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Federal-State Conflicts Over the Colorado River

INTRODUCTION

In 1963 the Supreme Court ended the long-fought battle between Arizona and California for water from the Colorado River.^{1,2} However, the Court's opinion in *Arizona v. California*³ appeared to decide far more than the interstate apportionment sought by the disputants. Interpreting the Boulder Canyon Project Act passed by Congress thirty-five years earlier,⁴ the Court not only ruled that the Secretary of the Interior had the authority to apportion the water among the states, but also that he had the unconditional authority to manage, distribute "and decide which users within each State would get [Colorado River] water."⁵ The Court ruled further that in the "distribution of waters to users, state law has no place."⁶

Aghast at this delegation of such apparently unrestrained authority to an executive official, Justice Douglas sarcastically remarked that "[n]ow one can receive his priority because he is the most worthy Democrat or Republican, as the case may be."⁷ This Comment

1. *Arizona v. California*, 373 U.S. 546 (1963), *decree entered* 376 U.S. 340 (1964) *supplemental decree entered*, 439 U.S. 419 (1979).

2. Arizona and California's dispute over Colorado River water, spanning well over six decades, first took legal form with the passage of the Boulder Canyon Project Act in 1928, 43 U.S.C. §§ 617a-617t (1982 & Supp. III 1985). *See infra* notes 83-89 and accompanying text. The Project Act authorized construction of the Hoover Dam and the All-American Canal, and with it a stable supply of water for California, Arizona, and Nevada, the three states within the River's Lower Basin. Five Supreme Court cases named *Arizona v. California* have dealt with the ensuing battle for the River's water. They are *Arizona v. California*, 283 U.S. 423 (1931); 292 U.S. 341 (1934); 298 U.S. 558 (1936); 373 U.S. 546 (1963); and 460 U.S. 605 (1982). The first three cases prefiguring the 1963 opinion central to this Comment's concerns are reviewed in Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 39-43 (1966).

For a brief description of the Colorado River and its role in irrigating the arid West, see Trelease, *Arizona v. California: Allocation of Water Resources to People, States and Nation*, 1963 SUP. CT. REV. 158, 159-60; Report of the Special Master at 15-22, *Arizona v. California*, 373 U.S. 546 (1963) [hereinafter Special Master]. *See generally* P. FRADKIN, *A RIVER NO MORE: THE COLORADO RIVER AND THE WEST* (1981).

3. 373 U.S. 546 (1963). To avoid confusion among the five similarly named Supreme Court cases, all references to *Arizona v. California* or *Arizona* refer to the 1963 opinion.

4. 43 U.S.C. §§ 617a-617t (1982 & Supp. III 1985) [hereinafter Project Act].

5. 373 U.S. at 580.

6. *Id.* at 588.

7. *Id.* at 630 (Douglas, J., dissenting).

addresses Justice Douglas' concerns; not, however, as to who may initially contract for water within each state—existing contracts moot that issue⁸—but as to the fundamental roles state law and the Secretary of the Interior play in governing the use, transfer, and quality of the river water within each state.

For California the issue could not be more pressing. Although she has long enjoyed the use of Arizona's legal share of the River water, California must wean herself from such luxury, now that Arizona is equipped with an aqueduct to utilize that water.⁹ A scramble by California and its users to conserve decreased supplies of water or to transfer water between users within the State will likely ensue,¹⁰ but the haunting words of the *Arizona* Court that "state law has no place"¹¹ must first be placed in context.

I.

ARIZONA V. CALIFORNIA'S BROAD DICTA

The *Arizona* Court's language interpreting the Project Act does not clearly define the Secretary's power to control Colorado River water.¹² At times the Court speaks broadly, suggesting the Secre-

8. See *infra* notes 104-06 and accompanying text.

9. For example, the Metropolitan Water District (hereinafter MWD), which wholesales water to 27 agencies within Southern California, has a contractual priority to the last 550,000 acre-feet of California's first 4.4 million acre-feet of Colorado River water and the first 550,000 acre-feet of any additional water available to California. See Water: California General Regulations (September 28, 1931) (adopting Water: California Seven-Party Water Agreement (art. I, §§ 1-4) (August 18, 1931) printed in WILBER & ELY, THE HOOVER DAM DOCUMENTS A487-89 (1948) [hereinafter Documents]. (The Seven-Party Agreement is reprinted at *infra* note 101 and the California General Regulations are reprinted at *infra* note 106). However, California is only guaranteed 4.4 million acre-feet of the Colorado River's Lower Basin allotment, *Arizona*, 373 U.S. at 583, so the MWD is only assured water to fill its first 550,000 acre-feet contract right. Nevertheless, the MWD has historically enjoyed the use of 1.2 million acre-feet, since a substantial portion of the River's water was unused. But Arizona has now partially completed the Central Arizona Project, and is thus able to deliver water for beneficial use. Thus, excess water once available for California's use will be reduced. By 1990 the MWD's take is expected to be 550,000 acre-feet while Arizona will take its legal maximum of 1.2 million acre-feet. See *Arizona Turns on the Water from Colorado*, L.A. Times, Nov. 16, 1985, pt. 1, at 1, col. 3; see generally *Sharing the Colorado River's Water: West Braces for a Change*, L.A. Times, Sept. 23, 1985, pt. 1, at 3, col. 1 (description of the Central Arizona Project's progress).

10. See *infra* notes 131-135 and accompanying text.

11. 373 U.S. at 588.

12. To avoid confusion, it is important to note outright that this Comment is concerned exclusively with the scope of power the Secretary has been actually authorized to exert over the Colorado River by the Congress in the Project Act. Whether Congress itself had the constitutional authority to grant the Secretary such powers was not a contested issue in the case. See *Arizona*, 373 U.S. at 565 (Congress' constitutional au-

tary's control is supreme in every conceivable aspect of the River's management, distribution, and use;¹³ at others the Court seems to find the Secretary's power supreme only in his apportionment of the Colorado;¹⁴ and at still others the Court suggests that the role of state law remains in large part an open question.¹⁵ Determining the proper scope of the Secretary's authority requires an understanding of how the Court's construction of the Project Act solved the dispute before it. A review of the facts surrounding the dispute before the Court in *Arizona* rehashes some fairly well traveled turf,¹⁶ but the review provides the necessary context for understanding the limits of the Court's decision and illuminates the Court's views on the respective federal and state roles in managing the Colorado.¹⁷

The Colorado River Compact,¹⁸ negotiated in 1922, apportions in perpetuity to Nevada, California, and Arizona, the three Lower Basin states of the Colorado River, the exclusive use of 7,500,000 acre-feet of water per year. Apportioning the 7.5 million acre-feet

thority implied); *id.* at 628 (Douglas, J., dissenting) (question is one of Congress' intent, not authority).

13. "[The Secretary's contract authority] includes the power to choose with whom *and upon what terms* will the contracts be made." *Id.* at 580 (emphasis added). "Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project. . . ." *Id.* at 590.

14. "[I]t is the [Project] Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment among the states[, and] in choosing between users within each state." *Id.* at 586.

15. "[T]he States [may] do things not inconsistent with the Project Act or with federal control of the river. . . . [Apart from distributing water to users,] things the States are free to do can be decided when the occasion arises." *Id.* at 588.

16. Commentators discussing this case are Trelease, *supra* note 2; Clyde, *The Colorado River Decision*—1963, 8 UTAH L. REV. 299 (1964); Haber, *Arizona v. California—A Brief Review*, 4 NAT. RESOURCES J. 17 (1964); Wilmer, *Arizona v. California, A Statutory Construction Case*, 6 ARIZ. L. REV. 40 (1964); Meyers, *supra* note 2.

17. While most commentators on *Arizona* have lamented what they believed to be the apparently complete loss of a state's control over the Colorado River water within its borders, *see, e.g.*, Trelease, *supra* note 2, at 191-94, they have failed to assess the *Arizona* Court's language within the more limited solution the Court crafted to the litigants' dispute, *see infra* notes 32-33 and accompanying text. Thus their reading of *Arizona* as meaning the demise of state control is suspect.

18. The Compact is reprinted in Documents, *supra* note 9, at A17. The Compact originally intended to effectuate an apportionment of the Colorado among the seven Colorado Basin states, but the States could only agree on an apportionment between the Upper and Lower Basins. Then, the Arizona legislature refused to ratify the Compact, fearing that California's extreme growth and thirst would cheat Arizona of her fair portion of the Lower Basin allotment. The Project Act incorporated the Compact's provision and circumvented Arizona's dissent by making the Compact effective upon the ratification of only six of the seven affected states. *See* 43 U.S.C. § 617c. Arizona resorted to the courts to challenge the Compact's constitutionality, but was unsuccessful. *See Arizona v. California*, 283 U.S. 423 (1931). In 1944, Arizona finally ratified the compact. Documents, *supra* note 9, at A165.

among the states was left for another day, thus forming the basis for the states' competing claims to Colorado River water in *Arizona v. California*.

