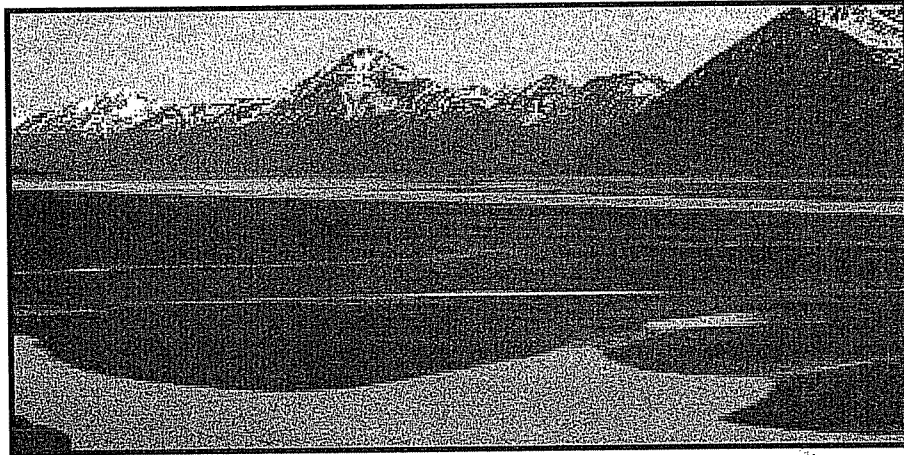


# West

# Northwest

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## 43 C.F.R. Part 417 Does Not Authorize Federal Agency Adjudication of IID Beneficial Use of Colorado River Water

David Osias<sup>1</sup> and Thomas Hicks<sup>2</sup>

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1. David Osias was one of the lead counsel for Imperial Irrigation District in the Quantification Settlement Agreement negotiations, Part 417 process, and *Imperial Irrigation District v. United States* litigation. The views expressed are entirely and solely those of the authors and do not represent the views or positions of IID.

2. Thomas Hicks is a 2005 graduate of the University of San Francisco School of Law. He would especially like to thank Prof. Alice Kaswan and John Demeter for their initial guidance and support during the first drafts of this article.

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## I. Introduction

In 2003, the Bureau of Reclamation (BuRec) utilized 43 C.F.R. Part 417 (Part 417)<sup>3</sup> to reduce the quantity of water available to a senior California water-right holder and increased the quantity available to junior California water-right holders. BuRec's action took place despite a declaration by the Secretary of the Interior (Secretary) that the Colorado River was experiencing normal flow conditions, and despite that the issue precipitating the Secretary's action involved a beneficial-use dispute among California water-right holders only. BuRec's action had no potential to impact other Colorado River basin states and California's aggregate use was not at issue.

BuRec conducted an informal adjudication to reallocate the water under presumptive federal principles requiring reasonable beneficial use. In doing so, BuRec ignored applicable California water and environmental laws, applicable federal environmental laws, historical and continuing exercise of jurisdiction by the California State Water Resources Control Board (SWRCB), a request by the State of California for formal consultation, administrative adjudicatory due process, and the terms of the United States contract controlling water delivery.

This article addresses whether Part 417 authorizes and empowers BuRec or the Secretary to act as an adjudicator of intra-state reasonable beneficial use of Colorado River water. The authors conclude that Part 417 is not authority for agency adjudication; no express preemptive federal legislation authorizes the Secretary to render a reasonable beneficial use decision without deference to California reasonable beneficial use determinations. The Secretary's reallocation of "permanently allocated" water disregarded specific conflict-resolution procedures contained in the water supply contract between the United States and the Imperial Irrigation District, violated federal preemption jurisprudence, and ignored Congressional intent and purpose. The 2003 adjudication and unilateral reallocation lacked legal foundation, contract compliance, and adjudicatory due process. Therefore, it should not be regarded as valid precedent.

### A. Water in the West

Today's West is the culmination of over 150 years of water development. The taming of the Colorado River played a major role. Over the span of the twentieth century, a sophisticated water storage and delivery network was built to capture and control the entire flow of the Colorado River. Major dams at Glen Canyon and Boulder Canyon harnessed the main stem of the Colorado River and a complementary phalanx of projects was

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3. The full text of 43 C.F.R. Part 417 is included as an appendix.

built deep in the mountain arteries and tributaries of the Colorado River; a drainage area totaling one-seventh of the continental United States.<sup>4</sup>

This water infrastructure has nurtured a vast and interdependent network of agricultural communities and modern cities. Irrigation districts in desert regions of Arizona and California supply water to some of the most productive agricultural lands in the world.<sup>5</sup> The same combination of sun and water created an unstoppable recipe for growth in the major cities of the southwest, such as Los Angeles, San Diego, Phoenix, Tucson, and Las Vegas, each of which has experienced the largest percentage of national population growth for the past decade.<sup>6</sup>

The conveyance, utilization and sharing of stored water in the Lower Basin of the Colorado River among California, Nevada, and Arizona is highly regulated and governed by a combination of contracts and federal, state, and local laws. The California and federal requirement that Colorado River water be put to "reasonable beneficial use" provides the starting point to evaluate the proper reach of Part 417.

### **B. Reasonable Beneficial Use as a Key Concept in Western Water Law**

Western water law evolved to fit the needs of settlers of the dry western landscape. Initially, each state utilized a combination of local rules, customs, and laws best suited to meet its own challenges and development needs; most commonly to support irrigation and mining activities. In recent years, growing municipal demand has caused increased pressure to reallocate supplies from those activities.

The first disputes over water helped define the concept of a water right.<sup>7</sup> A user acquired a defensible right to divert and use a quantity of water at a certain location for a specific purpose during the year. When the amount of water claimed, diverted and used converged, the right became "perfected." The right was then given a priority<sup>8</sup> superior to subsequent,

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4. *The Colorado River Basin . . . and Its Plumbing*, in WESTERN WATER MADE SIMPLE 155 (Island Press 1987).

5. MARC REISNER, *CADILLAC DESERT* 259-60, 333-34 (rev. ed., Penguin Books 1993).

6. California is projected to grow to 49.2 million from 32.5 million between 2000 and 2025; Arizona is projected to grow to 6.4 from 4.8; and Nevada is projected to grow to 2.3 from 1.8 during the same period. PAUL CAMPBELL, U.S. CENSUS BUREAU, *POPULATION PROJECTIONS: STATES, 1995-2025*, at 3 (1997), <http://www.census.gov/prod/2/pop/p25/p25-1131.pdf>.

7. *Irwin v. Phillips*, 5 Cal. 140 (1855); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

8. Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37 (2002); Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998).

junior competing users of the same water source. "First in time, first in right" became the shorthand for the rule governing the Doctrine of Prior Appropriation, and the principal tenet of state-based water right systems in the West.

The priority system lends predictability and stability to the sharing of a finite resource. When water is abundant, a greater number of junior water rights can be satisfied. Conversely, when water is not abundant, the limited supply is available first to the senior-most rights holders in descending order of priority, so long as their use is "reasonable and beneficial." That senior rights are satisfied before junior rights means that the holders of junior rights shoulder the risk of water demand outstripping available supply during dry years.

"Reasonable beneficial use" is the preeminent limitation on the exercise of a water right and a "cardinal principle" of western water law.<sup>9</sup> Unlike real property and the concept of fee simple absolute, no water right holder possesses an absolute right to water. Instead, a water right guarantees only the use of water, a usufructuary right, constrained by the limits of reasonable, beneficial use as defined by each state.

The concept of reasonable, beneficial use has slowly evolved over time in conjunction with the morphing ideals and values of states in the West. California's State Water Resources Control Board (SWRCB) and state courts are each expressly empowered to render reasonable, beneficial-use determinations. These determinations are not the result of a formulaic approach dependent upon a limited or defined checklist of variables. Rather, reasonable, beneficial-use determinations are shaped by a fact-specific balancing of considerations that are slowly evolving to reflect public water policies and pragmatic realities facing existing users.

### C. Colorado River Use and Dependence

The sharing of the Colorado River has been a historic point of tension and antagonism among water rights holders in the Lower Basin states of Arizona, Nevada and California. Within California, Colorado River water is a pivotal state concern because it is necessary to sustain economic and regional population growth.

On August 18, 1931, a number of existing California Colorado River water users — including the Imperial Irrigation District (IID), and several prospective users such as the Coachella Valley Water District (CVWD), the Metropolitan Water District of Southern California (MWD), and the City and County of San Diego — entered into the "Seven-Party Agreement" to divide and share California's right to 4.4million acre-feet (MAF) per year (MAFY) to

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9. *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 171 (Ct. App. 1986).

the Colorado River.<sup>10</sup> The California Department of Water Resources (DWR) recommended the Seven-Party Agreement to the Secretary, who then adopted verbatim the allocation and priority provisions of the Seven-Party Agreement in BuRec's contract with each of the seven parties.<sup>11</sup>

In the recent past, California used as much as 5.2 MAFY of Colorado River water, approximately 800,000 AFY in excess of California's maximum basic water right to 4.4 MAFY. MWD, the wholesale water supplier to millions living in coastal Southern California from San Diego County to Ventura County, holds the most junior rights among the members of the Seven Party Agreement. MWD holds almost 550,000 AFY of California's 4.4 MAFY and was the primary beneficiary of the California's 800,000 AFY of excess Colorado River use. By 2000, 16.9 million people,<sup>12</sup> roughly half of California's population, depended, at least in part, on Colorado River water provided by MWD.

Reducing MWD's Colorado River supply would require either replacement by other in-state sources or a reduction in deliveries to urban areas. The San Diego County Water Authority (SDCWA), a member agency of MWD, and the largest user of MWD water, perceived itself as more vulnerable to MWD supply constraints than other MWD users because its rights are junior to other users and because SDCWA has very limited alternative local supplies.

In contrast to MWD and SDCWA, IID holds a large and senior Colorado River water right to over 3.1 MAFY of California's agricultural right to 3.85 MAFY. Smaller and more senior rights to 400,000 to 500,000 AFY of agriculture's 3.85 MAFY belong to the Palo Verde Irrigation District (PVID) and the Yuma Project Irrigation District (YPID). CVWD holds a right junior to IID for the balance of the 3.85 MAFY.

### I. IID - A Community Built On Agriculture

The Imperial Valley, located about two hours east of San Diego near the Arizona-Mexico border, is one of California's major agricultural regions. Farming is the primary economic engine for the area.<sup>13</sup> Year-round sunshine allows Imperial Valley farmers to grow crops through all four seasons.<sup>14</sup> Much of the land is double and triple-cropped with numerous and diverse

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10. Declaration of Jesse P. Silva in Support of Imperial Irrigation District's Motion for Preliminary Injunction ¶ 20, *Imperial Irrigation Dist. v. United States*, No. 03 CV 0069W (JFS), (S.D. Cal. 2003) [hereinafter Silva Dec.].

11. *Id.*

12. REPORT ON METROPOLITAN'S WATER SUPPLIES app. A, at 2 (March 25, 2003).

13. Silva Dec., *supra* note 10, ¶ 14.

14. *Id.*

field, vegetable, and permanent crops.<sup>15</sup> In 2001, for example, over 50 different crops were commercially grown,<sup>16</sup> producing a gross value of \$1.01 billion.<sup>17</sup>

The Imperial Valley has a desert climate with an average rainfall of three inches per year.<sup>18</sup> All Imperial Valley farmers, businesses, municipalities, and residents rely on IID's Colorado River water right.<sup>19</sup> The combination of little rain, one source of water, and an agricultural economy makes a threat to IID's Colorado River right a very serious matter.

IID delivers water to approximately 450,000 acres of farmland in the Imperial Valley (about 703 square miles).<sup>20</sup> Distribution of water is principally achieved through a gravity-flow system that includes the 82-mile All-American Canal, almost 1,700 miles of other delivery canals servicing about 6,300 headgates, numerous reservoirs, and over 1,400 miles of drainage ditches.<sup>21</sup>

## 2. IID's Long-Established Colorado River Right

Unlike most BuRec contractors, IID's Colorado River water right predates its federal contract with the United States by decades. IID's right to appropriate Colorado River water originated in 1885 under California law, when a number of individuals and the California Development Company made a series of appropriations totaling 7.0 MAFY for use in the Imperial Valley.<sup>22</sup> The Southern Pacific Company later acquired these water rights.<sup>23</sup> IID was formed in 1911.<sup>24</sup> On June 22, 1916, the Southern Pacific Company conveyed all of its water rights to IID.<sup>25</sup> By 1929, at least 424,145 acres of the Imperial Valley's approximately one million irrigable acres were under irrigation.<sup>26</sup>

Under the Seven-Party Agreement, IID agreed to limit its water right in quantity and priority to a third priority right in the amount of 3.85 MAFY,

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15. *Id.*

16. IMPERIAL COUNTY AGRICULTURAL CROP & LIVESTOCK REPORT 3-8 (2001).

17. Silva Dec., *supra* note 10, ¶ 14.

18. *Id.* ¶ 13.

19. *Id.*

20. IMPERIAL IRRIGATION DIST., 2005 ANNUAL WATER REPORT 29 (2005), available at <http://www.iid.com/Media/2005IIDWaterAnnualReport.pdf>.

21. Silva Dec., *supra* note 10, ¶ 10.

22. *Id.* ¶ 19.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*



minus Priority 1 and Priority 2 usage, as well as to a sixth and seventh priority right for water available to California above 4.4 MAFY.<sup>27</sup> Article 17 of the 1932 contract between IID and the United States obligates the Secretary to deliver to IID "so much water as may be necessary to supply the District a total quantity . . . in the amounts and with priorities in accordance with [those stated in the Seven-Party Agreement]."<sup>28</sup>

Upon entering the 1932 contract, IID thought that the Coachella Valley would also become a part of IID's service area, even though such lands had no historic or pre-existing water right to the Colorado River.<sup>29</sup> However, the Coachella Valley farmers eventually negotiated their own contract with the United States. In 1934, IID and CVWD executed a Compromise Agreement that permitted CVWD to contract directly with the United States, but expressly required that CVWD's right to Colorado River water would be subordinate in perpetuity to IID's senior right.<sup>30</sup> Therefore, within the third, sixth and seventh priorities, as set forth in the Seven-Party Agreement and all the California right holder water delivery contracts with the United States, IID's right to use Colorado River water is senior to CVWD's right.<sup>31</sup>

The result of the Seven-Party Agreement water allocations, as incorporated into the United States contracts with each party in a 4.4 MAFY *non-surplus year*, is as follows:<sup>32</sup>

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27. *Id.* ¶ 21.

28. *Id.* ¶ 23.

29. *Id.* ¶ 24.

30. *Id.*

31. *Id.*

32. *Id.* ¶ 26.

| Priority | Description   | Annual Acre-feet |
|----------|---|------------------|
| 1        | Palo Verde Irrigation District—for a gross area of 104,500 acres                      |                  |
| 2        | Yuma Project (Reservation District)—up to a gross area of 25,000 acres                | 3,850,000        |
| 3a       | Imperial Irrigation District (senior)   |                  |
|          | Coachella Valley Water District (junior)  |                  |
| 3b       | Palo Verde Irrigation District—for 16,000 acres of mesa lands                         |                  |
| 4        | Metropolitan Water District and/or City of Los Angeles and/or others on coastal plain | 550,000          |
|          | SUBTOTAL  | 4.4 MAFY         |

When California is limited to 4.4 MAFY, subject to a reasonable, beneficial-use requirement, IID may use, and the United States has a contractual obligation to deliver, 3.85 MAFY minus amounts used by Priorities 1 and 2 (and adjusted pro rata for any use by Palo Verde Irrigation District (PVID) under Priority 3b).<sup>33</sup> The remainder of the 3.85 MAFY agricultural entitlement is available to junior right holder CVWD. In years when California can receive only 4.4 MAF, only 550,000 AF is available to junior right holder MWD under the contractual priority agreements.<sup>34</sup>

### 3. Drainage to the Salton Sea

Another important aspect of IID water use is the interrelationship between irrigated agriculture in the Imperial Valley and the Salton Sea, California's largest lake. The destruction of wetlands in coastal Southern California, as a result of development and the loss of wetlands in the Gulf of

33. *Id.* ¶ 28.

34. This ignores some senior miscellaneous and present perfected rights of smaller users, which reduces MWD's junior right even further. MWD contends that these minor senior rights should reduce the agricultural right of 3.85 MAFY because the use is primarily for agriculture. This dispute was settled by the Quantification Settlement Agreement.

California in Mexico from Colorado River use, has caused the Salton Sea to become the new home for approximately 400 different bird species. The Salton Sea averages between 1.5 million and 2 million water birds per year.<sup>35</sup> The Salton Sea has become an integral component of the Pacific Flyway, providing an important migratory stopover for fall and spring shorebirds and supporting large populations of wintering waterfowl. The Salton Sea is only one of four remaining interior sites along the Pacific Flyway that supports over 100,000 migrating shorebirds.<sup>36</sup> Many of the birds that stopover at the Salton Sea are listed as endangered or threatened species, or species of concern under federal and California endangered species laws.<sup>37</sup>

As a terminal lake with farm runoff as the primary source of inflow, the Salton Sea exists today only because of irrigated agriculture in the Imperial and Coachella Valleys.<sup>38</sup> From 1950 to 1999, for example, over 86 percent of the Salton Sea's average annual inflow of 1.34 MAF came from Imperial Valley irrigation drainage.<sup>39</sup> Any reduction in IID water deliveries, or any increase in irrigation efficiency that reduces IID irrigation drainage, causes a reduction of inflow to the Salton Sea and a corresponding negative environmental impact on the species which nest and feed there.

#### **4. California Exercises Jurisdiction Over IID's Reasonable Beneficial Use**

In the early 1980s, flooding from rising Salton Sea elevations damaged certain farmland in IID adjacent to the Salton Sea. The affected farmer then brought a lawsuit against IID to reduce the flooding by reducing Salton Sea inflows through forcing higher water use efficiencies. In 1983, the SWRCB held a lengthy evidentiary adjudicatory hearing, in which BuRec participated both as a party and as an expert witness. The SWRCB issued a lengthy decision containing detailed factual findings and legal conclusions regarding IID's water use and California's requirement for reasonable beneficial use, and ordered IID to undertake certain corrective measures. Further hearings, an additional decision, and a court order were issued in

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35. IMPERIAL IRRIGATION DIST., WATER CONSERVATION AND TRANSFER PROJECT: FINAL ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL IMPACT STATEMENT app. A, at A2-40 (June 2002).

36. *Id.* at A2-41.

37. *Id.* at A1-11 to -12, A2-54.

38. *Id.* at A2-13.

39. IMPERIAL IRRIGATION DIST., WATER CONSERVATION AND TRANSFER PROJECT AND HABITAT CONSERVATION PLAN: DRAFT ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL IMPACT STATEMENT § 3.1, at 70 (January 2002); IMPERIAL IRRIGATION DIST., *supra* note 35, at § 1.1.

1988.<sup>40</sup> The SWRCB retained jurisdiction over IID's reasonable, beneficial use and required IID to report semi-annually on its water use(s) and improvements to more efficiently deliver and use Colorado River water. In Order 88-20, SWRCB mandated IID to implement a conservation project sufficient to save at least 100,000 AFY.<sup>41</sup> In 1988, IID entered into a long-term conserved water transfer agreement with MWD. MWD paid the costs of water conservation in exchange for the right to receive the conserved water from IID.<sup>42</sup>

#### D. California's 4.4 MAFY Limit Begins to Pinch

Pursuant to the 1928 Boulder Canyon Project Act (BCPA),<sup>43</sup> the BuRec operates the Hoover Dam on the Colorado River and delivers water to California right holders consistent with the Seven-Party Agreement priorities. Under normal flow conditions, California right holders are entitled to consumptively use 4.4 MAFY. More is available in surplus years, and less in shortage years. The Secretary declared 2003 a normal flow year.<sup>44</sup>

#### 1. California Overuse of Colorado River

Between 1964 and 2002, California use of the Colorado River exceeded 4.4 MAFY in every year but two.<sup>45</sup> California utilized as much as 800,000 AFY of surplus and unused entitlement of Nevada and Arizona. In 1980, Arizona passed the landmark Arizona Groundwater Management Act<sup>46</sup> to centralize management of statewide groundwater resources and to establish

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40. *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 275 Cal. Rptr. 250, 254-57 (Ct. App. 1990), *cert. denied*, 502 U.S. 857 (1991).

