Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation

by

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I. INTRODUCTION

The issue addressed in this article is whether water rights[1] held by the Federal Bureau of Reclamation may be forfeited, under state law, by other entities or persons. This article concludes that rights to water held in a federal project, such as a federal reservoir, are subject to forfeiture for the following reasons. First, state law historically has governed water use and the U.S. Supreme Court has confirmed the notion of state primacy by holding that state law governs the control, appropriation, distribution and use of water unless state law directly conflicts with a specific congressional directive.[2] Second, rights to water appropriated under a federal project are appurtenant to the land on which the water is used, and the individual landowner or water user is

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1. Water rights have been described as usufructuary in nature but are nonetheless real property rights. They may be sold, donated, mortgaged, deeded, leased or treated similarly to any other real estate. *See* BLACK'S LAW DICTIONARY 1592 (6th ed. 1990).

2. California v. United States, 438 U.S. 645, 672-76 (1978).

the beneficial owner of the rights to water he applies to his land. Therefore, a water user, as the beneficial owner of the right, may forfeit this right if he fails to apply his water to a beneficial use for a statutorily determined period of time.[3]

II. BACKGROUND

In 1902, the Federal Bureau of Reclamation[4] (Bureau) was created to plan and oversee the construction of reservoirs designed to provide water for irrigation of the arid lands of the West.[5] The Federal Reclamation Act of 1902[6] (Reclamation Act) contemplated individual water rights would be sold to irrigators, who would reimburse the federal government for their proportionate share of the costs of the project. Today, rather than directly contracting with individuals, the Bureau typically enters into contracts with a distribution organization, such as an irrigation district,[7] conservancy district[8] or canal company,[9] which then controls distribution of the water to irrigators. Under a standard

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3. This article does not discuss the obligation of the United States with respect to federal reclamation project water rights, such as the obligation to obtain and protect project water. For a detailed discussion of this subject *see* Filings of Claims for Water Rights in General Stream Adjudications, Op. Solicitor Gen., 97 I.D. No. 2, p. 21 (July 6, 1989).

4. In July of 1902, pursuant to the Reclamation Act of 1902, the Secretary of the Interior created the Reclamation Service under the Geological Survey. In March 1907 the Service was separated from the Survey and in June of 1923 the name was changed to the Bureau of Reclamation. The name was changed to the Water and Power Resources Service in November of 1979 and was changed back to the Bureau of Reclamation in May of 1981 by Secretarial Order No. 3064. 52 Fed. Reg. 3354 (1987).

5. There are seventeen "Western" states subject to Reclamation law: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

6. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371-600 (1988)).

7. Much of western water, and specifically federal project water, is distributed through irrigation districts and canal companies. Irrigation districts are quasi-public entities, established according to statute, and are analogous to fire, highway or school districts. Irrigation districts typically own the natural flow water rights they deliver, although rights in federal reservoirs usually are owned by the federal government. Importantly, the landowners within the district do not hold rights to the water the irrigation district delivers to their lands. *See* 3 WATERS AND WATER RIGHTS § 27.02(f) (Robert Beck ed., 1991). For a more detailed discussion of irrigation districts *see id.* § 27.02.

8. Conservancy districts are similar to irrigation districts, but generally have a broader tax base due to state granted power to levy taxes on real and personal property within the district, including property owned by urban taxpayers. *See, e.g.*, COLO. REV. STAT. ANN. §§ 37-5-101-114 (West 1990). For a more detailed discussion of conservancy districts *see* 3 WATERS AND WATER RIGHTS, SUPRA note 7, § 27.03.

repayment contract involving an irrigation district, as authorized under section 9 of the Reclamation Project Act of 1939,[10] an individual irrigator's share of federal project costs is amortized over a forty year period, after a ten year development period, and is assessed to the lands by the irrigation district and collected along with operation and maintenance costs.[11] Upon receipt of the water, the irrigation district distributes the water to water users within the district who pay the district for the right to receive their share of the water. If the water user fails to use the water in the manner required by state law, he may forfeit his right to receive that water.[12]

Forfeiture of water rights is typically provided for under state law to prevent the waste of the state's water; and due to increasing demand for water and present drought conditions in many parts of the West, continued availability of water is of great concern to most water users.[13] The question whether water stored in reservoirs built and managed by the Bureau is subject to forfeiture under state law has not been directly addressed by the courts.

III. HISTORY OF WESTERN WATER LAW AND RECLAMATION

Western water law developed from the California gold rush, when thousands of miners staked claims on the streambeds and banks of California rivers. These miners often made conflicting claims to water needed for mining gold, and since there was not enough gold or water for everyone, both were claimed on a first in time, first in right basis.[14]

Similar to the gold rush, the settling of the arid regions of the West brought the settlers of those lands face to face with the problem of claims to limited water supplies. Again, the simple solution was the first settler in a valley took first choice of the land and appropriated

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9. Canal or ditch companies are private corporations or unincorporated groups which deliver water to shareholders based on the number of shares owned by each person. Typically, each shareholder is entitled to a number of shares proportionate to the number of acres irrigated. For a more detailed discussion of canal companies *see* 3 WATERS AND WATER RIGHTS , *supra* note 7, § 26.02.

10. Act of August 4, 1939, ch. 418, § 9, 53 Stat. 1193 (codified as amended at 43 U.S.C. § 485h (1988)).

11. FRANK J. TRELEASE, WATER LAW 744 n.6 (3d ed. 1979).

12. *E.g.*, IDAHO CODE § 42-222(2) (1990) (water right shall be forfeited by a failure to apply the water to a beneficial use for a period of five years).

13. In times of heavy precipitation or in areas where water demand is low, the issue of forfeiture may also arise where the capacity of a water storage facility, such as a reservoir, exceeds the use of the water by the holders of the water rights.

14. Frank J. Trelease, *Uneasy Federalism-State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 752 (1980).

enough water from the stream to irrigate the land; the second settler had to make do with what remained.[15]

Western state constitutional framers, legislatures and courts adopted the self-made law described above as the doctrine of prior appropriation.[16] Under this doctrine, rights to use water are established primarily based on the notion of first in time, first in right. Accordingly, the first and most "senior" water user is entitled to have his water right filled completely before any "junior" user is entitled to appropriate water.[17]

Generally, states adopting some form of the prior appropriation doctrine[18] also require beneficial use of the water.[19] Most of the farmers, miners, manufacturers, power companies and cities of the West met this requirement simply by taking the water because each had a "practical wealth-producing use in mind."[20] After water was appropriated it became a "definite and identifiable piece of property, lasting as

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15. *Id.*

16. *Id.* (footnote omitted).

17. *See* 2 WATERS AND WATER RIGHTS *supra* note 7, § 12.03(e).

18. Ten of the nineteen western states mix together elements of prior appropriation and riparian water law, which generally promotes equal sharing of water among streamside landowners. However, even in these states the principles of prior appropriation dominate.

19. *See, e.g.*, IDAHO CONST. art. XV, § 3; IDAHO CODE 42-222(2) (1990); ALASKA STAT. § 46.15.030 (Michie 1991); ARIZ. REV. STAT. ANN. § 45-141 (1987); CAL. WATER CODE § 1240-1257 (Supp. 1992); MONT. CODE ANN. § 85-2-301 (1991); N.M. STAT. ANN. § 72-1-1 (1985); N.D. CENT. CODE § 61-01-01 (Supp. 1991); WYO. STAT. ANN. § 41-3-101 (Supp. 1992). Beneficial use has been described as a "dynamic concept" and courts have found several uses to be beneficial, such as agriculture, domestic uses, manufacturing, mining and hydropower. *See* Idaho Dep't. of Parks v. Idaho Dep't. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974); State *ex rel.* Game Commission v. Red River Valley Co., 182 P.2d 421 (N.M. 1947). For a more detailed discussion of the concept of beneficial use *see* 2 WATERS AND WATER RIGHTS, *supra* note 7, § 12.03(c)(2). Most states adopting some form of prior appropriation also require diversion and free transferability of water rights. Traditionally, it was necessary to divert the water to a beneficial use to establish a legal right to use the water. However, the courts of most western states have ruled the appropriation doctrine does not require a diversion when it is unnecessary to accomplish beneficial use. *See, e.g., In re*: Application A-16642, 463 N.W.2d 591 (Neb. 1990); Idaho Dep't. of Parks v. Idaho Dep't. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974). *But see e.g.*, MONT. CODE ANN. § 85-2-102(1)(a) (1991)(private appropriator must divert, impound or withdraw); California Trout v. State Water Resources Control Bd., 153 Cal. Rptr. 672 (Ct. App. 1979); Fullerton v. State Water Resources Bd., 153 Cal. Rptr. 518 (Ct. App. 1979); State *ex rel.* Reynolds v. Miranda, 493 P.2d 409 (N.M. 1972).

