 671–74. The *California* majority wrote: "[W]e disavow the dictum to the extent that it would prevent [states] from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question." *Id.* at 674.

<sup>256</sup>*Id.* at 672.

<sup>257</sup>*See Kelley, supra* note 4, at 117–20 (criticizing majority opinion for failing to "deal effectively with important contrary authority").

<sup>258</sup>438 U.S. at 653–63.

<sup>259</sup>*Id.* at 663–70.

<sup>260</sup>*Id.* at 669.

<sup>261</sup>*Id.* at 677–78.

enactments: “While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives.”<sup>262</sup>

Without a doubt, the tone of *California v. United States* is strongly pro-deference. But a close reading of the opinion—especially the “fine print” (that is, the footnotes)—shows that federal deference to states under the reclamation laws is actually rather limited.<sup>263</sup> The holding itself allowed California to impose conditions on the USBR’s water permit for New Melones Dam, but *only to the extent that such conditions were “not inconsistent” with congressional directives relating to this project.*<sup>264</sup> The converse, which appears only in a footnote, is that any state laws or conditions that are inconsistent with congressional directives are preempted.<sup>265</sup> The Court also indicated (again in footnotes) that *Ivanhoe* and the other cases had been correct in reading section 8 to allow congressional preemption of inconsistent state laws.<sup>266</sup> Moreover, the Court acknowledged that even the 1902 Act did contain various directives that would preempt inconsistent state laws, footnoting the existence of the repayment provisions, the appurtenancy and beneficial use requirements (which appear in section 8 itself), and the 160-acre limit for receipt of project water.<sup>267</sup> Despite its deferential rhetoric, *California v. United States* comes down to this: the reclamation laws can and do preempt state water laws, but that preemption is limited to those state laws that are actually inconsistent with congressional directives.

#### 4. Project-Specific Statutes and Deference

The 1902 Act and subsequent statutes of general applicability are only a portion of the federal reclamation laws; there are also hundreds of

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<sup>262</sup>*Id.* at 678; *see also id.* (citing McCarran as prime example of deference in later statutes).

<sup>263</sup>*See id.* at 668 n.21, 672 n.25.

<sup>264</sup>*Id.* at 674, 679 (emphasis added). On remand, the Court of Appeals stated that a state law requirement is preempted in this context if it “clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme.” *United States v. Cal. State Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982). In essence, the Ninth Circuit took a middle ground position on preemption, rejecting the arguments of both sides and calling for a more cooperative federalist approach. *See Benson, supra* note 4, at 379–80.

<sup>265</sup>*California*, 438 U.S. at 672 n.25. Or, perhaps it would be more accurate to say that state laws and conditions are preempted if they are *not* “not inconsistent” with congressional directives. Justice Rehnquist, who presumably was admonished in grammar school against using double negatives, repeatedly stated that state conditions are acceptable if they are “not inconsistent” with federal laws. *See id.* at 671 n.24, 672, 674, 676, 678 & n.31.

<sup>266</sup>*Id.* at 668 n.21. “*Ivanhoe* and *City of Fresno* read the legislative history of the 1902 Act as evidencing Congress’ intent that specific congressional directives which were contrary to state law regulating distribution of water would override that law. Even were this aspect of *Ivanhoe res nova*, we believe it to be the preferable reading of the Act.” *Id.* at 672 n.25.

<sup>267</sup>*Id.* at 668 n.21, 678 n.31. The Court also noted the irrigation preference in section 9(c) of the 1939 Act, which the Court addressed in *Fresno*. *Id.* at 671 n.24.

statutes by which Congress has authorized new projects or modified the arrangements regarding existing ones.<sup>268</sup> These project-specific acts of Congress commonly specify many aspects of each project's construction and operation, such as its purposes, the approximate number of acres to be irrigated, and the geographic area to be served by the project,<sup>269</sup> as well as the amount of water to be stored or diverted<sup>270</sup> and other conditions.<sup>271</sup> Through these authorizing acts, Congress largely determines the functions, size, and scope of each project, and *California v. United States* seems to say that these federal directives trump any inconsistent requirements imposed under state law.<sup>272</sup>

Congress showed particularly little deference to states in the Boulder Canyon Project Act of 1928,<sup>273</sup> as interpreted by the Supreme Court in *Arizona v. California*.<sup>274</sup> Among other things, the Project Act authorized construction of a dam (now known as Hoover Dam) on the lower Colorado, required

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<sup>268</sup>The USBR has said that only about 70 of its over 180 projects were authorized before World War II; the others were authorized later in "small and major authorizations" such as the Pick-Sloan Program for the Missouri River Basin and the Colorado River Storage Project. U.S. BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, BRIEF HISTORY OF THE BUREAU OF RECLAMATION 5 (2000), available at <http://www.usbr.gov/history/briefhis.pdf>.

<sup>269</sup>See, e.g., Act of June 13, 1962, Pub. L. No. 87-483, § 8, 76 Stat. 96, 97-98 (codified as amended at 43 U.S.C. § 620(a) (2000)) (authorizing initial stage of San Juan-Chama Project "for the principal purpose of furnishing water supplies to approximately thirty-nine thousand three hundred acres of land in the Cerro, Taos, Llano, and Pojoaque tributary irrigation units in the Rio Grande Basin and approximately eighty-one thousand six hundred acres of land in the existing Middle Rio Grande Conservancy District and for municipal, domestic, and industrial uses, and providing recreation and fish and wildlife benefits"); Act of June 3, 1960, Pub. L. No. 86-488, § 1, 74 Stat. 156, 156 (authorizing San Luis Unit of Central Valley Project "for the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California, . . . and as incidents thereto of furnishing water for municipal and domestic use and providing recreation and fish and wildlife benefits").

<sup>270</sup>See, e.g., Act of June 13, 1962, § 8, 76 Stat. at 98 (requiring USBR to operate initial stage of San Juan-Chama Project so that "diversions to the Rio Grande Valley shall not exceed one million three hundred and fifty thousand acre-feet of water in any period of ten consecutive years . . . [and] not more than two hundred and seventy thousand acre-feet shall be diverted in any one year"); Act of Apr. 11, 1956, Pub. L. No. 84-485, § 1, 70 Stat. 105, 106 (authorizing construction of various units of Colorado River Storage Project, "[p]rovided, [t]hat the Curecanti Dam shall be constructed to a height which will impound not less than nine hundred and forty thousand acre-feet of water").

<sup>271</sup>See, e.g., Colorado River Basin Project Act, Pub. L. No. 90-537, § 304(a), 82 Stat. 885, 891 (1968) ("Unless and until otherwise provided by Congress, water from the Central Arizona Project shall not be made available directly or indirectly for the irrigation of lands not having a recent irrigation history."); Act of June 3, 1960, § 1, 74 Stat. at 156 (prohibiting delivery of water from Central Valley Project's San Luis Unit "for the production on newly irrigated lands of any basic agricultural commodity" that Secretary of Agriculture determines to be surplus crop).

<sup>272</sup>438 U.S. at 668 n.21, 672 n.25.

<sup>273</sup>ch. 42, §1, 45 Stat. 1057, 1057 (current version at 43 U.S.C. §§ 617-617t (2000)).

<sup>274</sup>373 U.S. 546, 551-52 (1963).

ratification of the 1922 Colorado River Compact by at least six states before the Act would take effect, further required California to commit irrevocably to limit its annual consumption of Colorado River water to 4.4 million acre-feet, and authorized the states to divide the Lower Basin's compact share of water among themselves by allocating 2.8 million acre-feet to Arizona and 0.3 million acre-feet to Nevada.<sup>275</sup> Section 5 of the statute also gave the U.S. Interior Secretary the power to contract for storage and delivery of water from the dam, and provided that no person could use this stored water without such a contract.<sup>276</sup> The Court interpreted these provisions of the Project Act (along with its legislative history) as showing Congress's intent to effect an apportionment of the lower Colorado.<sup>277</sup>

Significantly, the *Arizona v. California* Court held that the statute does not require the Interior Secretary to follow state law in contracting for water from the project, as Congress had intended *the* Secretary to use this section 5 authority "both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water."<sup>278</sup> The States argued, based on both section 8<sup>279</sup> and a similar savings clause<sup>280</sup> (section 18) in the Project Act, that their laws must govern federal water supply contracts from the project.<sup>281</sup> The Court rejected this argument, holding that Congress had given full power to the Interior Secretary:

As in *Ivanhoe*, where the general provision preserving state law was held not to override a specific provision stating the terms of disposition of the water, here we hold that the general saving language of [section] 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by [section] 5. Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river,

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<sup>275</sup>*Id.* at 559–61.

<sup>276</sup>*Id.* at 561.

<sup>277</sup>*Id.* at 565–90.

<sup>278</sup>In support of this interpretation, the Court noted that an earlier version of the Act would have made any such contracts "subject to rights of prior appropriators," but that this language was dropped from the bill at the time that section 5 was amended to require that all users have a contract, and no similar language was ever added. *Id.* at 580–81 (quoting *Hearing on H.R. 6251 and H.R. 9826 Before the H. Comm. on Irrigation and Reclamation*, 69th Cong. 12 (1926)).

<sup>279</sup>The Court noted that section 14 of the Project Act makes the reclamation laws (which would include section 8) applicable to the Boulder Canyon Project except as otherwise provided. *Id.* at 585 (citing Reclamation Act of 1902, Pub. L. No. 57-161, § 8, 32 Stat. 388, 390 (codified as amended in scattered sections of 43 U.S.C. (1986))).

<sup>280</sup>"Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders . . . ." *Id.* at 585.

<sup>281</sup>*Id.* at 585–87.

for example, regulation of the use of tributary water and protection of present perfected rights. What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place.<sup>282</sup>

The Central Arizona Project ("CAP") provides a remarkable example of federal *antideference* in the reclamation law context. Congress wanted to ensure that the multi-billion-dollar CAP would be the last federal "rescue project" for thirsty Arizona, which had been mining its groundwater reserves.<sup>283</sup> Thus, in authorizing the project,<sup>284</sup> Congress mandated that each federal contract for CAP water "shall require that there be in effect measures, adequate in the judgment of the Secretary, to control expansion of irrigation from aquifers affected by irrigation in the contract service area."<sup>285</sup> In the words of Professor John Leshy, "[f]or the first time ever, Congress insisted on effective state groundwater law reform as a price for getting federal largesse. . . . Arizona would have to abandon its Wild West laissez-faire approach to groundwater if it wanted the Secretary to open the spigot of the two billion dollar CAP."<sup>286</sup> As he described it, "the federal ultimatum worked," resulting in the 1980 enactment of Arizona's detailed and progressive Groundwater Management Act.<sup>287</sup>

##### 5. *Analysis of Deference under the Reclamation Laws*

Section 8 itself and *California v. United States*<sup>288</sup> certainly provide authority to argue that the federal reclamation laws are highly deferential to western state water laws. On the other hand, statutes and Supreme Court cases show that this deference is limited. As far back as 1945, the Court said, "[w]e do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."<sup>289</sup>

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<sup>282</sup>*Id.* at 587–88 (citations omitted). *Arizona* was a five to three decision. Justice Harlan, in a dissent joined by Justices Douglas and Stewart, found it "inconceivable" and "utterly incredible" that Congress intended to give such sweeping powers to the Interior Secretary at the expense of the states, *id.* at 614 (Harlan, J., dissenting), especially because key members of Congress shared "the pervasive hostility that many westerners had to any form of federal control of water rights." *Id.* at 610 (Harlan, J., dissenting).

<sup>283</sup>See John D. Leshy, *The Federal Role in Managing the Nation's Groundwater*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 9 (2004) (discussing designs and purposes of CAP).

<sup>284</sup>See Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885, 887–94 (1968) (codified as amended at 43 U.S.C. §§ 620, 1501–44, 1551–56 (2004)).

<sup>285</sup>*Id.* § 304(c)(1), 82 Stat. at 891.

<sup>286</sup>Leshy, *supra* note 283, at 9.

<sup>287</sup>*Id.*

<sup>288</sup>438 U.S. 645 (1978).

<sup>289</sup>*Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945).