California's position, designed to increase her share of the 7.5 million acre-feet, was restated by the Court as follows: "[California] takes the position that the judicial doctrine of equitable apportionment giving full interstate effect to the traditional Western law of prior appropriation should determine the rights of the parties to the water."¹⁹ If the law of prior appropriation²⁰ were determinative in apportioning the river, California, having been first to reduce a sizable portion of the 7.5 million acre-feet of water to a beneficial use—and the only state then and within the foreseeable future equipped with a delivery system able to reduce additional water to a beneficial use²¹—would be assured the lion's share of the 7.5 million acre-feet allocated to the Lower Basin states.

Arizona's opposing view was ultimately adopted by the Court: "Congress intended to provide its own method for a complete ap-

19. 373 U.S. at 563. Previous to *Arizona*, the Supreme Court had settled only two cases by utilizing the concept of equitable apportionment. They are *Nebraska v. Wyoming*, 325 U.S. 589 (1945) and *Wyoming v. Colorado*, 259 U.S. 419 (1922). The Court described equitable apportionment in *Nebraska v. Wyoming*:

Apportionment calls for the exercise of an informed judgment on a consideration of many factors. *Priority of appropriation is the guiding principle*. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue.

325 U.S. at 618 (emphasis added). Thus, while not the exclusive factor, the law of prior appropriation would be weighted heavily in an equitable apportionment of the Colorado River.

20. The Supreme Court provides the following description of the doctrine of prior appropriation: "[W]ater rights are acquired by diverting water and applying it for a beneficial purpose. A distinctive feature of the prior appropriation doctrine is the *rule of priority*, under which the relative rights of water users are ranked in the order of their seniority." *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982) (emphasis in original). See generally W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES Misc. Pub. No. 1206 (1971).

Six of the seven states within the Colorado River Basin have adopted the prior appropriation doctrine exclusively. Although California water law is primarily dominated by prior appropriation, see CAL. WATER CODE §§ 1200-1800 (West 1971), the state has also recognized riparian rights, see *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). California's claims to the Colorado River, however, were based primarily on the prior appropriation doctrine. Thus, had the Court performed an equitable apportionment, it could have relied upon the commonly accepted appropriation rights doctrine.

21. See *Trelease*, *supra* note 2, at 165; *supra* note 9.

portionment of the mainstream [Colorado River] water among Arizona, California, and Nevada.”²² The Court discovered Congress’ intent to apportion the water in the combined effect of sections 4(a), 5, and 8(b) of the Project Act.²³ Section 5 grants the Secretary the authority “to contract for the storage of water . . . and . . . delivery . . . as may be agreed upon, for irrigation and domestic uses. . . .”²⁴ Furthermore, users may obtain water only if they have a contract with the Secretary to do so, but once obtained, a contract would be for “permanent service.”²⁵

The Secretary’s authority to enter into contracts for use of the water is conditioned by section 4(a) of the Act.²⁶ That section authorizes but does not require the Lower Basin states to agree among themselves, by compact, to apportion the 7.5 million acre-feet of water allotted to their exclusive use in accord with a strict allocation: 4.4 million acre-feet to California, 2.8 million acre-feet to Arizona, and .3 million acre-feet to Nevada.²⁷ Finally, section 8(b) provides that should a compact be formed, it must recognize any permanent future allocations already made by the Secretary’s contracts.²⁸ Thus, either by compact or by the Secretary’s contracts, Congress intended the Project Act to be the basis for a complete appropriation of the River. Absent a compact, the Secretary would determine the River’s appropriation solely by contract.²⁹

The Lower Basin states never agreed to a compact. Instead, the Secretary actually entered into contracts with the states.³⁰ The legitimacy of this course of events depends upon the degree of authority vested in the Secretary of the Interior by virtue of his power to contract.

It is in this context, then, that the Court’s perplexing language describing the scope of the Secretary’s power to control the Colorado³¹ must be understood. The Project Act’s statutory scheme

22. 373 U.S. at 575.

23. *Id.* at 562.

24. 43 U.S.C. § 617d.

25. *Id.*

26. *Id.*

27. *Id.* § 617c.

28. *Id.* § 617g(b).

29. 373 U.S. at 575, 579.

30. General regulations for subsequent California contracts were promulgated in 1930 and 1931. Documents, *supra* note 9, at A485-89. Major contracts with California users followed shortly thereafter. *Id.* at A491-A619. General regulations governing Arizona’s right to contract were promulgated in 1933, *id.* at A551, although the state did not secure a contract for its share of the water until 1944. *Id.* at A559.

31. *See supra* notes 13-15.

would have to vest the Secretary with the power to reject California's claim that the River should be apportioned by equitable apportionment, since application of that theory would entail at least partial recognition of traditional state claims of prior appropriation. If the law of prior appropriation were invoked, it would, in turn conflict with what the Court found to be Congress' intent that the Secretary of the Interior apportion the River by contract. Thus, the Court's logic demands that the Secretary's power to contract supersede each competing state's claim to water under conventional prior appropriation doctrine. Conflicting state claims simply could not be reconciled with the Congress' goal to apportion the water among the Lower Basin states; they were inconsistent with provisions of the Project Act.

If the Court had limited the Secretary's contracting power to the authority merely to supersede conflicting interstate claims, the issue before the Court—to apportion the River among the states—would have been resolved. Nonetheless, the Court reserved to the Secretary the additional power “to decide which users *within each state* would get water.”³² However, this statement is mere dictum, since the matter that brought the Lower Basin states to court was an *interstate* conflict over the amount of water each would secure in perpetuity, *not an intrastate conflict* between users within a particular state. While it was necessary for the Secretary's contract power to supersede conflicting interstate claims to water, the Court was not called upon to determine the Secretary's role should a purely intrastate conflict arise.

The Court's statement that “state law has no place”³³ in effectuating Congress' apportionment plans should be limited by the case's specific holding to mean that state law has no place in resolving *interstate* conflicts over the apportionment of the River. Future courts confronted with federal-state conflicts over matters of purely *intrastate* control, distribution, and management of water from the Colorado are not bound by the *Arizona* Court's excessive language.

II.

STATUTORY CALLS FOR A STATE ROLE

Two provisions of the Project Act ensure a state role in the management of the Colorado River. Section 18 of the Project Act states that

32. 373 U.S. at 580 (emphasis added).

33. *Id.* at 588.

[n]othing herein shall be construed as interfering with such rights as the States *now* have either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders. . . .³⁴

The *Arizona* Court made it clear that this section in no way limits the Secretary's power to contract; it "merely preserves such rights as the States now have, that is, such rights as they had at the time the [Project] Act was passed."³⁵ With the passage of the Project Act, Congress simply exercised its option to apportion the River.

This interpretation essentially renders Section 18 incompetent to mediate the present federal-state balance. However, in the same paragraph the Court provided section 18 with some additional bite:

Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights. What other things the States are free to do can be decided when the occasion arises.³⁶

It is clear that the Court envisioned a state presence on matters not inconsistent with federal control of the river.

A firmer ground delineating the federal-state balance has developed under yet another provision of the Project Act, along with the Reclamation Act of 1902.³⁷ Section 14 of the Project Act requires that its commands "shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."³⁸ Thus, the Project Act is subject to the initial federal-state balance struck by Congress in 1902, when it

34. 43 U.S.C. § 617q (1982) (emphasis added).

35. 373 U.S. at 585.

36. *Id.* at 588 (footnote omitted).

37. The Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.) marked the federal government's formal beginning as an irrigator of the West. Pursuant to this Act, the great number of water projects since authorized by Congress has caused an exponential growth in what has generally come to be known as reclamation law. For an excellent introduction into this complex area of law, see generally Professor Sax's 180-page chapter on federal reclamation law in 2 *Waters and Water Rights* §§ 110-125 (R. Clark ed. 1967). An interesting historical discussion of the need for irrigation to make the arid western lands productive appears in W. STEGNER, *BEYOND THE HUNDREDTH MERIDIAN* 219-31 (1954). Finally, Marc Reisner, in his fascinating piece of investigative journalism, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1986), documents and critiques the political and bureaucratic rivalry between the Bureau of Reclamation and the Army Corps of Engineers in their battle to irrigate the West.

