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**UCLA Journal of Environmental Law and Policy**

**Title**

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**Journal**

UCLA Journal of Environmental Law and Policy, 11(1)

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**Publication Date**

1992

**DOI**

10.5070/L5111018800

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# Will Federal Environmental Regulation Be Permitted to Infringe on State Vested Water Rights?

*Kristen Dorrity\**

## I. INTRODUCTION

In 1978, the United States Supreme Court decided two landmark cases: *California v. United States*<sup>1</sup> and *Tennessee Valley Authority v. Hill*.<sup>2</sup> Other than being decided in the same year, these cases and the matters they resolved were completely unrelated. In *California*, the Court decided that because water rights are a matter of local concern, a state may impose any conditions on the control, appropriation, use, or distribution of water in a federal reclamation project which are not inconsistent with clear congressional directives concerning the project.<sup>3</sup> Meanwhile, the *TVA* holding interpreted the Endangered Species Act ("ESA"), ruling that the mandate of the Act to protect a listed species was not an option but an order that governs all federal projects and that "admits of no exception."<sup>4</sup>

It may not have been apparent in 1978 that these two far-reaching holdings would have to be reconciled in order to determine the status of California water rights.<sup>5</sup> The decisions do not actually conflict or even necessarily cause incongruous results. Nevertheless, the implications of these decisions foreshadow a possible

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\* J.D. expected 1993, UCLA School of Law; B.A. 1989, Swarthmore College. I would like to thank Michael Sherwood, Staff Attorney at Sierra Club Legal Defense Fund in San Francisco, for his insight into the Endangered Species Act and the related water rights problem.

1. 438 U.S. 645 (1978)

2. 437 U.S. 153 (1978)

3. 438 U.S. 645.

4. 437 U.S. at 173.

5. A contrast between the two holdings is that while *California* simply reaffirmed and strengthened the historically recognized rule that water rights should be governed by local law, *TVA* broke new ground by finding that the ESA signaled a new priority of the federal government in species protection.

change in the historical recognition that state law dominates in the domain of water rights.

Specifically, through the construction of federal reclamation projects in California, the federal government has contributed to the creation of state water rights for irrigators who use project water. More recently, the federal Endangered Species Act has compelled the federal agency in charge of the reclamation projects to make species protection a priority.<sup>6</sup> By forcing the federal government to cut back on its reclamation water deliveries in order to protect a listed species, the Endangered Species Act in effect threatens the sanctity of state-vested water rights. In view of the conditional nature of these rights under state law plus the implicit move in federal priorities toward environmental concerns, it is not yet settled whether federal infringement on these rights will necessarily constitute a taking for which compensation is required.

## II.

### CALIFORNIA WATER LAW

#### *Background*

California is distinctive in its recognition of both riparian and appropriative water rights, thereby creating a hybrid system.<sup>7</sup> In general, riparian rights holders have the most senior water rights<sup>8</sup> and earlier appropriators have more senior rights than later appropriators. The physical layout of the state, with its vast expanses of arid desert and relatively few sources of water, has encouraged the construction of many private, state, and federal water projects. These projects divert waters from the huge Sacramento and San Joaquin Rivers to the drier parts of the state. As a result, the most common water right in California is appropriative.<sup>9</sup>

In order for any water right to vest in California, it must be

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6. 16 U.S.C. §§ 1531-1544 (1988 & Supp. III 1991).

7. 1 WATERS AND WATER RIGHTS 350-51, 382 (Robert E. Beck ed. 1991). While several other Western states recognize already vested riparian rights along with appropriative rights, California is the only state which still allows the acquisition of future riparian rights. 2 *id.* at 79.

8. One caveat to the "automatic" seniority of riparians is that riparians' rights vest when they acquire title to the land, and therefore a prior appropriator could claim a more senior right. Ronald B. Robie, *The Delta Decisions: The Quiet Revolution in California Water Rights*, 19 PAC. L.J. 1111, 1114 (1988); see also *Irwin v. Phillips*, 5 Cal. 140 (1855).

9. The doctrine of prior appropriation began as custom among the mining communities which inundated California in the second half of the 19th century. 1 WATERS AND WATER RIGHTS, *supra* note 7, at 348-49, 351-56. Since 1914, the exclusive means of obtaining an appropriative right has been through a permit system administered by the

linked to both the "beneficial" and "reasonable" use of the water.<sup>10</sup> Historically, beneficial use required that the water be put to use rather than permitted to "run to waste," that the end use is generally accepted as useful, and that the water is not misused or used in an inefficient manner.<sup>11</sup> Whether a use is reasonable, on the other hand, requires a balancing of the use in question with other possible uses.<sup>12</sup> While the "beneficial" requirement was always a recognized prerequisite to a vested water right, the "reasonable" component was not a formal requirement until the state legislature amended the state constitution in 1928 to require explicitly that the use be reasonable as well as beneficial.<sup>13</sup> The 1928 amendment established two principles: (1) a determination of reasonableness depends on the facts of the particular case; and, more importantly, (2) what is reasonable may change over time.<sup>14</sup>