*California v. United States* repeatedly states that deference extends only to those state laws and conditions that are “not inconsistent” with congressional directives. The Supreme Court did not explain the nature or degree of conflict necessary to establish this inconsistency,<sup>290</sup> but on remand, the Ninth Circuit held that state requirements may be preempted even if they are not directly contrary to a specific statutory provision.<sup>291</sup> *California v. United States* spoke of deference but squarely reaffirmed the preemptive effect of federal statutes governing USBR projects, admitting that this was the “preferable” reading of the 1902 Act.<sup>292</sup>

In the reclamation context, congressional directives regarding water allocation and use are not only supreme, they are plentiful and pervasive. *California v. United States* noted five such provisions;<sup>293</sup> these included section 8’s requirements regarding beneficial use of water and appurtenancy of water rights to specific lands, neither of which was necessarily consistent with western state laws as of 1902.<sup>294</sup> Another longstanding provision of the general reclamation laws authorizes the Interior Secretary “to make general rules and regulations governing the use of water in the irrigation of the lands within any project.”<sup>295</sup> Project authorizing statutes, which commonly specify the size, scope, and purposes of individual projects and impose various other conditions and requirements, are another major source of congressional directives regarding water use in this context. Actual conflicts between these directives and state water law requirements may be rare, but if such a conflict arises, the state law must give way.<sup>296</sup> The deference of *California v. United States* is really no more than state authority to fill in the gaps left by federal directives that apply to the entire reclamation program or the specific project in

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<sup>290</sup>See generally Kelley, *supra* note 4, at 149–74 (discussing challenges faced by federal courts in determining whether particular state requirements are preempted under *California*).

<sup>291</sup>See *United States v. Cal. State Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982). After the Supreme Court remanded *California v. United States*, 438 U.S. 645 (1978), the Court of Appeals stated that a state condition on federal management or control of a reclamation project “is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme.” *Cal. State Water*, 694 F.2d at 1177.

<sup>292</sup>438 U.S. at 668 n.21, 672 n.25. The Court even acknowledged (once again, in a footnote) that Congress had weakened the language of section 8 prior to its enactment, deleting language that would have provided that state law “shall govern and control” the federal program. *Id.* at 664 n.19. The Court mused that the revision may have been intended to clarify that state law could not override specific congressional directives. *Id.* According to Professor Donald Pisani, President Roosevelt requested the change, partly in hopes of protecting national interests. See PISANI, *supra* note 51, at 316.

<sup>293</sup>438 U.S. at 671 n.24, 672, 674, 676, 678 n.31; see also *supra* note 263 and accompanying text (suggesting Federal Reclamation Act is not particularly deferential to states).

<sup>294</sup>Goldberg, *supra* note 2, at 28–29.

<sup>295</sup>43 U.S.C. § 440 (2000) (originally enacted as Act of Aug. 13, 1914, ch. 247, § 8, 38 Stat. 688, 688).

<sup>296</sup>See *supra* notes 260–63 and accompanying text (discussing why state laws inconsistent with statutory conditions and requirements are preempted).

question.<sup>297</sup> Viewed in these terms, then, federal reclamation law provides only a moderate level of deference to state water laws.

### C. Low Deference: Federal Power Act Hydroelectric Licensing

After a century of leaving water power regulation entirely to the states, Congress, in the late nineteenth century, began developing national policy in this area, but in the early 1900s any would-be hydropower developer was still required to get specific congressional approval before building a dam.<sup>298</sup> Congress then enacted the Federal Water Power Act of 1920<sup>299</sup> (“FPA”), establishing the Federal Power Commission<sup>300</sup> (“Commission”) and charging it with administering a national program for development and regulation of hydroelectric power resources.<sup>301</sup> The FPA required any nonfederal entity seeking to build or operate a hydropower project to obtain and comply with a license issued by the Commission.<sup>302</sup> The Supreme Court would later state that the FPA was intended to be “a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach” of previous laws.<sup>303</sup>

The FPA has been complex from the beginning,<sup>304</sup> and has been amended numerous times since 1920,<sup>305</sup> but this Article will focus on two aspects of the statute that are particularly relevant to federalism in the realm of

<sup>297</sup>At one point, *California* does indicate that states may impose conditions “which are not inconsistent with congressional provisions authorizing the project in question.” 438 U.S. at 674. This statement cannot be read as authorizing conditions that are inconsistent with the general reclamation laws, as that would be directly contrary to the holdings of *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958), and *City of Fresno v. California*, 372 U.S. 627 (1963), which the Court did not overturn. See *California*, 438 U.S. at 671–72.

<sup>298</sup>See Michael A. Swiger et al., *Hydroelectric Regulation under the Federal Power Act*, in 4 WATERS AND WATER RIGHTS § 40-1, § 40-2 (Robert E. Beck ed., 1991 & Supp. 2004).

<sup>299</sup>ch. 285, 41 Stat. 1063, 1063–64 (codified as amended at 16 U.S.C. §§ 791(a)–828(c) (2000)). The Federal Water Power Act was subsequently amended and reenacted in the Federal Power Act of 1935, ch. 687, §§ 213, 320, 49 Stat. 803, 823 (codified as amended at 16 U.S.C. § 791(a)), thus the acronym “FPA.”

<sup>300</sup>Now, the Federal Power Commission is known as the Federal Energy Regulatory Commission (“FERC”). Swiger et al., *supra* note 298, § 40-1.

<sup>301</sup>*Id.* § 40-2(b).

<sup>302</sup>Section 23(b) of the FPA makes it “unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in” any navigable waters or federal public lands, except in accordance with a license from the Commission. 16 U.S.C. § 817(1).

<sup>303</sup>First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n, 328 U.S. 152, 180 (1946).

<sup>304</sup>See *New Jersey v. Sargent*, 269 U.S. 328, 335–36 (1926) (stating that 1920 FPA “is a long one” and listing numerous provisions relating to dam licensing.)

<sup>305</sup>Swiger et al., *supra* note 298, § 40.2(b)–(e).

water resources: the types of projects (and waters) subject to FPA licensing jurisdiction, and the role of state regulatory requirements in project licensing.

### *1. Commission Licensing Jurisdiction*

The 1920 FPA asserted licensing jurisdiction over new hydropower projects on “navigable waters of the United States” or on federal public lands.<sup>306</sup> Congress extended the Commission’s jurisdictional reach in 1935 to include any project on a nonnavigable waterway if the stream was subject to congressional power under the Commerce Clause, or if the project would affect interstate or foreign commerce.<sup>307</sup> Thus, Congress sought to extend its authority over water resources beyond its traditional domain of navigation and navigable waters, setting up a series of statutory and constitutional clashes.

Even before the 1935 amendments, Congress’s assertion of federal regulatory jurisdiction over water power projects did not necessarily sit well with the states, East or West. New Jersey launched a frontal assault on the FPA not long after its enactment, essentially arguing that the licensing provisions exceeded Congress’s power over water and infringed on the state’s power.<sup>308</sup> The Court dismissed the case for lack of ripeness.<sup>309</sup>

The States were intensely concerned over the assertion of federal jurisdiction beyond traditionally navigable waterways and the imposition of federal requirements beyond those needed to protect navigability—so much so that nearly every state joined an amicus brief opposing the Commission in *United States v. Appalachian Power*.<sup>310</sup> This blockbuster water-federalism case arose when the Commission asserted jurisdiction over a partially completed dam on the New River in West Virginia, even though the navigability of some portions of the river below the project was questionable.<sup>311</sup> The lower federal courts had determined that the river was not navigable and held that the project was beyond the Commission’s jurisdiction.<sup>312</sup> In the course of an extended discussion on the test for “navigability” for purposes of Commerce Clause jurisdiction, the Court declared that a waterway that is nonnavigable in its natural state may be deemed navigable if it can be made so by “reasonable improvements,”<sup>313</sup> reasoning that “plenary federal power over commerce must

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<sup>306</sup>Projects using surplus water or water power from a federal dam were also subject to licensing under the 1920 FPA. *Id.* at 40.3 (citing 16 U.S.C. § 817(1) (2000)).

<sup>307</sup>These provisions apply only to those projects that were built or significantly modified after 1935. *Id.* (citing Act of Aug. 26, 1935, §§ 202, 210, 49 Stat. 838, 846).

<sup>308</sup>*Sargent*, 269 U.S. at 337.

<sup>309</sup>*Id.* at 339–40.

<sup>310</sup>311 U.S. 377, 397–98 (1940).

<sup>311</sup>*Id.* at 399–401.

<sup>312</sup>*Id.* at 402–03.

<sup>313</sup>*Id.* at 409. “A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.” *Id.* at 407.

be able to develop with the needs of that commerce which is the reason for its existence.”<sup>314</sup> The Court then applied this new test to the New River and found it navigable,<sup>315</sup> thus validating the exercise of jurisdiction under the FPA.

The bigger issue for the States in *Appalachian Power*, however, was the Commission’s authority to impose license conditions unrelated to the protection of navigability. They admitted the Commission’s authority to prohibit the placement in a navigable waterway of any structure that would impair navigation, but argued that this power did not allow the Commission to impose conditions unrelated to navigation in licensing such structures.<sup>316</sup> Such authority would mean federal control over resources traditionally managed by the states, which, they argued, would violate the Tenth Amendment.<sup>317</sup> The Court rejected this argument with a sweeping affirmation of congressional power over water under the Commerce Clause.<sup>318</sup> It stated that both the states and those with water rights under state law “hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce.”<sup>319</sup>

The next major Supreme Court case regarding FPA licensing jurisdiction involved a proposed dam on a nonnavigable river located on federal reserved lands, and thus the Commission’s assertion of jurisdiction based on U.S. land ownership was a particular concern for the western states. The Commission granted a license for the Pelton Dam on Oregon’s Deschutes River, on federal and tribal lands that the United States had reserved for hydropower purposes.<sup>320</sup> The State of Oregon objected both to the assertion of FPA jurisdiction on a nonnavigable stream<sup>321</sup> and to the project’s potential impact on salmon and steelhead populations in the Deschutes River basin.<sup>322</sup> In *Federal Power Commission v. Oregon*, the Court upheld the Commission’s jurisdiction to license the dam based on FPA section 23, requiring a license for any hydropower project located “upon any part of the public lands or

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<sup>314</sup>*Id.* at 409.

<sup>315</sup>*Id.* at 417–19.

<sup>316</sup>*Id.* at 419.

<sup>317</sup>*Id.* at 421–22.

<sup>318</sup>*Id.* at 426–27. *See supra* notes 62–64 and accompanying text (discussing federal authority over water under Commerce Clause and Property Clause). The Court also stated that “navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government.” *Appalachian Power*, 311 U.S. at 426–27.

<sup>319</sup>*Id.* at 423.

<sup>320</sup>The west end of the dam would be located on the Warm Springs Indian Reservation and the east end on federal lands; the United States had designated the dam site for power purposes no later than 1913. *Fed. Power Comm’n v. Oregon*, 349 U.S. 435, 438–39 (1955).

<sup>321</sup>The Court noted that the lower portion of the Deschutes, a Columbia River tributary, flowed through a narrow canyon with an average gradient of 17.6 feet per mile and, thus, it assumed (without deciding) that the river was nonnavigable. *Id.* at 438 n.4.

<sup>322</sup>*Id.* at 437 & n.2.

reservations of the United States.”<sup>323</sup> Oregon argued, however, that the Desert Land Act and earlier statutes had effected “an express congressional delegation or conveyance to the State of the power to regulate the use of these waters,” limiting FPA jurisdiction and requiring the state’s consent to the project.<sup>324</sup> The Court disposed of this argument in a paragraph, finding the Desert Land Act inapplicable to those federal lands (such as the Pelton Dam site) that the United States had reserved for a particular purpose.<sup>325</sup> While the Desert Land Act had severed water and soil rights on the public domain and required anyone obtaining a federal land patent to acquire water rights under state law, the statute did not apply to federal reserved lands that were not open to disposition and sale.<sup>326</sup> Thus, with a minimum of discussion, the Court determined that Congress had not intended to cede control to the western states over waters on federal reserved lands.<sup>327</sup> This holding not only upheld federal regulatory jurisdiction over such waters, but also signaled the applicability of the *Winters* doctrine to nontribal federal reservations.<sup>328</sup>

A decade later, the Court in *Federal Power Commission v. Union Electric Co.*<sup>329</sup> upheld a further expansion of the Commission’s licensing jurisdiction.<sup>330</sup> The proposed project was a pumped-storage facility on a nonnavigable tributary of a navigable stream in Illinois;<sup>331</sup> the project would have had little if any impact on downstream navigability,<sup>332</sup> but the

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<sup>323</sup>*Id.* at 442 n.8 (emphasis removed) (quoting 16 U.S.C. § 817 (2000)). In addition, FPA section 4 authorized the Commission to issue licenses for projects located on any part of the public lands and reservations of the United States. *See* 16 U.S.C. § 797(e). The Court found constitutional authority for these statutory provisions in the Property Clause. *Fed. Power Comm’n*, 349 U.S. at 443.

