Reborn Federalism in Western Water Law: The New Melones Dam Decision

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American federalism, wrought by early patriots who feared a concentration of national power, is a product of the unique history, tradition, and experience of the American nation. In response to historical necessity or convenience, however, the federal tradition has been eroded over the years by an increasing concentration of power at the national level. The activities of all branches of the federal government have contributed to this erosion; the judicial branch has more expansively defined federal power and the legislative and executive branches have more willingly wielded it. This development, however, has been partially reversed by the emergence of a new federalism, under which both Congress and the courts have given new emphasis to the role of

1. Congress has recently enacted several laws that allow the states to exercise substantial authority in matters affecting national policy. For instance, the Clean Water Act of 1972 authorizes the states to adopt permit systems for the control of water pollution and to apply their permit systems to federal agencies. See 43 U.S.C.A. §§ 1251-1376, 1323 (West Supp. 1978). The Clean Air Act of 1977 similarly authorizes states to adopt implementation plans for the control of air pollution and to apply their plans to federal agencies. See 42 U.S.C. §§ 7401-7642, 7418 (West Supp. 1978). The Deepwater Ports Act of 1975, 33 U.S.C. §§ 1501-1524 (1976), gives the U.S. Department of Transportation authority to license deep-water ports, but gives the states a veto power over the licensing of such ports. Id. §§ 1503(c)(9)-(10), 1508. The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976), encourages the states to develop management plans for the protection of their coastal areas, and provides that the plans must follow guidelines set forth in the Act and must be federally approved; federal agencies are required to comply with such plans "to the maximum extent practicable." Id. § 1456(c)(1)-(2).

2. The Supreme Court recently held that Congress lacks constitutional power to apply its minimum wage laws to the states quae employers, reversing its decision in Maryland v. Wirtz, 392 U.S. 183 (1968). See National League of Cities v. Usery, 426 U.S. 833 (1976). The Court has also held that the states do not necessarily waive their immunity from suit under the eleventh amendment when engaged in activity regulated by Congress under its commerce powers, modifying its decision in Parden v. Terminal Railway, 377 U.S. 184, 186
the states in our constitutional order. The federal tradition, once threatened with dormancy, has recently gained new life.

These historical events are significant for purposes of this Article in that they reflect, and in large part explain, events that have taken place in the field of land reclamation. In 1902, Congress established a national program to build dams that would conserve the West's sparse water supply and reclaim its arid lands. In keeping with the federal tradition, Congress provided that the western states would control the water stored behind the dams. Congress cast doubts on the continuing viability of the state role in reclamation, however, by subsequently expanding the federal role without defining its exact scope. Moreover, as the Supreme Court expanded the definition of federal power in other areas, it expanded the definition of federal power in the field of reclamation, eventually holding that the federal government has exclusive control of water stored behind federal dams. Little was left of the federal tradition that underlay Congress' original reclamation program, which had recognized the states as having such control.

In its recent decision in California v. United States, known as the New Melones decision, the Supreme Court abruptly changed the course of western water law. It held that the states have a right to control the water in federal dams to the extent not inconsistent with specific congressional directives. By accommodating federal and state interests rather than perpetuating a pervasive federal supremacy, the Court gave rebirth to the tradition of federalism in the field of reclamation. Its decision further diffuses national power in an era in which the limits of effective national power have been freshly appreciated, and, not coincidentally, provides another sign that the judicial activism of former years has been replaced with a new sense of judicial restraint.

After examining the historic federal tradition in western water law and the reasons why Congress chose to follow it in its original reclamation program, this Article will trace the erosion of this tradition by the


3. See notes 5-13 & accompanying text infra.

The general expansion of federal power over water in the West and by the specific expansion of federal power in the field of reclamation. The Article will then examine the Supreme Court's decision in the *New Melones* case to see how the Court gave new meaning to the federal tradition, even to the point of overruling several of its prior decisions. Finally, this Article will demonstrate that the decision, rather than solving all problems of federalism in the field of reclamation, opens the door to new problems: in providing for an accommodation of federal and state interests, the Court left open the exact kinds of interests to be accommodated. After examining these new problems, this Article will suggest how they should be solved.

**The Reclamation Act of 1902**

By the turn of the present century, the American nation had long abandoned the notion that the American West was the "howling wilderness" depicted earlier by Daniel Webster. As part of its manifest destiny, the nation had committed itself to the task of extending its civilization to the lands of the West, lands recently won by treaty and conquest. Since nature had deprived the area of a plentiful water supply, the lands could be made habitable and productive only by the intervention of man, by the construction of reclamation works that would overcome the vagaries of nature. Encouraged by President Theodore Roosevelt, Congress decided to undertake a massive reclamation effort on a national level. It authored the Reclamation Act of 1902, which provided for federal construction and operation of projects that would divert, store and distribute the waters of the western states and territories.

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5. I KINNEY, IRRIGATION AND WATER RIGHTS 8 (2d ed. 1912) [hereinafter cited as KINNEY].

6. President Roosevelt stated, in his annual message to Congress in 1901: "Great storage works are necessary to equalize the flow of streams and to save the flood waters. Their construction has been conclusively shown to be an undertaking too vast for private effort. Nor can it best be accomplished by the individual States acting alone. Far-reaching interstate problems are involved; and the resources of single States would often be inadequate. It is properly a national function, in at least some of its features . . . ." 35 CONG. REC. 6775 (1902).


8. A major question faced by Congress, in deciding whether to pass the Act, was whether reclamation was a national or local function. Those who opposed the Act, all from states which received no direct benefits from its enactment, argued that reclamation was a
In considering the Act, Congress devoted much attention to the question of whether the allocation of water from the projects would be controlled by the federal government or by the states. Some members of Congress argued that if the federal government is to build and operate the projects, it should control the allocation of water from them;\(^9\) if reclamation is a national function, it should be fully controlled at the national level. Others, including the western representatives who drafted and most vigorously supported the Act, argued that this control should rest with the states rather than the federal government,\(^{10}\) and that the federal government should acquire its water rights for the local function that should be undertaken by the states themselves, not by the federal government; the federal contribution, at most, should be limited to a cession of federal lands to the states for reclamation purposes. \(\text{See, e.g., 35 CONG. REC. 6670, 6682-6683 (1902) (remarks of Rep. Ray); H.R. REP. NO. 794, 57th Cong., 1st Sess. 2-5 (1902) (Minority Rep.).}\) Those who supported the Act, however, including representatives of the western states that received direct benefits under the Act, argued that reclamation was a national function, at least in terms of whether the projects should be built at the national or local level. \(\text{See, e.g., 35 CONG. REC. 6676 (1902) (remarks of Rep. Mondell); id. at 6673 (remarks of Rep. Newlands); H.R. REP. NO. 794, 57th Cong., 1st Sess. 3-4, 7-8 (1902); S. REP. NO. 254, 57th Cong., 1st Sess. 5-6 (1902); H.R. REP. NO. 1468, 57th Cong., 1st Sess. 3-4, 7-11 (1902).}\) Some western representatives introduced bills prior to 1902 under which the federal government would construct reclamation projects in the western states but the states would physically operate and manage the projects. \(\text{See, e.g., H.R. 14165, 56th Cong., 2d Sess., 34 CONG. REC. 2351 (1901). They argued that the western states lacked the financial capacity to build the projects, and that the sprawling western desert would never bloom without a national reclamation undertaking. The latter view proved more appealing in an age of nationalism and expansion, and Congress decided that the projects should be built and operated by the federal government rather than the states.}\)

\(^{9}\) \(\text{See, e.g., 35 CONG. REC. 6696 (1902) (remarks of Rep. Ray); H.R. REP. NO. 794, 57th Cong., 1st Sess. 16 (1902) (Minority Rep.). A leading reclamation authority, George H. Maxwell, wrote an article in which he argued that § 8 of the reclamation bill, in providing for state control of water, would fail to protect “the right of the Government to a return of its investment.” Maxwell, “National Homemaker,” Supplement, at 1 (April 1902).}\)

\(^{10}\) \(\text{For instance, the main proponent of the reclamation bill in the Senate, Senator Clark of Wyoming, disclaimed the notion that “a great Government Bureau . . . shall have control of all the lands and waters in our arid regions.” 35 CONG. REC. 2222 (1902). He further stated: “The question of conservation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the Government as a matter of national import, but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition. . . . It is right that the General Government should control, should conserve, and should reservoir the head waters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another.” Id.}\)

\(\text{Similar statements were made during the debate in the House of Representatives. See 35 CONG. REC. 6676-6679 (1902) (remarks of Rep. Mondell); id. at 6770 (remarks of Rep. Sutherland).}\)
projects in the same manner as private water users; because the western states traditionally had controlled the acquisition of water rights and the allocation of their waters, they should exercise the same control over water developed under the federal reclamation program. The latter view prevailed. At the behest of the western legislators, the Act contained a provision, section 8, which stated that the Act should not be construed as affecting state laws relating to the “control, appropriation, use, or distribution” of water, and directed the Secretary of Interior, in operating the projects, to “proceed in conformity with” such state laws. Section 8 thus established a paramount principle of federalism in western water law, the principle that the states would control

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11. Representative Mondell of Wyoming, the main proponent of the bill in the House of Representatives, stated: "I can perhaps best illustrate . . . [the bill’s] workings by indicating how the Secretary of the Interior, as the agent of the Government under this act, would proceed. . . . It having been ascertained that a sufficient supply of water for the irrigation of the lands in question was available and unappropriated and the feasibility of a project having been determined, the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works are located." 35 CONG. REC. 6678 (1902).

12. Section 8 provides: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.” Pub. L. No. 57-161, 32 Stat. 390 (1902) (current version at 43 U.S.C. §§ 372, 383 (1976)).