These principles are important in assessing the nature of a vested water right under California law. The California water right is a form of "property" in that the right is a thing of value which provides economic benefit to the holder of the right.<sup>15</sup> An important distinction from the typical property right, however, is that the water right holder does not have a possessory interest in the water itself, but rather a vested interest in the beneficial and reasonable use of the water, thereby making the right a "usufructuary" right.<sup>16</sup> In *United States v. State Water Resources Control Board*, the California Court of Appeal explained that because the rule of reasonable and beneficial use is a cardinal principle of California water rights law, "no water rights are inviolable; all . . . are subject to governmental regulation."<sup>17</sup> In effect, the highly regulated nature of the

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State Water Resources Control Board and codified in CAL. WATER CODE §§ 1200-1851 (West 1971 & Supp. 1993). Robie, *supra* note 8, at 1115.

10. 1 WATERS AND WATER RIGHTS, *supra* note 7 at 382-83.

11. 2 *id.* at 107.

12. William R. Attwater & James Markle, *Overview of California Water Rights and Water Quality Law*, 19 PAC. L.J. 957, 979 (1988).

13. The amendment was a legislative reaction to a California Supreme Court decision in *Herminghaus v. Southern Cal. Edison Co.*, 252 P. 607 (Cal. 1926), *cert. dismissed*, 275 U.S. 486 (1927), that a riparian owner's beneficial use of water automatically outweighed an appropriator's use, with no consideration of whether the riparian's use was reasonable in the circumstances presented.

14. Attwater & Markle, *supra* note 12, at 979.

15. Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context*, 29 NAT. RESOURCES J. 585, 590 (1989) (citing *Palmer v. Railroad Comm'n*, 138 P. 997 (Cal. 1914)).

16. See *United States v. State Water Resources Control Bd.*, 227 Cal. Rptr. 161 (Ct. App. 1986).

17. *Id.* at 171.

state law creates a system which makes water rights conditional, in that the rights holders cannot reasonably expect that their rights will never change with respect to water use.<sup>18</sup>

### *The Central Valley Project*

Just as state law has the power to make water rights conditional, state law also dominates federal water projects, one of which is the Central Valley Project (CVP). Initiated by the State of California, the CVP was taken over by the federal government as an irrigation project in 1935 pursuant to the Reclamation Act of 1902 (1902 Act).<sup>19</sup> In compliance with state appropriation laws, the Bureau of Reclamation (Bureau) — which the federal government charged to carry out the CVP — would apply to the California State Water Resources Control Board (State Board) for permits necessary to divert sufficient water for each dam constructed. The Bureau would then form contracts with irrigators (either individual farmers, or more often, irrigation districts), guaranteeing delivery of a certain amount of water in exchange for money from the contractors to repay the costs of building and operating the dam.<sup>20</sup> As for the respective interests of the parties, the Bureau owns the project facilities and retains authority to ensure project repayment, while the irrigators who contract with the Bureau have vested state rights to the water.<sup>21</sup> Still, the Supreme Court reasoned early on that the fact that the Bureau holds formal title to both the facilities and the state permits underlies the notion that the contractor's water right

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18. *Id.*

19. 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371-600e (1988)).

20. The 1902 Act was premised on the assumption that the reclamation projects would pay for themselves through the payment schemes in the contracts. But since the costs of irrigating turned out to be much higher than originally anticipated, payment periods were extended and Congress began appropriating money to subsidize the irrigators. E. PHILLIP LEVEEN & LAURA B. KING, TURNING OFF THE TAP ON FEDERAL WATER SUBSIDIES, VOLUME I: THE CENTRAL VALLEY PROJECT: THE \$3.5 BILLION GIVEAWAY 46 (1985). Today the CVP alone is subsidized at \$3.5 billion. *Id.*

21. As a technical matter, it is the Bureau and not the contractor that has obtained state appropriative rights via the permit system. Arguably, then, the irrigators do not have vested rights of their own but only contract rights to the water — which are presumably “weaker” than even usufructuary rights. However, the Supreme Court explained in 1937 that while the Bureau constructed the irrigation systems for the purpose of storing and distributing the water, the water rights vested in the contractors for whose use the water was intended. *Ickes v. Fox*, 300 U.S. 82, 93 (1937) (citing § 8 of the 1902 Act). This comports with the definition of water rights as “appurtenant to the land irrigated,” since the land irrigated belongs to the contractors. *Id.* at 95; *accord* *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), *modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983) (United States has only a lienholder's interest to secure repayment of the project construction costs).

is usufructuary.<sup>22</sup> Because it holds title, the Bureau does "not give up all control over the water or . . . do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land."<sup>23</sup>

While the CVP is a federal project which is therefore governed by federal law, the resolution of the water rights held by project contractors is a matter of California law, since section 8 of the 1902 Act calls for complete deference to state law on issues of water rights.<sup>24</sup>