20. Trelease, *supra* note 14, at 752-53.

long as the beneficial use continued."[21] Notably, the property right could be sold if the proper legal formalities were followed.[22]

As one would expect, the beneficial use requirement seeks to ensure that water is used efficiently. Forfeiture was devised, typically by statute, and developed from the common law principle of abandonment as a further assurance the water would continue to be used in a beneficial manner. In the majority of western states a water right is forfeited under statute if the water is not beneficially used for the purpose for which it was appropriated for a certain period of time.[23] The distinction between forfeiture and abandonment is an important one. Forfeiture merely requires nonuse for the statutory period, abandonment requires both nonuse and intent to abandon.[24] Due to the lack of the intent element, forfeiture under a state statute is more easily accomplished than abandonment, and the goal of efficient water use is better preserved.

In the early stages of development of western water law, even before some of the western states were admitted to the Union, Congress deferred to state and local water law.[25] During this stage landowners pressured the federal government to provide funding for projects needed to facilitate further irrigation of arid lands in the West. In response to this pressure Congress established a reclamation system to assist the developing states with irrigation needs. Congress codified this system in the Reclamation Act.[26]

The Reclamation Act[27] was enacted to facilitate development of irrigated agricultural production in the western United States through the construction and management of dams, reservoirs and canals. Significantly, in section 8 of the Reclamation Act, Congress made it clear that nothing in the Act should be interpreted as affecting or interfering with existing state laws regarding the control, appropriation, use or distribution of water employed for use in irrigation.[28] Congress in-

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21. *Id.* at 753.

22. *Id.*

23. *See, e.g.*, NEV. REV. STAT. ANN. § 533.060(2) (Michie 1986); N.M. STAT. ANN. § 72-5-28(A) (Supp. 1992); IDAHO CODE § 42-222(2) (1990).

24. *See* 2 WATERS AND WATER RIGHTS, *supra* note 7, § 17.03(a).

25. *See Hearings on S.1275 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess. 302-10 (1964) (App. B, supplementary material submitted by Sen. Kuchel) (listing 37 statutes in which Congress has expressly recognized the importance of deference to state water law).

26. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371-600 (1988)).

27. 43 U.S.C. §§ 371-600.

28. *Id.* § 383.

cluded this language to maintain existing state control over all aspects of water use and ensure that the states would continue to have this level of control in the future. This article will show that forfeiture of rights to federal reclamation water is properly within the domain of state law.

IV. EXTENT STATE LAW GOVERNS THE CONTROL, APPROPRIATION, USE AND DISTRIBUTION OF RECLAMATION PROJECT WATER

State law has historically controlled water use within the state, however, under the Reclamation Act the federal government assumed a major role in the development and use of water resources. To determine whether forfeiture of rights to water held in federal projects might occur, the issue whether federal or state law governs the control, appropriation, use and distribution of water held in federal projects must be examined.

The landmark decision of *California v. United States*[29] overwhelmingly supports the notion of federal deference to the states when issues of control, appropriation, use and distribution of project water arise unless state water law directly conflicts with a specific congressional directive.[30] An examination of the important reclamation cases which precede *California v. United States* facilitates discussion of the holding as it relates to forfeiture of federal project water.

A. Pre-*California v. United States*

Prior to the U.S. Supreme Court's decision in *California v. United States*,[31] the Court decided several cases involving the question of federal control over appropriation and distribution of water held in federal reservoirs. Significantly, these cases can be distinguished from *California v. United States* because they involved a direct conflict between a congressional directive and state water law.

The U.S. Supreme Court confronted the issue of federal control over water distribution in *Ivanhoe Irrigation District v. McCracken*.[32] The Court was asked to determine whether section 5 of the Reclamation Act,[33] which prohibits delivery of water to lands in excess of 160

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29. 438 U.S. 645 (1978).
30. *Id.* at 672-76.
31. *Id.* at 645 (discussed in more detail, *infra* notes 59-84 and accompanying text).
32. 357 U.S. 275 (1958).
33. Section 5 of the Reclamation Act provides:
No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such

acres, applied to irrigation districts and water agencies in California. The Supreme Court of California had ruled that section 8 of the Reclamation Act required the application of state law.[34] Section 8 of the Reclamation Act states:

> 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.[35]

Section 5 was deemed inapplicable under state law because the federal acreage limitation conflicted with the trust theory of California water law, which "placed a trust on the State and the irrigation districts for the benefit of water users."[36] The U.S. Supreme Court reversed the California Supreme Court and held that states were not allowed to disregard section 5, which prevented the sale of project water rights to these lands, because the acreage limitation was a "specific and mandatory prerequisite laid down by Congress."[37] Congress did not intend that "[section] 8 would, under the application of state law, make inapplicable . . . [section] 5 of the Reclamation Act . . . ."[38]

Despite the language in section 8 mandating continued state control over water, the Court found Congress did not intend section 8 of the Reclamation Act to "override the repeatedly reaffirmed national policy"[39] inherent in the acreage limitation. The Court noted 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 or vested interests therein. But

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> sale shall be made to any landowner unless he be an actual bona fide resident on such land . . . and no such right shall permanently attach until all payments therefor are made.

Act of June 17, 1902, ch. 1093, § 5, 32 Stat. 389 (codified as amended at 43 U.S.C. § 431 (1988)).

34. Ivanhoe Irrigation Dist. v. All Parties and Persons, 306 P.2d 824 (Cal. 1957).
35. 43 U.S.C. § 383 (1988).
36. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. at 288.
37. *Id.* at 291.
38. *Id.* at 293.
39. *Id.* at 292.

the acquisition of water rights must not be confused with the operation of federal projects."[40]

The policy behind the acreage limitation, which the Court referred to, was that the benefits of water distributed through the project be available to the largest number of irrigators possible consistent with the "public good."[41] Clearly, certain state water laws, such as the public trust doctrine, conflict with the recognized goal of section 5 and frustrate the ability of the federal government to control distribution. However, section 8 makes it clear that the federal government may not interfere with state laws relating to the "control, appropriation, use, or distribution of water used in irrigation."[42]

Given the language of section 8, the Court implicitly upheld the validity of the federal acreage limitation based on an exception to the general language of section 8. This "exception" applies in circumstances in which a specific mandate of Congress directly conflicts with state water law. Thus, the Supreme Court's reasoning appears to be based primarily upon federal supremacy principles,[43] in other words, federal law should control in a case in which a direct conflict exists between a specific congressional directive and state water law.

Several years after *Ivanhoe*, the U.S. Supreme Court in *City of Fresno v. California*[44] was faced with the question of whether state or federal law would control in a dispute over the appropriation of water rights. In *City of Fresno* a California municipal preference for water was in direct conflict with the Reclamation Act's preference for irrigation.[45] The City of Fresno asserted state law protected certain water rights from federal government interference, specifically condemnation.[46]

The Court, in response to Fresno's claims, held section 8 merely left "to state law the definition of the property interests, if any, for which compensation [by the federal government] must be made."[47] Thus, to this extent section 8 of the Reclamation Act was inapplicable because a specific congressional directive, the Reclamation Act's pref-

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40. *Id.* at 291.

41. *Id.* at 292.

42. 43 U.S.C. § 383 (1988).

43. *See* U.S. CONST. art. VI, cl. 2 (the Supremacy Clause).

44. 372 U.S. 627 (1963).

45. *See* 43 U.S.C. § 485h(c) (1988).

46. Fresno's claims included: 1) a claim based on ownership of groundwater; 2) a claim based on California's county of origin and watershed protection laws; and 3) a claim based on California's preference for domestic and municipal water uses. *City of Fresno*, 372 U.S. at 628-29.