41. *Imperial Irrigation Dist.*, Decision 1600, at 69 (Cal. State Water Res. Control Bd. June 21, 1984), *available at* <http://www.waterrights.ca.gov/hearings/decisions/WRD1600.PDF>; *Imperial Irrigation Dist.*, Order WR 88-20, at 44 (Cal. State Water Res. Control Bd. Sept. 7, 1988), *available at* <http://www.waterrights.ca.gov/hearings/WaterRightOrders/WRO88-20.pdf>.

42. *Imperial Irrigation Dist. & Metro. Water Dist.*, Agreement for Implementation of a Water Conservation Program and Use of Conserved Water (1988).

43. 43 U.S.C. §§ 617-617v (2008).

44. *Silva Dec.*, *supra* note 10, ¶ 27.

45. According to the Bureau of Reclamation's field office, which manages such statistics, the exact year that California exceeded 4.4 can only be narrowed to a window of time between 1958 and 1964 at which time California was at 5.0 MAF.

46. The Groundwater Code, ARIZ. REV. STAT. ANN. §§ 45-401 to -704 (2008), was originally enacted as part of the Groundwater Management Act of 1980, ch. 1, 1980 Ariz. Sess. Laws, 4th Spec. Sess. § 86.

"groundwater banks" to store any portion of its annual 2.8 MAF Colorado River entitlement that could not be consumptively used within Arizona in any given year. In 1990, Arizona announced that it was ready to fully utilize its 2.8 MAFY share of the Colorado River, putting California on notice that its use of Arizona's unused entitlement was about to end.<sup>47</sup> During this same period, Nevada surpassed its annual Colorado River entitlement of 300,000 AFY and edged towards 330,000 AFY due to the explosive growth of Southern Nevada.

Today, Nevada and Arizona regularly utilize their full Colorado River entitlements. For over a decade, Nevada and Arizona, along with Colorado, New Mexico, Wyoming, Utah, and the BuRec encouraged California to reduce its dependency on the unused entitlement of Arizona and Nevada and on surplus-flow declarations.<sup>48</sup> Such reduction, however, was not easy to accomplish.

## 2. Interim Surplus Guidelines and the Quantification Settlement Agreement

Over a few brief years, California's nearly 40-year reliance on up to 800,000 AFY of Colorado River surplus or unused entitlement entered a phasing-out period. Throughout this period, MWD's sought to gradually decrease, over a period of years, its dependence on the unused entitlement of Arizona and Nevada and avoid the harsh reality of an abrupt shutoff.<sup>49</sup> Though IID's 1988 conserved-water transfer to MWD added 100,000 AFY to MWD's normal year supply, MWD still required an additional 550,000 AFY above its normal year entitlement.

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47. James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part II: The Development, Implementation and Collapse of California's Plan to Live Within Its Basic Apportionment*, 6 U. DENV. WATER L. REV. 318, 322-36 (2003).

48. 43 U.S.C. § 1552 (2008). Each year, BuRec takes inventory of existing reservoir levels in its Upper and Lower basin systems and creates an Annual Operating Plan (AOP). It solicits water delivery orders from contractors anticipating their annual needs and factors a complex set of interdependent variables such as hydropower production, water quality, recreation, fish and wildlife needs, obligations to Mexico, and others. Depending on the final assessment, a pronouncement will indicate whether the system will be operated according to "surplus," "normal," or "shortage" conditions relative to the baseline of 7.5 MAF annual minimum delivery for the Lower Basin. When a surplus exists, the Law of the River has an explicit scheme for division of excess waters which favors California. When the AOP declares a normal year, each state is restricted to its maximum portion of water (4.4/2.8/0.3 MAFY), although California usually benefited from the portion of water that Arizona could not put to use.

49. Lochhead, *supra* note 47, at 370-79.

By 1998, a collection of California parties, other Basin States, the Secretary, and BuRec began developing the "4.4Plan." The Plan's goal was to voluntarily conserve and transfer for urban use a portion of the Colorado River water used by agricultural right holders.<sup>50</sup> IID's ability to conserve and transfer water was identified as a significant possible new source of urban supply to help California live within its 4.4 MAFY limit. However, a quick agreement was not forthcoming.

In 2001, the Secretary offered California an incentive of "Interim Surplus Guidelines"<sup>51</sup> (ISG) that would provide California fifteen years to ramp down to 4.4 MAFY.<sup>52</sup> Through the ISG, the Secretary required California's Colorado River contractors to revisit their respective water allocations per the 1931 Seven-Party Agreement and devise a Quantification Settlement Agreement (QSA) by December 31, 2002, to settle their disputes, provide for new limits on IID water use, and allow intra-state conserved water transfers. Should the QSA not be executed by December 31, 2002, the Secretary reserved the authority to suspend the ISG and immediately limit California to 4.4 MAFY.

The QSA specifically sought to resolve long-standing differences between the Seven Party Agreement signors. The QSA addressed disputes between MWD, CVWD, and IID regarding reasonable, beneficial use, the right to transfer conserved Colorado River water, the sharing of responsibility for required environmental mitigation for conservation and transfer impacts, as well as various other disputes.

SDCWA, responding to the increased risk of a truncated MWD water supply, sought to bolster its own water reliability by independently acquiring conserved water from IID.<sup>53</sup> A transfer of conserved water from IID directly to SDCWA, through MWD's conveyance aqueduct, would be based upon increased IID irrigation efficiency.<sup>54</sup> SDCWA payments to IID would allow IID to implement technological and other efficiency improvements. SDCWA would reap the benefit of acquiring the saved water (potentially up to 300,000 AFY)<sup>55</sup> at IID's high senior priority.

In 2002, the SWRCB issued Order 2002-13, in which it reviewed IID's water use in the context of the voluntary conservation and transfer petition jointly filed by IID and SDCWA.<sup>56</sup> The SWRCB approved IID's request to

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50. *Id.* at 358.

51. Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 7772 (Jan. 25, 2001).

52. Lochhead, *supra* note 47, at 359-65, 390-401.

53. *Id.* at 322-36.

54. *Id.*

55. *Id.*

56. Imperial Irrigation Dist., Order WRO 2002-13 (Cal. State Water Res. Control Bd. Oct. 28, 2002).

transfer up to 300,000 AFY of conserved water to SDCWA and CVWD, with an option for MWD, conditioned on certain environmental safeguards for the Salton Sea and other habitats.<sup>57</sup> The SWRCB again retained jurisdiction.<sup>58</sup> Throughout 2002, the California Legislature, various state agencies, and agricultural, urban, and environmental interests feverishly negotiated the terms of a fully consensual QSA. After the California legislature adopted special legislation in September 2002 to allow the taking of a highly-protected endangered species to facilitate the implementation of the QSA, a final push was made to finalize the QSA before the Secretary's December 31, 2002, deadline.

### 3. BuRec's Refusal To Honor IID's 2003 Water Order

In early December of 2002, IID's Board of Directors refused to approve the proposed QSA. IID asserted the QSA imposed unacceptable environmental costs and risks on IID and its water users. The Secretary rejected the same QSA as having too many environmental mitigation-related cancellation provisions. On December 31, IID and SDCWA approved a revised QSA that MWD and CVWD rejected.

The year drawing to a close, the Secretary declared a normal condition on the River for 2003<sup>59</sup> and announced that California would be limited to a maximum of 4.4 MAF in 2003. The Secretary suspended the ISG<sup>60</sup> forcing California to deal with an instant water loss of 800,000 AFY.

The Secretary did not stop there. The Secretary announced through the BuRec that IID's water delivery would also be reduced to a consumptive use volume of approximately 2.86 MAF in contrast to IID's requested consumptive use of 3.1 MAF. The Secretary granted the difference of almost 250,000 AF to junior right holders CVWD and MWD. BuRec articulated a reasonable, beneficial use cap of 2.86 MAFY for IID and relied on 43 C.F.R. Part 417 as authority for this intrastate reallocation from a senior right holder to two junior right holders. The letter<sup>61</sup> of the Assistant Secretary for Water and Science set the reasonable beneficial use cap at a volume based on a formulaic application of the Supreme Court Decree in *Arizona v. California*.<sup>62</sup>

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57. *Id.* at 86-87.

58. *Id.* at 88-94.

59. Lochhead, *supra* note 47, at 399-400.

60. *Id.* at 398.

61. Letter from Bennett Raley, Assistant Sec'y of the Interior, to Jesse Silva, Gen. Manager, Imperial Irrigation Dist. (Dec. 27, 2002) (on file with author and Hastings W.-Nw. J. Envtl. L. & Pol'y).

62. *Arizona v. California*, 439 U.S. 419 (1979).

The Secretary's cutback of water to IID was an unprecedented use of Part 417 and an extraordinary federal intrusion into the province of intrastate reasonable beneficial use determinations.

#### 4. *Imperial Irrigation District v. United States* (2003)

On January 10, 2003, IID filed suit to enjoin the federal reduction and challenge the Secretary's authority to unilaterally adjudicate IID's 2003 Colorado River entitlement.<sup>63</sup> IID's complaint alleged that Part 417 was adopted in excess of the Secretary's authority,<sup>64</sup> and, even if valid, Part 417 was improperly applied to IID's 2003 water order.<sup>65</sup> Importantly, the Secretary's authority to limit California to 4.4 MAFY was not challenged.

The federal district court agreed that IID's contract with the Secretary was likely breached by the imposition of the cap identified by the Assistant Secretary, and that BuRec had not acted properly under Part 417. The court preliminarily enjoined the federal cutback, but made no final decision on the validity, scope, or reach of Part 417. The court reserved the question of the propriety of BuRec authority to make reasonable beneficial use adjudications and the validity and legality of Part 417 to future hearings.<sup>66</sup>

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63. Complaint for Injunctive and Declaratory Relief, *Imperial Irrigation Dist. v. United States*, No. 03-CV-0069W (JFS) (S.D. Cal. Jan. 10, 2003). Articles contemporary to the lawsuit include: David R.E. Aladjem, *Reclamation Determines Beneficial Use of Water by California's IID*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., August 2003; Michael J. Pearce, *The Federalization of Beneficial Use*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., June 2003; David Lindgren, *Southern Nevada Water Authority's Perspective*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., February 2003; Michael Pearce, *Arizona Reflections on the Suspension of the Colorado River Interim Surplus Guidelines*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., February 2003; Scott Balcomb, *Colorado's View An Upper Basin Perspective of California's Need to Reduce Its Colorado River Water Use*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., February 2003; Jeffrey Kightlinger, *California's Painful Journey to 4.4*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., February 2003; James Taylor, *San Diego's Perspective*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., February 2003; John Penn Carter, *Water Confiscation! Imperial Valley's New Challenge*, A.B.A. WATER RESOURCES COMMITTEE NEWSL., February 2003.

64. Complaint for Injunctive and Declaratory Relief, *supra* note 62, at 46.

65. *Id.* § XII, at 46-47 (Eighth Claim for Relief).

66. Order Remanding Action, *Imperial Irrigation Dist. v. United States*, No. 03 CV 0069W(JFS) (S.D. Cal. Apr. 17, 2003); Order re: Clarification, *Imperial Irrigation Dist. v. United States*, No. 03 CV 0069W(JFS) (S.D. Cal. May 14, 2003).



### 5. BuRec's *De Novo* 43 C.F.R. Part 417 Determination

After the preliminary injunction halted the reduction in water deliveries to IID, BuRec requested and received district court permission to conduct a *de novo* Part 417 review.<sup>67</sup> For the first time, BuRec extensively adjudicated IID's requested water order for calendar year 2003 under the Part 417 reasonable, beneficial-use standards.

The Regional Director issued a decision on August 29, 2003, in which he concluded that IID, which had ordered 3.1 MAF in 2003, needed only 2.84 MAF for reasonable, beneficial use. Volumes above that were deemed wasteful.<sup>68</sup> By identifying volumes above 2.84 MAF as wasteful, BuRec denied IID the benefit of its senior water right and authorized the wasted water to be reallocated to junior water rights holders, CVWD and MWD, without charge.<sup>69</sup> The preliminary injunction, however, precluded BuRec's decision from being implemented.

IID submitted to BuRec the administrative record from the 2002 SWRCB proceeding, as well as substantial volumes of other evidence. BuRec, however, reached its Part 417 reasonable, beneficial-use decision<sup>70</sup> independent of and without consideration of the 2002 SWRCB water transfer approval. BuRec ignored the prior SWRCB decision which allowed IID's conserved water to be transferred to SDWCA under California law in exchange for payments from SDWCA to IID to fund environmental mitigation and conservation costs. BuRec also ignored the SWRCB specific requirements for environmental mitigation as a condition to the conservation and transfer. BuRec held no hearings, allowed no discovery by IID, and allowed no cross-examination by IID of BuRec experts.

BuRec specifically ignored the costs of proposed IID efficiency improvements, the costs of SWRCB-imposed environmental mitigation, and failed to consider or discuss the link between IID conservation activity and

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67. Federal Defendants' Brief re Remedy for 43 C.F.R. Part 417 Breach Found by Court on Motion for Preliminary Injunction, *Imperial Irrigation Dist. v. United States*, No. 03 CV 0069W (JFS) (S.D. Cal. Mar. 31, 2003).

68. U.S. BUREAU OF RECLAMATION, REGIONAL DIRECTOR, LOWER COLORADO REGION, PART 417 REGIONAL DIRECTOR'S FINAL RECOMMENDATIONS AND DETERMINATIONS, IMPERIAL IRRIGATION DISTRICT, CALENDAR YEAR 2003 59 (Aug. 29, 2003), available at <http://www.imperialgroup.info/PDF/417FinalRec.pdf>.

69. Coincidentally, the amount of water gained by MWD through this federal review was approximately the exact same amount MWD was in jeopardy of losing as a result of California's reduction of Colorado River water in excess of 4.4 MAFY.

70. U.S. BUREAU OF RECLAMATION, REGIONAL DIRECTOR, LOWER COLORADO REGION, PART 417 REGIONAL DIRECTOR'S INITIAL RECOMMENDATIONS AND DETERMINATIONS, IMPERIAL IRRIGATION DISTRICT, CALENDAR YEAR 2003 (July 2, 2003); see also U.S. BUREAU OF RECLAMATION, *supra* note 68.

environmental impacts. Relying on the alleged authority of Part 417, BuRec adjudged that IID was inefficiently irrigating and thus wasting water in violation of the reasonable, beneficial-use requirement in IID's federal contract for water delivery. BuRec thus negated the SWRCB-authorized transfer of conserved water.

IID appealed BuRec's Part 417 decision to the Secretary, and ultimately would have sought judicial review in the pending lawsuit. The appeal was rendered moot and the IID litigation dismissed after the OSA was further negotiated, revised and finally executed on October 10, 2003.

The district court never ruled upon the validity and use of Part 417 as applied in 2003. It remains an open legal question and the focus of this article.

## II. Federal Preemption of California Reasonable Beneficial Use Law or Jurisdiction is Not Warranted

The legitimate role for Part 417 depends upon whether the Secretary can trump California authority to make reasonable beneficial use determinations for Colorado River water to be used entirely within California and within California's 4.4 MAFY right. BuRec relied solely on Part 417 as authority for the alleged exclusive federal right to make reasonable, beneficial-use determinations. California constitutional, statutory, common and administrative law governing reasonable, beneficial use was totally ignored. The legal question is whether a federal contract requiring reasonable, beneficial use coupled with Part 417 preempts California reasonable beneficial use law and jurisdiction.<sup>71</sup>

### A. Doctrinal Framework for Preemption Analysis

Three types of preemption analyses are available to evaluate the interrelationship of federal and California law: express preemption; field preemption; and conflict preemption.<sup>72</sup>

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71. An alternative statutory construction analysis is also warranted, and in the view of the authors, leads to the same conclusion. See *infra* note 78.

72. Of inestimable help in understanding the framework and proper structural analysis of preemption analysis: Amy K. Kelley, *Staging a Comeback—Section 8 of the Reclamation Act*, 18 U.C. DAVIS L. REV. 97 (1984) [hereinafter Kelley, *Staging a Comeback*]; Roderick Walston, *Reborn Federalism in Western Water Law: The New Melones Decision*, 30 HASTINGS L.J. 1645 (1979); Amy K. Kelley, *Federal Preemption and State Water Law*, 105 J. CONTEMP. WATER RES. & EDUC. 4 (1996) [hereinafter Kelley, *Federal Preemption and State Water Law*], [http://www.ucowr.siu.edu/updates/pdf/V105\\_A2.pdf#search='Amy%20K.%20Kelley'](http://www.ucowr.siu.edu/updates/pdf/V105_A2.pdf#search='Amy%20K.%20Kelley').

Express preemption arises in the context of Congressional legislation that unambiguously asserts federal authority and expressly prohibits state activity in a particular legal domain.<sup>73</sup> State regulation within the federally-legislated domain is expressly forbidden and all enforcement authority is completely consolidated within federal control.<sup>74</sup>

Field preemption is similarly based on an express or "dominant" federal interest,<sup>75</sup> but involves an implied intent to "occupy the field"<sup>76</sup> rather than the express prohibition of state activity.

Conflict preemption examines whether specific provisions of federal law conflict with state law. State law that is in direct conflict with, inconsistent with, or frustrates the implied intent and purpose of Congressional action is nullified by the federal law<sup>77</sup> if it cannot be reconciled with the federal purpose.<sup>78</sup>

Congress has neither expressly preempted a role for the states in reasonable beneficial use determinations for intrastate use of Colorado River water nor specifically enacted any federal program to occupy the field of reasonable beneficial use adjudications for intrastate use of Colorado River water. To the contrary, the savings clause of section 8 of the Reclamation Act expressly preserves state authority:

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.<sup>79</sup>

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73. Kelley, *Federal Preemption and State Water Law*, *supra* note 72, at 5.

74. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 384-85 (2d ed. 2005).

75. Kelley, *Federal Preemption and State Water Law*, *supra* note 72, at 5.

76. *Id.*

77. A prime example of field preemption is federal control of nuclear regulation.

78. Kelley, *Federal Preemption and State Water Law*, *supra* note 72, at 6.

79. 43 U.S.C. § 383 (2008). This specific Congressional directive to the Secretary to "proceed in conformity" with the laws of the states relating to the use of water used in irrigation negates any implied authority of the Secretary to issue regulations for the use of irrigation water inconsistent with state laws or to ignore state laws or state's rights. Furthermore, the general powers of the Secretary

Neither the Boulder Canyon Project Act (BCPA) nor any other subsequent Congressional legislation or law regarding the Colorado River expressly or impliedly preempts applicable state reasonable beneficial use law. Thus, a federal reasonable beneficial use determination preempts state law only if a conflict preemption analysis reveals an irreconcilable conflict between a federal purpose and state law. Without a clear conflict, California reasonable, beneficial-use decisions and control remain valid and beyond federal preemption.

## B. Federal Reasonable Beneficial Use Authorities

### 1. Presumptions of Federal Supremacy and Deference to States

The Supremacy Clause of the United States Constitution reserves to Congress the authority to preempt state law.<sup>80</sup> Both the Commerce Clause<sup>81</sup> and the Property Clause<sup>82</sup> establish a fundamental foundation and context for federal authority, should Congress decide to exercise its power. The two prominent examples of Congressional preemption of state supremacy in the water law context, distinct from reclamation law, are navigational servitudes and federal reserved water rights.<sup>83</sup>

Three years before passage of the Reclamation Act in 1902, *United States v. Rio Grande Dam & Irrigation Co.*<sup>84</sup> addressed whether the federal government had the power to limit the building of a dam (near the present day Elephant Butte Dam in New Mexico) if the construction of the dam would impact and limit the downstream navigability of the Rio Grande.<sup>85</sup> The court traced the roots of federal authority in the realm of water rights to a "preexisting right of possession" under state authority.<sup>86</sup> This essential context solidified the

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authorized by § 10 of the Reclamation Act are subservient to the specific restrictions of § 8 under common principles of statutory construction that the more specific statutory language prevails over the more general language. The Rehnquist opinion in *California v. Arizona*, discussed *infra*, appears to rely on this analytical approach of statutory construction.