*Deference to State Water Law as Explained in California v. United States*

In *California v. United States*,<sup>25</sup> the United States Supreme Court interpreted section 8 of the 1902 Act. While the Bureau had consistently complied with the state's permit requirement, in *California* the Bureau challenged the state's authority to subject the permits to some twenty-five conditions, one of which prohibited full impoundment until the Bureau submitted a plan to the Board for use of the water.<sup>26</sup> The Bureau sought declaratory judgment that it could appropriate any unappropriated state waters without complying with state law. The Supreme Court disagreed, saying that the state conditions were valid as long as they were not inconsistent with the clear congressional directives engendered in the 1902 Act.<sup>27</sup>

Ruling specifically on the possible conflict between state law and the 1902 Act, the Court insisted that state law would prevail except where Congress explicitly provided otherwise within the reclamation laws. But while it determined within the facts of the case that the state's conditions had not been undermined by the 1902 Act, the Court still left room for instances where federal law would preempt state water law. In fact, it declined to overrule the prior line of Supreme Court cases which found preemption where the federal law at issue was contained within one of the federal reclamation statutes.<sup>28</sup> The *California* rule was therefore that federal law can

22. *Ide v. United States*, 263 U.S. 497 (1924).

23. *Id.* at 506.

24. Section 8 of the 1902 Act says in relevant part:

[N]othing 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 . . .

25. 438 U.S. 645 (1978).

26. *Id.* at 652.

27. *Id.* at 647.

28. In *Ivanhoe Irrig. Dist. v. McCracken*, the Court considered whether § 5 of the

preempt state water law only where Congress clearly intended to do so within the reclamation laws themselves. Despite such a narrow holding, however, the nature of water rights themselves, in addition to a pronounced shift in congressional priorities, hints that the federal government might seek to increase its authority in the domain of state water law.

### *Limitations on Water Rights*

That water rights are not absolute is evident from the fact that even real property rights can be infringed by the government. The power of eminent domain is founded in both the federal and state constitutions, and authorizes the government to take private property for public use as long as just compensation is paid for what is taken.<sup>29</sup> Other than the compensation requirement, there is apparently no limitation on the government's power to "reassert . . . its dominion over any portion of the soil of the state on account of public exigency and for the public good."<sup>30</sup> Moreover, when the government exercises its police power to benefit the health and safety of the public, it usually need not even compensate for the loss to the individual property owner.<sup>31</sup>

Because water rights are based on use and not just possession, there is an implication that they are somehow less inviolable than typical property rights. For example, there is the automatic limitation which requires an applicant to put the water to an acceptable use by an actual diversion rather than leaving it instream.<sup>32</sup> By con-

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1902 Act, which imposed a 160-acre limitation on irrigation water deliveries, preempted California law forbidding such a limitation. 357 U.S. 275 (1958). The Court held that the federal provision, which was part of the 1902 Act itself, preempted the state law to the contrary. *Id.* at 291-92. In *City of Fresno v. California*, the Court similarly decided that § 9(c) of the Reclamation Project Act of 1939, which required that the Secretary prefer irrigation use over municipal and domestic use, was not outweighed by the § 8 deference to state water law. 372 U.S. 627, 630-31 (1963).

29. See U.S. CONST. amend. V; CAL. CONST. art. I, § 19.

30. BLACK'S LAW DICTIONARY 523 (6th ed. 1990). See *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 747 F. Supp. 401, 405 (N.D. Ohio 1990) (Just compensation is a remedial measure and does not abridge the absolute right of the government to take private property for public use.)

31. See, e.g., *Wright v. United States*, 14 Cl. Ct. 819, 824 (1988) ("Where public interest is involved, preferment of that interest over the property interest of the individual, even to the extent of its destruction, is not unconstitutional.")

32. *California Trout, Inc. v. State Bd.*, 153 Cal. Rptr. 672 (Ct. App. 1979) (valid appropriation requires three things: (1) intent to apply to a beneficial use, (2) actual diversion of the water (as opposed to "instream use"), and (3) application to a beneficial use). Compare riparian rights, which vest in the owners of land within a watershed which touches a watercourse, and cannot be lost through disuse. 4 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW: REAL PROPERTY § 768 (9th ed. 1987).

trast, limits on real property rights prohibit uses which create a nuisance or a public harm, rather than prohibiting nonuse of the property.

The limited nature of water rights is further illustrated by California's legislative treatment of these rights, in that the state's power to restrict water rights has increased over the past 100 years. Correspondingly, the courts have found it less and less reasonable for water right holders to expect that their interest in water is inviolable. When California water law was first formulated in the second half of the 19th century, it was based on certain hard and fast rules: (1) riparians' water rights vested when they received title to the land and were automatically senior to subsequent appropriators,<sup>33</sup> (2) the rights of prior appropriators were always senior to later appropriators ("first in time, first in right"),<sup>34</sup> and (3) in times of shortage, the most junior appropriator would lose all of his or her interest in the water before the next junior appropriator lost any interest.<sup>35</sup> The only limitation to water rights was that the use of water be beneficial, and the test for beneficial use was, and still is, broad.