<sup>324</sup>*Id.* at 446–47; *see also supra* notes 95–108 and accompanying text (discussing Desert Land Act, ch. 107, § 1, 19 Stat. 377, 377 (codified at 43 U.S.C. § 321 (2000)); mining law of 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified as amended at 43 U.S.C. § 661 (2000)); and mining law of 1870, ch. 235, § 17, 16 Stat. 217, 218 (current version at 43 U.S.C. § 661 (2000))).

<sup>325</sup>*Fed. Power Comm’n*, 349 U.S. at 448.

<sup>326</sup>The Court noted that federal laws relating to the disposal of the public domain (for example, the Desert Land Act) generally do not apply to those federal lands “‘appropriated to some other purpose.’” *Fed. Power Comm’n*, 349 U.S. at 448 (quoting *United States v. O’Donnell*, 303 U.S. 501, 510 (1938)).

<sup>327</sup>Justice Douglas dissented, arguing that the Desert Land Act did apply and the project should be subject to Oregon’s state law. *See id.* at 452–57 (Douglas, J., dissenting).

<sup>328</sup>The Court confirmed that nontribal reservations may carry implied reserved water rights in *Arizona v. California*, 373 U.S. 546 (1963). *Id.* at 601. The Pelton Dam decision was largely responsible for triggering proposals in Congress to subject certain federal water right activities to state law, having “reaffirmed fears of federal plenary control over all nonnavigable waters arising on or flowing through federal reservations.” Morreale, *supra* note 208, at 439–41.

<sup>329</sup>381 U.S. 90 (1965).

<sup>330</sup>*Id.* at 110.

<sup>331</sup>*Id.* at 92–93.

<sup>332</sup>*Id.* at 93–94. The Commission based its asserted jurisdiction partly on potential downstream effects on navigability, but the Court seemed to indicate that navigability impacts would not actually be a significant issue. *See id.* at 93 & n.5 (finding no effect on flow levels

Commission required a license primarily because the project would use water power to generate electricity for interstate sale and thus would affect interstate commerce. The Court stated that the question was whether Congress<sup>333</sup> had authorized the Commission to require a license for a hydroelectric project utilizing the headwaters of a navigable river to generate energy for an interstate power system, and answered “yes” based on both the language and the purposes of the FPA.<sup>334</sup> As for the statutory text, the Court found plain meaning in section 23(b), requiring a license for a project to be located on nonnavigable waters “over which Congress has jurisdiction under its authority to regulate commerce . . . if upon investigation [the Commission] shall find that the interests of interstate or foreign commerce would be affected.”<sup>335</sup> The *Union Electric* Court also relied heavily on the central purpose of the FPA, “to provide for the comprehensive control over those uses of the Nation’s water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power.”<sup>336</sup> It further declared that this purpose would be best served if the Commission considered “the impact of the project on the full spectrum of commerce interests.”<sup>337</sup>

## 2. Federal Preemption of Potentially Inconsistent State Laws

Despite the states’ concerns about the breadth of federal jurisdiction and regulatory authority under the FPA, the statute itself includes two provisions that would appear to preserve an important role for states in regulating hydropower projects. Section 9(b) provides that each license applicant must show the Commission that it “has complied with the requirements” of the laws of the state(s) in which the project is to be located “with respect to bed and banks and to the appropriation, diversion, and use of water for power

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below dam during normal operations, but noting that project “might affect” downstream flow levels in event of malfunction or abnormal flows). The Court of Appeals held that there was not substantial evidence to support the Commission’s determination of potential navigability impacts, but the Supreme Court did not reach this issue. *Id.* at 93 n.6.

<sup>333</sup>The Court quickly established that Congress clearly had Commerce Clause power over the interstate transmission of electricity, and could regulate hydropower projects selling electricity in the interstate market regardless of their effect on navigation. *Id.* at 94. Thus, the only issue was construction of the FPA; even the dissenters agreed that there were no constitutional issues involved. *Id.* at 111–12 (Goldberg, J., dissenting).

<sup>334</sup>*Id.* at 95.

<sup>335</sup>*Id.* at 96 & n.8 (citing 16 U.S.C. § 817 (2000)). The utility had urged a narrow construction of this provision, arguing that Congress had intended to invoke jurisdiction over nonnavigable streams only to the extent needed to protect downstream navigability. *Id.* at 101–02. The Court rejected this argument, finding “compelling significance” in Congress’s use of comprehensive language in section 23(b) with no limitation regarding navigability. *Id.* at 107.

<sup>336</sup>*Id.* at 98. The Court looked to the FPA’s legislative history and other provisions of the statute in confirming this broad purpose. *Id.* at 98–99.

<sup>337</sup>*Id.* at 101.

purposes.”<sup>338</sup> Moreover, section 27 provides that the FPA shall not be “construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”<sup>339</sup> In the years immediately following enactment of the FPA, the Commission took the position that compliance with relevant state laws was a condition precedent to a federal license, and that states therefore could legitimately veto hydropower projects.<sup>340</sup> The Commission would later change this position, however, and the Supreme Court would face the question of state authority to impose conditions on a federally licensed project.

*First Iowa Hydro-Electric Cooperative v. Federal Power Commission*<sup>341</sup> involved a proposed project that would divert water from Iowa’s Cedar River into the neighboring Mississippi, removing nearly the entire flow of the Cedar for its lower twenty miles.<sup>342</sup> The applicant originally proposed a project that would have produced much less power with much less impact on the Cedar,<sup>343</sup> but changed course after it became clear that the Commission favored the more ambitious design.<sup>344</sup> The new proposal, however, evidently conflicted with an Iowa statute requiring any dam to return any water to the stream from which it was diverted “at the nearest practicable place.”<sup>345</sup> Thus, the applicant could not obtain the state permit required for the proposed dam; it seemed reasonably clear that the State of Iowa opposed the

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<sup>338</sup>Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, 1068 (codified as amended at 16 U.S.C. §§ 791(a)–828(c) (2000)). Section 9(b) requires the applicant to submit “satisfactory evidence” to the Commission of compliance with these types of state laws, as well as those state laws “with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this [Act].” *Id.* (codified at 16 U.S.C. § 802(b)).

<sup>339</sup>*Id.* at 1077 (codified at 16 U.S.C. § 821).

<sup>340</sup>See Roderick E. Walston, *State Regulation of Federally-Licensed Hydropower Projects: The Conflict between California and First Iowa*, 43 OKLA. L. REV. 87, 91 (1990).

<sup>341</sup>328 U.S. 152 (1946).

<sup>342</sup>*Id.* at 158. The diversion would leave about twenty-five cubic feet per second (c.f.s.) in the lower Cedar River. *Id.*

<sup>343</sup>The original concept did not involve a diversion to the Mississippi but, instead, would have returned water to the Cedar River immediately below the dam. *Id.* at 157 n.3. This design would have generated one-third to one-fourth as much power as the final proposal. *Id.* at 157 n.3, 166.

<sup>344</sup>*Id.* at 158–59, 166. Following hearings on the revised proposal, the Commission found that the applicant’s original plans “were neither desirable nor adequate, but many important changes in design have been made. . . . The present plans call for a practical and reasonably adequate development . . .” *Id.* at 160 (citation omitted).

<sup>345</sup>*Id.* at 166–67. This statute also required that the water be returned to the river “without being materially diminished in quantity or polluted or rendered deleterious to fish life.” *Id.* at 166. Iowa statutes required a state permit to operate, maintain, or construct any dam and appeared to prohibit a permit unless the water was returned directly to the stream. *Id.* at 164–66 (citing IOWA CODE §§ 7767, 7771 (1939)).

project,<sup>346</sup> which presented an apparent conflict between state water resource laws and the Commission's power to license projects.

The Court held that the FPA preempted state laws that could be inconsistent with Commission licenses, reading narrowly those FPA provisions (especially section 9(b)) that seemed to preserve state authority regarding proposed projects.<sup>347</sup> According to the Court, section 9(b) did not actually mandate compliance with state law; the requirement that an applicant supply the Commission with evidence that it has complied with the requirements of state law is merely "by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress."<sup>348</sup> Thus, the Court saw the 9(b) requirement as purely informational and not substantive. As for section 27, declaring that the FPA should not be construed as interfering with state laws "'relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein,'" the Court concluded that it applied primarily or even exclusively to *proprietary* water rights for irrigation, municipal, and similar uses.<sup>349</sup> By preserving state authority only in this narrow field, Congress showed its willingness "to let the superseding of the state laws by federal legislation take its natural course" in all other fields relevant to project licensing.<sup>350</sup> The Court refused to read these provisions as requiring state consent as a prerequisite to FPA licensing, reasoning that if Congress had intended such a requirement, the statute would have said so.<sup>351</sup>

The *First Iowa* Court obviously believed that limiting the power of states was necessary to serve the fundamental purpose of the FPA—that is, to establish a comprehensive national regulatory scheme to promote full

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<sup>346</sup>*See id.* at 159 n.4, 170–71 (discussing fact that permit application was rejected twice by State of Iowa and Iowa's litigation position). In dissent, however, Justice Frankfurter contended that the actual requirements of Iowa law should be determined by Iowa agencies and courts, and that the Supreme Court should not assume any conflict until the State has spoken authoritatively. *Id.* at 183–88 (Frankfurter, J., dissenting).

<sup>347</sup>*Id.* at 175–78.

<sup>348</sup>*Id.* at 177–78. One flaw in this reasoning is that section 9(c) already required the applicant to provide "[s]uch additional information as the Commission may require," whereas section 9(b) required the submission of evidence regarding compliance with state law. Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, 1068 (codified as amended at 16 U.S.C. § 802(a)(2), (c) (2000)).

<sup>349</sup>*First Iowa*, 328 U.S. at 175–76 (quoting Federal Water Power Act of 1920, ch. 287, 41 Stat. at 1077 (codified as amended at 16 U.S.C. § 821)). The Court could have read the phrase "other uses" broadly; instead, the Court said that its meaning in section 27 was limited to "rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *Id.* at 176; *cf.* *United States v. Dist. Court in and for Eagle County*, 401 U.S. 520, 524 (1971) (reading term "or otherwise" broadly, in McCarran Amendment).

<sup>350</sup>*First Iowa*, 328 U.S. at 176.

<sup>351</sup>*See id.* at 178–79 (noting pre-FPA proposals that would have required state consent and congressional arguments against these proposals).

development of the nation's water resources.<sup>352</sup> The Court stated that requiring the applicant to comply with Iowa law in addition to obtaining a Federal Energy Regulatory Commission ("FERC") license would effectively give Iowa "veto power over the federal project. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission . . . ."<sup>353</sup> The Court saw this result as antithetical to the overall statutory scheme of the FPA, through which Congress created a "federal plan of regulation leav[ing] no room or need for conflicting state controls."<sup>354</sup>

In subsequent cases, the Court held fast to its *First Iowa* holding and rationale regarding FPA preemption of state authority. In the Pelton Dam case, the Court rejected arguments that the project must obtain both Commission and state approval: "To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision."<sup>355</sup> The FPA not only preempted state requirements directly relevant to hydropower, but other state laws that could frustrate a Commission-licensed project.<sup>356</sup> These cases finding broad preemption of state laws under the FPA, however, were called into question by *California v. United States*,<sup>357</sup> the Reclamation Act decision in which the Court went on at great length about federal deference to the western states in matters of water allocation.<sup>358</sup>

In *California v. FERC*,<sup>359</sup> however, the Court unanimously reaffirmed *First Iowa* over the objections of all fifty states.<sup>360</sup> The dispute, in

<sup>352</sup>*Id.* at 180–81.

<sup>353</sup>*Id.* at 164. The Court's characterization of the project as "federal" is interesting and somewhat misleading—First Iowa Hydro-Electric Cooperative was the project developer, and the federal government simply issued a license approving it; the Court's wording indicates the strong federal *interest* in development of the nation's hydropower resources. *Id.* at 182.

<sup>354</sup>*Id.* at 181.

<sup>355</sup>Fed. Power Comm'n v. Oregon, 349 U.S. 435, 445 (1955).

<sup>356</sup>*See, e.g.,* City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 322–23, 328, 340–41 (1958) (denying State of Washington's licensing challenge that licensee had no authority under state law to condemn state property—a fish hatchery that would be destroyed by project on Cowlitz River—and holding that issue had been resolved by earlier Ninth Circuit decision (citing Wash. Dep't of Game v. Fed. Power Comm'n, 207 F.2d 391, 396 (9th Cir. 1953))); *see also* Wash. Dep't of Game, 207 F.2d at 396 (rejecting same argument based on *First Iowa* (citing *First Iowa*, 328 U.S. at 167)).