38. 43 U.S.C. § 617m (1982).

passed the first reclamation law: Section 8 of the 1902 Act calls for the Secretary to proceed in conformity with "the laws of any state relating to the control, appropriation, use, or distribution of water for irrigation."³⁹

The *Arizona* Court squared its reading of the Secretary's powers with this section by adopting an incredibly narrow reading of it. The *Arizona* Court drew upon the vastly restricted reading of section 8 offered five years earlier in *Ivanhoe Irrig. Dist. v. McCracken*⁴⁰ and the same year in *City of Fresno v. California*.⁴¹ Those cases held that section 8 "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. . . . But the acquisition of water rights must not be confused with the operation of federal projects."⁴² Based upon this limiting language, termed the "proprietary theory,"⁴³ the *Arizona* Court disposed of the section 8 problem, arguing that "[s]ince § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act."⁴⁴

The Supreme Court's present reading of section 8 in *California v. United States*,⁴⁵ however, provides a broader view of the states' role in federal reclamation projects. The "proprietary theory" that subjected the Secretary to state law only when he acquired water for his

39. Section 8 reads in part:

Nothing in this Act shall be construed as affecting or intending 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. . . . 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.

43 U.S.C. §§ 373, 383 (1982) (emphasis added).

40. 357 U.S. 275 (1958).

41. 372 U.S. 627 (1963).

42. 357 U.S. at 291-92.

43. This theory was the basis for the United States' argument that the Secretary's only obligation was to pay parties for taking water rights protected under state law. See Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49, 57-68 (1964).

44. 373 U.S. at 587.

45. 438 U.S. 645 (1978). *California* is described briefly at *infra* note 62.

projects was discarded by the Court.⁴⁶ In its place, the *California* Court, stressing the goals of “cooperative federalism,”⁴⁷ issued a new standard for delineating the proper federal-state balance: “[The state may impose any condition] not inconsistent with congressional provisions authorizing the [federal] project in question.”⁴⁸ Absent such an inconsistency, the Secretary of the Interior must “comply with state law in the ‘control, appropriation, use, or distribution of water.’ ”⁴⁹ Thus, the Secretary is to “proceed in conformity”⁵⁰ with “not inconsistent”⁵¹ state law in the acquisition of water, the operation of a federal project, and the distribution of federal water and the terms conditioning its use.

A. *Section 8 Applies to the Project Act*

The extent to which the Secretary’s extensive contract power over the Colorado River survives the Court’s present reading of section 8 depends upon the grounds the *California* Court used to distinguish the *Arizona* decision. The *California* Court devoted a single paragraph to this end, which reads:

In *Arizona v. California*, the States had asked the Court to rule that state law would control in the distribution of water from the Boulder Canyon Project, a massive multistate reclamation project on the Colorado River. . . . [T]he [*Arizona*] Court concluded that because of the unique size and multistate scope of the Project, Congress did not intend the States to interfere with the Secretary’s power to determine with whom and on what terms water contracts would be made. . . . [T]here was no need for [the *Arizona* Court] to reaffirm [the section 8 standard of *Ivanhoe* and *City of Fresno*] except as it related to the singular legislative history of the Boulder Canyon Project Act.⁵²

This cryptic passage was crafted to free the *California* Court to enunciate its section 8 standard. One possible reading of the passage is that it concurrently frees the Secretary’s extensive control over the Colorado River from any restrictions the *California* Court’s new section 8 standard might otherwise impose.

Perhaps in referring to the Project Act’s “singular legislative history,” the *California* Court believed that Congress never intended

46. 438 U.S. at 674-75.

47. *Id.* at 650.

48. *Id.* at 674.

49. *Id.* at 675 (quoting in part section 8 of the Reclamation Act of 1902, *supra* note 39).

50. Reclamation Act of 1902, § 8; *see supra* note 39.

51. 438 U.S. at 674.

52. *Id.* (footnotes omitted) (emphasis added).

that the Secretary's power be subject to section 8 at all. If this were the case, not only *what* the *Arizona* Court said about section 8 would be dicta, but *anything* it said about section 8 would be dicta. This construction would certainly free the *California* Court to pronounce its new "not inconsistent" standard.

The above construction is at least plausible. Section 14 of the Boulder Canyon Project Act incorporates reclamation law, but it does so subject to a seemingly innocuous caveat: "except as otherwise herein provided."⁵³ A case can be made that the *Arizona* Court decided that the Project Act did "provide otherwise" when it came to section 8. Since the Project Act requires interstate interests to be apportioned by the Secretary, section 8's requirement of compliance with state law may never have been intended to apply to the Project Act at all.⁵⁴

The problem with this analysis is that the *California* Court never stated whether, and to what extent, it believed section 8 applies to the Project Act. Apparently the extent of its applicability was not enough to bind the *California* Court to the *Arizona* Court's section 8 interpretation, but this does not mean that *California* distinguished *Arizona* on the grounds that section 8 is entirely inapplicable to the Project Act. Such a leap is neither supported by *Arizona* nor the actual legislative history of the Act.⁵⁵ The *Arizona* court found it necessary to square the Secretary's power with section 8, thus tacitly acknowledging its applicability to the Project Act.⁵⁶

53. Section 14 states that the Project Act "shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, *except as otherwise herein provided.*" 43 U.S.C. § 617m (1982) (emphasis added). "Reclamation law" is defined in Section 12 "to mean that certain Act of Congress of the United States approved June 17, 1902, and the Acts amendatory thereof and supplemental thereto." *Id.* § 617k.

54. One commentator seems to have given such a reading to *Arizona*, see Trelease, *supra* note 2, at 200-01, but the position is wholly without support from the text of *Arizona*. See *infra* notes 56-57 and accompanying text.

55. Congress' primary concern when it passed the Project Act was to resolve the competing state claims for the River's water. See *infra* notes 85-96 and accompanying text. Thus all discussion by the Congress of the Secretary's power necessarily began with the general and tacit assumption that state law would have a place in the Project Act via section 8 of the Reclamation Act; only then could it logically progress to the specific issue of whether the states' competing claims to the water would prevail, or whether the Secretary had unlimited power to apportion the water as he saw fit. At no time did the discussion even suggest a categorical rejection of section 8's call for conformity with state law.

56. The *Arizona* Court had been extensively briefed on the applicability of section 8 of the Reclamation Act to the Project Act. The Court also had before it the 433-page volume, prepared by the Court-appointed Special Master, reporting his findings, conclusions, and recommendations. Yet of all the various positions and arguments presented

Rather than rely on the section 14 "otherwise herein provided" caveat, it adopted a narrow construction of section 8.⁵⁷

Why, then, did Congress include the "otherwise" clause in the Project Act? Since the Project Act was passed by a separate act of Congress, rather than as an amendment to the Reclamation Act, a special provision was necessary to make the Act subject to reclamation law.⁵⁸ However, certain provisions of the Project Act are meant to be excluded from reclamation law. One such notable exclusion applies to users of the Colorado possessing present perfected water rights prior to the Project Act.⁵⁹ The section 14 "otherwise"

to the Court concerning section 8 applicability, none relied upon the "otherwise" clause to render section 8 inapplicable.

The Special Master stated that section 8 is applicable to the Project Act, Special Master, *supra* note 2, at 217, and that although it requires that competing intrastate claims "be decided under state law," *id.* at 218, such competing intrastate claimants were "not parties to this suit." *Id.* Therefore, the Special Master declined to decide the issue of competing intrastate claims. *Id.* at 218-19. His inaction lends support to the argument that the *Arizona* Court's language relating to the Secretary's power over intrastate concerns is mere dicta. *See supra* notes 31-33 and accompanying text.

California argued that section 8 applied in full force, requiring the Secretary to conform to intrastate laws as well as interstate laws. Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master at 147-50, *Arizona*, 373 U.S. 546 (1963). In this fashion, California sought to retain the traditional Western law of prior appropriation in the apportionment of the Colorado. *See supra* notes 19-21 and accompanying text.

Most telling, however, is the United States' argument. Although its position was designed to retain the greatest degree of federal control possible, it did not rely upon the "otherwise" clause to read section 8 entirely out of the Project Act. To the contrary, it utilized the argument ultimately adopted by the Court: that section 8 does apply, but that 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." Brief In Support of Exceptions of the United States, Intervener, To the Special Master's Report and Recommended Decree at 41, *Arizona*, 373 U.S. 546 (1963) (quoting *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291 (1958)). The Secretary therefore would not have to conform with state law in the distribution and allocation of the water. *Id.* at 41-43. The State of Arizona did not even address the issue of section 8 applicability, except with respect to the separate issue of Indian water rights, *see* Opening Brief for Arizona at 143-44, *Arizona*, 373 U.S. 546 (1963), and even then, neither section 14 nor its "otherwise" clause was invoked. *See id.* at ix, 143-44.