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

81. *Id.* at art. I, § 8, cl. 3.

82. *Id.* at art. IV, § 3, cl. 2.

83. "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).

84. *Id.*

85. *Id.* at 702.

86. It is the established doctrine of this court that rights of miners . . . and for purposes of agricultural irrigation, in the region

premise of state sovereignty over water resources; yet, the basis for preemptive federal authority was the express reserved authority of Congress to ensure the integrity of the waterways which served as the "natural highways" of interstate commerce.<sup>87</sup> The federal commerce authority and control over navigable waterways preempted state law.

A second non-reclamation case, *United States v. New Mexico*,<sup>88</sup> addressed whether the United States reserved any water right for federal purposes at the time it created the Gila National Forest in 1899.<sup>89</sup> Of paramount importance was the distinction between express and implied Congressional intent and the limits to implied intent if any was found.<sup>90</sup> The Supreme Court confirmed federal preemption over state water rights regimes by concluding that Congress had expressly created the national forest and attached an implied reservation of a water right necessary to accomplish the express federal purpose.<sup>91</sup> But, the Supreme Court struck down a U.S. Forest Service claim to water beyond the express Congressional purpose of timber preservation. Other uses of the National Forests, such as recreation, aesthetics, wildlife preservation, or cattle grazing, not expressly identified in the legislation establishing the Gila National Forest, did not warrant an implied federal preemption of state law for procuring water supplies.<sup>92</sup> The

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where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one.

*Id.* at 705.

87. [I]t is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any state action.

*Id.* at 703.

88. 438 U.S. 696 (1978).

89. *Id.* at 698.

90. *Id.*

91. "[W]ater is frequently necessary to achieve the purposes for which these reservations are made. But Congress has seldom expressly reserved water for use on these withdrawn lands." *Id.* at 699.

92. Recreational, aesthetic, and wildlife preservation uses.

Supreme Court unambiguously curtailed the implied authority to displace state water law<sup>93</sup> beyond the expressed purposes articulated in a given federal act.

## 2. Federal Statutes and Interstate Agreements

The Supreme Court's admonition that conditions imposed by a state are invalid if inconsistent with congressional directives provides a threshold question of preemption.<sup>94</sup> The inquiry of the conflict preemption analysis is to determine the scope and purpose of express congressional directives that pertain to reasonable, beneficial use and the role of the Secretary regarding the Colorado River.

Federal authority for the control and use of the Lower Colorado River originates in the 1902 Reclamation Act and the subsequent 1928 Boulder Canyon Project Act (BCPA). Upon these two federal statutes rests a unique cluster of arrangements — including an interstate compact, federal regulations, water delivery contracts and Supreme Court decisions and decrees — collectively referred to as the "Law of the River."<sup>95</sup>

### a. Reclamation Act (1902)

Congress launched federal involvement in the water reclamation business with the landmark Newlands Reclamation Act of 1902.<sup>96</sup> Western states envisioned *reclaiming* the predominately dry lands west of the 100th

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93. A particularly interesting footnote within a footnote is the fact that *New Mexico* was decided on the same day as *California v. United States*, 438 U.S. 645 (1978), and both were written by [future, now deceased] Chief Justice William Rehnquist as an Associate Justice.

94. *United States v. California*, 694 F.2d 1171, 1175 (9th Cir. 1982).

95. Understanding the Law of the River requires a grasp of the history, actors, and phases of litigation beyond the possible scope of a single paper. Excellent introductory resources are: Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966); James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River*, 4 U. DENV. WATER L. REV. 290 (2001); Kara Gillon, *Watershed Down?: The Ups and Downs of Watershed Management in the Southwest*, 5 U. DENV. WATER L. REV. 395 (2002); Warren Abbott, *California Colorado River Issues*, 19 PAC. L.J. 1391 (1988); Gary Weatherford, *Decree Enforcement Comes into the Law of the River: Cross Currents in Cutting California to 4.4 MAFY*, 49 ROCKY MTN. MIN. L. INST. 8-1 (2003); Lochhead, *supra* note 47; Robert Glennon & Peter Culp, *The Last Green Lagoon: How and Why the Bush Administration Should Save the Colorado River Delta*, 28 ECOLOGY L.Q. 903 (2002).

96. Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.).

meridian through massive irrigation projects.<sup>97</sup> However, this vision required federal funding to make the infrastructure projects financially feasible.

Section 8 of the Reclamation Act reserves state authority over water resources.<sup>98</sup> It also provides, "[t]he 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.*"<sup>99</sup> Each state was limited by the federal requirement that federal reclamation waters could only be distributed for beneficial uses; but this limitation was lifted directly from existing state law. No explicit enunciation of any separate federal standard of reasonable, beneficial use accompanied the statute. Thus, the meaning of reasonable, beneficial use remained with each state, for which the requirement already existed.

Section 10 of the Reclamation Act authorized the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect."<sup>100</sup> This express regulatory authority is not itself sufficient to create a conflict with state reasonable, beneficial use laws. Under the *New Mexico* holding, federal regulations do not preempt state law unless such regulations carry out the express purposes of the Act and are necessary to fulfill that federal purpose. A general power to adopt necessary and proper regulations creates no basis for finding conflict with a pre-existing state role and no authority in defining and enforcing intrastate reasonable, beneficial use.

The Reclamation Act of 1902 provides no support for conflict preemption. The express beneficial use limitation on the right to use reclamation project water is imposed without federal definition and without any identified federal process for making reasonable, beneficial use decisions. Accordingly, the requirement does not create an express conflict with any state law that defines or limits water rights to reasonable, beneficial use, even when such state law also includes substantive definitions and dispute resolution and enforcement procedures.

#### **b. Colorado River Compact (1922)**

Congress authorized construction and operation of federal projects through the Department of the Interior (Interior) and BuRec. In conjunction with federal support, many states successfully developed surface water

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97. *California v. United States*, 438 U.S. 645, 648 (1978).

98. Reclamation Act § 8. Note that the utilization of Part 417 regarding IID also requires recognition that IID's water rights to the Colorado River were first obtained under state law prior to any reclamation project involvement.

99. 43 U.S.C. § 372 (2008) (emphasis added).

100. 43 U.S.C. § 373 (2008).

supplies on large interstate rivers. In an important early precedent, the Supreme Court declared that as between states with similar prior appropriation water-rights systems, priority established by "first in time, first in right" was without regard to a fixed or guaranteed portion of water for users in different states.<sup>101</sup>

The prior appropriation system which protected senior users from junior users within each state was extended at an interstate level. This immediately fueled rivalry among states and raised concerns about relative rates of growth and the prospect of permanent state-level loss of undeveloped water. If an entire river was put to beneficial use by a downstream state before an upstream state utilized any water, the slower developing state could legally be deprived of all use of water which passed through it.

The Upper Basin Colorado River States determined that proactive steps were necessary to prevent California, the fastest growing Basin State, from establishing priority through prior appropriation to all or most of the Colorado River. The Colorado River Compact (Compact) divided the waters of the Colorado into "Upper"<sup>102</sup> and "Lower"<sup>103</sup> Basins and decoupled the prior appropriation system between the two basins. The Upper Basin was freed from pressure to develop its waters or risk losing them in perpetuity to the ascendant California.

However, the Compact did not partition rights to the Colorado River between the states of each basin. The Lower Basin States of Arizona, Nevada, and California had to determine how to fairly split their collective 7.5 MAFY among themselves. The Compact referenced that the volumes were for beneficial use only. However, it provided no illuminating detail and omitted any clarifying or common definition in regard to reasonable, beneficial use. The absence of such language prevents any interpretive insight into later federal legislation which incorporated the Compact's beneficial use requirement.

### c. Boulder Canyon Project Act (1928)

California enjoyed the use of the Colorado River for agriculture in the Imperial Valley long before the 1902 Reclamation Act was passed. However, intermittent flooding and abundant seasonal sediment which damaged irrigation projects combined with the issue of Mexico's water claims to escalate pressure on Congress for local Imperial infrastructure support, culminating in the 1928 Boulder Canyon Project Act (BCPA).<sup>104</sup>

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101. *Wyoming v. Colorado*, 259 U.S. 419 (1922).

102. Colorado, Wyoming, New Mexico, and Utah.

103. California, Arizona, and Nevada.

104. 43 U.S.C. §§ 617-617v (2008).



Section 1 identifies the BCPA's express purposes: flood control, navigation and water regulation, and the reclamation of public lands (irrigation).<sup>105</sup> Electrical energy production is an additional, but subordinate, purpose.<sup>106</sup> Section 1 expressly references "beneficial use" as the limit on the use of reclamation water, but omits any substantive definition of reasonable, beneficial use or any process for federal determination of reasonable, beneficial use.<sup>107</sup> Instead, section 1 outlines the scope of Secretarial authority to "construct, operate, and maintain a dam and incidental works in the main stream" of the River and a "main canal and appurtenant structures."<sup>108</sup> It primarily describes the Secretary as a builder and operator of infrastructure rather than as a regulator or adjudicator of the reasonable, beneficial use requirement.

Section 4(a) of the BCPA divides the Lower Basin apportionment of 7.5 MAFY among California, Arizona, and Nevada<sup>109</sup> and details the contingencies necessary for ratifying the Colorado River Compact.<sup>110</sup> Lower Basin states cannot withhold water from each other under a standard of reasonable application [of water] to domestic and agricultural uses. The 1922 Compact is referenced as the standard for reasonable application to which all three states are bound.<sup>111</sup> However, as mentioned above, the Compact is notably silent as to any definition or process for determining "reasonable application." Section 4(a) is also silent as to any role for the Secretary in the adjudication, dispute resolution, or enforcement of the reasonable application requirement. Responsibility is placed on the three Lower Basin States to "mutually agree" on reasonable applications of water.<sup>112</sup>

Congress conditioned enactment of the BCPA on approval by California's legislature of an express and firm limitation to a maximum right to 4.4 MAFY of the Colorado River.<sup>113</sup> In addition, the BCPA had to be ratified by six of the seven Upper and Lower Basin States.<sup>114</sup> In the event that one of the Lower Basin States other than California refused to ratify the

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105. *Id.* § 617.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* § 617c(a). Arizona: 2.8 MAFY; California: 4.4 MAFY; Nevada: 300,000 AFY. An acre-foot is just under 327,000 gallons or the amount of water it takes to cover an area the size of a football field one foot deep.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

partition, Congress authorized the Secretary to operate, distribute, and allocate the River's waters in the same fixed proportion.<sup>115</sup>

Section 5 of the BCPA authorized the Secretary to prescribe regulations "to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon" so that the costs of construction, operation, and maintenance can be recouped by the federal government.<sup>116</sup> Section 5 also contains a provision indicating that all contracts for irrigation and domestic purposes "shall be for permanent service . . ."<sup>117</sup> Contracts must conform with section 4(a) and "[n]o person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract . . ."<sup>118</sup>

Section 5 makes no reference to reasonable, beneficial use. The Secretarial regulations referenced are for the purpose of entering into permanent contracts with users and for managing storage, delivery points, and assuring federal financial recoupment. The permanence of all contracts strongly undercuts any hint of a Secretarial role to deny water deliveries or reallocate water inconsistent with permanent contractual priority. Similar to section 10 of the Reclamation Act, section 5 authorizes the Secretary to issue regulations for contracts for storage and delivery of Colorado River water. But, the context of the section 5 authority is for the Secretary to issue regulations for the purpose of entering storage and delivery contracts. No express authority instructs the Secretary to make either annual intrastate water use allocations or annual reasonable beneficial use adjudications. The full extent of the section 5 contracting authority is properly framed by the pragmatic federal interest to recoup infrastructure costs and ensure that no state exceeds its legal maximum.

Section 6 cements the controlling purposes and priorities of the BCPA. It prioritizes the purposes of use of the dam and reservoir listed in section 1: river regulation, improvement of navigation and flood control, irrigation and domestic uses, "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact," and power production.<sup>119</sup> Title, control, management, and operation of the dams are expressly stipulated to remain with the federal government<sup>120</sup> and the general focus of the federal role is on the maintenance and operation of the physical waterworks.

Section 14 coordinates the BCPA with the Reclamation Act, which is expressly recognized as the primary law controlling "the construction,

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115. *Id.*

116. *Id.* § 617d.

117. *Id.*

118. *Id.*

119. *Id.* § 617e.

120. *Id.*

operation, and management" of the BCPA infrastructure, "except as otherwise herein provided."<sup>121</sup>

Similarly, section 18 reaffirms the savings clause language of section 8 of the Reclamation Act, articulating federal recognition of state rights specific to appropriation, control, and use of intrastate waters.<sup>122</sup> Importantly, nothing in the BCPA abrogates the savings clause of section 8 of the Reclamation Act.

The BCPA contains no federal definition of reasonable, beneficial use and does not identify any federal procedure to adjudicate reasonable, beneficial use. There is no identified federal purpose and no necessity to supplant state reasonable, beneficial use law, nor is there any language that suggests a conflict with a continuing state role in reasonable, beneficial use decisions. Instead, section 4 and section 18 reaffirm congressional intent to limit the federal role pertaining to reasonable, beneficial use and congressional preference for state law dominion.

The BCPA allowed California, with no Colorado tributary water of its own, 4.4 MAFY plus half of any surplus and all unused entitlement by either Arizona or Nevada. Arizona challenged the quantification of how its tributary water would be accounted for in the broader formula. If the Gila River was included as part of Arizona's 2.8 MAFY entitlement, Arizona would only gain a secure right to 1.0 MAF of the Colorado River's main stem waters. The differential of 1.8 MAF would allow California a perpetual right to an additional 900,000 AF (roughly the same amount of extra water that MWD used in the recent past and close to the volume of Priority 5 under the Seven-Party Agreement). Arizona believed it was being shortchanged to California's benefit and refused to ratify the BCPA.

Even without Arizona's ratification, section 4(a) of the BCPA expressly authorized the Secretary to operate the Boulder Canyon Dam and distribute the waters of the Colorado in accordance with the Congressional allocation, if California ratified the 4.4 MAFY limit and five of the other six basin states ratified the BCPA. California's legislature ratified the BCPA 4.4 MAFY limit in 1929 with the passage of the California Limitation Act<sup>123</sup> and the BCPA shortly thereafter became law.

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121. *Id.* § 617m.

122. Nothing 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 may deem necessary with respect to the appropriation, control, and use of waters within their borders, *except* as modified by the Colorado River compact or other interstate agreement.

*Id.* § 617q (emphasis added).

123. California "Limitation Act," ch. 16, 1929 Cal. Stat. 38-39, 48th Sess.

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### 3. Judicial Construction and the Law of the River

The term "cooperative federalism" has been used to define the oscillating balance between state and federal control of intrastate water resources. An early string of U.S. Supreme Court cases<sup>124</sup> established a presumption of federal deference to state control over water resources, but in 1958, *Ivanhoe Irrigation District v. McCracken*<sup>125</sup> reversed course and signaled a new period of federal encroachment upon state sovereignty.

#### a. *Ivanhoe Irrigation District v. McCracken*

Section 5 of the Reclamation Act expressly limits the use of Reclamation water on irrigated acreage under single ownership to 160 acres. California law did not recognize the same limitation on irrigated acreage.<sup>126</sup> The lead issue in *Ivanhoe* was whether section 5 of the Reclamation Act preempted California law. The California Supreme Court declared section 5 unconstitutional and invalidated the federally imposed acreage limitations.<sup>127</sup> The U.S. Supreme Court overruled the California high court, holding that Congress's express limitation and specific language in section 5 preempted a contrary state law.<sup>128</sup> It was a clear case of conflict preemption where state law could not be reconciled with a conflicting express federal purpose.

However, the *Ivanhoe* decision included critical dicta that tinted subsequent interpretation of section 8 of the Reclamation Act and triggered the beginning of a dramatic erosion of state authority.<sup>129</sup> Previous deference

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124. *Nebraska v. Wyoming*, 295 U.S. 40 (1935); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

125. 357 U.S. 275 (1958).

126. *Id.* at 277-79.

127. *Id.* at 278-79.

128. We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system. Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that '[n]o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner.

*Id.* at 291-92 (alteration in original) (quoting *Nebraska v. Wyoming*, 325 U.S. 589 (1945)).

129. We believe this erroneous insofar as the substantive provisions of § 5 of the 1902 Act are concerned. As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes

to state law in the domain of water supply management and water rights regulation was fractured by a new distinction between the acquisition of water rights, which were not impacted by reclamation law and which were still governed by state law, and the operation and delivery of Reclamation water, which was now subject to inconsistent state imposed conditions.<sup>130</sup> While California maintained exclusive jurisdiction over appropriation and allocation of water rights, it was no longer able to control or condition the federal use or delivery of that water once the federal government acquired a right to use water for reclamation purposes.

**b. City of Fresno v. California**

In 1963, *City of Fresno v. California*<sup>131</sup> addressed whether Fresno could enjoin the United States from diverting surface water for irrigation purposes in contravention of two California laws that expressed a preference for municipal uses over irrigation purposes and a preference for use of water within its county of origin.<sup>132</sup>

Like the decision in *Ivanhoe*, the U.S. Supreme Court relied on express Congressional language prioritizing reclamation water for irrigation<sup>133</sup> over other uses, in overruling the conflicting California preference for municipal water. *Fresno* further eroded federal deference to state law by affirming the dictum of the *Ivanhoe* decision and then by restricting state authority in limiting or conditioning federal *acquisition* of water rights.<sup>134</sup> The second lever of state authority over water resources was taken away.

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necessary for it to *acquire* water rights or vested interests therein. But the *acquisition* of water rights must not be confused with the *operation* of federal projects... We read nothing in § 8 that compels the United States to *deliver* water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century.

*Id.* (emphasis added).

130. Walston, *supra* note 72, at 1666-68.

131. 372 U.S. 627 (1963).

132. *Id.* at 628.

133. "No contract relating to municipal water supply or miscellaneous purposes shall be made unless, in the judgment of the Secretary [of the Interior], it will not impair the efficiency of the project for irrigation purposes." Reclamation Project Act of 1939, ch. 418, § 9(c), 53 Stat. 1187, 1194 (current version at 43 U.S.C. § 485h(c) (2003)).

134. However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others . . . . Rather, the effect

c. *Arizona v. California* (1963)

As previously noted, Arizona did not ratify the BCPA apportionment of the Lower Colorado and sued California to exclude the Gila River from the Colorado River water accounting scheme.

The Colorado River Compact divided the waters between the Upper and Lower Basins; the BCPA divided the waters among California, Arizona, and Nevada; and the litigation in *Arizona v. California*<sup>135</sup> resolved substantial issues as to how the accounting for water allocation would be implemented.<sup>136</sup> A closely divided Supreme Court (5-3; Chief Justice Warren did not participate) determined that equitable apportionment did not govern allocation of the Colorado River since the BCPA was an express comprehensive Congressional scheme governing interstate apportionment.<sup>137</sup> The primary holding divided the river in a 4.4/2.8/0.3 ratio among California, Arizona, and Nevada respectively, and excluded the tributary flow of the Gila River from Arizona's 2.8 MAFY.<sup>138</sup> Arizona had won.

The *Arizona* decision also resolved an important secondary issue regarding the extent to which the Secretary was bound by state law when entering into contracts to allocate and distribute the waters of the Colorado River with contractors of each state. Most importantly for understanding the present Part 417 contention, the Supreme Court examined the Secretary's section 5 contract authority through the provisions of sections 14 and 18 of the BCPA and section 8 of the Reclamation Act to determine if state law could limit the Secretary's ability to enter the congressionally-required water delivery contracts.<sup>139</sup> The *Arizona* Court held that the BCPA authorized the

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of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.

*Fresno*, 372 U.S. at 630.

135. 373 U.S. 546 (1963).

136. An essential reference is Charles J. Meyers' *The Colorado River*, *supra* note 95.

137. 373 U.S. at 560, 575-90.

138. *Id.* at 592-93.

139. Nor does § 18 of the Project Act require the Secretary to contract according to state law. That Act was passed in the exercise of congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects, and is equally sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements. Section 18 merely preserves such rights as the States 'now' have, that is, such rights as they had at the time the Act was passed. While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to

Secretary to implement the interstate water apportionment exclusively through water delivery contracts and these contracts were to be the sole method for contractors to acquire waters impounded behind the federal dams on the Lower Colorado River.