<sup>357</sup>438 U.S. 645 (1978); *see also* Walston, *supra* note 340, at 95 ("Several commentators have observed that, after *California*, *First Iowa* is no longer valid."). Walston himself argued that the two cases conflicted because they provided "contradictory interpretations of virtually identical federal statutes." *Id.* at 101.

<sup>358</sup>*See supra* notes 227–44 and accompanying text (discussing pre-*California* cases allowing FPA to pre-empt state laws).

<sup>359</sup>495 U.S. 490 (1990). The Federal Power Commission's name was changed to the Federal Energy Regulatory Commission in the 1970s.

which California sought to impose higher minimum streamflows on a federally licensed project,<sup>361</sup> presented the same type of conflict as that in *First Iowa*: the Commission's project licensing decisions versus state permitting requirements intended to protect riverine resources. California argued that FPA section 27 expressly preserved the state's authority to impose such requirements, but the Court held that this argument was directly contrary to *First Iowa*,<sup>362</sup> and declined "fundamentally to restructure a highly complex and long-enduring regulatory regime."<sup>363</sup> Allowing California to impose minimum flows higher than those set by the Commission "would disturb and conflict with the balance embodied in that considered federal agency determination," and would conflict with congressional intent by effectively allowing California to veto the project.<sup>364</sup> The Court then stated the general rule that a state law requirement is preempted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."<sup>365</sup>

The Court also rejected the state's argument based on *California v. United States*,<sup>366</sup> partly because section 8 of the Reclamation Act contained language requiring the Interior Secretary "to proceed in conformity with" relevant state laws, and the Court viewed the absence of such language in FPA

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<sup>360</sup>*Id.* at 506; *see also id.* at 492–93 (listing attorneys general of forty-nine states as amici curiae).

<sup>361</sup>The issue was the minimum flow level to be maintained in Rock Creek, a tributary of California's American River, in the reach below the hydropower project. *Id.* at 494. FERC originally established minimum flows of eleven to fifteen c.f.s. (depending on the time of year), but the California State Water Resources Control Board sought to impose minimum flows of thirty to sixty c.f.s. as a condition of the state water permit for the project. *Id.* at 494–95. After a federal administrative hearing, FERC set the flow level at twenty c.f.s. *Id.* at 496 (citing Rock Creek Ltd. P'ship, 41 F.E.R.C. P63,019 (1987)).

<sup>362</sup>Because California relied heavily on section 27, it argued that *First Iowa* had turned entirely on section 9(b) and that its statements regarding section 27 were dicta, but the Court disagreed. *Id.* at 500–03.

<sup>363</sup>*Id.* at 500.

<sup>364</sup>*Id.* at 506.

<sup>365</sup>*Id.* (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

<sup>366</sup>As discussed *supra* notes 239–56 and accompanying text, *California v. United States*, 438 U.S. 645 (1978), held that California had authority to impose requirements on a USBR project so long as they were "not inconsistent with clear congressional directives," based largely on the Court's construction of section 8 of the 1902 Reclamation Act. *Id.* at 672. The State's basic argument in *California v. FERC*, 495 U.S. 490 (1990), then, was that

[section] 8 is similar to, and served as a model for, FPA [section] 27, that this Court in *California v. United States* interpreted [section] 8 in a manner inconsistent with *First Iowa*'s reading of [section] 27, and that that reading of [section] 8, subsequent to *First Iowa*, in some manner overrules or repudiates *First Iowa*'s understanding of [section] 27.

*Id.* at 503.

section 27 as indicating a lesser degree of deference.<sup>367</sup> It also issued the following cautionary statement about its earlier decision:

*California v. United States* is cast in broad terms and embodies a conception of the States' regulatory powers in some tension with that set forth in *First Iowa*, but that decision bears quite indirectly, at best, upon interpretation of the FPA. The Court in *California v. United States* interpreted the Reclamation Act of 1902; it did not advert to, or purport to interpret, the FPA, and held simply that [section] 8 requires the Secretary of the Interior to comply with state laws, not inconsistent with congressional directives, governing use of water employed in federal reclamation projects. Also, as in *First Iowa*, the Court in *California v. United States* examined the purpose, structure, and legislative history of the entire statute before it and employed those sources to construe the statute's saving clause. Those sources indicate, of course, that the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act.<sup>368</sup>

*D. Analysis of Deference under McCarran, the Reclamation Laws, and the FPA*

The preceding discussion of issues arising under McCarran, the reclamation laws, and the FPA raises several points regarding federal deference to state water laws. First, there is no universal policy of deference that applies consistently across the many areas of federal law relating to water. Despite the Court's broad pronouncements in *California v. United States*<sup>369</sup> and in the reserved rights case of *United States v. New Mexico*,<sup>370</sup> there is nothing approaching a uniform policy of deference; instead, Congress and the Court have handled the issue differently in the context of each statutory scheme. This point is irrefutable after *California v. FERC*, where the Court stated that its earlier decision regarding the Reclamation Act, despite being

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<sup>367</sup>*Id.* at 504. The Court also emphasized that federal agencies play different roles under the two statutes, and viewed the USBR's role in building and operating a reclamation project as "analogous to a licensee under the FPA." *Id.* at 505.

<sup>368</sup>*Id.* at 504 (citations omitted).

<sup>369</sup>438 U.S. 645 (1978).

<sup>370</sup>438 U.S. 696 (1978). This decision took a narrow view of the purposes for which reserved rights could be established on federal lands generally, and for National Forest lands in particular. *Id.* at 718. The majority justified its approach based in part on "the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. 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." *Id.* at 701-02. The Court described the reserved rights doctrine as "an exception to Congress' explicit deference to state water law in other areas." *Id.* at 715.

“cast in broad terms,” meant little or nothing in an analysis of deference under the FPA.<sup>371</sup>

Second, one should not attach too much significance to a general “saving clause” regarding state water laws in a federal statute. Such clauses are common enough, having appeared in some form in at least thirty-seven federal statutes over the years,<sup>372</sup> but in practice the Court has not given these provisions great weight in the context of a particular statutory scheme.<sup>373</sup> Such clauses are not meaningless; section 8 of the Reclamation Act, in particular, carries some power after *California v. United States*.<sup>374</sup> But even that decision, representing the high-water mark of federal deference in recent Supreme Court case law, held that section 8 requires USBR to “proceed in conformity with” state laws<sup>375</sup> only to the extent that they are “not inconsistent with clear congressional directives.”<sup>376</sup> And in other cases, such as *Arizona v. California*<sup>377</sup> (interpreting Boulder Canyon Project Act section 18), *First Iowa*,<sup>378</sup> and *California v. FERC*<sup>379</sup> (both interpreting FPA section 27), the Court has read these provisions narrowly, refusing any role for states that could interfere with the broader purposes of the statute.<sup>380</sup>

Third, the Court has based its deference decisions more on the purpose and objectives of the statute than on its actual provisions.<sup>381</sup> In the context of *McCarran*, this approach resulted in consent to state court

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<sup>371</sup>495 U.S. 490, 530 (1990).

<sup>372</sup>See *supra* note 9 (referencing list of thirty-seven statutes); see also *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982) (referring to same list, and characterizing section 8 of Reclamation Act as “typical of the other 36 statutes”).

<sup>373</sup>One could argue that these provisions show that Congress has deferred to state water allocation authority, but its policies have been frustrated by an activist Supreme Court. See *TRELEASE*, *supra* note 3, at 79–82. On the other hand, as explained in the following paragraph, the Court has consistently upheld the broad goals and purposes of a particular statute in deciding questions of deference under that statute. One could certainly argue that the Court has, therefore, been more faithful to congressional intent than it would have by giving controlling weight to a general saving clause regarding state water laws, particularly where there is apparent tension between the saving clause and the statutory purposes.

<sup>374</sup>438 U.S. 645 (1978).

<sup>375</sup>*Id.* at 650.

<sup>376</sup>*Id.* at 672.

<sup>377</sup>283 U.S. 423 (1931).

<sup>378</sup>328 U.S. 152 (1946).

<sup>379</sup>495 U.S. 490 (1990).

<sup>380</sup>See, e.g., *First Iowa*, 328 U.S. at 175–76 (reading FPA as saving state authority with respect to “proprietary” rights for irrigation, municipal, and similar purposes under section 27, but allowing preemption of state law in other areas); *Arizona*, 373 U.S. at 588 (“Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights.”).

<sup>381</sup>The Court has also emphasized federal purposes in the reserved rights context, upholding reserved rights where the absence of an adequate water supply would defeat the primary purpose(s) of the federal reservation. See *United States v. New Mexico*, 438 U.S. 696, 700 & n.4 (1978) (discussing past court decisions regarding reserved rights).

jurisdiction that was arguably broader than the text required in order to fulfill the statutory policy. By contrast, the Court read sections 9(b) and 27 of the Federal Power Act narrowly, largely because it viewed state water laws as posing an obstacle to fulfillment of the broad national purpose of the statute.<sup>382</sup> In addition, the federal government's role in the statutory scheme is a key consideration; *California v. FERC* found it significant that "the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act."<sup>383</sup> The Court has said that it considers the "purpose, structure and legislative history of the entire statute"<sup>384</sup> in determining deference under that statute, and its cases confirm the importance of these factors.

Finally, the preceding discussion shows that strong statutory deference to state authority over water<sup>385</sup> is limited to a single area: the allocation and determination of water *rights*, especially "proprietary" rights for irrigation, municipal and similar uses. Section 8 itself extends deference to a narrow category of state laws, those "relating to the control, appropriation, use, or distribution of water used in irrigation."<sup>386</sup> Interpreting section 27, *First Iowa* concluded that the FPA saving clause "has primary, if not exclusive

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<sup>382</sup>See *supra* notes 350–63 and accompanying text (discussing Court's decision in *First Iowa*).

<sup>383</sup>495 U.S. at 504; see also *id.* at 505 (characterizing federal role under Reclamation Act as being similar to licensee under FPA).

<sup>384</sup>*Id.* at 504; see also *id.* (explaining both *California v. United States* and *First Iowa*).

<sup>385</sup>This Article focuses on federal deference to *state laws*, not on deference to existing private water rights established under these laws. Deference to existing water rights is a common feature of saving clauses in federal statutes, including Reclamation Act section 8, 43 U.S.C. § 383 (2000) ("Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with [state or territorial water allocation laws] or any vested [water] right acquired thereunder . . ."); and FPA section 27, 16 U.S.C. § 821 (2000) (containing nearly identical language). The true meaning of these provisions is not easy to determine because the great majority of deference cases involve federal-state relations rather than existing water rights. In two cases from the 1950s, however, the Court relied on such saving clauses to hold that Congress did not intend to allow the federal government to destroy private, proprietary water rights without any compensation. See *Fed. Power Comm'n v. Niagara Mohawk Power Co.*, 347 U.S. 239, 246–56 (1954) (interpreting section 27 and other FPA provisions); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735–40 (1950) (interpreting section 8 in context of congressional authorization of Central Valley Project). Destruction without compensation would have been possible because of the federal navigation servitude, which allows the federal government to take certain actions that protect or improve navigation without having to pay compensation for taking or impairing certain property interests that depend on access to navigable waters. See *United States v. Rands*, 389 U.S. 121, 122–24 (1967) (discussing dominant servitude doctrine). It would seem, however, that such provisions would not necessarily prevent the federal government from taking actions that would limit the exercise of private water rights without destroying them. See, e.g., *O'Neill v. United States*, 50 F.3d 677, 681–84 (9th Cir. 1995) (upholding reduced deliveries of water to irrigators under USBR contracts, caused by requirements to protect endangered fish).

<sup>386</sup>43 U.S.C. § 383 (2000). Irrigation was originally the sole purpose of the reclamation program.

reference to such proprietary rights;”<sup>387</sup> *California v. FERC* refused to apply section 27 to save (nonproprietary) instream flow requirements applicable to a licensed project, even though California sought to impose such requirements through the water rights permitting process.<sup>388</sup> McCarran, of course, extends deference by ensuring a state forum for adjudicating federal water rights, and the Court—recognizing that the state courts would adjudicate private, proprietary water rights in a particular river system—felt compelled to reject concurrent jurisdiction over federal and tribal claims largely to avoid any potential for “inconsistent dispositions of property.”<sup>389</sup> Thus, Congress has largely left the states in control of proprietary water rights, and through certain statutes (for example, McCarran and section 8) it has subjected federal interests to state authority.<sup>390</sup>

By contrast, federal law shows little or no deference to states in most matters relating to federally approved water projects. States simply cannot block construction of these projects, whether they are private hydropower projects with a federal license under the FPA,<sup>391</sup> projects built by a federal agency under the authority of the reclamation laws,<sup>392</sup> or other federal statutes such as the Flood Control Act.<sup>393</sup> Moreover, federal law gives the states very

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<sup>387</sup>328 U.S. at 176. The Court found further support for this reading of section 27 in the phrase “any vested right acquired” under state law. *Id.*

<sup>388</sup>See *supra* note 370 (discussing reserved water rights).