47. *Id.* at 630.

erence for irrigation, conflicted directly with state laws. Accordingly, the U.S. Supreme Court followed the exception established in *Ivanhoe* and held reclamation law controls when a direct conflict with state law exists.

In *Arizona v. California*,[48] the Secretary of the Interior (Secretary) received judicial authorization to ignore state law regarding the distribution of water from the Colorado River despite the fact that section 8 of the Reclamation Act did not expressly allow such disregard for state law.[49] *Arizona v. California* arose from a dispute among Colorado River basin states[50] over the equitable apportionment[51] of rights to the water of the Colorado River. Congress responded to this dispute by enacting the Boulder Canyon Project Act[52] which placed the Bureau in control of the project, established a water apportionment plan for the lower basin states and authorized the Secretary to make contracts for water delivery. The states challenged the legislation based in part on the noninterference language of section 8 of the Reclamation Act, claiming the Secretary was bound to follow state laws of prior appropriation when contracting for the delivery of water.[53]

The Supreme Court, in rejecting the states' argument, held "the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by [section 8 of the Reclamation Act] to follow state law."[54] Further, the Court stated "[w]here the Government, as here, has . . . undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws."[55]

Arizona v. California, like *Ivanhoe* and *City of Fresno*, is a case in which a specific congressional directive[56] directly conflicted with state laws of prior appropriation. Consequently, the U.S. Supreme Court in *Arizona v. California* relied on these earlier decisions, and held federal

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48. 373 U.S. 546 (1963).

49. *Id.* at 586-87.

50. These include Arizona, California, Colorado, New Mexico, Utah and Wyoming.

51. Under the doctrine of equitable apportionment, an interstate stream is divided fairly among the states sharing it, without regard to the relative economic power of those states. Arthur H. Chan, *Outline of a Three-Stage Policy of Interstate Groundwater Allocation that Promotes Equity, Efficiency and Orderly Development*, 26 LAND & WATER L. REV. 149, 153 (1991).

52. Act of 1928, ch. 42, 45 Stat. 1057 (codified as amended at 43 U.S.C. §§ 617-617t (1988)).

53. *Arizona*, 373 U.S. at 563.

54. *Id.* at 586.

55. *Id.* at 587 (footnote omitted).

56. In this case, the authority of the Secretary of the Interior to make contracts under the Boulder Canyon Project Act of 1928.

law controls in instances in which a direct conflict with state water law exists. In each case the Supreme Court found federal law controlled despite the general language of section 8 favoring state control of appropriation and distribution.[57]

Applying the law established in *Ivanhoe*, *City of Fresno* and *Arizona v. California* to a hypothetical dispute over the forfeiture of water appropriated and distributed via a federal project logically results in the conclusion that state law controls. The aforementioned cases can be distinguished from a hypothetical case involving forfeiture because no specific section of the Reclamation Act applies to forfeiture. In accordance with the language of section 8, state law concerning forfeiture of water rights should control since there is no direct conflict with federal reclamation law.[58]

B. *California v. United States*

In 1978, the Supreme Court further clarified the holdings in these earlier cases in the landmark decision of *California v. United States*.[59]

The Supreme Court held that section 8 of the Reclamation Act mandated state law govern the control, appropriation, use and distribution of reclamation project water, unless it is inconsistent with specific congressional directives.[60] *California v. United States* involved a dispute between the State of California and the federal government which was seeking to impound several million acre-feet of water from the Stanislaus River as part of a federal water project.[61] The California State Water Resources Board had previously ruled under California law that the water could only be allocated to the federal government if the government agreed to and complied with certain conditions of water use determined by the state.[62] The federal government sought a declaratory judgment allowing the Bureau to impound any unappropri-

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57. 43 U.S.C. § 383 (1988).

58. In addition to these Supreme Court cases, the Ninth Circuit in Burley v. United States, 179 F. 1 (9th Cir. 1910), recognized state control of appropriation of project water in the absence of a direct conflict with federal law. The *Burley* court held that, under section 8 of the Reclamation Act, the Secretary must act in conformity with state water law when carrying out the provisions of the Act. *Id.* at 9. Thus, the *Burley* holding supports the notion of federal deference to state law established by the Reclamation Act, and specifically, confirms the need for federal deference to state water law in the absence of a direct conflict with a specific congressional directive.

59. 438 U.S. 645 (1978).

60. *Id.* at 672-76.

61. *Id.* at 647.

62. *Id.*

ated water necessary for a federal reclamation project notwithstanding conflicting state water law.[63]

The district court held that, as a matter of comity, the United States must apply to the state for an appropriation permit, but the state must issue the permit, without any conditions, if sufficient unappropriated water existed.[64] On appeal, the Ninth Circuit Court of Appeals affirmed, but ruled section 8 of the Reclamation Act, rather than comity, required the federal government to apply for the permit.[65] The U.S. Supreme Court reversed the Ninth Circuit and held California could condition its allocation of water to a federal reclamation project. The Court stated "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law."[66]

Significantly, the issue of congressional power to ignore state laws in pursuit of reclamation programs was not the question before the Supreme Court in *California v. United States*.[67] Further, no issue of ownership of water or water rights was before the Court. "Instead, the question before the court was whether, in light of section 8, Congress had chosen to disregard state laws."[68]

The Supreme Court distinguished *California v. United States* from both *Ivanhoe Irrigation District v. McCracken*[69] and *City of Fresno v. California*[70] by noting specific provisions of the Reclamation Act were not involved in *California v. United States*, whereas they were involved in *Ivanhoe* and *City of Fresno*.[71] The Court emphasized state law could not be ignored if explicit congressional directives were not in conflict with state law.[72] All statements contained in *Ivanhoe* and *City of Fresno* that were unrelated to a conflict with specific con-

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63. *Id.*

64. California v. United States, 403 F. Supp. 874, 889-90 (E.D. Cal. 1975).

65. California v. United States, 558 F.2d 1347, 1351 (9th Cir. 1977).

66. California v. United States, 438 U.S. at 675.

67. However, such power had been conceded in the district court proceedings. *California*, 403 F. Supp. at 883.

68. Amy Kelley, *Developments in Water and Environmental Law—Staging a Comeback—Section 8 of the Reclamation Act*, 18 U.C. DAVIS L. REV. 97, 111 (1984).

69. 357 U.S. 275 (1958).

70. 372 U.S. 627 (1963).

71. *California*, 438 U.S. at 672-74. The Court also rejected statements in *Arizona v. California* regarding the scope of section 8 as dicta, *id.* at 674, although *Arizona v. California* involved a conflict between a specific provision of the Federal Power Act rather than a conflict between the Reclamation Act and state water law. *See* 43 U.S.C. § 617 (1988).

72. *California*, 438 U.S. at 674.

gressional directives were rejected as dicta because they were unnecessary in deciding the cases.[73]

Further, the Supreme Court rejected the Bureau's argument that the state could not impose conditions on water appropriation because of the Bureau's failure to present satisfactory supporting authority, statutory or otherwise.[74] Further, the Court concluded state conditions would be deemed valid so long as they were consistent with specific, explicit and clear congressional directives.[75]

In *California v. United States*, the Supreme Court carefully examined the language and intent of the Reclamation Act to determine whether California law controlled the allocation of unappropriated water. Section 8 of the Reclamation Act states:

> *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.[76]

As emphasized, section 8 of the Reclamation Act specifies that state laws are unaffected by and continue to govern the "control, appropriation, use, or distribution of water . . . ."[77] Furthermore, the legislative history of the Reclamation Act demonstrates state water law was intended to govern in two areas, appropriation and distribution. With respect to appropriation, section 8 provides that the Secretary may only appropriate necessary water in strict conformity with existing state law.[78] The principal sponsor of the reclamation bill in the House, U.S. Representative Mondell, stated that once the Secretary had determined that a project was feasible, and that an adequate water supply existed for the project he "would proceed to make the appropriation of the necessary water by giving notice and complying with the forms of