57. *See supra* notes 40-43 and accompanying text.

58. *See* Trelease, *supra* note 2, at 200-01.

59. Section 6 of the Project Act requires that the water it makes available be used for the "satisfaction of present perfected rights. . . ." 43 U.S.C. § 617e. In *Bryant v. Yellen*, 447 U.S. 352 (1980), the Court relied upon the section 14 "otherwise" clause to hold that the 160-acre land limitation of reclamation law does not apply to the present perfected rights, identified by the Project Act, which the Imperial Irrigation District possessed.

The Court defined a present perfected right as "a right that had been acquired in accordance with state law and that had been exercised by the actual diversion of a specific quantity of water and its application to a defined area of land." *Id.* at 369-70.

clause assures that such exceptions will not conflict with the Act's incorporation of reclamation law.

Moreover, Congress routinely incorporates reclamation law into the many projects it passes. A provision reading "except as otherwise provided" has become commonplace in federal projects.⁶⁰ It is inconceivable that Congress intended by its routine use of this clause to preclude states completely from exerting any control over water that would be used entirely within their borders once an interstate apportionment had been made.

A far more plausible reading of *California* is that it distinguished *Arizona* on its facts. The Court emphasized that *Arizona* was concerned with a "multistate" project,⁶¹ whereas the project in *California* was purely intrastate.⁶² The Court's reference to the Project Act's "singular legislative history"⁶³ was thus a reference to Congress' intention under the Act that the Secretary apportion the Colorado River among the States. Apportioning the Colorado in the face of competing interstate claims was the narrow issue in *Arizona*, and the Court responded to this issue by holding that the Project Act intended the Secretary to make the interstate apportionment.⁶⁴

Thus understood, *Arizona*'s holding does not conflict with the holding in *California* that the Secretary conform to state laws "not inconsistent with congressional provisions authorizing the [federal] project in question."⁶⁵ Congress specifically authorized the Secretary to apportion the River among the States; conflicting interstate claims based on state law were inconsistent with this congressional directive and were thus properly ignored by the Secretary. Since

60. See, e.g., the Weber Basin Project, 63 Stat. 677 (1949); the Vermejo Project, 64 Stat. 1072 (1950); the Collbran Project, 66 Stat. 325 (1952); the Washita River Basin Project, 70 Stat. 28 (1956); the Washoe Project, 70 Stat. 775 (1956); the San Angelo Project, 71 Stat. 372 (1957); the Colorado River Storage Project Act, 43 U.S.C. § 620c (1982); The Distribution System Loans Act, 43 U.S.C. § 421d (1982); and the Colorado River Basin Project Act, 43 U.S.C. § 1554 (1982).

61. See *supra* text accompanying note 52.

62. *California* involved the California State Water Resources Control Board's imposition of conditions on the permits sought by the federal government to operate the Central Valley Project, a federal reclamation project. Unlike the Project Act, the Central Valley Project is contained solely within one state: California. Most commentators who have traced the history of section 8 litigation agree, unfortunately without much analysis, that *California* distinguished *Arizona* based on the unistate/multistate differences in the projects. See, e.g., Kelley, *Staging a Comeback—Section 8 of the Reclamation Act*, 18 U.C. DAVIS L. REV. 97, 120 n.113 (1984); Note, *Allocation of Water from Federal Reclamation Projects: Can the States Decide*, 4 ECOLOGY L.Q. 343, 367-68 (1974).

63. See *supra* text accompanying note 52.

64. See *supra* notes 22-32 and accompanying text.

65. 438 U.S. at 674.

such a direct conflict existed, there was no need for the *Arizona* Court to invoke its narrow reading of section 8 to reach its holding; the interstate conflict before the Court was reason enough to discard state law in that instance in favor of a federal interstate apportionment. Accordingly, *California* rejects as dicta *Arizona*'s narrow reading of section 8.

An important consequence of this analysis is that *California* necessarily classified *Arizona*'s language regarding the Secretary's power over purely intrastate matters as part of *Arizona*'s dicta, since that language depended upon the *Arizona* Court's narrow reading of section 8.⁶⁶ Therefore, in rejecting *Arizona*'s narrow construction of section 8, it implicitly rejected the Secretary's seemingly unlimited power over intrastate matters that depended upon that narrow construction.⁶⁷

The Supreme Court acknowledged this in *Bryant v. Yellen*,⁶⁸ noting that the *Arizona* holding

that the Project Act vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition of § 18 of the Project Act not to interfere with state law⁶⁹ was "considerably narrowed"⁷⁰ in *California*.⁷¹

California effectively has brought the *Arizona* decision, and with it the adjudication of federal-state conflicts over control of the Colorado, within its section 8 "not inconsistent" standard. It can still be argued that the Secretary has complete authority over, and that state law has no place in, the control of the Colorado, but something other than *Arizona v. California* must serve as the basis for such an argument.

66. One of the issues section 8 raised for the *Arizona* Court was whether it prevented the Court's broad reading of the Secretary's power. To avoid this problem the Court adopted a narrow section 8 construction. 373 U.S. at 585-87. See *supra* notes 37-44 and accompanying text.

67. The *California* Court was well aware of this link between the *Arizona* Court's section 8 determination and the Secretary's broad grant of power to preclude state law. Professor Charles J. Meyers, in an Amicus Curiae brief submitted in *California*, urged that the narrow section 8 standard of *Arizona* be rejected so that state law would have a place in the management of Colorado River water. Brief Amicus Curiae of Charles J. Meyers at 13-14, *California v. United States*.

68. 447 U.S. 352, 369 (1980). See *supra* note 59 for a brief description of the case.

69. 447 U.S. at 370.

70. *Id.* at 370 n.21.

71. Although the *Bryant* Court warned that the *California* case "did not question the description of the Secretary's power under the Project Act," *Bryant*, 447 U.S. at 370 n.21, the Secretary's power is affected by the *California* case's interpretation of section 8 of the Reclamation Act.

B. *Interpreting the Section 8 Standard*

The *California* section 8 standard provides a clear and practicable guide with which lower courts may adjudicate the proper federal-state role in any given federal project: Look to the "congressional provisions authorizing the project in question,"⁷² and determine whether the state law is inconsistent with those provisions. Moreover, an inconsistency must arise within the context of a particular factual setting; the effective implementation of congressional provisions authorizing the project in question must conflict with applicable state law.⁷³ A merely abstract conflict would, therefore, not trigger a section 8 inconsistency. Finally, in *South Delta Water Agency v. United States*, a section 8 case, the Ninth Circuit held that "[t]he burden of proof lies with federal defendants to show that compliance would violate a relevant congressional directive."⁷⁴ The lower courts must still determine whether a factual inconsistency exists. This is well within the function of a court of first review.

One notable case has, ironically, strayed from the Supreme Court's section 8 standard issued in *California*. The Ninth Circuit decision in *United States v. California*,⁷⁵ which was the continuation of *California v. United States* after having been remanded by the Supreme Court, applied a standard far different than that of the Supreme Court.⁷⁶ It replaced the Supreme Court's standard of "not inconsistent" with "clashes" or "works at cross-purposes," and replaced the Supreme Court's instructions to look to the "congressional provisions authorizing the project in question" with "express or clear intent" or "important federal interest served by the con-

72. 438 U.S. at 674.

73. See *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 137, 227 Cal. Rptr. 161, 192 (1986) (recognizing "that the consistency issue is ordinarily a factual one") (citing *California v. United States*, 438 U.S. at 679; *United States v. California*, 694 F.2d 1171, 1174 (9th Cir. 1982) (on remand from the Supreme Court's decision in *California v. United States*, *supra*)). In *United States v. California*, the court refused to find a federal-state law conflict based upon mere conflicting statutory language, absent an actual showing of conflict. 694 F.2d at 1178-79.

74. 767 F.2d 531, 539 (9th Cir. 1985) (citing *United States v. California*, 694 F.2d at 1177); cf. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1136 (10th Cir. 1981) (court looks first to state laws, and only then to federal law to see if Congress intended a use "otherwise prohibited" under state law); see *infra* note 144.

75. 694 F.2d 1171 (9th Cir. 1982), *aff'g in part, rev'g in part and rem'g* 509 F. Supp. 867 (E.D. Cal. 1981), *on remand from* 438 U.S. 645 (1978).