The proviso in § 8, requiring that water be used only on “appurtenant” lands and that “beneficial use” is the measure of the water right, was apparently intended to limit the disparity in the water laws of the western states. By 1902, most states had adopted the appropriation doctrine, which limits water to one who puts it to a “beneficial use.” See text accompanying notes 14-21 infra. Some states, although adopting the appropriation doctrine, retained elements of the riparian doctrine, which provides that water can be used only on lands appurtenant to the water. See note 17 & accompanying text infra. By utilizing both the appurtenancy concept and the beneficial use concept, the proviso in § 8 may have been intended to create a hybrid right that assimilated certain features of both the riparian and appropriation doctrines. During the congressional debates, it was explained that the proviso would result in water rights “most approved by centuries of irrigation practice, and such as will absolutely insure the user in his right and prevent the possibility of speculative use of water rights . . . [and] will undoubtedly tend to uniformity and perfection of water laws throughout the region affected.” H.R. REP. NO. 1468, 57th Cong., 1st Sess. 7 (1902). See also 35 CONG. REC. 6679 (1902) (remarks of Rep. Mondell). Since the riparian doctrine was thought to be socialistic and the appropriation doctrine to result in monopolies, see United States v. Gerlach Live Stock Co., 339 U.S. 725, 750 (1950), perhaps it was thought that the proviso would limit the defects of both doctrines.
the use of water developed under the federal reclamation program. In providing for state control of water, section 8 followed the historic federal tradition that recognized the states as the source of water rights in the West. To fully understand the raison d'être of section 8, it is necessary to review that federal tradition more fully.

The Federal Tradition: State Control of Water

Development of the Appropriation Doctrine

The riparian doctrine, under which landowners are entitled to the use of water flowing past their land, is a common law doctrine that is the basis of water law in the eastern states. The miners who hurried westward in search of gold after its discovery in California in 1848 developed a custom that departed from the riparian doctrine; under this new custom, the first miner to divert water to his claim was recognized as having a prior right to the water as against miners who appeared later on the scene. This custom was adopted in the manufacturing and agricultural industries, was recognized by the early courts and legislatures, and eventually ripened into a formal doctrine of water law, the doctrine of prior appropriation.

Under the appropriation doctrine, the first person to appropriate water for the beneficial use has a prior right to its use, as long as the beneficial use continues. The doctrine was tailored to the exigencies of the West, which nature has disfavored with a sparse water supply. By tying the right to water to its most beneficial use rather than its proximity to land, the doctrine provided for the most efficient use of water. The appropriation doctrine has now been adopted in all western states.


states, although some states retain elements of the riparian doctrine and thus have dual systems of water rights.\textsuperscript{17}

An important component of the appropriation doctrine is that the determination whether water can be put to a beneficial use, and thus whether a water right should exist, is made by the state.\textsuperscript{18} The appropriation doctrine thereby vests the states with broad control of water, unlike the riparian doctrine in its common law form. The states made little effort to exercise this control in the early years, however, beyond recognizing water rights based on the priority of use. For instance, California developed a statutory scheme in the 1850's for the allocation of water between the mining and agricultural industries,\textsuperscript{19} but failed to regulate the allocation of water within each industry. With increasing demands upon their water, however, many states became conscious of the need to regulate such allocations. Following Wyoming's example, many states adopted administrative systems of water rights, under which the state would issue a permit to an applicant for the right to use water if the state determines that the proposed use is "beneficial" and "reasonable" and in the "public interest."\textsuperscript{20} These administrative sys-

\begin{enumerate}
  \item[17.] 2 W. Hutchins, \textit{Water Rights Law in the Nineteen Western States} 6-14 (1974). Some states, following the example of Colorado, have exclusively adopted the appropriation doctrine, wholly rejecting the riparian doctrine. \textit{Id.} Other states, following the example of California, have adopted both appropriation and riparian doctrines. \textit{Id.; see} Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886). In California, it was held that, in a conflict between an appropriator and a riparian, the riparian right can be exercised although it results in an unreasonable use of water. Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607 (1926). This decision led to the passage of a constitutional amendment in 1928, which provides that both riparian and appropriative rights in California can exist only to the extent that the water use is both "beneficial" and "reasonable." \textit{Cal. Const.} art. X, \S 2 (formerly art. XIV, \S 3); Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933); Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).
  \item[18.] See authorities cited note 15, \textit{supra}.
  \item[19.] Hutchins, \textit{supra} note 14, at 47-48.
  \item[20.] The Wyoming law, adopted in 1891, provided that the state engineer must approve applications for water rights if he determines that the water will be put to a "beneficial use," and that "where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the State Engineer to reject such application and refuse to issue the permit asked for." 2 Wiel, \textit{supra} note 14, at 1557-58. Contemporaneously with the passage of the Reclamation Act of 1902, the states of Idaho, Nevada and Utah also adopted appropriative permit systems under which "an application must be made to the State engineer for permission to make an appropriation." U.S. \textit{Dep't of the Interior, Proceedings of Second Conference of Engineers of the Reclamation Service} 223-24 (1905). California's permit system, adopted in 1914, provides that the Water Resources Control Board can issue a permit only if the proposed use is "reasonable and beneficial," and only if the Board imposes such conditions as are necessary to protect the "reasonable and beneficial use" of water and to protect the "public interest." \textit{Cal. Const.} art. X, \S 2 (formerly art. XIV, \S 3); \textit{Cal. Water Code} §§ 1201, 1240, 1253,
tems have been adopted by most western states and are the essence of their modern appropriation laws.\textsuperscript{21}

Federal reclamation authorities have consistently followed state appropriation law, including state permit requirements, in acquiring and using water under the federal reclamation program, often acknowledging that section 8 of the Reclamation Act of 1902 requires them to do so.\textsuperscript{22} For their part, the states have usually accommodated the federal program by granting the water rights sought by federal authorities; many states have granted preferential treatment for federal water rights as against other water rights.\textsuperscript{23} The federal program has thus been carried forth largely in a spirit of harmony rather than animosity,

\begin{itemize}
  \item \textsuperscript{1255}, \textsuperscript{1257}, \textsuperscript{1375} (West 1971); Temescal Water Co. v. Department of Pub. Works, 44 Cal. 2d 90, 280 P.2d 1 (1955).
  \item Of the 19 western states, all but 3 require an appropriator of surface water to obtain an appropriative permit from the state. I W. Hutchins, \textit{Water Rights Laws in the Nineteen Western States} 302 (1974). The exceptions are Hawaii, Colorado and Montana. Hawaii, which is not an arid state, does not recognize the appropriation doctrine. Colorado and Montana have judicial rather than administrative systems for statutory adjudications of appropriative rights. Montana additionally provides that such rights can be acquired by posting of notice and filing of records. \textit{Id}.
  \item \textsuperscript{22}. \textit{See, e.g.}, California v. United States, 438 U.S. 645, 675-76 (1978); United States v. Gerlach Live Stock Co., 339 U.S. 725, 735 n.9, 740 n.14 (1950). In California, the U.S. Bureau of Reclamation has applied to California's Water Resources Control Board for 51 permits to appropriate water for the Central Valley Project since 1938, and the California agency has approved 41 such applications, most of which are subject to conditions. The federal agency has never acquired its water rights for the project without complying with California law. Affidavit of Bill Dendy, Executive Officer of Water Resources Control Board, Appendix, vol. II, at 2, California v. United States, 438 U.S. 645 (1978).
  \item In 1950, the U.S. Bureau of Reclamation provided a statement of its water rights practices in the western states, in response to a request from the Supreme Court in its deliberations in United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). The statement declared that "it is the practice of the Government to make appropriations of water from unnavigable streams in accordance with the provisions of State law." \textit{Federal-State Water Rights: Hearings on S. 1375 Before the Sub-Comm. on Irrigation and Reclamation of the Sen. Comm. on Int. and Ins. Affairs}, 88th Cong., 2d Sess. 320 (1964). The same practice is followed with respect to waters of navigable streams. \textit{Id}. The only exception to this practice is with respect to certain projects located on the lower Colorado River, which are governed by the Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928) (codified at 43 U.S.C. \textsect\textperiodcentered\textperiodcentered 617-617t (1976)). Different appropriation practices are followed with respect to these projects, according to the statement, for the reason that, "at the time that it [the project] was built, the opposition to the project in Arizona was such that, even if an appropriation under the laws of Arizona had been required, none could have been made." \textit{Id}.
  \item For example, some states have withdrawn water from appropriation so that the water can be subsequently appropriated by the Secretary of the Interior for the federal projects; some have allowed the Secretary to withdraw unappropriated water prior to applying for a water right; and some—such as California—have assigned their own water rights to the Secretary of the Interior. \textit{See} Trelease, \textit{Reclamation Water Rights}, 32 Rocky Mt. L. Rev. 464, 466-467 (1960).
\end{itemize}
federal authorities complying with state laws and state authorities advancing rather than hindering the purposes of the federal program.

Congressional Recognition of the Appropriation Doctrine

Long before the states developed their administrative systems, at a time when the appropriation doctrine was in its infancy, the rights created under the doctrine were imperiled by the constitutional might of the United States. Early judicial decisions, noting that the United States acquired ownership and control of the public domain lands in what is now California by signing the Treaty of Guadalupe Hidalgo with Mexico in 1848, reasoned that the federal government's water rights were superior to those of the miners. Moreover, the miners' rights were jeopardized by the rights of many settlers who had acquired public domain lands under federal laws, such as the Homestead Act of 1862; since these settlers succeeded to the rights of the United States, their rights might also be superior to those of the miners.