The California Legislature first chipped away at the strength of water rights in 1928 when it formally required that water use be "reasonable."<sup>36</sup> This standard is more difficult to satisfy than a "beneficial use" standard because it is based upon the balancing of competing needs for water.<sup>37</sup> The riparian right was no longer supreme over other water rights, and prior appropriators were no longer guaranteed that their rights were stronger than those of later appropriators.

Because water rights had originally been deemed as sacred as real property rights in the 1800s, even the relatively mild "reasonableness" requirement of the 1928 constitutional amendment came under attack as a government taking requiring due process and just compensation. But the California Supreme Court put the issue to rest in *Gin S. Chow v. City of Santa Barbara*, finding the restriction to be a valid exercise of state police power and thus not a compensa-

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33. 1 WATERS AND WATER RIGHTS, *supra* note 7, at 406-07; *see also* *Herminghaus v. Southern Cal. Edison Co.*, 252 P. 607 (Cal. 1926), *cert. dismissed*, 275 U.S. 486 (1927).

34. 1 WATERS AND WATER RIGHTS, *supra* note 7, at 354-55.

35. *Robie*, *supra* note 8, at 1114.

36. *See supra* notes 13-14 and accompanying text.

37. Alf W. Brandt, *Note*, *United States v. State Water Resources Control Board: A Comprehensive Approach to Water Policy in California*, 14 *ECOLOGY L.Q.* 713, 714 (1987). *See* *Joslin v. Marine Mun. Water Dist.*, 429 P.2d 889, 897 (Cal. 1967).



ble taking.<sup>38</sup> This finding was reiterated in *Joslin v. Marine Municipal Water District*,<sup>39</sup> holding that where a riparian owner had benefitted from sand and gravel deposited on his land by the stream, when later upstream appropriations curtailed the deposits by decreasing the flow, the riparian was not entitled to compensation since his use was not reasonable.<sup>40</sup> The trial court granted summary judgment against plaintiff even though plaintiff had operated a business on the land by selling the deposits and claimed that the value of his land had been decreased by \$ 250,000.<sup>41</sup> In fact, today even a riparian owner must apply to the Board before exercising the water right so that the Board may evaluate the proposed use and determine whether it should be permitted in view of the state's interest in promoting the most efficient and beneficial uses<sup>42</sup> — a complete about-face from the 1926 *Herminghaus* ruling.<sup>43</sup>

As the California courts have deemed more and more uses unreasonable, they have increasingly maintained that no right is actually taken away and that therefore no compensation is necessary. Because a water rights holder has a vested right only to *reasonable* use of the water, any use that the Board does not consider reasonable is not a right at all.<sup>44</sup>

At least one commentator points out, however, that even after 1928, courts were at first reluctant to alter traditional water rights.<sup>45</sup> But this changed dramatically in the 1960s when water *quality* became a state priority. Prior to 1967, water rights and water quality determinations were made by two separate agencies. In a purposeful attempt to ensure that both water rights and water quality were administered together, however, the two agencies were merged into the State Water Resources Control Board.<sup>46</sup> Two years later, the state enacted the Porter-Cologne Water Quality Control Act of 1969,<sup>47</sup> which gave the state new regulatory authority to protect, among other things, "aesthetic enjoyment" and

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38. 22 P.2d 889 (Cal. 1933).

39. 429 P.2d 889 (Cal. 1967).

40. *Id.* at 895.

41. *Id.* at 900.

42. *In re Water of Hallet Creek Stream Sys.*, 749 P.2d 324, 337 (Cal.), *cert. denied*, 488 U.S. 824 (1988).

43. *See supra* note 13.

44. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 275 Cal. Rptr. 250 (Ct. App. 1990).

45. Harrison C. Dunning, *State Equitable Apportionment of Western Water Resources*, 66 NEB. L. REV. 76, 80-81 (1987).

46. Robie, *supra* note 8, at 1111.

47. 1969 Cal. Stat. ch. 482, division 7.

“preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.”<sup>48</sup> These legislative changes have allowed the State Board to impose quality standards without regard to priority of appropriation.<sup>49</sup> Also, the old rule that junior appropriators lose all their water interests before senior appropriators lose any has been replaced by a rule of “equitable apportionment” of water resources. Now all rights holders are potentially subject to lose all or some of their rights when there is not enough water to meet all appropriation needs and to maintain water quality.<sup>50</sup>

With the clear legislative priority in water quality, California courts were no longer reluctant to infringe on traditional state rights. The California Court of Appeal in *United States v. State Board* held that in assessing water quality in conjunction with water rights, the State Board could not limit its consideration of water quality to what the federal and state projects were capable of attaining; rather, the Board was first obligated to first determine its water quality objectives irrespective of the water rights held under the projects. Further, in light of new findings regarding a use’s adverse effect on water quality, the Board can declare a previously “reasonable” use to be unreasonable.<sup>51</sup>

While the state’s power to take away these rights, as with any property rights, through the power of eminent domain is undoubted,<sup>52</sup> the *United States v. State Board* court, as well as prior and subsequent authority, has gone even further. The infringement on water rights through redefining reasonable uses is a valid exercise of state police power and is thus not considered compensable taking.<sup>53</sup> The California courts have premised this rule on the understanding that all property is held subject to the police power of the state.<sup>54</sup> Still, the difference between police power and the exercise of eminent domain is a matter of degree, and at some point state regulation goes beyond the point of reasonableness and be-

48. Robie, *supra* note 8, at 1118 (citing CAL. WATER CODE § 13050(f) (West 1971) (current version at § 13050(f) (West Supp. 1993)).

49. See *United States v. State Water Resources Control Bd.*, 227 Cal. Rptr. 161 (Ct. App. 1986) (Board can alter “first in time, first in right” rule by imposing permit conditions which give a higher priority to a more preferred beneficial use, even though later in time).

50. See Dunning, *supra* note 45, at 107-08.

51. The Board is authorized in Water Code section 1394 to reserve jurisdiction to alter the terms and conditions of the permit. CAL. WATER CODE § 1394 (West Supp. 1993); see also *United States v. State Board*, 227 Cal. Rptr. at 187-88.

52. Walston, *supra* note 15, at 590.

53. 227 Cal. Rptr. 161.

54. *Id.* at 183.

comes a compensable taking.<sup>55</sup> Nevertheless, although the state regulations of water quality in *United States v. State Board* "substantially" impaired vested rights, that court found no compensable taking.<sup>56</sup>

California Water Code section 102 describes water within the state as the property of the people of the state, and the right to use the water can be acquired as provided by law—meaning pursuant to the appropriations permit system.<sup>57</sup> In general, the Board must reject an application when the proposed appropriation would not best serve the public interest.<sup>58</sup> Other sections of the Code specify which public interests the Board must consider when it acts on appropriations applications. While the highest use of water in California is domestic, followed by irrigation,<sup>59</sup> the Board shall consider a whole range of beneficial uses when assessing the relative benefit to be derived from, among other things, the preservation and enhancement of fish and wildlife, as well as uses called for in state water quality control plans.<sup>60</sup> The Code now formally defines instream uses as potentially beneficial, and requires the Board to consider such uses when it is in the public interest to do so.<sup>61</sup>

Related to the state's codified police power is the state's implicit power over property subject to a "public trust." The Public Trust Doctrine exists independently of the Water Code provisions, enabling the state to review the appropriative use of water. Developed as a real property concept, the Doctrine allows the government to regulate the use of public property resources so as "to protect public rights against exclusive private ownership."<sup>62</sup> Applied to water resources, the Public Trust Doctrine not only authorizes, but compels, the state to take public trust uses into account in making allocations.<sup>63</sup>

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55. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

56. 227 Cal. Rptr. at 200.

57. CAL. WATER CODE § 102 (West 1971).

58. *Id.* § 1255. The Board, however, determines what is in the public interest.

59. *Id.* § 1254.

60. *Id.* § 1257.

61. But while consideration of instream uses is purportedly to protect the "public" interest, individual members of the public are barred from acquiring an appropriation permit for the purpose of leaving the water instream. The reason seems to lie in one of the traditional requirements of appropriation, i.e., that there be an actual diversion from the water course. See *supra* note 16 and accompanying text.

62. Arthur L. Littleworth, *The Public Trust vs. the Public Interest*, 19 PAC. L.J. 1201, 1203 (1988).

63. Littleworth criticized the *National Audubon* holding discussed *infra* text accompanying note 64, arguing that public trust law, while a viable real property concept, is

The Public Trust Doctrine was invoked in *National Audubon Society v. Superior Court* to force a reconsideration of water rights which had vested prior to the State Board's authority to reserve jurisdiction to review the rights granted in the permits.<sup>64</sup> While the Doctrine had existed prior to 1983 as a real property concept affecting ownership of tidelands and other shoreline lands, the *National Audubon* court was the first to recognize its potential application to preclude the use of stream flows for water supply purposes.<sup>65</sup> Still, that court refused to term the public trust a "priority" in water resource allocation, but rather acknowledged that such interests must be considered by the state in balancing economic versus environmental needs.<sup>66</sup>