76. The standard applied by the Ninth Circuit is as follows: "[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." *Id.* at 1177.

gressional scheme.” This new standard weakens the states’ role in federal projects by broadening a court’s permissible search for a conflict to include the vague area of legislative purposes⁷⁷ and the even more elusive area of “important federal interest,” and by expanding “inconsistency,” to the far more readily satisfiable “clashes” or “cross-purpose.”

Despite the Ninth Circuit court’s ungrounded attempt to broaden federal control under its reinterpretation of section 8,⁷⁸ it failed to find an inconsistency, since there was no actual showing of conflict.⁷⁹ Subsequent cases that cite this expanded reinterpretation of section 8 have in practice proceeded cautiously,⁸⁰ and have paid close attention to the Supreme Court’s standard in *California* and its goal of “cooperative federalism.”⁸¹ The remaining portions of this Comment will, therefore, follow the plain meaning of the more

77. This is not to say that the Supreme Court’s “not inconsistent” standard would not involve a search for legislative intent, but that it would do so in regard to the specific provisions of the act in question, rather than in the general context of notions of Congress’s “scheme” or “federal interest,” more properly utilized to determine whether Congress has preempted an entire field. See *infra* note 78.

78. In support of its rejection of the *California* “not inconsistent” standard, the Ninth Circuit court states that “[c]ases deciding whether state regulation is preempted under the Supremacy Clause by congressional action aid us in interpreting the Supreme Court’s command that only state law ‘inconsistent’ with ‘congressional directives’ is overridden by the relevant portion of [Public Law] 87-874 [the act authorizing the water project in question].” 694 F.2d at 1176. The Ninth Circuit’s use of a preemption test in this matter is entirely without foundation. The court never explained why a preemption test under the Supremacy Clause is applied to a situation involving only statutory analysis, where the Supreme Court has already provided an interpretation of that statutory standard. Moreover, to support its proposed section 8 standard, the court relied on *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 338, 572 P.2d 1128, 1134, 142 Cal. Rptr. 904, 910 (1978), even though that case utilized the old section 8 standard of *Arizona v. California* that the Supreme Court had overruled in *California v. United States*. Accordingly, the judgment in *Environmental Defense Fund* had been vacated and the case remanded by the Supreme Court, *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, 439 U.S. 811 (1978), to the California Supreme Court where it was reversed, 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980). The Ninth Circuit has thus resurrected a standard previously overruled by the Supreme Court from a case previously reversed by the California Supreme Court. Therefore, the Ninth Circuit’s reinterpretation of section 8 in *United States v. California* should carry little weight with other courts. See *infra* note 82 and accompanying text.

79. *United States v. California*, 694 F.2d at 1178-79; see *supra* note 73 and accompanying text.

80. See, e.g., *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 134-36, 227 Cal. Rptr. 161, 190-92 (1986) (state conditions imposed upon federal project “not facially inconsistent with congressional directives.”); *South Delta Water Agency v. United States*, 767 F.2d 531, 536-39 (9th Cir. 1985) (no evidence of congressional conflict with state law).

81. *California*, 438 U.S. at 650.

precise and authoritative Supreme Court formulation.⁸²

C. *The Project Act Does Not Categorically Preclude a State Role*

Having identified the standard of law under section 8 to apply in federal-state conflicts, it can now be applied to the specific context of the Colorado River. A fresh look at the scope of the Secretary's contract power under the Project Act is therefore in order. If Congress actually intended to afford the Secretary absolute control and discretion over all phases of the River's management, then virtually any and every state law would be inconsistent with the Secretary's power. In *Arizona*, the Supreme Court pronounced, though in somewhat schizophrenic language,⁸³ that under the Project Act the Secretary's power is absolute. However, as previously argued, the Court was not called upon to decide the Secretary's contract power in a purely intrastate context, and hence its commentary is dicta.⁸⁴ Similarly, the Court's reading of the Project Act's legislative history, used to support its broad reading of the contract power, is also dicta. Nonetheless, a Supreme Court declaration of Congress' legislative intent cannot simply be ignored. This Comment will argue that the *Arizona* Court misinterpreted the Project Act's legislative history; Congress never intended the contract power to categorically preclude state law at the whim of the Secretary.

The Court's mischaracterization of the concerns of a Project Act opponent, Representative Colton of Utah, illustrates the flaw inherent in the Court's reading of the legislative history associated with the Project Act's section 5 contract power. To support its position, the Court cites Representative Colton's criticism before the Project Act's passage that section 5 gave the Secretary "absolute control"⁸⁵ over the allocation of the River water. But the Court took the Congressman's statement out of context, a context that had been clearly revealed minutes earlier in the debate: As a Congressman from Utah, an Upper Basin state, Representative Colton sought to protect a share of water for his State's future development.⁸⁶ Although the Project Act incorporates the Colorado River Compact's abso-

82. See *supra* notes 48-51 and accompanying text.

83. See *supra* notes 13-15 and accompanying text.

84. See *supra* notes 31-33 and accompanying text.

85. 373 U.S. at 582-83. Referring to section 5 of the Project Act, Representative Colton stated that "if it does not seek to give the Secretary of the Interior *absolute control* of this water, I cannot understand the English language; and, gentlemen, that is exactly what we are objecting to." 69 CONG. REC. 9649 (1928) (emphasis added).

86. In response to Representative Vinsom's question: "what will be the loss to Utah in water and water rights" should the bill become law, Representative Colton re-

lute reservation of water for the Upper Basin, it did so on the basis of a six— instead of seven— state ratification.⁸⁷ The Upper Basin states feared that the seventh state, Arizona, a Lower Basin state, would not be bound by the water rights supposedly reserved by compact for the Upper Basin.⁸⁸ Representative Colton's fear of the Secretary's "absolute control," then, was that it would enable the Secretary to contract away the portion of water reserved for his State. Whether state law or the Secretary should control water *within* each state was the least of his concerns.

The Court similarly misplaces importance in the fact that an early unenacted version of the Project Act contained a provision, absent from the final version, making the Secretary's contract power "subject to rights of prior appropriations."⁸⁹ The Court thought the deletion of this provision demonstrated an intention to empower the Secretary with the authority to ignore *intrastate* laws of prior appropriation. However, the Court failed to note that the amendment striking the provision was offered by the Upper Basin states.⁹⁰ The most likely explanation for the provision's deletion is that it was done to allay the Upper Basin states' fear that interstate prior appropriation claims to water would supersede what they believed to be the questionable protections of a seven-state compact ratified by only six states.⁹¹ By deleting the provision, the Upper Basin states ensured that they would receive the protections of the Compact.

It is the Court's mischaracterization of the Project Act's legislative history—misapplying statements addressing the threat of competing states' water claims to an intrastate context—that led the

sponded: "All that they [referring to users in *other states*] put to a beneficial use before we [Utah, the Representative's state] get ready for development." *Id.* at 9650.

87. See *supra* note 75.

88. Moments before criticizing the spectre of the Secretary's "absolute control," Representative Colton expressed the reason for his concern: "We [Utah] do not get full protection under this bill, for there is no seven-state compact. Arizona is not a party at all to this compact. She and her citizens may appropriate water at any time." 69 CONG. REC. 9648 (1928). See also *id.* at 9649 (statements of Representative Colton).

89. This provision was contained for the first time in an early version of the Project Act, H.R. 9826, a bill introduced on February 27, 1926 to the 69th Congress, by Congressman Phil Swing. The full sentence including the provision reads: "Contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators." H.R. 9826, 69th Cong., 1st Sess. § 5, reprinted in *Arizona's Legislative History of Sections 4(a), 5 (1st Paragraph), and 8 of the Boulder Canyon Project Act at 6 [hereinafter Legislative History], Arizona*, 373 U.S. 546 (1963).

90. See *Legislative History, supra* note 87, at 5-6.

91. See *supra* notes 85-88 and accompanying text, and *infra* note 97 and accompanying text.

Court to the incorrect conclusion that the Congress intended to grant the Secretary the power to supersede virtually all state laws in allocating and conditioning the use of the Colorado.

The question remains: if Congress did not intend the Secretary's power to be unlimited, why require users to contract with the Secretary before they could obtain water? Part of the answer is found in a Senate committee report accompanying the early version of the Project Act that first incorporated the contract provision: "Section 5 authorizes the Secretary of the Interior to make contracts for storage and delivery of water for irrigation and domestic purposes . . . to meet financial requirements of the act."⁹² Contracts ensure that all users pay for the water they receive.