To remove the cloud that hung over the miners' claims, Congress passed the Mining Act of 1866. This act authorized the miners to explore and occupy the public domain lands and provided that the right to use water on the lands was subject to "local customs, laws and the decisions of the courts." By recognizing existing water rights based on local laws and customs, these acts provided the first congressional recognition of the new appropriation doctrine.

Having protected the miners' claims, Congress turned to the task of encouraging the settlement and reclamation of the water-scarce lands of the West. It passed the Desert Land Act of 1877, which

24. 9 Stat. 922 (1848).
25. Irwin v. Phillips, 5 Cal. 140 (1885); Moore v. Smau, 17 Cal. 199 (1861); Boggs v. Mining Co., 14 Cal. 279, 374 (1859), appeal dismissed, 70 U.S. (3 Wall.) 304 (1865). The notion that the United States controls the public domain lands, although not surprising today, was a shocking revelation to the frontier villages and communities of the early West. The fear grew that the United States might oust the miners from their claims at the slightest whim. Indeed, shortly after the Civil War, the Secretary of the Treasury proposed to pay the war debt by selling the lands acquired by the miners and claiming the proceeds for the federal government. WIEL, supra note 14, at 105.
27. Ch. 262, 14 Stat. 251 (1866) (current version at 43 U.S.C. § 661 (1976)).
granted such lands to anyone willing to settle on them. The Act also provided that the settlers' rights to water “shall depend on bona fide prior appropriation,” and that unappropriated, nonnavigable waters not acquired by the settlers were “free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.” The Act thus appeared to make the appropriation doctrine generally applicable to the nonnavigable waters of the West, even as to settlers who acquired their rights under federal law. However, the Act left open the question whether the appropriation laws to be applied were those of the states and territories or were to be found in an undefined body of federal common law.

This question was not answered until more than half century later, in California Oregon Power Co. v. Beaver Portland Cement Co. There, the Supreme Court held that the Desert Land Act of 1877 had “severed” the nonnavigable waters from the lands of the public domain, thus providing for state control of such waters. The federal government, although retaining its control of the land, had thereby surrendered much of its control of the water to the states. Although settlers may acquire the lands under federal law, their water rights are dependent on state law. The Court also held that the Act authorized the states to adopt whatever water laws they chose—the appropriation doctrine, the riparian doctrine, or a combination of the two. The severance of land and water applied to lands acquired under other federal acts as well as under the Desert Land Act of 1877. According to the Court, the states have a “plenary right” to control their nonnavigable waters, subject only to certain federal constitutional powers. The decision, by recognizing state law as the source of water rights in the West, resulted in broad state control of water.

33. 295 U.S. 142 (1935).
34. Id. at 158-62.
35. Id. at 163-64.
36. Id. at 161-62.
37. “What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.” Id. at 163-64.
38. See text accompanying notes 42-58 infra.
Equal Footing Doctrine

The states were also recognized as having broad powers over their navigable waters under the equal footing doctrine. When the original thirteen states formed the Union, they retained certain attributes of their sovereignty, including control of the beds and shores of their navigable waters and, apparently, of the waters themselves. When other states were admitted into the Union on an equal footing with the original states, they acquired similar control of their beds, shores, and waters. The equal footing doctrine, by equalizing the sovereign powers of the various states, thus provided the western states with the same broad control of their navigable waters that was enjoyed by the original thirteen states.

* * *

In enacting section 8 of the Reclamation Act of 1902, Congress followed and extended the tradition of state control of water which it had recognized and approved in the prior century. Just as Congress had earlier recognized state law as the source of water rights in the West, it recognized state law as the source of federal water rights under the 1902 Act; just as the states had historically controlled the use of water, they would control the use of water under the new federal reclamation program. Section 8 thus represents a continuation of the tradition of federal deference to state law that had governed the West's waters prior to the inauguration of the federal reclamation program.

Federal Rights to Control Water

Because Congress had provided for state control of water in the Desert Land Act of 1877 and related acts, some thought that the western states had the right to control water uses by the federal government, not just by private users. Under this line of reasoning, the states ac-


41. See notes 30-32 & accompanying text supra.

42. See Mead, Irrigation Institutions 372 (1903); I Wiel, Water Rights in the Western States §§ 108-12 (3d ed. 1911). See generally Hanks, Peace West of the 98th Meridian—A Solution to Federal-State Conflicts Over Western Waters, 23 Rutgers L. Rev. 33, 37-39 (1968); Morreale, Federal-State Conflicts over Western Waters—A Decade of At-
quired absolute ownership of their water, and their rights were thus superior to those of the federal government. This argument was soundly rejected in a series of Supreme Court decisions. Without passing on the question whether the water is owned by the states or the federal government,\(^4\) the Court has definitively ruled that the states’ authority to control water is subject to Congress’ paramount constitutional powers, particularly as found in the Commerce Clause\(^4\) and the Property Clause\(^4\) of the U.S. Constitution.\(^4\) This constitutional limitation on the states’ authority made the ownership question of academic interest only; the federal government has imperium, if not dominium, over the waters of the West.

This federal imperium, in limiting the historic tradition of state control of water,\(^4\) undermines much of the rationale of section 8 of the Reclamation Act of 1902, which was to continue the tradition in the field of reclamation. The directive of the section, if not its rationale, remains unaffected by the federal imperium, however. Since the section mandates the Secretary of the Interior to “proceed in conformity with” state laws, the Secretary cannot proceed otherwise under the federal commerce or property powers. Congress has, in effect, relinquished its constitutional power to control water in the field of reclamation.

The matter is not as simple as that, however. The emergence of the federal imperium, reflecting a judicial trend to enlarge federal control of water and to narrow state control, established a climate that disfavored a broad construction of state power under section 8. This climate largely explains judicial decisions prior to the New Melones case that virtually emasculated state power to control water stored behind federal dams.\(^4\) Therefore, to understand the forces that were at work in the New Melones case, it is helpful to examine the nature and scope of the federal imperium over water as found in the commerce and property powers.


\(^{44}\) U.S. CONST. art. I, § 8, cl. 3.

\(^{45}\) U.S. CONST. art. IV, § 3, cl. 2.


\(^{47}\) See notes 14-40 & accompanying text supra.

\(^{48}\) See text accompanying notes 94-110 infra.
Scope of Federal Commerce and Property Powers

The federal commerce power has been traditionally construed as authorizing the federal government to control water to the extent necessary to promote the navigability of navigable waters.49 This power has been broadly construed to provide for federal control of water for purposes that are only distantly related to navigation, such as project power purposes,50 and to apply to nonnavigable waters that flow into navigable waters.51 The power has never been construed, however, as applying when navigation and navigable waters are not affected in any way.52

Unlike the federal commerce power, the federal property power provides a basis for federal control of nonnavigable waters. At one time, this power was regarded as no more than a source of federal control of water for use on Indian reservations.53 The modern judicial development of the reserved rights doctrine, however, has expanded the scope of the property power. Under this doctrine, the federal government has the right to use water that is necessary to serve the purposes of any federal land that is reserved or withdrawn from the public domain, whether or not the land includes an Indian reservation.54 This doctrine

52. See notes 63-64 & accompanying text infra.
53. Winters v. United States, 207 U.S. 564 (1908); see United States v. Powers, 305 U.S. 527 (1939); United States v. Walker River Irrig. Dist., 104 F.2d 334 (9th Cir. 1939). In Kansas v. Colorado, 206 U.S. 46, 85-100 (1907), the Court construed the property power as authorizing the United States to use water for the benefit of federal lands, but stated that “[w]e do not mean that its [Congress'] legislation can override state laws in respect to the general subject of reclamation.” Id. at 92.
54. See United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128, 138-42 (1976); United States v. District Court, 401 U.S. 520 (1971); Arizona v. California, 373 U.S. 546, 595-601 (1963). See generally Kiechel & Green, Riparian Rights Revisited: Legal Basis for Federal Instream Flow Rights, 16 NAT. RESOURCES J. 969 (1976); Ranquist, The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water, 1975 B.Y.U. L. REV. 639; Note, New Mexico's National Forests and the Implied Reservation Doctrine, 16 NAT. RESOURCES J. 975 (1976); Note, Expansion of the Reservation of Water Rights Doctrine, 56 NEB. L. REV. 410 (1977). In United States v. New Mexico, 438 U.S. 696 (1978), the Supreme Court held that the reserved-rights doctrine applies only to “primary” federal purposes of the reserved lands, not “secondary” purposes. For purposes of determining the priority of the federal reserved water right in relation to private rights, the federal right is deemed to be created at the time that the lands are reserved or withdrawn from the public domain. Arizona v. California, 373 U.S. 546, 600 (1963). The Supreme Court has, in some cases, defined the reserved rights doctrine as based on both the federal commerce power and the federal property power. See Cappaert v. United States, 426 U.S.
is based on the assumption that Congress, in providing for state control of water in the Desert Land Act of 1877 and other acts, reserved the right to use water as needed on the federal lands. The severance of land and water in the public domain, as noted in the Beaver Portland case, does not apply to water that is necessary to serve federal lands. The reserved rights doctrine thus rests on twin pillars, one constitutional and the other statutory: it provides a constitutional basis for the federal government to acquire water for use on federal lands, and provides a statutory presumption that Congress means to exercise this power independently of state law at the time that it reserves or withdraws federal lands.