The Court affirmed that the BCPA expressly incorporated Reclamation Law, which itself recognized that state law governed the "control, appropriation, use, or distribution of water used in irrigation." However, *Ivanhoe* and *Fresno* emerged as prominent authority within *Arizona*<sup>140</sup> to expansively strip states of regulatory authority over water allocation and distribution from the Colorado River, previously and expressly conferred by the Reclamation Act. The Supreme Court relied on *Ivanhoe* for the proposition that the federal government was not bound by state law in *delivering* or distributing reclamation water<sup>141</sup> and held that the Secretary "in choosing between users *within* each State and in settling the terms of his contracts is not bound . . . to follow state law."<sup>142</sup> The Supreme Court

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regulate and develop the river. Where the Government, as here, has exercised this power and 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*. As in *Ivanhoe*, where the general provision preserving state law was held not to override a specific provision stating the terms for disposition of the water, here we hold that the general saving language of § 18 *cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by § 5*. 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. *But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place.*

373 U.S. at 587-88 (emphasis added).

140. *Id.* at 546.

141. "Since § 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." *Id.* at 587.

142. Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the management of the works except as otherwise provided, and § 8 of the Reclamation Act, much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws relating to the control, appropriation, use, or distribution of water used in

emphasized that "where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place."<sup>143</sup> State law could not impede congressional intent or limit the Secretary's contracting authority.

Justice Black linked the fundamental Congressional objective of section 5 with the concern that Arizona would not accept the federally outlined and "suggested" apportionment among states.<sup>144</sup> Congress expressly imposed its own "statutory apportionment" formula for division of waters among the states and expressly authorized the Secretary to apportion waters among Lower Basin States according to section 4(a) of the BCPA<sup>145</sup> and to allocate each state portion among users.<sup>146</sup>

Evaluating the extent and limit on the Secretary's section 5 contracting authority, the Supreme Court stated, "authority is no less than the general authority, unless Congress has placed some limit on it."<sup>147</sup> Justice Black concluded:

[there is] no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any other time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" in § 6.<sup>148</sup>

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irrigation . . . . In our view, *nothing* in any of these provisions affects our decision, stated earlier, that it is the Act and the Secretary's contracts, *not the law of prior appropriation*, that control the apportionment of water among the States. Moreover, contrary to the Master's conclusion, we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law.

*Id.* at 585-86 (emphasis added) (brackets in original).

143. *Id.* at 588.

144. *Id.* at 579.

145. 4.4/2.8/0.3 MAFY for each state respectively.

146. "Congress made sure, however, that if the States did not agree on any compact the objects of the Act would be carried out, for the Secretary would then proceed, by making contracts, to apportion water among the States and to allocate the water among users *within* each State." 373 U.S. at 579 (emphasis added).

147. *Id.* at 580.

148. *Id.* at 581.



Justice Black summarized the BCPA as giving the Secretary sufficient power to permanently allocate water "among states and among users within each State without regard to the law of prior appropriation."<sup>149</sup> Concluding the section of his analysis titled "ALLOCATION OF WATER AMONG THE STATES AND DISTRIBUTION TO USERS,"<sup>150</sup> he framed the scope of federal interests within the concept of cooperative federalism. In taking responsibility for the harnessing of the Colorado River through a "great complex" of public works, the United States had an underlying interest to "make certain that the waters were effectively used." The "vast, interlocking machinery" could only function under unitary federal management, which was uniquely capable of synthesizing and coordinating the competitive interests of the states.<sup>151</sup> The Secretary was thus empowered to operate this machinery and contract in such a way as to avoid the "possibly inconsistent commands of the different state legislatures" and to allocate and distribute the Colorado River's water.<sup>152</sup>

Despite a vociferous dissent, *Arizona* significantly strengthened federal authority over water allocation and distribution, and decisively tipped the balance between state and federal authority in section 8 of the Reclamation Act towards dominant federal control.

#### d. 1964 Arizona Decree

A 1964 Supreme Court decree<sup>153</sup> following the *Arizona v. California* decision, defined key terms from the 1963 decision and the growing lexicon of the Law of the River. "Perfected right"<sup>154</sup> and "present perfected rights"<sup>155</sup> were to be protected as senior priorities on an interstate level in times of

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149. *Id.* at 581.

150. *Id.* at 564.

151. *Id.* at 589.

152. *Id.* at 589-90.

153. *Arizona v. California*, 376 U.S. 340 (1964).

154. (G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use.

*Id.* at 341.

155. "(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." *Id.*

insufficient water to satisfy the full Lower Basin legal apportionment of 7.5 MAF.<sup>156</sup> The Decree required the "satisfaction of present perfected rights in the order of their priority date without regard to state lines,"<sup>157</sup> utilizing a traditional prior appropriation shortage formula similar to the Supreme Court decision in *Wyoming*.

The Decree also directed the Lower Basin states to quantify and identify "present perfected rights" which had been established before the passage of the BCPA.<sup>158</sup> All water rights perfected would be placed in one of two baskets, either before or after 1929, and the Secretary would first satisfy those rights established prior to 1929.<sup>159</sup> It also reinforced the Secretary's water delivery contracting authority as the only valid method for any Lower Basin contractor to receive water from the Colorado River.<sup>160</sup>

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156. (3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights.

*Id.* at 341-42.

157. *Id.* at 342.

158. *Id.* at 351.

159. *Id.* at 341-43.

160. (5) Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute.

*Id.* at 343.

e. *California v. United States*

In 1978, for the first time since *Arizona*, the State of California and BuRec again clashed over their respective roles and authority under the Reclamation Act. In *California v. United States*,<sup>161</sup> the issue was whether the SWRCB could lawfully attach conditions to its approval of appropriation permit applications from BuRec regarding acquisition of water rights needed to store water of the Stanislaus River behind the federally owned New Melones Dam.<sup>162</sup>

The SWRCB had conditioned the acquisition of the water right by BuRec upon compliance with a California law that required the appropriated waters to be used both "reasonably" and "beneficially."<sup>163</sup> The SWRCB did not deny the federal application to appropriate water, but it would not grant a permit in advance of the submittal of a "specific plan" for the use of the water so that the SWRCB could ensure compliance with state reasonable, beneficial use law. BuRec had no advance contracts in place for water delivery or use, and thus could not comply with the SWRCB condition that a specific plan be submitted.

BuRec challenged the SWRCB's authority to impose *any* conditions,<sup>164</sup> since it considered the water rights appropriation application and permit issuance process a mere formality. BuRec argued that *Ivanhoe*, *Fresno*, and *Arizona* had diminished state authority over *appropriation* and *distribution* of water for federal projects and therefore there was no role left for the SWRCB for federal projects with respect to defining and enforcing state reasonable, beneficial use requirements.

Justice Rehnquist began the analysis at the 1902 Reclamation Act and traced a "consistent thread of purposeful and continued deference to state water law by Congress."<sup>165</sup> Congress intended that "authority over intrastate waterways lies with the States."<sup>166</sup> As originally conceived, the blueprint for cooperative federalism between state and federal roles was most clearly delineated through Secretarial control and management of the "construction

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161. *California v. United States*, 438 U.S. 645 (1978).

162. *Id.* at 647, 652; Kelley, *Staging a Comeback*, *supra* note 72; Walston, *supra* note 72.

163. *California*, 438 U.S. at 652-654.

164. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982); *United States v. California*, 509 F. Supp. 867 (E.D. Cal. 1981); *California v. United States*, 438 U.S. 645 (1978); *United States v. California*, 558 F.2d 1347 (9th Cir. 1977); *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975); *see also* Kelley, *Staging a Comeback*, *supra* note 72.

165. *California v. United States*, 438 U.S. 645, 653 (1978).

166. *Id.* at 662.

and operation<sup>167</sup> of reclamation projects, while state law would govern the realm of "appropriation and later distribution" of water.<sup>168</sup> State law controlled the distribution of water once it was released from a federal dam,<sup>169</sup> since a "principal motivating factor"<sup>170</sup> for federal deference to state law was the legal confusion that would inhere if both sets of laws operated "side by side."<sup>171</sup>

Nonetheless, federal deference was not a blank check for states to do as they wished with reclamation water. Express provisions, such as the section 8 reasonable, beneficial use requirement, the preference for irrigation use, and the 160-acre irrigation maximum limited intrastate use of reclamation water.<sup>172</sup> The court noted the overriding message of the Reclamation Act was silence and omission, reflecting a fundamental intent to restrict federal authority from inception.

After recounting this early history, the more recent incongruity of *Ivanhoe*, *Fresno*, and *Arizona* posed a formidable task for judicial reconciliation. Weighing the legislative language and subsequent history, it became apparent that a clear expression of section 8 intent to uphold state sovereignty with regard to appropriation and distribution had been radically turned on its head, eroding a cornerstone of state authority. California asked the court to reassert the primacy of the states' authority,<sup>173</sup> while BuRec argued that recent Supreme Court language had stripped states of that authority.

The issues in *Ivanhoe* and *Fresno* were characterized as particular conflicts between *express* federal directives and contrary provisions of California law (160-acre limit and reclamation preference for irrigation over municipal uses of water).<sup>174</sup> Thus, the distinction between *acquisition* and

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167. *Id.* at 664.

168. *Id.*

169. *Id.* at 665-67.

170. *Id.* at 668.

171. *Id.* at 668-69.

172. *Id.* at 668 n.21.

173. "Petitioners instead ask us to hold that a State may impose any condition on the 'control, appropriation, use, or distribution of water' through a federal reclamation project that is not inconsistent with clear congressional directives respecting the project." *Id.* at 672.

174. While we are not convinced that the above language is diametrically inconsistent with the position of petitioners, or that it squarely supports the United States, it undoubtedly goes further than was necessary to decide the cases presented to the Court. *Ivanhoe* and *City of Fresno* involved conflicts between § 8, requiring the Secretary to follow state law as to water rights, and other

*distribution* within *Ivanhoe* was recognized as dictum and discarded. This removed a critical linchpin from the subsequent dicta in *Fresno* which had limited state authority over *appropriation*.

Similarly, the Court narrowly construed the holding in *Arizona* to an issue of whether state law could control the *distribution* of water in a multi-state reclamation project.<sup>175</sup> Congress had specifically empowered the Secretary to enter permanent delivery contracts, free from state limitations or conditions, to ensure that the distribution of Colorado River water among the Lower Basin states and within each state was consistent with congressional allocation. The *Arizona* Court borrowed the dictum from *Ivanhoe* and *Fresno* as to the scope of section 8, but there was "no need for it to reaffirm such language except as it related to the singular legislative history of the Boulder Canyon Project Act."<sup>176</sup>

Rehnquist specifically distinguished the express Congressional authorization to consolidate interstate contracting authority in the Secretary for the Colorado River from a Congressional grant of unlimited power to the Secretary to dictate contract terms relating to distribution of all waters without accommodation for state conditions.<sup>177</sup> The apportioned *distribution* of the main stem waters of the Colorado River between interstate appropriators was Congress's express intent under the BCPA. The opinion in *California* discarded the distinction between acquisition and distribution and undercut the decision in *Arizona* that state law had no role when the BCPA and Reclamation Act were reconciled alongside one another. On the contrary, the Reclamation Act preempted the BCPA.

Rehnquist identified the essence of the previous holdings: "state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary."<sup>178</sup> The section 8 savings clause in the Reclamation Act would not be brushed aside lightly, nor would the Court need to reverse its prior holdings. However, state authority still needed to be reconciled with the Secretary's express BCPA section 5 contract authority. The core issue boiled down to the context and syntax of acquisition and distribution of water within the Colorado River system and the broader reclamation program. The immediate context at

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provisions of Reclamation Acts that placed specific limitations on how the water was to be distributed. Here the United States contends that it may ignore state law even if no explicit congressional directive conflicts with the conditions imposed by the California State Water Control Board.

*Id.* at 673.

175. *Id.* at 674.

176. *Id.*

177. *Id.* at 673-75.

178. *Id.* at 668 n.21.

issue in the *Arizona* opinion was distribution by the Secretary to interstate recipients, while the acquisition of the water was expressly solved by Congress's apportionment between sibling states.

The *California* opinion reconciled the two extremes of interpretation and recognized a section 5 federal power to veto state distributions of reclamation water, but it did not find language that permitted the Secretary to limit distribution of water beyond the BCPA section 4(a) language authorizing permanent water allocations. The ultimate purpose of the BCPA is to allocate and distribute the waters of the Colorado River and force the State of California into a permanent quantified limit for the benefit of California's uneasy neighbors. It was not to usurp state authority.

The Supreme Court concluded that section 8 authorized states to govern the substance of water supply distribution.<sup>179</sup> Returning to the beneficial use standard within section 8 and the absence of any Congressional language within the BCPA limiting section 8, there was a strong implication that Congress was not concerned about the "possibly inconsistent" state commands once water was delivered within a state and exclusively applied intrastate. The integrity of state authority under section 8's reasonable, beneficial use clause, the Congressional purpose of the BCPA, and the Secretary's section 5 contract authority could stand alongside each other and govern separate aspects of water allocation and distribution on the Lower Colorado.

The *California* opinion resurrected state authority in the domain of "control, appropriation, use, or distribution of water"<sup>180</sup> on federal

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179. *Id.* at 678.

180. But because there is at least tension between the above-quoted dictum and what we conceive to be the correct reading of § 8 of the Reclamation Act of 1902, *we disavow the dictum* to the extent that it would prevent petitioners from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question. Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but *it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water."* Nor, as the United States contends, does § 8 merely require the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law. The 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

reclamation projects. The creeping judicial distinctions and dicta from three successive cases, which had reversed a tradition of cooperative federalism; were effectively trimmed to restore the original balance between state and federal authorities.

**f. 1979 Arizona Decree**

Per the 1964 Decree, the three Lower Basin States were brought back before the Supreme Court to outline and establish a quantified table of present perfected rights.<sup>181</sup> In accord with the Reclamation Act, the 1979 Decree reiterated that "[a]ny water right listed herein may be exercised only for beneficial uses."<sup>182</sup> It also quantified IID's present perfected rights with a maximum and a formula,<sup>183</sup> but it did not elaborate on how or whether federal or state law would define beneficial use, what processes should be utilized, or address any maximum reasonable beneficial use "duty" on IID.

**g. Bryant v. Yellen**

In 1980, the Supreme Court, in *Bryant v. Yellen*, addressed the issue of whether irrigated private lands that exceeded 160 acres before the passage of the Reclamation Act were exempt from the 160-acre reclamation limitation on irrigation deliveries.<sup>184</sup> Importantly, the Supreme Court rooted present perfected rights within state water law<sup>185</sup> and identified a clear role

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water law. The Government's interpretation would trivialize the broad language and purpose of § 8.

*Id.* at 674-75 (emphasis added).

181. *Arizona*, 439 U.S. 419 (1979).

182. *Id.* at 421.

183. *The Imperial Irrigation District* in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

*Id.* at 429.

184. 447 U.S. 352 (1980).

185. In the first place, it bears emphasizing that the § 6 perfected right is a water right originating under state law. In *Arizona v. California*, we held 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

for state law in "determining the content and characteristics of the water right that was adjudicated to the District by our decree."<sup>186</sup> The Court carved out a protected haven for present perfected rights from federal controls and restraints associated with the BCPA.<sup>187</sup>

#### 4. Conclusion: Limits on Federal Beneficial Use Authority

Decided only six months after *Fresno*, the *Arizona v. California* opinion is an unquestioned landmark in the Law of the River and remains the lead authority for interpretation of the BCPA.<sup>188</sup> However, the impact of *California* on *Arizona* is the most critical cog in the analysis of whether the Secretary, by regulation after entering permanent service contracts, can preempt state reasonable, beneficial use laws and procedures.

The Supreme Court addressed the section 5 contractual authority of the Secretary related to *interstate* allocations of the Colorado River in *Arizona* and the federal-state balance of section 8 authority in *California*. As discussed above, *California* explicitly disavowed dicta from two prominent section 8 cases, *Ivanhoe* and *Fresno*, diminishing reliance on *Arizona* as authority to justify federal displacement of state law.

*California* unambiguously validated a state role in both acquisition and distribution, specifically related to reasonable beneficial use, and strikes inconsistent aspects of the *Arizona* holding. *California* affirmed SWRCB authority to impose and condition a beneficial use requirement on the

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to interfere with state law. . . . We nevertheless clearly recognized that § 6 of the Project Act, requiring satisfaction of present perfected rights, was an unavoidable limitation on the Secretary's power and that in providing for these rights the Secretary must take account of state law. In this respect, state law was not displaced by the Project Act and must be consulted in determining the content and characteristics of the water right that was adjudicated to the District by our decree.

*Id.* at 370-71.

186. *Id.* at 371.

187. Here, we are dealing with perfected rights protected by the Project Act; and because its water rights are to be interpreted in the light of state law, the District should now be as free of land limitations with respect to the land it was irrigating in 1929 as it was prior to the passage of the Project Act. To apply § 46 would go far toward emasculating the substance, under state law, of the water right decreed to the District, as well as substantially limiting its duties to, and the rights of, the farmer-beneficiaries in the District.

*Id.* at 373-74.

188. *Arizona*, 373 U.S. 546, 551 (1963).



acquisition of water by BuRec. *Arizona* and section 5, therefore, cannot be the basis for Secretarial authority to impose reasonable, beneficial use restrictions or deny the role of state law and a state authority over reasonable, beneficial use disputes. *Arizona* is not authority to supplant applicable California reasonable, beneficial use law and procedures.

At the same time, while section 8 expressly articulates a federal requirement of reasonable, beneficial use for water distribution governing all reclamation projects, the language falls far short of the necessary depth or breadth to establish a federal standard which can be distinguished from applicable state law. At every possible juncture, the meat of express legislative language is left off the bone. If state law evidenced the outright absence of a state beneficial use standard and adjudication process, one might infer greater leeway for a federal role to implement the express requirement of section 8. However, California has substantial constitutional, statutory, judicial, and administrative authorities that explicitly govern reasonable, beneficial use. There is no vacuum for federal authority to fill and the Supreme Court has identified no preemptive basis to do so.

### C. California Beneficial Use Laws

Conflict preemption analysis also requires an analysis of California law and process to determine whether a direct conflict exists with federal law or whether California law or process thwarts the Congressional intent of the previously discussed federal law. As outlined on remand of *California*, "[a] state statute or regulation is preempted by a federal rule 'to the extent it conflicts with a federal statute' or where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>189</sup> If conflict is not found, California's beneficial use law will be presumed to stand.

#### I. Constitutional and Statutory Authority

In 1928, just before the BCPA was passed, article X, section 2 of the California Constitution was enacted by the California legislature.<sup>190</sup> Common law reasonable, beneficial use definitions were expressly consolidated through one overarching governing standard.

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to *beneficial use* to the fullest extent of which they are capable, and that the *waste*

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189. *United States v. California*, 694 F.2d 1171, 1176-77 (9th Cir. 1982).

190. CAL. CONST. art. X, § 2.

or *unreasonable use* or *unreasonable method* of use of water be prevented, and that the *conservation* of such waters is to be exercised with a view to the *reasonable* and *beneficial* use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be *limited* to such water as shall be *reasonably required* for the *beneficial use* to be served, and such right does not and shall not extend to the *waste* or *unreasonable use* or *unreasonable method* of use or *unreasonable method of diversion of water*.<sup>191</sup>

Since 1928, California's legislature has articulated nuanced statutory details of how reasonable, beneficial use, waste, and unreasonable use are to be measured and determined.<sup>192</sup> For example, statutes identify the limit of an appropriated water right, when it ceases, and the process whereby a right reverts to the public.<sup>193</sup> "Conserved water" is a recognized reasonable,

191. *Id.* (emphasis added).

192. California's Water Code was created by the state legislature in 1943, but has statutory roots dating back to the Civil Code of 1872.

193. Purpose of appropriation; cessation of right: The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

CAL. WATER CODE § 1240 (West 2008);

Reversion of unused water: When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, such unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. Such reversion shall occur upon a finding by the board following notice to the permittee and a public hearing if requested by the permittee.

