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FEDERALISM AND WATER: THE CALIFORNIA EXPERIENCE

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FEDERALISM AND WATER: THE CALIFORNIA EXPERIENCE

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I. INTRODUCTION

The struggle between California's water plentiful north and the water deficient south has marked water conflict in the state for the last century.[2] This struggle has played out in repeated disputes over the operation of the federal Central Valley Project ("CVP") and the California State Water Project ("SWP"), the two inter-basin water conveyance facilities that deliver water through-out the state. Commencing in the 1920's and 30's with the enactment of California's area of origin statutes and extending in more recent times to federal and state environmental laws, a complex set of legal requirements constrain the CVP and the SWP's ability to deliver water to the projects' agricultural and municipal users.

Doubts about the efficacy of these requirements to achieve their goals have been long-standing. Former California state senator Peter Behr's remark that "[y]ou can't contain a thirsty beast in a paper cage" reflects the skepticism held by many that the rule of law cannot effectively constrain project operations in a water-short state such as California.[3]

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[2] Seventy-five percent of California's available water is in the northern third of the state (north of Sacramento), while eighty percent of the urban and agricultural water demands are in the southern two-thirds of the state. https://www.watereducation.org/photo-gallery/california-water-101 (last visited Apr. 24, 2020).

[3] Norris Hundley, Jr., The Great Thirst 326 (1st ed. 1992).

This article will address one sub-set of these legal requirements: the historic requirement that federal reclamation projects such as the CVP defer to state law relating to the control, appropriation, use, or distribution of water as set forth in section 8 of the federal Reclamation Act of 1902.[4] This article will discuss: (1) the origin of the federal reclamation law principle of deference to state water law and its inclusion in the Reclamation Act of 1902, (2) the application of the deference principle in California to the CVP, (3) the rise of federal and state endangered species laws as constraints on the CVP and SWP's use of water, and (4) the implications of the deference principle as to the question of whether California's endangered species law applies to the CVP.

II. The Origins of Federal Deference to State Water Law

A. The Equal Footing Doctrine

As improbable as it may seem, the story behind the principle that modern federal reclamation projects must defer to state water law begins with ancient English common law. In a dispute over ownership of the oyster beds of New Jersey's Raritan Bay, the U.S. Supreme Court observed in *Martin v. Lessee of Waddell* that the English monarchy's sovereign powers under English common law included "[t]he dominion and property in navigable waters, and in the lands under them, being held by the King as a public trust."[5] The *Martin* court begins its story by explaining that King Charles II granted the Duke of York royal charters for lands that encompassed Raritan Bay, which the duke then conveyed to twenty-four proprietors. The proprietors subsequently reconveyed certain powers back to the king, but retained title to the land for themselves.[6] According to the Court, the royal charters originally conveying this land conveyed the king's sovereign powers to the colonial proprietors, and the proprietors' subsequent reconveyance of the powers back to the king did not diminish those powers.[7] At the conclusion of the American Revolution, the thirteen colonies, freed from English rule, "took into their own hands the powers of sovereignty" and "the prerogatives and regalities which before belonged either to the Crown or the Parliament became immediately and rightfully vested in the state[s]."[8] Due to this transfer of sovereignty, the original states "hold the absolute right to all

[4] 43 U.S.C. § 383.
[5] *Martin v. Lessee of Waddell*, 41 U.S. 367, 411 (1842).
[6] *Id*. at 407.
[7] *Id.* at 413-416.
[8] *Id.* at 416.

their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government," up to the ordinary high water mark.[9] Thus at the nation's birth, the individual states were "vested" with the general powers of sovereignty, including the power over navigable waters, limited only by the those powers delegated to the federal government under the constitution.

As the nation grew beyond the original thirteen states, Congress passed the Northwest Territories legislation and other enactments declaring that the new states were to be admitted into the Union "on an equal footing with the original States in all respects whatever."[10] In addressing a dispute over formerly submerged lands under Mobile Bay in Alabama, the U.S. Supreme Court in *Pollard's Lessee v. Hagan* held that "Alabama was admitted into the Union, on an equal footing with the original States" and "succeeded to all the rights of sovereignty, jurisdiction and eminent domain" of the original thirteen states.[11] Those rights are "absolute" and include "the navigable water[s], and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States."[12]

This "equal footing" doctrine therefore granted the new states the broad sovereign powers heretofore held by the English monarchy and Parliament. In *Shively v. Bowlby*, the U.S. Supreme Court explained the state's sovereign interests in navigable waters in terms of their unsuitability for private possession and the public's shared interest in their use.

> Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people.[13]

The U.S. Supreme Court's reference to fishery purposes as a "public use and right" echoes the Court's earlier recognition in *Martin* of the English common law "principle" that " 'the public common of piscary' belong[s] to the common people of England."[14]

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[9] *Id*. at 410; *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22-23 (1935).
[10] *Pollard's Lessee v. Hagan*, 44 U.S. 212, 222 (1845).
[11] *Id*. at 223.
[12] *Id.* at 229.
[13] *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).
[14] *Martin*, 41 U.S. at 412.

In *Kansas v. Colorado*, a case involving the Arkansas river, the U.S. Supreme Court extended and explained the equal footing doctrine.[15] First, the Court expanded the sovereign powers held by the states under the doctrine beyond questions of state ownership of land underlying navigable waters to include questions relating to the allocation of water within the states' respective boundaries. The United States had argued that it held the power to reclaim arid lands in the western states and that this power authorized the United States to impose an appropriative water rights system in the allocation of water from the Arkansas river.[16] Relying upon *Martin* and other equal footing cases, the Court rejected this argument and held that each state "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state."[17]

Second, the *Kansas* court fleshed out the language in the Court's earlier equal footing decisions that the states' sovereign powers were "subject to the rights surrendered by the Constitution to the United States."[18] Citing to its 1899 decision in *United States v. Rio Grande Dam and Irrigation Co.*, the *Kansas* court explained that:

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each state, yet two limitations must be recognized: first, that, in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters — so far at least, as may be necessary for the beneficial uses of the government property. Second, that it 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.[19]

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[15] *Kansas v. Colorado*, 206 U.S. 46 (1907).