Constitutional questions aside, there can be little question that the reserved rights doctrine is not applicable under the Reclamation Act of 1902. Section 8 overcomes the presumption, inherent in the doctrine, that Congress intends to acquire water independently of state law. Moreover, the presumption would seem of doubtful validity since the water is distributed for use by nonfederal users on nonfederal lands, rather than for traditional federal purposes. In Nebraska v. Wyoming, the Supreme Court arrived at this result for the wrong reason. It stated that the reserved rights doctrine is not applicable under the 1902 Act because the water right under the Act is held by nonfederal users who ultimately receive the water, not by the federal government itself. The federal government rather than the nonfederal user, however, diverts the water, applies to the state for the water right, and, in signing contracts with nonfederal users, decides how, by whom, and in what amounts the water will be used. Moreover, the federal government, in operating its modern, multi-purpose projects, does not distribute all project water to private users, but instead often uses part of the water to maintain instream flows for the protection of fish and wildlife, water quality control, and related purposes. Since this water is not used by nonfederal users, the right to the water obviously does not repose in them. Thus, there can be little ques-

128 (1976); Arizona v. California, 373 U.S. 546 (1963). However, in the New Melones case, the Court defined the doctrine as based only on the property power, not on the commerce right to promote navigation. California v. United States, 438 U.S. 645, 662 (1978). Most commentators have also defined the reserved rights doctrine as based on the property power, not the commerce power. See, e.g., Note, Expansion of the Reservation of Water Rights Doctrine, 56 Neb. L. Rev. 410 (1977).

55. See text accompanying notes 33-38 supra.
57. See text accompanying note 122 infra.
58. 325 U.S. 589 (1945).
59. Id. at 629; accord, Ickes v. Fox, 300 U.S. 82, 95 (1937).
tion that the water right is held by the federal government, not the nonfederal user. The reserved rights doctrine is inapplicable under the 1902 Act because of section 8, not, as stated in *Nebraska*, because of the identity of the appropriator.

Federal Constitutional Powers to Acquire Reclamation Water

This analysis raises an interesting question about the constitutional right of the federal government to acquire water for reclamation purposes without complying with state law. The Supreme Court has never definitively answered the question. It has stated, however, that the federal reclamation program is sustainable under either the commerce or property powers; presumably, the federal right to obtain water for the program is also sustainable under these powers. Certainly the commerce power can sustain the federal right to acquire water to the extent that the project serves a navigation purpose, such as flood control. It has never been held, however, that the federal right to acquire water for many other project purposes, such as irrigation, is also sustainable under the commerce power. Moreover, if the water is not navigable, the commerce power would not be applicable in any event, at least in its traditional sense.

In *Federal Power Commission v. Oregon*, the so-called Pelton Dam case, the Supreme Court was called on to determine whether the federal government has the right to license a private power project, and presumably to authorize water for the project, when the waters in question are not navigable. Rather than expand the commerce power to include nonnavigable waters, the Court held that the federal right is sustainable under the property power because the lands that abutted the project had been reserved from the public domain. The decision suggests that the federal right to obtain water for reclamation projects under the Reclamation Act of 1902 is also sustainable under the property power, when the lands abutting the projects are reserved from the public domain. This result is unsound, however. The property power...
would seem applicable only where the water is acquired for use on the federal lands, for the purpose of providing benefits to the federal lands. It has little relevance where, as in the field of reclamation, the water is principally distributed to nonfederal lands to provide benefits for farmers and other nonfederal users.

Under these circumstances, the federal right should be sustained under the commerce power, not the property power. Indeed, since the water is distributed to farmers, cities, and industries, its use results in the production of foods and goods that will find their way to interstate markets. In light of this impact on interstate commerce, it is of little consequence that the commerce may be unrelated to navigation or generated by waters that are not navigable. The commerce power has been liberally construed as the basis for a wide range of federal programs that provide national benefits in other areas, and should be construed as the basis for the federal reclamation program, which provides national benefits in the fields of agriculture, industry, and power development. Accordingly, at least in the field of reclamation, there is little justification for confining the commerce power to matters involving navigation and navigable waters.

In any event, the expansive judicial definition of federal power in nonreclamation areas created a hostile context for a generous interpretation of state power in the reclamation area. The context worsened with the Supreme Court’s recent development of a rule of statutory


64. It has been held that the exercise of the federal navigation power authorizes the taking of private water rights without the payment of compensation. See, e.g., United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Appalachian Power Co., 311 U.S. 377 (1940); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913). However, it would seem that the due process clause of the U.S. Constitution, which requires the payment of compensation for the taking of other forms of property under the federal commerce power, should be construed to also require the payment of compensation for the taking of water rights under the navigation power. See, e.g., Morreale, Federal-State Conflict Over Western Waters—A Decade of Attempted ‘Clarifying Legislation’, 20 Rutgers L. Rev. 423, 512 (1966). In any event, in United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), the Court held that § 8 of the Reclamation Act of 1902 requires the payment of compensation for the taking of private water rights under the Act. Hence, the no-compensation rule is not applicable under that Act. Id. at 727-56.
construction that the states cannot regulate federal activities in the absence of "clear and unambiguous" congressional authorization; such authorization was found lacking by the Court in actions to determine whether the states can regulate air and water pollution by federal agencies.\textsuperscript{65} Under this rule, any lack of clarity in section 8, such as its failure to specifically mention the administrative permit systems developed by most western states,\textsuperscript{66} invites a narrow interpretation of its effect.\textsuperscript{67} This rule, and the entire judicial construction of broad federal powers in nonreclamation areas, cast doubts on the role of the states in the field of reclamation.

**Conflicts Between Federal and State Policies**

The states' role in the field of reclamation was further clouded by reclamation policies developed by Congress and the Secretary of the Interior under authority of the Reclamation Act of 1902 and amendatory acts. Many of Congress' substantive policies, such as those limiting the distribution of water, are in potential conflict with policies worked out by the states under section 8. The Secretary of the Interior, entrusted by Congress with broad discretion to carry forth the purposes of the federal reclamation program, has developed administrative policies that are also in potential conflict with state policies.

Most of these federal policies were developed after the enactment of section 8 in 1902, and Congress may not have fully understood or appreciated the magnitude of the conflicts when it enacted the section. Certainly Congress has failed to provide a precise method for their resolution, either in section 8 or elsewhere. Thus, as Congress has expanded the scope and complexity of its reclamation program, it has given rise to new questions relating to federalism in western water law. It has sketched its reclamation principles with a broad brush, and left to the courts the task of resolving the clash between federal and state powers arising from these principles.


\textsuperscript{66} See notes 20-21 & accompanying text supra.

\textsuperscript{67} In the New Melones case, the lower appellate court held that Congress had not "clearly and unambiguously" authorized the states to apply their administrative permit systems to federal agencies, because § 8 failed to specifically refer to such systems. See United States v. California, 558 F.2d 1347 (9th Cir. 1977), rev'd, 438 U.S. 645 (1978).
The Reclamation Act of 1902 and Amendatory Laws

An example of this clash can be found in the original reclamation law, the Reclamation Act of 1902. In order to discourage the acquisition of water by monopolies, the Act provides that water will not be made available on lands exceeding 160 acres or to landowners who do not reside on their lands.68 Further, the Act authorizes the Secretary of the Interior to adopt rules and regulations to carry out these and other provisions of the act.69 Nothing in the Act, however, indicates whether the antimonopoly provisions are paramount to state laws,70 or whether the Secretary's power to adopt rules and regulations limits the states' powers under section 8.

These federal ambiguities were compounded by congressional acts that amended the Reclamation Act of 1902, and that wove a more intricate web of congressional policies in potential conflict with state policies. Illustrative of these problems are congressional acts passed in 1911, 1920, and 1939.

The first Act, the Warren Act of 1911,71 provides for the sale of surplus water when a project impounds more water than is needed for reclamation purposes. The Act contains a provision declaring that it is not to be construed as enlarging federal control of water,72 and the legislative history indicates that this provision was intended to ensure that the Secretary would comply with state law under the Act.73 However, the Act also authorized the Secretary to enter into contracts for the sale of water "upon such terms as he may determine to be just and proper."74 Did the Act limit the states' authority under section 8 by precluding the states from barring the sale of surplus water? Did the

70. See text accompanying notes 94-95 infra.
73. This provision was inserted, it was explained, "to allay and set aside any suspicion that anyone might entertain that the Government had the right to the water." 46 CONG. REC. 2783 (1911) (remarks of Rep. Reeder). The House report, in explaining the provision, quoted from a report submitted by the Secretary of the Interior: "Section 8 of the reclamation act provides, among other things, in effect that the use and distribution of water appropriated and impounded by the Secretary of the Interior under said act shall conform with the state laws, and Congress could not otherwise provide, for the reason, as stated by Mr. Justice Brewer, in Kansas v. Colorado (106 U.S. 46, 92), "We do not mean that its legislation can override state laws in respect to the general subject of reclamation." H.R. REP. NO. 2002, 61st Cong., 3d Sess. 3 (1911).
Act, in authorizing the Secretary to impose terms on the sale of water, prevent the states from imposing their own terms? The Warren Act failed to answer these questions.

The 1920 Act\textsuperscript{75} expanded the purposes of the federal reclamation program, originally limited to irrigation, to include nonirrigation purposes as well. The Act provided authority for the construction and operation of multi-purpose projects that would make water available for subsidiary nonirrigation purposes, such as domestic, industrial, power, and recreational purposes. The congressional debates reflected an expectation that the Secretary would comply with state law under the Act;\textsuperscript{76} this result would effectively expand the scope of section 8, which on its face provides only for state control of water for "irrigation" purposes, to include other project purposes as well. The Act also contained a provision, however, authorizing the Secretary to enter into contracts for the use of nonirrigation water "upon such conditions of delivery, use and payment as he may deem proper."\textsuperscript{77} By apparently giving the states and the Secretary control over the same subject matter, the 1920 Act further compounded the problems of federalism.

The Reclamation Project Act of 1939\textsuperscript{78} substantially amended the basic reclamation law by developing, among other things, a comprehensive scheme for the payment of construction charges on the federal projects. The Act was subsequently amended to include a provision identical to section 8,\textsuperscript{79} in order to ensure, according to legislative reports, that the basic policy of section 8 would be followed under the new Act.\textsuperscript{80} The Act of 1939 vested the Secretary with broad discretion to carry out the purposes of the Act, however, by signing contracts with water users, adopting rules and regulations, and so forth.\textsuperscript{81} Again, the Act failed to provide any guidelines for the resolution of conflicts between federal and state powers.