The Court in *Arizona* suggested a second reason for the Secretary's contract power. Referring to the great task of managing reclamation projects, the Court stated, "Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the section 5 contract power, to direct, manage, and coordinate their operations."⁹³ The power to contract, then, was the Secretary's tool to effectuate the management provisions of the Project Act. The management power includes apportioning the river between the states, ensuring that the amount of water each state receives is in accord with the Colorado River Compact,⁹⁴ providing water for users with present perfected rights,⁹⁵ and other management directives provided in the Act.⁹⁶ To prevent users from obtaining water without the Secretary first ensuring that the Project Act's directives were met, section 5 states, "no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."⁹⁷

This view of the power to contract—as a tool to enforce the many

92. S. REP. NO. 654, 69th Cong., 1st sess. 26 (1926). See *Arizona*, 373 U.S. at 615 (Douglas, J., dissenting) (noting that in an early House bill, the contract provision was added in response to the Secretary of the Interior's request that water users help bear the project's cost).

93. 373 U.S. at 589-90.

94. See *supra* note 18 and accompanying text.

95. See *supra* note 59 and accompanying text.

96. See *infra* note 99.

97. 43 U.S.C. § 617d (1982). This provision was added by amendment to ensure enforcement of the Colorado River Compact. At a House Committee Hearing on H.R. 9826, Congressman Carpenter of Colorado described its purpose as follows:

[It] is proposed by the upper states for the fundamental reason I assigned at the outset of my statement to-day, which is that we insist that no use occur by reason of this structure which may later be said to be independent of the compact and be asserted as adverse to the upper state. If the Secretary of the Interior should contract for the use of water to somebody in a manner that did not obligate them to respect the compact,

provisions of the Project Act—comports with the many more recent and explicit congressional grants of contract power to the Secretary in managing reclamation projects.⁹⁸ Therefore, the power to contract should not be interpreted as a grant of unbridled power and complete discretion but rather as the power to implement the limited provisions of the Project Act.

This analysis of the contract power is in many important ways supported by the *Arizona* Court, which stressed the many provisions in the Project Act controlling the Secretary's management of the river.⁹⁹ It is the demands of these provisions that prompted the Court to state there is "no room for inconsistent state laws,"¹⁰⁰ and that "[s]ubjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow."¹⁰¹ The Court also recognized, however, that the Project Act "plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river. . . . What other things the States are free to do can be decided when the occasion arises."¹⁰²

III.

FEDERAL MANAGEMENT PROVISIONS OF THE PROJECT ACT: FEDERAL-STATE INCONSISTENCIES

Determining just what the States and Secretary may do to control the Colorado River remains in many important respects an open question that only can be answered piecemeal as federal-state conflicts arise in the courts.¹⁰³ Nevertheless, by examining the major

then they would later come in and say, 'we are not bound and we therefore disclaim any obligation under the compact,' and it would provoke litigation.

While the upper states do not fear the outcome of litigation, they do insist that they be protected by interstate compact from any unwarranted assertions or threats by the states of the lower basin against present or future development in the lower basin. Legislative History, *supra* note 89, at 6-7.

98. For example, in authorizing the construction of the New Melones Dam, the Flood Control Act of 1962 states, "[t]he appropriate Secretary is authorized to perform any and all acts and enter into such agreements as may be appropriate *for the purpose of carrying the provisions of this Act into full force and effect.*" 76 Stat. 1194 (emphasis added).

99. See 373 U.S. at 584.

100. *Id.* at 587.

101. *Id.* at 590.

102. *Id.* at 585. Although the Court's statement describes the states' role under section 18 of the Project Act, see *supra* notes 34-36, it portends the section 8 standard that now governs the River's use and control.

103. A state's laws must be factually inconsistent with the Project Act's provisions.

provisions of the Project Act, the situations in which courts may find a state's otherwise valid and applicable laws to be inconsistent with the Project Act may be understood.

In California the most striking limitations to the imposition of state law are the contracts that the Secretary has already entered into allocating all—in fact more than all¹⁰⁴—of the Colorado River water available to California. Thus, whether the Secretary must comport with state law in choosing which instate users should receive water is a moot question. The contracts already exist, and the Secretary comported with California law, because he agreed to allocate the River's water to California in accord with an agreement by the seven California users who laid claim to the River.¹⁰⁵ The agreement creates a seven-tiered priority scheme, whereby each of the users occupies a priority level accompanied by an allocation of water that will be met after the more senior users' allotments have been satisfied, provided that water from the River is still available for California.¹⁰⁶ This scheme has been incorporated into each of

See supra note 73 and accompanying text. Thus, the Supreme Court's dicta in *Arizona*, *see supra* notes 13-14 and accompanying text, amounts to an improper predetermination that each state's laws governing the intrastate use of water is categorically inconsistent with the Project Act, without an actual showing of inconsistency. Potential federal-state conflicts over the Colorado River must each be resolved on their own facts.

104. *See supra* notes 9 and 18 and accompanying text, and *infra* note 106 and accompanying text.

105. The Seven-Party Agreement was formed on August 18th, 1931, between the Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and the County of San Diego. The Agreement provides:

[T]he parties hereto have fully considered their respective rights and requirements in cooperation with the other water users and applicants and the [California] Division of Water Resources . . . and respectfully request the [California] Division of Water Resources to, in all respects, recognize said apportionments and priorities in all matters relating to [California] State authority and to recommend the [Agreement] hereof to the Secretary of the Interior of the United States for insertion in any and all contracts for water made by him pursuant to the terms of the Boulder Canyon project act

. . . .

California Seven-Party Water Agreement, *printed in Documents, supra* note 9, at A479-80. The Agreement also contains a provision requesting the California Division of Water Resources to amend all applications for Colorado River water that previously had been made to its office to conform with the Agreement. *Id.* Art. II, *printed in Documents, supra* note 9, at A482. Thus, the Agreement conformed to state requirements for water appropriation.

106. The priority scheme incorporated into all California contracts reads in part:

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclu-

the seven users' contracts, and since the contracts are, as required by the Project Act, for permanent service,¹⁰⁷ the intrastate allocation of water to California users is complete.

A. *The Possibility of Intrastate Transfers*

California state law permits a user who reduces his water-use under an existing right by using reclaimed or polluted water¹⁰⁸ to sell, lease, or exchange the water he saves.¹⁰⁹ A similar measure allows a user with an appropriative water right to sell the water from that right saved by conservation measures.¹¹⁰ Such transfers

sively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

Sec. 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

Sec. 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal District in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa', adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

Sec. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

Sec. 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Sec. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the Lower Palo Verde Mesa, adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

Sec. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation. California General Regulations, *printed in Documents, supra* note 9, at A488.

107. 43 U.S.C. § 617d (1982); *see also* California General Regulations 4, *printed in Documents, supra* note 9, at A487. *See supra* note 25.

108. CAL. WATER CODE § 1010(a) (West Supp. 1987).

109. *Id.* § 1010(b).

110. *Id.* § 1011.

must also conform with other state provisions governing the transfer of water.¹¹¹ For example, a user possessing a post-1914 appropriative right, who wishes to transfer conserved water, must first obtain approval from the State Water Resources Control Board if the transfer might change the point of diversion, place of use, or purpose of use.¹¹² The Board will permit a proposed transfer only if "the change will not operate to the injury of any legal user of the water involved."¹¹³ Other California statutes prohibit the transfer of water outside of a state water district service area when the water is necessary within the district,¹¹⁴ and protect each county from a transfer that would deprive the area "of any such water necessary for the development of the county."¹¹⁵ Watershed areas, their inhabitants, and property owners are also protected from diversions that would deprive them of the "water reasonably required to adequately supply [their] beneficial needs. . . ."¹¹⁶ Finally, article X, section 2 of the California Constitution requires the "beneficial use" of water resources "to the fullest extent to which they are capable."¹¹⁷

State requirements alone might prohibit any California user's proposed transfer of Colorado River water. In this respect, a transfer of Colorado River water is no different than the transfer of any other water. The important point to note, however, is that the Secretary, as well as the water users, would have to comport with California law, absent a showing that the law is inconsistent with a provision of the Project Act.

One of the Project Act provisions that is potentially inconsistent with state law is the previously mentioned requirement that the Secretary's contracts be for permanent service.¹¹⁸ Any state-permitted transfer that jeopardizes the supply of another user's Colorado River water would most likely be inconsistent with the permanent right to water the Project Act intended water users to receive by

111. *Id.* §§ 1010(b), 1011(b).