<sup>389</sup>As the Court stated in *Colorado River Water Conservation District*:

[T]he clear federal policy evinced by [McCarran] is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.

*Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); see also *San Carlos Apache v. Arizona*, 463 U.S. 545, 567–68 (1983) (discussing duplicative nature of federal proceedings in context of Native American water rights).

<sup>390</sup>Congress has rejected all efforts to block federal reserved rights and force the United States to obtain water rights under state law, however. See *Morreale*, *supra* note 208, at 464–512 (describing failed legislative attempts of 1950s and 1960s regarding federal water rights).

<sup>391</sup>See *First Iowa*, 328 U.S. at 164 (rejecting state “veto power over the federal project”).

<sup>392</sup>*California v. United States*, 438 U.S. 645 (1978), of course, held that section 8 allows states to impose only those conditions and requirements that are “not inconsistent with Congressional directives.” *Id.* at 677; see also *supra* notes 245–267 and accompanying text (discussing *California* in more detail).

<sup>393</sup>16 U.S.C. § 460d (2000). “The program of the Corps of Engineers for improvement of navigation, for flood control and for the development of hydro-electric power in dams constructed for navigation and flood-control purposes were never subject to any form of state control.” *TRELEASE*, *supra* note 3, at 80. The State of Oklahoma fought construction of Denison

limited power to dictate how water from these projects will be used. In the reclamation law context, both general and project-specific congressional directives regarding the use of project water—of which there are many<sup>394</sup>—preempt inconsistent state law requirements. *California v. FERC*<sup>395</sup> blocked California's efforts to impose minimum flows higher than those specified in a FERC license, even though the project conceivably could have been operated to meet both the federal and state "minimum" requirements.<sup>396</sup> Thus, where state control might interfere with a water resources program authorized by Congress, federal law extends little or no deference to state authority.<sup>397</sup>

These lessons regarding deference in the statutory context—the need for statute-by-statute analysis, the limited significance of saving clauses, the importance of statutory policy and purpose, and the limited scope of deference to state authority—are all relevant to a discussion of deference in another statutory field: the federal environmental laws.

#### V. DEFERENCE UNDER THE CLEAN WATER ACT AND THE ENDANGERED SPECIES ACT

Over the past several years, some of the hottest federalism issues involving water have involved the application of the federal environmental

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Reservoir all the way to the Supreme Court. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 510 (1941). Congress authorized Denison as a flood control, navigation, and hydropower project on a nonnavigable portion of the Red River along the Oklahoma-Texas border. *See id.* at 519–20. Oklahoma alleged that the project would harm it in many different ways, and argued, in detail, that Denison was a hydropower and flood control project that Congress could not constitutionally authorize. *Id.* at 511–13, 515. The Court rejected every argument, ending with the following: "And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress." *Id.* at 534–35 (citations omitted). Moreover, water from flood control projects is not freely available for distribution by the states, despite a provision of the 1944 Flood Control Act stating a congressional policy of recognizing "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 33 U.S.C. § 701-1 (2000). In *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), the Court held that the Corps of Engineers must consent to the use of water from Oahe Reservoir, a Missouri River project constructed under the 1944 Act. *Id.* at 517. The Court invalidated an Interior Department contract making Oahe water available for a coal-slurry pipeline project, and mentioned only in passing that "South Dakota already had granted ETSI a state permit to use this water." *Id.* at 498.

<sup>394</sup>*See supra* notes 268–271 and accompanying text (discussing project-specific statutes and deference).

<sup>395</sup>495 U.S. 490 (1990).

<sup>396</sup>*See id.* at 506 ("California's requirements for minimum instream flows cannot be given effect and allowed to supplement the federal flow requirements.").

<sup>397</sup>As stated by Professor David Getches, "'state primacy' was, in truth, never much more than a shibboleth of western politicians. Most important decisions and responsibilities were ceded to or assumed by the federal government or by special districts. *State water law was simply a framework for allocating rights in the first instance . . .*" Getches, *supra* note 12, at 18 (emphasis added).

laws, particularly the Clean Water Act<sup>398</sup> (“CWA”) and the Endangered Species Act<sup>399</sup> (“ESA”), to water rights and water supply projects.<sup>400</sup> For example, the EPA’s 1991 veto of a CWA permit for Denver’s proposed Two Forks Dam<sup>401</sup>—despite the city’s longstanding water rights for the project—triggered strong protests from water use interests and prompted Professor Wilkinson to write a tongue-in-cheek obituary for the prior appropriation doctrine.<sup>402</sup> More recently, clashes between traditional water uses and the ESA have been hotly controversial in such places as the Klamath River Basin, the Middle Rio Grande, and Washington’s Methow Valley.<sup>403</sup> This section considers the federal CWA and ESA in relation to state water allocation authority and water rights.

### A. *The Clean Water Act and Water Quantity Issues*

One could easily assume that a statute titled “The Clean Water Act”<sup>404</sup> would address only water quality, not water quantity, and a quick review of some of the CWA’s major provisions might reinforce this impression. However, the purpose of the statute is considerably more broad: “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>405</sup> Further, the Supreme Court has clearly stated that water quantity and water supply matters are not beyond the reach of the CWA.<sup>406</sup>

It is certainly true that the CWA’s best-known and most effective programs regulate the discharge of pollutants to water. The linchpin of the CWA is section 301(a), which states that “the discharge of any pollutant by

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<sup>398</sup>33 U.S.C. §§ 1251–387 (2000).

<sup>399</sup>16 U.S.C. §§ 1531–44 (2000).

<sup>400</sup>Other federal environmental laws also have saving clauses regarding state water allocation authority, *see, e.g.*, 42 U.S.C. § 300h-6 (2000) (Safe Drinking Water Act sole source aquifer program), but this Article discusses the ESA and the CWA because they have shown the greatest potential to affect water allocation and use.

<sup>401</sup>*See* Daniel F. Luecke, *Two Forks: The Rise and Fall of a Dam*, NAT. RESOURCES & ENV’T, Summer 1999, at 24, 28.

<sup>402</sup>Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848–1991*, 21 ENVTL. L. at v, xvi (1991).

<sup>403</sup>*See* Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities between Western Water Law and the Endangered Species Act*, 44 NAT. RESOURCES J. 29, 29–35 (2004) (discussing ESA water disputes in these three basins and others in West).

<sup>404</sup>Since 1977, the primary federal statute for water quality control has generally been called the Clean Water Act, although it is occasionally referred to by its earlier name, the Federal Water Pollution Control Act.

<sup>405</sup>33 U.S.C. § 1251(a). The text and legislative history of the CWA indicate that Congress was serious about the broad, ambitious goal of protecting and restoring the health of aquatic ecosystems. Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 35–47 (2003).

<sup>406</sup>*See infra* notes 420–34 and accompanying text (discussing Supreme Court’s treatment of CWA issues).

any person shall be unlawful” except in compliance with certain other provisions of the Act.<sup>407</sup> The CWA defines “discharge of a pollutant” to mean the addition of “any pollutant[<sup>408</sup>] to navigable waters[<sup>409</sup>] from any point source[<sup>410</sup>].”<sup>411</sup> Permits authorizing such discharges are issued under section 402<sup>412</sup> (for most point source discharges) and section 404<sup>413</sup> (for discharges of dredged or fill material); such permits impose a variety of restrictions on the discharge to protect water quality.<sup>414</sup> Similarly, CWA section 401 gives states authority to regulate certain federal activities that could adversely affect water quality, but only if the activity could result in a “discharge.”<sup>415</sup> Thus, the CWA’s main regulatory thrust is to restrict the addition of pollutants to rivers, lakes, and other water bodies, and not to restrict water withdrawals (or additions) that could affect the level of these water bodies.

Section 1251(g), at the end of the CWA’s introductory statement of goals and policy, also seems to exclude water quantity and water use from

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<sup>407</sup>This provision reads: “Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a).

<sup>408</sup>“The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* § 1362(6). The definition excludes certain discharges from military vessels and certain materials injected into oil and gas wells. *Id.*

<sup>409</sup>“The term ‘navigable waters’ means waters of the United States, including the territorial seas.” *Id.* § 1362(7). The Supreme Court’s decision in *SWANCC* called into question the CWA’s jurisdictional reach over some smaller water bodies. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 162–74 (2001). Case law and regulatory developments since *SWANCC* have not resolved the uncertainty surrounding this issue. *See supra* notes 14–18 and accompanying text (discussing Court’s reasoning in *SWANCC*).

<sup>410</sup>“The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The term excludes agricultural stormwater discharges and return flows from irrigated agriculture. *Id.*

<sup>411</sup>*Id.* § 1362(12).

<sup>412</sup>*Id.* § 1342(a)(4).

<sup>413</sup>*Id.* § 1344(a).

<sup>414</sup>The statute contains an elaborate series of requirements applicable to point source discharges, as indicated by the provision authorizing the EPA to issue a section 407 permit upon condition that the discharge will meet all the requirements of sections 1311, 1312, 1316, 1317, 1318, and 1343 of the statute. *Id.* § 1342(a)(1). Each of these sections, in turn, provides for specific requirements on certain types of discharges. *Id.*

<sup>415</sup>Section 1341 mandates that “[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . [or] that any such discharge will comply” with applicable requirements of the CWA, including the state’s water quality standards. *Id.*

CWA coverage. Commonly known as the “Wallop Amendment” after former Senator Malcolm Wallop (R-Wyo.),<sup>416</sup> section 1251(g) reads:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.<sup>417</sup>

It has become increasingly clear over the past twenty years, however, that the CWA may affect water allocations and uses, including uses authorized by water rights under state law. The CWA’s initial effects on water use arose in the context of section 404, as the Corps of Engineers insisted that dredge-and-fill permits were required for the construction of new dam projects even where such projects had valid water rights.<sup>418</sup> The controversy over water rights and section 404 reached new heights in the late 1980s and early 1990s with the Two Forks Dam controversy, prompting arguments that CWA authority should not be exercised so as to impair state water rights or state water allocation authority, in line with the policy of deference in section 101(g).<sup>419</sup>

The U.S. Supreme Court has held, however, that section 101(g) does not give water allocations and uses immunity from regulation under the CWA. The Court clearly made this point in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,<sup>420</sup> where the state agency imposed minimum streamflow conditions on a proposed hydroelectric dam project on the Dosewallips River in order to protect the river’s designated use as a salmon fishery.<sup>421</sup> The utility argued that the state had no authority to impose a minimum flow requirement, but the Supreme Court disagreed and upheld the

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<sup>416</sup>For a discussion of the Wallop Amendment’s legislative history (in support of an argument favoring deference), see Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 852–55 (1989).

<sup>417</sup>33 U.S.C. § 1251(g); *see also id.* § 1370(2) (stating that CWA shall not be construed as “affecting any right or jurisdiction of the States” with respect to their waters).

<sup>418</sup>*See Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) (discussing Corp of Engineer’s claims under section 404).

<sup>419</sup>*See, e.g., Hobbs & Raley, supra* note 416, at 867–68 (arguing that section 404 is intended to “operate in concert with [state] water rights”).

<sup>420</sup>511 U.S. 700 (1994).

<sup>421</sup>*Id.* at 705–10, 720–21.

flow condition as a valid exercise of the state's CWA authority.<sup>422</sup> In so doing, the Court rejected an argument that the CWA does not reach water *quantity* issues:

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. This broad conception of pollution—one which expressly evinces Congress' concern with the physical and biological integrity of water—refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, [section] 304 of the Act expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . . , including changes caused by the construction of dams."<sup>423</sup>

The Court also found that sections 101(g) and 510(2) do not preclude CWA regulation of water quantity.<sup>424</sup> The Court wrote that these sections "preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."<sup>425</sup> The Court found support for its view in the legislative history of section 101(g), including a statement by Senator Wallop that CWA requirements

may incidentally affect individuals' water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are

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<sup>422</sup>Specifically, the Court held that section 401, 33 U.S.C. § 1341(d), authorized the state's action. *Id.* at 711.