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73. *Id.*
74. Kelley, *supra* note 68, at 113.
75. *California*, 438 U.S. at 668 n.21, 668-79.
76. 43 U.S.C. § 383 (1988) (emphasis added).
77. *Id.*
78. *Id.*

law of the State or Territory in which the works were located."[79] Representative Mondell also stated "[t]he bill provides explicitly that even an appropriation of water can not [sic] be made except under State law."[80] The second area focused on by Congress prior to drafting the Reclamation Act involved water distribution. As explained by Senator Clark, a strong supporter of the Reclamation Act, "the control of the waters after leaving the reservoirs shall be vested in the States and Territories through which such waters flow."[81]

These excerpts demonstrate the legislative intent of the Reclamation Act was as clear as the language of section 8 itself. State water law was intended to continue to govern the control, appropriation, use and distribution of water held in federal reservoirs. The purpose behind requiring deference to state law was to avoid the legal confusion which would likely result if federal reclamation law and state water law were allowed to compete with one another in the same locality.[82]

Arguably, because there are no specific provisions within the Reclamation Act that address forfeiture, and because section 8 mandates compliance with state water law, the Bureau would have a difficult time arguing federal reclamation law controls in forfeiture issues, especially in the face of *California v. United States*. However, the Bureau could argue that forfeiture conflicts with Congress' goal to reclaim western lands, or even that it impairs the ability of the government to be reimbursed for project construction costs and the ability of persons receiving water to cover operation and management costs, thus threat-

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79. 35 CONG. REC. 6678 (1902)(statement of Rep. Mondell), *quoted in California*, 438 U.S. at 665 (1978).

80. 35 CONG. REC. 6687 (1902).

81. 35 CONG. REC. 2222 (1902)(statement of Sen. Clark), *quoted in California*, 438 U.S. at 667.

82. *California*, 438 U.S. at 669. The Senate Report on the McCarran Amendment, 43 U.S.C. § 666(a) (1988), which subjects the federal government to the jurisdiction of state courts in general stream adjudications, offers an articulate statement concerning state control over water.

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
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> . . . .
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> Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

California, 438 at 678 (quoting S. REP. No. 755, 82d Cong., 1st Sess. 3, 6 (1951)).

ening the viability of the project itself.[83] Despite the existence of such arguments, the better view is that forfeiture enhances the Reclamation Act's purpose of increased agricultural production by ensuring that project water is used efficiently. Therefore, state forfeiture laws should not be found to conflict with a specific congressional directive and rights to federal project water should be subject to forfeiture.

In summary, the U.S. Supreme Court in *California v. United States* held that the State of California could impose conditions on appropriation; and based on the express language contained in the Reclamation Act and the corresponding legislative history of the Act which supports this interpretation, state law governs when rights to water are in dispute unless state law directly conflicts with specific congressional directives. This holding does not conflict with the Court's decisions in the *Ivanhoe* line of cases because *California v. United States* did not involve a direct conflict between reclamation law and California water law.[84]

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83. Also, the Bureau could avoid forfeiture if Congress, in the Act authorizing a particular federal project, specifically mandates that forfeiture of rights to project water frustrates the purpose of that legislation. However, Congress has yet to do so. *See infra* note 120 and accompanying text. For further discussion of "defenses" available to the Bureau in a forfeiture dispute *see infra* note 179.

84. Other cases have followed the U.S. Supreme Court's ruling in *California v. United States* that Congress intended state water law to control in the absence of a direct conflict with federal law.

In the companion case to *California v. United States*, United States v. New Mexico, 438 U.S. 696 (1978), the U.S. Supreme Court reiterated the importance of state control over water rights and water usage. The issue in *United States v. New Mexico* involved the extent of federal reserved water rights for national forests. *Id.* at 698. The Court cited *California v. United States* for the view that Congress has usually deferred to state law when it has expressly addressed the question whether the federal government must abide by state water law. *Id.* at 702 (citing *California*, 438 U.S. at 653-70, 678-79). This Court's strong posture on deference is illustrated by its reference to thirty-seven statutes which expressly recognized the importance of federal deference to state water law. *Id.* at 702 n.5 (1978). Despite this deferential stance, the Court held that the United States Forest Service held reserved rights to satisfy the purposes of the forest reservation. *Id.* at 702.

In Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1133 (10th Cir. 1981), the Tenth Circuit Court of Appeals held state law governs the distribution of water from federal projects unless Congress legislates a different position. The critical issue in *Jicarilla* involved the definition of beneficial use. The court cited *California v. United States* as controlling precedent for the view that distribution of water is to be controlled by state law, *id.* at 1137 (citing *California*, 438 U.S. at 665), and thus, the court appeared to assume beneficial use would be defined by the states. In fact, the possibility the analysis of the case under section 8 could be based on a federal definition of beneficial use was not even considered. *Jicarilla Apache Tribe*, 657 F.2d at 1134-36.

Despite the seeming clarity of the Supreme Court's opinion in *California v. United States*, the case was remanded because no court had decided whether the conditions placed on the New Melones Project by the State Water Resources Board were inconsistent with congressional directives. Initially, the lower court was forced to decide whether the United States could still challenge the conditions imposed by the state.[85] After deciding this procedural question, the district court examined the conditions imposed on the United States. Two conditions limited water storage by the Bureau to the amount required for established uses until the Bureau showed firm commitments for additional waters[86] and limited the amount of water that could be stored for hydroelectric power generation.[87]

The district court upheld the storage limitation until the Bureau demonstrated firm commitments, however, it invalidated the limitations on hydroelectric power generation.[88] The court took several conditions into account in invalidating the power limitation. First, the purpose of the New Melones Project which was to produce electricity wherever possible.[89] Second, the Act authorizing the Project specifically addressed power generation, instituting preferential power sales. Thus, Congress "intended a steady and dependable year-round supply of power to be available . . . ."[90] Third, the allowance of the Board to store additional water for consumption when it could show firm commitments but not for power generation was too broad.[91] Fourth, the United States was denied an important source of revenue which it intended to use to repay the costs of the project. Any limitation on the amount of water which the United States might acquire for generation of power was "inconsistent with the congressional directive."[92] The remaining conditions were generally held consistent with congressional intent.

On appeal, the Ninth Circuit found that none of the conditions were inconsistent with congressional directives. The court characterized the issue as one of preemption[93] and criticized the Bureau's failure

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85. California v. United States, 509 F. Supp. 867 (E.D. Cal. 1981).

86. *See* California State Water Resources Control Bd. Decision No. 1422, at 15 (1973). The entire text of this decision is appended to the *California v. United States* remand opinion, *California*, 509 F. Supp. at 888-902.

87. *California*, 509 F. Supp. at 888-902 (Conditions 1-b, 1-c, & 2).

88. *Id.* at 884-86.

89. *Id.* at 885; *see* Act of Aug. 26, 1937, ch. 832, § 2, 50 Stat. 844, 850.

90. *California*, 509 F. Supp. at 886.

91. *Id.* at 886-87.

92. *Id.* at 887.

93. California v. United States, 694 F.2d 1171, 1176 (9th Cir. 1982).

to cooperate with the state.[94] The Ninth Circuit interpreted the Supreme Court's earlier decision such that state law would be preempted only "to the extent it conflicts with a federal statute"[95] or where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[96] The conditions imposed by the state were deemed consistent with the "express or clearly implied congressional intent" behind the act authorizing the project; and they did not work at "cross-purposes with an important federal interest served by the congressional scheme."[97]

Therefore, the Ninth Circuit opinion upon remand adds further support to the notion of federal deference to state law when conflicts over federal project water exist. Based on the Supreme Court's and the Ninth Circuit's analysis of the facts in *California v. United States*, statutory forfeiture of the right to federal project water under state law should be deemed consistent with congressional directives, unless the Act authorizing the federal project at issue contains specific language to the contrary.

C. Administrative Preemption

The administrative preemption of state water law is one issue which has been problematic in section 8 cases decided after 1978 . *California v. United States* failed to address this issue. The question of administrative preemption is relevant to this discussion because the Reclamation Act specifically contains many references to the discretion of the Secretary to make "such rules and regulations as may be necessary and proper."[98] Thus, it could be argued that actions of the Secretary under the Reclamation Act which are "necessary and proper" preempt state water law, including statutory forfeiture.

