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Reed D. Benson

University of New Mexico - School of Law

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ARTICLE

WHOSE WATER IS IT? PRIVATE RIGHTS AND PUBLIC AUTHORITY OVER RECLAMATION PROJECT WATER

*Reed D. Benson**

I. INTRODUCTION

The American West, for the most part, is an arid place. The average annual precipitation in the seventeen western states¹ is twenty-one inches, but in many places is far less.² Often there is too little water to go around, even in places such as Oregon that are commonly believed to be wet.³ Water is valuable everywhere because it is indispensable; it is even more precious in the West because it is scarce.

* J.D., University of Michigan, 1988; B.S., Iowa State University, 1985. The author is Reclamation Issues Director for WaterWatch of Oregon, a nonprofit environmental group based in Portland. He can be reached at WaterWatch at 213 SW Ash #208, Portland, OR 97204, phone (503) 295-4039, fax (503) 295-2791.

¹ The seventeen western states with Bureau of Reclamation water projects are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. See U.S. BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, ACREAGE LIMITATION AND WATER CONSERVATION RULES AND REGULATIONS ch. 3, at 2 (1996) [hereinafter BUREAU EIS].

² See *id.* at 45.

³ As stated recently by Oregon's water management agencies:

The soggy winter and spring climate of Oregon's northwest quarter have given the state a reputation for water abundance that obscures an important fact: each year the State's water supply falls far short of the demands placed on it. Across Oregon, many streams are dry in the summer and fall months. Significant natural flow reserves for new or expanded uses do not exist. In many places, sufficient flows for *existing* uses do not exist — and haven't for decades. In more and more areas, we are facing uncertainties about ground-water reserves. All over the state, prospective users are competing for the last drops of available water. Put very simply, there is not enough water where it is needed, when it is needed, to satisfy existing out-of-stream and instream uses. This situation seriously limits the ability of Oregon's economy to grow and threatens the long-term sustainability of the very ecosystems our economy relies upon.

OREGON WATER RESOURCES COMM'N AND DEP'T, 1995-1999 STRATEGIC WATER RESOURCE MANAGEMENT PLAN 2 (1995).

Where there is water in the West, it is often supplied by the U.S. Bureau of Reclamation ("the Bureau"). The Bureau delivers about thirty million acre-feet⁴ of water in the seventeen western states, which is roughly double the annual yield of the Colorado River and six-sevenths of the annual yield of the Snake River.⁵ Over eighty-five percent of that water goes to irrigation, and the great majority of the irrigation water is delivered to lands in California and the Northwest.⁶ One in every five irrigated acres in the seventeen states obtains at least some of its water from the Bureau.⁷

While the Bureau has traditionally served irrigation above all other purposes, and continues to do so, in recent years the Bureau has become more responsive to other water needs and users. The Bureau more than doubled its deliveries of water for municipal and industrial uses from 1970 to 1991.⁸ In addition, the Bureau is paying increased attention to the long-neglected interests of Indian tribes, as well as to the need for instream flows to support fish and wildlife, water quality, and recreation. Under former Commissioner Dan Beard, the Bureau officially embraced the principle of moving water into new uses in support of the public interest.⁹ The Bureau has often encountered opposition, however, from farmers and their allies who seek to continue using Bureau water for established irrigation.

Conflicts over Bureau water involve a wide range of issues, and are played out in various arenas. Ultimately, though, nearly all the conflicts come down to a single question: who has the right to say how Bureau water will be used? In other words, whose water is it?

⁴ An acre-foot is enough water to cover one acre of land one foot deep — about 326,000 gallons.

⁵ See TIM PALMER, *THE SNAKE RIVER: WINDOW TO THE WEST* 5 (1991).

⁶ In 1991, Idaho, California, Washington, and Oregon, in that order, collectively received more than 72% of the Bureau's total output of irrigation water. Arizona, Wyoming, Colorado and Montana received another 18%. The other nine states combined received less than 10% of Bureau irrigation water. See BUREAU EIS, *supra* note 1, ch. 3, at 2.

⁷ The Bureau delivered irrigation water to over 9.1 million acres in 1991. See *id.* at 1.

⁸ The Bureau's municipal and industrial deliveries increased from 2 million acre-feet in 1970 to 4.2 million acre-feet in 1991. The states receiving the largest blocks of municipal and industrial water from the Bureau in 1991 were Arizona, California, and Nevada. See *id.* at 1, 5.

⁹ The Bureau in 1993 adopted a set of guiding "organizational principles," the first of which was to "facilitate changes from current to new uses of water in accordance with state law when such changes increase benefits to society and the environment." U.S. BUREAU OF RECLAMATION, *BLUEPRINT FOR REFORM 1* (1993) (on file with author).

This Article explores that important and deceptively simple question. The initial pages provide a basic grounding in the reclamation program and the nature of federal "project water." The bulk of the Article examines the correlative rights and duties of state governments, individual water users, irrigation districts, and the federal government with respect to Bureau water. The Article devotes particular attention to several fairly recent cases from the Ninth Circuit Court of Appeals that shed new light on the question of who controls the water from Bureau projects.

II. BACKGROUND

A. *The Reclamation Program*

The federal government launched its program to "reclaim" the arid lands of the West through large-scale irrigation water development when it passed the Reclamation Act of 1902.¹⁰ Under the reclamation program the government would build dams, canals, and other facilities to make water available for the irrigation of small family farms. The U.S. Interior Secretary would build these projects on federal lands and be responsible for their operations.¹¹

Courts interpreting the 1902 Act have found that Congress clearly intended to promote social goals as well as agricultural production:

With the Reclamation Act, Congress created a blueprint for the orderly development of the West, and water was the instrument by which that plan was to be carried out. . . .

. . . As the Supreme Court observed in [*Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958)], Congress clearly intended the federal reclamation program to promote the growth of an agricultural society in the West "by limiting the quantity of land in a single ownership to which project water might be supplied." 357 U.S. at 292. And as [the Ninth Circuit] has said, the Reclamation Act of 1902 was animated by three primary goals: "to create family-sized farms in areas irrigated by federal projects . . . , to secure the wide distribution of the substantial subsidy involved in reclamation

¹⁰ Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C. from § 371 to § 498) (1994).

¹¹ See *Peterson v. United States Dep't of the Interior*, 899 F.2d 799 (9th Cir. 1990) (citing *California v. United States*, 438 U.S. 645 (1978)).

projects and [to] limit private speculative gains resulting from the existence of such projects."¹²

While Congress' primary goal was to supply subsidized water to irrigate small family farms, the Bureau of Reclamation's main mission turned out to be building dams and other large facilities.¹³ The Bureau became known as the builder of the West's most fabulous dams, including Hoover and Grand Coulee, but those are only the most famous facilities of a remarkably prolific agency. Today, reclamation project facilities in the seventeen western states include 347 storage reservoirs, 254 diversion dams, 268 major pumping plants, over 25,000 miles of canals and pipelines, over 37,000 miles of distribution laterals, and over 17,000 miles of drains.¹⁴

The Bureau built these facilities after obtaining water rights under state law. The facilities store, release, divert, and deliver water — "project water" — for irrigation and other uses. But project water is not free for the taking by any water user, even one with water rights under state law. Rather, project water is delivered only through federal contracts — typically, contracts between the Bureau and an entity known as an irrigation district — which provide for water deliveries in exchange for certain payments. Districts receive water under these contracts and deliver it, subject to certain terms and conditions, to their patrons. These patrons, mostly irrigators, are the end users of project water.¹⁵

¹² *Id.* at 802-03 (quoting *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1119 (9th Cir. 1976)).

¹³ See MARC REISNER, *CADILLAC DESERT* 145-68 (revised ed., Penguin Books 1993) (1986). Reisner states:

Within its first thirty years, [the Bureau] had built about three dozen projects. During the next thirty years, it built nineteen dozen more. . . . By 1956, Congress had voted 110 separate authorizations for the Bureau of Reclamation, some encompassing a dozen or more irrigation projects and dams. Of these, seventy-seven — nearly three-quarters — were authorized between 1928 and 1956 In that astonishingly brief twenty-eight-year period between the first preparations for Hoover Dam and the passage of the Colorado River Storage Project Act, the most fateful transformation that has ever been visited on any landscape, anywhere, was wrought.

Id. at 165-66.

¹⁴ See BUREAU EIS, *supra* note 1, ch.3, at 3. The great majority of these facilities were built by the Bureau, although some were constructed using loans under the reclamation program and others were built privately. See *id.*

¹⁵ As Professor Sax has explained it,

The process frequently begins with a purchase or appropriation of the necessary water rights by the United States. Then dams, reservoirs, and transmission structures through which project water will be captured and distributed are built. The United States no longer (though it once did) deals directly with

B. Control and Ownership of Project Water

Who has the power to determine the use of reclamation project water? Or, put another way, who owns project water? At least three factors complicate the ownership issue.

First, ownership is shared by several parties. The entire package of rights in reclamation project water can be thought of, as with other property rights, as a "bundle of sticks." In most cases, the sticks of the project water bundle are divided among at least four entities: the federal government, the state, the district, and the end user. Most of this Article is devoted to exploring the correlative rights, and some of the responsibilities, of these four entities. It is not always clear which entities hold which sticks.

This last point brings up the second source of complexity. The four entities' rights and responsibilities with respect to project water are not the same everywhere. These rights and responsibilities may vary by state, by project, by district, and even by user within a district. State laws, federal project authorizing statutes, and reclamation contracts vary widely. And with seventeen states, perhaps three hundred projects, and nearly six hundred districts involved in the reclamation program,¹⁶ the potential differences are enormous.

The third difficulty with the question, "Whose water is it?," is that the answer may depend on another question: "Why do you want to know?" The context of the inquiry matters; that is, exactly who wants to control the use of the project water and to what end? As Professor Thompson has stated, "[t]he general views of a court regarding 'ownership' of water rights can be quite misleading when applied to specific questions without any sense of context. For a variety of reasons, it is important to analyze each question individually and not fall back on the simplistic talisman of 'ownership.'"¹⁷

the ultimate water users. Instead, it enters into what is known as a repayment contract with a state entity known as a conservancy or irrigation district. The function of the district is to act as an intermediary between the United States and the ultimate user, contracting with individuals for allotments within the projects, administering the distribution of water, and collecting taxes and user fees to pay annual maintenance expenses as well as the capital repayment due to the United States.

JOSEPH SAX, *WATER LAW, PLANNING AND POLICY*, 119-20 (1968).

¹⁶ See BUREAU EIS, *supra* note 1, ch. 3, at 2. A recent Bureau publication noted that the total number of districts in the program increased from 572 in 1984 to 592 in 1993. See *id.* at 7.

¹⁷ Barton H. Thompson, Jr., *The Relevance of Water "Ownership" to Water Markets and Other Issues* 8 (June 1993) (unpublished paper presented at a conference at the Natural Resources Law Center in Boulder, Colorado, on file with author). Frank Trelease has

"Whose water is it?," then, is a complicated legal question requiring case-by-case analysis. And the matter is certainly not just academic. The issue of who controls project water has been and continues to be the crux of many court cases and public policy debates in the West. In many instances, irrigators and states have challenged the Bureau's authority over project water. Consider these few recent examples:

- The Bureau has failed to implement a strong water conservation program for federal projects and disclaimed its authority to determine how conserved water will be used, stating that districts and state law would determine the disposition of conserved water;¹⁸
- When the Bureau reallocated water from irrigation to fish and wildlife uses on California's Central Valley Project as required by Congress, irrigators sued to block the reallocation, claiming they had constitutionally protected rights to the water;¹⁹
- The Bureau promised to correct rampant "water spreading" (the use of project water on unauthorized lands or for unauthorized purposes) but suspended its efforts after irrigators challenged the Bureau's authority to take action against the practice;²⁰

also suggested that notions of ownership in the abstract are not particularly helpful in sorting out water issues:

It must always be remembered that when we say "alakazam," or "state ownership," or "the state holds in trust," no genie out of a bottle brings us a beautiful maiden draped in pearls, and no magical solution is provided for difficult problems of adjusting the relations of an individual to the state or of the state to the federal government in the complex field of development of water resources.

Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638, 654 (1957).

¹⁸ See BUREAU EIS, *supra* note 1, ch. 2, at 6, ch. 4, at 114.

¹⁹ See *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717 (E.D. Cal. 1993), *affirmed sub nom. O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).

²⁰ Former Commissioner Dan Beard promised a congressional committee in 1994 that he would move against unauthorized uses of project water. See *Water Use Practices on Bureau of Reclamation Projects: Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Natural Resources*, 103d Cong. 32 (1994) [hereinafter *Reclamation Hearings*]. Attorneys representing irrigators, however, have questioned the Bureau's power to stop such uses. See *id.* at 210-23 (testimony of Gail Achterman, Oregon Water Resources Congress). Environmentalists, on the other hand, have argued that the Bureau has a duty to halt water spreading and to reallocate water that has been put to unauthorized uses, at least in some circumstances. See *id.* at 232-45 (testimony of Reed Benson, WaterWatch of Oregon). The Interior Department Inspector General's office has criticized the Bureau for allowing project water to reach ineligible recipients. See Office of Inspector General, U.S. Dep't of the Interior, *Audit Report, Irrigation of Ineligible Lands*, Bureau of Reclamation, Report No. 94-I-930 (1994), *reprinted in Reclamation Hearings*, *supra*, at 264-89.

- After the Bureau announced its intent to implement an operating plan for the Klamath Project that would temporarily make more water available to meet fishery and tribal needs, an Oregon Assistant Attorney General opined that the Bureau had no authority to do so.²¹

This Article does not address the merits of current, specific issues such as these. Nor does it attempt to make the definitive statement on complex matters such as water right takings or federal-state relations under the reclamation and water laws. Instead, the Article provides a basic overview of important rights and responsibilities of water users, districts, and the state and federal governments regarding reclamation project water. With this overview, the reader may have an easier time analyzing specific issues and finding case-by-case answers to the question, "Whose water is it?"²²

III. THE NATURE OF RECLAMATION PROJECT WATER

In most respects, water from a federal reclamation project is just like any other water. The two kinds of water behave the same way, whether they are flowing in a river, stored behind a dam, or diverted into an irrigation canal. A hydrologist could not tell them apart, nor could an irrigated plant or a fish. Under the law, however, reclamation project water is different from the rest.

For nearly twenty years, the Ninth Circuit Court of Appeals has clearly and consistently held that project water is not like other kinds of water:

A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project

²¹ Letter from Stephen E.A. Sanders, Oregon Assistant Attorney General, to Martha Pagel, Director, Oregon Water Resources Congress, DOJ File No. 690-002-G0037-86-0010 (Mar. 18, 1996) (on file with author). The Interior Department eventually issued its own opinion, setting forth its authority and duties in managing the Klamath Project. Memorandum from David Nawi & Lynn Peterson, Solicitors, Dep't of Interior, Pacific Southwest Region, to various Interior Department officials (Jan. 9, 1997) [hereinafter *Regional Interior Solicitors Memo*] (on file with author).

²² For a thorough discussion of reclamation project water issues in all their contextual complexity, see generally NATURAL RESOURCES LAW CENTER, *RESTORING THE WEST'S WATERS: OPPORTUNITIES FOR THE BUREAU OF RECLAMATION* (1996). Volume II of this work explains in some depth the factual and legal background of six major reclamation project areas, and explores how issues of project water use have unfolded in those areas. The study concentrates on efforts to address environmental problems associated with reclamation project water use, such as diminished habitat for threatened and endangered species, degraded water quality resulting from irrigation drainage, and depleted tribal and recreational fisheries.

water, and between the manner in which rights to use of such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. In most western states it is obtained by appropriation — putting the water to beneficial use upon lands. Once the rights are obtained they vest, until abandoned, as appurtenances of the land upon which the water has been put to use. Project water, on the other hand, would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States.²³

Thus, the United States has much more control over project water than over other types of water. This article explores the relative rights and powers of the federal and state governments, irrigation districts, and individual water users with respect to project water.

A. *What is Project Water?*

A simple, straightforward definition of reclamation project water is elusive and perhaps impossible. Neither case law nor statute seems to contain one. For most purposes, however, project water is water diverted, stored, withdrawn, or otherwise taken from its normal course by a reclamation project.²⁴

²³ *Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977); *see also* *Flint v. United States*, 906 F.2d 471, 477 (9th Cir. 1990); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 626 F.2d 95, 99 (9th Cir. 1980); *Central Ariz. Irrigation & Drainage Dist. v. Lujan*, 764 F. Supp. 582, 591 (D. Ariz. 1991). Once project water has been applied to beneficial use in accordance with the reclamation laws and state water rights, however, the federal government's control over that water is limited. *See infra* Part V.B.1.

²⁴ The Reclamation Reform Act of 1982, Pub. L. No. 97-295, 96 Stat. 1263 (codified as amended at 43 U.S.C. §§ 390aa to 390zz-1 (1994)), provided a definition of "project," but not a very enlightening one:

The term "project" means any reclamation or irrigation project, including incidental features thereof, authorized by Federal reclamation law, or constructed by the United States pursuant to such law, or in connection with which there is a repayment or water service contract executed by the United States pursuant to such law, or any project constructed by the Secretary through the Bureau of Reclamation for the reclamation of lands.

43 U.S.C. § 390bb(8) (1994). The 1902 Reclamation Act did not define "project," but the Act authorized "the construction and maintenance of irrigation works for the storage,

Most project water is delivered for specific purposes under contracts between the Bureau of Reclamation and a water user organization such as an irrigation district. The organization, in turn, supplies water to its patrons,²⁵ who typically are irrigators. Roughly eighty-five percent of project water is used for irrigation purposes, while municipal, industrial, and miscellaneous uses account for roughly fifteen percent.²⁶

The Bureau delivers project water under two types of contracts. The more common is the repayment contract, whereby an organization receives water in return for making scheduled payments on a portion of the costs of a project.²⁷ The other type is the water service contract, whereby an organization pays an agreed rate for annual water deliveries.²⁸ The repayment contract is analogous to a mortgage, while a water service contract is more like a lease.²⁹

Some projects have water that is not covered by any contract and thus not obligated to any user. Contracts entitle users to a quantity of water or percentage of storage space in a project reservoir. Some reservoirs are not fully allocated by these contracts and therefore have unused capacity, also known as uncontracted space.³⁰ Thus, not all project water is controlled by a user or delivered under a reclamation contract.

Conversely, not all water delivered by project facilities under a Bureau of Reclamation contract is project water. Federal law has long allowed water users to contract for excess delivery or storage

diversion, and development of waters for the reclamation of arid and semiarid lands." *Id.* § 391 (1994).

²⁵ See 1 WELLS HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 569 (1971).

²⁶ In 1990, the net supply of reclamation project water throughout the West was about 39.3 million acre-feet, of which 19.9 percent was lost in transportation or operational spills. Of the remaining water, over 26.5 million acre-feet were delivered to farms, while nearly 5 million acre-feet went to municipal/industrial or miscellaneous uses. See BUREAU EIS, *supra* note 1, ch. 3, at 53.