<sup>423</sup>*Id.* at 719–20 (citations omitted).

<sup>424</sup>*Id.* at 720–21.

<sup>425</sup>*Id.* at 720.

prompted by legitimate and necessary water quality considerations.<sup>426</sup>

Ten years after *PUD No. 1*, the Supreme Court decided another CWA case that may have implications for many water supply projects. In *South Florida Water Management District v. Miccosukee Tribe*,<sup>427</sup> the key statutory provision was section 402, authorizing permits for pollutant discharges from point sources.<sup>428</sup> The Court of Appeals had held that a section 402 permit was needed to pump water from a drainage canal into a remnant Everglades wetland;<sup>429</sup> the canal water contained pollutants, primarily phosphorus, at levels exceeding those in the receiving water of the wetland.<sup>430</sup> The key legal issue before the Supreme Court was whether a section 402 permit was required for an activity that moves water containing pollutants from a relatively dirty water body to a relatively clean one, but adds no pollutants to the water in the process.<sup>431</sup> The Court unanimously held that such activities are not exempt from permitting requirements simply because they only move water from one place to another without adding a pollutant.<sup>432</sup> The Court recognized that this interpretation might result in section 402 permits being required for a variety of water supply projects, especially in the West, that move water from one basin to another as authorized by state law water rights, potentially imposing significant burdens on them.<sup>433</sup> The Court found that this was no reason to exempt such projects from permitting requirements:

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<sup>426</sup>*Id.* at 721 (quoting 3 ENVTL. POL'Y DIV., CONG. RES. SERV., 95TH CONG., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 532 (Comm. Print 1978)).

<sup>427</sup>541 U.S. 95 (2004).

<sup>428</sup>*Id.* at 102.

<sup>429</sup>*S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 280 F.3d 1364, 1368–69 (11th Cir. 2002).

<sup>430</sup>*Id.* at 1366.

<sup>431</sup>*Miccosukee Tribe*, 541 U.S. at 104–05. Several courts of appeals have addressed this issue and decided that a permit is needed for such activities. *See, e.g.*, *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1164–65 (9th Cir. 2003) (holding that CWA permit requirements apply).

<sup>432</sup>*Miccosukee Tribe*, 541 U.S. at 104–05. The federal government argued that no permit was needed because both the source and receiving waters were “waters of the United States,” and, thus, there was no net addition of pollutants to waters protected by the CWA. *Id.* at 105–07. The Supreme Court expressed some skepticism regarding this “unitary waters” theory, but ultimately chose to leave the issue unresolved. *Id.* at 106–09. The Court remanded the case for resolution of a factual issue regarding whether the drainage canal and the remnant wetland were actually the same water body. *Id.* at 112.

<sup>433</sup>The Court indicated that it was aware of the consequences of requiring a permit for such water projects:

Finally, the government and numerous *amici* warn that affirming the Court of Appeals in this case would have significant practical consequences. If we read the [Clean Water] Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued,

It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. [§ 1251(g)]. On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs.<sup>434</sup>

Thus, while the CWA does not directly address water use activities, these cases clearly indicate that they are not "off limits" to CWA regulation.

### *B. The Endangered Species Act and Water Use*

Enacted in 1973, the ESA<sup>435</sup> is one of America's best-known and most important environmental laws. The ESA's purpose is to conserve endangered species<sup>436</sup> and the ecosystems on which they depend.<sup>437</sup> The statute extends protection to those species that have been listed as endangered or threatened under section 4.<sup>438</sup>

Two ESA provisions are particularly noteworthy in the water resources context. Section 7 applies only to federal agencies, and prohibits them from taking actions that may cause jeopardy to any listed species.<sup>439</sup> In order to ensure that all agencies meet this substantive standard, the ESA mandates a

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particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. Many of those diversions might also require expensive treatment to meet water quality criteria.

*Id.* at 108 (citation omitted).

<sup>434</sup>*Id.* (citation omitted).

<sup>435</sup>16 U.S.C. §§ 1531–45, 1599 (2000).

<sup>436</sup>*Id.* § 1532.

<sup>437</sup>*Id.* § 1531(b).

<sup>438</sup>*See id.* § 1533.

<sup>439</sup>Section 7(a)(2) of the ESA provides that each federal agency "shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *Id.* § 1536(a)(2). Rather remarkably, the statute does not define the crucial term of "jeopardize the continued existence," but Interior Department regulations define it as "engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (2004).

process whereby an action agency must “consult” with the relevant Service<sup>440</sup> if the agency’s proposed action may adversely affect a listed species.<sup>441</sup> If the Service determines that the proposed action may jeopardize the species, it must suggest “reasonable and prudent alternatives” to avoid jeopardy while meeting the purposes of the proposal.<sup>442</sup> The agency may not proceed with the proposed action until consultation is completed.<sup>443</sup>

Section 9 applies to all persons,<sup>444</sup> not just federal agencies, and prohibits (among other things) “take” of any member of a protected species of fish or wildlife.<sup>445</sup> Under the ESA, “‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>446</sup> The Fish and Wildlife Service, by rule, has defined “harm” in this context to include “significant habitat modification or degradation where it actually kills or injures wildlife,”<sup>447</sup> thus bringing some habitat destruction on private lands within the ESA’s prohibition of take.<sup>448</sup>

The ESA makes only one mention of state water allocation laws, declaring “the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”<sup>449</sup> Over the past twenty years, however, the ESA has shown that it can affect water development and use, not simply by restricting new projects, but also by limiting the exercise of established water

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<sup>440</sup>For most species, this is the U.S. Fish and Wildlife Service in the Interior Department, but for oceangoing species (including salmon), it is the National Oceanic and Atmospheric Administration Fisheries Service (“NOAA Fisheries”) in the Commerce Department.

<sup>441</sup>The “consultation” provided in section 7(a)(2) culminates in a Biological Opinion (also known as a “BiOp” or “BO”) issued by the relevant Service, assessing the likely effects of the agency’s proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

<sup>442</sup>*Id.* § 1536(b)(3)(A).

<sup>443</sup>After initiation of consultation . . . the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

*Id.* § 1536(d). If the agency wants to go ahead with the proposed action despite a jeopardy opinion, it may seek an ESA exemption from the cabinet-level Endangered Species Committee, better known as the “God Squad.” *See id.* § 1536(e). Finally, section 7 directs affirmatively all agencies to use their existing authorities to conserve listed species. *See id.* § 1536(a)(1).

<sup>444</sup>Section 9 applies to “any person,” and the ESA defines “person” broadly. *See id.* §§ 1532(13), 1538(a)(1).

<sup>445</sup>*Id.* § 1538(a)(1)(B). Take may be permitted, however, for nonfederal entities through permits issued under ESA section 10, *id.* § 1539, and for federal entities through an incidental take statement issued after fulfillment of section 7 requirements, *id.* § 1536(b)(4)(C).

<sup>446</sup>*Id.* § 1532(19).

<sup>447</sup>50 C.F.R. § 17.3 (2005).

<sup>448</sup>The Supreme Court upheld this rule in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). *Id.* at 708.

<sup>449</sup>16 U.S.C. § 1531(c)(2).

rights.<sup>450</sup> The ESA applies most commonly to water use in situations where the use depends on some discretionary approval or action from a federal agency, and is therefore subject to section 7. For example, it may block development of new water projects requiring federal permits if the projects might cause jeopardy to listed species.<sup>451</sup> The USBR must complete ESA consultation before making any new water supply commitments, even if it is renewing existing contracts to deliver irrigation water.<sup>452</sup> The USBR must also consult on how it operates its existing water supply projects if these operations might adversely affect a listed species,<sup>453</sup> and may have to reduce water deliveries to irrigators under long-established contracts if the water is needed to ensure the survival of a listed species.<sup>454</sup>

All water users, whether they have any federal connections are not, are prohibited from causing “take” of a listed species.<sup>455</sup> However, section 9 of the ESA has had limited effects on water use thus far. In one case, an irrigation district was found to have caused take by operating a water diversion with inadequate fish screens, causing the death of listed fish either at the diversion itself or in the defendant’s irrigation canals.<sup>456</sup> It seems equally clear that a water withdrawal would cause an illegal take if it caused the death of listed species by removing all the water from a stream.<sup>457</sup> There has been little section 9 enforcement activity against irrigators for drying up streams inhabited by listed fish, although an enforcement threat against irrigators in the Walla Walla River Basin was responsible for a successful flow restoration agreement.<sup>458</sup>

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<sup>450</sup>Other authors have addressed the interaction of the ESA and western water law in some depth. Notable articles include: Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 750–64 (2000); Holly Doremus, *Water, Population Growth, and the Endangered Species Act in the West*, 72 U. COLO. L. REV. 361, 379–94 (2001); and A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1, 13–26 (1985).

<sup>451</sup>See *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) (rejecting argument that federal environmental laws may not result in adverse effects on state-issued water rights).

<sup>452</sup>*Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126–27 (9th Cir. 1998).

<sup>453</sup>*Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1242–43 (N.D. Cal. 2001).

<sup>454</sup>*Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003), *vacated*, 355 F.3d 1215 (10th Cir. 2004); *O’Neill v. United States*, 50 F.3d 677, 686–88 (9th Cir. 1995).

<sup>455</sup>As noted above, the ESA’s prohibition against “take” of listed fish and wildlife applies to “any person.” 16 U.S.C. § 1538(a)(1).

<sup>456</sup>*United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1129–30 (E.D. Cal. 1992).

<sup>457</sup>The National Marine Fisheries Service has stated that water withdrawals are “very likely to injure or kill” fish protected by the ESA. *Endangered and Threatened Species: Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionary Significant Units*, 65 Fed. Reg. 42,422, 42,429 cmt.27 (July 10, 2000).

<sup>458</sup>See David E. Filippi, *The Impact of the Endangered Species Act on Water Rights and Water Use*, 48 ROCKY MOUNTAIN MIN. L. INST. §§ 22-1, 22-10 to -12 (2002).

The Supreme Court has not decided a case applying the ESA in the context of water rights and water use, but the lower federal courts have given no indication that the ESA provides any particular deference to states regarding water allocation, or even to established water uses. In one case, the district court upheld the USBR's power to reduce irrigation deliveries in order to provide water for species protected by the ESA: "If Congress has directed that the Bureau reserve water for environmental purposes, [the irrigators] cannot be heard to insist that their water rights require the Bureau to disobey the law."<sup>459</sup> In a case alleging "take" by an irrigation district, the district court noted that the ESA does not exempt persons holding state law water rights from complying with its requirements, "and thus the District's state water rights do not provide it with a special privilege to ignore the Endangered Species Act. Moreover, enforcement of the Act does not affect the District's water rights but only the manner in which it exercises those rights."<sup>460</sup> In addition, some federal courts have held that state or local governments may violate section 9 by permitting certain private actions that, in turn, cause harm to protected species,<sup>461</sup> suggesting that the ESA potentially could impose liability on a state for authorizing a private water use that causes "take" of a listed fish or other ESA-protected species.<sup>462</sup> In sum, although the statute says little about water rights and the relevant case law is limited, there is no reason to believe that the ESA offers any special accommodation for state water allocation authority.<sup>463</sup>

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<sup>459</sup>*Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 732 (E.D. Cal. 1993), *aff'd sub nom. O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995). In a similar case, irrigators' rights to water from the USBR's Klamath Project were deemed "subservient" to the ESA. *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990, 993 (D. Or. 1998), *aff'd*, 204 F.2d 1206 (9th Cir. 1999).

<sup>460</sup>*Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1134.

<sup>461</sup>*See, e.g., Strahan v. Coxe*, 127 F.3d 155, 159, 168–70 (1st Cir. 1997) (regarding whale entanglement with fishing gear and requiring Massachusetts regulations to comport with federal regulation). The Court of Appeals held that the State of Massachusetts violated the ESA by issuing permits for fixed fishing gear to be placed in Massachusetts coastal waters where such gear was causing harm to endangered whales. *Id.* at 168.

<sup>462</sup>*See James R. Rasband, Priority, Probability, and Proximate Cause: Lessons from Tort Law about Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 628–30 (2003) (noting—but criticizing—potential ESA "vicarious liability" for states arising from their management of water use activities).