CAL. WATER CODE § 1241 (West 2008);

Beneficial use of water: It is hereby declared that because of the conditions prevailing in this State, the general welfare requires that the water resources of the State be put to *beneficial use* to the fullest extent of which they are capable, and that the *waste* or *unreasonable use* or *unreasonable method of use* of water be prevented, and that the *conservation* of such water is to be exercised with a view to the *reasonable* and *beneficial* use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in

beneficial use, preventing conserved water from being classified as waste and subject to possible forfeiture, which provides an important incentive for cooperation by water rights holders.<sup>194</sup> In addition, California expressly recognizes the use of water for recreation, fish, and wildlife values as beneficial uses.<sup>195</sup> The California legislature has articulated specific factors

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this State is and shall be limited to such water as shall be *reasonably required* for the *beneficial use* to be served, and such right does not and shall not extend to the *waste* or *unreasonable use* or *unreasonable method of use* or *unreasonable method of diversion* of water.

CAL. WATER CODE § 100 (West 2008) (emphasis added);

Prevention of unreasonable use of water: The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.

CAL. WATER CODE § 275 (West 2008).

194. Appropriated water rights; cessation or reduction in use; forfeiture; transfer; reversion of rights: (a) When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. No forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to water appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriated prior to December 19, 1914.

CAL. WATER CODE § 1011 (West 2008).

195. Recreation; preservation of fish and wildlife resources: The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources. The board shall notify the Department of Fish and Game of any application for a permit to appropriate water. The Department of Fish and Game shall recommend the amounts of water, if any, required for the preservation and enhancement of fish and wildlife resources and shall report its findings to the board. This section shall not be construed to affect riparian rights.

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governing what beneficial uses must be considered and how these beneficial uses are to be synthesized into a final determination by the SWRCB.<sup>196</sup>

## 2. Judicial Authority

The breadth and depth of California judicial opinions add significant substance to the California law of reasonable, beneficial use. *Herminghaus v. Southern California Edison Co.*<sup>197</sup> held that use of water by a downstream riparian to flood pastureland was a protected beneficial use of state water with priority over a proposed upstream appropriation for a power project. Even though the flood waters benefited few people relative to the net benefit provided by the proposed power project, the court did not strike at the reasonableness of the beneficial riparian use of water. The case precipitated the adoption of the Constitutional amendment embodied in article X, section 2. Priority of right no longer precluded an evaluation of the reasonableness or the degree of beneficial use among competing water right holders.

In 1935, the *Peabody v. Vallejo*<sup>198</sup> decision evaluated the question of unreasonableness, waste, and beneficial use of water by a riparian who used the entire flow of a river to flood his lands with restorative silts. After contemplating a set of facts roughly similar to *Herminghaus*, the court dissected the asserted right by the riparian to the "full flood flow" of the stream with the new article X, section 2 standard of reasonableness.<sup>199</sup> The

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CAL. WATER CODE § 1243 (West 2008).

196. Consideration of relative benefit: In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant. The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated.

CAL. WATER CODE § 1257 (West 2008).

197. *Herminghaus v. S. Cal. Edison*, 252 P. 607, 619-20 (Cal. 1926).

198. *Peabody v. Vallejo*, 40 P.2d 486 (Cal. 1935).

199. "A stream supply may be divided but the product of the division in nowise remains the same. When the supply is limited; public interest requires that there be the greatest number of beneficial uses which the supply can yield." *Id.* at 491;

Court decided the law no longer supported continued and unreasonable use.<sup>200</sup> As a result, no water right within the state was exempt from the

...  
1. The right to the use of water is *limited* to such water as shall be *reasonably required* for the beneficial use to be served. 2. Such right does not extend to the *waste* of water. 3. Such right does not extend to *unreasonable use* or *unreasonable method of use* or *unreasonable method of diversion* of water. 4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

*Id.* (emphasis added);

...  
As to what is *waste* water depends on the circumstances of each case and the time when *waste* is required to be prevented. In sections of the state, few in number, where the rivers and streams are plentifully supplied, and there is no need for the *conservation* of the product thereof, the water flows freely to the sea. When needed for *beneficial uses* it may be stored or restrained by appropriation subject to the rights of those who have a *lawful priority* in a *reasonable beneficial use*. That *priority* has been subjected to limitations and regulations prescribed by the Constitution, but it has by no means been abolished. Under the new policy the vested right theory, that is, the right of the riparian owner to all of the waters of the stream, as it is wont to flow in the state of nature, and without regard to the *reasonableness* of such use as against an appropriator, has been subjected to such limitations that the old doctrine . . . is no longer the law of this state.

*Id.* at 492 (emphasis added).

...  
[T]he rule of reasonable use as enjoined by section 3 of article XIV [now Article X, Section 2] of the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right.

*Id.* at 498-99 (emphasis added).

200. The *asserted right* of a riparian owner, whose lands in a state of nature form a delta at about sea level, to have the full flood flow of the stream to overflow his lands for the purpose of depositing silt thereon, or by artificial check dams and levees to remove the saline content of the soil which in a state of nature are salt marsh lands, *cannot be supported*. So far as we are advised, this asserted

sweeping purpose of article X, section 2, and all water users were put on notice that the state would no longer consider past use as a presumptive safe harbor with absolute immunity from reasonable beneficial use evaluation.<sup>201</sup>

Additional case law refined and illustrated the limits of beneficial use. At issue in *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*<sup>202</sup> was the reasonableness of the use of water to flush out and drown gophers that damaged overlying crops. The court discussed the growing needs of an expanding population in terms of a dynamic, non-static variable in the beneficial use analysis, and described how beneficial uses of one era could gradually displace and outweigh established uses from another.<sup>203</sup> The court distinguished a quantity of water considered to be an "excessive diversion" above the amount required for "reasonably necessary" use<sup>204</sup> and specified

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right *does not inhere* in the riparian right at common law, and as a natural right cannot be asserted as against the police power of the state in the *conservation* of its waters. This asserted right involves an *unreasonable use* or an *unreasonable method of use* or an *unreasonable method of diversion* of water as contemplated by the Constitution.

*Id.* at 492 (emphasis added).

201. [T]he rule of reasonable use as enjoined by section 3 of article XIV [now Article X, Section 2] of the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right.

*Id.* at 498-99.

202. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972 (Cal. 1935).

203. As the pressure of population has led to the attempt to bring under cultivation more and more lands, and as the demands for water to irrigate these lands have become more and more pressing, the decisions have become increasingly emphatic in limiting the appropriator to the quantity *reasonably necessary* for *beneficial uses*.

*Id.* at 997 (italics added).

204. If the appropriator uses more than the amount so required, he gains no right thereto. An *excessive diversion* of water for any purpose cannot be regarded as a diversion for a beneficial use. In so far as the diversion exceeds the amount *reasonably necessary* for beneficial purposes, it is contrary to the policy of the law and is a taking without right and confers no title, no matter for how long continued.

*Id.* (emphasis added).

that the measuring standard was not "the most scientific method known," but instead would generally be established by local custom.<sup>205</sup>

*Tulare* did not eliminate senior priority rights based on waste and instead injected an element of beneficial use flexibility to protect farmers and irrigators who could not afford to keep pace with the "most scientific method" of diversion or maintain the most modern distribution systems.<sup>206</sup> The Court clearly recognized the importance of increased economic utility and the need to avoid waste as core beneficial use considerations. However, neither consideration could be applied absolutely to a beneficial use determination to unilaterally preempt and usurp local customs and water control.<sup>207</sup>

In 1967, *Joslin v. Marin Municipal Water Dist.*<sup>208</sup> broadened the scope of reasonable, beneficial use review to include "statewide considerations of transcendent importance."<sup>209</sup> A riparian plaintiff sought to enjoin the construction of a dam, since the diminished flows below the dam prevented

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205. "However, an appropriator cannot be compelled to divert according to the most scientific method known. He is entitled to make a *reasonable use* of the water according to the general custom of the locality, so long as the custom does not involve *unnecessary waste*." *Id.* (emphasis added).

206. *Id.*

207. There can be no doubt that respondents as a group do not divert the water in the most scientific manner. There can be no doubt that in some cases, because of the paralleling of the ditches of some of the respondents, there is an uneconomic use of water. If all of the respondents constituted one appropriating unit, then perhaps there would be some merit in appellant's contention that respondents' methods are *wasteful*. But these various appropriators are not one unit—each one has its own appropriative right, gained by many years of use. The courts cannot and, even if they had the power, should not compel these appropriators, many of whom have been diverting water for over fifty years, at their expense, to build new systems of diversion.

*Id.* at 1009 (emphasis added).

208. *Joslin v. Marin Mun. Water Dist.*, 429 P.2d 889 (Cal. 1967).

209. 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.

*Id.* at 894 (emphasis added).

the beneficial recharge of gravels and other sediments on the riparian's property. The court evaluated the growing list of beneficial use factors to ascertain whether such use of water was beneficial and concluded that the use of unfettered flows to restore gravel beds could not be treated as a reasonable, beneficial use.<sup>210</sup>

Similarly, in *SWRCB v. Forni*,<sup>211</sup> the court considered whether or not the beneficial diversion and use of water from the Napa River for the purpose of frost protection was unreasonable. Encountering a need to differentiate distinctions between beneficial uses that could also be deemed unreasonable, as in *Joslin*, the Court announced "the overriding constitutional consideration is to put the water resources of the state to a reasonable use and make them available for the constantly increasing needs of all the people." The court explained that "[I]n order to attain this objective, the riparian owners may properly be required to endure some inconvenience or to incur reasonable expenses."<sup>212</sup> A showing of beneficial use can only be supported if the underlying usage is reasonable. If a use is beneficial, yet unreasonable, the use cannot stand.<sup>213</sup>

One year later, in *Environmental Defense Fund v. EBMUD (I)*,<sup>214</sup> a public interest plaintiff sought to enjoin the construction of a canal which would change the point of diversion in the Lower American River and thereby harm a fall run of Chinook salmon. Although the case was later overruled and remanded by the U.S. Supreme Court, the state court emphasized the

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210. On the other hand, unlike the unanimous policy pronouncements relative to the use and *conservation* of natural waters, we are aware of none relative to the supply and availability of sand, gravel and rock in commercial quantities. Plaintiffs do not urge that the general welfare or public interest requires that particular or exceptional measures be employed to insure that such natural resources be made generally available and should therefore be carefully conserved.

*Id.* at 894-95 (emphasis added).

211. *State Water Res. Control Bd. v. Forni*, 126 Cal. Rptr. 851, 855-56 (Ct. App. 1976).

212. *Id.* at 856.

213. [T]he claim that respondents' use of water is beneficial does not bring it within the constitutional postulate of reasonableness. As emphasized in *Joslin*, "beneficial use" cannot be equated with "reasonable use," and "the mere fact that a use may be *beneficial* to a riparian's lands is not sufficient if the use is not also *reasonable* within the meaning of section 3 of article XIV [now Article X, Section 2] . . ." (*Joslin*, 429 P.2d 889).

*Id.* at 751 (emphasis added).

214. *Envtl. Def. Fund, Inc. v. East Bay Mun. Util. Dist.*, 572 P.2d 1128 (Cal. 1977).



necessity to evaluate the entire circumstances, more so when "transcendent interests of public health and safety beyond normal water use are involved."<sup>215</sup>

*National Audubon Society v. Superior Court*<sup>216</sup> added the "public trust doctrine" to California reasonable, beneficial use considerations.<sup>217</sup> The case centered on the reasonableness of water diversions from non-navigable tributary streams feeding Mono Lake. The court commented that article X, section 2 establishes that "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use."<sup>218</sup> The court noted the obvious dependence of the population and economy "upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values."<sup>219</sup> The court also recognized a new component of reasonable, beneficial use insofar as "it prevents any party from acquiring a vested right to appropriate water in a manner harmful to interests protected by the public trust."<sup>220</sup>

The judiciary acted as the state guardian to protect fish, wildlife, and recreational values from the sometimes mechanical application of economic analysis and beneficial utility.<sup>221</sup> The public trust doctrine precludes reasonable beneficial use determinations from omitting consideration of public trust values. Yet the court pragmatically acknowledged the difficulty in weighing and balancing these considerations:

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215. *Id.* at 1137.

216. 658 P.2d 709 (Cal. 1983).

217. Three excellent resources to introduce Public Trust Doctrine are: Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Harrison C. Dunning, *The Significance of California's Public Trust Easement for California's Water Rights Law*, 14 U.C. DAVIS L. REV. 357 (1980); and Gregory S. Weber, *Articulating the Public Trust: Text, Near-Text, and Context*, 27 ARIZ. ST. L.J. 1155 (1996).

218. 658 P.2d at 725.

219. *Id.* at 727.

220. *Id.*

221. The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests.

*Id.* at 728.

As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation omitted] and to preserve, so far as consistent with the public interest, the uses protected by the trust.<sup>222</sup>

*United States v. SWRCB* recognized water-quality impacts as relevant to reasonable, beneficial use determinations.<sup>223</sup> The case arose in the context of state efforts to regulate water quality in the Bay Delta. The court referenced reasonable, beneficial use as the "cardinal principle"<sup>224</sup> of California water law and recognized SWRCB regulatory authority to prevent uses that unreasonably harm water quality. SWRCB authority included the evaluation of the "relative benefit" to be derived from competing uses of water, even those which are beneficial and reasonable, but which become less so when water quality impacts are considered.<sup>225</sup> The SWRCB decision reaffirms the broad authority<sup>226</sup> to modify permits on the basis that previously reasonable, beneficial uses of water had become unreasonable.<sup>227</sup>

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222. *Id.*

223. *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161 (Ct. App. 1986).

224. *Id.* at 171.

225. Moreover, the power of the Board to set permit terms and conditions (§ 1253) includes the power to consider the "relative benefit" to be derived (§ 1257). If the Board is authorized to weigh the values of competing beneficial uses, then logically it should also be authorized to alter the historic rule of "first in time, first in right" by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time.

*Id.* at 189.

226. We perceive no legal obstacle to the Board's determination that particular methods of use have become *unreasonable* by their deleterious effects upon water quality. Obviously, some accommodation must be reached concerning the major public interests at stake: the quality of valuable water resources and transport of adequate supplies for needs southward. The decision is essentially a policy judgment requiring a balancing of the competing public interests, one the Board is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources. (§ 174.) (26) (See fn. 24.), (27) We conclude, finally, that the Board's power to prevent *unreasonable methods of use* should be broadly interpreted to

*Imperial Irrigation District v. SWRCB* (I)<sup>228</sup> added water conservation opportunities to the lexicon of reasonable, beneficial use considerations. The SWRCB determined that IID's failure to develop a plan for additional water conservation measures could constitute a misuse of water.<sup>229</sup> The SWRCB ordered IID to explore conservation opportunities and efficiency improvements to be financed by urban junior priority holders in search of new water.<sup>230</sup> By 1988, the SWRCB (with judicial support) asserted that it could impose a "physical solution" on IID and junior right holders if they could not reach agreement on a conserved water transfer. Important to the future Part 417 dispute, the SWRCB expressly recognized increased water use efficiency as an important element of the reasonable, beneficial use analysis.<sup>231</sup>

A more recent articulation of California's reasonable, beneficial use doctrine occurred in *City of Barstow v. Mojave Water Agency*.<sup>232</sup> The plaintiff city sought a guarantee of adequate groundwater within a basin that suffered from an annual overdraft of water supply. The trial court determined that an "equitable apportionment" between parties could be imposed as a physical solution to the water supply issue to the detriment of senior water right holders with priority. The California Supreme Court reversed the decision and firmly protected senior water right holders. In so doing, the Court bucked the beneficial use trend which disfavored agriculture by tilting water resources towards larger population centers. Any proclivity the state may

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enable the Board to strike the proper balance between the interests in water quality and project activities in order to objectively determine whether a *reasonable method of use* is manifested.

*Id.* at 188 (emphasis added).

227. Here, the Board determined that changed circumstances revealed in new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards. Accordingly, the Board had the authority to modify the projects' permits to curtail their use of water on the ground that the projects' use and diversion of the water had become *unreasonable*.

*Id.* at 187 (emphasis added).

228. *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 231 Cal. Rptr. 283 (Ct. App. 1986).

229. *Imperial Irrigation Dist.*, Decision 1600, at 66 (Cal. State Water Res. Control Bd. June 21, 1984).

230. *Id.*

231. *Imperial Irrigation Dist.*, Order WR 88-20, at 27-29 (Cal. State Water Res. Control Bd. Sept. 7, 1988).

232. *City of Barstow v. Mojave Water Agency*, 5 P.3d 853 (Cal. 2000).

have revealed for "socializing" water for public uses in the wake of *Audubon* was bluntly rebutted.<sup>233</sup>

As dynamic a concept as reasonable, beneficial use must be, the California Supreme Court left little doubt that water allocation would not be uprooted from its traditional respect for priority. The Court limited the extent to which a lower priority reasonable and beneficial use of water can preempt senior water rights.<sup>234</sup>

### 3. SWRCB Beneficial Use Enforcement Authority

#### a. SWRCB Authority

In California, a corollary question is implicated as to whether SWRCB's exercise of its reasonable, beneficial use adjudicative authority conflicts with or thwarts federal Colorado River law.

The SWRCB is the primary administrative agency making reasonable, beneficial use determinations over California's developed surface water. The SWRCB is authorized by the California legislature to "provide for the orderly and efficient" appropriation of water rights and distribution of water resources.<sup>235</sup> Section 174 of the California Water Code grants the SWRCB concurrent jurisdiction with the courts to "exercise the adjudicatory and regulatory functions of the state in the field of water resources."<sup>236</sup> As prominently noted in the *California* decision, SWRCB authority is recognized

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233. Thus, although it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution's general purpose cannot simply ignore the priority rights of the parties asserting them. In ordering a physical solution, therefore, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the *reasonable use* doctrine.

*Id.* at 869 (emphasis added) (citation omitted).

234. Respondents unpersuasively argue for imposition of an equitable physical solution that disregards prior legal water rights. They cite the principle that the State Constitution requires the greatest number of *beneficial users* that the water supply can support, but they omit the requirement that this use be subject to the rights of those with lawful priority to the water.

*Id.* at 870 (emphasis added).

235. CAL. WATER CODE § 174 (West 2008).

236. *Id.*; see also *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 231 Cal. Rptr. 283 (Ct. App. 1986).

by the United States Supreme Court,<sup>237</sup> while additional authorities, such as *United States v. SWRCB*,<sup>238</sup> have expressly<sup>239</sup> and unequivocally<sup>240</sup> established that the SWRCB has significant authority to compel compliance with reasonable, beneficial use.<sup>241</sup>

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237. *California v. United States*, 438 U.S. 645, 647 (1978).

238. 227 Cal. Rptr. 161 (Ct. App. 1986).

239. All water rights, including appropriative, are subject to the overriding constitutional limitation that water use must be *reasonable* . . . . To that end, the Board is empowered to institute necessary judicial, legislative or administrative proceedings to *prevent waste or unreasonable use* . . . including imposition of *new permit terms* . . . . Moreover, all permits of the projects are subject to the continuing authority of the Board to *prevent unreasonable use*.

*Id.* at 187 (emphasis added).

240. We perceive *no legal obstacle* to the Board's determination that particular methods of use have become *unreasonable* by their deleterious effects upon water quality. Obviously, some accommodation must be reached concerning the major public interests at stake: the quality of valuable water resources and transport of adequate supplies for needs southward. The decision is essentially a policy judgment requiring a balancing of the competing public interests, one the Board is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources. . . . We conclude, finally, that the Board's power to prevent *unreasonable methods of use* should be broadly interpreted to enable the Board to strike the proper balance between the interests in water quality and project activities in order to objectively determine whether a *reasonable method of use* is manifested.

*Id.* at 188 (citing CAL. WATER CODE § 174 (West 2008)) (emphasis added).

241. [T]he Board has the separate and additional power to take whatever steps are necessary to prevent *unreasonable use or methods of diversion* . . . . That independent basis of authority vests jurisdiction in the Board to compel compliance with the water quality standards insofar as the projects' diversions and exports adversely affect water quality.

*Id.* at 196-97 (emphasis added).