\textsuperscript{76.} According to Representative Mondell: "[The Secretary] has no authority except as we give him authority as an agent to do what any other agent could do under the State law; and we provide here that, acting as the agent or the trustee of these people, he may, of the water diverted under the State law, provide for its use for certain purposes incidental to the use for irrigation . . . ." 59 CONG. REC. 2981 (1920).
\textsuperscript{80.} S. REP. No. 2241, 84th Cong., 2d Sess. 5 (1956); H.R. REP. NO. 1754, 84th Cong., 2d Sess. 5 (1956).
\textsuperscript{81.} 43 U.S.C. §§ 485b-1, 485d, 485e, 485g, 485h, 485i (1976).
Reclamation Laws Authorizing Specific Projects

These problems of federalism arise not only from federal policies applicable to all projects, but also from federal policies applicable solely to individual projects. The Reclamation Act of 1902 and its amendments only establish the foundation of the federal reclamation program; the program is implemented by individual projects that are authorized by individual acts of Congress. These authorizing acts create another set of federal policies that must be cranked into Congress' overall reclamation scheme, and that increase the potential conflict with state policies under section 8. For instance, the authorizing acts typically describe the basic purposes of the individual project, such as irrigation and power.\(^8^2\) The acts do not, however, typically describe how these purposes are to be achieved, or how much water is to be impounded and allocated for each purpose.\(^8^3\) The details of the project operation are often, but in varying degrees of specificity, set forth in feasibility and engineering studies prepared by federal authorities prior to congressional authorization; these studies are often incorporated by reference in the authorizing act,\(^8^4\) but the act usually requires only that the project be operated “substantially” in conformity with the studies.\(^8^5\) The authorizing act also often vests federal reclamation officials with broad discretion to carry forth certain project purposes. For instance, the act authorizing the New Melones Project provides that the Secretary of the Army, who is responsible for building the project, shall adopt “appropriate” measures to protect fish and wildlife and shall “give consideration . . . to the advisability” of providing for water quality control.\(^8^6\) Thus, Congress often gives ample attention to federal powers when it authorizes an individual project but little attention to state powers under section 8. This result adds to the difficulty of determining the effect of section 8 on the project.

Thus, Congress' reclamation objectives vary widely in terms of their specificity, clarity, and importance. Further, Congress has given the Secretary of the Interior authority over much of the same subject


83. See sources cited in note 82 supra.


85. See sources cited in note 84 supra.

matter that is reserved to state control under section 8. Therefore, as Congress has expanded the federal role in reclamation, it has cast doubts on the state role.

**Judicial Interpretation of Section 8**

Turning to the cases interpreting federal and state powers in the field of reclamation, it is clear that several disparate traditions and forces were at work. On the one hand, a federal tradition, followed in the West in the last century and apparently continued under the federal reclamation program by section 8, contemplated a broad state role in the allocation of water. On the other hand, the broad judicial definition of federal constitutional powers to control water, although not strictly relevant to whether Congress had surrendered its power to the states, established an unfavorable climate for a broad interpretation of state power. Moreover, the development of substantive reclamation policies by Congress and federal executive officials further compounded the difficulties in defining the scope of state power. As the following discussion makes clear, the Supreme Court originally followed the federal tradition that recognized broad state control of water, then, contemporaneously with its expansion of federal power over water in other areas, expanded federal power over waters in the field of reclamation, and finally, in the *New Melones* case, followed the federal tradition of state control once more.

**Early Reclamation Cases**

In the early reclamation cases, the Supreme Court, without directly facing the question, suggested that section 8 vests the states with broad control of federal water uses. In *Kansas v. Colorado*,

87. 206 U.S. 46 (1907).

88. *Id.* at 85-94; see note 53 *supra*.

89. 295 U.S. 40 (1935); 325 U.S. 589 (1945).
that case. In the 1935 decision, however, it commented briefly that
section 8 requires the United States to obtain "permits and priorities"
for its water rights under state law and provides for state control of the
impoundment and release of project water. In the 1945 case, the
Court commented that the United States, having acquired its water
rights under state law, had complied with the congressional "directive"
in section 8. The Court sounded a cautionary note, however, stating
that "we do not suggest that where Congress has provided a system of
regulation for federal projects, it must give away before an inconsistent
state system." Although this comment was not amplified, it implied
that state control under section 8 is not absolute but is limited by Con-
gress' own national policies.

Later Reclamation Cases

In later reclamation cases, decided during the Warren Court era,
the Court reversed its earlier direction. Departing from the federal tra-
dition that recognized state control of water, the Court held that section
8 does not provide any authority for the states to regulate federal water
uses in the field of reclamation.

In Ivanhoe Irrigation District v. McCracken, the Court faced the
question whether section 8 authorizes a state to override the acreage
limitation contained in the Reclamation Act of 1902. The Court had
little difficulty with this question. It ruled that the acreage limitation
was a "specific and mandatory" provision of the reclamation laws, that
it "has represented national policy for over a half century," and that
Congress must have meant for this important policy to override the
general authority of the states under section 8. Accordingly, the
Court concluded, the states cannot require project water to be delivered
to lands that are not in compliance with the acreage limitation. If the
Court had stopped at this point, it would have established the defensi-
ble proposition that state law under section 8 cannot contravene spe-
cific congressional policy.

The Court went further, however, and although disclaiming the
intention of "passing generally on the coverage of section 8 in the deli-

90. 325 U.S. at 614-16.
91. 295 U.S. at 42, 43.
93. Id. at 615-16.
95. Id. at 291-92. But cf. Mallory, With No Need for Homesteading, 160-Acre Law is
Hopelessly Outdated, Los Angeles Times, Mar. 25, 1979, § 5, at 3, col. 1 (growers'
viewpoint).
cate area of federal-state relations in the irrigation field,"96 proceeded to do just that. It stated in dictum:

As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the state.97

The Ivanhoe dictum, by suggesting that state law applies under section 8 only when the United States “acquires” water and not when it “delivers” water, created a distinction between the appropriation and distribution of water, between its acquisition and its use.98 One difficulty with the distinction is that an important purpose of the states’ appropriation laws is to provide for the most beneficial use of water.99 Thus, the appropriation and distribution of water under state appropriation laws are part of the same process.

The effect of the Ivanhoe distinction is that the states would be allowed to process applications for water rights filed by the United States, but not to regulate the use of the water. This result would enable the states to determine whether there is sufficient unappropriated water to serve the federal right. It would also enable the states to assign a priority to the United States based on the date of its application, thereby preventing the disruption to the states’ water systems that would result if the United States were allowed to simply acquire water without filing an application.100 The result would not, however, permit

96. 357 U.S. at 292.
97. Id. at 291-92.
98. This same distinction was suggested by the lower appellate court in the New Melones litigation, which ruled that § 8 requires federal compliance with the “forms” but not the “substance” of the states’ water laws. See United States v. California, 558 F.2d 1347 (9th Cir. 1977), rev’d, 438 U.S. 645 (1978).
99. See text accompanying notes 16-21 supra.
100. This disruption would result because the United States could acquire water without regard to other established priorities of state law and be able to claim that its rights are superior to rights that have priority under state law. In this event, a private user, although having obtained a priority under state law, would have no assurance that the United States might not subsequently claim an earlier priority to the same water based on the date that the federal project was authorized by Congress. Cf. Cappaert v. United States, 426 U.S. 128, 138 (1976) (water rights vest in the federal government on the date the underlying land is reserved for a federal purpose). Further, if the United States were not required to obtain a priority by filing an application under state law, the state would not know the amount of unappropriated water necessary to serve the federal right or the amount of its other unappropriated waters that are available for use by private users. Without this knowledge, the state would not know whether to grant or deny new applications for water rights by private users.
the states to exercise regulatory control of water; they could not require
as a condition of the appropriation that the water be distributed in a
way that results in the best use of water as determined by the state. The
dictum, making no reference to the 1902 congressional debates which
explained that the states were to have this regulatory control,101 was
hardly a model of statutory analysis. Since the Court had contemporane-
ously expanded federal control of water in other areas, the Ivanhoe
dictum might be explained as extending, a priori, the concept of federal
control to the field of reclamation.

The Ivanhoe dictum provided the basis of the Supreme Court's
later decision in City of Fresno v. California.102 There the Court held
that the United States is authorized under the Reclamation Act of 1902
to acquire private water rights by condemnation, notwithstanding state
laws that effectively prevent condemnation of the rights.103 The Court
might have considered whether the state laws conflicted with specific
congressional policy, as in Ivanhoe it had held that a state law con-
flicted with the acreage limitation policy. Instead, the Court ruled sim-
ply that the United States is not required to comply with state law when
it exercises its condemnation powers under the Reclamation Act of
1902; the effect of section 8 is merely to require the United States to pay
compensation for the loss of the rights, as the value is defined under
state law.104 According to the decision, this issue had already been set-
tled in Ivanhoe.105 In the Ivanhoe dictum, however, the Court indicated
that state law applies only when the United States acquires water,
not when it delivers water. In Fresno, the Court held that state law
does not even apply when the United States acquires water, at least
when it acquires water by condemnation. Thus, Fresno went beyond
Ivanhoe by casting doubts on the role of state law even with respect to
federal acquisition of water.