<sup>463</sup>In one case, the Court of Appeals vacated an injunction, issued by the district court under the ESA, that required limits on groundwater pumping from Texas's Edwards Aquifer. *Sierra Club v. San Antonio*, 112 F.3d 789, 791 (5th Cir. 1997). A divided panel of the Fifth Circuit held that Texas had established a comprehensive regulatory scheme under the Edwards Aquifer Act, ch. 626, 1993 Tex. Gen. Laws 2355, *as amended by* Act of May 29, 1995, ch 261, 1995 Tex. Sess. Law Serv. 2505, and that the federal courts should thus abstain in favor of the state regime. *Sierra Club*, 112 F.3d at 793–94, 798. The court based its decision on an application of the *Burford* federal court abstention doctrine, however, and not on an interpretation of the ESA or on notions of federal deference to state water law. *Id.* at 793 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

*C. Analysis of Deference in the Environmental Law Context*

In analyzing deference to state water laws under the CWA and the ESA, there is not much directly relevant law to apply—certainly less than under such statutes as McCarran, the reclamation statutes, or the FPA. The cases applying those statutes, however, offer some useful principles for considering deference in the context of these federal environmental laws.

First, given the limited importance of state law saving clauses in federal statutes, the ESA and the CWA provisions addressing water allocation provide weak support for deference. Although the Wallop Amendment<sup>464</sup> states a policy that state water allocation power “shall not be superseded, abrogated or otherwise impaired” by the CWA, this provision (and a similar clause in CWA section 510)<sup>465</sup> is very similar to FPA section 27,<sup>466</sup> which the Court has read narrowly.<sup>467</sup> Unlike section 8 of the Reclamation Act, the CWA lacks an affirmative mandate for federal compliance with state laws.<sup>468</sup> Not surprisingly, the Court has given the CWA saving clauses limited effect, indicating that they merely address the ability of states to allocate water as between users.<sup>469</sup> As for the ESA, its sole provision regarding water allocation is notably less deferential to states than the Wallop Amendment. Unlike many state law saving clauses, it makes no mention of preserving state water allocation authority;<sup>470</sup> instead, it speaks of resolving water issues in concert with species conservation, indicating that Congress anticipated that issues would arise and that the national interest in protecting endangered species should not simply give way to the interests of states and traditional water users.<sup>471</sup>

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<sup>464</sup>See *supra* note 423 and accompanying text (discussing Congress’s intent in enacting CWA).

<sup>465</sup>Except as otherwise expressly provided, nothing in the CWA shall “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” 33 U.S.C. § 1370(2) (2000).

<sup>466</sup>Nothing in the FPA “shall be construed as affecting or intending to affect or in any way to interfere with” state laws regarding water allocation, or rights acquired under those laws. 16 U.S.C. § 821 (2000).

<sup>467</sup>See *infra* note 380 and accompanying text (describing Supreme Court’s interpretation of FPA).

<sup>468</sup>Section 8 requires the USBR to “proceed in conformity with” state laws, 43 U.S.C. § 383 (2000), and the Court has distinguished section 8 from FPA section 27 on that basis. *California v. FERC*, 495 U.S. 490, 504 (1990).

<sup>469</sup>The Court, in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), said that sections 101(g) and 510 “preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.” *Id.* at 720.

<sup>470</sup>In fact, some in Congress tried, in 1982, to add a provision to the ESA identical to the Wallop Amendment, but settled for the language in 16 U.S.C. § 1531(c)(2). See Tarlock, *supra* note 450, at 19 (contrasting Wallop Amendment language with ESA’s much weaker requirement that “[f]ederal agencies shall cooperate with state and local agencies”).

<sup>471</sup>16 U.S.C. § 1531.

Second, the purposes of the CWA and the ESA reflect Congress's intent to establish strong *national* protection for the health of the nation's waters and endangered species, respectively. The CWA begins by stating that "[t]he objective of this [Act] is to restore and maintain the chemical, physical and biological integrity of the Nation's waters,"<sup>472</sup> and then establishes two national goals and five national policies regarding water pollution control.<sup>473</sup> The CWA contains numerous provisions for carrying out this vision at the national level, requiring, for instance, national effluent standards for the discharge of pollutants,<sup>474</sup> national programs for permitting such discharges,<sup>475</sup> and national mandates regarding enforcement of the statute's requirements.<sup>476</sup> In the ESA, Congress declared that imperiled "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."<sup>477</sup> The ESA's national requirements apply to every federal agency,<sup>478</sup> and its national prohibitions apply to any person subject to U.S. jurisdiction.<sup>479</sup> And as the Supreme Court stated in the landmark case of *Tennessee Valley Authority v. Hill*,<sup>480</sup> "examination . . . indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."<sup>481</sup>

Third, neither the CWA nor the ESA places the federal government in a deferential posture vis-à-vis the states—quite the opposite. The CWA authorizes and encourages states to take the lead in carrying out many of its

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<sup>472</sup>33 U.S.C. § 1251(a).

<sup>473</sup>The national goals are the elimination of water pollution discharges by 1985, and the achievement of the interim "fishable/swimmable" goal by 1983. *Id.* § 1251(a)(1)–(2). The national policies address such issues as toxic pollution control, sewage treatment plant funding, and nonpoint source pollution. *Id.* § 1251(a)(3)–(7).

<sup>474</sup>*See id.* § 1311 (nontoxic pollutants); *id.* § 1317 (toxic pollutants).

<sup>475</sup>*See id.* § 1342 (point-source discharges of most pollutants); *id.* § 1314 (discharge guidelines for dredged or fill material).

<sup>476</sup>*See id.* § 1319 (general enforcement provisions); *id.* § 1365 (allowing citizen enforcement suits to be brought in federal court).

<sup>477</sup>Endangered Species Act, 16 U.S.C. § 1531(a)(3) (2000).

<sup>478</sup>*See id.* § 1536 ("All other Federal agencies shall . . . utilize their authorities in furtherance of the purposes of this Act . . .").

<sup>479</sup>*Id.* § 1538. "Person" is broadly defined at 16 U.S.C. § 1532(13) (2000).

<sup>480</sup>437 U.S. 153 (1978).

<sup>481</sup>*Id.* at 174. This case, in which the Court enjoined the completion of Tellico Dam on the Little Tennessee River in order to prevent jeopardy to the endangered snail darter, *id.* at 193–95, clearly signaled the ESA's potential to affect water development and use. After acknowledging that it "may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million," the Court held "that the explicit provisions of the Endangered Species Act require precisely that result." *Id.* at 172–73.

programs,<sup>482</sup> such as water quality standard setting,<sup>483</sup> pollution discharge permitting,<sup>484</sup> and enforcement,<sup>485</sup> but nearly always subject to the oversight and ongoing authority of the Federal EPA.<sup>486</sup> Moreover, the statute specifically prohibits a state from adopting any standard or limitation regarding pollutant discharge that is less stringent than a relevant national standard set by the EPA;<sup>487</sup> states may be more stringent,<sup>488</sup> however, indicating a sort of one-way deference in favor of those states that choose to provide tougher pollution control than the EPA would. As for the ESA, it certainly gives great authority and responsibility to federal agencies<sup>489</sup> and provides a rather narrow role for states.<sup>490</sup> Here again, the statute allows states to be more restrictive than federal law regarding “take” of protected species, but not less,<sup>491</sup> and the ESA’s general prohibition against take does apply to states.<sup>492</sup> In sum, Congress in these statutes mandated a dominant federal role<sup>493</sup> that seems inconsistent with much deference, even if the national interests in clean water or species protection incidentally infringe on state water allocation authority.

This leads to the fourth and final point: the CWA and the ESA do not directly address water *rights*, and therefore fall outside the area where Congress has traditionally extended the strongest deference to states. Neither statute creates water rights directly or provides a legal basis for federal water

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<sup>482</sup>Indeed, the CWA states that the policy of Congress is “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b) (2000).

<sup>483</sup>*Id.* § 1313(a).

<sup>484</sup>*Id.* § 1342(b).

<sup>485</sup>*Id.* § 1319(a).

<sup>486</sup>*See id.* § 1313(c) (explaining federal oversight of water quality standards and duty to promulgate if state fails); *id.* § 1319(a) (providing ongoing EPA enforcement authority in states with approved programs, and explaining duty to assume enforcement in those states where violations are so widespread that they indicate failure to enforce by state); *id.* § 1342 (b)–(c) (providing that federal approval of state permitting program is subject to national standards, and explaining duty of EPA to withdraw approval of noncomplying state program).

<sup>487</sup>*Id.* § 1370(1).

<sup>488</sup>*See id.* (preserving state authority to adopt or enforce any standard or limitation unless it would be less stringent than federal standards).

<sup>489</sup>*See, e.g.*, 16 U.S.C. § 1533 (2000) (providing that Federal EPA Secretary will list species, designate critical habitat, and develop recovery plans); *id.* § 1536 (stating that all federal agencies shall utilize resources to conserve listed species and to avoid taking actions that would jeopardize them); *id.* § 1540(e) (establishing federal enforcement authority).

<sup>490</sup>*See id.* § 1535(c) (providing for federal-state cooperative agreements); *see also id.* § 1539 (requiring habitat conservation plans as prerequisite for permits authorizing take of listed species, which are available to states).

<sup>491</sup>*See id.* § 1535 (precluding state “takes” that do not meet minimum federal qualifications).

<sup>492</sup>As noted above, section 9 prohibits “any person” from causing take, and the definition of “person” includes “any State, municipality, or political subdivision of a State,” as well as “any officer, employee, agent, department, or instrumentality” thereof. *Id.* § 1532(13).

<sup>493</sup>*See generally* California v. FERC, 495 U.S. 490, 504 (1990) (noting importance of federal role in statutory scheme for purposes of determining deference to state authority).

right claims under the reserved rights doctrine. Nor does either statute require the elimination of existing water rights for protection of water quality or endangered species. Instead, these statutes impose a regulatory overlay on a wide range of activities, federal, state, and private. This regulatory overlay may result in limits on the exercise of water rights in various ways, such as by prohibiting the building of a dam without the necessary federal permit despite the existence of state water rights, by prohibiting an irrigator with state water rights from diverting water in a way that causes take of fish protected by the ESA, or by reducing the amount of deliveries to irrigators from a USBR project that needs to change its operations to avoid jeopardy to a listed species.<sup>494</sup> These effects may harm individual water users,<sup>495</sup> and may result in a state's waters being used in a way that is contrary to what the states would recognize legally or would choose as a matter of policy, but the ESA and the CWA do not "allocate" water among uses or users in any proprietary sense. These functions are left to the states, and in that respect the environmental statutes do continue a tradition of federal deference in this narrow field<sup>496</sup>—but that tradition does not extend to congressionally authorized regulatory programs that protect significant national interests, such as those established by the CWA and the ESA.

Despite these factors—and often because of them—efforts persist to expand deference to state water laws under the ESA and the CWA, as explained above.<sup>497</sup> These efforts raise important questions regarding the future of federal deference in the environmental law context. This Article concludes by identifying some of these questions and offering some brief thoughts on the answers.

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<sup>494</sup>See *supra* notes 450–463 and accompanying text (discussing application of ESA to water rights and use).

<sup>495</sup>The question of water right "takings" resulting from environmental regulation is highly complex. Cf. John D. Leshy, *A Conversation about Takings and Water Rights*, 83 TEX. L. REV. 1985, 2000–03 (2005) (discussing constraints on individuals' water rights due to governmental regulations). In one case, the Court of Federal Claims found that ESA-based restrictions on water deliveries to California State Water Project irrigators had caused a temporary taking of their water rights. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318–19 (2001). This decision has been criticized for its analysis of both California water law and federal takings law. See, e.g., Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 583–86 (2002) (applying takings analysis to *Tulare*, 49 Fed. Cl. 313).

<sup>496</sup>See *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994) (finding that CWA saving clauses "preserve the authority of each State to allocate water quantity as between users"); *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 175–76 (1946) (finding that FPA saving clause regarding state water allocation "has primary, if not exclusive, reference to such proprietary rights").

<sup>497</sup>See *supra* notes 13–47 and accompanying text (discussing cases and legislative proceedings that involve ESA and CWA).

VI. THE FUTURE OF DEFERENCE TO STATE WATER LAWS UNDER THE CWA  
AND ESA

The foregoing analysis shows that federal deference to states in water resource matters may be a familiar refrain, but it is not a uniform, or even a consistent, requirement of federal law. Instead, federal statutes and Supreme Court cases have protected federal interests while acknowledging that states retain the primary role in choosing how to allocate water resources among various users. In some circumstances, of course, deference is required by law—for example, federal water right claims are subject to state jurisdiction in general stream adjudications, and the USBR must comply with state water law requirements unless they are inconsistent with congressional directives. But some provisions of federal law—such as the FPA’s hydropower licensing provisions and various mandates of the reclamation statutes—clearly preempt state law. Others, such as the ESA’s prohibition on federal actions causing jeopardy to a listed species, seem to leave no room for deference. Thus, when the Interior Department wrote that “federal water law and policy has deferred to the states” since 1866, it oversimplified and overstated the matter, and when it stated its intention to “honor and enhance” this policy,<sup>498</sup> it went well beyond—and potentially against—the requirements of federal law.