²⁷ Repayment contracts are sometimes called "nine D" contracts, because § 9(d) of the Reclamation Project Act of 1939 sets forth requirements for repayment contracts. See 43 U.S.C. § 485h(d) (1994).

²⁸ Water service contracts are also known as "nine E" contracts, for the section of the 1939 Reclamation Project Act that authorized them. See *id.* § 485h(e) (1994).

²⁹ Even a water service contract, however, may convey a permanent right to water. See Richard Roos-Collins, *Voluntary Conveyance of Water Project Rights*, 13 *ECOLOGY L.Q.* 773, 836-38 (1987); see also *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397 (9th Cir. 1993).

³⁰ See, e.g., *RESTORING THE WEST'S WATERS*, *supra* note 22, § 2.12.4.1 (discussing the sufficiency of uncontracted space to satisfy increased minimum pool requirements in the Payette Division of the Boise Project, Payette River, Idaho).

capacity in project facilities. Under these "Warren Act"³¹ contracts, water users who have their own private water rights can receive water under those rights through project facilities, and that water is not considered project water.³²

Contracts may also define what is and is not project water in a particular context. If an irrigation district's use of water from a particular river predates a federal project on that river, then the district may contract with the Bureau for water deliveries, but the contract may specify that water which the district would have received without the project is not project water.³³ Users whose water rights predate the project may get priority in times of shortage as against other users who receive water only by virtue of the project.³⁴

Water may be project water even if it issues straight from a spring, miles from any project facility. Cases both old and recent, from both state and federal courts, have held that water seeping from a reclamation project may be project water even if it seems to arise naturally from a spring or stream on private land.³⁵

B. Project Water Rights

From the inception of the reclamation program in 1902, the federal government has largely deferred to the western states in matters of water rights and water allocation.³⁶ Thus, a reclamation

³¹ 43 U.S.C. §§ 523-525 (1994). Congress passed the Warren Act, ch. 141, 36 Stat. 925, in 1911. For a discussion of the types of agreements the Secretary of the Interior may enter into as Warren Act contracts, see Roos-Collins, *supra* note 29, at 838-39.

³² See Roos-Collins, *supra* note 29, at 838-39.

³³ At least two major cases have involved contracts which impose limitations on the use of "project water," but not on the use of a district's pre-existing water supply. See *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 285 (1958) (contracts of districts on the Central Valley Project); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1095 n.3 (9th Cir. 1976) (contract of the Tulare Lake Canal Company).

³⁴ See *Westlands Water Dist. v. Patterson*, 900 F. Supp. 1304, 1321 (E.D. Cal. 1995), *rev'd*, 100 F.3d 94 (9th Cir. 1996).

³⁵ See *Idre v. United States*, 263 U.S. 497 (1923); *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990); *Washington Dep't of Ecology v. United States Bureau of Reclamation*, 827 P.2d 275 (Wash. 1992). The latter case contains a mildly interesting discussion of judicial tests for determining when seepage from a project is no longer considered to be project water.

³⁶ See, e.g., 43 U.S.C. § 383 (1994) (Section 8 of the 1902 Reclamation Act, declaring that nothing in the act is meant to interfere with state water use laws); *California v. United States*, 438 U.S. 645 (1978) (holding that § 8 authorizes states to attach conditions on a federal reclamation project, as long as the conditions do not violate clear congressional intent for the project).

project needs one or more water rights³⁷ from the state in which it is located, just as any other water project would, although state power to dictate terms to the federal government is somewhat limited.³⁸

Many reclamation projects involve water storage facilities, and the necessary water rights for these projects vary by state. Most states issue a single water right authorizing water to be stored, released, and finally applied to a beneficial use.³⁹ The single water right is issued in the name of the storage facility owner.⁴⁰ Other states separate the right to store water from the right to release it and apply it to a beneficial use.⁴¹ The “primary” storage permit is held by the facility owner, while the “secondary” beneficial use permit is typically held by a water user or an organization of such users.⁴²

The Bureau obtained some project water rights directly from the states, while other rights were acquired from prospective project beneficiaries.⁴³ According to the Bureau:

[P]roject water rights to which the United States holds legal title . . . may include storage rights, diversion rights, drainage rights, and/or ground-water pumping rights. Usually, if the United States has a vested interest in the project, the water right is held in the name of the United States. Some water rights may be held by the water user or by both.⁴⁴

³⁷ See Filings of Claims for Water Rights in General Stream Adjudications, 97 Interior Dec. 21, 22-23 (1989) (opinion of Dep’t of the Interior Solicitor Tarr) [hereinafter Stream Adjudications Opinion].

³⁸ See *infra* Part IV.

³⁹ See Stream Adjudications Opinion, *supra* note 37, at 22-23.

⁴⁰ See *id.* at 23.

⁴¹ See *id.*

⁴² See *id.* at 22-23.

⁴³ According to the Interior Solicitor:

[T]he Bureau has customarily obtained water rights for reclamation projects by making application to the appropriate state agency which in turn would generally grant a single water right for the entire project in the name of the United States. The Bureau also obtained water rights from those who had appropriated water for use on lands that ultimately were included within project boundaries prior to authorization of the project. In some instances, project water rights are not held in the name of the United States.

Id. at 25 & n.4.

⁴⁴ BUREAU EIS, *supra* note 1, Comments & Responses app. at 124.

Where the Bureau holds the water rights, its authority over project water appears to be the same whether it obtained those rights itself or acquired them from someone else.⁴⁵

On the other hand, where water rights are not in the Bureau of Reclamation's name, its authority and obligations with respect to project water may be somewhat more limited. A 1989 opinion of the Interior Solicitor interpreted *Nevada v. United States*⁴⁶ and other cases as placing certain duties on the federal government wherever it holds legal title to project water rights.⁴⁷ Where water rights are not in the name of the Bureau, it is presumably relieved of these duties, as well as deprived of certain powers. The same Solicitor's opinion, however, stated that "none of the cases discussed herein should be read to restrict the right of the Secretary to enforce Federal reclamation or other applicable law with respect to project water users."⁴⁸

IV. STATE AUTHORITY OVER PROJECT WATER

The Bureau of Reclamation does business in seventeen western states, all of which assert control over the waters within their boundaries. Congressional deference to state water law gives these

⁴⁵ In *United States v. Tulare Lake Canal Co.*, for example, the Ninth Circuit saw no significance in the fact that irrigators had pre-existing water rights which they had conveyed to the Bureau:

[T]he lands in the Pine Flat project were not arid, and the lands, the water rights, and the canals and other irrigation works were privately owned. In these respects, Pine Flat does not differ from the typical reclamation project. It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.

535 F.2d 1093, 1143 (9th Cir. 1976). The Interior Department also makes no distinction between water rights issued directly to the Bureau and those acquired from earlier appropriators. See Stream Adjudications Opinion, *supra* note 37, at 24-30.

⁴⁶ 463 U.S. 110 (1983).

⁴⁷ See Stream Adjudications Opinion, *supra* note 37, at 27-30. In very general terms, the Solicitor determined that the federal government is "obligated at least to do what is necessary to preserve, maintain, protect, or have confirmed project water rights that are held in the name of the United States." *Id.* at 28. The federal government bears these obligations even though the beneficial ownership of project water rights is in the water users, not the United States. See *infra* Part V.B.

⁴⁸ Stream Adjudications Opinion, *supra* note 37, at 27 n.5. The opinion did not squarely address the question of whether the Bureau's authority to enforce federal laws is circumscribed where it does not hold project water rights. On this point, see *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 719-21 (9th Cir. 1982) (Wallace, J., concurring) (finding, and taking exception to, an implication in the majority opinion that acreage limitations could apply to water stored by a federal reclamation project but previously vested in private landowners), *vacated as moot*, 459 U.S. 1095 (1983).

states considerable authority over reclamation project water, but federal supremacy checks the states' power to dictate how projects are managed and how project water is used.

A. State Ownership of Waters

In most if not all western states, water is the property of the state or the people of the state. Public ownership is established by state constitution, statute, or both.⁴⁹ Public ownership of water in the western states is expressly subject to rights of appropriation.⁵⁰ Appropriative water rights are strictly usufructuary,⁵¹ meaning that they provide only a right to use the public resource. These rights have become established through various means, and for various uses, over the past 140 years. Today, all the western states (except Colorado, which clings to a judicial scheme) allocate new water rights through an administrative permitting process.⁵²

While water in the West is nominally owned by the public, it tends not to be managed or viewed as a public resource. Water rights holders generally view the water they use as being their own, and they stress the private property nature of water rights. Water management agencies and western state legislatures generally accommodate the water users.⁵³ State or public ownership of water has far more meaning on paper than in practice.⁵⁴

B. Limited Federal Deference to States on Project Water Rights

In enacting laws that affect water, Congress has shown great deference to state laws and state control over water allocation. Respect for state laws was a basic principle of the federal reclamation program from the beginning, as stated in section 8 of the 1902 Reclamation Act:

⁴⁹ See Trelease, *supra* note 17, at 640-43.

⁵⁰ See HUTCHINS, *supra* note 25, at 141.

⁵¹ See *id.*, at 142.

⁵² See DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 156 (1984).

⁵³ See, e.g., PALMER, *supra* note 5, at 113-39 (exploring the attitudes of irrigators, conservationists, and water officials regarding Idaho water rights and water use).

⁵⁴ See Trelease, *supra* note 17, at 640-49. Trelease noted that while the various western states had said quite different things about water ownership, the differences have made little practical difference:

In Nebraska the court has said, without taking a breath, that the water is *publici juris*, that its use belongs to the public, that its use is controlled by the state in a sovereign capacity, and that the state has a proprietary interest, all without any understanding that it is saying different and inconsistent things rather than simply redundantly paraphrasing the same concept.

Id. at 642-43.

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 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.⁵⁵

The statute further provides "that the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."⁵⁶ Other federal statutes showing continuing congressional intent to defer to state water laws include the McCarran Amendment⁵⁷ and the Clean Water Act.⁵⁸

Because Congress chose to respect state water laws in section 8 of the 1902 Reclamation Act, projects were required to obtain state water rights. This requirement presented relatively few conflicts in the first several decades of the Reclamation program, as most states were only too eager to obtain federal projects, and state and federal water development goals diverged little.⁵⁹ Things began to change in the 1950s and '60s, however, as California water users began seeking to apply state laws which ran counter to basic provisions of reclamation law.

In *Ivanhoe Irrigation District v. McCracken*,⁶⁰ the U.S. Supreme Court held that, section 8 notwithstanding, state water laws could not trump directly conflicting provisions of federal reclamation

⁵⁵ 43 U.S.C. § 383 (1994).

⁵⁶ *Id.* § 372.

⁵⁷ McCarran Amendment, ch. 651, tit. II, § 208(a)-(c), 66 Stat. 560 (1952) (codified at 43 U.S.C. § 666 (1994)). The McCarran Amendment gave consent for the United States to be joined in general stream adjudications in state court. See 43 U.S.C. § 666(a) (1994).

⁵⁸ Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155 (codified as amended in scattered sections of 33 U.S.C. from § 1251 to § 1387). Section 101(g) of the Clean Water Act provides 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 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.

33 U.S.C. § 1251(g) (1994).

⁵⁹ See Frank Trelease, *Reclamation Water Rights*, 32 ROCKY MOUNTAIN L. REV. 464, 467 (1960).

⁶⁰ 357 U.S. 275 (1958).

law.⁶¹ The Court in *Ivanhoe* reversed the Supreme Court of California, which had held that the reclamation laws' 160-acre limit on parcels receiving project water⁶² was contrary to state law, and that section 8 requires state law to prevail over the reclamation laws in the event of any conflict.⁶³ Five years later, the U.S. Supreme Court found in *City of Fresno v. California*⁶⁴ that California laws purporting to grant a preference for domestic uses over irrigation uses did not bind the Bureau because reclamation laws contained a specific preference for irrigation.⁶⁵

The Court went further in these cases, however, and spoke generally to the authority of states to dictate the delivery of project water. The Court opined that the federal government was generally free from state constraints in operating projects and delivering project water. As summarized by the Court in *Arizona v. California*:

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this court in *Ivanhoe Irr. Dist. v. McCracken*, and reaffirmed in *City of Fresno v. California*. Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in [*Ivanhoe*], we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act.⁶⁶

The Supreme Court's decision in *Ivanhoe* touched off twenty years of uncertainty and debate regarding state authority and federal obligation with respect to project water rights.⁶⁷ The Supreme

⁶¹ See *id.* at 291-94.

⁶² Section 5 of the 1902 Reclamation Act imposed the 160-acre limitation. See 43 U.S.C. § 431 (1994). The 1982 Reclamation Reform Act extensively revised federal law on acreage limits. See *Peterson v. United States Dep't of the Interior*, 899 F.2d 799 (9th Cir. 1990).

⁶³ See *Ivanhoe Irrigation Dist. v. All Parties & Persons*, 306 P.2d 824, 851, 854-55 (Cal. 1957).

⁶⁴ 372 U.S. 627 (1963).

⁶⁵ See *id.* at 630-31. Section 9(c) of the Reclamation Project Act of 1939 provides in part, "No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." 43 U.S.C. § 485h(c) (1994).

⁶⁶ 373 U.S. 546, 586-87 (1963) (citations omitted).

⁶⁷ See, e.g., Joseph L. Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49 (1964) (exploring congressional intent as to federal control of reclamation waters in the wake of the *Ivanhoe*, *City of Fresno*, and *Arizona v. California* decisions); Trelease, *supra* note 59 (describing the history and present status of the relationship between state and federal water laws).

Court settled much of that debate, and repudiated some of the dicta of its earlier cases, with its 6-3 decision in *California v. United States*.⁶⁸

California v. United States came before the Court after California had attached twenty-five conditions to a water right permit for the New Melones Dam, and the Bureau of Reclamation had challenged the state's authority to impose such conditions.⁶⁹ The Bureau relied upon the Court's pronouncements in *Ivanhoe*, *City of Fresno*, and *Arizona v. California* in asserting that a state could not place limits on the Bureau's use of project water.⁷⁰ Unlike the state laws at issue in those earlier cases, however, California's conditions on the New Melones Dam permit did not conflict with any specific provision of federal law.⁷¹

After an extensive review of legislative history indicating congressional deference to state water laws,⁷² the Court rejected the federal government's contention that the state lacked authority to impose any conditions.⁷³ Notwithstanding the dicta of earlier cases, the majority found that California could place conditions on the project permit "which are not inconsistent with congressional provisions authorizing the project in question."⁷⁴ The Court reaffirmed the actual holdings of *Ivanhoe* and *Fresno*, however, that specific congressional directives override conflicting state laws regulating the distribution of water.⁷⁵ The Court remanded the case for a determination of whether California's conditions on the New Melones Dam permit were actually inconsistent with the project's authorizing legislation.⁷⁶

⁶⁸ 438 U.S. 645 (1978).

⁶⁹ See *id.* at 652.

⁷⁰ See *id.* at 672-73.

⁷¹ The *California v. United States* majority thus framed the issue: "Here the United States contends that it may ignore state law even if no explicit congressional directive conflicts with the conditions imposed by the California State Water Control Board." *Id.* at 673.

⁷² See *id.* at 653-70.

⁷³ See *id.* at 674-75.

⁷⁴ *Id.* at 674.

⁷⁵ See *id.* at 672 n.25.

⁷⁶ See *id.* at 679. In dissent, three Justices argued that the majority had wrongly refused to follow the Court's earlier cases dealing with § 8 of the 1902 Reclamation Act. The dissent explained:

The short of the matter is that no case in this Court, until this one, has construed § 8 as the present majority insists that it be construed. All the relevant cases are to the contrary. . . . Only the revisionary zeal of the present majority can explain its misreading of our cases and its evident willingness to disregard them.

On remand, the Ninth Circuit announced that "a state limitation or condition on the federal management or control of a federally financed water 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."⁷⁷ The court thus found a middle ground between the positions of the state and federal governments.⁷⁸ California had argued that only explicit federal statutory policies, such as those involved in *Ivanhoe* and *Fresno*, could preempt state water law. The United States, seemingly unwilling to accept the result of the Supreme Court's decision, had essentially argued that it was not subject to state conditions.⁷⁹

Although the United States challenged nineteen of the twenty-five conditions that California placed on the New Melones Dam permit, it did not present evidence on remand that any condition would actually harm or frustrate the purposes of the project.⁸⁰ The court noted potential problems with many of the conditions, but it had no evidence to show an actual conflict, and most of the conditions were capable of being interpreted or implemented in more than one way.⁸¹ Thus, the Ninth Circuit refused to invalidate any of California's conditions.⁸²

The Ninth Circuit clearly disapproved of what it saw as the federal government's intransigent stance against the state. Using

Id. at 692-93 (White, J., dissenting).

⁷⁷ *United States v. California State Water Resources Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982). The Ninth Circuit was reviewing the district court's decision in *United States v. California*, 509 F. Supp. 867 (E.D. Cal. 1981), which had been appealed by both sides. See *California State Water Resources Control Bd.*, 694 F.2d at 1174.

⁷⁸ See Sax, *supra* note 67, at 57-69 (comparing the federal government's "proprietary theory" with the states' "veto theory").

⁷⁹ The court rejected the United States' position "that since it built the dam it need not justify its operational plans so long as those plans are consistent with the scope of the project as envisioned by Congress." *California State Water Resources Control Bd.*, 694 F.2d at 1174.

⁸⁰ See *id.*

⁸¹ See *id.* at 1177-82.

⁸² The court found that it was premature to review many of the conditions, which were not yet implemented and were at least possibly consistent with the congressional scheme for the project. "It may be that constitutional standards of ripeness are met. Nonetheless, the parties' actions, as they seek appropriate accommodation of state and federal interests in the operation of the project, will decisively influence the meaning, and hence the consistency with the [project authorizing] statute, of the conditions." *Id.* at 1181; see also *South Delta Water Agency v. United States Dep't of the Interior*, 767 F.2d 531 (9th Cir. 1985) (ruling that the Bureau of Reclamation, in operating the Central Valley Project, was subject to a California law protecting basins of origin).

fairly strong language, the court said that sovereigns involved in a water dispute should not behave that way:

There is a preference, in interstate water cases, for "negotiation," "mutual accommodation and agreement," rather than litigation. A similar preference applies in cases where we are asked to arbitrate complicated and delicate questions of federalism.

In legal terms, these principles require the United States, at a minimum, to attempt to reconcile its interests with California law before a court can override the state's position as conflicting with federal policy. The precepts of federalism, if followed, should produce mutual respect and accommodation for state interests. The congressional scheme and the Supreme Court's earlier decision in this case make it clear that such precepts are to be carefully observed here. The United States may not justify its demands simply as a raw exercise of superior authority. It may not be indifferent to state interests affected by the operation of an intrastate reclamation project.⁸³

Thus, while acknowledging both congressional deference to state water law and federal supremacy, the Ninth Circuit — like the Supreme Court in *California v. United States*⁸⁴ — stressed cooperative federalism as the guiding principle in matters of reclamation project water rights.⁸⁵ Given both the outcome and the language of the case, neither a state nor the federal government can afford to insist stubbornly on its perceived legal rights while ignoring the other's interests.