[16] *Id*. at 86-87.

[17] *Id.* at 94. The riparian and appropriative water rights are the two generally recognized types of water rights under state law. The riparian doctrine confers upon the owner of land the right to divert the water flowing by his land for use upon his land, without regard to the extent of such use or priority in time. In times of shortage, the right is reduced proportionally to other land owners. *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 101 (1986). The appropriation doctrine confers a right upon one who actually diverts and uses water for reasonable and beneficial use. The right is not linked to land ownership and in times of shortage the right is reduced on a first in time, first in right priority system. *Id.* at 101-102.

[18] *Shively*, 152 U.S. at 58; *Pollard's Lessee*, 44 U.S. at 229; *Martin*, 41 U.S at 410.

[19] *Kansas*, 206 U.S. at 86 citing *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 703 (1899).

Seventy-nine years after the *Rio Grande* decision, the U.S. Supreme Court would affirm these federalism principles in *California v. United States* by declaring "that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters."[20] But we are getting ahead of our story.

B. The Severance Doctrine

During the 19th century, the courts were not the only instruments of the federal government to recognize the principle of deference to state water law. In the Mining Act of 1866, Congress expressly acknowledged the western mining custom of prior appropriation as the method for allocating water. Section 9 of that act provided that "[w]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."[21]

In 1870, Congress amended the Mining Act to ensure that federal land grantees took their lands subject to appropriative water rights by providing that ". . .all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory."[22] In *Rio Grande*, the U.S. Supreme Court affirmed the deference to state law principle by declining to read the Mining Act as creating independent federal water rights, but, instead, constituting "a voluntary *recognition of a preexisting right of possession,* constituting a valid claim to its continued use, [rather] than the establishment of a new one."[23]

Passage of the Desert Land Act of 1877 completed Congress'19th century embrace of the principle of deference to state water law. The act allowed for the entry and settlement of desert lands in the western states and, importantly, provided that ". . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of

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[20] *California v. United States*, 438 U.S. 645, 662 (1978).

[21] Act of July 26, 1866, § 9, 14 Stat. 253.

[22] Act of July 9, 1870, § 17, 16 Stat. 217, 218.

[23] *Rio Grande*, 174 U.S. at 705, citing *Broder v. Water Co.*, 101 U.S. 274, 276 (1879), emphasis added.

the public for irrigation, mining and manufacturing purposes subject to existing rights."[24]

In *California Oregon Power Co. v. Beaver Portland Cement Co.*, the U.S. Supreme Court addressed this section of the Desert Land Act in a dispute over the Rogue river between a riparian claimant holding a Homestead Act land patent and a cement company holding adjudicated state water rights.[25] The Court defined the issue before it as whether the "homestead patent in question carried with it as part of the granted estate the common law rights which attach to riparian proprietorship."[26] The Court then rejected the landholder's riparian claim by reading the Desert Land Act as effectuating a "severance" of all water from public domain land:

> If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.[27]

The Court expressly declined to limit its "severance" holding to land patents issued for desert lands. Recognizing that lands would be held within watersheds under multiple types of land patents, the Court broadly applied its "severance" holding and concluded that "it is inconceivable that Congress intended to abrogate the common law right of the riparian patentee for the benefit of the desert landowner and keep it alive against the homestead or preemption claimant."[28]

As the nation entered the 20th century, the question raised in *Kansas* of whether the states controlled the river flow within their boundaries or whether such "flow is subject to the superior authority and supervisory control of the United States" appeared settled in favor of deference to state water law, a deference limited only by the property clause and navigational servitude powers surrendered to the national government under the constitution.[29] However, Congress' authorization of federally-funded

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[24] Desert Land Act of 1877, Act of March 3, 1877, § 1, 19 Stat. 377.

[25] *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 151 (1935).

[26] *Id.* at 154.

[27] *Id.* at 158.

[28] *Id.* at 162.

[29] *Kansas*, 206 U.S. at 85-86.

water projects under the Reclamation Act of 1902 would soon re-open the question of "national control" of the nation's waterways.[30]

C. Section 8 of the Reclamation Act of 1902

By the turn of the century, a bi-partisan movement was growing for direct federal involvement in constructing water storage projects to reclaim the arid lands of the western states and territories. This self-proclaimed "National Irrigation Movement" obtained favorable language in the 1900 national platforms of both the Republican and Democratic parties.[31] President Theodore Roosevelt's December 1902 message to Congress supported this movement, arguing that it is "as right for the National Government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind."[32] Importantly, Roosevelt's message embraced the deference to state water law principle by declaring that "[t]he distribution of the water, the division of the streams among irrigators, should be left to the settlers in conformity with State laws and without interference with those laws or with vested rights."[33]

On January 21, 1902, bills were introduced in both the House and Senate to implement President Roosevelt's reclamation vision.[34] On June 17, 1902, Congress responded by approving the Reclamation Act of 1902.[35] The act (1) created a reclamation fund from the receipts of public land sales in the sixteen western states, (2) authorized the Secretary of the Interior to investigate and construct water storage projects to be financed by the fund, (3) removed from private transfer public lands required for the projects, and (4) limited the right to use project water on land in private ownership to tracts of 160 acres or less and to landowners who resided on or within the neighborhood of the land.[36] Under the act's

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[30] *Id.* at 85.

[31] 35 Cong. Rec. 6773 (1902). The Republican platform stated, "In further pursuance of the constant policy of the Republican party to provide free homes on the public domain, we recommend adequate national legislation to reclaim the arid lands of the United States, reserving the control of the distribution of water for irrigation to the respective States and Territories." *Id*. The Democratic platform read, "We favor an intelligent system of improving the arid lands of the West, storing the waters for purposes of irrigation, and holding of such land for actual settlers." *Id.*

[32] 35 Cong. Rec. 6775 (1902).