**b. IID Cases**

The 1984 and 1988 SWRCB assessments of IID's reasonable, beneficial use articulated criteria to evaluate IID's alleged waste: (1) other potential beneficial uses for conserved water; (2) whether the excess water now serves a reasonable and beneficial purpose; (3) probable benefits of water savings; (4) amount of water reasonably required for current use; (5) amount and reasonableness of the cost of saving water; (6) whether the required methods of saving water are conventional and reasonable rather than extraordinary; (7) a physical plan or solution.<sup>242</sup> Additional factors that the SWRCB is required to consider are the positive or negative environmental impacts of the current use versus more efficient water use.<sup>243</sup>

The 1988 SWRCB order required IID to conserve of 100,000 AFY. The SWRCB acknowledged the enormous financial burden this placed on IID and made the 1988 order contingent upon IID finding a third party to pay for the cost.<sup>244</sup> The third party would become the beneficiary of the conserved water. Otherwise, the SWRCB reserved to itself the right to impose a "physical solution" requiring IID to conserve and requiring the recipient of the conserved water to pay the costs, including environmental mitigation costs.

**c. SWRCB Exclusive Jurisdiction over IID's Water Use**

Since the 1980's, the SWRCB has reserved its rights to exercise continuous, exclusive jurisdiction over IID. Despite this, in 2003, BuRec utilized Part 417 to review whether IID's use was reasonable and beneficial. It ignored both the SWRCB's jurisdiction and the State's request for consultation on the matter.<sup>245</sup>

Assuming the propriety of Part 417 and compliance with section 8 conformity to state law, the State of California and the United States would ordinarily exercise concurrent jurisdiction to determine IID's reasonable, beneficial use of Colorado River water under state reasonable, beneficial use standards. However, with the United States' acquiescence in 1986, California first exercised and then retained jurisdiction to enforce that obligation. Under these circumstances, the federal government is required to defer to California. The Ninth Circuit has recognized the doctrine of prior

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242. *Imperial Irrigation Dist.*, Decision 1600, at 24-29 (Cal. State Water Res. Control Bd. June 21, 1984).

243. *Id.* at 25.

244. The availability of financial resources for implementing proposed water conservation measures is a factor to be considered in evaluating the reasonableness of an existing method of diversion and use. *Imperial Irrigation Dist.*, Order WR 88-20, at 36 (Cal. State Water Res. Control Bd. Sept. 7, 1988).

245. U.S. BUREAU OF RECLAMATION, *supra* note 68.

exclusive jurisdiction as a mandatory bar to federal jurisdiction when the federal and state governments previously held concurrent jurisdiction over water rights and the state tribunal exercised its jurisdiction first.<sup>246</sup> California's prior exercise of jurisdiction automatically precludes BuRec from separately adjudicating the matter.

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246. In *State Engineer v. South Fork Band of Te-Moak Tribe of Western Shoshone Indians*, 339 F.3d 804, 813 (9th Cir. 2003), a Nevada state court entered a decree determining water rights on the Humboldt River. A dispute arose and a case was filed in state court that was removed to federal court. *Id.* The state and federal courts each claimed jurisdiction over the matter and enjoined the other from conducting further proceedings. *Id.* at 807-08. The issue before the Ninth Circuit was whether a state court that has adjudicated a water decree retains exclusive jurisdiction over its administration, even though both the federal and state courts could have originally exercised jurisdiction. *Id.* at 807. The Ninth Circuit explained that where "both federal and state courts enjoy concurrent jurisdiction," each "may commence proceedings to decide questions about the allocation of water rights." *Id.* at 813 (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)). However, "jurisdiction is only the *power* of the court to decide a matter." *Id.* (internal quotation omitted). "The mere fact that state and federal courts are *initially* vested with coequal authority does not mean that more than one court can actually adjudicate — much less administer — decrees over the same res." *Id.* (emphasis in original).

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The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is *withdrawn from the jurisdiction of the courts of the other authority* as effectually as if the property had been entirely removed to the territory of another sovereignty.

*Id.* at 809-810 (quoting *Palmer v. Texas*, 212 U.S. 118, 125 (1909)) (emphasis in original); see also *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229-30 (1922); *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999) ("[T]he first court to gain jurisdiction over a res exercises exclusive jurisdiction over an action involving that res."). The doctrine of prior exclusive jurisdiction is "no mere discretionary abstention rule," but "is a mandatory jurisdictional limitation," denying jurisdiction to the federal courts. *S. Fork Band*, 339 F.3d at 810.

**d. SWRCB 2002 Water Transfer and Beneficial Use Determination**

By 2002, IID had voluntarily identified conservation opportunities and a willing transferee who had agreed to negotiated payment terms. The SWRCB reviewed this proposed long-term transfer of conserved water, IID's full compliance with previous SWRCB reasonable, beneficial use mandates, and the impacts of the proposed transfer on other water rights holders, the environment, and other third parties.<sup>247</sup> The SWRCB pressed for environmental mitigation measures to dull the impact of the agricultural water conservation and urban transfer on the Salton Sea and expressly conditioned approval for the transfer on implementation of certain mitigation.<sup>248</sup> The SWRCB evaluated the broadest impact of its decision and concluded:

To the extent that environmental impacts are not fully mitigated, and to the extent that fallowing may result in adverse socio-economic impacts, the public interest in the transfer outweighs those adverse impacts. The transfer is a critical part of California's efforts to reduce its use of the Colorado River water in accordance with California's Colorado River Water Use Plan, the Interim Surplus Guidelines, and the draft OSA. Implementation of the

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247. Provided that IID implements the transfer in accordance with the OSA and the flooding problem is resolved, we do not anticipate the need, absent a change in circumstances, to reassess the reasonableness of IID's water use before 2024. IID's conservation and transfer of 230,000 to 300,000 afa will be in furtherance of the SWRCB's directive to IID, contained in Decision 1600 and Order WR 88-20, to evaluate secure funding for, and implement potential conservation measures. Because irrigation efficiency is not the only fact relevant to a determination of reasonableness, it would not be appropriate to find, as requested by IID, that the circumstances under which we anticipate it may be necessary to reassess IID's water use are limited to IID's irrigation practices or technological advances in irrigation efficiency.

Imperial Irrigation Dist., Revised Order WRO 2002-0013, at 81 (State Water Res. Control Bd. Oct. 28, 2002).

248. "In conclusion, we find that, with the implementation of the SSHCS [Salton Sea Habitat Conservation Strategy] for 15 years, the impacts of the conservation and transfer project on the fish, wildlife, and other instream beneficial uses of the Salton Sea will not be unreasonable." *Id.* at 47.



transfer as approved by this order will benefit not just the parties to the transfer, but the state as a whole.<sup>249</sup>

In its determination, the SWRCB specifically identified and dismissed the legal basis for any federal beneficial use preemption as a limit on its own beneficial use determination.<sup>250</sup>

#### 4. California Summary

California has a rich legal history supporting state sovereignty and dominion over the determination of the reasonable, beneficial use of waters. The legal precedents for reasonable, beneficial use were established in the early days of the Gold Rush and continue to the present. These precedents provide structure and predictability for all users of water within California.

The California judiciary has balanced pragmatic flexibility with respect for priority through its reasonable, beneficial use determinations. Reasonable, beneficial use is not a static definition under California law, but one that evolves gradually. Over time, California courts, the California legislature, and the SWRCB have deemed certain uses previously considered beneficial as no longer beneficial, while recognizing new beneficial uses. Notably, in *United States v. Gerlach Live Stock Co.*<sup>251</sup> the U.S. Supreme Court specifically referenced article X, section 2 of the California Constitution and unambiguously confirmed that it "constitutes California's basic water law, to which the Federal Reclamation Act defers."<sup>252</sup>

As to the 2002 SWRCB review of IID's proposed transfer, California exercised its right to control and direct the beneficial and most reasonable uses of water within its borders and within the federal limit of 4.4 MAFY. Relying on the Court's decision in *California*, the SWRCB had no reason to believe it was without authority. There was no federal limitation involved, such as the 160-acre limitation, or any inconsistency with a federal

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249. *Id.* at 84.

250. As we stated previously, we question whether federal law can or should be interpreted to preclude the use of water to mitigate the impacts of conserving and transferring water for irrigation and domestic purposes. But we need not resolve the issue here because the federal beneficial use requirement cannot be interpreted to limit IID's ability to use Colorado River water to mitigate impacts to the Salton Sea where IID is using its present perfect rights in a manner consistent with state law.

Imperial Irrigation Dist., Order WRO 2002-0016, at 17 (Cal. State Water Res. Control Bd. Dec. 20, 2002).

251. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

252. *Id.* at 751.

preference for agricultural use. The United States had previously participated as a party in evidentiary hearings before the SWRCB, and since then the SWRCB had retained continuing jurisdiction over IID's reasonable, beneficial use and monitored IID water use compliance. SWRCB activity in 2002 was consistent with and an extension of SWRCB's exercised and retained jurisdiction.

In 2002, neither the SWRCB adjudicatory process nor the substance of the SWRCB reasonable beneficial use analysis was inconsistent with the permanent allocation of the Colorado River created by the BCPA or the Secretary's section 5 contract power. Similarly, California did nothing to interfere with the Secretary's operation of the Colorado River infrastructure. In sum, California's role regarding IID's reasonable, beneficial use does not conflict with any federal purpose.

#### **D. 43 C.F.R. Part 417 as Implied Federal Beneficial Use Authority**

BuRec asserted, in the 2003 *Imperial Irrigation District v. U.S.* litigation, that it had the exclusive beneficial use adjudicatory role pursuant to the regulatory authority granted to it by Congress and recognized by the US Supreme Court in *Arizona v. California*. It argued that the adoption of Part 417 was the proper exercise of its granted regulatory authority to exclusively adjudicate IID reasonable, beneficial use under principles of federal law. This section of the article examines and rejects this argument. An examination of the Secretary's power to adopt regulations and the purpose of such regulations, the wording and substantial adjudicatory procedural deficiencies of Part 417, the historical application of Part 417 by BuRec, and the inconsistency of Part 417 with the US 1932 contract with IID all reveal no appropriate preemptory result.

##### **1. Sources of Administrative Authority**

The Reclamation Act requires the use of water to be beneficial and limits water rights to such beneficial use: "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.*"<sup>253</sup>

BCPA section 5 explicitly authorized the Secretary to adopt regulations regarding contracts for the storage and delivery of water:

The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery

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253. 43 U.S.C. § 372 (2008) (emphasis added).

thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses . . . .<sup>254</sup>

The Reclamation Act, as incorporated into the BCPA, also authorizes the Secretary to promulgate general rules and regulations:

The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.<sup>255</sup>

The Reclamation Reform Act of 1982<sup>256</sup> (Reform Act) also authorizes the Secretary to issue regulations related to federal reclamation law:

The Secretary may prescribe regulations and shall collect all data necessary to carry out the provisions of this title and other provisions of Federal reclamation law."<sup>257</sup>

Thus, the Secretary is expressly authorized to adopt regulations regarding the delivery of Colorado River water. But, Congressional authorization for the Secretary to perform administrative adjudications regarding a water right holder's reasonable beneficial use of Colorado River water is not found in any statute. The adoption of federal reasonable, beneficial use standards and a process to adjudicate compliance is a radical departure from historical state, judicial, and contractual provisions and cannot be implied from the statutory language granting the Secretary a general power to adopt necessary regulations.

## **2. Early BuRec Regulations on the Colorado River**

The first formal step towards the coupling of state and federal interests on the Lower Colorado River is a letter<sup>258</sup> from California contractors inviting the Secretary to initiate enactment of the BCPA. Of particular relevance is the inclusion of language stating, "[W]e do find that if there are no further limitations then upon the construction of the Boulder Dam the supply will

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254. 43 U.S.C. § 617d (2008).

255. 43 U.S.C. § 373 (2008).

256. 43 U.S.C. § 390aa-390zz-1 (2008).

257. 43 U.S.C. § 390ww(c) (2008).

258. Colorado River Commissioners of California, Preliminary Agreement (February 21, 1930), in RAY LYMAN WILBUR & NORTHCUTT ELY, *THE HOOVER DAM DOCUMENTS* app. 1001, at A475 (2d ed., GPO 1948).

be ample . . . ." Based on the savings clause language in both the Reclamation Act and the BCPA protecting the domain of state law and the subsequent absence of a single express federal limitation, there can be no implication that an extension of federal authority was underfoot.

The second step was the adoption of "General Regulations"<sup>259</sup> which incorporated key elements of the BCPA. Contracts for permanent service in accord with section 4(a) are reaffirmed, as is the section 5 contracting authority. In addition, "[t]he right is reserved to amend or extend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require."

The third major component in the evolution of regulation is a 1930 letter from the Secretary<sup>260</sup> addressed to IID. A deferential tone emphasized the "impossible" nature of dividing the Colorado until California submits a definite figure quantifying the individual water rights within the 4.4 MAF allocation.<sup>261</sup> The Secretary recognized that "the division of California's share of Colorado River water among various California interests is a matter which the State, and not the Department of the Interior, should work out and recommend to the Department." The Secretary provided a blank draft of what later became the "Seven Party Agreement" (see *infra*), and acknowledged that the state will have control over the final recommendation.

### 3. Incorporation of Seven-Party Agreement

The fifth important exchange between state and federal authorities is the "Seven-Party Agreement."<sup>262</sup> This document provided the formula for apportionment and recognition of priority uses of the Colorado River by California users until 2003. Seven entities in Southern California, both agricultural and urban, addressed the California Division of Water Resources and specifically requested that it "recognize said apportionments and priorities in all matters relating to State authority and to recommend the provisions of Article I . . . ."<sup>263</sup>

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259. U.S. DEP'T OF THE INTERIOR, CONTRACTS FOR THE STORAGE OF WATER IN BOULDER CANYON RESERVOIR (1930), reprinted in THE HOOVER DAM DOCUMENTS, *supra* note 256, app. 1004, at A485.

260. Letter of the Secretary of the Interior Requesting Recommendation of the State in Effecting a Water Allocation (November 5, 1930), in THE HOOVER DAM DOCUMENTS, *supra* note 258, app. 1002, at A477.

261. *Id.*

262. Palo Verde Irrigation Dist. et al., Agreement Requesting the Division of Water Resources of the State of California (Seven-Party Water Agreement) (August 18, 1931), in THE HOOVER DAM DOCUMENTS, *supra* note 256, app. 1003, at A479.

263. *Id.*

Article I establishes an exact allocation between seven priorities of use. MWD received a fourth and fifth priority, each of 550,000 AFY,<sup>264</sup> while San Diego gained an equal right in the fifth priority to its own 112,000 AFY.<sup>265</sup> Just as importantly, the standard of beneficial, consumptive use was identified as the measure of each right, which for lack of any express reference or definition, remains to be construed as established by California law.<sup>266</sup>

California law was explicitly imported into and borrowed for federal authority. Article I of the Seven-Party Agreement was adopted wholesale into the federal regulations,<sup>267</sup> which were governed by provisions of both the 1902 Act and the BCPA. The federal regulation adopting the Seven-Party Agreement provided the capstone of section 8 beneficial use limitations. Cooperative federalism functioned without hitch.

#### 4. 1932 Contract

The sixth major exchange in the administrative record is the water delivery contract between IID and the Secretary.<sup>268</sup> The alternating back-and-forth of state-federal cooperation established a pattern of deference and respect from both sides. California contractors submitted the Seven-Party Agreement to their own state authority — the Division of Water Resources — which formally recommended that the Secretary adopt the intrastate allocation of water rights into federal regulations. The Secretary obliged and utilized the regulations in the Colorado River apportionment contracts with each of the individual contractors. At the outset, it did not appear that California had yielded any degree of state authority to control the use of Colorado River water within California.

The contracts established a clear role for the Secretary as the operator of the infrastructure system in accord with the language of the BCPA. Article 2 of the 1932 Contract authorized the Secretary to "construct, operate, and maintain a dam and incidental works,"<sup>269</sup> while article 5 of the 1931 Contract referenced the applicability of reclamation law and outlined the basic arrangement whereby revenues were to be collected by the Secretary to pay for "all expenses of construction, operation, and maintenance of the said

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264. *Id.* at A480.

265. *Id.*

266. *Id.* at A480-81.

267. U.S. DEP'T OF THE INTERIOR, *supra* note 259.

268. U.S. Dep't of the Interior, Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water (December 1, 1932), in THE HOOVER DAM DOCUMENTS, *supra* note 256, app. 1106, at A595.

269. *Id.*

diversion dam, main canal, and appurtenant structures."<sup>270</sup> Article 8 of the 1932 Contract governed the terms for transition of certain components of the conveyance system and the inheritance of costs.<sup>271</sup>

In addition, Article 17 imported the Seven-Party Agreement and made an express allocation of each portion of California's 4.4 MAFY, again "in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California."<sup>272</sup>

Article 24 of the 1932 Contract contained an express reservation to

the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the district and to other contractors. Such rules and regulations may be modified, revised, and/or extended from time to time after notice to the district and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and this contract, or amendments thereof, or to protect the interests of the United States. The district hereby agrees that in the operation and maintenance of the Imperial Dam and All-American Canal, all such rules and regulations will be fully adhered to.<sup>273</sup>

Article 27 of the 1932 Contract referenced the agreement of the IID and the Secretary to resolve disputes or disagreements by arbitration or court proceedings.<sup>274</sup>

Article 30 of the 1932 Contract summarized that reclamation law governs "the construction, operation, and maintenance of the works to be constructed hereunder" other than as provided by the BCPA.<sup>275</sup>

The 1932 Contract governed IID's operations on the California side of the Lower Colorado for nearly seventy years with only minor modifications. Article 24 of the contract comprises IID's most substantial contractual grant of authority to BuRec recognizing that the Secretary has reserved authority to create rules and regulations for diversion and delivery.<sup>276</sup> But this language does not provide the Secretary with authority contrary to the 1932

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270. Palo Verde Irrigation Dist. et. al, *supra* note 262.

271. U.S. Dep't of the Interior, *supra* note 268.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

Contract, such as to reallocate IID's permanent water right or to adjudicate reasonable, beneficial use determinations contrary to the requirements of section 8 of the Reclamation Act. Without having to second-guess whether it had accidentally given away the "keys to the kingdom" in the event of a contract dispute, Article 27 expressly secured for IID the ability to decode the "true intent and meaning of the law and this contract" through an independent third party.

## 5. 43 C.F.R. Part 417

### a. Federal Register Notices

In 1969, the Secretary opportunistically filled the partial vacuum of diminished state authority created in the wake of the *Arizona* decision. The Secretary issued a seemingly innocuous notice in the Federal Register promulgating "new" procedures for Colorado River water delivery under contracts.<sup>277</sup> These new procedures related to conservation practices in the "diversion, delivery, distribution, and use of the Colorado River" so that deliveries not "exceed that reasonably required for beneficial use."<sup>278</sup> The Secretary's notice cited the BCPA, the contracts for the storage and delivery of Colorado River water made pursuant to the BCPA, and the Decree of the Supreme Court in *Arizona* as the enabling authorities for proposed Part 417.<sup>279</sup> In 1972, the Secretary posted an intermediate revision<sup>280</sup> which, again, cited the BCPA, the contracts and the Decree enabling authorities.

Notably, none of the enabling sources contain an express authorization by Congress to the Secretary to act as a reasonable, beneficial use adjudicator. These sources only authorized the Secretary to promulgate rules and regulations regarding entering permanent contracts for the delivery of Colorado River water. Furthermore, these same authorities nowhere suggest that the Secretary could administratively adjudicate reasonable, beneficial use disputes with contractors or supplant the contractual provisions requiring arbitration or judicial resolution of any disputes.

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277. Procedural Methods for Implementing Colorado River Water Conservation Measures, 34 Fed. Reg. 11499 (proposed July 11, 1969) (to be codified at 43 C.F.R. pt. 417).

278. *Id.*

279. *Id.*

280. Procedural Methods for Implementing Colorado River Water Conservation Measures, 37 Fed. Reg. 18076 (proposed Sept. 7, 1972) (to be codified at 43 C.F.R. pt. 417).

