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BUREAU OF RECLAMATION REQUIRED TO COMPLY WITH CALIFORNIA WATER ALLOCATION PROCEDURES

WATER LAW—FEDERAL RECLAMATION PROJECTS: The United States Bureau of Reclamation need not comply with state water laws in obtaining water to be used for federal reclamation projects but will be legally required to file in accordance with state laws in order to determine the availability of water and to give adequate notice of the reclamation project. *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), cert. granted, 54 L. Ed.2d 477 (Dec. 6, 1977) (No. 77-285).

The federal Reclamation Act of 1902¹ authorized the construction of federal reclamation projects in the arid and semiarid regions of the western United States. At the time the Act was adopted, water was appropriated in California by physically diverting the water and applying it to a beneficial use. Subsequently, California developed a modern permit system which is currently governed by the California Water Code.² This statutory scheme includes a procedure for the appropriation of unappropriated water, requiring the approval of the California State Water Resources Control Board.³ This case involves the California Board, the United States Bureau of Reclamation, and the delicate area of federal-state relations in the water reclamation field.

Beginning early in this century, Congress has authorized various reclamation projects under special reclamation legislation. The Central Valley Project was one of these projects. The Central Valley Project was originally a California state project,⁴ later inherited by the federal government.⁵ The Project's purpose was to develop the Sacramento and San Joaquin Rivers and their tributaries into a well coordinated system and to regulate agricultural, industrial, and municipal uses in the Central Valley.⁶ The Central Valley Project gradually expanded with Congressional approval of additional units.

1. 43 U.S.C. §§ 371-616 (1970).

2. Cal. Water Code § 1 *et seq.* (West 1943).

3. *Id.* § 179 (hereinafter cited as the California Board).

4. *Id.* §§ 11100-11925.

5. Rivers and Harbors Act of August 30, 1935, Pub. L. No. 74-409, 49 Stat. 1028 (1935); Act of June 22, 1936, Pub. L. No. 74-739, 49 Stat. 1597 (1936); Rivers and Harbors Act of August 26, 1937, Pub. L. No. 75-392, 50 Stat. 844, 850 (1937).

6. Cal. Water Code § 11200 *et seq.* (West 1943).

Involved in this case is one of those units, the New Melones Project.⁷

In 1975 the United States sought a declaratory judgment to determine *inter alia*, whether it could take unappropriated water for use in federal reclamation projects in California. It sought to do this without the formality of applying for a permit with the state of California.⁸ The Department of the Interior [hereinafter the Department] and the California Board had established a course of dealing concerning the use of California water, namely, the Department regularly applied to the California Board for water permits for their reclamation projects. In 1973 the Department applied for two new appropriations and sought to have two older appropriations assigned to them, a total of four permits from the Stanislaus River. The California Board concluded that there was adequate unappropriated water available to supply the Department's requests, yet the California Board proceeded to apply conditions subsequent to the assigned permits and new permits. These conditions placed upon the water permits by the California Board are the crux of the case. The United States contends that California has no authority to place restrictions upon federal water rights; contrariwise, California claims that federal water rights are subject to any of its conditions, terms, or limitations.

Protests were received opposing the four applications by individuals, companies, public agencies, and private associations. The protests involved environmental concerns and purported detriment to prior appropriators as a result of federal diversion plans.⁹ After citing these concerns the California Board approved the permits and proceeded to place twenty-five conditions upon their use.

The substantive issue involves an analysis of Section 8 of the Act.¹⁰ Specifically, does that section require that the federal government comply with state restrictions on water permits procured for its project pursuant to the law of prior appropriation? The district court in interpreting the Act extensively analyzed its historical background, ranging from the desires of President Theodore Roosevelt to

7. Flood Control Act of December 22, 1944, Pub. L. No. 78-534, 58 Stat. 887 (1945); Flood Control Act of October 23, 1962, Pub. L. No. 87-874, 76 Stat. 1180, 1191 (1962).

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

9. *Id.* at 881. The official board decision documented four main concerns. First, that there was at present and within the foreseeable future no need for the additional quantities of water that would be made available by the New Melones dam. Second, that the natural recreation and fishing that would be eliminated behind the dam would not be reasonably replaced by lake fishing and lake recreation. Thirdly, that there would be an unknown effect upon the Stanislaus River salmon fishing industry, which needed more analysis. Fourth, that the total recreation and fishing resource outweighed the need for additional hydroelectric power.