The foregoing limitations on water rights indicate that when California water rights are restricted by either the constitutional requirement of reasonableness, the state police power to enact regulations to preserve water quality, or the state's invocation of the Public Trust Doctrine, the state is immune from the challenge that the restrictions are compensable takings under state law.<sup>67</sup> Arguably the state infringement can be challenged under the Takings Clause of the United States Constitution, which is applicable to the states under the 14th Amendment.<sup>68</sup> For example, in *Pennsylvania Coal Co. v. Mahon*, which involved state regulation of *land use*, the Supreme Court found that, notwithstanding the state's police power reasonably to regulate property use, the state is liable to compensate for an unconstitutional taking of property when the regulations become unreasonable.<sup>69</sup> However, such a challenge in the water rights context is problematic. Although state law defines property rights generally, water rights have been classified specifically as a form of property subject to continuing regulation. As a result, the water right holder has a vested right only to uses permitted by evolving state conditions.<sup>70</sup> Therefore it is unlikely that the Court would find state regulation of water rights to be an unconstitutional taking even where it would find a taking if the property involved

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peculiarly ill-suited in application to California water law. Littleworth, *supra* note 62, at 1202.

64. 658 P.2d 709 (Cal. 1983).

65. Littleworth, *supra* note 62, at 1201.

66. 658 P.2d 709.

67. Walston, *supra* note 15, at 590-91.

68. *Id.* at 591.

69. 260 U.S. 393 (1922).

70. Walston, *supra* note 15, at 591 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 293 (1922)).

were real property.<sup>71</sup>

### III.

#### THE ENDANGERED SPECIES ACT AS INTERPRETED BY *TVA V. HILL*

While the state's "uniquely sovereign" interests in water could conceivably allow unbridled state regulation of water rights without effecting a taking, different issues arise where *federal* regulations result in similar restrictions of water rights. When a federal environmental statute such as the Endangered Species Act impinges on such rights, it is not even clear, as a threshold issue, whether the federal government intended to take vested water rights, under either its eminent domain or police powers. The ESA is not in direct conflict with state water law, making it ambiguous whether Congress intended to override state law in this area. Under traditional analysis, the future infringement on water rights which the ESA is likely to cause would probably be recognized as a regulatory taking. However, if the ESA portends a change in national priorities, then perhaps the federal government is assuming the more traditional state role in water law, and correspondingly should be afforded greater authority to condition and restrict water rights without having to compensate. Such a result is especially appropriate in the realm of environmental law, since federal environmental statutes typically require that state regulations in the same area be at least as stringent as the federal standards. Indeed, the ESA clearly requires that the federal standards therein preempt any weaker state standards.<sup>72</sup>

Although the ESA itself addresses the state water law only cursorily,<sup>73</sup> it provides clear directives from Congress to all federal agen-

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71. *Id.* at 591-92. "Because of the states' uniquely sovereign interests in water, the water rights holder would bear an especially heavy burden in establishing that he has a reasonable expectation that the state will not modify his right as necessary to accommodate important social uses. Therefore, the state action would carry a strong presumption of correctness, even assuming that the state action can be constitutionally challenged." *Id.* at 592.

72. Section 6(f)(2) stipulates that any state regulation of a listed species "may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined." 16 U.S.C. § 1535(f)(2) (1988).

73. Section 2(c)(2) of the ESA states ambiguously: "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." *Id.* § 1531(c)(2). Some might argue that this provision, like § 8 of the 1902 Act, accords deference to state law, but it certainly does not contain quite the deferential language § 8 does. *See supra* note 24.

cies for the protection of any species listed as either endangered or threatened under the Act.<sup>74</sup> The strength of the ESA directives was emphasized in *Tennessee Valley Authority v. Hill*, where environmental groups sued to enjoin the Tennessee Valley Authority from completing a dam that would eradicate the remaining population of the snail darter, an endangered species of fish.<sup>75</sup> Even though the dam was nearly completed and had cost some \$50 million dollars in public funds, the Supreme Court held that the ESA's mandate that "[f]ederal agencies shall seek to conserve endangered species and threatened species,"<sup>76</sup> was sufficiently strong to require the Tennessee Valley Authority to abandon work on the dam.<sup>77</sup>

While a more recent Ninth Circuit case has claimed that the liberal *TVA v. Hill* interpretation of the ESA was too strong, this finding has no basis in the statutory language. In *Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy*, the Ninth Circuit found that the Navy was wrong in its interpretation that it must comply with ESA only so far as compliance would not interfere with the Navy's "primary mission."<sup>78</sup> The court cited *TVA v. Hill* to reject the Navy's claim, but it also rejected plaintiffs' claim that congressional policy in the ESA is that listed species must be conserved at all costs.<sup>79</sup> Instead, the court interpreted the modifications made in the statute after *TVA v. Hill* as an indication by Congress that the *TVA v. Hill* interpretation of the ESA mandate was too strong.<sup>80</sup> However, this interpretation is not supported by the statute's language. The changes in the statute to which the court referred were a list of exemptions in section 7 of the ESA, which shall be decided on a case by case basis.<sup>81</sup> These exemptions do not detract from the language of sections 7(a) and (b), which the Supreme Court interpreted in *TVA v. Hill* as evidencing an affirmative duty to conserve.<sup>82</sup>

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74. Section 7 requires agencies to conduct programs to conserve listed species, as well as ensure that agency action is not likely to jeopardize the continued existence of any such species or destroy or adversely modify any designated critical habitat. 16 U.S.C. § 1536(a)(1)-(2) (1988). Section 7(a)(2) further imposes a procedural duty to consult with the National Marine Fisheries Service or the United States Fish and Wildlife Service. Section 9 prohibits any person from "taking" any endangered species. *Id.* § 1538(a)(1).