**b. Part 417 Textual Analysis**

The Part 417.2 regulation language expressly ties water deliveries by the Secretary to a limit "reasonably required for beneficial use."<sup>281</sup>

Part 417.3 then enunciates the first and only federal language that details the components of a "federal beneficial use":

Following consultation with each Contractor and after consideration of all relevant comments and suggestions advanced by the Contractors in such consultations, the Regional Director will formulate his recommendations and determinations relating to the matters specified in §417.2. The recommendations and determinations shall, with respect to each Contractor, be based upon but not necessarily limited to such factors as the area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the condition of water carriage and distribution facilities, record of water orders, and rejections of ordered water, general operating practices, the operating efficiencies and methods of irrigation of the water users, amount and rate of return flows to the river, *municipal water requirements and the pertinent provisions of the Contractor's Boulder Canyon Project Act water delivery contract.*<sup>282</sup>

Part 417 applies to all valid contracts for the delivery of Colorado River water in the Lower Basin. However, it does not apply to Indian uses (federal

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281. The Regional Director or his representative will, prior to the beginning of each calendar year, arrange for and conduct such consultations with each Contractor as the Regional Director may deem appropriate as to the making by the Regional Director of annual recommendations relating to water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water, and to the making by the Regional Director of annual determinations of each Contractor's estimated water requirements for the ensuing calendar year to the end that deliveries of Colorado River water to each Contractor will not exceed those *reasonably required for beneficial use* under the respective Boulder Canyon Project Act contract or other authorization for use of Colorado River water.

43 C.F.R. § 417.2 (2007).

282. *Id.* § 417.3 (emphasis added).



reserved rights)<sup>283</sup> and the BuRec Director has express discretion to exclude municipal and industrial contractors from Part 417 review.<sup>284</sup> In other words, Part 417 is primarily applicable to agricultural contractors. Furthermore, it is worded as a "look ahead" prediction for the determination of allowed deliveries for the subsequent year.

Under Part 417, delivery shall not exceed an amount "reasonably required for beneficial use."<sup>285</sup> The standard for predicting each contractor's annual water delivery requirement is a nonexclusive standard loosely based on a variety of factors, including the "pertinent provisions" of the contractor's water delivery contract.<sup>286</sup>

In addition, Part 417 imparts no standing or participation by any other impacted right holder, nor does it provide for administrative adjudication due process procedures. Contractors can only appeal BuRec Regional Director decisions to the Secretary, but the Secretary's decision is final without any neutral hearing. Part 417 is an unconstitutional form of administrative adjudication.

### c. Part 417 Is Missing Essential Due Process Protections

"Formal" and "informal" adjudications are not legal principles as such, but are terms of art to describe the application (or non-application) of certain aspects of the Administrative Procedures Act (APA).<sup>287</sup> "Formal" adjudication refers to those proceedings governed by § 554 of the APA. That section applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."<sup>288</sup> It applies when a statute or agency regulation requires a hearing pursuant to § 554. Section 554 contains numerous procedural requirements for any "formal" agency hearing.

All other adjudications are governed by § 555 of the APA. Therefore, all agency adjudications are "informal" unless otherwise required by statute.<sup>289</sup> Part 417 is an informal adjudication. No applicable statute or

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283. *Id.* § 417.1.

284. *Id.*

285. *Id.* § 417.2.

286. *Id.* § 417.3.

287. Administrative Procedures Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, and in scattered sections of 5 U.S.C.).

288. 5 U.S.C. § 554 (2008).

289. *See, e.g., Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981) (informal adjudication is a "residual category including all agency actions that are not rulemaking and need not be conducted through on the record hearings").

regulation requires application of § 554 of the APA to Secretarial determinations of beneficial use of Colorado River water, therefore § 555 of the APA governs.

Informal adjudication under § 555 of the APA requires an agency to provide basic procedural safeguards. The agency must:

- (a) allow any party appearing before it to be represented by an attorney or other representative;
- (b) permit the claimant to receive copies of any evidence submitted against him;
- (c) issue subpoenas on request; and
- (d) provide prompt notice of the grounds of any denial of requested relief.<sup>290</sup>

The requirement of due process exists above and beyond the requirements of the APA. Satisfaction of the procedural requirements of the APA may still result in a court determination that the procedural compliance is inadequate to meet due process requirements.<sup>291</sup>

The seminal test for whether an agency violated due process procedural requirements is found in *Mathews v. Eldridge*.<sup>292</sup>

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>293</sup>

The due process test as articulated in *Mathews* applies independently of the APA. If the agency's adjudication procedures fall short of what is required for due process, the agency's action is invalid. The APA allows, in

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290. 5 U.S.C. § 555.

291. See, e.g., *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 190-91 (4th Cir. 1994); RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 9.1 (4th ed. 2002).

292. 424 U.S. 319 (1976).

293. *Id.* at 335.

§ 706(2)(B) and (D), a reviewing court to set aside agency action if it is "contrary to constitutional light" or "without observance of procedure required by law," including applicable constitutional due process requirements.<sup>294</sup>

The Ninth Circuit addressed due process issues in a line of cases regarding Interior recognition of the Samish Indian tribe.<sup>295</sup> In *Greene v. Lujan*, the Department of the Interior determined by informal adjudication that the Samish were not a recognized tribe.<sup>296</sup> The tribe challenged the conclusion, claiming procedures used to determine their tribal status did not afford them a hearing or an opportunity to cross-examine witnesses, and violated their due process rights under the *Mathews* balancing test.<sup>297</sup> The district court ordered a full hearing with appropriate APA formal adjudication safeguards.<sup>298</sup> Interior appealed and the Ninth Circuit affirmed that the informal adjudication procedures used by Interior violated due process.<sup>299</sup>

The *Greene v. Lujan* opinion began by summarizing the procedural inadequacies outlined by the district court, including: 1) the inability to call witnesses; 2) no argument permitted before the decision was made; 3) denied access to all material evidence; and 4) lack of impartiality, including *ex parte* contacts and other indications that the issue may have been prejudged.<sup>300</sup>

The Ninth Circuit then explained, "due process generally includes an opportunity for some type of hearing before the deprivation of a property interest, and . . . in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."<sup>301</sup> The Court described the importance of rights being litigated in such a case stating, "[i]nformal decision-making, behind closed doors and with an undisclosed record, is not an appropriate determination of matters of such gravity."<sup>302</sup>

Part 417 as written, and as utilized by the Secretary violates due process standards. As such, Part 417 should not be construed as a

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294. See, e.g., *Greene v. Babbitt*, 943 F. Supp. 1278, 1285 (W.D. Wash. 1996) ("Even if there is 'substantial evidence' in the record for an agency finding, the court must set the finding aside if the agency failed to follow the 'procedures required by law' in making its determination.").

295. *Greene v. Lujan*, 1992 WL 533059 (W.D. Wash. 1992), *aff'd*, 64 F.3d 1266 (9th Cir. 1995).

296. *Id.* at 1.

297. *Id.*

298. *Id.* at 8-9.

299. *Greene v. Babbitt*, 64 F.3d 1266, 1274-75 (9th Cir. 1995).

300. *Id.* at 1274.

301. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)).

302. *Id.* at 1275.

regulation intended to authorize the BuRec or the Secretary to conduct reasonable, beneficial use adjudications because such adjudications affect important property interests.

**d. Historical Application of Part 417**

Yet, prior to 2003, there was neither a single exercise of Part 417 authority to find waste nor a correlating suit by a contractor challenging either the authority or application of the regulation. In this time, BuRec approved all orders without a substitution of its own judgment or acting as an administrative tribunal. Occasionally, contractors voluntarily complied with BuRec requests for resubmittal of modified water orders.

**e. 2003 Application of Part 417 to IID**

In 2003, BuRec made its first Part 417 adjudication. Peculiarly, the initial BuRec determination to refuse IID's requested water delivery preceded the actual Part 417 review. Then, the formal Part 417 review was focused and restricted to a single agricultural contractor, IID, rather than to the entire class of agricultural contractors. Native American and municipal users were also excluded from the scope of the review. The Regional Director evaluated each of the listed Part 417.3 factors, but narrowly evaluated only such factors against the 2003 IID request for water, and unilaterally denied the IID order and imposed a water delivery reduction.

The July 2003, BuRec Part 417 beneficial use determination did not acknowledge or recognize the 2002 SWRCB determination that the transfer of conserved water was a reasonable and beneficial use of water under state law.<sup>303</sup> Instead, BuRec ignored previously identified state evaluations of conservation, environmental impacts, and socio-economic factors in the reasonable, beneficial use analysis and narrowly determined that IID was inefficiently applying waters to its acreage and was wasting water in violation of the reasonable, beneficial use provision of its federal contract.

In sum, IID was denied the benefit of its senior water rights under the priority provisions of both the 1931 Seven-Party Agreement and IID's subsequent 1932 water delivery contract. By finding IID wasted water in violation of its federal contract, BuRec caused IID to forfeit part of its senior water right, which cascaded free of charge to the next junior water rights holders, CVWD and MWD. As a result, the proposed state-authorized transfer of IID water to CVWD and SDCWA in exchange for

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303. U.S. BUREAU OF RECLAMATION, *supra* note 70; *see also* U.S. BUREAU OF RECLAMATION, *supra* note 68.

payments to fund conservation and environmental mitigation was thwarted by federal intervention.<sup>304</sup>

The Regional Director selectively identified Articles 17, 24, and 30 of the 1932 IID water contract as "pertinent provisions," to the exclusion of all other articles also within the contract. Most notably, the Regional Director ignored Article 27 for resolution of disputes or disagreements by "arbitration or court proceedings." As applied, the "true intent and meaning" of both the law and the contract were administratively commandeered through a unique Part 417 process that violated IID's due process protections.

There was no opportunity for a hearing, no ability to call or cross-examine witnesses, no discovery rights, no opportunity to argue before a hearing, and no right to have the dispute resolved by a neutral third party. The Secretary used Part 417 to unilaterally diminish IID's water right without compensation; a suspect action that raises fundamental takings issues.<sup>305</sup> Part 417 does not include a guarantee of due process, provide a role for state participation or deference to state decisions.

#### **6. Limits on the Secretary's Regulatory Beneficial Use Authority**

Regulations promulgated by a federal administrative agency must not fall outside the authority conferred by Congress. They must be rooted within a Congressional grant of power, conform to Congressional procedural requirements, and reasonably be within the contemplation of the authorizing statute.

Regulations must also be consistent with congressional purpose.<sup>306</sup> In *Chrysler Corp. v. Brown*<sup>307</sup> the Supreme Court stated:

The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies *must be rooted in a*

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304. Coincidentally, the amount of water gained by MWD through this federal review was approximately the same exact amount MWD was in jeopardy of losing as a result of California's reduction of Colorado River water in excess of 4.4 MAF.

305. The full development of this topic is beyond the scope of this Article. See *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001); *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005); *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677 (2007).

306. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-08 (1979); *United States v. Quincy-Columbia Basin Irrigation Dist.*, 649 F. Supp. 487, 490 (E.D. Wash. 1986); *Zarr v. Barlow*, 800 F.2d 1484, 1486 (9th Cir. 1986); *Ryan Outdoor Advertising, Inc. v. United States*, 559 F.2d 554, 556 (9th Cir. 1977).

307. 441 U.S. 281 (1979).

*grant of such power by the Congress and subject to limitations which that body imposes.*<sup>308</sup>

In addition, the regulations must have some nexus to the legislative authority.<sup>309</sup> To determine whether a nexus exists, the Supreme Court has held that regulations must be reasonably within the contemplation of the statute:

The pertinent inquiry is whether under any of the arguable *statutory* grants of authority the OFCCP [Office of Federal Contract Compliance Programs] disclosure regulations relied on by the respondents are reasonably within the contemplation of that grant of authority.<sup>310</sup>

The nexus requirement is satisfied only when the grant of authority contemplates the regulations issued. "What is important is that the reviewing court reasonably be able to conclude that the *grant of authority contemplates the regulations issued.*"<sup>311</sup>

**a. *Ickes v. Fox***

*Ickes v. Fox*<sup>312</sup> and *Fox v. Ickes*<sup>313</sup> both address the role of the Secretary in beneficial use decisions. In 1906, the Sunnyside Water Users Association (the Association) entered into a contract with the United States regarding the reclamation of the waters of the Yakima River.<sup>314</sup> Pursuant to this contract, the Association agreed that the aggregate amount of their water rights "should not exceed the number of acres of land capable of irrigation by the total quantity of water available."<sup>315</sup> The parties also agreed that the Secretary should determine the number of acres capable of such irrigation, "to be based upon and measured and limited by the beneficial use of water."<sup>316</sup>

After execution of the contract, the Association applied for water rights for the irrigation of the lands involved. By the terms of the applications, the

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308. *Id.* at 302 (emphasis added).

309. *Id.* at 304.

310. *Id.* at 305.

311. *Id.* at 308 (emphasis added).

312. 300 U.S. 82 (1937).

313. 137 F.2d 30 (D.C. Cir. 1943).

314. *Ickes*, 300 U.S. at 88-89.

315. *Id.* at 89.

316. *Id.*

measure of the water right for the land "was stated to be that quantity which shall be beneficially used for the irrigation thereof, not exceeding the share proportionate to irrigable acreage of the water supply actually available. . . ."<sup>317</sup>

The Supreme Court recognized that, pursuant to the Reclamation Act and the Association's contract with the Secretary, the Secretary had been making factual determinations regarding the association's beneficial use of water:

[T]hereafter the successive Secretaries of the Interior uniformly construed the Reclamation Act and the contractual obligations, *to the effect that the owners of the lands had purchased a sufficient quantity of water to beneficially and successfully irrigate their lands, to be determined by representatives of the Secretary having physical charge of the water distribution, from a factual investigation and personal examination of the lands and the crops growing thereon and the water requirements thereof.*

. . . .  
Pursuant thereto, it was determined by representatives of the successive Secretaries that 4.84 acre-feet of water per annum was necessary to beneficially and successfully irrigate respondents' lands . . . .<sup>318</sup>

In response to a water shortage in 1930, the Secretary proposed the construction of a new reservoir to supply water to the project.<sup>319</sup> The Secretary notified the water users that they would be deprived of all water in excess of three acre-feet unless they made applications for additional water at new rates. The water users refused<sup>320</sup> and sued the Secretary. The Supreme Court noted that the Secretary's new three acre-foot limit was a digression from the Secretary's historical 4.84 AF determinations, which were based upon the users' historical beneficial use of water:

Under the Reclamation Act, . . . as well as under the law of Washington, "beneficial use" was "the basis, the measure and the limit of the right." And by the express terms of the contract made between the government and the Water Users Association in behalf of respondents and other shareholders, *the determination of the Secretary as to the number of acres capable of irrigation was "to be based upon and measured and*

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317. *Id.* at 90.

318. *Id.* at 91 (emphasis added).

319. *Id.* at 92; *Fox*, 137 F.2d at 31.

320. *Ickes*, 300 U.S. at 92-93; *Fox*, 137 F.2d at 31.

*limited by the beneficial use of water.*" Predecessors of petitioner, accordingly, had decided that 4.84 acre-feet of water per annum per acre was necessary to the beneficial and successful irrigation of respondents' lands; and upon that decision, for a period of more than twenty years prior to the wrongs complained of, there was delivered to and used upon the lands that quantity of water.<sup>321</sup>

After the Supreme Court determined the United States was not an indispensable party,<sup>322</sup> the suit went back to the district court. The district court found that the Secretary's new charges for water in excess of three acre-feet were proper; however, the appellate court, in *Fox v. Ickes*, reversed because the landowners' rights were based not on contract but on beneficial use:

In holding that appellants' rights were dependent on the enforcement of contracts with the United States, we think the trial court failed to follow the decision in *Ickes v. Fox*, decided by the Supreme Court in a previous appeal in these proceedings. . . . the Supreme Court held that the rights of applicants were not limited to the enforcement of any contract with the government. The opinion said: "Under the Reclamation Act, . . . as well as under the law of Washington, 'beneficial use' was 'the basis, the measure, and the limit of the right.'

. . . Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners . . . .

Reading the Reclamation Act in the light of the decision in *Ickes v. Fox*, we find the situation in this case to be as follows: *The water-rights of appellants are not determined by contract, but by beneficial use.*<sup>323</sup>

Most importantly, the Court explained that even in the case where the Secretary was expressly given certain beneficial use authority by contract (unlike on the Colorado River), the Secretary's beneficial use evaluations were afforded "tentative" status, and the trial court was the ultimate decision-maker as to beneficial use as defined by *state law*:

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321. *Ickes*, 300 U.S. at 94 (emphasis added).

322. *Id.* at 96.

323. *Id.* at 33 (emphasis added).



The amount of water to which appellants are entitled by reason of prior appropriations for beneficial use *can only be finally determined by a court of the State of Washington*. However, when the Secretary decides that there is surplus water available which can be delivered to appellants without violating the rights of others, he must make a *tentative* determination of appellants' rights.<sup>324</sup>

Ultimately, the Supreme Court refused to allow the Secretary to implement the new charges.<sup>325</sup>

**b. Central Arizona Irrigation & Drainage Dist. v. Lujan**

In *Central Arizona Irrigation & Drainage District v. Lujan*,<sup>326</sup> a federal district court cleanly distinguished the Secretary's ability to allocate Colorado River water and the aspect of Colorado River water use controlled by state law:

The allocation and preferences given to CAP [Central Arizona Project] water seems to be within the exclusive province of the Secretary of the Interior; once the preferences are already established, *the possible uses of that water are governed by state law*. Consequently, the Secretary of the Interior is authorized to allocate CAP water to M & I users. Then M & I users may use their water for any use authorized by Arizona law, including recharge.<sup>327</sup>

**7. Conclusion: Part 417 as Implied Federal Authority**

In the 2003 IID v. U.S. litigation, the Secretary relied on section 5 of the BCPA authority for federal beneficial use preemption. Part 417 may not exceed the authority authorized by the BCPA or contract. Congress did not expressly grant the Secretary the power to adjudicate reasonable beneficial use or venture into California for purposes of reallocating water appropriations or distributions among California users. After *California, Arizona* cannot credibly support any implied Part 417 usurpation of the traditional state domain of intrastate reasonable beneficial use.

While the discretionary authority of the Secretary was left open by the *Arizona* Court in times of shortage, no such powers exist under either surplus

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324. *Id.* at 36 (emphasis added).

325. *Id.* at 35-36.

326. 764 F. Supp. 582 (D. Az. 1991).

327. *Id.* at 591.

or normal conditions.<sup>328</sup> While certain aspects of California's sluggish response to over a decade of federal efforts to limit California's total aggregate use may deserve critique, the fact of the matter is that the Secretary declared 2003 a normal year on the Colorado River. The only authorized option available to the Secretary was to cap California at 4.4 MAF.

*New Mexico* affirmed the presumption of state sovereignty and unambiguously enunciated a judicial reluctance to expand implied federal authorities to new purposes beyond those expressed in the particular enabling act. Part 417 does not align with the strict purposes of the BCPA if used as a substitute for state definition and procedure. Accordingly, any extension of implied authority must comply with state beneficial, reasonable use law.

At a minimum, the judiciary is left to determine disputes involving beneficial use, not the Secretary. Even in a case such as *Ickes*, where the Secretary was granted a beneficial use role by *express* contractual provisions, the Secretary's decisions were merely tentative and not binding on a court. Part 417 lacks any statutory or judicial underpinning if utilized to usurp the proper deference accorded to state reasonable, beneficial use law and the resolution of reasonable, beneficial use disputes by the judiciary.

Other states have also supported state sovereignty in making beneficial, reasonable use determinations of Colorado River water. For example, both in the litigation surrounding *Arizona v. California*, and in the recent dispute over California's use of Arizona's Colorado River entitlement, Arizona never argued for federal usurpation of California's determination of beneficial, reasonable use. The proper reach of the *Arizona* holding should be read to support the narrow purpose of the BCPA: to achieve a 4.4 MAFY cap on California's consumption and to funnel all interstate allocations of Colorado River water through formal section 5 contracts. Arizona would agree with this conclusion.

Some suggest that the federal use of Part 417 was a pragmatic and necessary political prod to move California agencies towards OSA execution. Others claim that *California* should not be read to limit the BCPA or *Arizona*.

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328. *Arizona* carefully staked out an additional yard of turf for the Secretary in times of "shortage", which is one of three formal standard choices the Secretary can make each year through his or her Annual Operating Plan while determining the status of water supply in the entire Colorado system. For purposes of this analysis, it will be noted that the Secretary noted that 2003 was not a "surplus" or "shortage" year, but rather a "normal" year, thus muting the relevance of this authority in times of drought. 373 U.S. at 594.