C. State Control Over Water Use Under Existing Rights

States have authority to regulate water use under existing rights, at least to the extent of enforcing limitations specified in state law and the water rights themselves. State authority over water relies more on the state's police powers than on notions of state ownership of the resource. "It has *long been the settled law* in the arid

⁸³ *California State Water Resources Control Bd.*, 694 F.2d at 1178 (citations omitted). Some of the interests which California sought to protect through the 25 conditions included river recreation, wildlife preservation, and water quality. See *id.* at 1179-80.

⁸⁴ 438 U.S. 645 (1978). As the Court stated in *California v. United States*, "[i]f the term 'cooperative federalism' had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it. . . . Reflective of the 'cooperative federalism' which the Act embodied is § 8" *Id.* at 650.

⁸⁵ See *California State Water Resources Control Bd.*, 694 F.2d at 1181-82 (noting that cooperative federalism might accommodate competing state and federal interests and avoid adjudication).

and semiarid states that a state, *in the exercise of its police power*, may regulate the manner of appropriation and distribution of water from natural streams for purposes of irrigation."⁸⁶ Certainly, states have the authority to require compliance with conditions of the water right itself, such as place, purpose, and season of use, point of diversion, and rate and duty conditions.⁸⁷ States also have authority to restrict water right transfers,⁸⁸ to enact and enforce laws providing that water rights will be forfeited for non-use,⁸⁹ and to enforce less specific legal mandates such as "beneficial use without waste."⁹⁰

States may exercise this authority over their waters regardless of whether water rights are owned by an individual or by the United States, subject to preemptive federal authority. Thus, states regulate the use of project water on more or less the same basis as other water, except where that regulation would conflict with congressional directives.⁹¹

⁸⁶ HUTCHINS, *supra* note 25, at 7 (emphasis added by Hutchins) (quoting Humboldt Lovelock Irrigation, Light & Power, Co. v. Smith, 25 F.Supp. 571, 573 (D. Nev. 1938)).

⁸⁷ As Professor David Getches has stated:

The prior appropriation states have all constitutionally or statutorily asserted their prerogative to administer use of their waters for the benefit of their citizens. . . . These provisions are best understood as asserting sovereign, rather than proprietary, interests; they establish a state's power and duty to regulate appropriation of water by individuals under the rubric of state ownership. . . .

. . . .
The extent of regulation of the usufructuary [water] right defines the property interest. The general pattern followed by states is to require that appropriated water continue to be used for the purpose for which it was originally taken. This purpose is determined when the priority date is established, as are the quantity, rate of flow, point of diversion, and times when water may be taken from the stream.

GETCHES, *supra* note 52, at 86-88.

⁸⁸ See, e.g., *Broughton v. Stricklin*, 28 P.2d 219 (Or. 1933) (applying a state statute that restricted the ability of water rights owners to transfer those rights).

⁸⁹ See, e.g., *Rencken v. Young*, 711 P.2d 954 (Or. 1985) (interpreting a state statute that imposed forfeiture on water rights owners for non-use).

⁹⁰ See, e.g., *Washington Dep't of Ecology v. Grimes*, 852 P.2d 1044 (Wash. 1993) (interpreting the beneficial use element of the standard for confirming existing water rights). State authority to regulate water use under existing rights may be far-reaching, even though states are reluctant to exercise it. See Brian E. Gray, *The Modern Era in California Water Law*, 45 HASTINGS L.J. 249 (1993-94).

⁹¹ As stated by one group of scholars:

[S]tates do not *own* water in the sense of holding property, but they do possess broad jurisdictional and regulatory authority over the water within their boundaries, subject to the supreme authority of Congress to preempt, or overrule, state laws. . . . One side of the coin, therefore, is that Congress can override state water laws; the other side of the coin is that state water laws

In its sovereign role, a state has authority over its waters, and also has some degree of responsibility. State *duties* with respect to water are not very well defined. Under the public trust doctrine, however, a state's duty to protect public trust resources and values may be far-reaching. As the California Supreme Court stated in the leading public trust case involving western water:

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. . . . As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust . . . , and to preserve, so far as consistent with the public interest, the uses protected by the trust.

Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.⁹²

V. THE WATER USER'S RIGHTS TO PROJECT WATER, PART ONE: WATER RIGHTS

Congress' goal in passing the 1902 Reclamation Act was not simply to make the desert bloom, but to create and support small family farms.⁹³ The Supreme Court has stated that reclamation

control until Congress does exercise its superior authority. In the case of western water, the federal government has left most areas of regulation to the states — major exceptions include federal water pollution control laws, *large water development projects*, and federally guaranteed Indian water rights.

SARAH BATES ET AL., *SEARCHING OUT THE HEADWATERS: CHANGES AND REDISCOVERY IN WESTERN WATER POLICY* 146 (1993) (second emphasis added).

⁹² *National Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 728 (Cal. 1983) (citations omitted). The California court held that the public trust duty applies to all navigable lakes and streams, and the public trust values include not only the traditional uses of navigation, commerce, and fishing, but also recreational and ecological values. *See id.* at 719.

⁹³ *See United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1119 (9th Cir. 1976). As this case illustrates, Congress' Jeffersonian ideals caused it to place significant restrictions on the use of project water, particularly the 160-acre limitation, which have created some of the greatest controversies of the reclamation program.

projects were "designed to benefit people, not land."⁹⁴ As the intended beneficiaries of the reclamation program, water users have rights to project water that are well protected but also limited.

A. *Water Rights as Property Rights*

Whether they receive federal project water or not, irrigators generally regard the water they use as their own private property.⁹⁵ They hold this belief for at least two basic reasons. First, the law does recognize state water rights as property rights, although as explained below, these rights may be considerably more limited than many water users seem to believe. Second, state and federal water resource agencies have generally done little to control or restrict existing water uses, so that for decades irrigators have had a rather free hand.⁹⁶ Western resource users tend to believe that any resource they have used for a long time with little regulation is *theirs*, even where the law clearly does not recognize that resource as private property.⁹⁷

The basic nature of a water right can be simply stated. "[P]rivate ownership of stream water while in its natural environment does not exist; but private rights to abstract and use such waters — under State supervision and control in the exercise of its police powers — do exist, and they are property rights."⁹⁸ In the words of Frank Trelease:

[P]rivate rights to the use of water in a stream may be obtained. These private usufructuary rights, like other property, exist by virtue of and are subject to the law of the place where the stream is located. The state has power over such private rights in water, power in the sense of sovereignty or

⁹⁴ *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958).

⁹⁵ See PALMER, *supra* note 5, at 83-139.

⁹⁶ The Bureau has systematically failed to require water users to comply with reclamation law and contracts. See *infra* notes 325-30 and accompanying text; see also, e.g., Reed D. Benson & Kimberly J. Priestley, *Making a Wrong Thing Right: Ending the 'Spread' of Reclamation Project Water*, 9 J. ENVTL. L. & LITIG., 89, 95-104 (1994) (discussing widespread unauthorized use of project water and the Bureau's failure to address it). States' enforcement records are less well documented but probably no better. See Karen A. Russell, *Wasting Water in the Northwest: Eliminating Waste as a Way to Restore Streamflows*, 27 ENVTL. L. (forthcoming 1997) (manuscript at 7, on file with author).

⁹⁷ The longrunning controversy over livestock grazing leases on federal lands is a good example. Western cattlemen often characterize their struggle against the federal government as a matter of property rights, even though the U.S. Supreme Court has specifically held that a grazing permittee does not acquire a property interest in her permit or in the increased value that it imparts to her land. See *United States v. Fuller*, 409 U.S. 488, 494 (1973).

⁹⁸ HUTCHINS, *supra* note 25, at 443.

imperium, the general power to dictate the laws of property and to regulate its use.⁹⁹

These scholarly statements as to the nature of water rights present three major points. First, a water right is a right to use a resource which is in some sense "owned" by another — in this case, generally by the state or the public.¹⁰⁰ Second, such rights of use are nonetheless private property.¹⁰¹ Third, water rights are subject to control by the state under its police powers; the permissible extent of such control by states is explored below.

This notion that water rights are subject to state control, "like other property,"¹⁰² runs contrary to a common belief among users that water rights are not like other property, but are somehow more sacrosanct. Joseph Sax has directly addressed this notion:

Water rights *are* property, but they have no higher or more protected status than any other sort of property. Insofar as "there appears to be a broadly held view that a water right is a special kind of property right which cannot be regulated in the same manner as other property rights," a simple response can be given: that view is wrong.¹⁰³

B. Irrigator Rights in Project Water

Most irrigators who use reclamation project water do not deal directly with the federal government. Instead, they receive water through a delivery organization such as an irrigation district or canal company, which in turn has made a contract with the Bureau of Reclamation. The U.S. Supreme Court has held that the end user, rather than the district or the Bureau, is the real beneficiary of project water.¹⁰⁴ However, an irrigator who uses project water is

⁹⁹ Trelease, *supra* note 17, at 640.

¹⁰⁰ See *supra* Part IV.A.

¹⁰¹ The nature of this property right is akin to the right in a trust. Yet, as Trelease notes, "to deprive [an individual] of this right is said to violate the due process clause and the equal protection of the laws." Trelease, *supra* note 17, at 647.

¹⁰² *Id.* at 640.

¹⁰³ Joseph Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990) (quoting a letter from Lawrence J. McDonnell to Joseph L. Sax (Feb. 2, 1989)). Sax continues, "[t]he protection of the Constitution is afforded to 'private property,' and there is only one such category. Nowhere in the decisions of the Supreme Court is there any hint that water rights are a constitutionally favored form of property." *Id.* at 261. In fact, Sax argues that water rights have less protection than most other property rights because they are subject to prior public claims such as the navigation servitude and the public trust, are limited to beneficial and non-wasteful uses, and are granted by permit. See *id.* at 260.

¹⁰⁴ See *Ickes v. Fox*, 300 U.S. 82 (1937).

subject to controls and conditions imposed by both the district and the Bureau, unlike an individual irrigator who holds water rights in his own name and diverts water for his own use.

1. *Irrigator as Beneficial Owner of Project Water*

The question of who really owns reclamation project water — the irrigator or the federal government — was first addressed by the U.S. Supreme Court sixty years ago in *Ickes v. Fox*.¹⁰⁵ That case involved a dispute between the Bureau of Reclamation and irrigators on the Yakima Project in Washington. The Bureau for decades had delivered 4.84 acre-feet of water per acre of project land, in exchange for an obligation of the irrigator to repay project construction charges of \$52 per acre.¹⁰⁶ An act of Congress prevented any increase in that repayment obligation without the irrigators' consent.¹⁰⁷ But the Bureau, in an effort to finance a new reservoir, issued an order limiting project irrigators to three acre-feet per acre unless they agreed to pay an additional charge.¹⁰⁸ The irrigators sued Interior Secretary Ickes to enjoin enforcement of the order. The question for the Supreme Court was whether the suit should be dismissed because the United States, possessing sovereign immunity, was an indispensable party to the action.¹⁰⁹

The Court found that the United States was not an indispensable party because it was not the beneficial owner of project water rights:

Although the government diverted, stored, and distributed the water, the contention of [Ickes] that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 90-91.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 92.

¹⁰⁹ *See id.* at 96.

¹¹⁰ *Id.* at 94-95. The Court found that the government was "simply a carrier and distributor of the water." *Id.*

The irrigators' suit was thus allowed to proceed, and the Secretary was enjoined from enforcing his order.¹¹¹

The Court used similar language, under somewhat similar circumstances, in its 1983 decision in *Nevada v. United States*.¹¹² That case involved the federal government's 1973 assertion of reserved rights in Carson-Truckee river waters on behalf of the Pyramid Lake Paiute Tribe.¹¹³ These rights would have subordinated those granted to Newlands Project irrigators under an earlier decree known as *Orr Ditch*, and would have effectively reassigned water from the irrigators to the Tribe. The United States had represented both the Tribe and the irrigators in the *Orr Ditch* adjudication, but it had not sought water to protect the tribal fishery in Pyramid Lake.¹¹⁴ In *Nevada v. United States*, the irrigators argued that *res judicata* prevented the federal government from raising the new claim.¹¹⁵

In its opening brief to the Supreme Court, the federal government made the mistake of characterizing its action as simply "a reallocation of the water decreed in *Orr Ditch* to a single party — the United States — from reclamation uses to a Reservation use with an earlier priority."¹¹⁶ The Supreme Court unanimously rejected that argument based on its earlier cases,¹¹⁷ and declared that the federal government could not simply reallocate water once it had been applied to beneficial use:

[T]he Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became

¹¹¹ See *Fox v. Ickes*, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943).

¹¹² 463 U.S. 110 (1983).

¹¹³ See *id.* at 118.

¹¹⁴ See *id.* at 117-19.

¹¹⁵ See *id.* at 119.

¹¹⁶ *Id.* at 121 (quoting Brief for United States at 21).

¹¹⁷ The Court quoted extensively from *Ickes v. Fox*, 300 U.S. 82 (1937), as well as *Nebraska v. Wyoming*, 325 U.S. 589 (1945), an interstate allocation case involving the Platte River.

appurtenant upon the application of Project water to the land.¹¹⁸

While *Nevada v. United States* confirmed that irrigators are the beneficial owners of project water rights, it did not free these irrigators of federally-imposed controls on their use of project water. In a later case involving the Newlands Project,¹¹⁹ the Ninth Circuit upheld two provisions of a 1973 judicial decree¹²⁰ which required project water users to have valid water rights and to comply with federal "Operating Criteria and Procedures" governing water use.¹²¹ The 1973 decree provided for Interior Department review of whether project water use met these federal requirements. The Ninth Circuit found that the Supreme Court's decision in *Nevada v. United States* did not affect the validity of the two provisions: "[W]hether the farmers or the government own the water rights, users of the water rights must comply with the 1973 decree in order to continue to receive water."¹²²

2. *The Relationship Between the Irrigator and the District or Other Intermediary*

In the earliest days of the reclamation program, the federal government worked directly with individual irrigators, who entered into contracts in the form of water right applications.¹²³ But in 1922, Congress authorized the Bureau to contract with districts rather than individual users, and, in the Omnibus Adjustment Act of 1926,¹²⁴ required that all future contracts be made only with irrigation districts.¹²⁵ Thus, users now receive reclamation project water through an intermediary, which may be an irrigation district, a conservancy district, a water user's association, or some other form of organization.¹²⁶

The rights of most project irrigators are thus defined by their relationship with a district.¹²⁷ Although the issue of irrigators'

¹¹⁸ *Nevada v. United States*, 463 U.S. at 126.

¹¹⁹ *Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215 (9th Cir. 1989).

¹²⁰ *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973).

¹²¹ See *Pyramid Lake Tribe of Indians*, 878 F.2d at 1216.

¹²² *Id.* at 1217.

¹²³ See Roos-Collins, *supra* note 29, at 847.

¹²⁴ Act of May 25, 1926, ch. 383, 44 Stat. 636 (codified in scattered sections of 43 U.S.C.).

¹²⁵ See 43 U.S.C. § 423e (1994); Roos-Collins, *supra* note 29, at 847.

¹²⁶ See Roos-Collins, *supra* note 29, at 834-35.

¹²⁷ "Except where the individual irrigators have confirmed project rights, contracts with irrigators, district bylaws, and state law determine how the district's directors must divide the project supply." *Id.* at 849. Some individual irrigators do have their own confirmed water rights in projects such as the Columbia Basin Project, where Congress specifically

rights within irrigation districts and other organizations is exceedingly complex and beyond the scope of this Article, it should be noted that irrigators' rights within an organization vary according to state, type of organization, and the articles and by-laws of the organization itself.¹²⁸

The difficulty of defining the rights of individual irrigators with respect to a district or other intermediary can be illustrated by comparing two conflicting judicial decisions. In *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior*,¹²⁹ the irrigation district claimed that the Interior Department had taken the district's property rights to receive Newlands Project water without due process of law.¹³⁰ The Ninth Circuit rejected this claim and found that the district had no property rights in the project water. The court held that although landowners within the district have property rights to receive project water, the district itself only has rights to *manage* the water.¹³¹ The court did not explain whether its decision was based on state or federal law, although the holding appears to be consistent with *Nevada v. United States*¹³² and the federal cases cited therein.

A second case, *Nelson v. Belle Fourche Irrigation District*,¹³³ involved a suit by an irrigator who alleged that the district had wrongfully deprived him of property by failing to deliver the full amount of project water owed from 1990 to 1992.¹³⁴ The federal district court rejected the irrigator's claim, based on its finding that South Dakota law vests property rights in project water in the district itself, not the irrigator.¹³⁵ The court read section 8 of the Rec-

provided for contracts with individual irrigators, and in older projects where individual irrigators have been given equitable rights to water by the courts or government agencies. *See id.* at 847-48.

¹²⁸ *See* Thompson, *supra* note 17, at 1. *See also generally* Jeffrey C. Fereday, Ownership of Water Rights in Irrigation Water Delivery Organizations: An Outline of the Major Issues (June 1983) (discussing the three basic water delivery organizations in the west: mutual ditch corporations, commercial or "carrier" ditch corporations, and irrigation districts) (unpublished paper presented at a conference at the Natural Resource Law Center in Boulder, Colorado, on file with author).

¹²⁹ 742 F.2d 527 (9th Cir. 1984).

¹³⁰ *See id.* at 530.

¹³¹ *See id.* at 530-31.

¹³² 463 U.S. 110 (1983).

¹³³ 845 F. Supp. 1361 (D.S.D. 1994).

¹³⁴ *See id.* at 1363.

¹³⁵ *See id.* at 1366.

lamation Act of 1902¹³⁶ as explicitly providing for the application of state law in deciding the matter.¹³⁷

The *Nelson* court's interpretation of section 8 seems dubious. Since Congress intended land owners to be the beneficiaries of the reclamation program, and since districts are only intermediaries in that program, a state law purporting to vest property rights in the district might be inconsistent with congressional intent and therefore invalid notwithstanding section 8's preference for state law.¹³⁸ However, regardless of whether the district or the irrigator is considered the beneficial owner, it seems clear that the irrigator's actual use of project water is subject to certain terms specified by the district.¹³⁹

C. State and Federal Laws Limiting Irrigator Rights

Water rights are property, and thus cannot be "taken" without due process of law and just compensation.¹⁴⁰ However, governments do have the power to regulate the use of private property, so long as their actions do not rise to the level of a taking.¹⁴¹ Thus, water rights — like other forms of private property — are subject to regulation by state and federal governments.

In exercising their police powers, the western states have long regulated the appropriation and distribution of waters within their boundaries.¹⁴² As one commentator noted, "[t]he idea that the individual has a vested right to enjoy the use of running water without public regulation or control is subversive of the sovereignty of the State. The state cannot divest itself of, or surrender, grant, or bargain away this authority."¹⁴³ Under the public trust doctrine,

¹³⁶ 43 U.S.C. § 383 (1994).

¹³⁷ See *Nelson*, 845 F. Supp. at 1365.