However, this argument can easily be refuted. *California v. United States* requires the presence of "congressional directives"[99] in order for the federal government to avoid compliance with state laws. Thus, it can be argued that administrative preemption does not exist in cases involving section 8 of the Reclamation Act because no "congressional directives" are contained within section 8, only a general administra-

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94. *Id.* at 1178 (the Bureau had failed to be upfront and had presented no evidence to the district court on remand of "impracticality or harmful consequence from any specific condition set by the California Water Board.") *Id.* at 1174.

95. *Id.* at 1176-77 (citations omitted).

96. *Id.* at 1177 (citations omitted).

97. *Id.*

98. 43 U.S.C. § 373 (1988); *see also* 43 U.S.C. §§ 375f, 390ww, 422i, 424e, 440, 485i, 597d (1988).

99. California v. United States, 438 U.S. 645, 668 n.21, 670 (1978).

tive directive. If this argument is accepted, however, the Court in *California v. United States* should not have upheld the holding in *City of Fresno v. California*[100] that the municipal use preference statute was preempted by the Reclamation Act's preference for irrigation.[101]

Recall that in *City of Fresno* the statutory provision at issue provided that no water delivery contract could be entered into unless "in the judgment of the Secretary of the Interior, it will not impair the efficiency of the project for irrigation purposes."[102] This language does not appear to direct the Secretary to do anything, instead it merely grants the Secretary the authority to make the final determination whether project efficiency will be diminished, and thus, whether water delivery contracts may be entered into.

Despite the Court's failure to answer the question of administrative preemption in *California v. United States*, its recent decision in *California v. FERC*[103] offers a solution. The issue in *California v. FERC* concerned whether federal or state law controlled the setting of hydroelectric power project water flow rates, specifically, whether the Federal Power Act's[104] standards for the control of water flow rates preempted California's minimum stream flow requirements.[105]

In *California v. FERC*, the State of California argued that the state's minimum stream flow requirements related to the control, appropriation, use and distribution of water used for other uses, principally the protection of fish, and therefore, under section 27 of the Federal Power Act,[106] these statutory requirements could not be preempted by federal law.[107] The State further argued that section 8 of the Reclamation Act served as a model for section 27 of the Federal Power Act and therefore, based on *California v. United States*, section 27 should be interpreted such that state water laws, not inconsistent with congressional directives, governed the use of water employed in

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100. 372 U.S. 627 (1963).

101. *See supra* notes 44-47 and accompanying text.

102. 43 U.S.C. § 485h(c) (1988).

103. 495 U.S. 490 (1990).

104. Act of June 10, 1920, ch. 285, § 321, formerly § 320, as added Aug. 26, 1935, ch. 687, Title II, § 213, 49 Stat. 863, and renumbered Nov. 9, 1978, Pub. L. 95-617, Title II, § 212, 92 Stat. 3148 (codified as amended at 16 U.S.C. § 821 (1988)).

105. California v. FERC, 495 U.S. at 493-96.

106. Section 27 provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821 (1988).

107. California v. FERC, 495 U.S. at 497.

federal hydroelectric power projects.[108] The Court unanimously rejected these arguments and held that section 27 did not protect California's interest in stream flows against the federal government's interest in the generation of power.[109] Additionally, the Court emphasized state law is "pre-empted to the extent it actually conflicts with federal law . . . ."[110]

The Court interpreted the Federal Power Act and the Reclamation Act differently based on their distinct purposes, even in light of their linguistic similarities.[111] The Court emphasized section 27 of the Federal Power Act did not contain a particular clause found in the Reclamation Act, specifically, the section 8 language that "the Secretary of the Interior . . . shall proceed in conformity with such [state] laws . . . ."[112] This clause appears to eliminate administrative, as opposed to congressional, discretion to override state law. However, this conclusion results in a conflict with the Supreme Court's decision in *California v. United States* not to overrule *City of Fresno* because *Fresno* held the Secretary could effectively preempt state water law.

The solution to this apparent conflict is based on the following interpretation of the term "congressional directive" as used in *California v. United States*.[113] When Congress requires the Secretary to make a specific decision, this order should be deemed a directive allowing state law to be preempted if the law conflicts with such a directive. However, when Congress merely authorizes the Secretary to make general rules and regulations state water law controls.[114] Applying this interpretation to the facts in *City of Fresno*, it is clear that Congress required the Secretary to make a specific decision, whether the water delivery contract could be entered into without impairing the efficiency of the project for irrigation purposes.[115]

Although *California v. FERC* does not involve an interpretation of the Reclamation Act, the U.S. Supreme Court acknowledged that sec-

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108. *Id.* at 503-04.

109. The U.S. Supreme Court in First Iowa Hydro-Electric Power Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946), ruled that the term "other uses," as found in section 27 of the Federal Power Act, referred only to other uses of the same nature, i.e. irrigation or municipal purposes. *Id.* at 175-76. The U.S. Supreme Court in *California v. FERC* followed this interpretation of section 27 in holding that California's minimum stream flow requirements did not relate to the use of water in irrigation or for municipal purposes. *California v. FERC*, 495 U.S. at 497-98.

110. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

111. California v. FERC, 495 U.S. at 503-05.

112. 43 U.S.C. § 383 (1988) *cited in* 495 U.S. at 504.

113. 438 U.S. 645, 670-76.

114. 4 WATERS AND WATER RIGHTS, *supra* note 7, § 41.04, p. 404.

115. *See* 43 U.S.C. § 485h(c) (1988).

tion 27 of the Federal Power Act, which is similar to section 8 of the Reclamation Act, deferred control to the states over water affected by federal hydroelectric projects and used in irrigation or for municipal use.[116] Thus, the U.S. Supreme Court's holding in *California v. FERC* is consistent with *California v. United States* in that federal law controls to the extent state water law directly conflicts with the specific directives of Congress.

In summary, the U.S. Supreme Court and several Federal Courts of Appeals have found, under section 8 of the Reclamation Act and section 27 of the Federal Power Act, that state water law governs the control, appropriation, distribution and use of federal project water unless there is a direct conflict with a specific congressional directive contained in a federal act. Since forfeiture is not addressed in the Reclamation Act, existing case law and sound statutory interpretation strongly suggest that state water law should control when forfeiture of water rights acquired through a federal project is at issue.

V. OWNERSHIP OF PROJECT WATER RIGHTS

The issue of ownership of water rights and water acquired through a federal project is relevant to the determination of their susceptibility to forfeiture. Logically, if the water user does not "own" the water right he cannot forfeit that right. Although many cases have discussed the issue of ownership of water and water rights in controversies between federal and state governments, or between water distribution organizations and individuals, the U.S. Supreme Court has been hesitant to determine outright ownership of water in these disputes.[117] Instead, the important issue is not who absolutely owns the water, but rather who has the right to control or use the water as between competing persons or entities. In the context of rights to reclamation project water, two questions are raised. First, what is the federal government's interest in the water, and second, when is this interest superior to that of the water user. Several courts have discussed these questions in deciding whether the federal government owns federal project water with

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116. California v. FERC, 495 U.S. at 497.

117. *See, e.g.*, Nevada v. United States, 463 U.S. 110, 123-27 (1983); Nebraska v. Wyoming, 325 U.S. 589, 613-16 (1945); Ickes v. Fox, 300 U.S. 82, 94-96 (1937) (all rejecting federal "ownership" claims); Sporhase v. Nebraska, 458 U.S. 941, 951-52 (1982); New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982) (all rejecting state "ownership" claims). *See also* 4 WATERS AND WATER RIGHTS , *supra* note 7, § 36.02, p. 172-74.

respect to water distribution organizations and individual water users.[118]

The arguments against federal ownership of project water are generally based on the history of federal deference to the states in matters involving water control.[119] Theoretically, Congress, if it chose to, could exercise its authority under the Supremacy Clause of the U.S. Constitution[120] and grant total ownership and control of the water of the United States to the federal government. However, the Congress has not done so. In fact, with the exception of federal reserved water rights,[121] Congress, with respect to daily governmental control of rights to use waters of the United States, has left allocation decisions to the states.[122]

When Congress has recognized water rights provided under state allocation laws,[123] or when a federal agency has recognized such a water

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118. *Compare, e.g.*, Ide v. United States, 263 U.S. 497, 506 (1924) (holding the federal government retained all rights beyond those incident to the appropriation). *See also* Frank J. Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 476 (1960) (now U. COLO. L. REV.) (describing how this was a typical approach in western states to issues concerning water distribution organizations and individuals: "[B]etween the project and other claimants to the water, the distributor was regarded as 'the proprietor of the appropriation,' but . . . between the distributor and the consumer, the consumer had property rights that the courts would protect from the arbitrary action by the distributor"); Sporhase v. Nebraska, 458 U.S. 941, 951-52 (1982) (ownership a "fiction"); New England Power Co. v. New Hampshire, 455 U.S. 331, 338 n.6 (1982) (state's claim of ownership was no justification for interference with federal hydropower license); Westside Irr. Co. v. United States, 246 F. 212 (9th Cir. 1917) *with* Nevada v. United States, 463 U.S. 110, 123-27 (1983) (federal government had legal title; water users had beneficial title); Nebraska v. Wyoming, 325 U.S. 589, 613-16 (1945) (question of ownership theoretical, but even if federal government owned the water rights, the rights had been acquired under contracts by the water users); Ickes v. Fox, 300 U.S. 82, 94-6 (1937).