Finally, in Arizona v. California,106 the Supreme Court rejected the
claims of Arizona and California that the states were authorized to ap-

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101. See notes 9-12 & accompanying text supra.
103. The state laws provided for, first, a priority for water uses for municipal purposes
over agricultural purposes, and, second, a priority for water users in the county and watershed
where the water originates. Cal. Water Code §§ 1460, 11460, 11463 (West 1971); 372
U.S. at 628. The Court noted that the first state law, providing for a priority of municipal
uses over agricultural uses, is directly contrary to the priorities contained in the federal
reclamation laws. 43 U.S.C. § 485h(c) (1976); 372 U.S. at 630; see text accompanying notes
126-27 infra.
104. 372 U.S. at 630.
105. Id.
ply conditions on the delivery of water from the Boulder Canyon Project, a series of reclamation works on the Colorado River. The states’ claims were based on provisions of the Boulder Canyon Project Act (BCPA)\textsuperscript{107} which, in effect, incorporated the provisions of section 8 of the Reclamation Act of 1902. Citing its dictum in \textit{Ivanhoe}, which now began to acquire a life of its own, the Court concluded that section 8 does not require the United States “in the delivery of water to follow priorities laid down by state law.”\textsuperscript{108} Moreover, the Court purported to find a conflict between section 8 of the 1902 Act and provisions of the BCPA which authorize the Secretary of the Interior to enter into contracts with water users;\textsuperscript{109} since the Secretary was authorized to contract for the distribution of water, the Court stated, the states were powerless to fix any limitations on the distribution of water.\textsuperscript{110} The Court thus appeared to suggest that Congress, in providing the Secretary with discretionary authority to fulfill the purposes of its reclamation program, negated whatever regulatory authority it might have given the states in section 8.

The New Melones Decision

In the \textit{New Melones} case, the Supreme Court provided for the first time a comprehensive definition of the relationship between federal and state power in the field of reclamation. The United States had applied to the State of California for permits to appropriate water for the New Melones Project, a new reclamation facility on California’s Stanislaus River. Although the State issued the permits, it imposed conditions therein that limited the amount of water that could be impounded by the project, on grounds that the United States had failed to develop a plan for water uses for the project and that full impoundment would destroy the recreational value of an upstream stretch of whitewater that was widely used for rafting and canoeing. The State reserved jurisdiction to authorize full impoundment when the United States developed a plan for water use that was satisfactory to the State. The United States brought a lawsuit against California, asserting that California lacked jurisdiction to impose any condition on the acquisition and use of project water, assuming that there is sufficient water for the project. California argued that its jurisdiction to impose such

\begin{itemize}
\item 107. 43 U.S.C. §§ 617-617t, 617m, 617q (1976).
\item 108. 373 U.S. at 586.
\item 110. 373 U.S. at 587-88.
\end{itemize}
conditions derived from section 8.\textsuperscript{111}

The Supreme Court followed the forces of history and tradition rather than the influence of \textit{stare decisis}. Rather than follow its own precedents in \textit{Ivanhoe}, \textit{Fresno}, and \textit{Arizona}, it examined the pre-1902 federal tradition that recognized state control of water, the language and legislative history of the 1902 Act, and the post-1902 federal administrative practice in following state water laws.\textsuperscript{112} The Court, speaking through Justice Rehnquist, concluded that section 8 requires the United States to comply with state water laws relating to the appropriation of water, even when such state laws condition its use.\textsuperscript{113} Thus, the United States must not only follow state procedures in filing applications for water rights, but must also follow state laws that substantively regulate water uses; it must comply with state laws relating to both appropriation and distribution of water. The Court overruled those portions of its decisions in \textit{Ivanhoe}, \textit{Fresno}, and \textit{Arizona} that reached an opposite result.\textsuperscript{114}

Justice White's dissenting opinion did not challenge the historical analysis of the majority opinion. Instead, it objected that the "present temporal majority" of the Court had engaged in "revisionary zeal" by overruling the Court's prior decisions.\textsuperscript{115} These prior decisions, however, paid no heed to the historical forces that produced section 8 or that followed in its wake, and thus were not without their own revision-

\textsuperscript{111} See United States v. California, 403 F. Supp. 874, 877-82 (E.D. Cal. 1975), \textit{aff'd}, 558 F.2d 1347 (9th Cir. 1977), \textit{rev'd}, 438 U.S. 645 (1978); Decision 1422, California Water Resources Control Bd., at 14, 15-16, 17-18, 23-24, 26-30 (Apr. 4, 1973). The conflict between California and the United States over the New Melones Project is merely part of a long-standing dispute between these sovereignties over the proper scope and objectives of the federal reclamation program. The federal government, under the Secretary of the Interior, has traditionally sought to use water under the program primarily for the purpose of stimulating economic growth, by providing water and power to farmers, cities, and industries. In recent years, California, under its Water Resources Control Board, has sought to use a substantial portion of such water to protect the environment that is threatened by the program. California has required water to be released from federal dams to protect downstream water quality and fish and wildlife, and has limited impoundment of water in the dams to protect upstream environmental resources. See Decision 1400, California Water Resources Control Bd. (Apr. 11, 1972); Decision 1379, California Water Resources Control Bd. (July 28, 1971); Note, The Delta Water Rights Decision, 2 Ecol. L.Q. 733 (1972). Thus, the New Melones case not only raises fundamental questions of federalism concerning control of water in the West; it also raises fundamental questions about the extent to which the federal reclamation program should be operated to achieve economic growth at the expense of environmental degradation.

\textsuperscript{112} 438 U.S. at 653-70.
\textsuperscript{113} \textit{Id}. at 665-68, 670-75.
\textsuperscript{114} \textit{Id}. at 674.
\textsuperscript{115} \textit{Id}. at 679-93 (White, J., dissenting).
ary effect. Indeed, these prior decisions had themselves departed from earlier decisions which had gone the other way. By reestablishing the federal tradition that underlay section 8, the majority opinion might be defended on grounds that it followed history once more, rather than revised it once again.

In any event, the majority further concluded that section 8 requires the United States to follow state law when it acquires private water rights by condemnation, not just when it acquires unappropriated water. The Court thus overruled the contrary part of its decision in Fresno. Since the United States had not acquired water by condemnation in the New Melones case, the Court was not called on to rule on this additional question. It would have been anomalous, however, if the United States were required to follow state law in acquiring unappropriated water but not in acquiring water by condemnation. Section 8 does not distinguish between these kinds of water in providing for state control, and the states have an interest in regulating both kinds of water. By going beyond the facts of the case to define the nature of the federal condemnation power, the Court avoided an anomaly that would have resulted in confusion and, most likely, litigation.

Having ruled that section 8 requires federal compliance with state regulatory law, the Court turned to the more difficult question of resolving conflicts between federal and state reclamation policies. Adopting the position urged by California, the Court stated that section 8 requires federal compliance with state law only when the state law is not inconsistent with "clear congressional directives." The Court's decision, if inconsistent with the Ivanhoe dictum, is consistent with the Ivanhoe holding that a state law is invalid if it conflicts with Congress' acreage limitation policy.

The Court appeared to suggest at one point that, according to the congressional debates relating to section 8, Congress meant to avoid conflicts between federal and state policies by requiring the United States to obtain its water rights prior to congressional authorization of a project. Under this view, if state law does not authorize the United States to obtain water for the project, Congress would simply not authorize the project and conflicts between federal and state policies would not occur. In modern practice, however, the United States often acquires its water rights for a project after, rather than before, a project.

116. Id. at 671 n.24.
117. Id.
118. Id. at 668-69 n.21, 672-75.
119. Id. at 668-69 n.21.
is authorized. This practice might change, of course, as a result of the Court's decision. The appropriation laws of some states, however, authorize the states, in granting water rights, to reserve jurisdiction to impose conditions on the use of water at a future time, as water needs change. Thus, it is not always possible to fully define the nature of the federal water right at the time that the project is authorized by Congress. Accordingly, although Congress in 1902 may have expected that federal-state conflicts would be worked out prior to congressional authorization of the project, the modern appropriation doctrine does not always permit that result. Since such conflicts cannot always be avoided, they must be resolved by judicial rules of statutory construction, absent a congressional rule for resolving them. In ruling that the conflicts must be resolved in favor of Congress' specific policies, the Court limited the extent of its departure from its past precedents and insured the prevalence of specific national interests over parochial state interests.

The New Melones decision thus restores the federal tradition to western water law. By providing for state regulatory control of water to the extent not inconsistent with national objectives mandated by Congress, it provides an accommodation of federal and state interests that is the essence of federalism. Indeed, at least in the field of reclamation, the federal tradition can be justified on the basis of modern as well as historical values. Water from federal reclamation projects is not used primarily for usual federal purposes, such as nourishing federal forests or Indian reservations. Rather, the water is used primarily by local economic interests, by farmers, cities, and industries, and its use

120. For instance, the Central Valley Project, which consists of a coordinated series of federal dams, reservoirs, and waterways in California, was authorized by the Rivers and Harbors Acts of 1935 and 1937. See ch. 831, 49 Stat. 1028 (1935); ch. 832, § 2, 50 Stat. 844, 850 (1937). In obtaining its right to appropriate water for the project, the United States filed applications for permits and for assignment of state-filed applications subsequent to congressional authorization of the project. See H.R. Doc. No. 246, 85th Cong., 1st Sess. (1957), in II ENGLE, CENTRAL VALLEY PROJECT DOCUMENTS 543-47 (1957). A different procedure, however, was followed with respect to the Central Arizona Project, a series of reclamation facilities in Arizona that will utilize the interstate waters of the Colorado River. Congress initially refused Arizona's request to build the project on the grounds that Arizona had failed to establish that it had the right to obtain sufficient water for the project, as against California's claims to superior water rights in the Colorado River. Accordingly, Arizona brought a lawsuit against California to obtain recognition of its rights. See Arizona v. California, 373 U.S. 546 (1963). After Arizona succeeded in establishing its rights in that case, Congress then authorized the Central Arizona Project. Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885, 887 (1968) (codified at 43 U.S.C. § 1521 (1976)); see E. COOPER, AQUEDUCT EMPIRE 309-11 (1968).