¹³⁸ See *United States v. California State Water Resources Control Bd.*, 694 F.2d 1171, 1176-77 (9th Cir. 1982); see also *Nevada v. United States*, 463 U.S. 110, 126 (1983); *Ickes v. Fox*, 300 U.S. 82, 95 (1937). Moreover, two Ninth Circuit decisions regarding the Newlands Project have emphasized that project water rights must be evaluated at the parcel or landowner level, not at the district level. See *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1228-29 (9th Cir. 1989); *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1490-91 (9th Cir. 1992).

¹³⁹ See *Roos-Collins*, *supra* note 29, at 846-49.

¹⁴⁰ See U.S. CONST. amend. V.

¹⁴¹ See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-25 (1978) (discussing factors used to determine whether an action constitutes a taking under the Constitution).

¹⁴² See *HUTCHINS*, *supra* note 25, at 7.

¹⁴³ *Id.* (quoting *Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917)).

states have an affirmative responsibility to retain and exercise control over public resources, including water resources.¹⁴⁴

While Joseph Sax has acknowledged that water rights are private property, he maintains that water rights are actually *less* constitutionally protected than other property rights for the following reasons:

(a) because their exercise may intrude on a public common, [water rights] are subject to several original public prior claims, such as the navigation servitude and the public trust, and to laws protecting commons, such as water pollution laws; (b) their original definition, limited to beneficial and non-wasteful uses, imposes limits beyond those that constrain most property rights; [and] (c) insofar as water rights (unlike most other property rights) are granted by permit, they are subject to constraints articulated in the permits.¹⁴⁵

Relying primarily on Supreme Court cases, and noting that state courts have generally followed the same principles,¹⁴⁶ Sax concluded that states have considerable authority to regulate water use and even to change the terms of use under long-established water rights.¹⁴⁷ But how far the state and federal governments may go before a regulation becomes a "taking" is the subject of vigorous debate.¹⁴⁸

While state-law limitations apply to all water rights, project water rights are subject to an unusual degree of federal control. The most familiar federal directives affecting project water use are the general reclamation laws, particularly the acreage limitations and related provisions.¹⁴⁹ A user who fails to comply with these laws may have no right to receive project water.¹⁵⁰ Other applicable federal directives include acts of Congress relating to a specific

¹⁴⁴ See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 718 (Cal. 1983). The public trust doctrine requires that states, among other things, serve as trustees of the waterways and submerged land within their borders for the benefit of the public. See *id.* For the seminal discussion of the public trust doctrine, see Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

¹⁴⁵ Sax, *supra* note 103, at 260.

¹⁴⁶ See *id.* at 259-60 n.4.

¹⁴⁷ See *id.* at 262-67.

¹⁴⁸ See generally WATER LAW: TRENDS, POLICIES AND PRACTICE 43-89 (Kathleen Marion Carr & James D. Crammond eds., 1995) (containing articles on water rights takings by James S. Burling, Gregory J. Hobbs, Jr., Barton H. Thompson, Jr., and Joseph L. Sax).

¹⁴⁹ Important laws affecting project water include the substantive portions of the Omnibus Adjustment Act of 1926, 43 U.S.C. §§ 423-423g (1994), and § 5 of the 1902 Reclamation Act, 43 U.S.C. § 431 (1994) (imposing the 160-acre limitation).

¹⁵⁰ See, e.g., *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1143 (9th Cir. 1976); *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 793 (1993).

project, whether these statutes authorize a new project¹⁵¹ or change the law relating to an existing project.¹⁵² Also relevant to project water rights are Interior Department regulations relating to a particular project¹⁵³ or to all projects,¹⁵⁴ and federal environmental laws.¹⁵⁵

D. Contractual Limits on Rights to Project Water

Perhaps the most important limitation on rights to use project water is that they are largely defined by reclamation contracts. As explained in Part VI below, water users' contract rights for project water may be far more limited than the users have come to expect.

In *Fox v. Ickes*¹⁵⁶ and *United States v. Alpine Land & Reservoir Co.*,¹⁵⁷ the courts held that the amount of water to which project irrigators are entitled is defined not by their contracts, but by their beneficial use of water.¹⁵⁸ Although the provisions of the irrigators' contracts seemed to limit water use to three acre-feet of water for each acre of land to be irrigated,¹⁵⁹ in practice, the irrigators received substantially more water for many years.¹⁶⁰ Despite testimony that the irrigators could have grown crops successfully with less water, the courts found that the historic water use was "beneficial."¹⁶¹ In making such findings, both courts placed more emphasis on the provision of the Reclamation Act of 1902, which states

¹⁵¹ See, e.g., Washoe Project Act, ch. 809, 70 Stat. 775 (1956) (repealed by Pub. L. No. 101-618, 104 Stat. 3307 (1990)); see also, e.g., Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984) (interpreting Washoe Project Act).

¹⁵² See, e.g., Central Valley Improvement Act, Pub. L. No. 102-575, § 3401, 106 Stat. 4706 (1992); see also, e.g., O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995) (interpreting Central Valley Project Improvement Act).

¹⁵³ See, e.g., Truckee-Carson Irrigation Dist. v. Secretary of the Dep't of the Interior, 742 F.2d 527, 530, 532 (9th Cir. 1984) (upholding Interior Department regulations on the Newlands Project).

¹⁵⁴ See, e.g., United States v. Quincy-Columbia Basin Irrigation Dist., 649 F. Supp. 487, 490 (E.D. Wash. 1986) (upholding Interior Department regulations addressed to all land subject to reclamation law acreage limitations).

¹⁵⁵ See, e.g., Barcellos & Wolfson, Inc. v. Westlands Water Dist., 849 F. Supp. 717 (E.D. Cal. 1993), *aff'd sub nom.* O'Neill v. United States, 50 F.3d 677 (9th Cir.). As the district court stated, "Even assuming, *arguendo*, that the [irrigators] hold water rights based on statutes which are broader than their contractual rights, they are not exempt from compliance with environmental laws." *Id.* at 732 (citing United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992)). See also Melissa K. Estes, *The Effect of the Federal Endangered Species Act on State Water Rights*, 22 ENVTL. L. 1027 (1992).

¹⁵⁶ 137 F.2d 30 (D.C. Cir. 1943).

¹⁵⁷ 697 F.2d 851 (9th Cir. 1983).

¹⁵⁸ See *Alpine Land & Reservoir Co.*, 697 F.2d at 855; *Fox*, 137 F.2d at 33.

¹⁵⁹ See *Alpine Land & Reservoir Co.*, 697 F.2d at 857.

¹⁶⁰ See *id.*; *Fox*, 137 F.2d at 31.

¹⁶¹ See *Alpine Land & Reservoir Co.*, 697 F.2d at 856-57; *Fox*, 137 F.2d at 34-35.

that beneficial use shall be "the basis, the measure, and the limit of the [project water] rights,"¹⁶² than on the provisions of the contracts.¹⁶³

Moreover, in *Fox v. Ickes*, the Court of Appeals for the D.C. Circuit implied that project water rights are not limited by the provisions of reclamation contracts, and noted that "the water-rights here are not based upon the construction or enforcement of contracts with the government."¹⁶⁴ However, the court appears to have misconstrued the Supreme Court's remand decision of *Ickes v. Fox*.¹⁶⁵ In contrast to the D.C. Circuit, the Supreme Court clearly believed it was *upholding* the contracts by awarding the irrigators the full amount of their "beneficial use," since beneficial use language was included in the original contract.¹⁶⁶

More recently, however, courts within the Ninth Circuit have held that the reclamation contracts themselves, rather than beneficial use, define project water rights. In ascertaining the vested rights of project water users, courts have looked to the users' contracts, even where their historic water use went beyond the terms of those contracts.¹⁶⁷ In *Barcellos & Wolfsen, Inc. v. Westlands Water District*,¹⁶⁸ the court specifically rejected an argument, based on the Supreme Court opinion in *Ickes v. Fox*, that irrigators' water

¹⁶² *Alpine Land & Reservoir Co.*, 697 F.2d at 853 (quoting Reclamation Act of 1902, ch. 1093, § 8, 32 Stat. 390 (codified at 43 U.S.C. § 372 (1994))); *Fox*, 137 F.2d at 33 (same).

¹⁶³ See *Alpine Land & Reservoir Co.*, 697 F.2d at 853-55; *Fox*, 137 F.2d at 33.

¹⁶⁴ *Fox*, 137 F.2d at 30, 35.

¹⁶⁵ 300 U.S. 82 (1937).

¹⁶⁶ After noting that the irrigators had performed all their duties under the reclamation contracts, the Supreme Court stated:

[B]y the express terms of the contract made between the government and the Water Users Association on behalf of [irrigators], the determination of the [S]ecretary as to the number of acres capable of irrigation was "to be based upon and measured and limited by the beneficial use of water." [Interior Department officials], accordingly, had decided that 4.84 acre feet of water per annum per acre was necessary to the beneficial and successful irrigation of respondents' lands.

Id. at 94.

¹⁶⁷ See *Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 811-12 (9th Cir. 1990) (finding no contract right to deliver subsidized water to leased lands, despite federal acquiescence to the practice); see also *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1311 n.22 (9th Cir. 1981) (stating in dicta that the Truckee-Carson Irrigation District's water rights were defined in the contract with the federal government and that the district would be afforded traditional contract remedies for breach), *aff'd in part and rev'd in part on other grounds sub nom. Nevada v. United States*, 463 U.S. 110 (1983).

¹⁶⁸ 849 F. Supp. 717 (E.D. Cal. 1993), *aff'd sub nom. O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).

rights are greater than their contract rights.¹⁶⁹ The court recognized that while *Ickes v. Fox* gave irrigators certain property rights in project water,

Ickes does not stand for the proposition that these property rights require the government to continue to deliver water in contravention of the water delivery contract, which defines the extent of the water right. The disputed contract grants specified water rights. The government is prohibited from breaching the terms of the contract.¹⁷⁰

The court found that the contracts in question did not obligate the government to continue delivering the amounts of water which irrigators had traditionally received.¹⁷¹ The following section more fully explores the extent of irrigators' contract rights in project water.

VI. THE WATER USER'S RIGHTS TO PROJECT WATER, PART TWO: CONTRACT RIGHTS

Individual water users generally do not have their own contracts with the federal government. Instead, they receive water through a district or other organization which in turn has a reclamation contract with the federal government.¹⁷² However, as third party beneficiaries of such contracts, water users can sue to protect their rights to receive project water.¹⁷³

Users' rights vary widely due to differences in reclamation contracts. While most can generally be classified as either repayment contracts or water service contracts,¹⁷⁴ their terms vary significantly by project and by district. Several important terms define users' rights to receive and use project water, including terms specifying

¹⁶⁹ See *id.* at 731-32. On appeal, the Ninth Circuit did not explicitly address the issue of whether the contract defines the water rights, but it did rely almost exclusively on the irrigators' contracts in determining their rights. See *O'Neill v. United States*, 50 F.3d 677, 682-87 (9th Cir. 1995).

¹⁷⁰ See *Barcellos & Wolfson*, 849 F. Supp. at 731.

¹⁷¹ See *id.* at 732.

¹⁷² District rights and responsibilities regarding project water are discussed in Part VII, *infra*.

¹⁷³ See *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 816-17 (9th Cir. 1990). The plaintiffs were district irrigators who were third-party beneficiaries of a contract between the district and the government. See *id.* at 816. The irrigators sued the district in state court, but the district joined the United States as a party and the case was removed to federal court. See *id.* at 817; cf. *Peterson v. United States Dep't of the Interior*, 899 F.2d 799 (9th Cir. 1990) (water users and districts suing the Interior Department directly).

¹⁷⁴ See *supra* Part III.A.

the quantity of water to be delivered,¹⁷⁵ the allocation of water during shortages,¹⁷⁶ the lands and total acreage on which the water may be used,¹⁷⁷ and the purposes for which the water may be used.¹⁷⁸ While terms such as these vary among contracts, other terms — including an important provision relieving the government of liability for failure to deliver water for any reason — appear in reclamation contracts with high consistency.¹⁷⁹

A. Contract Rights as Property Rights

Reclamation contracts create certain property rights which the United States Constitution protects from government impairment.¹⁸⁰ These rights may be permanent, even if the underlying contract is not. In *Madera Irrigation District v. Hancock*,¹⁸¹ the district was found to have a vested property right in a permanent supply of project water, even though its forty-year water service contract had expired.¹⁸²

In *Madera* and several other cases, districts and irrigators have argued that federal actions deprived them of property rights under

¹⁷⁵ Some contracts specifically address the quantity of water to be delivered; others do not. Where a contract provides for the delivery of stored water, it may allocate a percentage of the storage space in a particular reservoir to the contracting district. These are called "spaceholder" contracts. See, e.g., Island Irrigation Company Reclamation Contract § 7, Minidoka and Palisades Projects, Idaho, Contract No. 14-06-W-29 (1952) (allocating .3917% of the reservoir's capacity to the irrigation district) (on file with author).

¹⁷⁶ See, e.g., Roza Irrigation District Reclamation Contract § 15, Yakima Project, Washington, Contract No. 14-06-W-69 (1953) (establishing a pro-rata water distribution in times of shortage) (on file with author).

¹⁷⁷ See, e.g., North Unit Irrigation District Reclamation Contract § 11, Deschutes Project, Oregon, Contract No. 14-06-W-71 (1954) (setting forth certain coverage areas) (on file with author).

¹⁷⁸ See, e.g., Tualatin Valley Irrigation District Reclamation Contract § 10(b), Tualatin Project, Oregon, Contract No. 14-06-100-6956 (1971) (as amended by Contract No. 14-06-100-6956A (1976)) (limiting water for irrigation purposes only, excluding delivery to parcels of land smaller than 2 acres, and prohibiting domestic or municipal uses without prior approval) (on file with author).

¹⁷⁹ Repayment contracts typically have some version of the "United States not liable" clause. See, e.g., Island Irrigation Company contract, *supra* note 175, § 18; Roza Irrigation District contract, *supra* note 176, § 32; North Unit Irrigation District contract, *supra* note 177, § 14(f); Tualatin Valley Irrigation District contract, *supra* note 178, § 22. The irrigator plaintiffs in *O'Neill v. United States* characterized the clause as a standard provision of water service contracts. See 50 F.3d 677, 687 (9th Cir. 1995).

¹⁸⁰ See *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir. 1993); *Barcellos & Wolfson, Inc. v. Westlands Water Dist.* 899 F.2d 814, 821 (9th Cir. 1990).

¹⁸¹ 985 F.2d 1397 (9th Cir. 1993).

¹⁸² See *id.* at 1401-02. The Ninth Circuit based this finding on the language of the water service contract itself. See *id.*

reclamation contracts.¹⁸³ In addressing such claims, the Ninth Circuit has stated that in order to demonstrate a wrongful taking or impairment, a district or irrigator must first establish that it has a cognizable property right arising out of a federal contract, and then show a substantial impairment of that right by the government.¹⁸⁴ Only the Madera district was able to establish a clear property right,¹⁸⁵ and in every case the government ultimately prevailed.¹⁸⁶

Although contract rights may be property rights, water users' expectations do not rise to the level of property rights unless those expectations are protected in the contract itself. The Ninth Circuit made this point clear in *Peterson v. United States Department of the Interior*,¹⁸⁷ in response to a water district argument that a provision of the Reclamation Reform Act of 1982 (RRA)¹⁸⁸ would unlawfully prevent deliveries of subsidized water to large tracts of leased land.¹⁸⁹ The plaintiffs argued that they had vested property rights to continue such deliveries because of their "reasonable investment-backed expectations" based on pre-RRA statutes, the statements and conduct of government officials during the negotiation and drafting of the contracts, and the absence of contract provisions forbidding the deliveries.¹⁹⁰ The court rejected that argument, stating that the plaintiffs had offered "no authority for the proposition that a constitutionally protected property interest can be spun out of the yarn of investment-backed expectations."¹⁹¹

¹⁸³ See, e.g., *id.* at 1400-01; *Barcellos & Wolfson*, 899 F.2d at 821; *Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 807 (9th Cir. 1990); *Barcellos & Wolfson*, 849 F. Supp. 717, 731 (E.D. Cal. 1993), *aff'd sub nom.* O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995).

¹⁸⁴ See *Madera Irrigation Dist.*, 985 F.2d at 1401; *Barcellos & Wolfson*, 899 F.2d at 821.

¹⁸⁵ See *Madera Irrigation Dist.*, 985 F.2d at 1401-02. The court found, based on provisions of 1939 and 1951 reclamation contracts, that the district had a right to a permanent supply of water. See *id.* The court also held, however, that the United States had not wrongfully impaired that right by adding payment and environmental conditions in the district's new water service contract. See *id.* at 1402-06.

¹⁸⁶ See *id.* at 1406; *Barcellos & Wolfson*, 899 F.2d at 825-26; *Peterson*, 899 F.2d at 813-14; *Barcellos & Wolfson*, 849 F.Supp. at 734.

¹⁸⁷ 899 F.2d 799 (9th Cir. 1990).

¹⁸⁸ 43 U.S.C. §§ 390aa-390zz-1 (1994).

¹⁸⁹ See *Peterson*, 899 F.2d at 807. Specifically, the district attacked section 203(b) of the RRA, the so-called "hammer clause," which requires districts to either amend their contracts to conform to the provisions of the RRA or pay full cost for any water delivered to tracts larger than 160 acres. See *id.* at 806 (citing 43 U.S.C. § 390cc(b)).

¹⁹⁰ See *id.* at 812-13.

¹⁹¹ *Id.* at 813. The court stated that the districts erred in relying on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984):

Ruckelshaus is authority for the proposition that once a constitutionally protected property interest is established, then a reasonable investment-backed

Other recent cases in the Ninth Circuit have reinforced this conclusion.¹⁹²

Irrigators have also failed to establish a property right sufficient to maintain their existing water use even where Interior Department regulations, policies, and practices have created a reasonable expectation that the use could continue. Courts have rejected water users' claims of property rights for several reasons. First, the courts have recognized that the United States government must retain the power to change its policies to reflect the public interest.¹⁹³ In several recent cases involving reclamation contract disputes, the Ninth Circuit has stated that the federal government retains its sovereign power "unless surrendered in unmistakable terms."¹⁹⁴ Second, courts have found irrigators' property rights limited by contract provisions that excuse the government for failing to deliver water.¹⁹⁵ Third, especially where past Interior Department action (or inaction) was contrary to the letter and

expectation is one of several factors to be taken into account "when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.'" Whether a "taking" has occurred is the second step of the inquiry. Here, we do not reach that step because the Water Districts have failed to survive the first step, which is establishing that a property right exists. Thus, the Water Districts' reliance on *Ruckelshaus* is misplaced, leaving them with no support for the curious proposition that investment-backed expectations can give rise to a constitutionally protected property interest.

Id. (citations omitted).

¹⁹² As the Ninth Circuit stated in *Madera Irrigation District v. Hancock*:

Reasonable expectations arising out of past policy but without a basis in cognizable property rights may be honored by prudent politicians, because to do otherwise might be unfair, or because volatility in government policy will reduce its effectiveness in inducing long term changes in behavior. But violation of such expectations cannot give rise to a Fifth Amendment [takings] claim.