119. *See, e.g.*, Mining Act of 1866, ch. 262, § 9, 14 Stat. 253 (codified as amended at 43 U.S.C. § 661 (1988)); Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (codified as amended at 43 U.S.C. § 661 (1988)); Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1988)).

120. U.S. CONST. art. VI, cl. 2.

121. A federal reserved water right is similar to a right owned by the federal government. Because the priority date of the right attaches from the date the land was set aside or "reserved," not from the date the federal government acquired title to the land, preexisting vested rights may have seniority over the federal right. *See generally* 4 WATERS AND WATER RIGHTS , *supra* note 7, § 37.

122. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) (states free to develop water law rules of their choice).

123. *See, e.g.*, Mining Act of 1866, ch. 262, § 9, 14 Stat. 253 (codified as amended at 30 U.S.C. § § 51, 52 and 43 U.S.C. § 661 (1988)); The Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (codified as amended at 43 U.S.C. § 661 (1988)); Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377 (codified as amended at 43 U.S.C. 321 (1988)).

right,[124] the courts have generally protected such rights from the interference of agencies, such as the Bureau.[125] In protecting such state interests, courts have recognized two levels of ownership, the legal owner and the beneficial owner.[126] More specifically, with respect to federal project water rights, the U.S. Supreme Court has held the water user has "beneficial" title to project water and the federal government merely has legal title.[127] Since the Court has failed to decide the issue of absolute ownership of reclamation project water it is necessary to examine other factors which may help to determine whether these water rights are subject to forfeiture.

The issues of appurtenance of water rights to the land owned by the water user and the right to control the use of the water are the most relevant factors in determining forfeitability of water rights in light of the language of section 8. A finding that 1) rights to reclamation project water are appurtenant to the land on which the water is beneficially used and 2) the water user is the property or beneficial owner of the water right giving him the right to control the use of the water, will expose the user, and consequently the entities he acquired the water through,[128] to forfeiture of project water rights as provided under state law. Conversely, a finding that the federal government has superior ownership interests based on its status as the legal titleholder of reclamation project water and control of the water in the reservoir would likely result in the inapplicability of forfeiture to these water rights.

Section 8 of the Reclamation Act states "[t]hat the right to the use of water acquired under the provisions of the Act shall be appurtenant to the lands irrigated, and beneficial use shall be the basis, the measure

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124. For example, the Bureau of Reclamation contracts with water distribution organizations, i.e. irrigation districts, for provision of waters destined for water users. For more detailed explanation *see* 2 WATERS AND WATER RIGHTS, *supra* note 7, § 16; 4 WATERS AND WATER RIGHTS, *supra* note 7, § 41.

125. *See* Ickes v. Fox, 300 U.S. 82 (1937) (after the Bureau had entered into a water delivery contract the water rights became the "property of the land owners, wholly distinct from the property right of the government in the irrigation works . . . the government was and remained simply a carrier and distributor of the water.") *Id.* at 95.

126. Nevada v. United States, 463 U.S. 110 (1983); *accord* Griffiths v. Cole, 264 F. 369, 372 (D. Idaho 1919); Sauve v. Abbott, 19 F.2d 619, 620 (D. Idaho 1927) (these federal courts have stated that Idaho users do not own water, but can acquire the right to use it for beneficial purposes through compliance with Idaho law). *See also* Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 P. 418 (1924).

127. *Nevada*, 463 U.S. at 123-27.

128. This could include irrigation districts, conservancy districts, canal companies and the Bureau of Reclamation.

and the limit of the right."[129] Several arguments have been made as to the meaning of "appurtenance" as referred to in the Reclamation Act.

Arguably, the appurtenance language in section 8 could merely be an acknowledgment of the presumption that water rights should run with the land in any conveyance of the irrigated land.[130] Others have argued the water rights become appurtenant to the land only once an irrigator beneficially uses project water by applying it to land and making payments in accordance with the Reclamation Act.[131] Significantly, if water rights were not deemed appurtenant to the land the failure to beneficially apply project water to land would be of minor significance in regard to forfeiture.

The U.S. Supreme Court addressed the issue of federal ownership of project water in *Ide v. United States*.[132] *Ide* involved a dispute between the federal government and water users over the federal government's right to make changes to Wyoming's Bitter Creek, in which seepage water flowed from upstream lands irrigated with federal project water.[133] Prior to irrigation of these lands, Bitter Creek flowed only for short, irregular periods, such as after heavy rains or during a thaw.[134] Under Wyoming law, as in most western states, an appropriation which is not useful has no effect because beneficial use is the "basis, measure and limit of the right to use water at all times . . . ."[135] Since water could not be usefully appropriated from Bitter Creek prior to irrigation of upstream lands, due to the lack of regular flow, the federal government argued it had the right to recapture and utilize the seepage from project irrigation which flowed into Bitter Creek.[136]

The Court held the federal government had a right in the unappropriated seepage water and therefore, had a right to alter Bitter Creek.[137] The Court stated:

> In disposing of the lands in small parcels, the [federal government] invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but does

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129. Reclamation Act of June 17, 1902, ch. 1093, § 8, in part, 32 Stat. 390 (codified as amended at 43 U.S.C. § 372 (1988)).

130. 2 WATERS AND WATER RIGHTS, *supra* note 7, § 16.03(c), p. 729.

131. 35 CONG. REC. 6679 (1902). For purposes of this article the term "beneficial use" will generally be synonymous with the landowner's application of project water to his land for irrigation purposes.

132. 263 U.S. 497 (1924).

133. *Id.* at 498-99.

134. *Id.* at 504-5.

135. WYO. STAT. § 41-3-101 (Michie 1977 & Supp. 1991).

136. *Ide*, 263 U.S. at 505.

137. *Id.* at 506.

> not give up all control over the water or to do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the [federal government].[138]

It is clear from this discussion that the federal government maintains some interest in project water after it is appropriated and distributed to purchasers, such as individual water users.[139] Thus, the two following questions are raised: 1) what is the federal government's interest in the water; and 2) when is this interest superior to that of the water user. Based on *Ide*, it can be argued that the federal government retains only some legal interest in the water after distribution to water users and has superior ownership interests and control only with respect to rights to previously unappropriated seepage from lands irrigated with project water. Thus, in a case in which project water is distributed by contract with the Bureau, the water user has a right to receive the water necessary to irrigate his land, and as the property owner of this water the water user has complete control over the use or nonuse of that water. The federal government meanwhile retains only a nominal legal interest in the water user's property right to the water and has no control over the water after releasing it for use. By accepting this legal conclusion, it only follows that the water user, as the beneficial owner and ultimate controller of the use of the water, may forfeit his water right should he fail to apply the water to a beneficial use for a specified period of time as defined by state forfeiture statutes. Accordingly, such water user would also subject the federal government to forfeiture of any interest it has in the water.

The U.S. Supreme Court again addressed the issue of federal ownership of rights to reclamation project water in *Ickes v. Fox*.[140] *Ickes* involved an action by water users against the federal government for unwarrantable interference with their property, specifically the property right to the water held in a federal reservoir.[141] The water users had been allowed large quantities of water under the original water right contracts with the Bureau, but were later notified by the Secretary that they would have to pay additional sums in order to receive

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138. *Id.*

139. *See also* Westside Irr. Co. v. United States, 246 F. 212 (9th Cir. 1917); United States v. Union Gap Irr. Co., 209 F. 274 (E.D. Wash. 1913). These courts held that the United States is the appropriator and others merely have contract rights against it.