10. 43 U.S.C. §383 (1970).

the contentions of the state's righters led by Congressman Mondell. Judge MacBride concluded that such historical analysis does not clearly indicate an answer; instead he indicated that the Act implies only a strong national policy for the reclamation of western acreage. Nonetheless, the judge decided that the federal government for purposes of comity, must comply with the forms of state law in order to determine whether unappropriated water is available and to give formal notice to the host state.

The district court also considered the available common law relied upon by both parties, *Nebraska v. Wyoming*,¹¹ *Nebraska v. Wyoming*,¹² *Ivanhoe Irrigation District v. All Parties*,¹³ *Fresno v. California*,¹⁴ and *Arizona v. California*.¹⁵ These cases were not clearly supportive of either party but were more supportive of the United States than California. The statutes cited by California were held not to imply that the Act surrendered the responsibility of the United States in controlling and operating federal reclamation projects.¹⁶ Lastly, administrative practices interpreting the Act favorably to the California position were held to be supportive of the argument of the United States: namely, that the United States has complied with state filing requirements as a matter of comity.¹⁷

The district court granted summary judgment for the United States, concluding that California may not impose any conditions subsequent on newly appropriated water rights acquired by the federal government and that the California Board must grant water permits to the United States if unappropriated water exists. However, for reasons of comity the United States must first apply to the California Board for a determination that unappropriated water exists.¹⁸

On appeal, the Ninth Circuit affirmed the district court's decision with one minor modification.¹⁹ The decision was supported by *Hancock v. Train*,²⁰ which basically held that federal installations are subject to state regulation only where the Congressional intent to do so is clear and unambiguous. Congressional intent to require federal

11. 295 U.S. 40 (1934).

12. 325 U.S. 589 (1945).

13. 357 U.S. 275 (1958).

14. 372 U.S. 627 (1963).

15. 373 U.S. 546 (1963).

16. *United States v. California*, 403 F. Supp. 874, 896 (E.D. Cal. 1975).

17. *Id.* at 899.

18. The district court also decided the issues of equitable estoppel and res adjudicata pertaining to the procedural aspects of the case.

19. *United States v. California*, 558 F.2d 1347 (9th Cir. 1977).

20. 426 U.S. 167 (1976).

reclamation projects to submit to state control regarding water permits and conditions subsequent was not clear and unambiguous within the Act. Additionally, the court pointed out that the Act could not have intended compliance with California water permit conditions since these water permits were non-existent at the time the Act was passed. The modification of the district court's judgment is found in the Ninth Circuit's declaration that the United States must apply to the California Board as a matter of law rather than comity.

The impact of this case of first impression is not wholly clear. The decision was quite significant in terms of rejecting state conditions imposed on new permits for unappropriated water in federal reclamation projects. Yet presently most of the water in the West is already appropriated; therefore, the practical consequences of the decision could be minuscule. Even if there was substantial unappropriated water existing in the West, states could redefine unappropriated water or determine that no unappropriated water exists. The practical significance of this decision will be great if future decisions exempt not only new appropriations of formerly unappropriated water rights from state imposed conditions, but also exempt water rights obtained by other means. Water rights may be acquired from the state of California by assignment, by negotiated purchase from private parties, or by way of inverse condemnation by the federal government. If this decision is affirmed and expanded in the future, theoretically the United States could purchase in the free market all the appropriated water it required. By purchasing vested water rights for use in federal reclamation projects, the federal government could obtain these rights free from state imposed terms and conditions. By so obtaining such water rights, federal reclamation projects would be free from state control. Theoretically, this could place substantial western water rights within federal control. Practically speaking, the imagined takeover by the federal government of western waters is neither feasible nor possible.

But this decision could have far reaching effects on the future development of the geophysical western United States. The Ninth Circuit has recognized a need for federal control and operation of federal reclamation projects in order to promote long-term regional goals. Whether a federal western water policy will become dominant over state water policies and plans will be decided by the United States Supreme Court. This decision will be eagerly awaited by every western state that wishes to control its own water resource destiny.

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