[33] *Id.*

[34] H.R. 9676, 57th Cong., 1st Sess. (1902); S. 3057, 57th Cong., 1st Sess. (1902); Donald J. Pisani, To Reclaim a Divided West 313 (1st ed. 1992).

[35] Act of June 17, 1902, Pub. L. No. 161, 32 Stat. 388-390.

[36] *Id.* Congress removed the residency requirement, enlarged the acreage limitation, and made other changes to the Reclamation Act of 1902 in the Reclamation Reform Act of 1982. 43 U.S.C., §§ 373(a); 390aa-390zz-1; 422e; 425b; 485h; 502. *See generally Peterson v. United States*,

authority, the Secretary of the Interior created the Reclamation Service within the United States Geological Survey to administer the act. In 1907, the Reclamation Service was re-organized as a separate Bureau of Reclamation ("Bureau").[37]

In section 8 of the act, Congress expressly codified the deference to state water law principle by providing that:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of waters 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.[38]

The legislative history of the act discloses two critical points regarding this section. First, the section was intended to impose state law not only as to the "appropriation" of water required for the projects, but also as to the water's "distribution" and "use."[39] Second, the section was deliberatively drafted to further the deference to state water law principle set forth in earlier laws such as the Mining Act of 1866 and the Desert Land Act of 1877.[40]

Thus, with the passage of the Reclamation Act of 1902, federal water policy moved forward fully aligned with the principle that federal reclamation efforts must defer to state water law. However, the 20th century implementation of the act in California would tell a different story.

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899 F.2d 799 (9th Cir. 1990). Reflecting the anti-Chinese xenophobia of the times, section 4 of the act also included a provision mandating that in the construction of reclamation projects "no Mongolian labor shall be employed thereon." § 4, 32 Stat. at 389. Congress did not remove this provision until 1956. Act of May 10, 1956, Pub. L. No. 517, 70 Stat. 151.

[37] https://www.usbr.gov/history/borhist.html (last visited Apr. 26, 2020). In 1926, Congress created the position of Commissioner of Reclamation to be appointed by the President and subject to Senate confirmation. 43 U.S.C. § 373a.

[38] 43 U.S.C., § 383.

[39] 35 Cong. Rec. 6678, 6679 (1902) (Mondell); *Id*. at 6770 (Sutherland); *Id*. at 6728 (Burkett).

[40] *Id.* at 6679 (Mondell) ("We began to legislate in regard to the use of water in irrigation in 1866. We have legislated continuously along one line [in support of state control].").

III. Implementation of the Reclamation Act of 1902 in California and the Rise and Fall of Federal Dominion

A. *Ivanhoe*, *City of Fresno*, and *Arizona* - The Dismantling of Section 8

During the decades following passage of the Reclamation Act of 1902, the State of California would decline to aggressively defend the water rights authority granted to it by section 8 of the Reclamation Act of 1902. Furthermore, in a trio of mid-20th century cases, the U.S. Supreme Court would effectively dismantle the section. In *Ivanhoe Irrigation Dist. v. McCracken*, the Court reversed the California Supreme Court's ruling that section 8 of the act prevented the United States from enforcing the acreage limitations contained in section 5 of the act against California landowners receiving reclamation water.[41] The California Supreme Court had concluded that state law imposed a fiduciary trust on water rights holders, including the United States, for the benefit of all Californians, including all landowners, and that the section 5 limit on the delivery of reclamation water to landowners holding 160 acres of land or less violated that fiduciary trust.[42] The State of California, through the California Attorney General, contested the California Supreme Court decision and fully supported the United States' reading of reclamation law.[43] The *Ivanhoe* court sided with the United States and concluded that "[w]e read nothing in [section] 8 that compels the United States to deliver water on conditions imposed by the State."[44]

In *City of Fresno v. California*, the U.S. Supreme Court rejected the city's argument that section 8 limited "the United States from exercising the power of eminent domain to acquire the water rights of others" due to California's area of origin law and statutory preference for municipal use, holding that state authority in such a case is limited "to defining the

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[41] *Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275, 289-290 (1958).

[42] *Id.* On remand, the California Supreme Court reversed and repudiated its earlier ruling that state water rights were subject to a state law fiduciary trust for the benefit of all landowners within the irrigation district. *Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal.2d 692, 716 (1960) ("The trust theory was so interrelated to the erroneous interpretation of section 8 of the Reclamation Act, and so interwoven with that erroneous interpretation, that it must be held that it fell with that erroneous interpretation. . .Thus the trust theory is not the law of this case, is dicta, and for that reason should not be construed as a statement of the law of California.").

[43] *Id.* at 279 ("This litigation involves a dispute between landowners, on the one hand, and the combined State and Federal Governments, on the other. As the Attorney General of California points out, there is no clash here between the United States and the State of California.").

[44] *Id.* at 292.

property interest, if any, for which compensation must be made."[45] Finally, in *Arizona v. California*, the U.S. Supreme Court, relying upon *Ivanhoe*, held that "[s]ince [section] 8 of the Reclamation Act did not subject the Secretary [of the Interior] 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 [Boulder Canyon] Project Act."[46] When asked a question during the floor debates over the Reclamation Act of 1902 on "the subject of national or State control," Congressman Mondell, the bill's lead House proponent, responded, "as to State control over appropriation and distribution, I will say to the gentleman that there is no reasonable ground for disagreement on that point."[47] Sixty-one years later, the U.S. Supreme Court limited state "control" under section 8 "to defining the property interest, if any, for which compensation must be made" when the United States condemns property for reclamation purposes.[48] Federal dominion in the field of water was on the rise.