140. 300 U.S. 82 (1937).

141. *Id.* at 89-91.

the same quantity in the future.[142] The water users subsequently filed suit to require continued delivery of the original water quantities at the same price.[143]

The Supreme Court applied the "appurtenance rule" contained in section 8 of the Reclamation Act and ruled in favor of the water users. The Court held the water rights were appurtenant to the land irrigated[144] and further added:

> Although the [federal] government diverted, stored and distributed the water, the contention of petitioner [the federal government] that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation [of the water] was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract [between the government and the water users] . . . the water-rights became the property of the landowners . . . .[145]

The Court recognized the federal government simply as the carrier and distributor of the water, retaining only a nominal interest in the water.[146]

Although the Court did not overrule or distinguish *Ide*, it is clear from the language in *Ickes* that the water user has some right to receive water appropriated under the Reclamation Act and distributed to him by way of contract with the Bureau. Thus, it can be argued that the water user, who acquires a water right in the manner described above, has the right to beneficially use the water. Logically, it follows that if he fails to apply the water to a beneficial use he should lose any right which he has in that water, and thus, he may forfeit the water right if he meets the state forfeiture requirements.[147]

The U.S. Supreme Court again faced the question of federal ownership in *Nebraska v. Wyoming*.[148] *Nebraska v. Wyoming* arose from a dispute over the equitable apportionment[149] of waters of the North Platte River among the states of Nebraska, Wyoming and Colorado in which the United States intervened.[150] The federal government

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142. *Id.*
143. *Id.* at 93.
144. *Id.* at 93-94.
145. *Id.* at 94-95.
146. *Id.*
147. *Id.*
148. 325 U.S. 589 (1945).
149. *See supra* note 51.
150. *Nebraska*, 325 U.S. at 591-92.

claimed ownership of the water based on its acquisition of the water rights by appropriation for the North Platte Project and the Kendrick Project.[151] In the alternative, the federal government argued its basic rights to the water originated not from the appropriation but from its ownership of the water, originating from land acquired by cessions from France, Spain and Mexico, and later by agreement with Texas, which entitled it to an apportionment free from interference by the states.[152]

The issue of ownership of the previously unappropriated water was not relevant to the resolution of the case because the disputed water rights had later been acquired by water users in compliance with state law.[153] Nevertheless, the Court examined section 8 of the Reclamation Act because the North Platte and Kendrick Projects were initiated under the Reclamation Act.[154] The federal government's ownership claim was principally rejected based on the Supreme Court's earlier interpretation of the purpose behind appropriation of water under the Reclamation Act in *Ickes*.[155] The Court held the federal projects involved "were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act;"[156] and cited *Ickes* for the view that appropriation was made for water users, not the government, and through the law and the contract between the parties the water rights were the property of the water users.[157] The Court emphasized:

> To allocate those water rights to the United States would be to disregard the rights of the landowners. To allocate them to the States, who represent their citizens . . . in no [way] interferes with the ownership and operation by the United States of its storage and power plants, works and facilities.[158]

Although the Court did not determine the extent of federal ownership of previously appropriated or unappropriated waters emanating from federal projects, the Court's analysis of *Ickes* and of the appurtenance language in section 8 emphasizes the importance of recognizing section 8's purpose. Appropriation of water under the Reclamation Act is for use by water users, and by the Reclamation Act's terms and the

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151. *Id.* at 611.
152. *Id.*
153. *Id.* at 612.
154. *Id.* at 613.
155. *Id.* at 613-14.
156. *Id.*
157. *Id.* at 614 (quoting Ickes v. Fox, 300 U.S. 82, 94-95 (1937)).
158. *Nebraska*, 325 U.S. at 616.

resulting contract with the Bureau, the water rights become the property of the water users.[159] Logically, it follows that the water user, as the property owner or beneficial owner of the water right, has the right to control the use of the water, which was appropriated for his use under the Reclamation Act and granted to him directly or indirectly by contract with the Bureau, subject to the beneficial use requirement provided under section 8 of the Reclamation Act and state law. Therefore, if the water user fails to use the water in a beneficial manner for the statutorily defined period he can forfeit the water right under state law and bind the federal government.

Finally, in *Nevada v. United States*[160] the Supreme Court reviewed an action brought by the federal government, on behalf of the Pyramid Lake Indian Reservation, to acquire additional water from the Truckee River for the Reservation's benefit.[161] The federal government did not dispute water rights previously adjudicated,[162] instead it claimed the prior action only determined the Reservation's right to water for purposes of irrigation.[163] The U.S. Supreme Court, in determining the validity of the defendant water users' res judicata defense, examined the issue of appurtenance.[164]

After reviewing *Ickes* and *Nebraska v. Wyoming*, the Court held "the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land."[165] The Court concluded once the lands were acquired by the occupants in the project, "the Government's 'ownership' of the water rights was at most nominal . . . ."[166] In fact, the Court found the federal government merely possessed legal title to the water right; beneficial title was held by the water users.[167] *Ickes* was again cited for the proposition that appropriation of the water distributed via a federal project was made for the use of the water users and not the government.[168] Based on this reasoning the Court in *Nevada* concluded the

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159. *Id.* at 614 (quoting Ickes v. Fox, 300 U.S. 82, 94-95 (1937)).

160. 463 U.S. 110 (1983).

161. *Id.* at 113.

162. In 1944, a settlement agreement was reached between parties disputing rights to the waters of the Truckee River. Various water rights were awarded to the Pyramid Lake Indian Reservation and the Newlands Reclamation Project, which was managed by the Truckee-Carson Irrigation District. *Id.* at 116-18.

163. *Id.* at 119.

164. *Id.* at 119-25.

165. *Id.* at 122-26.

166. *Id.* at 129.

167. *Id.* at 123-27.

168. *Id.* at 125 (citing Ickes v. Fox, 300 U.S. 82, 95 (1937)).

government could not reallocate project water rights to the Reservation as if it were the owner of those rights.[169]

The fact that this Court used the term "beneficial title" to describe the interests of water users in project water as opposed to property ownership, as used by the Court earlier in *Ickes*[170] and *Nebraska v. Wyoming*,[171] probably is inconsequential for purposes of determining the applicability of forfeiture. Beneficial ownership may be viewed as a type of property right which is dependent on the owner's beneficial use of the property, in this case the water itself. Whether the federal project was constructed and the water was appropriated for the use of the water user, and whether he is deemed the property or beneficial owner of the water right, he controls the use or nonuse of the water. Rationally, the water user and his corresponding right to federal project water should be subject to forfeiture if he meets the statutory requirements for nonuse.

In summary, the rulings in the *Ickes* line of cases are consistent with the ownership scheme provided under the Reclamation Act.[172] Assuming all payments are made for the water rights, the project water is supplied to the distribution organization and then is distributed to the owners of the irrigated land; the management and operation of the reservoir works and facilities typically remain in the federal government.[173] The water user assumes control over the use of the water and the rights to the water are appurtenant to the land, giving the water user a property or beneficial right to the water so long as it is applied to his land. Consequently, the water user can forfeit the right under state law if he meets the statute's requirements with respect to nonuse, even though the Bureau is the legal title holder.[174]

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169. *Nevada*, 463 U.S. at 128. *Cf.* Butte County v. Lovinger, 266 N.W. 127 (S.D. 1936). Plaintiff obtained land in a foreclosure sale and argued that stock in the irrigation association represented certain water rights which were appurtenant to the land. The court disagreed, holding that water rights represented by shares in an irrigation company are personal property, independent of the land. *Id.* at 132. The irrigation association's position is analogous to that of the federal government in that the association is the legal title holder of the water, however, the landowners as beneficial owners of the water are capable of selling and transferring, or even forfeiting those shares.

170. Ickes v. Fox, 300 U.S. 82, 94-95 (1937).

171. 325 U.S. 589, 614 (1945).