985 F.2d 1397, 1403 (9th Cir. 1993) (citing *Peterson*, 899 F.2d at 812-13); see also *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 825 (9th Cir. 1990) (holding that government regulations created reasonable expectations that landowners would receive subsidized water for an extended period of time, but that the application of the statute requiring them to pay full cost rather than subsidized rate did not violate any constitutionally protectable expectations); *Central Ariz. Irrigation & Drainage Dist. v. Lujan*, 764 F. Supp. 582, 589 (D. Ariz. 1991) (stating that the plaintiffs' mere expectations that they would receive the project water "do not rise to the level of vested rights").

¹⁹³ See *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995); accord *Madera Irrigation Dist.*, 985 F.2d at 1406; *Peterson*, 899 F.2d at 808, 812.

¹⁹⁴ *O'Neill*, 50 F.3d at 686 (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)); see also *Madera Irrigation Dist.*, 985 F.2d at 1401, 1406 (same); *Peterson*, 899 F.2d at 808, 812 (same).

¹⁹⁵ See *Fremont-Madison Irrigation Dist. v. United States Dep't of the Interior*, 763 F.2d 1084, 1088 (9th Cir. 1985); *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 731-32 (E.D. Cal. 1993), *aff'd sub nom.* *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).

spirit of the reclamation laws, courts have refused either to recognize a property right in irrigators based on that action,¹⁹⁶ or to find that Interior is estopped from adopting a new position.¹⁹⁷

B. Contract-based Limits on Users' Rights to Project Water

Because users' rights to project water arise from reclamation contracts, the contracts necessarily limit those rights. This point is fundamental, but has often been contested by irrigators who seek to continue existing uses not fully protected by a contract. The cases raise several corollary points.

First, users without contracts have no right to receive project water, even if they have actually applied project water to a beneficial use. In *United States v. Alpine Land & Reservoir Co.*,¹⁹⁸ irrigators argued that certain "transferee" lands lacking contracts were nonetheless entitled to continue receiving project water,¹⁹⁹ based on the holding of an earlier case involving the same parties which implied that project water rights were defined by actual beneficial use, not contractual limits.²⁰⁰ The Ninth Circuit, however, rejected that argument:

The *Alpine* court's discussion of the beneficial use requirement occurs only in the context of determining how much water duty is appropriate for lands *already* entitled to receive Project water. Section 8 of the Act strictly limits the beneficial use concept to properties that are entitled to receive Project water. Section 8 explains that beneficial use is the measure of the "right to the use of water *acquired under the provisions of this Act.*"

The critical defect with the transferee properties involved in this case, however, is that they generally have no right to

¹⁹⁶ See *Peterson*, 899 F.2d at 810-11. The Ninth Circuit reached a similar conclusion in *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 540-42 (9th Cir. 1977), *rev'd on other grounds sub nom.* *Bryant v. Yellen*, 447 U.S. 352 (1980). In *Imperial Irrigation District*, irrigators claimed they had a right to continue irrigating lands despite statutory acreage limitations, based largely on the Interior Department's longstanding refusal to enforce those limitations. See *id.* at 536. The court had little trouble rejecting that argument: "Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer." *Id.* at 540.

¹⁹⁷ See *Bostwick Irrigation Dist. v. United States*, 900 F.2d 1285 (8th Cir. 1990):

¹⁹⁸ 878 F.2d 1217 (9th Cir. 1989).

¹⁹⁹ See *id.* at 1221. As the court explained, "[s]ome Project properties are presently under irrigation although they are not entitled to receive Project water by contract or certificate. Indeed, most of the properties in this case to which appellees seek to transfer water rights are examples of these improperly irrigated properties." *Id.*

²⁰⁰ See *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 855-56 (9th Cir. 1983).

receive Project water. The landowners do not hold contracts or certificates entitling their properties to be irrigated. The beneficial use discussion, central to the *Alpine* decision, is therefore of no consequence to the presumed right of transferee properties to receive transferred water rights.²⁰¹

Second, users must comply with contract terms or risk losing their rights to receive project water. In one case, irrigators who failed to dispose of their excess lands, as they had agreed to do, were found to have no right to continue receiving project water on those lands.²⁰² In another case, *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior*,²⁰³ the Ninth Circuit upheld the cancellation of the water district's contract because the district failed to observe federal regulations governing water use on the Newlands Project.²⁰⁴ The court held that the district had openly violated the contract's operating criteria, and that the contract gave the Secretary the right to terminate the contract upon a violation of these regulations.²⁰⁵ While it had the power to terminate its contract with the *district*, the Secretary could not necessarily deny water to TCID's irrigators, who were the actual beneficial owners of the Newlands Project water rights.²⁰⁶

²⁰¹ *Alpine Land & Reservoir Co.*, 878 F.2d at 1228-29 (citations omitted). The Ninth Circuit reaffirmed this holding in *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1992).

²⁰² *See Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 822 (9th Cir. 1990). The contract between the Bureau of Reclamation and the Westlands Water District required any owner of excess lands, as a condition precedent to receiving project water on those lands, to agree to dispose of those lands within ten years. *See id.* at 816. If the owner failed to do so, the contract gave the Department of Interior the power to sell them. *See id.* The irrigators argued that they had fulfilled their contract obligations merely by *agreeing* to sell those lands, and that they could continue to receive project water even though they had not actually sold them. *See id.* The Ninth Circuit disagreed, holding that the landowners breached the contract, thus absolving the Department of Interior of its duty to supply water. *See id.* at 822.

²⁰³ 742 F.2d 527 (9th Cir. 1984).

²⁰⁴ *See id.* at 532.

²⁰⁵ *See id.* The Ninth Circuit disposed of the issue tersely:

TCID readily admits that it violated the operating criteria by diverting more water than the criteria permitted. The 1926 contract explicitly gave the Secretary the right to terminate the contract if TCID violated regulations concerning the operation of the Newlands Project. It did, and the Secretary exercised his right to terminate. That was the agreement and we see no reason why TCID should not be required to abide by it.

742 F.2d at 532.

²⁰⁶ *See id.* at 530-31. The Ninth Circuit rejected the district's claim that the contract's operating criteria deprived the district of property without due process on the ground that project water rights were held by irrigators rather than the district, and thus, only the irrigators could make a due process claim. *See id.* The Court had previously determined that

Perhaps the most important contractual limitation on irrigators' rights to receive project water, however, is found within the contracts. As noted above, most reclamation contracts contain a provision that excuses the government from liability for water shortage arising from any cause.²⁰⁷ The Westlands Water District's 1963 reclamation contract contains such a clause,²⁰⁸ which has been the subject of litigation at least twice. In the first case, *Westlands Water District v. United States Department of the Interior*,²⁰⁹ the court relied on the clause to uphold the Bureau's apportionment of scarce water supplies among various irrigation users in the drought year of 1992.²¹⁰

The second case, *Barcellos & Wolfson, Inc. v. Westlands Water District*,²¹¹ may have more far-reaching implications. In that case, the Westlands Water District challenged the Department of Interior's 1993 decision to halve the district's normal allocation of 900,000 acre-feet of water from the Central Valley Project.²¹² The United States acknowledged its contractual duty to deliver 900,000 acre-feet but contended that it could not deliver Westlands's full supply because the Endangered Species Act (ESA)²¹³ and the 1992 Central Valley Project Improvement Act (CVPIA)²¹⁴ required that

Newlands Project water rights were beneficially owned by the irrigators. See *Nevada v. United States*, 463 U.S. 110, 126 (1983).

²⁰⁷ See *supra* note 179 and accompanying text.

²⁰⁸ See *O'Neill v. United States*, 50 F.3d 677, 682-83 n.2 (9th Cir. 1995). Article 11 of the Westlands contract, entitled "United States Not Liable for Water Shortage," provides in relevant part:

There may occur at times during any year a shortage in the quantity of water available for furnishing to the district through and by means of the Project, but in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought or any other causes

Id. at 682 n.2. The contract also provides that the district's sole remedy in the event of a shortage is an adjustment to its payment obligation. See *id.* at 683 n.2.

²⁰⁹ 805 F. Supp. 1503 (E.D. Cal. 1992), *aff'd sub nom.* *Westlands Water Dist. v. Firebaugh Canal Co.*, 10 F.3d 668 (9th Cir. 1993).

²¹⁰ See *id.* at 1512-13. In February 1992, the Bureau ordered that Westlands would receive only one-fourth of its normal water supply from the Central Valley Project that year. See *id.* at 1513. The court characterized the Bureau's actions as "honoring its legal commitments to holders of senior water rights," although the Bureau's February announcement also noted that project water distributions might vary during the summer "to address fishery and other priorities." *Id.*

²¹¹ 849 F. Supp. 717 (E.D. Cal. 1993), *aff'd sub nom.* *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).

²¹² See *id.* at 721.

²¹³ 16 U.S.C. §§ 1531-1544 (1994).

²¹⁴ Pub. L. No. 102-575, 106 Stat. 4706 (codified as amended in scattered sections of 16 U.S.C., 25 U.S.C. and 43 U.S.C. (1994)).

water be made available for environmental uses.²¹⁵ The government argued that it need not deliver a full supply because of the shortage clause in the district's reclamation contract.²¹⁶ The district court found that the shortage clause was valid and that the Bureau's compliance with the congressional mandate to use Central Valley Project water for environmental purposes had created a legitimate shortage under the terms of the Westlands contract.²¹⁷ As a result, the Bureau was justified in delivering water for environmental purposes, rather than irrigation.²¹⁸

In *O'Neill v. United States*,²¹⁹ the Ninth Circuit affirmed *Barcellos & Wolfson* and held that the reclamation contract clauses absolving the United States of liability for a shortage allowed the government to reallocate water from irrigation to environmental uses if done in the course of carrying out mandatory duties under federal law.²²⁰ Two factors temper this rather dramatic holding. First, the CVPIA contained unusually strong requirements to provide water for environmental purposes.²²¹ The result might have been different if the government did not have a clear statutory duty to deliver water for those purposes,²²² although the district court in *Barcellos & Wolfson* also upheld the Bureau's actions under the less specific requirements of the ESA.²²³ Second, the government does not have unlimited discretion to invoke the shortage clause

²¹⁵ See *Barcellos & Wolfson, Inc.*, 849 F. Supp. at 721.

²¹⁶ See *id.* at 721-22.

²¹⁷ See *id.* at 725. The court did not reach the issue of whether the government's actions under the ESA and the CVPIA were legal. This issue was litigated in a separate suit, in which Westlands sought to enjoin implementation of the environmental provisions of the CVPIA. See *Westlands Water Dist. v. United States*, 850 F. Supp. 1388 (E.D. Cal. 1993), *rev'd on other grounds sub nom. Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994). Westlands argued that implementation would violate § 102 of the National Environmental Policy Act, 42 U.S.C. § 4321-4370d (1994). See *Westlands Water Dist.*, 43 F.3d at 459. The district court granted a preliminary injunction. See *id.* The Ninth Circuit vacated the injunction, finding that the CVPIA had directed the Department of Interior to take immediate action without the need for NEPA compliance. See *id.* at 460-62.

²¹⁸ See *Barcellos & Wolfson, Inc.*, 849 F. Supp. at 717.

²¹⁹ 50 F.3d 677 (9th Cir. 1995).

²²⁰ See *id.* at 689.

²²¹ See Pub. L. No. 102-575, 106 Stat. 4706, 4714-15 (1990) (describing the obligations of the Interior Secretary to operate the Central Valley Project to protect and restore fish and wildlife habitats).

²²² The district court noted that the "Federal Defendants have not suggested that the Bureau's allocation decisions were based on its *voluntary* compliance with federal or state law, or that a shortage may be created under the contract by acts not *required* by law." *Barcellos & Wolfson, Inc.*, 849 F. Supp. at 724 n.11.

²²³ See *id.* at 733.

based on water needs for other purposes.²²⁴ Water users may always attack the government's action as unlawful or unreasonable under the contract.²²⁵

In any litigation against the government regarding contract interpretation, water users are somewhat disadvantaged. The Ninth Circuit, at least, has consistently given the United States the benefit of the doubt: "[i]n a case where the government is charged by private individuals with breaching its own obligations in violation of the Constitution, '[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public.'"²²⁶ On more than one occasion, the Ninth Circuit has questioned the basic fairness of the government's actions.²²⁷ But the Ninth Circuit has made it clear, in matters of reclamation contracts, that the United States retains its sovereign authority "unless surrendered in unmistakable terms."²²⁸

VII. DISTRICT RIGHTS AND OBLIGATIONS REGARDING PROJECT WATER

For the past seventy years, the Bureau has contracted with organizations, typically irrigation districts, rather than individuals to deliver project water.²²⁹ The district functions as a manager and middleman, distributing project water to individual users within the district and collecting money from those users to pay the United States as required by the district's repayment or water service contract.²³⁰ But a contracting district is not simply a passive conduit

²²⁴ See *id.* at 723-24.

²²⁵ See *id.* at 724.

²²⁶ *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 824 (9th Cir. 1990) (citation omitted). On the other hand, the Court of Federal Claims ruled that ambiguities should be interpreted in a way that favors the non-drafting party. See *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 799 (1993). The court ruled for the district and against the United States in a case involving reporting requirements under the Reclamation Reform Act. See *id.* at 793, 796.

²²⁷ See *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1402-04 (9th Cir. 1993); *Barcellos & Wolfson, Inc.*, 899 F.2d at 826 (Fernandez, J., dissenting).

²²⁸ *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995) (citation omitted); see also *Madera Irrigation Dist.*, 985 F.2d at 1401, 1406 (recognizing the need to interpret the statute to avoid "foreclosing the exercise of sovereign authority"); *Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 808, 812 (9th Cir. 1990) (recognizing that Congress has the right to alter contracts unless it clearly surrenders this authority).

²²⁹ See *Roos-Collins*, *supra* note 29, at 834-35.

²³⁰ Professor Sax explains that:

The function of the district is to act as an intermediary between the United States and the ultimate user, contracting with individuals for allotments from the project, administering the distribution of water, and collecting taxes and

for water and money; it also has certain rights and responsibilities with respect to project water.

A. *The District's Rights as Manager and Middleman*

Bureau contracts give districts certain property rights protected by the Constitution.²³¹ As explained in the previous Part, courts have found these rights to be defined by contract terms and circumscribed by the federal government's retention of sovereign authority. A district's contract rights may include the right to manage the project from which it receives water.²³²

The district's interests in project water, however, depend on several factors not defined in its reclamation contract. First, a district may hold project water rights in its own name. Project water rights are generally held in the name of the United States, but not always.²³³ Where the district itself holds title, it may assume some of the authorities and duties which the United States normally would bear by virtue of being the nominal owner of project water rights.²³⁴ Even where the United States holds the water rights, however, the district has an equitable interest in them.²³⁵

Second, a district's interests in project water depend on that district's organizational form. Many different kinds of entities hold reclamation contracts, including districts, mutual ditch and canal

user fees to pay annual maintenance expenses as well as the capital repayment due to the United States.

JOSEPH L. SAX, *WATER LAW, PLANNING AND POLICY* 119-20 (1968).

²³¹ See *Madera Irrigation Dist.*, 985 F.2d at 1401.

²³² See *Truckee-Carson Irrigation Dist. v. Secretary of the Dep't of the Interior*, 742 F.2d 527, 530-31 (9th Cir. 1984). The Ninth Circuit affirmed the district court, which had held that the district's management rights were limited by the terms of its contract and by Bureau regulations governing project water use. See *Truckee-Carson Irrigation Dist. v. Secretary of the Dep't of the Interior*, No. R-74-34 BRT, slip op. at 16-18 (D. Nev. Aug. 18, 1983) (on file with author).

²³³ See *Stream Adjudications Opinion*, *supra* note 37, at 25 n.4.

²³⁴ These duties include, among other things, the responsibility to take actions needed to protect project water supplies. See *id.* at 27-30.

²³⁵ See *Roos-Collins*, *supra* note 29, at 835. In the general stream adjudication for the Yakima Basin in Washington, the court has held that the United States holds water rights as "trustee" for the Yakima-Tieton Irrigation District. *Washington Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, slip op. at 8 (Super. Ct. Yakima County, Wash. Sept. 14, 1995) (Conditional Final Order Yakima-Tieton Irrigation District-1). In response to a request from the federal government, the court has clarified that the "trust" language imposes no fiduciary duties on the United States. Telephone Conversation with Jim Esget, U.S. Bureau of Reclamation, Yakima, Wash. (Jan. 17, 1996). One commentator has stated that where the Bureau holds legal title to project water rights, "[t]he district holds an equitable interest in the project, as defined by its contract, in trust for its irrigators, who in turn have equitable shares of the district's interest." *Roos-Collins*, *supra* note 29, at 835.

companies, and commercial water supply companies.²³⁶ These entities differ in their ownership of water rights and their relationship to individual water users.²³⁷

Third, a district's interests in project water rights depend on the law of the state in which the district is located. In most states, irrigation districts own the project water rights.²³⁸ In California, on the other hand, landowners within the district who apply water to beneficial use are considered the actual water right owners.²³⁹ Some states also view mutual ditch companies and commercial water companies as owning water rights, in which individual users retain a beneficial interest.²⁴⁰

Even though users always have a beneficial interest, the question of whether a district "owns" project water rights is potentially very important. If a district has an ownership interest in project water, it may retain its entitlement to all of that water even though individual users lose their rights. The district could simply shift that water to other qualified lands within the district,²⁴¹ or increase deliveries to lands not receiving a complete supply. On the other hand, if a district is essentially a carrier or manager with no beneficial interest in receiving project water, it may have no complaint if the government reduces the district's water deliveries.

The United States Interior Solicitor recently took the position that irrigation districts generally hold a very limited interest in reclamation project water:

Unlike the United States and individual water users, in the typical case irrigation districts hold neither a legal nor beneficial interest in the water right. They have no property interest in the water, nor have they in their own right diverted the water to storage. . . . Moreover, the districts

²³⁶ According to the Bureau, the entities that hold reclamation contracts include, but are not limited to, canal companies, conservancy districts, ditch companies, irrigation and drainage districts, irrigation companies, irrigation districts, reclamation districts, service districts, storage districts, water districts, and water users associations. See BUREAU EIS, *supra* note 1, at G-3.

²³⁷ For a comparison of the ownership interests of irrigation districts, mutual ditch companies, and commercial water companies, see Fereday, *supra* note 128, at 13-24.

²³⁸ See DAVID H. GETCHES, WATER LAW 416 (1984).

²³⁹ See *id.*

²⁴⁰ See Fereday, *supra* note 128, at 13-24.