75. 437 U.S. 153 (1978).

76. *Id.* at 180, quoting 16 U.S.C. § 1531(c)(1) (1988) (emphasis added by the court).

77. *Id.*

78. 898 F.2d 1410, 1417 (9th Cir. 1990).

79. *Id.* at 1418.

80. *Id.*

81. 16 U.S.C. § 1536(e)-(h) (1988).

82. In *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257 (9th Cir.),

## IV.

NEW CONGRESSIONAL OBJECTIVES EMPHASIZED IN *TVA*

To the extent that enactment of the ESA "indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities,"<sup>83</sup> the statute evidences a shift in congressional objectives from an interest primarily in irrigating and populating the Western states in the first half of the century to protecting ecosystems nationwide by preventing the extinction of the species which comprise them.<sup>84</sup> This new set of congressional directives now must be considered when federal law threatens state vested rights.

The ESA has a potential impact on water rights because its mandate is binding on federal agencies. Thus, the Bureau, which runs the CVP and has given the irrigators water rights through its contracts, now has a compelling interest in species protection. This very conflict arose in California in early 1992 within the context of efforts to preserve the threatened winter-run chinook salmon. This species was threatened with extinction because the extensive appropriations from the Sacramento River under the CVP substantially decreased the river flow and thereby raised the temperature of the water. At temperatures above fifty-six degrees Fahrenheit, salmon cannot reproduce sufficiently to maintain their population. The appropriations have resulted in constant temperatures several degrees above this cutoff, decreasing the species's likelihood of survival. Saving the salmon would require substantially decreasing diversions from the river, allowing more water to flow out to sea. To comply with the ESA, then, the Bureau is arguably compelled to decrease supplies to the irrigators, thereby defaulting on the contracts and, more importantly, eradicating some or all of the water rights cur-

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*cert. denied*, 470 U.S. 1083 (1984), the Ninth Circuit, not necessarily espousing the stringent mandate of *TVA v. Hill*, did affirm the lower court's holding that the Secretary of the Interior could give endangered species priority over all other uses until fish recovery was achieved. The court rejected the claims of the water conservancy district, power company and state, that the Secretary was permitted to save only that water necessary for the bare survival of the fish, and was otherwise obligated to make the remaining water available to plaintiffs, who had water contracts with the Bureau. *Carsen-Truckee*, 741 F.2d at 262.

83. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

84. This very shift is what caused the conflict at issue. In its zeal to irrigate the arid west in the first half of the century, Congress made water available to irrigators who bought land and engaged in agriculture dependent on the project waters. The largest federal project in California is the Central Valley Project. Now that Congress has recognized the harm occurring to marine species as a result of the once generous diversions, it must limit or take away the rights it provided to those contractors.

rently held by the irrigators.<sup>85</sup>

The federal government has the constitutional authority to preempt state water law where it clearly expresses the intent to do so,<sup>86</sup> notwithstanding the recognized state reign over water law. Moreover, the federal power to take property rights through eminent domain proceedings is seemingly limitless as long as it compensates for the loss.<sup>87</sup> The problem with using the ESA as evidence of federal intent is that this statute does not clearly express any intent respecting water rights. While section 2(c)(2) of the ESA<sup>88</sup> perhaps implies that the federal government should defer to state law, that provision "does not require . . . that state water rights should prevail over the restrictions set forth in the [Endangered Species] Act. Such an interpretation would render the Act a nullity."<sup>89</sup>

Where the ESA does result in impairment of water rights of CVP irrigators, the irrigators will likely bring inverse condemnation actions seeking compensation from the federal government.<sup>90</sup> Generally when a federal regulation results in a taking, authority is split on whether federal or state law should apply to gauge the amount of compensation owed. However, in the water rights context, deference to state law for this determination is particularly appropriate. The *California* case provides a straightforward analysis: the deference of section 8 of the 1902 Act to state law does not override the federal government's eminent domain power; however, this provi-

85. Throughout recent efforts to compel the Bureau to maintain sufficient river flow to save the salmon, the Bureau has consistently maintained that it could not impair the contractors' water rights. The Bureau seems to have taken a traditional stance on the issue: regardless of the ESA, the Bureau is charged with running the CVP and fulfilling its obligations to the irrigators first.

86. Sandra Dunn, *Cooperative Federalism in the Acquisition of Water Rights: A Federal Practitioner's Point of View*, 19 PAC. L.J. 1323, 1326 (1988). According to the Supremacy Clause of the United States Constitution, when federal and state law conflict, federal law governs. U.S. CONST. art. VI.