172. Act of June 17, 1902, ch. 1093, § 6, 32 Stat. 389 (codified as amended at 43 U.S.C. § 498 (1988)).

173. *Id.*

174. *Cf.* Ide v. United States, 263 U.S. 497 (1924) (although the Court held the federal government owns and controls some rights to federal project water, this decision does not interfere with states' interests in controlling project water appropriated for the use of landowners by way of contract with the Bureau).

A finding that rights to water acquired through a federal project are not subject to forfeiture under state law would conflict with Congress' intent to defer control over the appropriation, distribution and use of water and water rights acquired under the Reclamation Act to the states.[175] Furthermore, immunity of federal project water to forfeiture would destroy the ability of the states to ensure the beneficial use of all its waters without any guarantee that the federal government would ensure the beneficial use of water deemed beyond the control of the states. Therefore, based on the policy inherent in state water law and federal reclamation law to encourage the beneficial use of water, state law should control in disputes over forfeiture of federal project water rights.

VI. IDAHO FORFEITURE LAW

Rights to water held in a reclamation project should be subject to state water forfeiture laws in view of the recognition by federal courts that state water law controls acquisition and distribution of reclamation project water so long as it is consistent with congressional directives; and that the water user who applies project water to a beneficial use is the beneficial or property owner of these water rights.[176]

Idaho Code section 42-222(2) specifically provides for forfeiture of water rights under certain circumstances, stating in part:

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure of the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter . . . .[177]

Idaho courts have generally not favored forfeiture of water rights.[178] However, in cases in which the water user has no legitimate

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175. 43 U.S.C. § 372 (1988).

176. The consequences of forfeiture of federal project water rights is beyond the scope of this article. However, in Idaho, upon forfeiture the water right would revert to the State of Idaho and be available for a new appropriation. *See* IDAHO CODE § 42-222(2) (1990).

177. IDAHO CODE § 42-222(2) (1990).

178. *E.g.*, Dovel v. Dobson, 831 P.2d 527 (Idaho Ct. App. 1992); McAtee v. Faulkner Land & Livestock, Inc., 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987); Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984); Jenkins v. State, Dep't. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976);

reason for his nonuse of the water, Idaho courts have deemed the rights to the water forfeited under the statute.[179]

Hodges v. Trail Creek Irr. Co., 78 Idaho 10, 297 P.2d 524 (1956); Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400 (1945).

179. *See* Jenkins v. State Dep't. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982) (involving the state's denial of an application to transfer the point of diversion based principally on the plaintiff's failure to use the water more than five years, thereby subjecting the right to forfeiture. Although the court emphasized forfeitures are not favored and clear and convincing proof of nonuse is required, it nonetheless held a water right may be lost if it is not applied to a beneficial use for a period of five years as provided by Idaho Code section 42-222(2)). Other Idaho cases finding forfeiture include: Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976).

Notably, the Idaho legislature has recognized an exception to the forfeiture provision, specifically in circumstances where a showing of good and sufficient cause for nonuse can be shown. *Jenkins*, 103 Idaho at 389, 647 P.2d at 1261. Courts have also declined to declare a forfeiture in an instance where the use of a water right is resumed after the five year period has lapsed, but before any third parties have made a claim on the water right. *See* Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952); Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400 (1945); Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944). Also, wrongful interference with a water right and failure to use the water as a result of circumstances beyond the control of the right holder have been recognized as defenses to forfeiture by the courts. *See* Alamo Water v. Darrington, 95 Idaho 16, 501 P.2d 700 (1972); Hodges v. Trail Creek Irr. Co., 78 Idaho 10, 297 P.2d 524 (1956); Welch v. Garrett, 5 Idaho 639, 51 P. 405 (1897).

The Bureau can make several additional arguments against forfeiture notwithstanding those available under Idaho Code section 42-222(2) or a similar state forfeiture statute. The Bureau could argue water held in federal reservoirs meets the beneficial use requirement due to public use of the water for recreation and fishing. *See* United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nevada 1980) (the District Court held public recreation and fishing on the reservoir constituted beneficial uses of the water provided by the United States, thereby precluding forfeiture of the water rights). The Bureau could also argue that storage itself is a beneficial use. *See* Farmers' High Line Canal & Reservoir Co. v. Southworth, 21 P. 1028, 1030 (Colo. 1889).

Idaho Code section 42-108 allows for a change in the nature of water use upon approval of the State Department of Water Resources. Faced with a claim of forfeiture involving rights to water held in a federal project constructed prior to 1971, the Bureau could argue it established water rights under Article 15, section 3 of the Idaho Constitution and later informally transferred these rights for purposes of another beneficial use, i.e. recreation, thus avoiding the formal transfer requirements of Idaho Code section 42-108 and forfeiture under section 42-222(2). For a more detailed discussion of transfer requirements *see* A. Lynne Krogh-Hampe, *Injury & Enlargements in Idaho Water Right Transfers*, 27 IDAHO L. REV. 249 (1991); Brian E. Gray et al., *Transfers of Federal Reclamation Water: A Case Study of California's San Joaquin Valley*, 21 ENVTL. L. 911 (1991); Bonnie G. Colby et al., *Procedural Aspects of State Water Law: Transferring Water Rights in the Western States*, 31 ARIZ. L. REV. 697 (1989).

The Bureau could argue that irrigation districts are analogous to conservancy districts and should receive similar protections. *See* City of Raton v. Vermejo Conservancy Dist., 678 P.2d 1170, 1175 (N.M. 1984) (the New Mexico Supreme Court upheld a New

VII. CONCLUSION

Due to increasing urbanization of lands in the West and other factors resulting in nonuse of water originally appropriated for irrigation of these lands, the issue of forfeiture of federal reclamation project water rights may well be addressed by the judiciary in the future.

Historically, state water law, primarily through the doctrine of prior appropriation, has controlled the acquisition of water in the West; and state, not federal law, controls the appropriation, distribution and use of water held in a federal project unless state water law directly conflicts with a specific congressional directive.

Certainly, Congress, in order to prevent forfeiture by the Bureau, could choose to create a federal system of water law which would completely supersede all existing state water systems.[180] Indeed, the relevant question is not whether Congress has the authority to displace state systems, but whether it has elected not to do so.[181] The Reclamation Act is silent with respect to forfeiture of federal project water rights and, in fact, section 8 emphasizes conformity with existing state law. Therefore, section 8 of the Act should be construed as evidence that Congress intended state water law control in disputes over forfeiture of federal reclamation project waters.

Under the Reclamation Act, all rights to project water are appurtenant to the land subject to state requirements[182] regarding beneficial use. The landowner or water user establishes himself as the beneficial owner of the water right and ultimately controls the use of his water by applying the water to a beneficial use, typically by irrigating his lands with this water, and the federal government retains some "mere" legal

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Mexico statute protecting conservancy districts from losing rights to district water, use of the water or the land within the district or property owned by the district by adverse possession or nonuse of the water).

Finally, the Bureau could argue state forfeiture law frustrates the purpose of the Reclamation Act because after forfeiture the water reverts to the state rather than the irrigation district or individual landowner. However, it could be countered that state forfeiture law actually furthers the purpose of the Reclamation Act. If federal project water rights are deemed susceptible to state forfeiture law incentives for beneficial use of project water will be reinforced and presumably, landowners will apply project water to a beneficial use as contemplated by the Reclamation Act. However, if federal project water rights are immune from forfeiture, states cannot ensure beneficial use of project water and, due to the lack of any comparable federal forfeiture law, the federal government also would be unable to ensure beneficial use of these waters.

180. *See* Lawrence J. MacDonnell, *Federal Interests in Western Water Resources: Conflict and Accommodation*, 29 NAT. RESOURCES J. 389 (1989).

181. *Id.* at 406.

182. Section 8 of the Reclamation Act affirms the state law requirement of beneficial use.

interest in the water right. As a result, the beneficial owner is capable of forfeiting his water right under state law, and thus, is also capable of binding the federal government due to his action, or inaction as the case may be.

Based on the history of federal deference to state governments in water regulation, the legislative history and language of section 8 of the Reclamation Act and case precedent, a court could reasonably conclude that an individual, as the beneficial owner of a right to water held in a federal reclamation project, can forfeit that right on behalf of the Bureau due to his failure to apply the water to a beneficial use for several years, as defined under the appropriate state law.

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