²⁴¹ State law, federal law, and reclamation contracts limit the district's discretion in moving water to new lands. See Benson & Priestley, *supra* note 96, at 89-90.

have not put the water to beneficial use and thus do not hold an interest in the water right.²⁴²

The Ninth Circuit has addressed the issue of district water right ownership at least twice, with seemingly inconsistent results. In *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior*,²⁴³ the court found that the district's contract rights were limited to project management, while the actual project water rights were held by landowners within the district.²⁴⁴ Thus, the district could not claim a taking of private property resulting from a reduction in project water deliveries.²⁴⁵

In *United States v. Imperial Irrigation District*,²⁴⁶ however, the Ninth Circuit found that the district held title to project water rights and that no individual landowner within the district had a property interest entitling them to receive water.²⁴⁷ The court therefore decided that while the acreage limitation provisions of federal reclamation law might deprive some district lands of project water, the water supply of the district itself would not change, and thus, the water redistribution would not impair the district's rights.²⁴⁸ The court decided that the water redistribution comported with the requirement in the Boulder Canyon Project Act²⁴⁹ that the Interior Secretary must satisfy "present perfected rights" acquired under state law and also comported with California law

²⁴² Regional Interior Solicitors Memo, *supra* note 21, at 10 (citing *Truckee-Carson Irrigation District v. Secretary of the Interior*, 742 F.2d 527 (9th Cir. 1984)) (citation omitted). The memorandum made these points in support of the position that the United States was the proper party to file for irrigation water rights associated with the Klamath reclamation project in a water rights adjudication. *See id.* at 1-2, 9-11.

²⁴³ 742 F.2d 527 (9th Cir. 1984).

²⁴⁴ *See id.* at 530.

²⁴⁵ *See id.* at 530-31. An earlier judicial decision had required the Interior Department to change its operations at the Newlands Project to provide additional water to an Indian tribe and its fishery in Pyramid Lake. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 266-67 (D.D.C. 1973). That decision, and Interior Department regulations implementing it, had caused reductions in water deliveries to the district. *See id.* The Ninth Circuit stated: "[t]he *Tribe v. Morton* decision, of course, reduced the amount of water TCID was authorized to divert. But TCID had no water rights. Only the nature of its managerial duty was affected. This does not amount to a taking of property without due process." *Truckee-Carson Irrigation Dist.*, 742 F.2d at 531. Only the landowners were considered to have lost property and were able to claim a taking. *See id.*

²⁴⁶ 559 F.2d 509 (9th Cir. 1977), *rev'd in part on other grounds sub nom.* *Bryant v. Yellen*, 447 U.S. 352 (1980).

²⁴⁷ *See id.* at 528-29. The court found that water rights are held in trust by a water district for common public use. *See id.* at 529. Landowners do not own individual rights to water, nor does such a right attach to their land. *See id.* The class of landowners as a whole shares the right to beneficial use of the water. *See id.*

²⁴⁸ *See id.*

²⁴⁹ Ch. 42, 45 Stat. 1057 (1928) (codified as amended at 43 U.S.C. §§ 617-619b (1994)).

regarding ownership of water rights by and within irrigation districts.²⁵⁰

The two cases do not actually conflict because *Imperial Irrigation District* turned on a specific provision of the Boulder Canyon Project Act.²⁵¹ *Truckee-Carson Irrigation District* cited no authority to support its holding on district water rights,²⁵² but it seems consistent with *Nevada v. United States*²⁵³ and *Ickes v. Fox*,²⁵⁴ and with the appurtenancy requirement of section 8 of the 1902 Reclamation Act.²⁵⁵ The *Truckee-Carson* approach also leads to more uniform and predictable results, in that it bases a district's right to receive project water on the provisions of the district's reclamation contract, rather than on the nature of the contracting organization or on varying state laws regarding water right ownership by districts.²⁵⁶ But reclamation law and contracts by themselves may not determine a district's ownership interests; state law may also be a factor.²⁵⁷

B. District Responsibilities Regarding Water Delivery

While irrigation districts have rights regarding project water, they also have responsibilities to ensure that the water is used in accordance with federal requirements. Clearly, a district must comply with federal mandates applicable to the district itself.²⁵⁸

²⁵⁰ See *Imperial Irrigation Dist.*, 559 F.2d at 527-29.

²⁵¹ See *id.* at 528. The *Imperial* and *Truckee-Carson* cases are entirely consistent in one respect: both upheld federal limitations on project water use. *Imperial* confirmed that the excess lands restrictions of federal reclamation law apply to lands within the Boulder Canyon Project. See *id.* at 527-28. The Supreme Court reversed this holding in *Bryant v. Yellen*, 447 U.S. 352 (1980), on the grounds that Congress did not intend to apply the restrictions to that project. See *Bryant*, 447 U.S. at 368. *Truckee-Carson* upheld Interior Department regulations on Newlands Project water use, issued pursuant to an earlier judicial decision requiring greater federal protection of ecological and tribal trust resources. See *Truckee-Carson Irrigation Dist.*, 742 F.2d at 532.

²⁵² See *Truckee-Carson Irrigation Dist.*, 742 F.2d at 530-31.

²⁵³ 463 U.S. 110 (1983).

²⁵⁴ 300 U.S. 82 (1937); see also *supra* Part V.B.1 (setting forth cases that hold that land-owners who use project water are the beneficial owners of that water).

²⁵⁵ Section 8 provides that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated" 43 U.S.C. § 372 (1994).

²⁵⁶ See *Truckee-Carson Irrigation Dist.*, 742 F.2d at 530-31.

²⁵⁷ See, e.g., *Imperial Irrigation Dist.*, 559 F.2d at 528 (considering California law to determine ownership of water rights).

²⁵⁸ See *Truckee-Carson Irrigation Dist.*, 742 F.2d at 532, where the district violated a federal regulation limiting the total volume of water the district could divert annually. The Ninth Circuit upheld Interior's termination of the district's repayment contract, based on a term of that contract authorizing termination for substantial violation of the contract. See *id.*

Courts have also stated that districts have the primary responsibility for ensuring that their individual users comply with federal reclamation law and for taking action against users in violation. Unfortunately, courts have not convincingly articulated the legal bases for these responsibilities, leaving some uncertainty as to the extent of district duties and the consequences of failing to meet them.

The most detailed statement of the source and nature of district responsibilities appears in *Peterson v. United States Department of the Interior*.²⁵⁹ In *Peterson*, several California districts argued that they had a right to continue delivering water to leased tracts of any size, despite section 203(b) of the 1982 Reclamation Reform Act (RRA).²⁶⁰ In reviewing the statutory scheme of reclamation law, the Ninth Circuit wrote:

Originally, the Department of the Interior was given responsibility not only for constructing the reclamation projects, but also for administering the distribution of water to agricultural users in a project service area. In 1926, however, Congress amended the reclamation laws to remove from the Department the primary responsibility for distributing water and monitoring its use. Omnibus Adjustment Act § 46, 43 U.S.C. § 423e. Instead, the Secretary of the Interior was directed to enter into long-term water service contracts with irrigation districts organized under state law. It was left to the individual districts to execute subcontracts with the actual users of water and to deliver the water. Under this arrangement, the water districts, rather than the United States, had responsibility for ensuring that recipients of project water were complying with federal reclamation law, including the acreage limitation and excess-land sale requirement.²⁶¹

This statement was *dictum*, as the court upheld the challenged RRA provisions with no further mention of who bears primary responsibility for ensuring compliance with reclamation law.

²⁵⁹ 899 F.2d 799, 804 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990).

²⁶⁰ This section of the RRA is also known as the "hammer clause" because it requires districts to choose between amending their contracts to conform to RRA requirements, or paying full cost for all water delivered to tracts exceeding 160 acres. *See id.* at 801; 43 U.S.C. § 390cc(b) (1994).

²⁶¹ 899 F.2d at 804 (citations omitted).

It seems to be generally accepted that a district must not deliver water to a user who is not in compliance with reclamation laws.²⁶² However, *Peterson* does not mean that districts are the primary enforcers of reclamation law. Section 46 of the 1926 Omnibus Adjustment Act — the section referred to by the *Peterson* court — calls for contracts with irrigation districts, but under section 46 the only clear district responsibility under these contracts is to pay the cost of constructing, operating, and maintaining project works during the time they are under control of the United States.²⁶³ Therefore, there is a strong argument that the chief purpose of section 46 is to make districts responsible for arranging repayment, rather than directly enforcing reclamation law requirements.²⁶⁴

²⁶² See, e.g., *Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215, 1216 (9th Cir. 1989) (reaffirming district duties established in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257-58 (D.D.C. 1973)); *United States v. Quincy-Columbia Irrigation Dist.*, 649 F. Supp. 487, 492 (E.D. Wash. 1986).

²⁶³ Section 46 provides in relevant part:

No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary . . . ; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; . . . upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales

43 U.S.C. § 423e (1994).

²⁶⁴ Section 46 requires reclamation contracts to provide only that districts *pay* operation and maintenance costs, rather than assume operation and maintenance responsibilities directly. See 43 U.S.C. § 423e. Moreover, section 46 provides that no excess lands "shall receive water from any project," but does not say whether the district or the government is primarily responsible for denying water to these lands. *Id.* This omission is notable because the statute clearly assigns responsibility for several other tasks. See *id.* And the only real "enforcement" provision of section 46, which allows cancellation of water rights for fraudulent misrepresentation, authorizes the Department of Interior to act, rather than the district. See *id.* The purposes of section 46 and related provisions are discussed generally in *Yellen v. Hickel*, 335 F. Supp. 200, 203-04 (S.D. Cal. 1971), *vacated for lack of standing*, 559 F.2d 509 (9th Cir. 1977). For further discussion of section 46, see also *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), in which the court stated:

While districts have certain duties under reclamation statutes, regulations, and contracts, the U.S. government is ultimately responsible for ensuring that project water users meet federal requirements. This fact is well illustrated by *Orange Cove Irrigation District v. United States*,²⁶⁵ which involved the water users' duty to submit eligibility certification forms.²⁶⁶ The Court of Federal Claims made the following broad statement: "The irrigation districts, rather than the Bureau, are responsible for ensuring that the recipients of project water comply with reclamation law, including any eligibility requirements. The Bureau's role is limited to regulating and to distributing subsidized water to the irrigation districts."²⁶⁷ The court went on to hold, however, that the district's duties were limited to supplying users with blank forms and denying water to those users who failed to submit completed forms. The government had attempted to place additional requirements on the district but the court refused to hold the district to them, largely because their wording was somewhat vague.²⁶⁸ In other words, the court found that the district's duties went no further than carrying out the specific requirements of reclamation statutes, regulations, and contracts.

VIII. FEDERAL POWERS AND DUTIES WITH RESPECT TO PROJECT WATER

The United States has both authorities and responsibilities with respect to the water it develops through reclamation projects. Yet, the cases do not clearly demarcate all of those authorities and responsibilities, primarily because there are few cases defining the issue. While the reclamation program has been in place for over ninety years, the Bureau has generally sought to satisfy irrigators

Section 46 also requires the United States to enter into contracts with irrigation districts organized under state law in the area to be served by the reclamation project. In exchange for the government's promise to supply water, the districts undertake to reimburse the United States for an allocated portion of the costs of constructing the project and to withhold water from excess lands within their boundaries for which recordable contracts have not been executed.

535 F.2d at 1094. That case turned on the enforceability of the acreage limitation and excess lands provisions of section 46, not on who was responsible for enforcing them. *See id.*

²⁶⁵ 28 Fed. Cl. 790 (1993).

²⁶⁶ The 1982 Reclamation Reform Act requires landowners to submit annual forms certifying that they are complying with the RRA. *See* 43 U.S.C. § 390ff (1994).

²⁶⁷ 28 Fed. Cl. at 792.

²⁶⁸ *See id.* at 798-800.

and other project beneficiaries, rather than exercise federal authority contrary to the water users' wishes. For most of its history and in most of the West, the Bureau has avoided confrontation and controversy by siding with irrigators, even when that meant ignoring clear requirements of federal law.²⁶⁹ Thus, only a handful of relevant cases exist. In fact, the vast majority of cases defining federal authority over project water come from two places: California's Central Valley, where the issues have included acreage limitations, excess land sales, and environmental requirements;²⁷⁰ and the Carson-Truckee-Pyramid Lake Basin in Nevada and California, where there has been a century-long tug of war between irrigation demands and tribal, fishery, and environmental needs.²⁷¹

This tradition of inertia makes it somewhat difficult for the Bureau to act today. As noted above, the federal government's

²⁶⁹ In the 1970s, individuals and groups who did not receive project water sued the Bureau for failing to enforce basic, long-established provisions of reclamation law. The government fought these suits and raised a wide variety of arguments, creating the impression that the Bureau would say anything to justify doing nothing. See *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980) (holding that National Land for People, Inc. was entitled to intervene as of right in suit to enjoin Bureau from issuing regulations regarding excess land sales); *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976) (issuing preliminary injunction directing Bureau to initiate formal rulemaking to promulgate regulations regarding procedures and criteria for excess land sales); *Yellen v. Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971) (holding that residency requirement of the Reclamation Act of 1902 was still in effect and that the Bureau's failure to enforce that requirement was "contrary to any reasonable interpretation of the reclamation law . . . , and . . . destructive of the clear purpose of the national reclamation policy."). Even in the 1990s, the Bureau remains unwilling to exercise its authority if such action would upset irrigators. See *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533 (E.D. Cal. 1991) (invalidating regulations implementing the RRA because the Bureau failed to perform an environmental impact statement (EIS) beforehand).

²⁷⁰ *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), reviews the history of the Central Valley Project and addresses the basic acreage limitation issues. A few of the major cases arising from the Central Valley include *California v. United States*, 438 U.S. 645 (1978); *O'Neill v. United States*, 50 F.3d 677 (9th Cir.), cert. denied, 116 S. Ct. 672 (1995); *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397 (9th Cir.), cert. denied, 114 S. Ct. 59 (1993); and *Peterson v. United States Department of the Interior*, 899 F.2d 799 (9th Cir. 1990), cert. denied, 498 U.S. 1003 (1990).

²⁷¹ Some of the cases arising from the Carson-Truckee basin include: *Nevada v. United States*, 463 U.S. 110 (1983); several cases under the name *United States v. Alpine Land and Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993); 887 F.2d 207 (9th Cir. 1989), cert. denied, 111 S. Ct. 60 (1990); 878 F.2d 1217 (9th Cir. 1989); 697 F.2d 851 (9th Cir.), cert. denied, 464 U.S. 863 (1983); *Carson-Truckee Water Conservancy District v. Watt*, 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985); and *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 254 (D.D.C. 1973).

Brief summaries of the basin's water history are set forth in *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1289-96 (9th Cir. 1981), aff'd in part, rev'd in part sub nom. *Nevada v. United States*, 463 U.S. 110 (1983), and in *Alpine Land & Reservoir Co.*, 878 F.2d at 1219-20.

responsibilities, rights, and remedies are often poorly defined by case law, and the Bureau has enacted few regulations to clarify them. Moreover, because irrigators have grown accustomed to a very deferential Bureau of Reclamation, it will be politically difficult for the federal government suddenly to exercise power it has rarely used. But while it may be reluctant to act, the federal government clearly has considerable authority over the use of project water.

A. Sources of Federal Authority over Project Water

The U.S. government owns reclamation project works, such as dams and irrigation canals,²⁷² and it generally holds title to project water rights in its name.²⁷³ Ownership of these assets, however, is not the primary source of federal authority over project water. In fact, the Bureau gains very little authority over project water merely by owning project facilities and water rights. The Supreme Court has clearly stated that project water rights vest in individual landowners who beneficially use the water, not in the government.²⁷⁴ Thus, federal law limits the Bureau's authority to determine the uses of project water which has been applied to beneficial use, even when the water rights remain in the name of the United States.²⁷⁵

Section 8 of the 1902 Reclamation Act, as interpreted by the courts, further reduces the significance of federal ownership.²⁷⁶ State law governs the appropriation and use of federal project water, except where inconsistent with congressional directives. For example, the federal government does not have primary authority

²⁷² "[T]he courts have . . . consistently reaffirmed the proposition that the United States retains ownership of or an interest in management of project facilities." Authority to Provide Water to Stillwater Wildlife Management Area, 97 Interior Dec. 32, 44-45 (1989) (citing, inter alia, *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Ickes v. Fox*, 300 U.S. 82 (1937)).

²⁷³ BUREAU EIS, *supra* note 1, Comments & Responses app. at 124.

²⁷⁴ See *supra* Part V.B.1.

²⁷⁵ As the Supreme Court stated in *Nevada v. United States*:

the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

463 U.S. 110, 126 (1983).

²⁷⁶ See *supra* Part IV.B.

over transfers in place of use because the Ninth Circuit has held that state law governs such transfers. The Bureau has only a right to participate in state procedures for considering and approving changes in use.²⁷⁷ And even though the federal government is the undisputed owner of project dams, it remains subject to state control over dam operations to the extent that such laws and operations affect water distribution and use.²⁷⁸

The Bureau's primary authority over project water is based not on what the government *owns*, but on what it *gives*. Every reclamation project provides a federal benefit — publicly subsidized water — to certain users. In return, the United States has the power to attach conditions to delivery of that benefit. Users must accept those conditions if they want to receive project water.

The Supreme Court clearly established this basis for federal authority over project water in *Ivanhoe Irrigation District v. McCracken*.²⁷⁹ *Ivanhoe* was the first of many cases brought by California districts fighting the acreage limitation and excess lands provisions of federal reclamation law. In considering the validity of contract provisions limiting the delivery of project water to 160 acres, the Supreme Court specifically noted that ownership of water rights was *not* the issue.²⁸⁰ Instead, the Supreme Court held that the United States, having expended public funds to develop reclamation projects,²⁸¹ could place conditions on the receipt of project benefits:

[a]lso beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. . . . [T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. Article VI of

²⁷⁷ See *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 857-58 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983).

²⁷⁸ See *Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425, 1433 (E.D. Cal. 1992) and cases cited therein.

²⁷⁹ 357 U.S. 275 (1958).

²⁸⁰ "At the outset we set aside as not necessary to decision here the question of title to or vested rights in unappropriated water. If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the project . . ." *Ivanhoe Irrigation Dist.*, 357 U.S. at 290-91 (citations omitted).

²⁸¹ See *id.*

the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action.²⁸²

After noting that irrigators would repay the federal government, without interest, for only a fraction of the overall cost of the Central Valley Project, the Court continued:

[i]n short, the project is a subsidy, the cost of which will never be recovered in full In the light of these facts we believe that the language of the Court in *Wickard v. Filburn*, 317 U.S. 111, 131 (1942), is apposite: "*It is hardly lack of due process for the Government to regulate that which it subsidizes.*"²⁸³

From the beginnings of the reclamation program in 1902, the federal government has had statutory authority to regulate the use of the water it subsidizes.²⁸⁴ Moreover, many reclamation contracts contain a provision recognizing the authority of the Interior Department to issue regulations.²⁸⁵ And even though it has entered into a contractual relationship to deliver water, the United States retains its sovereign authority unless surrendered in unmistakable terms.²⁸⁶ Thus, as the provider of subsidized water under reclamation laws and contracts, the federal government has authority over project water regardless of nominal ownership.²⁸⁷

²⁸² *Id.* at 295 (citations omitted).

²⁸³ *Id.* at 295-96 (some citations omitted) (emphasis added). The Ninth Circuit relied on the *Ivanhoe* rationale in rejecting constitutional arguments against the acreage limitation and excess land sales provisions in *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 719 (9th Cir. 1982), *vacated as moot*, 459 U.S. 1095 (1983).