87. *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 747 F. Supp. 401 (N.D. Ohio 1990); accord *Schertel v. Rex*, 764 F. Supp. 1002 (E.D. Pa. 1991).

88. See *supra* note 73.

89. *United States v. Glenn-Colusa Irrig. Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992).

90. Though the case of *Christy v. Hodel* is distinguishable, in it the ESA withstood challenge as a federal regulatory taking. 857 F.2d 1324, 1334 (9th Cir. 1988). The statute listed grizzly bears as endangered. Grizzly bears had killed several of plaintiff's sheep, and when plaintiff killed a bear which was approaching his herd, plaintiff was assessed a \$3,000 penalty for violating the ESA. Plaintiff sued for, among other things, a government taking of his property without just compensation. Summary judgment was entered against plaintiff, finding no taking since plaintiff retained full possession of his bundle of property rights to the sheep and, further, the federal government cannot be answerable for the conduct of wild animals it protects.



sion does require that the federal government look to state law to define the water right, and thus determine the amount of money to compensate.<sup>91</sup>

## V.

### IMPLICATIONS OF THE NEW CONGRESSIONAL OBJECTIVES FOR THE FUTURE OF STATE VESTED WATER RIGHTS

Still, the question remains whether the ESA results in a taking which must be compensated by the federal government. After all, the state's broad power to regulate and severely to restrict water rights implies that these rights are not as inviolable as real property rights. Also, to the extent that the ESA reflects a new national priority in environmental protection, water interests might correspondingly become a matter of national concern. As already mentioned, the ESA's requirement that state environmental laws meet the federal government's level of stringency strongly indicates that the federal government seeks to dominate this area of the law.

The traditional reason for recognizing local authority over water law was that the needs of each region were different. However, today the federal government might maintain that inappropriately regulated water use poses a threat to the ecosystem of the entire nation, such that a comprehensive national plan will better serve national interests. Maybe, then, our whole concept of water rights must change to accommodate our changing world.<sup>92</sup>

Also, requiring the federal government to compensate in certain cases could cause an arguably incongruous result. If the state enacted an Endangered Species Act that was identical to the federal act, where water rights were affected the rights holder could seek compensation from the federal government but not from the state. So in cases where the state act predated the federal act, state water rights holders would lose their interest without compensation, but if the federal act came first, the rights holders would be entitled to compensation.

Despite these contentions, however, the better resolution of this issue would be to require the federal government to compensate for

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91. *California v. United States*, 438 U.S. 645 (1978); *see also* 1902 Act, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371-600e (1988)).

92. *See Sierra Club v. Marsh*, 692 F. Supp. 1210 (S.D. Cal. 1988) (holding that the ESA delineated a congressionally declared program of national scope, and that California cannot use its permit-issuing authority under the California Coastal Act to circumvent the mandates of the federal statute).

its regulatory taking of state vested water rights.<sup>93</sup> While legal tradition alone is not necessarily the best basis upon which to decide an issue, here the development of the rights has always been purely a state matter. It is true that government concerns — both national and local — have changed dramatically since laws in this area were first formulated. But although the federal government is the ultimate governmental power, for it to infringe on these rights under the guise of reasonable regulation would undermine the purpose of the Takings Clause and of the Constitution generally: to preserve an individual's property rights and ensure that they cannot be taken away without just compensation.

Because water rights are not only defined by state law, but are subject to continual regulation and modification by the state, it is not necessarily incongruous that the federal government would have to pay when the state would not. These rights do not exist except as defined by state law, and the federal government has imparted to the states complete control over water law.

Moreover, allowing federal infringement on these rights without compensation would raise a more complex conflict of laws question which would make that solution insensible. Even if a federal statute such as the ESA were considered a reasonable exercise of the police power, and therefore not a taking, presumably there would be other regulations that would require compensation because their restriction of water rights was not reasonable. Since water law has been governed exclusively by the states, the federal regulation of water rights would have to be judged according to what would be a reasonable restriction for the state to apply.<sup>94</sup> But the reason such state restrictions are permissible is precisely because state regulation of water law is so firmly entrenched. Where the federal government and not the state promulgates the regulation, whether that regulation would be permissible under state police power is inapposite to the determination of whether the same regulation is a compensable taking by the federal government. There would be no consistent standard by which to measure the reasonableness of the regulation.

Therefore, in the final analysis, the recent wave of federal environmental regulation, which is sure to infringe on water rights

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93. Although the cases which interpreted § 8 prior to *California* did not find that the provision called for deference to state law, they did read it as requiring the United States to pay just compensation for nonfederal water rights taken as the result of a federal project. See cases cited *supra* note 28.

94. If it were judged under a newly developed federal standard, then this same standard would be applied to many distinctive water law systems, since the different regions of the country have vastly different water needs.

throughout the country, must inevitably require the federal government to compensate for the taking of these state-vested rights.