In looking generally at the relationship of federal law to state water allocation authority, the biggest outstanding legal question is whether the Court’s 2001 decision in *SWANCC*<sup>499</sup> has given deference a constitutional dimension under the Commerce Clause. *SWANCC* appears to narrow the scope of waters regulated by the CWA under section 404,<sup>500</sup> based largely on the Court’s belief that extending CWA jurisdiction to a gravel pit lake with no connection to a navigable waterway would “result in significant impingement of the States’ traditional and primary power over land and water use.”<sup>501</sup> The majority<sup>502</sup> “thus read the statute as written to avoid the significant constitutional and federalism questions raised” if the CWA were to apply to

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<sup>498</sup>See *supra* notes 31–35 and accompanying text (discussing Department of Interior policy statement).

<sup>499</sup>See *supra* notes 13–17 and accompanying text (discussing Supreme Court case applying CWA to small intrastate water bodies).

<sup>500</sup>*Compare* *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (reading CWA term “navigable waters” as showing that Congress intended to assert only “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made”), *with* *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 133 (1985) (finding that term “navigable” was of “limited” importance in determining CWA jurisdiction). The *SWANCC* opinion distinguished *Riverside Bayview*, in which the Court unanimously upheld CWA jurisdiction over wetlands adjacent to navigable water bodies. *SWANCC*, 531 U.S. at 167–72.

<sup>501</sup>*Id.* at 174.

<sup>502</sup>*SWANCC* was decided five to four, with a strong dissent authored by Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer. See *id.* at 174 (Stevens, J., dissenting).

such waters.<sup>503</sup> The Court thus indicated that the states' "traditional and primary power" is a relevant factor in judicial review of statutes<sup>504</sup> that raised questions about Congress's commerce power to regulate water-related activities.<sup>505</sup> With respect to water use, these statements are dicta; the dispute in *SWANCC* was whether the gravel pits could be used as a garbage dump, so there was no water *allocation* issue before the Court. Moreover, these statements should be read narrowly in light of a century's worth of federal water law established by Congress and the Supreme Court that conflicts with the conventional wisdom of broad and consistent deference. As discussed above, strong deference to states has been limited to the allocation of water among users and the creation and recognition of water rights.<sup>506</sup>

In the specific context of the federal environmental laws, the legal arguments in favor of broad deference to state water laws under the existing CWA and ESA are particularly weak.<sup>507</sup> Thus, the serious remaining questions about the future of deference under these environmental laws are primarily questions of policy.

First, why *should* federal environmental laws defer to state water resource laws? Through the CWA and the ESA, Congress has recognized and protected significant national interests in water quality and biodiversity; those who argue for deference to states must make a case for it that is stronger than the need to ensure continued protection of these national interests. Arguing that the federal government should continue to defer to states because it has always done so<sup>508</sup> is neither very accurate nor very compelling.

Even if one accepts that control of water resources is a traditional state role, it does not necessarily follow that states have some special

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<sup>503</sup>*Id.* For this reason, the Court also declined to give deference to the agency's statutory interpretation that resulted in an assertion of CWA jurisdiction over such waters. *Id.*

<sup>504</sup>*Id.* The Court did not say that these "traditional and primary" state powers would actually affect Congress's *power* under the Commerce Clause. It did say that courts should take special care to interpret statutes to avoid constitutional questions "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. In other words, the Court will read a statute narrowly to avoid such "encroachment" unless it finds "a clear indication that Congress intended that result." *Id.* at 172.

<sup>505</sup>Just before its "significant impingement" remark, the Court noted two cases in which it had "reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Id.* at 173 (citing *United States v. Morrison*, 529 U.S. 598, 669–70 (2000); *United States v. Lopez*, 514 U.S. 549, 636–37 (1995)).

<sup>506</sup>*See supra* notes 385–397 and accompanying text (discussing limits on statutory deference to state authority).

<sup>507</sup>*See supra* Part V.C (discussing principles for considering deference to federal environmental laws).

<sup>508</sup>Congressional supporters of a bill that would dramatically expand deference have, in fact, argued that the legislation is consistent with nearly 150 years of federal law and policy. *See supra* notes 45–47 and accompanying text (discussing S. 561 from 105th Congress, requiring subjection of U.S. government to state procedural and substantive laws).

competence or perspective that would justify deference by a federal government that is somehow less well suited to make water-related decisions. In other words, there seems to be no compelling argument that the states inherently *deserve* deference in this area.<sup>509</sup> By contrast, consider the administrative law doctrine of judicial deference to responsible federal agencies' statutory interpretations, which is supported by a clear policy rationale.<sup>510</sup> It is possible that states are somehow best suited to make certain types of water resource decisions; for example, each state may be uniquely qualified to decide whether to prohibit or restrict transbasin water diversion projects within that state, based on each state's water supplies and demands and on the views of its citizens on the importance of protecting the "basin of origin."<sup>511</sup> Especially where important national interests are implicated, however, proponents of deference should clearly articulate why the state forum is superior.

Second, is deference to states more important than environmental protection? Proponents of deference might take issue with the premise of the question and argue that there is no tension between deference and environmental protection because the states have the commitment and capability to protect water quality and endangered species. It is true that, *outside* the environmental law context, deference to states would not necessarily impair environmental protection; to the contrary, the state laws preempted in *First Iowa*<sup>512</sup> and *California v. FERC*<sup>513</sup> would have protected rivers from the impacts of dams,<sup>514</sup> and environmental groups sided with the

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<sup>509</sup>Arguments based on the notion of "local control of local resources" have intuitive appeal, but they do not account for the broader national interests that may be affected by water allocation decisions made at the state or local level. *See, e.g.*, Benson, *supra* note 166, at 11,057–59 (describing failure of state adjudications under McCarran to protect federal and tribal interests).

<sup>510</sup>The Supreme Court, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), justified deference to agencies based on their subject matter expertise, their delegated role in implementing congressional legislation, and their (indirect) political accountability. *Id.* at 862–64. The policy rationale underlying *Chevron* deference has been heavily debated in the literature. For a limited survey of the commentary, see PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW CASES AND COMMENTS 1040–51 (10th revised ed. 2003). I do not suggest that the *Chevron* policy rationale is particularly relevant to federal-state relations in water, but it does illustrate the kinds of reasons that may support deference in favor of one branch or level of government.

<sup>511</sup>*See generally* Little Blue Natural Res. Dist. v. Lower Platte N. Natural Res. Dist., 294 N.W. 2d 598, 600–04 (Neb. 1980) (discussing legal and policy issues associated with proposed transbasin diversion project from Platte River).

<sup>512</sup>*First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946); *see also id.* at 161–88 (rejecting Iowa's argument that proposed dam be subject to approval of both Federal Power Commission and Executive Council of Iowa).

<sup>513</sup>*California v. FERC*, 495 U.S. 490 (1990); *see also id.* at 493–507 (rejecting California's argument that state minimum in-stream flows should supplement federal flow requirement).

<sup>514</sup>Even in the hydropower licensing context, however, deference to states regarding instream flows would sometimes produce worse environmental results. On the Platte River, for example, FERC imposed minimum flows on the operation of Kingsley Dam that Nebraska law

state against the USBR in *California v. United States*.<sup>515</sup> Congressional proponents of extending deference, however, have clearly indicated their dissatisfaction with the application of these laws, particularly the ESA.<sup>516</sup> For its part, the Western Governors' Association has pushed for ESA reforms with a main goal of increasing "certainty and technical assistance for landowners and water-users,"<sup>517</sup> and argued that states under the CWA should "retain primary jurisdiction" over water allocation decisions, "including how to most appropriately balance state water resource needs with Clean Water Act objectives."<sup>518</sup> Although their statements tend to be couched in the language of diplomacy, proponents of deference evidently seek to weaken or eliminate environmental requirements that could limit states' water allocation decisions or threaten state law water rights.

In any event, there are two additional reasons to question whether any environmental good can come from extending deference to state water laws under the ESA and the CWA. First, both statutes already allow states to be tougher than federal law in protecting endangered species and water quality; this one-way deference already accommodates those states that want to be "greener" than the federal government. Second, the record of nonpoint source pollution control under the CWA stands as a cautionary tale regarding the potential pitfalls of deference to the states. Unlike its approach to point-source pollution discharges, the CWA largely allows the states to make their own choices regarding whether and how to control nonpoint source pollution.<sup>519</sup> Not coincidentally, the nonpoint source provisions are generally regarded as the CWA's biggest failure, and nonpoint source pollution is now the greatest

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would not have authorized. See Peter J. Kirsch & J. Barton Seitz, *Environmental Protection through Federal Preemption of State Water Laws*, 20 ENVTL. L. REP. 10,438, 10,445–46 (1990).

<sup>515</sup>438 U.S. 645 (1978); see also *id.* at 646 (noting that environmental groups and western states filed amicus briefs urging reversal, in support of California's position).

<sup>516</sup>See *supra* notes 41–47 and accompanying text (discussing bills proposed in 108th Congress that would restrict federal authority over water). For example, Senator Pete Domenici (R–N.M.), one of the cosponsors of S. 561 in the 108th Congress, called the ESA "a Frankenstein" and "a monster" in a 2003 hearing. *Endangered Species Act: Review of the Consultation Process Required by Section 7: Hearing before the Subcomm. on Fisheries, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 108th Cong. 34 (2003) (statement of Sen. Pete Domenici), available at [http://epw.senate.gov/hearing\\_statements.cfm?id=213020](http://epw.senate.gov/hearing_statements.cfm?id=213020).

<sup>517</sup>W. GOVERNORS' ASS'N, POLICY RESOLUTION 03–15: REAUTHORIZATION AND AMENDMENT OF THE ENDANGERED SPECIES ACT OF 1973, at 3 (2003), available at <http://www.westgov.org/wga/policy/03/esa3-15.pdf>. This resolution also notes that ESA reauthorization is one of the Western Governors' Association's highest legislative priorities. *Id.* at 1.

<sup>518</sup>W. GOVERNORS' ASS'N, POLICY RESOLUTION 05–10: WATER QUALITY ISSUES IN THE WEST 2 (2005), available at <http://www.westgov.org/wga/policy/05/CWA.pdf>.

<sup>519</sup>See *Pronsolino v. Nastro*, 291 F.3d 1123, 1137–40 (9th Cir. 2002) (noting that CWA requires states to develop Total Maximum Daily Loads for waters impaired by nonpoint source pollution, but lets states decide whether, how, and to what extent to control nonpoint sources).

source of impaired water quality in U.S. rivers and lakes.<sup>520</sup> At a minimum, increased deference to the states under the ESA and the CWA would provide decreased assurance that imperiled species and water quality would be fully protected.

Ultimately, this is the trade-off: deference to states in water matters comes at a cost of protecting national interests. In the past, Congress and the Supreme Court have recognized this trade-off and have consistently defended national interests while respecting the states' traditional role in the relatively narrow field of establishing and determining water rights. In enacting the CWA and the ESA, Congress preserved this traditional state role, but established a strong policy of controlling water pollution and conserving biodiversity in all fifty states. Those who argue for reforms that would *expand* deference essentially contend that these national interests should give way to state sovereignty over water. Those who argue that deference is legally required under the *existing* environmental laws are merely stretching the myth.

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<sup>520</sup>Professor William Andreen has noted that nonpoint source pollution is now “the chief impediment to achieving national water quality objectives.” William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 564 (2004). The reason for this, he explains, is that the CWA

has never addressed non-point source pollution in a straightforward comprehensive way. Instead, it has been treated as something of an afterthought, a troublesome area to be primarily left in the hands of state and local government. As a consequence, non-point source pollution has evolved into the largest single obstacle to improving water quality.

*Id.* at 593; see also Victor B. Flatt, *Spare the Rod and Spoil the Law: Why the Clean Water Act Has Never Grown Up*, 55 ALA. L. REV. 595, 598–99 (2004) (asserting that CWA has failed to control nonpoint sources because it gives states nearly complete control and discretion in this area, with weak federal oversight role and no serious consequences for failure to address nonpoint source problems).