²⁸⁴ Section 10 of the 1902 Reclamation Act authorizes the Secretary of Interior "to perform any and all acts and to make such regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." 43 U.S.C. § 373 (1994). The 1982 Reclamation Reform Act reinforced this authority by giving the Secretary of the Interior the power to prescribe regulations necessary to carry out that act and other provisions of federal reclamation law. *See* 43 U.S.C. § 390ww(c)(1994).

²⁸⁵ The four contracts cited in *supra* notes 175-78 all contain some form of a provision allowing the Department of Interior to prescribe regulations consistent with the contract. *See* Island Irrigation Company contract, § 46(a); Roza Irrigation District contract, § 34; North Unit Irrigation District contract, § 36(a); Tualatin Valley Irrigation District contract, § 33(a); *see also, e.g.*, Truckee-Carson Irrigation Dist. v. Secretary of the Dep't of the Interior, 742 F.2d 527, 532 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985).

²⁸⁶ *See supra* Part VI.A.-B.

²⁸⁷ The nominal ownership of project water rights may have considerable practical significance for the federal government. For example, if a state is considering an application by a landowner or district to transfer project water to a new place of use, the state is less likely to ignore the Bureau if the water rights are held by the United States. Moreover, having nominal title to project water rights allows the federal government to face one less legal or political argument that the water is not "theirs." It is, therefore, not surprising that the Bureau has opposed efforts by the State of Oregon to issue project water right certificates in the name of an irrigation district, rather than the United States. *See* Letter from

B. Specific Federal Powers Regarding Project Water

It is probably not possible to provide a complete list of the federal government's powers as they relate to project water. Again, the Bureau of Reclamation has rarely been bold in exercising control over project water; thus, the nature and limits of federal authority have not been fully explored. The relevant case law, nonetheless, mentions an assortment of specific federal powers.

First, the United States has power to place conditions on water deliveries from reclamation projects.²⁸⁸ These conditions may be of several types, such as required payments,²⁸⁹ mandatory reports,²⁹⁰ or even constraints on water diversions.²⁹¹ States cannot override these conditions, at least those which are directed by Congress.²⁹²

The United States also has the power to change the terms and conditions for receipt of project water. In recent cases, the Ninth Circuit has held, with apparent uneasiness, that the United States can change its policies regarding the delivery of project water. Thus, the court upheld the government's actions in applying the provisions of the RRA,²⁹³ in renegotiating water service contracts to increase districts' payment obligations,²⁹⁴ and in reallocating Central Valley Project water to meet instream needs.²⁹⁵ The federal government, however, can only go so far in altering terms for delivery of project water. As the Ninth Circuit has stated, "Con-

John Keys III, Regional Director, Bureau of Reclamation, to Martha Pagel, Director, Oregon Water Resources (July 22, 1996) (on file with author).

²⁸⁸ As the Ninth Circuit stated in *Israel v. Morton*:

[P]roject water . . . is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which right to continued use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States.

549 F.2d 128, 132-33 (9th Cir. 1977).

²⁸⁹ See *Flint v. United States*, 906 F.2d 471, 476 (9th Cir. 1990).

²⁹⁰ See *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 797 (1993).

²⁹¹ See *Truckee-Carson Irrigation Dist. v. Secretary of the Dep't of the Interior*, 742 F.2d 527, 532 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985).

²⁹² See *California v. United States*, 438 U.S. 645, 673-74 (1978) (holding that the United States must follow state law where it does not interfere with congressional directives).

²⁹³ See *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 821-25 (9th Cir. 1990); *Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 813-14 (9th Cir. 1990).

²⁹⁴ See *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1403 (9th Cir. 1993).

²⁹⁵ See *O'Neill v. United States*, 50 F.3d 677, 681 (9th Cir. 1994).

gress can change federal policy, but it cannot write on a blank slate."²⁹⁶

Another recognized governmental power is the authority to withhold water from reclamation projects. Water users who fail to meet certain federal requirements have no right to continue receiving project water, and the United States has authority to withhold deliveries²⁹⁷ until they comply. The Bureau has denied water to users who violated project-specific regulations on water use,²⁹⁸ failed to submit required eligibility forms,²⁹⁹ or refused to sell their excess lands within an agreed time.³⁰⁰ The Bureau can also stop deliveries to a user who has no contractual right to receive project water³⁰¹ and reduce deliveries to those who are unreasonably wasting water.³⁰² It is certainly possible that other kinds of violations may also cause the Bureau to deny water to the offending user.

²⁹⁶ The court continued:

[T]he old policies deposit a moraine of contracts, conveyances, expectations and investments. Lives, families, businesses, and towns are built on the basis of the old policies. When Congress changes course, its flexibility is limited by those interests created under the old policies which enjoy legal protection. Fairness toward those who relied on continuation of past policies cuts toward protection. Flexibility, so that government can adapt to changing conditions and changing majority preferences, cuts against. Expectations reasonably based on constitutionally protected property rights are protected against policy changes by the Fifth Amendment. Those based only on economic and political predictions, not property rights, are not protected.

Madera Irrigation Dist., 985 F.2d at 1400. The Ninth Circuit's decision leaves a clear impression that *Madera* was a close case and that the government prevailed only because the court found that the United States had never surrendered its sovereign power in unmistakable terms.

²⁹⁷ While it may be a district, rather than the federal government, who directly shuts off water to a noncomplying user, it is the federal government that requires the districts to take the action. See, e.g., *United States v. Quincy-Columbia Basin Irrigation Dist.*, 649 F. Supp. 487, 492 (E.D. Wash. 1986).

²⁹⁸ See *Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215, 1216 (9th Cir. 1989).

²⁹⁹ See *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 795 (Fed. Cl. 1993).

³⁰⁰ See *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 819-20 (9th Cir. 1990).

³⁰¹ See *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1229 (9th Cir. 1989).

³⁰² See *Yuma County Water Users' Ass'n v. Udall*, 231 F. Supp. 548, 549-50 (D.D.C. 1964). This case arises from the Lower Colorado River Basin, where the United States has unique authority over the allocation and distribution of water. See *Arizona v. California*, 373 U.S. 546, 579-81 (1963). Normally, state agencies are responsible for enforcing against wasteful water use, but the Bureau would seem to have a continuing interest in ensuring that project water is not wasted. Cf. *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983).

The government also has the power to enact rules and regulations to carry out reclamation law. Section 10 of the 1902 Reclamation Act provides that "[t]he Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."³⁰³ Section 224(c) of the Reclamation Reform Act contains a similarly broad authorization for rulemaking.³⁰⁴ Courts have used both provisions to uphold the Department of the Interior's regulations and other administrative actions.³⁰⁵ Such regulations may affect the exercise of project water rights, although they generally must not conflict with state water laws.³⁰⁶ Nevertheless, the Bureau receives great judicial deference in interpreting its own regulations.³⁰⁷

A further power recognized by the courts concerns allocation of project water among users. Courts have found that the reclamation laws give the Bureau considerable authority to allocate project water among eligible users. Thus, the Bureau has authority to determine how project water should be divided among different

³⁰³ 43 U.S.C. § 373 (1994).

³⁰⁴ "The Secretary may prescribe regulations and shall collect all data necessary to carry out the provisions of this title and other provisions of Federal reclamation law." *Id.* § 390ww(c) (1994).

³⁰⁵ See *Alpine Land & Reservoir Co.*, 887 F.2d at 214 (upholding land classification regulations under section 10); *United States v. Quincy-Columbia Basin Irrigation Dist.*, 649 F. Supp. 487, 492 (E.D. Wash. 1986) (upholding reporting regulations under both section 10 and section 224(c)); *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 800-01 (1993) (upholding Bureau authority to establish a deadline for returning required forms under section 10). The Ninth Circuit has also held that section 10 authorized the Interior Department's request for reserved water rights on behalf of an Indian tribe affected by a reclamation project. See *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1300 (1981), *aff'd in part, rev'd in part on other grounds sub nom. Nevada v. United States*, 463 U.S. 110 (1983).

³⁰⁶ See *Alpine Land & Reservoir Co.*, 887 F.2d at 211-14, where the Ninth Circuit upheld Interior Department regulations that classified Newlands Project lands as "bench" or "bottom" lands. These regulations effectively determined how much water the lands could receive because the controlling judicial decrees allowed bench lands to receive 4.5 acre-feet per acre, while bottom lands were limited to 3.5 acre-feet per acre. See 887 F.2d at 208. The government could not change those amounts because the court had earlier held that the water duty of Newlands Project lands was determined by actual beneficial use. See *Alpine Land & Reservoir Co.*, 697 F.2d at 853-54. The court later found that the Interior Department could adopt regulations classifying project lands as long as they did not violate state-law standards of beneficial use: "State law regarding the acquisition and distribution of reclamation water applies if it is not inconsistent with congressional directives. . . . Conversely, in the absence of congressional directives, DOI [Department of Interior] can regulate distribution, acquisition, and vested water rights if its regulations are not inconsistent with state law." 887 F.2d at 212 (citations omitted).

³⁰⁷ See *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 370 (9th Cir. 1989).

authorized purposes, such as municipal and irrigation uses.³⁰⁸ The Bureau also has considerable discretion to allocate scarce water supplies among users in the event of a drought.³⁰⁹ One court held that a state cannot infringe on the Interior Department's authority to allocate project water among users.³¹⁰ The Interior Department has asserted its authority to deliver water for tribal and environmental needs in managing the Klamath reclamation project, relying heavily on section 10 of the 1982 Reclamation Act.³¹¹ Courts have shown deference to the Bureau's allocation decisions concerning issues like sharing shortages during droughts³¹² and determining water needs of endangered species.³¹³

C. Federal Duties Regarding Project Water

1. Reclamation Law Requirements

In exercising its authority over project water, the United States must meet several requirements that arise under federal law. The Bureau may have a difficult time reconciling these various requirements. Many of the more interesting reclamation cases of the past twenty-five years have involved conflicts between the Bureau's traditional duties — delivering water for irrigation under reclamation laws and contracts, and complying with state water laws in the process — and its more recently imposed (or heeded) duties under

³⁰⁸ See *Central Arizona Irrigation and Drainage Dist. v. Lujan*, 764 F. Supp. 582, 591 (D. Ariz. 1991); see also *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984) (upholding Secretary's decision to allocate Washoe Project water to meet tribal and endangered species needs, rather than for municipal and industrial supply).

³⁰⁹ See *Westlands Water Dist. v. United States Dep't of the Interior*, 805 F. Supp. 1503, 1507 (E.D. Cal. 1992), *aff'd*, 10 F.3d 668 (9th Cir. 1993).

³¹⁰ In *Lujan*, the court considered an Arizona statute that ranked water uses by order of preference. The statute would have given irrigation priority over artificial groundwater recharge, contrary to the Department of Interior's decision. See 764 F. Supp. at 591. The court stated:

The problem with this statute is that, as it pertains to the operation of the CAP [Central Arizona Project], if interpreted literally it would usurp the power of the Secretary of the Interior to allocate water among users. The CAP is a federally subsidized project, and the federal government is authorized to allocate the resources which flow through the CAP.

The allocation and preferences given to CAP water seems to be within the exclusive province of the Secretary of the Interior; once the preferences are already established, the possible uses of that water are governed by state law.

Id. (citations omitted).

³¹¹ See Regional Interior Solicitors Memo, *supra* note 21.

³¹² See *Westlands Water Dist.*, 805 F. Supp. at 1507.

³¹³ See *Carson-Truckee Water Conservancy Dist. v. Watt*, 549 F. Supp. 704, 710 (D. Nev. 1982), *aff'd*, 741 F.2d 257 (9th Cir. 1984).

the environmental laws and the federal trust responsibility to indian tribes. These are important cases because, as competition for the West's finite water supplies grows more intense, there will be increasing tension between "old" and "new" uses for project water. The following paragraphs review these cases and other authority regarding the federal government's legal duties in running the reclamation program.

The Bureau's most obvious responsibility is to meet the requirements of the reclamation laws,³¹⁴ including generally applicable laws such as the 1902 Reclamation Act, the 1939 Reclamation Project Act, and the 1982 RRA, as well as project authorizing acts and other statutes affecting individual projects. Both kinds of laws impose numerous duties. In broad terms, generally applicable laws address matters such as contracts, payment requirements, acreage limits, and disposal of excess lands,³¹⁵ while project authorizing acts specify such things as individual project purposes, limitations on irrigated acreage for the project, federal spending, and repayment terms.³¹⁶

Some of the major federal responsibilities regarding project water are set forth in section 8 of the 1902 Reclamation Act.³¹⁷ The Bureau must comply with state water laws except those which conflict with congressional directives.³¹⁸ The federal government's obligations and the limits on state power under section 8 are explored in some detail in *supra* Part IV.B.

Section 8, by its own terms, seems to give the Bureau two additional duties: ensuring that (1) project water rights are appurtenant to the land irrigated and (2) use of project water under those

³¹⁴ See *Yellen v. Hickel*, 352 F. Supp. 1300, 1317 (S.D. Cal. 1972), *rev'd*, 559 F.2d 509 (9th Cir. 1977).

³¹⁵ In authorizing a specific project, however, Congress has sometimes exempted that project from the general provisions of reclamation law. The United States has fought extended court battles with California districts over the applicability of certain limitations to specific projects. See *Bryant v. Yellen*, 447 U.S. 352, 352-53 (1980) (determining whether acreage limitations apply to certain lands served by the Boulder Canyon Project); *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), *vacated as moot*, 459 U.S. 1095 (1983) (determining whether lands served from Pine Flat Dam are subject to excess lands provisions); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1094-96 (9th Cir. 1976).

³¹⁶ See, e.g., Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156 (authorizing the San Luis Unit of the Central Valley Project); Act of Mar. 1, 1956, ch. 75, 70 Stat. 32 (authorizing Department of the Interior to construct, operate, and maintain the Ventura River Project in California).

³¹⁷ See 43 U.S.C. §§ 372, 383 (1994).

³¹⁸ See *id.* § 383.

rights does not exceed "beneficial use."³¹⁹ According to the Supreme Court, these duties are congressional directives regarding project water that the Bureau must meet, even if there is a conflicting state law. In *California v. United States*, the Supreme Court placed these requirements on the same plane as the acreage limitation,³²⁰ enforcement of which is certainly a federal duty.³²¹ The Ninth Circuit has held that beneficial use is to be *determined* by state law, and the federal government cannot unilaterally determine what level of use is "beneficial."³²² Nevertheless, the Bureau has a duty to see that project water deliveries are limited to beneficial use.³²³

³¹⁹ Section 8 begins by requiring the Interior Department to proceed in conformity with state water laws, but then states, "[t]hat 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." *Id.* § 372.

³²⁰ In a series of footnotes, the Court acknowledged that certain congressional directives in the 1902 Reclamation Act override inconsistent state laws:

Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States. Congress provided in § 8 itself that the water right must be appurtenant to the land irrigated and governed by beneficial use, and in § 5 Congress forbade the sale of reclamation water to tracts of land of more than 160 acres.

California v. United States, 438 U.S. 645, 668 n.21 (1978). Congress intended that, "specific congressional directives which were contrary to state law regulating distribution of water would override that law." *Id.* at 672 n.25. The Court later observed:

It is worth noting that the original Reclamation Act of 1902 was not devoid of such directives. That Act provided that the charges for water should "be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and . . . be apportioned equitably" and that water rights should "be appurtenant to the land irrigated, and beneficial use . . . the basis, the measure, and the limit of the right"; the Act also forbade sales to tracts of more than 160 acres. Despite these restraints on the Secretary, however, it is clear from the language and legislative history of the 1902 Act that Congress intended state law to control where it was not inconsistent with the above provisions.

Id. at 678 n.31.

³²¹ See *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715-17 (9th Cir. 1982), *vacated as moot*, 459 U.S. 1095 (1983); see also *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 527 (9th Cir. 1977), *rev'd on other grounds sub nom. Bryant v. Yellen*, 447 U.S. 352 (1980) (pertaining to federal duties regarding excess land sales); *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449, 450-51 (D.D.C. 1976).

³²² In *United States v. Alpine Land & Reservoir Co.*, the Ninth Circuit found that Congress intended to defer to state law governing beneficial use in passing the 1902 Reclamation Act, and that the "United States' interest in the determination of a user's water duty, as declared by the statute, is to see that beneficial use is its measure and limit." 697 F.2d 851, 854, 856 n.3 (9th Cir. 1983). For a further discussion of the beneficial use requirement, see *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1492-93 (9th Cir. 1992).

³²³ In the recent decision in *Nebraska v. Wyoming*, 115 S. Ct. 1933 (1995), the Supreme Court again acknowledged that beneficial use of project water is a federal requirement under section 8. See *id.* at 1942. More importantly, the Court allowed Wyoming to pro-

In practice, the Bureau has failed to meet many of its duties under the reclamation laws, particularly those which are unpopular with irrigators. Lax oversight of project water use has created a widespread problem of unauthorized uses, sometimes known as "water spreading."³²⁴ The Bureau has also received sharp criticism for failing to implement the water conservation provisions of the RRA.³²⁵

In the 1970s, the Bureau was sued after it refused to enforce the residency requirement³²⁶ and acreage limitation/excess lands³²⁷ provisions of reclamation law. In defending these cases, the government raised a variety of arguments in justifying its practices, but the courts ordered the Bureau to take action on these reclamation law requirements.³²⁸ The Ninth Circuit made it clear that statutory mandates survive both erroneous legal opinions and bureaucratic inaction:

It is true that, in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first upon the Wilbur letter which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter but instead decided against nonenforcement of the 160-acre limitation because it had not been enforced before. Inaction based on

ceed with a claim *against the United States* for failing to limit deliveries of project water in Nebraska to "beneficial use." See *id.* at 1942-43. Wyoming argued that the Bureau's failure to enforce the beneficial use requirement violated an implied condition of the Supreme Court's earlier decree governing the North Platte River. See *id.* at 1935.

³²⁴ See *supra* note 20 and accompanying text.

³²⁵ See National Wildlife Federation, Water Resources Program, *Gathering Dust: The Bureau of Reclamation's Failure to Enforce Statutory Water Conservation Requirements* ii (Feb. 1991) (on file with author).

³²⁶ See, e.g., *Yellen v. Hickel*, 335 F. Supp. 200, 200 (S.D. Cal. 1971).

³²⁷ See *National Land for People v. Bureau of Reclamation*, 417 F. Supp. 449, 449 (D.D.C. 1976). The United States did sue the Imperial Irrigation District to enforce acreage limitation/excess lands provisions, but did not appeal an adverse decision, leaving intervenors to carry on the case. See *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 509 (9th Cir. 1977), *rev'd sub nom.* *Bryant v. Yellen*, 447 U.S. 352 (1980).