B. The Consequences of Federal Dominion to California's Management of its Natural Resources

The most striking consequence of California's acquiescence to federal dominion and the U.S. Supreme Court's diminution of section 8 was the fishery effects of the state's issuance of water right permits for Friant dam, a federal reclamation facility located on the San Joaquin river. Through passage of the Act of August 26, 1937[49], Congress authorized the construction and operation of the CVP as reclamation facilities. These facilities included Friant dam and the Madera and Friant-Kern distribution canals located in the southern Central Valley of California.[50] The Bureau commenced construction of Friant dam in 1939, the Madera Canal in 1940, and the Friant-Kern Canal in 1945. Water deliveries commenced in 1944.[51] However, the State Water Rights Board, now the State Water Resources Control Board ("State Water Board"), did not issue water right permits for the Friant project until June 2, 1959 in Decision 935.[52]

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[45] *City of Fresno v. California*, 372 U.S. 627, 630 (1963).
[46] *Arizona v. California*, 373 U.S. 546, 587 (1963).
[47] 35 Cong. Rec. 6679 (1902).
[48] *City of Fresno*, 372 U.S. at 630.
[49] Act of August 26, 1937, Pub. L. No. 392, 50 Stat. 844.
[50] *Id.* at § 2, 50 Stat. at 850.
[51] Decision 935, Cal. State Water Rights Board 14-15 (1959).
[52] *Id.* at 109.

The effect of allowing the construction and operation of Friant dam to precede the issuance of the project's state water rights coupled with the U.S. Supreme Court's decision in *Ivanhoe* limited the state law terms and conditions that California could impose on the project. During the State Water Rights Board hearings leading up to Decision 935, the California Department of Fish and Game, now the Department of Fish and Wildlife ("DFW"), argued that the operation of Friant dam had eliminated the San Joaquin River spring-run salmon fishery and that the dam's operations violated the state law requirement that water rights may only be issued in the public interest.[53] The State Water Rights Board rejected the Department of Fish and Game's arguments by noting that "the evidence is overwhelming that the salmon fishery on the San Joaquin River upstream from the junction with the Merced River is now virtually extinct."[54] The State Water Rights Board then concluded that "to require the United States to by-pass water down the channel of the San Joaquin River for the re-establishment and maintenance of the salmon fishery at this time is not in the public interest and accordingly, the protests of the Department of Fish and Game to the subject applications are dismissed."[55]

Prior to the construction of Friant dam, the San Joaquin river spring-run chinook salmon "was one of the largest Chinook runs anywhere on the Pacific Coast and has been estimated at several hundred thousand fish."[56] Construction and operation of Friant dam extinguished this salmon species and imperiled the separate San Joaquin river fall-run salmon species.[57] The adverse consequences of federal dominion in water to California's natural resources had become indisputably clear.

C. *California v. United States* and the Resurrection of Section 8

1. California v. United States

In 1978, the U.S. Supreme Court reversed field in *California v. United States* and for the first time gave effect to section 8 of the Reclamation Act of 1902 in accord with the intent of the act's authors.[58] At issue in *California* was whether section 8 required the Bureau, as the

[53] *Id.* at 33-34; Cal. Water Code, §§ 1253, 1255, and 1257.

[54] Decision 935, *supra* note 51 at 40.

[55] *Id.* at 41.

[56] *Natural Resources Defense Council v. Patterson*, 333 F.Supp. 2d 906, 909 (E.D. Cal. 2004).

[57] *Id.* at 910.

[58] *California,* 438 U.S. at 674.

operator of the New Melones Project on the Stanislaus River, to comply with state law terms and conditions imposed by the State Water Board on the water right permits issued for the project.[59] The State Water Board considered the Bureau's water right applications for the project in Decision 1422. Testimony before the State Water Board disclosed that the completed project would inundate nine miles of the upstream portion of the river that were heavily used for whitewater rafting and other recreational purposes.[60] The testimony did not disclose that the Bureau had any "specific plan for applying project water to beneficial use for consumptive purposes at any particular location."[61] According to Decision 1422, "[b]y failing to present evidence of a specific plan to use the water conserved by the New Melones Project for consumptive purposes, the Bureau failed in spirit if not in substance to meet the statutory requirements for approval of a permit to appropriate water for such purposes."[62] Nonetheless, the State Water Board issued water right permits to the Bureau for the project, but limited the Bureau's ability to store water until such time as the Bureau could show that it had "firm commitments to deliver water" for consumptive purposes.[63]

The United States predictably brought an action challenging Decision 1422, relying upon *Ivanhoe* and its successors. However, this time, the U.S. Supreme Court rejected the United States' claims. Characterizing the preemptive language in *Ivanhoe* as "dictum," the *California* court rejected the United States' preemption claim, stating "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."[64] Absent an "inconsistent" congressional provision, "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law."[65] According to the Court, the "substance" of state law includes both laws regarding the "appropriation" and the subsequent "distribution" of project water.[66] In rejecting the United States' argument

[59] *California*, 438 U.S. at 647.

[60] Decision 1422, Cal. State Water Resources Control Board 17 (1973). According to the State Water Board, "streams available for whitewater boating are extremely scarce" and "the Stanislaus may be the second most heavily used river in the nation for that purpose in actual numbers of visitors per year." *Id*. at 23.

[61] *Id*. at 14.

[62] *Id*. at 15.

[63] *Id*. at 30.

[64] *California*, 438 U.S. at 674.

[65] *Id*. at 675.