121. See, e.g., CAL. WATER CODE § 1394 (West 1971).
thereby affects the economic growth and development of the state in which the water arises and flows. Its use also affects the state's environmental quality; it determines the quality of its waters, the abundance of its fish and game, and its recreational values. These local impacts justify a substantial measure of local control. There is, of course, a large national interest in the water, since the water results in the production of foods and goods that reach national markets. There is no federal interest, however, that bars the states from controlling the water to the extent that these national interests are not impaired. Since the states have an interest in controlling the water within the larger national interest and since the national interest is not impaired by this result, a proper application of federal principles would allow the state interest to be served.

Indeed, since the western states traditionally controlled the allocation of water to local economic interests, it would be anomalous if the states had no control over the allocation of water to these interests under the federal reclamation program. Such an anomaly would create two separate, unintegrated systems of water law in the western states, one under exclusive state control and the other under exclusive federal control. The New Melones decision results in an integration of these different systems to the extent consistent with specific national policies. Thus, although it rejects a unitary national system of water law in the field of reclamation, the decision promotes substantial uniformity in the water law systems of each state.

**Congressional “Directives”: New Problems of Federalism**

Rather than resolving all problems of federalism arising under the

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123. For instance, California has built its own water distribution system, the State Water Project, that utilizes many of the same distribution facilities as the federal system, and that results in distribution of water to many areas that are also served by the federal system. Because of the parallel facilities and goals of these systems, there is a need for maximum coordination of the systems. In particular, the waters released from both systems eventually collect in the Sacramento-San Joaquin Delta, an area with valuable ecological interests and agricultural uses; part of the water from both systems is used by Delta interests, and part is exported to agricultural users in the Central Valley. There is a continuing dispute between federal and state authorities over how much water should be allocated from the projects for use in the Delta, and how much exported to the Central Valley. See Note, *The Delta Water Rights Decision*, 2 ECOL. L.Q. 733, 738-42 (1973). Because the New Melones decision allows California, within the limits of national policy, to apply the same conditions on the federal system that it applies on the state system, the decision will doubtlessly result in greater coordination of the federal and state projects with respect to water allocations between Delta interests and non-Delta interests.
federal reclamation laws, the *New Melones* decision inevitably opens the door to new problems. The Court failed to define the kinds of congressional "directives" that will be deemed to override state law; it remanded the case to the lower courts for determination of that question under the facts of the case. As the courts grappled for many years with the question whether state laws can limit federal water uses, they must now grapple with the question whether state laws are inconsistent with congressional "directives." Although it is difficult to develop a comprehensive list of the specific problems that may be encountered in such inquiries, it is possible to identify two major problem areas involving, first, the limits of discretionary powers of federal administrative officials and, second, the limits of state authority to allocate water.

**Discretionary Powers of Federal Reclamation Officials**

As noted earlier,\(^\text{124}\) much of the difficulty in resolving conflicts between federal and state policies arises from the fact that Congress has entrusted the Secretary of the Interior with broad discretionary powers, overlapping state powers under section 8, to carry forth the purposes of the federal reclamation program. In the *New Melones* case, the Court, after reviewing the congressional acts that vest such discretionary powers in the Secretary, concluded that the Secretary "should follow state law in all respects not directly inconsistent with these [congressional] directives."\(^\text{125}\) By this statement, the Court appeared to hold that Congress meant to authorize the Secretary to take those steps necessary to carry forth congressionally mandated purposes, but not to immunize him from state laws that are not substantively inconsistent with these congressional purposes. Therefore, the Secretary's administrative powers do not displace state powers under section 8. The Secretary cannot develop a body of substantive administrative policies that are superior to state law; state law must be followed in signing contracts with water users, adopting rules and regulations, and taking other action, unless the state law is inconsistent with the substantive congressional policy that is being carried out.

It is not always easy, however, to determine whether a substantive policy owes its origin to Congress or the Secretary. An example of this difficulty can be found in the Reclamation Project Act of 1939,\(^\text{126}\) which provides that water cannot be made available for municipal or power purposes unless, "in the judgment of the Secretary," its use will

\(^{124}\) See text accompanying notes 68-86 *supra*.

\(^{125}\) 438 U.S. at 678.

not impair the agricultural purposes of the project. Has Congress established a policy for the priority of agricultural uses over municipal and power uses? If so, does the Secretary have exclusive authority to carry out this policy? The answer to the first question, it seems, lies in determining whether Congress has mandated federal officials to carry out a specific policy or instead has remained neutral on the matter. The answer to the second question, it seems, is that if Congress has mandated federal officials to carry out a specific policy, the Secretary must still comply with state law unless the state law prevents the substantive policy from being achieved.

The 1939 Act illustrates this resolution. By requiring federal officials to provide for a priority of agricultural uses over municipal and power purposes, the Act appears to establish such a priority as a matter of congressional policy. This congressional policy would override state law. The Secretary, however, must follow state laws that regulate the allocation of water between agricultural, municipal, and power purposes unless the state law upsets the congressional priority by impairing the agricultural purposes of the project. The Secretary cannot override state law on the grounds that, in the Secretary's judgment, the state law will have that effect; the decision, if necessary, must be made in the courts, not by the Secretary.

Another example is found in the Flood Control Act of 1962, which authorizes the New Melones Project. As noted earlier the Act mandates the Secretary of the Army to adopt “appropriate” measures for the protection of fish and wildlife and to “give consideration” to the “advisability” of providing for water quality control. The Act appears to provide for the protection of fish and wildlife as a matter of congressional policy, which would override state policy. The Secretary, however, must comply with state laws on this subject unless such laws fail to protect fish and wildlife; the Secretary cannot ignore state laws by simply claiming that, in the Secretary's judgment, the state laws will not protect fish and wildlife. On the other hand, the Act, in authorizing the Secretary to “give consideration” to the “advisability” of providing for water quality control, does not appear to establish water quality control as a matter of congressional policy; instead, the Act appears to contemplate an administrative decision on whether the project should

129. See text accompanying note 82 supra.
achieve this purpose. Hence, congressional policy on this matter is apparently neutral. Accordingly, state law can require or forbid project water to be used for this purpose.

However, Congress can undoubtedly make it clear that federal administrative officials are to have exclusive authority to achieve Congress' substantive goals, and that they may override state laws regardless of their consistency with the substantive goals. One such example might be found in the Flood Control Act of 1944, which authorizes the Secretary of the Army to adopt regulations for flood control functions of federal projects.\footnote{131. Flood Control Act of 1944, Ch. 665, 58 Stat. 887, 890 (1944).} The flood control function is an outgrowth of the navigation power that has been traditionally exercised by the federal government. Accordingly, it is likely that Congress, in providing for federal regulation of the flood control function, meant to insure that this function would be exclusively controlled by the federal government, not the states. Indeed, California has historically taken the position that the flood control function is under exclusive federal control, and that the states may not limit the impoundment and release of water for that purpose.\footnote{132. Decision 935, CAL. WATER RIGHTS BD., at 64 (June 2, 1959).} Therefore, whatever the states' authority to control water for other project purposes, their authority may not extend to the flood control function. It so, this result follows from the fact that Congress has indicated with sufficient clarity that this matter is under exclusive federal control.

To summarize, the applicability of state laws in this context depends on an analysis of Congress' substantive goals and the means by which the goals are to be achieved. If Congress has not directed that a particular result be achieved, the state law is applicable. If Congress has directed that a result be achieved and has not clearly indicated that the states are powerless to achieve it, the state law is applicable unless it bars the result. Federal officials cannot ignore the state law on the ground that the matter lies solely within the province of federal officials. If Congress has directed that a result be achieved, however, and has clearly indicated that the matter is within the exclusive control of federal officials, the state law is inapplicable. In short, if federal officials can comply with the substantive goals of both Congress and the states, they must do so unless Congress clearly indicates otherwise.

State Allocation of Water

Another question arises in determining the states' authority to al-
locate water from individual reclamation projects. As noted earlier,\textsuperscript{133} when authorizing a project, Congress usually specifies its general purposes but fails to specify how the water is to be allocated among different purposes and among different users. This practice might change as a result of the *New Melones* decision. In any event, assuming that Congress has not expressly stated its intent, what are the limits of state power to allocate water among different project purposes and among different users?

Assuming that Congress has constitutional authority to acquire water for project purposes, a state cannot deny water for any project purpose described in the authorizing act.\textsuperscript{134} Accordingly, it cannot indirectly achieve the same result by allocating so much water for some purposes, such as water quality control, that insufficient water is available for other purposes, such as agriculture. At what point is there an insufficient allocation of water for a particular purpose? The answer to this question is not found in the federal reclamation laws. Perhaps the answer can be found in the normal federal judicial rules pertaining to the scope of judicial review of administrative decisions. Under these rules, factual findings contained in an administrative decision will be sustained on judicial review if supported by substantial evidence, based on the record before the administrative agency.\textsuperscript{135} Therefore, a state administrative scheme to allocate water from federal reclamation

\textsuperscript{133} See text accompanying notes 82-86 supra.

\textsuperscript{134} However, water impounded for primary project purposes, such as irrigation, is often used for subsidiary project purposes, such as power and recreation. *See, e.g.*, H.R. Doc. No. 453, 87th Cong., 2d Sess. 50, 51, 52 (1962) (New Melones Project). If a state is authorized to defer impoundment of water for the primary irrigation purpose, can it thereby defer impoundment of water for a subsidiary purpose such as power to the extent that both purposes are served by the same quantity of water? The states' argument is that power is "subsidiary to reclamation," and is "only available where the storage dam raises the water to a sufficient level." \textsuperscript{84} CONG. REC. 10220 (1939). The opposite argument is that power is frequently necessary to generate project revenues, and thus make the project economically feasible. This question is now raised on the remand of the *New Melones* case, since California deferred the full impoundment of water for power purposes on grounds that water should not be fully impounded for irrigation purposes. *See* United States v. California, No. S-3014 (E.D. Cal.).