112. *Id.* § 1701 (West 1971). *See generally* GOVERNOR'S COMMISSION TO REVIEW WATER RIGHTS LAW, THE TRANSFER OF WATER RIGHTS LAW IN CALIFORNIA (1973).

113. CAL. WATER CODE § 1702 (West 1971).

114. *Id.* § 22259.

115. *Id.* § 10505.

116. CAL. WATER CODE § 11460(a) (West Supp. 1985). *See* South Delta Water Agency v. United States, 767 F.2d 531, 538-39 (9th Cir. 1985) (state section 11460(a) does not conflict with section 2 of the Federal Rivers and Harbors Act of 1937).

117. *See infra* notes 136-46 and accompanying text.

118. *See supra* notes 24 and 107 and accompanying text.

their contract.¹¹⁹ Because the Seven-Party Agreement, incorporated into each water user's contract, creates a priority scheme,¹²⁰ the amount of water one user consumes, or transfers, will in some cases affect the supply a less senior user receives under his contract. In cases where a senior appropriator has an unconditional contract right for a specific amount of water, a state-permitted transfer of some portion of that water would not jeopardize the user below. But in those instances where a user is entitled to as much water as may be needed to beneficially irrigate a certain amount of land, the transfer would affect a user below, because the junior user's contractual right to a *permanent* supply of water depends upon the amount the senior appropriator requires to irrigate his land.

The latter scenario essentially describes the water right that California's Imperial Irrigation District (IID), which supplies water to farmland in the Imperial Valley, has under contract with the Secretary: the IID is limited to an annual quantity of water that can be put to "beneficial consumptive use" on a specified area of land.¹²¹ The critical factor to a junior user, then, is the actual amount of water the IID requires for beneficial use on that land. A transfer under state law to a different area of land would most likely be inconsistent with the water rights of a junior appropriator's permanent service to water guaranteed by his contract with the Secretary.

A particularly bewildering California statute passed in 1984 addresses IID's situation by stating that Colorado River water conserved within the IID shall not be forfeited by the IID, "except as set forth in the agreement between the parties and the United

119. Of course, obtaining a permit from the State for such a transfer is itself problematic since such permits are predicated upon a showing of non-injury to other users' water rights. See *supra* note 113 and accompanying text.

120. See *supra* notes 105-06.

121. Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water, Art. 17 (1932), *printed in Documents, supra* note 9, at A605. IID's contractual water right is defined by California Seven-Party Water Agreement (set out in *supra* note 106), which is incorporated into each California contract for the appropriation of Colorado River water. In addition to the beneficial use and land limitation requirements, IID's appropriation, in combination with that of two senior appropriators and one coappropriator, may not exceed an annual cap of 3,850,000 acre-feet of water. See *supra* note 10 (§ 3).

The IID's present perfected right to the River water is described by the Supreme Court as an annual amount not to exceed 2,600,000 acre-feet of water, or as much as is needed to irrigate 424,145 acres of land, whichever is less. *Arizona v. California*, 439 U.S. 419, 429 (1979). This description represents a portion of IID's total right to Colorado River water under its contract with the Secretary. See *supra* notes 59 and 95 and accompanying texts.

States.”¹²² The statute further provides that “it is not the intent of the [California] Legislature to alter the relationship of state and federal law, as each may apply to the distribution and use of Colorado River water.”¹²³ This statute sends a confused message. It attempts to make clear that state law permitting transfers and sales of conserved water applies to the IID;¹²⁴ however, it fails to define the nature of the federal-state relationship with regard to the Colorado.

This omission is likely the result of the California Legislature’s understandable confusion caused by the *Arizona* Court’s ambiguous statements regarding the Secretary’s power.¹²⁵ But this Comment has argued that the proper standard for delineating the federal-state mix in Colorado River affairs is the “not inconsistent” standard formulated in *California*. The statute does make sense under this standard: it applies to the IID subject to a showing of inconsistency. In the IID’s case a sale or transfer would likely be found inconsistent with a junior user’s permanent service as envisioned by the Project Act and incorporated into his contract.¹²⁶

A final obstacle posed by Colorado River water contracts has less to do with Project Act provisions than it does with the contracts themselves. The terms of the contracts would likely prohibit water transfers, even if state law would otherwise permit them. Each California user’s contract provides that “any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.”¹²⁷ A second contractual limitation would likely require each California user of Colorado water to agree to any transfer. Each contract incorporates the terms of the Seven-Party Agreement, which contemplates a closed priority system whereby water not used by one party goes to the next.¹²⁸ If one user’s rights are threatened by another user’s proposed sale contrary to the Agreement, then the threatened user’s approval of the transfer would be required. That parties have narrowed by contract

122. CAL. WATER. CODE § 1012 (West Supp. 1987).

123. *Id.*

124. *See supra* notes 108-11 and accompanying text.

125. *See supra* notes 13-15 and accompanying text.

126. Even if the California statute were not found inconsistent with the Project Act’s requirement of permanent service contracts, the statute defers to the terms of “the agreement between the parties and the United States.” CAL. WATER CODE § 1012 (West Supp. 1987). Thus the statute considers the contract terms prohibiting transfers supreme. *See supra* notes 106 and *infra* note 127 and accompanying text.

A reallocation that is consistent with the scheme created under the Project Act is discussed at *infra* notes 131-35 and accompanying text.

127. *See* IID Contract, *supra* note 121, art. 38, at A619.

128. *See supra* note 106.

their otherwise permissible alternatives under state law has little to do with inconsistencies between federal and state law. Of course, contracts can be renegotiated, but until they are, the contract terms alone foreclose a transfer.

Despite these obstacles to a transfer or sale of Colorado River water—and other potential problems posed by the Project Act¹²⁹ and, more generally, by reclamation law¹³⁰—some flexibility re-

129. An otherwise legal state transfer might be inconsistent with other provisions of the Project Act. For example, the Secretary is required to ensure that the River's water is used "[f]irst, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights . . . ; and third, for power." 43 U.S.C. § 617e (1982). A transfer might be found inconsistent with such an ordering of priorities. This, however, is highly unlikely since irrigation, domestic uses, and present perfected rights share a common tier in the Project Act's priority scheme, and transfers would likely be between such uses. Furthermore, the described uses may be interpreted to avoid inconsistency. See *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 136, 227 Cal. Rptr. 161, 192 (1986) (interpreting priority scheme similar to the Project Act's, court holds "river regulation" may be "reasonably interpreted" to include "release[s] of stored water to prevent intrusive saltwater damage").

130. Other provisions that would prevent transfers are found within reclamation law itself, which governs the Project Act and its waters. See *supra* notes 37-38 and accompanying text. In this respect, the Colorado River is no different from other reclamation projects, where reclamation law places strict limits on how project water may be used. See *California*, 438 U.S. at 677-78 n.31.

It is generally understood that the primary goal of the Reclamation Act of 1902 is to provide water for family farming. Though not explicitly stated, the provisions originally embodying reclamation law seek to ensure this result. See Pring & Edelman, *Reclamation Law Constraints on Energy/Industrial Uses of Western Water*, 8 NAT. RESOURCES LAW 297 (1975) (arguing that reclamation water must be used for irrigation absent a specific statutory exception). However, this would not bar transfers from irrigation to domestic uses since the Project Act specifically permits Colorado River water to be used for domestic purposes. Provisions of reclamation law that conflict with specific directives of the Project Act are inapplicable to those portions of the Project Act, since reclamation law is applicable to the Project Act "except as otherwise therein provided." 43 U.S.C. § 617m (1982). See *supra* notes 58-60 and accompanying text. A more explicit provision of reclamation law is the requirement that reclamation water not be used to irrigate farms larger than 960 acres. 43 U.S.C. § 390dd (1982). Thus, transfers of Colorado River water for irrigation must be limited to farms smaller than 960 acres. Presumably transfers to domestic users within the Project Act's priority scheme would not have to abide by this provision designed to apply to farm users.