So long as the BCPA is controlled by the Reclamation Act, *Arizona* cannot escape the full impact of *California*.

In the event of a reasonable, beneficial use dispute, the SWRCB and each of the Colorado River right holders within California had available procedural avenues to enforce the reasonable, beneficial use obligations of each right holder. Any California intrastate dispute about how to divide the 4.4 MAFY from the Colorado in a normal year was controlled by existing water right priorities, subject to California reasonable, beneficial use laws; federal intrusion was not required, and no federal purpose was served. The use of Part 417 must therefore be considered an invalid extension of implied federal authority not supported by law.

#### E. Federal Preemption Conclusion

*We are mindful, in deciding whether later federal law overrides inconsistent state law, that we may not seek out conflicts between state and federal regulation where none clearly exists.*<sup>329</sup>

There is neither express nor clearly implied congressional intent to support the federal allegation that Part 417 preempts California's beneficial use sovereignty. The federal government carries the burden of proof when attempting to wrest reasonable, beneficial use jurisdiction from the states. When evaluated against Congressional authorities and the express language of section 8 of the Reclamation Act, there is no express or implied authority granting the Secretary discretion to intrude on the jurisdiction of California recognized and protected so forcefully in *California*.

Federal utilization of Part 417 to administratively adjudicate intrastate reasonable, beneficial use and usurp the authority of the SWRCB is the same issue addressed in *California*. The federal position in the *IID v. U.S.* litigation argued that Part 417 preempted any California reasonable, beneficial use determinations and left no role for California. This position is directly contravened by *California*. Again, *California* holds that "a state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme."<sup>330</sup> *California* and *New Mexico* lend a sobering perspective to the full scope of federal water authority. Judicial opinions and the Law of the River must be interpreted for their clear and plain meaning. No source authorizes the Secretary to wander into the realm of intrastate reasonable, beneficial use adjudications in usurpation of state adjudicatory bodies. Section 5 BCPA contract authority

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

330. *Id.* at 1177.

raises no express or implied conflicts to support the Secretary's usurpation of state reasonable, beneficial use authority.

There is no instance of California legislative, judicial, or administrative authority that conflicts with federal purposes in the realm of reasonable, beneficial use. California reasonable, beneficial use regulation,<sup>331</sup> which has a much broader scope<sup>332</sup> than Part 417, broadly defines domestic,<sup>333</sup> municipal,<sup>334</sup> and irrigation<sup>335</sup> uses, but it is nonetheless consistent with federal purposes. While consistency can be partially attributed to the shallow sources of federal authority regarding reasonable, beneficial use meaning or enforcement, the federal silence is also evidence of deference to the long-standing supremacy of state water law reinforced by *California*. With its fertile agricultural lands and high productivity, California has often

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331. "Beneficial Use of Water: Beneficial use of water includes those uses defined in this subarticle. The board will determine whether other uses of water are beneficial when considering individual applications to appropriate water." CAL. CODE REGS. tit. 23, § 659 (2008).

332. CAL. CODE REGS. tit. 23, § 660 (2008) (Domestic Uses); CAL. CODE REGS. tit. 23, § 661 (2008) (Irrigation Use); CAL. CODE REGS. tit. 23, § 662 (2008) (Power Use); CAL. CODE REGS. tit. 23, § 662.5 (2008) (Frost Protection Use); CAL. CODE REGS. tit. 23, § 663 (2008) (Municipal Use); CAL. CODE REGS. tit. 23, § 664 (2008) (Mining Use); CAL. CODE REGS. tit. 23, § 665 (2008) (Industrial Use); CAL. CODE REGS. tit. 23, § 666 (2008) (Fish and Wildlife Preservation and Enhancement Use); CAL. CODE REGS. tit. 23, § 667 (2008) (Aquaculture Use); CAL. CODE REGS. tit. 23, § 667.5 (2008) (Fish and Wildlife Protection and Enhancement); CAL. CODE REGS. tit. 23, § 668 (2008) (Recreational Use); CAL. CODE REGS. tit. 23, § 668.5 (2008) (Water Quality Use); CAL. CODE REGS. tit. 23, § 669 (2008) (Stockwatering Use); CAL. CODE REGS. tit. 23, § 669.5 (2008) (Name and Address of Applicant); CAL. CODE REGS. tit. 23, § 670 (2008) (Water Quality Use); CAL. CODE REGS. tit. 23, § 670.5 (2008) (Supplement to Application May Be Required); CAL. CODE REGS. tit. 23, § 670.6 (2008) (Instream Beneficial Use Assessment); CAL. CODE REGS. tit. 23, § 671 (2008) (Frost Protection Use); CAL. CODE REGS. tit. 23, § 672 (2008) (Heat Control Use); CAL. CODE REGS. tit. 23, § 673 (2008) (General Requirements); CAL. CODE REGS. tit. 23, § 674 (2008) (Requirements).

333. Domestic use means the use of water in homes, resorts, motels, organization camps, camp grounds, etc., including the incidental watering of domestic stock for family sustenance or enjoyment and the irrigation of not to exceed one-half acre in lawn, ornamental shrubbery, or gardens at any single establishments. The use of water at a camp ground or resort for human consumption, cooking or sanitary purposes is a domestic use.

334. Municipal use means the use of water for the municipal water supply of a city, town, or other similar population group, and use incidental thereto for any beneficial purpose.

335. Irrigation use includes any application of water to the production of irrigated crops or the maintenance of large areas of lawns, shrubbery, or gardens.

pioneered the development of reasonable, beneficial use law. It must be left with no less than the full rights reserved to and accorded all states by the Constitution in the federal system. Without a conflict, federal law cannot preempt state law.

Since *California*, federal courts have reestablished state supremacy over beneficial use determinations. In *United States v. Alpine Land & Reservoir Co.*<sup>336</sup> the Secretary sought to modify the Nevada State Engineer's determination awarding local irrigators an amount of water historically applied towards growing alfalfa so that the difference in flow could be applied as a federally reserved water right to forest lands much like that in *U.S. v. New Mexico*. The Secretary argued that the beneficial standard of usefulness for irrigated water should be in proportion to a fixed yield, which would allow excess water to be diverted as water use efficiency increased.

The court concluded that the federal projections of an enhanced water yield were made under optimized conditions, which would not be actualized and that the farmers' use of the water and the techniques for growing alfalfa were reasonable. Ultimately, the court decided that "the conspicuous absence of transfer procedures, taken in conjunction with the clear general deference to state water law, impels the conclusion that Congress intended transfers to be subject to state water law."<sup>337</sup> Furthermore, the Court announced "beneficial use itself was intended by Congress to be governed by state law,"<sup>338</sup> and that "[w]hile there were provisions of federal law which were intended to displace state law, such as the 160-acre limit . . . beneficial use itself was intended to be governed by state law."<sup>339</sup>

The court further acknowledged the differences in water law between western states, yet found two general rules of beneficial use common to all. Waste does not accommodate "unreasonable transmission loss and use of cost-ineffective methods," while unreasonableness requires evaluation of "alternative uses of the water."<sup>340</sup> The Court summarized state beneficial use law as a "dynamic concept," evolving through time as conditions change.<sup>341</sup>

*Alpine* has important bearing on *IID v. U.S.* in two vital respects. First, is the similar nature of the government calculus used to determine that a portion of agricultural water is not yielding maximum efficiency, despite the fact that the water is being reasonably used. The *Alpine* court deflected the federal attempt to pry water away from an established reasonable and beneficial use. Per the SWRCB determination, IID's transfer of conserved

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336. 697 F.2d 851 (9th Cir. 1983).

337. *Id.* at 858.

338. *Id.* at 854.

339. *Id.* (citing 35 CONG. REC. 6677 (1907) (statement of Rep. Mondell); 35 CONG. REC. 2222 (1907) (statement of Sen. Clark); *California v. United States*, 438 U.S. 645 (1978)).

340. 697 F.2d at 854.

341. *Id.* at 855.

water was both beneficial and reasonable. While Part 417 makes no determination that directly confronts the reasonableness of the water transfer, it identifies the inefficiency of applied water. Like *Alpine*, Part 417 utilizing idealized water efficiency models lacks federal transfer procedures and also lacks federal analysis or procedures related to the assessment of reasonableness in connection with a proposed voluntary water transfer. State law should be afforded full berth to effectuate its own beneficial use determinations related to water transfers.

Second, is the disposition of the court in regard to the authority of the Nevada State Engineer. The court imported the relatively newly minted rule from *California* and declared "[f]undamental principles of federalism require the national government to consult state processes and weigh state substantive law in shaping and defining a federal water policy."<sup>342</sup> Within the IID litigation, there is little evidence of BuRec's effort to consider state policy.

*Nevada v. United States*<sup>343</sup> provides additional authority that limits an extension of federal control over state beneficial use determinations. The *Nevada* Court considered the general nature of federal intrusion upon state water rights and concluded, "[w]e are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West."<sup>344</sup> In a scolding tone the court added:

In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of relevant State and the contracts entered into by the landowners and the United States make this point very clear.<sup>345</sup>

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342. *Id.*

343. 463 U.S. 110 (1983).

344. *Id.* at 121.

345. *Id.* at 126.

Any legal interpretation giving the Secretary authority to disregard state dominion over reasonable, beneficial use must be met with skepticism. Part 417 has no basis in Congressional authority to overrule state reasonable, beneficial use sovereignty.

### **III. Federal Violation of the 1932 Water Delivery Contract**

A separate and independent legal flaw in addition to the erroneous claim of federal preemption by Part 417 is the direct violation of the provisions of the 1932 United States contract with IID.

#### **A. BuRec Authority to Contract**

As noted above, section 5 of the BCPA authorized the Secretary to enter permanent contracts for delivery of Colorado River water. Early Regulations and the creation of the Seven-Party Agreement culminated in the 1932 contract<sup>346</sup> between IID and the United States.

#### **B. 1932 Water Delivery Contract**

Under the contract, IID is required to put its water to reasonable, beneficial use. Article 17 states, "said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes . . ." The Contract does not define what "reasonably required" means. IID asserted that its 2002 uses and its 2003 water order were in amounts reasonably required, while BuRec flatly asserted the contrary. Thus, a dispute arose as to the interpretation of and compliance with the Contract's language.

Another Contract provision requires use of a court, or an agreed upon arbitration panel, to decide all disputes arising under the contract. Article 27 states that "[d]isputes or disagreements as to the interpretation or performance of the provisions of this contract, except as otherwise provided herein, shall be determined either by arbitration or court proceedings."<sup>347</sup>

The Secretary's asserted authority in making unilateral reasonable, beneficial use decisions contravenes the clear language of the Contract. By the Contract's terms, any dispute over reasonable, beneficial use must be resolved by a court, unless the parties have mutually agreed to utilize arbitration. Adoption of a regulation cannot amend the 1932 Contract.

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346. U.S. Dep't of the Interior, *supra* note 266.

347. *Id.* at art. 27, A612.

The United States must honor the terms and provisions of its contracts. As stated in *United States v. Coachella Valley County Water District*.<sup>348</sup>

A contract is a contract, regardless of whether it is made between individuals or between individual and a government agency; and if made with an agency, the latter should not have the right to change any of terms of the duly executed and partially performed contract.<sup>349</sup>

In addition, colorful, yet penetrating language cuts straight to the current issue:

"Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." Certainly when the contract in question was signed by the irrigation district, the members were not grasping a ghost which could elusively slip through their fingers or change its character at the whim of a government official.<sup>350</sup>

The general language of the Reclamation Act and BCPA authorizes the Secretary to "perform any and all acts and to make such rules and regulations as may be necessary and proper." However, nothing within the authorizing language intimates that a subsequent regulation adopted years later, Part 417, empowers the Secretary to undo the Contract between IID and BuRec.

#### IV. Overall Conclusion

Part 417 is only consistent with the intended congressional role for the Secretary if it's used to determine whether or not there is a valid dispute regarding a Colorado River contractor's compliance with its contractual obligation to order water reasonably required for beneficial use. Part 417 is valid if limited solely to identify the Secretary's position on a contractor's

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348. *United States v. Coachella Valley County Water Dist.*, 111 F. Supp. 172, 180 (S.D.Cal. 1953).

349. See also *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); *Hi-Shear Tech. Corp. v. United States*, 55 Fed. Cl. 418, 421 (2003) ("[W]hen the United States enters contracts, its rights and duties are governed by the laws applicable to private parties.").

350. 111 F. Supp. at 180.



use of water. It is invalid to the extent that it attempts to substantively resolve disputes over beneficial, reasonable use.

Application of Part 417 to adjudicate IID reasonable beneficial use in 2003 was an unprecedented federal attempt to exert control over established state domain. If allowed to stand as a valid extension of federal authority, the ripple of an enlarged and aggressive federal posture in the dominion of reasonable, beneficial use will send a profound jolt to the core of western states' rights. States such as California have painstakingly balanced competing political interests through reasonable, beneficial use doctrine. This delicate balance should not be subject to the inconsistent whim of unfettered federal meddling under the Reclamation Act. This would upend a century of federal deference to state reasonable, beneficial use determinations. It would invariably upset the delicately woven balance between urban, agricultural, and environmental interests reliant on the Colorado River.

**APPENDIX: 43 C.F.R. Part 417**

Title 43— Public Lands: Interior  
Chapter I—Bureau of Reclamation Department of the Interior  
Part 417—Procedural Methods for Implementing Colorado River Water  
Conservation Measures with Lower Basin Contractors and Others

**§ 417.1 Scope of part.**

The procedures established in this part shall apply to every public or private organization (herein termed "Contractor") in Arizona, California, or Nevada which, pursuant to the Boulder Canyon Project Act or to provisions of other Reclamation Laws, has a valid contract for the delivery of Colorado River water, and to Federal establishments other than Indian Reservations enumerated in Article II(D) of the March 9, 1964, Decree of the Supreme Court of the United States in the case of "Arizona v. California et al.", 376 U.S. 340 (for purposes of this part each such Federal establishment is considered as a "Contractor"), except that (a) neither this part nor the term "Contractor" as used herein shall apply to any person or entity which has a contract for the delivery or use of Colorado River water made pursuant to the Warren Act of February 21, 1911 (36 Stat. 925) or the Miscellaneous Purposes Act of February 25, 1920 (41 Stat. 451), (b) Contractors and permittees for small quantities of water, as determined by the Regional Director, Bureau of Reclamation, Boulder City, Nev. (herein termed "Regional Director"), and Contractors for municipal and industrial water may be excluded from the application of these procedures at the discretion of the Regional Director, and (c) procedural methods for implementing Colorado River water conservation measures on Indian Reservations will be in accordance with § 417.5 of this part

**§ 417.2 Consultation with contractors.**

The Regional Director or his representative will, prior to the beginning of each calendar year, arrange for and conduct such consultations with each Contractor as the Regional Director may deem appropriate as to the making by the Regional Director of annual recommendations relating to water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water, and to the making by the Regional Director of annual determinations of each Contractor's estimated water requirements for the ensuing calendar year to the end that deliveries of Colorado River water to each Contractor will not exceed those reasonably required for beneficial use under the respective Boulder Canyon Project Act contract or other authorization for use of Colorado River water.

**§ 417.3 Notice of recommendations and determinations.**

Following consultation with each Contractor and after consideration of all relevant comments and suggestions advanced by the Contractors in such consultations, the Regional Director will formulate his recommendations and determinations relating to the matters specified in § 417.2. The recommendations and determinations shall, with respect to each Contractor, be based upon but not necessarily limited to such factors as the area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the condition of water carriage and distribution facilities, record of water orders, and rejections of ordered water, general operating practices, the operating efficiencies and methods of irrigation of the water users, amount and rate of return flows to the river, municipal water requirements and the pertinent provisions of the Contractor's Boulder Canyon Project Act water delivery contract. The Regional Director shall give each Contractor written notice by registered or certified mail, return receipt requested, of his recommendations and determinations. If the recommendations and determinations include a reduction in the amount of water to be delivered, as compared to the calendar year immediately preceding, the notice shall be delivered to the Contractor or timely sent by registered or certified mail, return receipt requested, so that it may reasonably be delivered at least 30 days prior to the first date water delivery would be affected thereby, and shall specify the basis for such reduction including any pertinent factual determinations. The recommendations and determinations of the Regional Director shall be final and conclusive unless, within 30 days of the date of receipt of the notice, the Contractor submits his written comments and objections to the Regional Director and requests further consultation. If, after such further consultation, timely taken, the Regional Director does not modify his recommendations and determinations and so advises the Contractor in writing, or if modifications are made but the Contractor still feels aggrieved thereby after notification in writing of such modified recommendations and determinations, the Contractor may, before 30 days after receipt of said notice, appeal to the Secretary of the Interior. During the pendency of such appeal, and until disposition thereof by the Secretary, the recommendations and determinations formulated by the Regional Director shall be of no force or effect. In the event delivery of water is scheduled prior to the new recommendations and determinations becoming final, said delivery shall be made according to the Contractor's currently proposed schedule or to the schedules approved for the previous calendar year, whichever is less.

**§ 417.4 Changed conditions, emergency, or hardship modifications.**

A Contractor may at any time apply in writing to the Regional Director for modification of recommendations or determinations deemed necessary because of changed conditions, emergency, or hardship. Upon receipt of such written application identifying the reason for such requested modification, the Regional Director shall arrange for consultation with the Contractor with the objective of making such modifications as he may deem appropriate under the then existing conditions. The Regional Director may initiate efforts for further consultation with any Contractor on his own motion with the objective of modifying previous recommendations and determinations, but in the event such modifications are made, the Contractor shall have the same opportunity to object and appeal as provided in § 417.3 of this part for the initial recommendations and determinations. The Regional Director shall afford the fullest practicable opportunity for consultation with a Contractor when acting under this section. Each modification under this section shall be transmitted to the Contractor by letter.

**§ 417.5 Duties of the Commissioner of Indian Affairs with respect to Indian reservations.**

(a) The Commissioner of Indian Affairs (herein termed "Commissioner") will engage in consultations with various tribes and other water users on the Indian Reservations listed in Article II (D) of said Supreme Court Decree, similar to those engaged in by the Regional Director with regard to Contractors as provided in § 417.2 of this part. After consideration of all comments and suggestions advanced by said tribes and other water users on said Indian Reservations concerning water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water, the Commissioner shall, within the limits prescribed in said decree, make a determination as to the estimated amount of water to be diverted for use on each Indian Reservation covered by the above decree. Said determination shall be made prior to the beginning of each calendar year. That determination shall be based upon, but not necessarily limited to, such factors as: The area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the condition of water carriage and distribution facilities, record of water orders, and rejections of ordered water, general operating practices, the operating efficiencies and methods of irrigation of the tribes and water users on each reservation, the amount and rate of return flows to the river, municipal water requirements, and other uses on the reservation. The Commissioner of Indian Affairs shall deliver to the Regional Director written notice of the amount of water to be diverted for use upon each Indian Reservation for

each year 60 days prior to the beginning of each calendar year and the basis for said determination. The determination of the Commissioner shall be final and conclusive unless within 30 days of the date of receipt of such notice the Regional Director submits his written comments and objections to the Commissioner of Indian Affairs and requests further consultation. If after such further consultation, timely taken, the Commissioner does not modify his determination and so advises the Regional Director in writing or if modifications are made by the Commissioner but the Regional Director still does not agree therewith, the Regional Director may, within 30 days after receipt of the Commissioner's response, appeal to the Secretary of the Interior for a decision on the matter. During the pendency of such appeal and until disposition thereof by the Secretary, water deliveries will be made to the extent legally and physically available according to the Commissioner's determination or according to the Commissioner's determination for the preceding calendar year, whichever is less.

(b) Modifications of said determinations due to changed conditions, emergency or hardship may be made by the Commissioner, subject, however, to the right of the Regional Director to appeal to the Secretary, as provided in the case of an initial determination by the Commissioner. During the pendency of such an appeal, water deliveries will be made on the basis of the initial determination.

**§ 417.6 General regulations.**

In addition to the recommendations and determinations formulated according to the procedures set out above, the right is reserved to issue regulations of general applicability to the topics dealt with herein.