³²⁸ See *National Land for People*, 417 F. Supp. at 452-53; *Yellen*, 352 F. Supp. at 1317-19. A later case states that *National Land for People* was dismissed as moot by the D.C. Circuit based on federal assurances that the Bureau would expeditiously write rules and would suspend excess land sales, but the court reinstated the appeal when the Bureau reneged on its pledge to suspend sales. See *County of Fresno v. Andrus*, 622 F.2d 436, 437 (9th Cir. 1980).

previous inaction cannot be elevated into an administrative determination to which the courts should defer.³²⁹

The Bureau also has a responsibility under the reclamation laws to fulfill its contractual duties.³³⁰ In performing its contracts, the federal government has a duty of good faith and fair dealing.³³¹ However, as noted above, the United States always maintains its sovereign powers "unless surrendered in unmistakable terms," and contract terms generally excuse the federal government if it fails to deliver water for good cause.³³²

2. *Environmental and Tribal Trust Responsibilities*

The Bureau also has a duty to comply with federal environmental laws including, but not limited to, the ESA³³³ and the National Environmental Policy Act (NEPA).³³⁴ The ESA provides that all federal agencies shall, in consultation with the Interior Secretary, ensure that their actions are not likely to jeopardize the continued existence of any listed species.³³⁵ Section 7(a)(1) places an affirmative duty to conserve listed species on the Interior Department and all other federal agencies.³³⁶ NEPA requires federal agencies to prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment"³³⁷ and to conduct a less detailed environmental review for federal actions not meeting this test.³³⁸

The Bureau has taken certain actions to meet its ESA responsibilities in the Carson-Truckee-Pyramid Lake Basin, where it has a duty to conserve two listed fish species.³³⁹ The Bureau has operated the multi-purpose Washoe Project to benefit the listed fish

³²⁹ *Imperial Irrigation Dist.*, 559 F.2d at 540. The Supreme Court reversed on the ground that the Boulder Canyon Project Act was intended to exempt landowners on that project from the acreage limits of the reclamation laws. See *Bryant v. Yellen*, 447 U.S. 352, 368-69 (1980).

³³⁰ See, e.g., *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 731 (E.D. Cal. 1993), *aff'd*, 50 F.3d 677 (9th Cir. 1995).

³³¹ See *Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 800 (1993).

³³² See *supra* Part VI.B.

³³³ See 16 U.S.C. §§ 1531-1544 (1994).

³³⁴ See 42 U.S.C. §§ 4321-4370d (1994).

³³⁵ See 16 U.S.C. § 1536(a)(2).

³³⁶ See *id.* § 1536(a)(1).

³³⁷ See 42 U.S.C. § 4332(2)(c).

³³⁸ See 40 C.F.R. § 1501.4(b)(1996); see also *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533, 1538 (E.D. Cal. 1991) (interpreting the EIS requirement in the reclamation context).

³³⁹ See *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 259 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985).

and has refused to sell the water for municipal and industrial purposes.³⁴⁰ The Ninth Circuit, in *Carson-Truckee Water Conservancy District v. Clark*, upheld these actions under the ESA, finding that section 7(a)(1) and other provisions of the Act “direct that the Secretary actively pursue a species conservation policy.”³⁴¹ The Bureau also consulted with the U.S. Fish and Wildlife Service, as required by ESA section 7(a)(2), before adopting a set of long-term operating criteria and procedures for water use on the Newlands Project.³⁴² One reason for imposing these measures on the project was to meet ESA requirements.³⁴³

The Bureau has shifted water from irrigation to fish and wildlife uses on the Central Valley Project and has defended its action under the ESA as well as under a provision of the 1992 Central Valley Project Improvement Act (CVPIA) mandating dedication of 800,000 acre-feet of project water to ecological needs.³⁴⁴ The *Barcellos & Wolfson* court held that “Congress has mandated both expressly and implicitly that the Bureau make water allocations for environmental concerns,”³⁴⁵ and that project water users — regardless of the water rights they hold — cannot require the Bureau to disobey the law.³⁴⁶ The Ninth Circuit affirmed the district court in *O’Neill v. United States*,³⁴⁷ holding that the United States had not violated its contracts with irrigation districts in following the statutory mandates of the ESA and the CVPIA.³⁴⁸

³⁴⁰ See *id.* at 259-60.

³⁴¹ *Id.* at 262.

³⁴² See Authority to Provide Water to Stillwater Wildlife Management Area, 97 Interior Dec. 32, 40 (1989).

³⁴³ See *id.* at 37.

³⁴⁴ See *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 721 (E.D. Cal. 1993), *aff’d sub nom. O’Neill v. United States*, 50 F.3d 677 (9th Cir.), *cert. denied*, 116 S. Ct. 672 (1995). Section 3406(b)(2) of the Reclamation Projects Authorization and Adjustment Act of 1992 requires the Interior Secretary to “dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title.” Reclamation Projects Authorization Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600, 4715.

³⁴⁵ *Barcellos & Wolfson, Inc.*, 849 F. Supp. at 733 (citing section 3406(d) of the CVPIA and section 7(a)(2) of the ESA).

³⁴⁶ See *id.* at 732. The ESA “provides no exemption from compliance to persons possessing state water rights, and thus [the water district]’s state water rights do not provide it with a special privilege to ignore the Endangered Species Act.” *Id.* (quoting *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992)).

³⁴⁷ 50 F.3d 677 (9th Cir. 1995).

³⁴⁸ See *id.* at 687. The CVPIA also required the Bureau to comply with state water law before reallocating water, but the United States already held project water rights sufficient for the reallocation. See *Westlands Water Dist. v. United States Dep’t of Interior*, 43 F.3d 457, 461 (9th Cir. 1994).

These cases help define what the federal government *can* do under the ESA, but there is unfortunately no case that determines what the Bureau *must* do substantively to comply with the ESA in operating a project.³⁴⁹ The Bureau's determinations on the measures needed to comply with the ESA would be entitled to some deference.³⁵⁰

A recent U.S. district court decision³⁵¹ delineates the ESA's procedural requirements where reclamation project operations may affect listed species. The court stated that the Bureau violates the ESA when it renews water service contracts or delivers water under these contracts unless it can ensure that its action causes no jeopardy to listed species. The Interior Department can meet this ESA requirement only by completing a consultation and issuing a biological opinion before any action, or by complying with ESA section 7(d), which prohibits irretrievable commitments of resources during the consultation process.³⁵² The Court rescinded Central Valley Project water service contracts that were signed before consultation was completed.³⁵³

The Bureau must also comply with NEPA in preparing rules to carry out the reclamation program,³⁵⁴ as well as in committing water to a particular use through a water marketing program or a contract.³⁵⁵ On the other hand, NEPA does not require the Bureau

³⁴⁹ *Carson-Truckee Water Conservancy District v. Clark* specifically did not address this issue. See 741 F.2d 257, 262 n.5 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985). In another Carson-Truckee basin case, the Pyramid Lake Paiute Tribe challenged the use of Newlands Project water to irrigate lands on a Navy base. See *Pyramid Lake Paiute Tribe v. United States Dep't of the Navy*, 898 F.2d 1410, 1413 (9th Cir. 1990). The Ninth Circuit found that the practice did not violate the ESA, largely because the Fish and Wildlife Service issued a "no jeopardy" biological opinion. See *id.* at 1421. That case, however, dealt with the Navy's duties under the ESA in leasing lands for irrigation with project water, rather than with the Bureau's ESA responsibilities in operating the project itself. See *id.* at 1412.

³⁵⁰ See *Carson-Truckee Water Conservancy Dist. v. Watt*, 549 F. Supp. 704, 710 (D. Nev. 1982), *aff'd in part, vacated in part on other grounds*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985).

³⁵¹ *Natural Resources Defense Council v. Patterson*, No. Civ. S-88-1658 LLK (E.D. Cal. Jan. 16, 1997).

³⁵² See *id.*, slip op. at 16-17.

³⁵³ See *id.*, slip op. at 24.

³⁵⁴ See *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533, 1534 (E.D. Cal. 1991) (requiring the Bureau to prepare an EIS on rules to implement the 1982 Reclamation Reform Act).

³⁵⁵ See *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 851 (9th Cir. 1979). In *Westlands Water District v. Natural Resources Defense Council*, however, the Ninth Circuit upheld the Bureau's reallocation of Central Valley Project water without complying with NEPA, based on the specific and mandatory language of the CVPIA. See 43 F.3d 457, 462 (9th Cir. 1994).

to conduct an environmental review of its routine project operations.³⁵⁶ The Bureau has prepared detailed guidance on how it will comply with NEPA.³⁵⁷

The Bureau must also comply with *state* laws that impose minimum instream flow or bypass requirements. The federal government argued in *Natural Resources Defense Council v. Patterson*³⁵⁸ that it need not comply with California Fish and Game Code section 5937, which requires dam owners to allow enough water to pass through their dams to maintain downstream fisheries.³⁵⁹ Section 5937 was a fish and wildlife law, argued the Bureau, not the sort of state water law that the federal government need obey under section 8 of the Reclamation Act of 1902.³⁶⁰ The court disagreed, stating that because section 5937 limited the Bureau's ability to appropriate water for irrigation, it fell within the scope of section 8 and therefore bound the federal government.³⁶¹

The federal government also has a fiduciary duty to protect the trust assets of indian tribes.³⁶² These assets include, among other things, reserved water rights³⁶³ and fishing rights, whether these rights are claimed under treaty or executive order.³⁶⁴ In *Pyramid Lake Paiute Tribe of Indians v. Morton*,³⁶⁵ a federal district court discussed the federal government's tribal trust responsibility:

³⁵⁶ See Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 234 (9th Cir. 1990).

³⁵⁷ See BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK (1990).

³⁵⁸ 791 F. Supp. 1425 (E.D. Cal. 1992).

³⁵⁹ See *id.* at 1428, 1431.

³⁶⁰ See *id.* at 1431.

³⁶¹ See *id.* at 1435. The court stated:

[T]o the extent [section] 5937 preserves from appropriation by the Bureau of an amount of water necessary for instream uses, it relates to the appropriation or use of water used in irrigation. Accordingly, [section] 5937 must be held to be within the purview of state laws made applicable to the Bureau through Section 8.

Id. The court recently held, in a later decision in the same case, that its procedural ESA ruling deprived it of jurisdiction to decide whether section 5937 applied to the Bureau. See *Natural Resources Defense Council v. Patterson*, Civ. No. S-88-1658 LKK, slip op. at 32-25 (E.D. Cal. Jan. 16, 1997).

³⁶² The Ninth Circuit discussed the federal government's duty to protect Indian water rights at some length in *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1297-1301 (9th Cir. 1981), *aff'd in part, rev'd in part on other grounds sub nom. Nevada v. United States*, 463 U.S. 110 (1983).

³⁶³ See Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Dists. v. United States, 832 F.2d 1127, 1132 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988).

³⁶⁴ See *Parravano v. Babbitt*, 70 F.3d 539, 545 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996).

³⁶⁵ 354 F. Supp. 252 (D.D.C. 1973).

"[t]he United States, acting through the Secretary of Interior, 'has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.'"³⁶⁶

The *Pyramid Lake v. Morton* case defined the Bureau's tribal trust duty in the operations of the Newlands Project. Newlands was perhaps the original reclamation project, even predating the creation of the Reclamation Service within the Interior Department.³⁶⁷ The project had long been operated to the detriment of Pyramid Lake and the Paiute Tribe and to the benefit of irrigators, who had rights to project water under various decrees and contracts.³⁶⁸ Beginning in 1967, the Interior Department had begun issuing regulations covering Newlands Project water use in an effort to provide some additional water to Pyramid Lake and the Tribe.³⁶⁹ The court in *Pyramid Lake v. Morton*, however, found that the Interior Secretary had failed to meet his trust responsibility, which was to "insure to the extent of his power, that all water not obligated by court decree or contract with the District [went] to Pyramid Lake."³⁷⁰ The court found that the regulations failed to prevent waste by the Truckee-Carson Irrigation District or to limit the irrigators to their decreed water rights.³⁷¹ The court held the regulations unlawful³⁷² and established a new, detailed set of operating criteria and procedures for the project to "fulfill the Secretary's fiduciary and legal obligations to the Tribe."³⁷³ The operating criteria and procedures have remained in place and enforceable despite legal defeats suffered by the United States and the Tribe on related issues.³⁷⁴

Tribes and irrigators fought over the allocation of project water on Montana's Flathead Reservation in *Joint Board of Control of*

³⁶⁶ *Id.* at 256 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

³⁶⁷ Only days after the 1902 Reclamation Act was passed, the Interior Secretary directed the U.S. Geological Survey (USGS) to initiate the project. *See Authority to Provide Water to Stillwater Wildlife Management Area*, 97 Interior Dec. 32, 34 (1989). The project proposal is set forth in a 1903 memorandum between the Secretary and the Director of the USGS. *See id.*

³⁶⁸ *See id.* at 34-35.

³⁶⁹ *See Pyramid Lake Paiute Tribe of Indians*, 354 F. Supp. at 254-55.

³⁷⁰ *Id.* at 256.

³⁷¹ *See id.* at 257.

³⁷² *See id.* at 258.

³⁷³ *Id.* at 261. The court attached the new operating criteria and procedures to the end of the opinion. *See id.* at 262-66.

³⁷⁴ *See Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215, 1217 (9th Cir. 1989).

the Flathead, Mission and Jocko Irrigation Districts v. United States.³⁷⁵ The Confederated Salish and Kootenai Tribes had sued in 1985 to enjoin the U.S. Bureau of Indian Affairs (BIA), which acted as "Officer-in-Charge" of the irrigation project, from distributing water to non-Indian irrigation districts in a manner that severely depleted reservation streamflows and left tribal fisheries irreparably harmed.³⁷⁶ After the tribes obtained a temporary restraining order, the BIA in 1986 established an operating strategy that better protected the tribal fishery but decreased the amount of water available to the districts.³⁷⁷ The districts then sued, arguing that the BIA had abused its discretion by adopting the operating strategy without considering the irrigators' rights.³⁷⁸ The Ninth Circuit held that even though the Flathead Reservation water rights had not been adjudicated, the BIA still had to allocate water to the tribes under their reserved rights, which were senior to the district water rights.³⁷⁹ Furthermore, in determining the quantity of water that must be delivered to protect tribal fishing rights, the BIA acts as trustee for the tribes.³⁸⁰

³⁷⁵ 832 F.2d 1127, 1129 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988).

³⁷⁶ See *id.* at 1129-32. The Department of the Interior has authority separate from the reclamation laws to provide for irrigation on Indian reservations. See 25 U.S.C. §§ 381-390 (1994); *Hackford v. Babbitt*, 14 F.3d 1457, 1467-68 (10th Cir. 1994).

³⁷⁷ See *Joint Bd. of Control*, 832 F.2d at 1129.

³⁷⁸ See *id.* The district court issued the preliminary injunction sought by the districts. See *Joint Bd. of Control of the Flathead, Mission & Jocko Irrigation Dists. v. United States*, 646 F. Supp. 410, 427 (D. Mont. 1986), *rev'd*, 832 F.2d 1127 (1987), *cert. denied*, 486 U.S. 1007 (1988).

³⁷⁹ See *Joint Bd. of Control*, 832 F.2d at 1132. Even though the *Joint Board of Control* case involved an indian irrigation project, its holding seems equally applicable to reclamation projects because the case turned on federal agency duties under prior appropriation and trust principles rather than on any special power or duty relating to Indian projects. See *id.*

³⁸⁰ See *id.* The Ninth Circuit reversed the district court, which had held that the BIA must provide a "just and equal distribution" of all reservation waters. See *Joint Bd. of Control*, 646 F. Supp. at 426. According to the Ninth Circuit:

The action of the BIA in establishing stream flow and pool levels necessary to protect tribal fisheries is not unreviewable. In making its determination, however, the BIA is acting as trustee for the Tribes. Because any aboriginal fishing rights secured by treaty are prior to all irrigation rights, neither the BIA nor the Tribes are subject to a duty of fair and equal distribution of reserved fishery waters. Only after fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the *remaining* waters among irrigators of equal priority.

Joint Bd. of Control, 832 F.2d at 1132.

The United States' specific duties in protecting tribal trust assets will obviously depend on the circumstances of a given situation.³⁸¹ The *Pyramid Lake v. Morton* and *Joint Board of Control* cases, however, clearly show that the federal government has a duty to protect tribal interests even where a tribe's reserved water rights are unadjudicated and non-Indian irrigators have long been the favored recipients of project water. Federal and state courts have reached similar conclusions regarding federal duties in operating the Yakima Project to provide water for the tribal fishery of the Yakama Indian Nation.³⁸²

IX. CONCLUSION

Controversies over the use of the West's public natural resources are often argued in shorthand terms that oversimplify and mischaracterize the real issues. So it is with the debate over who controls project water. Simple notions of "federal supremacy," "state sovereignty," and "private property" all are valid to some degree, but none comes close to telling the whole story.

The western states have broad authority over their waters, but they cannot trump congressional directives. Water users have certain property rights in project water, but these rights are subject to important limitations. Districts, also, have significant rights and responsibilities, but these entities essentially play the role of manager and middleman. The United States has extensive powers and duties under federal law with respect to project water, even though the federal government has largely deferred to state water law and does not hold the beneficial interest in project water rights.

Thus, the federal government, states, districts, and private water users all have some rights and responsibilities with respect to pro-

³⁸¹ Two other cases have indicated that, in the Carson-Truckee-Pyramid Lake Basin, the tribal trust responsibility may coincide with the Bureau's duties under the ESA. See *Pyramid Lake Paiute Tribe v. United States Dep't of the Navy*, 898 F.2d 1410, 1421 (9th Cir. 1990); *Carson-Truckee Water Conservancy Dist. v. Watt*, 549 F. Supp. 704, 713 (D. Nev. 1982), *aff'd in part, vacated in part on other grounds*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985). Obviously, this may not be the case where there are tribal trust assets but no endangered species or where the Bureau's trust duties include supplying irrigation water to a tribe. See *Authority to Provide Water to Stillwater Wildlife Management Area*, 97 Interior Dec. 32, 39 n.6 (1989).

³⁸² See *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1035 (9th Cir.), *cert. denied*, 474 U.S. 1032 (1985); *Washington Dep't of Ecology v. Acquavella*, No. 77-2-01484-5 (Super. Ct. Yakima County, Wash. Apr. 2, 1996) (Memorandum Opinion Regarding Motion to Limit Treaty Water Right For Fish To Natural Flow); *Washington Dep't of Ecology v. Acquavella*, No. 77-2-01484-5 (Super. Ct. Yakima County, Wash. Dec. 22, 1994) (Memorandum Opinion Regarding "Flushing Flows").

ject water. The specific nature of those rights and responsibilities must be determined case-by-case, based on a number of factors.³⁸³ Most of those factors are variable, and few are constant.

The question, "Whose water is it?" is too involved to be answered on a bumper sticker, and too important to be disregarded or misunderstood. The Bureau delivers a vast amount of water, chiefly for irrigation, especially in California and the Pacific Northwest. Depending upon who controls that water, it may continue to be used for irrigation, or it may go to "new" purposes such as cities, high-tech industries, or instream flows. The answer may determine the fate of many farmers, native species, and communities whose existence is closely tied to the rivers of the West.

³⁸³ For further information on reclamation project water issues, particularly those related to environmental problems, see generally NATURAL RESOURCES LAW CENTER, *supra* note 22.