[66] *Id*. at 674 ("[T]he Act clearly provided that state water law would control in the appropriation and later distribution of the water.").

that more recent legislative enactments altered the federalism balance regarding reclamation projects, the Court held that "[w]hile later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives."[67] On remand, the Ninth Circuit recognized that "an inconsistent congressional directive" referred to a conflicting federal statute and then affirmed all of the conditions contained in Decision 1422 from federal preemption based upon the U.S. Supreme Court's decision.[68]

2. Judicial Decisions Protecting California's Natural Resources Through Application of the Deference Principle

At least three appellate decisions decided subsequent to *California* have applied the deference to state water law principle to federal reclamation projects in California to protect California's natural resources. First, in *United States v. State Water Resources Control Board*, the California Court of Appeal for the First Appellate District adopted the State Water Board's reading of *California* and rejected the "Bureau's contention that the Board-imposed conditions for salinity control [in the Sacramento and San Joaquin river delta] are inconsistent with congressional directives."[69] After reviewing the federal statutes authorizing the CVP, the Court of Appeal held that "the Board was fully authorized to impose the challenged water quality standards or conditions, a regulatory exercise which we determine to be consistent with congressional directives."[70]

Second, in *Natural Resources Defense Council v. Houston*, the Ninth Circuit, relying upon *California*, held that the 1992 Central Valley Project Improvement Act ("CVPIA") did not facially preempt the appli-

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[67] *Id.* at 678. Outside of the context of federal reclamation projects, the U.S. Supreme Court's approach to state water law saving clauses has been mixed. In *California v. FERC*, 495 U.S. 490, 492-493 (1990), the Court declined to require federally-licensed hydro-electric power facilities to comply with state law mandated in-stream fishery flows notwithstanding a Federal Power Act savings clause that was similar, although not identical, to section 8. However, in *PUC No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 721-722 (1994), the Court affirmed the imposition of state in-stream flows upon federal power licensees under section 401 of the Clean Water Act. *See also S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 386 (2006) [same].

[68] *United States v. State Water Resources Control Board*, 694 F.2d 1171, 1176 (9th Cir. 1982) (Section 8 requires "that the United States follow state water law absent a preempting federal statute," citing *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 717 (9th Cir. 1982).)

[69] *United States*, 182 Cal.App.3d at 135.

[70] *Id.* at 136.

cation of section 5937 of the California Fish and Game Code to the Bureau's distribution and use of Friant dam waters.[71] Section 5937 requires owners of dams to "allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."[72] Section 5937 is a legislative manifestation of California's common law public trust doctrine.[73] On remand, the district court affirmed the State Water Board's view that reclamation law as interpreted in *California* retained the principle of deference to state water law and, in applying that principle, required the Bureau to operate Friant dam consistent with section 5937.[74] Notably, neither the Ninth Circuit nor the district court questioned the inclusion of a provision of the California Fish and Game Code within the scope of section 8, which includes all "laws of any State or Territory relating to the control, appropriation, use, or distribution of waters."[75] This suggests that section 8 extends beyond traditional state water right statutes to include other state natural resource laws. The litigation resulted in a settlement leading to federal legislation creating a joint federal-state program to restore the San Joaquin river as habitat for a self-sustaining chinook salmon population.[76]

Third, in *San Luis & Delta Mendota Water Auth. v. Haugrud*, the Ninth Circuit applied the deference principle to support the Bureau's 2013 decision to release supplemental flows from Lewiston dam on the Trinity river to protect returning salmon from mortality due to low flow conditions in the lower Klamath river.[77] CVP water contractors had argued that the Bureau's decision violated California law because the state water right permits held by the Bureau did not designate the lower Klamath river as an authorized place of use for water stored at the dam, thus requiring the Bureau to obtain a permit change before using the water for the supplemental flows.[78] The DFW appeared as an amicus and argued that section 5937 of the Fish and Game Code supported the Bureau's decision.[79] The Ninth Circuit rejected the contractors' argument and held that section 5937 "creates an exception to the permit change re-

[71] *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1132 (9th Cir. 1998).

[72] Cal. Fish & Game Code, § 5937.

[73] *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal.App.3d 585, 626 (1989). *See generally National Audubon Society v. Superior Court*, 33 Cal.3d 419, 445-448 (1983).

[74] *Patterson*, 333 F.Supp. 2d at 919-921.

[75] 43 U.S.C. § 383.

[76] San Joaquin River Restoration Settlement Act, Pub. L. No. 111-11, §§ 10001-10011, 123 Stat. 1349-1364 (2009). The litigation also set in motion steps to reverse the salmon extinction outcome resulting from the State Water Rights Board's Decision 935.

[77] *San Luis & Delta Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1234-1235 (9th Cir. 2017).

[78] *Id.* at 1234.

[79] *Id.*

quirement" and that the section "requires BOR to allow sufficient water to pass the Lewiston Dam to maintain the fish below the Dam."[80] *Haugrud* therefore affirms the Ninth Circuit holding in *Houston* that the deference principle under section 8 of the Reclamation Act of 1902 extends beyond traditional water right law and may include provisions of the California Fish and Game Code intended to protect fishery resources.

3. Recent Central Valley Project Legislation Affirming the Deference Principle

Congressional legislation adopted subsequent to *California* regarding the CVP has included savings clause language that further affirms the section 8 deference principle. In 1992, Congress adopted the CVPIA. Section 3406(b) of the CVPIA provides that:

> [t]he Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under *State* and Federal *law, including but not limited* to the Federal Endangered Species Act, 16 U.S.C. 1531, et seq., and *all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project*.[81]

In 2016, Congress passed the Water Infrastructure Improvements for the Nation Act ("WIIN Act"), a statute that requires certain operational changes to the CVP.[82] Section 4012 of the WIIN Act affirmed the deference to state law principle by providing that:

> This subtitle shall not be interpreted or implemented in a manner that—preempts or modifies any obligation of the United States to act in conformance with *applicable state law*, including applicable State water law . . .[83]

The savings clauses in both the CVPIA and the WIIN Act thus uphold the deference principle. Tellingly, the clauses do not limit the deference principle to California Water Code provisions related to water rights. The CVPIA requires Bureau compliance with "state law. . .including but not limited to" State Water Board water right decisions.[84] The WIIN Act

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[80] *Id.*

[81] Central Valley Project Improvement Act, Pub. L. 102-575, § 3406(b), 106 Stat. 4706, 4714 (1992), emphasis added.

[82] Water Infrastructure Improvements for the Nation Act, Pub. L. 114, §§ 4001-4014, 130 Stat. 1851-1884 (2016).