Another reclamation law provision requires that water from reclamation projects be used appurtenant to the land owned by the holder of the water right. 43 U.S.C. § 372 (1982). Although this need not bar transfers to other farmers who would presumably use the water on their land, domestic users are nonappurtenant. However, the Project Act's explicit provision for domestic users indicates that Congress never intended such restrictions to apply where domestic users are concerned. Thus, it appears that proposed transfers to farm uses would be subjected to reclamation law, and hence highly problematic, while reclamation law would not restrict transfers to domestic uses. In this sense, the Project Act conforms with the current pressures to convert from agricultural to domestic water uses. See, e.g., Clyde, *Allocation of Water for Resource Develop-*

mains for the River's users. For example, under one proposal, the Metropolitan Water District (MWD), which wholesales water to twenty-seven agencies within Southern California, would finance conservation measures in the IID's water delivery system. The water conserved would remain in the River, where the MWD, as a member of the Seven Party Agreement and holder of a contract with the Secretary entitling it to water directly junior to the IID, could appropriate the excess to satisfy its otherwise unmet contract right.¹³¹

This proposal would not fall prey to the previously discussed obstacles prohibiting a transfer,¹³² since it is not a transfer but a reallocation among the River's original users in accordance with the Secretary's contracts made pursuant to the Project Act.¹³³ Since the IID's right to the River's water is limited to an amount that can be put to "beneficial consumptive use" on a specifically described area of land,¹³⁴ any reduction due to conservation measures in the total amount needed to meet this water right naturally frees the conserved water for use by junior appropriators, who then have legal rights to it. To date this attractive proposal to conserve valuable water resources has not been implemented.¹³⁵

B. *State Imposed Conservation Measures*

Another area of potential conflict involves the extent to which federal and state agencies may impose conservation measures on Colorado River users. The analysis begins with state law, which applies to Colorado River users unless inconsistent with a federal provision. Article X, section 2 of the California Constitution is the lever a state agency will most likely use to impose conservation measures on a Colorado user. It calls for the "beneficial use" of water resources "to the fullest extent of which they are capable," and prohibits the "unreasonable use" of water or its use by an "unreasonable method."¹³⁶

ment, 14 NAT. RESOURCES LAW. 519 (1982); Gould, *Conversion of Agricultural Water Rights to Industrial Use*, 27B ROCKY MTN. MIN. L. INST. 1791 (1982); Pring & Edelman, *supra*.

131. See *supra* note 9.

132. See *supra* notes 107-30 and accompanying text.

133. See *supra* notes 105-06.

134. See *supra* note 121 and accompanying text.

135. L.A. Times, Aug. 21, 1986, pt. 1, at 3, col. 5. During negotiations, the MWD and IID have differed over the price MWD would pay for a "purchase" of such water under the proposal.

136. Similar beneficial use requirements are repeated in section 100 of the CAL. WATER CODE (1971), and section 275, *id.*, gives the California Department of Water

Article X was recently applied for the first time to a Colorado River user. The State Water Resources Control Board concluded that the Imperial Irrigation District's¹³⁷ "failure to implement additional water conservation measures at this time is unreasonable and constitutes a misuse of water under article X, section 2 of the California Constitution and section 100 of the California Water Code."¹³⁸ Pursuant to this finding, the Board ordered conservation measures.¹³⁹ On appeal, the court in *Imperial Irrigation District v. State Water Resources Control Board*¹⁴⁰ held that the Board has authority under article X, section 2, to determine the issue of unreasonable use. The opinion does not address the issue of conflicts between state law and the Secretary's authority under the Project Act. The court and the litigants apparently, and properly, recognized that absent the Secretary actually and effectively implementing a provision of an applicable federal statute, there could be no possibility of conflict with the State's action.¹⁴¹

Nevertheless, a conflict is not entirely inconceivable. For example, the Project Act contains a beneficial use requirement by its incorporation of section 8 of the Reclamation Act of 1902.¹⁴² Thus,

Resources and the State Water Resources Control Board responsibility for preventing unreasonable uses of water in the state.

The California Supreme Court has described the constitutional beneficial use requirement as follows:

What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 567, 45 P.2d 972, 1007 (1935). And more recently the Court stated:

Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment [now Article X, Section 2 of the California Constitution].

Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 140, 429 P.2d 889, 894, 60 Cal. Rptr. 377, 382 (1967), cited with approval in *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.*, 26 Cal. 3d 183, 194, 605 P.2d 1, 6, 161 Cal. Rptr. 466, 474 (1980).

137. For a description of the IID's water rights to the Colorado, see *supra* note 116 and accompanying text. The proposal that the MWD finance conservation measures in the Imperial Valley in exchange for the conserved water is discussed at *supra* notes 131-135 and accompanying text.

138. California State Water Resources Control Bd. Decision No. 1600, at 66 (1984).

139. *Id.* at 67-71.

140. 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (1986).

141. See *supra* note 73 and *infra* notes 145-46 and accompanying text.

142. Incorporated to the Project Act by 43 U.S.C. § 617m (1982).

the Project Act directs that "beneficial use shall be the basis, the measure, and the limit of [any reclamation water] right."¹⁴³ It might be argued that state determinations of beneficial and reasonable use are inconsistent with this provision.

The Ninth Circuit has provided a tentative answer as to which body of law controls the beneficial use determination. Citing section 8 of the Reclamation Act, the court in *United States v. Alpine Land & Reservoir Co.* stated "that beneficial use itself was intended to be governed by state law."¹⁴⁴ However, before complete deference is given to state law, provisions of the Project Act should first be scrutinized. After all, it may well be that Congress, in any given law it passed subsequent to the passage of section 8 in 1902, intended the Secretary to make the beneficial use determination. This may have been Congress' intention when it authorized the Secretary to contract "under such regulations as he may prescribe, . . . for irrigation and domestic uses. . . ."¹⁴⁵

In 1972 the Secretary promulgated regulations allowing him to increase or decrease the amount of water a user is to receive in a given year based upon various factors that resemble a reasonable and beneficial use determination.¹⁴⁶ Whether such regulations were

143. 43 U.S.C. § 372 (1982). Section 8 is reprinted at *supra* note 39.

144. 697 F.2d 851, 853 (9th Cir. 1983), *cert. denied sub nom.* Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irr. Dist., 464 U.S. 863 (1983). *See also* Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1131 (10th Cir. 1981). Only after looking to state law to define New Mexico's constitutional beneficial use requirement, N.M. CONST. art. XVI, § 3, did the court in *Jicarilla* look to federal law to see if Congress intended a use "otherwise prohibited" under state law. 657 F.2d at 1136.

For a criticism of the *Jicarilla* court's approach to section 8's beneficial use requirement, *see* Kelley, *supra* note 62, at 171-74. The author argues that "section 8 dictates a different approach, one commencing with an analysis of federal law," *Id.* at 173, and that

[t]he 1902 [section 8] beneficial use requirement, however, is clearly an example of congressional intent to exercise its power to preempt the states. Therefore, state law should not serve as a substitute for the initial search for a federal definition of such use, whether found in authorizing statutes, legislative history, or duly authorized decisions of the Secretary of the Interior.

Id. at 174.

However, the Supreme Court has not held that section 8 preempts the field; rather, its test is one of inconsistency between the effective implementation of federally enacted provisions and state actions. Automatic preemption, without a matter of fact showing of inconsistency, has been rejected by the Supreme Court and the Ninth Circuit. *See supra* notes 68 & 103 and accompanying text.

145. 43 U.S.C. § 617d (1982).

146. Such factors include but are not necessarily limited to the area to be irrigated, climatic conditions, the kind of crops raised, cropping practices, the type of irrigation system in use, the condition of water carriage and distribution facilities, . . . the operating efficacies and methods of irrigation of the water users,

prescribed pursuant to the beneficial use requirement of the Project Act or one of the Act's other provisions is difficult to determine. But should the Secretary seek to implement such regulations to ensure that Project Act water is used beneficially and reasonably, a conflict with a state's conservation requirements could conceivably arise.¹⁴⁷

IV. CONCLUSION

Many questions regarding federal-state conflicts remain unanswered; however, this is not due to any peculiar complexity *Arizona v. California* lends to the federal-state balance in control of the Colorado River. The section 8 "not inconsistent" standard is applicable to the Colorado just as it is to other federal reclamation projects.

Identifying the actual inconsistencies in federal and state control of the Colorado remains a task for the courts as conflicts arise. This task may seem unwieldy, but the "not inconsistent" standard is not the cause of such a concern. The source is the reclamation law itself, complete with more than eighty years of growth and some very explicit and some not so explicit provisions governing the use of its water. Unfortunately, many beneficial management decisions that might come at the hands of state control may in fact be inconsistent with federal law set down over 80 years ago, and without the appropriate direction and prompting by Congress, the Secretary has made little progress in the sound management of the River's water.

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amount and rate of return flows to the river, municipal water requirements and the pertinent provisions of the California Boulder Canyon Project Act water delivery contract.

43 C.F.R. § 417.3 (1986). These compare favorably with the California Supreme Court's vision of reasonable and beneficial use, *see supra* note 136.

147. *See supra* notes 142-46 and accompanying text.

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