\textsuperscript{135} *See, e.g.*, Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 618-21 (1966); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942); Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941); 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29.08, 29.09, at 153-80 (1958). Formerly, the federal courts adhered to the view that, in reviewing an administrative decision, the courts would apply the "independent judgment" test rather than the "substantial evidence" test with respect to "fundamental, jurisdictional" issues, and further would require a trial *de novo* with respect to such issues. *See* Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). These cases are apparently no longer good law, however. 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29.08, 29.09, at 156, 167 (1958).
projects should be sustained to the extent that factual findings therein are supported by substantial evidence in the state administrative proceeding. An argument that the state scheme fails to provide sufficient water to satisfy a project purpose should not be upheld if substantial evidence supports the opposite conclusion. The states' authority to allocate water thus depends less on the substance than the procedure of federal law, less on an analysis of substantive congressional policy than on an application of judicial rules establishing a presumptive correctness of administrative decisions.

Although a state cannot deny water necessary to serve a purpose mandated by Congress, it does not follow that a state cannot require water to be allocated for a purpose not contemplated by Congress. Suppose, for example, that a state requires water to be allocated for a purpose, such as water quality control, that is not among the project purposes listed in the authorizing act. It might be argued that, since Congress has not included this purpose among the project purposes, it has directed that water not be used for this purpose. It is more likely, however, that Congress, by failing to mention the purpose, is neutral on whether it should be fulfilled. Since Congress is neutral, the state can require an allocation of water for the purpose. Therefore, although the states lack authority to subtract from the purposes contemplated by Congress, they apparently have authority to add to such purposes.

The states' authority to require an allocation of water for purposes not contemplated by Congress is stronger when the water is used for the protection of the environment. Recent congressional acts, in establishing a "national policy" to protect the environment, direct the states to bear the "primary responsibility" for achieving this policy and provide that federal laws, including those defining the obligations of federal agencies, shall be interpreted consistently with this policy. These laws appear to suggest that the purposes of federal reclamation projects shall, to the extent not inconsistent with other project purposes, include environmental protection. Thus, even when Congress has not specifically directed that water be used for environmental purposes in a particular project, a state law requiring an allocation of water for such purposes—far from being in conflict with a congressional directive—may be mandated by congressional directives found in other laws.

The states' authority to allocate water for environmental purposes,

136. See text accompanying notes 127-28 supra.
however, is subject to Congress’ paramount concern for the economic feasibility of the project. In the Reclamation Act of 1902, Congress directed that the projects are to be economically feasible in the sense that their costs are to be recovered by sales to water users.\textsuperscript{138} Subsequent acts have provided that the cost of supplying water for most environmental purposes, such as protection of fish and wildlife, are to be borne by consumers.\textsuperscript{139} In this way, the consumers subsidize the environmental purposes of the projects, or at least mitigate their harmful environmental effects. There is a point, however, at which so much water could be allocated for environmental purposes that the price of water to consumers is unreasonably or prohibitively high. If this point is reached, the economic feasibility of the project is jeopardized, since the project may not be able to generate the revenues necessary to pay back project costs. Certainly the states lack authority to produce this result by a massive allocation of water for environmental purposes. Thus, although the states have broad authority to allocate water for environmental purposes, their authority is limited by the need to insure that project costs are repaid to the federal government.

To further insure the economic feasibility of its projects, Congress has directed the Secretary of the Interior to prepare, prior to congressional authorization of the project, a feasibility report containing an analysis of project benefits and costs.\textsuperscript{140} As a practical matter, the project will not be authorized unless the benefits exceed the costs.\textsuperscript{141} Therefore, the states cannot allocate water for environmental or other purposes upon a showing that the allocation reduces benefits to less than costs. It is less clear whether a state can reduce benefits to less than those described in the feasibility report. It might be suggested that the extent to which benefits exceed costs, not just the fact that benefits exceed costs, influences Congress’ decision to authorize the project and thus limits the states’ allocation authority. However, this conclusion is not sufficiently clear to support such a limitation. Indeed, it is unlikely that Congress insists that its projects achieve a particular level of bene-

\textsuperscript{139} 43 U.S.C. §§ 485h(a), (b) (1976); Water Project Recreation Act, 16 U.S.C. §§ 4601-13(a), 4601-14(a) (1976).
\textsuperscript{140} Reclamation Project Act of 1939, 43 U.S.C. § 487h(a) (1976). The project benefits include certain environmental benefits, such as protection of fish and wildlife and water quality control, that must be paid for by consumers. \textit{Sax, Federal Reclamation Law} in 2 \textit{Clark, Waters and Water Rights} § 112.3(a), at 142 (R. Clark ed. 1967) [hereinafter cited as \textit{Sax}]. It is thus possible that a project may be economically feasible in the sense that its benefits exceed its costs, but not in the sense that it is able to generate the revenues necessary to pay back project costs.
\textsuperscript{141} \textit{Sax, supra} note 140, § 112.2, at 138-40.
fits. Congress' view of project benefits is usually flexible; it usually provides in its authorizing acts that the feasibility report sets only a general direction to be followed by project operators, not a narrow pathway from which they cannot stray.\textsuperscript{142} Therefore, the states can apparently allocate water to the point of reducing project benefits to less than those described in the feasibility report, but not to less than costs.

Finally, the authority of state administrative authorities to allocate water is subject to restraints under state law, beyond those imposed under federal law. Most western states limit the discretionary powers of state agencies to grant water rights by requiring that they determine that the water right is consistent with the reasonable and beneficial use of water.\textsuperscript{143} Moreover, the states' laws provide that this determination is subject to judicial review.\textsuperscript{144} In some states, including California, the state agency is required to conduct a public hearing when granting a water right, and competing users are allowed to testify and present evidence.\textsuperscript{145} These state legislative restraints limit state administrative powers. Justice Douglas once lamented that if the authority to allocate water belongs to the Secretary of the Interior rather than the states, the Secretary would be able to assign water to "the most worthy Democrat or Republican, as the case may be."\textsuperscript{146} Whether this is so, the same latitude does not belong to most state administrative authorities under the states' own laws.

\section*{Conclusion}

The \textit{New Melones} decision results in a new federalism in the field of reclamation, or, more exactly, a rebirth of the old federalism contemplated by Congress in 1902. The Court might have simply followed its own recent precedents and ruled that the federal government can control water that it develops, that it can regulate that which it subsidizes. Instead, the Court followed the revelations of history and experience. In keeping with the tradition of federalism underlying section 8, the Court balanced and harmonized federal and state interests rather than promulgated a pervasive federal supremacy. It manifestly fol-

\begin{footnotes}
\begin{enumerate}
\item Use id. The authorizing act typically requires only that the project be operated "substantially" in accordance with the feasibility report. See note 85 \textit{supra}.
\item See text accompanying notes 21-23 \textit{supra}.
\item \textit{Id.} at 323; \textit{Cal. Water Code \S\S} 1340-1359 (West 1971 & Supp. 1977). However, California does not require a hearing on unprotested applications. \textit{Cal. Water Code \S} 1351 (West 1971).
\end{enumerate}
\end{footnotes}
owed the policy judgments of Congress rather than its own policy judgments, although the two may not have been dissimilar. As a result, its decision is, at once, a triumph of diversity rather than uniformity of national power, and of judicial restraint rather than judicial activism. The decision reflects Justice Holmes' dictum that "[t]he life of the law has not been logic: it has been experience." In this case, the experience is found in the tradition of federalism.

There is an undoubted value in unitary federal control of water in the field of reclamation, in that it avoids conflicts between federal and state policies that lead to uncertainties and litigation. There is also a value in the federal tradition, however, in allowing the states to control water that affects their economy and environment. The Court opted for the values of federalism in its New Melones decision, even at the expense of causing uncertainties about the exact relationship of federal and state power. Much uncertainty can perhaps be overcome by following the suggestions contained in this Article, particularly by giving presumptive correctness to state administrative schemes for the allocation of water.

In any event, uncertainty about the exact relationship between federal and state power is not new under our federal tradition. Rather, it is the stuff of which the federal tradition is made. This tradition is based on the concept that federal and state powers are relative rather than absolute, that inquiries must be made into the nature and quality of the federal interest to determine whether it should prevail over state interests. This inquiry is common in other areas where federal and state powers overlap and compete, as under the preemption doctrine, and it is proper in the field of reclamation, where both federal and state interests are at stake. The lack of precise definition of federal and state powers resulting from the New Melones decision is the price that we


148. Under the preemption doctrine, the validity of a state law depends on whether it conflicts with a specific federal law, assuming that Congress has not occupied the field. See, e.g., New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). Further, the applicability of the federal antitrust laws to the states depends on the nature of the state interest, and whether there are alternative ways in which the state interest can be served. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Parker v. Brown, 317 U.S. 341 (1943). In the field of labor law, the substantive law applicable in interpreting collective bargaining contracts is federal law, which in turn depends on a mixture of federal and state policies. Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). Under the Outer Continental Shelf Act, state laws are applicable on the outer continental shelf to the extent not inconsistent with specific federal laws. 43 U.S.C. § 1332(a)(2) (1976); Rodrigue v. Aetna Cas. Co., 395 U.S. 352 (1959).
pay for our constitutional tradition of federalism. By its willingness to pay the price, the Court has served that tradition well.