[83] *Id.* at § 4012(a), 130 Stat. at 1882, emphasis added.

[84] § 3406(b), 106 Stat. at 4714.

speaks of "applicable state law," including state water law.[85] These acts thus suggest, consistent with the Ninth Circuit decisions in *Houston* and *Haugrud*, that the deference principle extends beyond state statutes directly related to water rights and may include other state natural resources laws.

The resurrection of section 8 of the Reclamation Act of 1902 under *California* and its judicial and legislative progeny is an important part of the deference principle's historical narrative. However, section 8's revival does not end our story. As water resource management in California unfolded in the 21st century, the deference principle faced a new challenge: the management of California's water projects under federal and state endangered species laws.

IV. The Rise of Endangered Species Law as a Limitation on the Central Valley Project and the State Water Project

The rise of federal and state endangered species laws as limitations on the CVP and the SWP has become the defining characteristic of California water project management in the 21st century. An appreciation of this development requires a more detailed understanding of these projects.

A. The Central Valley Project and the State Water Project

The CVP and the SWP are two major inter-basin water storage and delivery systems that divert and re-divert water from the southern portion of the Sacramento-San Joaquin River Delta ("Delta"). The CVP is operated by the Bureau and consists of twenty dams and reservoirs that together can store nearly twelve million acre-feet of water. The Bureau holds over 270 contracts and agreements for water supplies that depend upon CVP operations. Through operation of the CVP, the Bureau delivers water in twenty-nine of California's fifty-eight counties in the following approximate annual amounts: 5,000,000 acre-feet water for farms, 600,000 acre-feet of water for municipal and industrial uses, and 355,000 acre-feet of water for wildlife refuges.[86] The CVP's major storage facilities are the Shasta, Trinity, Folsom, and New Melones reservoirs up-

[85] § 4012(a)(1), 130 Stat. at 1882.

[86] U.S. Bureau of Reclamation, Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project Final Environmental Impact Statement at1-1 (2019) (hereinafter "Bureau Reinitiation EIS").

stream of the Delta.[87] These upstream reservoirs release water that enters the Delta and then can be exported at Jones pumping plant near Tracy for storage in the joint federal/state San Luis reservoir or delivered down the Delta Mendota Canal.[88]

The SWP is operated by the California Department of Water Resources ("DWR") and includes water, power, and conveyance systems, conveying an annual average of 2.9 million acre-feet of water. The principal facilities of the SWP are the Oroville reservoir and related facilities, the San Luis dam and related facilities, facilities in the Delta, the Suisun Marsh Salinity Control Gates, the California Aqueduct including its terminal reservoirs, and the North Bay Aqueduct and South Bay Aqueduct. DWR holds contracts with twenty-nine public agencies in Northern, Central, and Southern California for water supplies from the SWP. Water stored in the Oroville facilities and water available in the Delta are captured in the Delta and conveyed through several facilities to SWP contractors. The SWP is operated to provide flood control and water for agricultural, municipal, industrial, recreational, and environmental purposes.[89] Both the CVP and the SWP operate under a coordinated operations agreement between the United States and California which, as amended in 2018, coordinates the CVP and SWP's diversions and storage from common watersheds and apportions regulatory obligations between the two projects.[90]

CVP and SWP operations adversely affect fish species listed as threatened or endangered under the federal Endangered Species Act ("ESA") and the California Endangered Species Act ("CESA"). These adverse effects include impediments to fish migration, such as dams or other barriers, alteration of water temperature, changes in water quality such as turbidity and salinity conditions, modifications to water flow conditions, and the redirection or "entrainment" of fish into poor quality habitat such as the southern Delta or directly into the projects' pumping facilities.[91] These effects trigger the application of ESA and CESA to the projects.

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[87] *Id.*, app. C at C-1 to C-2, fig. C. 1-2, fig. C. 1-3 at C-5 to C-6.

[88] *Id.*, fig. C. 1-4 at C-7.

[89] California Department of Water Resources, Final Environmental Impact Report for Long-Term Operation of the California State Water Project, app. A at 2-1 (2020).

[90] Bureau Reinitiation EIS at 2-1, 3-2.

[91] National Marine Fisheries Service, Biological Opinion on Long-term Operation of the Central Valley Project and the State Water Project 186-200 (2019) (hereinafter "NMFS Opinion"); U.S. Fish and Wildlife Service, Biological Opinion for the Reinitiation of Consultation on the Coordinated Operations of the Central Valley Project and the State Water Project, tbl. 5-8 at 184 (2019) (hereinafter "USFWS Opinion").

B. The Federal Endangered Species Act

The ESA prohibits the "take" of threatened or endangered species unless the person engaging in the take has obtained incidental take authority through an incidental take permit under section 10 of the ESA or through a "federal agency action" consultation under section 7 of the ESA with the U.S. Fish and Wildlife Service ("USFWS") or the National Marine Fisheries Service ("NMFS").[92] The ESA defines "take" to include killing, harming and harassing of ESA-listed species.[93] ESA regulations define "harm" and "harass" to include habitat modification that significantly impairs a species' essential behavior patterns, such as breeding, feeding, spawning, rearing, migrating and sheltering.[94] Violation of the take prohibition may result in civil and criminal prosecution.[95] Although infrequently granted, the ESA allows for an exemption to a federal action agency's duty to avoid jeopardy to an ESA-listed species or the destruction or adverse modification of a species' critical habitat through an exemption application submitted to an inter-agency federal committee known as the Endangered Species Committee.[96]

A section 7 consultation commences with the federal action agency, in this case the Bureau as operator of the CVP, requesting consultation with the federal wildlife agencies over the federal action's potential to adversely affect the listed species or its designated critical habitat. Where listed species are present in the area of the federal action, section 7 generally requires the federal action agency to prepare a biological assessment for submittal to the federal wildlife agency.[97] The outcome of

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[92] 16 U.S.C. §§ 1538(a)(1)(B), 1536(b), 1539(a). The ESA defines "person" to include individuals and all types of private entities, as well as officers, employees, agents, departments and instrumentalities of the federal government and local and state governments. 16 U.S.C. § 1532(13). Under section 10 of the ESA, a federal wildlife agency may issue a permit for the incidental take of an ESA-listed species where the permit applicant prepares a species conservation plan and the wildlife agency finds that the species take is incidental, that the take will be minimized and mitigated to the maximum extent feasible, that adequate funding for the plan is available, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. 16 U.S.C. § 1532(a)(2). Under section 7 of the ESA, a "federal agency action" may receive incidental take coverage where the federal action agency consults with a federal wildlife agency and obtains a biological opinion granting incidental take authority. See *infra* notes 97 to 101 and accompanying text.

[93] 16 U.S.C. § 1532(19).

[94] 50 C.F.R. §§ 17.3, 222.102. The United States Supreme Court has upheld these regulations. *Babbitt v. Sweet Home Chapter, Communities for a Great Oregon*, 515 U.S. 687, 708 (1995).

[95] 16 U.S.C. §§ 1540(a)-(b).

[96] 16 U.S.C. § 1536(g); Eric Yuknis, *Would a "God Squad" Exemption under the Endangered Species Act Solve the California Water Crisis?*, 38 B.C. Envtl. Aff. L. Rev. 567, 578 (2011).

[97] 16 U.S.C. § 1536(c)(1).

the section 7 consultation process is a formal biological opinion prepared by the relevant federal wildlife agency.[98]

These opinions can be either a "no-jeopardy" or a "jeopardy" opinion. The wildlife agency will issue a no-jeopardy opinion only if upon reviewing the description of the federal action the agency finds, based upon best available science, that the project will not jeopardize the continued existence of any endangered or threated species or result in the destruction or adverse modification of the species' designated critical habitat.[99] A jeopardy opinion will be issued if the wildlife agency cannot make such findings. If the wildlife agency determines that the federal action will result in species jeopardy or destruction or adverse modification of the species' critical habitat, then the biological opinion must include additional mitigation measures that are called "reasonable and prudent alternatives," which when implemented, prevent species jeopardy or destruction or adverse modification of critical habitat.[100]

All biological opinions must include an "incidental take statement," which may authorize some level of incidental take of the listed species that does not rise to the level of jeopardy, and that: (1) specifies the impacts of the incidental take of the species; (2) identifies reasonable and prudent measures that minimize such impacts; and (3) includes such terms and conditions as are necessary to ensure compliance with these measures.[101]

On October 21, 2019, the NMFS and the USFWS issued biological opinions addressing the coordinated operations of the CVP and the SWP. These opinions authorize the incidental take of the following ESA-listed fish species by the CVP and SWP: the Delta smelt, the Sacramento river winter-run chinook salmon, the Central Valley spring-run chinook salmon, the California Central Valley steelhead, the southern distinct population segment of North American green sturgeon, and the southern resident distinct population of killer whale.[102] The opinions are no-jeopardy opinions.[103] They replaced prior jeopardy opinions that NMFS and USFWS had issued for the CVP and SWP in 2009 and 2008.[104]

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[98] 16 U.S.C. § 1536(b)(3)(A).

[99] *Id.*

[100] *Id.*

[101] 16 U.S.C. § 1536(b)(4).

[102] USFWS Opinion at 15; NMFS Opinion at 1-2.

[103] USFWS Opinion at 393, 398; NMFS Opinion at 797-798, 813.

[104] USFWS Opinion at 15; NMFS Opinion at 10.

C. The California Endangered Species Act

Like the ESA, CESA also makes it unlawful for any "person" to "take" an endangered species unless such take is otherwise authorized by law.[105] Section 86 of the California Fish and Game Code defines "take" to mean to "hunt, pursue, catch, capture, or kill, or to attempt to hunt, pursue, catch, capture, or kill" a CESA-listed species.[106] DWR, as operator of the SWP, is a person within the meaning of CESA.[107] Also, CESA requires DWR, as a state agency, to comply with the statute's requirements.[108] CESA provides for at least two mechanisms for authorizing the incidental take of CESA-listed species resulting from SWP operations.[109]

First, DWR may receive authorization to take CESA-listed species under CESA's "consistency determination" process. Under this process, the DFW may determine that DWR has authorization to take federally-listed species that are also listed under CESA, under either an ESA incidental take permit under section 10 of the ESA or through the biological opinion consultation process under section 7 of the ESA, provided that DFW determines that the ESA take authorization is "consistent" with CESA.[110] Second, DWR may receive authorization to take CESA-listed species by obtaining a separate CESA incidental take permit from DFW.[111] On March 31, 2020, DFW issued a CESA incidental take permit to DWR for the long-term operations of the SWP covering the longfin smelt, the Delta smelt, the winter-run chinook salmon, and the spring-run chinook salmon.[112]

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[105] Cal. Fish & Game Code, §§ 2080, 2085.

[106] Cal. Fish & Game Code, § 86.

[107] *Watershed Enforcers v. Department of Water Resources*, 185 Cal.App. 4th 969, 988 (2010).

[108] Cal. Fish & Game Code, §§ 2052, 2055.

[109] CESA provides other means to obtain incidental take authorization. For example, DFW may authorize take through a safe harbor agreement issued pursuant to Fish & Game Code section 2089.2 *et seq*. The Natural Community Conservation Planning Act also provides a pathway for obtaining incidental take authorization for CESA-listed species. Cal. Fish & Game Code, §§ 2830, 2835.

[110] Cal. Fish & Game Code, § 2080.1.

[111] Cal. Fish & Game Code, § 2081.

[112] Incidental Take Permit for Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta (2081-2019-066-00), Cal. Dep't. of Fish and Game 43-44 (2020) (hereinafter "DFW Permit").

V. The Deference Principle and the Application of the California Endangered Species Act to the Central Valley Project

A. The Divergence of ESA and CESA Fish Protections

Historically, the ESA and CESA fish protections required of the CVP and SWP have, for the most part, not diverged.[113] DWR obtained CESA take authorization for SWP operations affecting species dually-listed under both ESA and CESA through the consistency determination process in section 2080.1 of the California Fish and Game Code.[114] However, the USFWS' and the NMFS' October 21, 2019 issuance of new ESA biological opinions applicable to the CVP and the SWP, and DFW's March 31, 2020 issuance of a new CESA incidental take permit applicable to the SWP, imposed for the first time new and asymmetric fish protection requirements on the two projects. The following are some of the more prominent examples of this divergence:

- Old and Middle Rivers ("OMR") are tributaries to the Delta. Subject to tidal influences, the flows in these rivers under without-project conditions generally move south to north. CVP and SWP pumping operations in the southern Delta reverse the flow direction of these rivers, increasing the risk of fish entrainment in project pumping facilities and their redirection into poor habitat areas adjacent to the facilities.[115] The DFW Permit generally limits OMR negative flows to -5,000 cubic feet per second ("cfs") during certain periods of the year. However, during the winter and spring, the DFW Permit grants DFW the authority, based upon real-time species monitoring, to reduce SWP exports and thus reduce OMR negative flow to as low as -1,250 cfs to protect the long-fin smelt and the Delta smelt.[116] The USFWS Opinion does not contain any equivalent OMR limit for the protection of the Delta smelt.[117]
- Although the measures are not identical, both the DFW Permit and the NMFS Opinion require the projects to reduce exports so as to

[113] An exception to this historical practice has been DFW's treatment of the long-fin smelt. The long-fin smelt is a CESA-listed species, but not an ESA-listed species. DWR has historically obtained CESA take authorization for this species through an incidental take permit from DFW. Incidental Take Permit for the California State Water Project Delta Facilities and Operations (2081-2009-001-003), Cal. Dep't. of Fish and Game (2009).

[114] Cal. Fish & Game Code, § 2080.1; Consistency Determination (2080-2009-011-00), Cal. Dep't. of Fish and Game (2009); Consistency Determination (2080-2011-022-00), Cal. Dep't. of Fish and Game (2011).

[115] USFWS Opinion at 135-136, 139-140.

[116] DFW Permit at 71, 82, 85-86.

[117] USFWS Opinion at 40-48.

maintain OMR negative flows as low as -2,500 cfs when salvage of winter-run salmon at project pumping facilities exceeds certain annual thresholds.[118] However, the NMFS Opinion allows for the waiver of this OMR limit if "Reclamation and DWR determine that further Old and Middle River restrictions are not required based on risk assessment."[119] The DFW Permit leaves the final risk assessment decision with DFW where disagreement exists between the projects and DFW.[120]

- Both the DFW Permit and the NMFS and USFWS Opinions allow project pumping during storm events to result in negative OMR flows that exceed -5,000 cfs.[121] However, the DFW Permit limits such exceedance pumping to pumping that does not result in negative OMR flows exceeding -6,250 cfs.[122] The NMFS and USFWS opinions do not impose any numeric OMR limit on exceedance pumping during storm events.[123]
- The Low Salinity Zone ("LSZ") is a variable habitat region in the Delta where the Delta smelt commonly reside. The LSZ has historically been indexed using a salinity metric known as X2. X2 is the geographic location of 2 parts per thousand ("ppt") salinity near the bottom of the water column measured as a distance from the Golden Gate Bridge.[124] In order to protect the Delta smelt's habitat, both the DFW Permit and the USFWS Opinion require the projects to operate so as to allow sufficient freshwater outflow to maintain X2 during September and October at 80 kilometers from the Golden Gate Bridge in above-normal and wet years.[125] However, the USFWS Opinion allows the projects to waive the X2 requirement if the Bureau, DWR, and the USFWS determine that alternative habitat measures provide "similar or better protection."[126] Furthermore, the USFWS opinion appears to exempt the projects from the X2 requirement "[i]n the event that Reclamation determines the Delta outflow augmentation necessary to meet 2 ppt isohaline at 80 km from the Golden Gate . . . cannot be met through primarily export reductions and is expected to have a high storage cost."[127] The DFW Permit does not provide the SWP with any similar waivers or exemptions from its X2 requirement.[128]

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[118] DFW Permit at 87-88; NMFS Opinion at 535, 548.
[119] NMFS Opinion at 548.
[120] DFW Permit at 71, 88.
[121] DFW Permit at 92-94; NMFS Opinion at 479, 530; USFWS Opinion at 47-48.
[122] DFW Permit at 93.
[123] NMFS Opinion at 479, 530; USFWS Opinion at 47-48.
[124] USFWS Opinion at 75.
[125] DFW Permit at 114-115; USFWS Opinion at 51.
[126] USFWS Opinion at 52.
[127] USFWS Opinion at 53.
[128] DFW Permit at 114-119.

B. The Deference Principle and CESA

The deference to state water law principle outlined above offers a pathway out of the confusion created by the conflicting fishery requirements imposed by federal and state endangered species laws to the extent that the principle can be read to require the CVP to comply with CESA fishery protections.[129] During the floor debates over the Reclamation Act of 1902, Congressman Sutherland presciently observed that reclamation projects had to comply with state law because "if appropriation and use were not under the provisions of State law the utmost confusion would prevail."[130] Building on Congressman Sutherland's remark, the U.S. Supreme Court in *California* noted that practical necessity mandates the deference principle because otherwise "[d]ifferent water rights in the same state would be governed by different laws, and would frequently conflict," precisely the conundrum California currently faces in the implementation of ESA and CESA.[131] For the following reasons, the deference principle set forth in section 8 of the Reclamation Act of 1902 should be read to include the application of CESA to the CVP's "control, appropriation, use, or distribution" of California waters, thus requiring the Bureau to obtain incidental take authority for CESA-listed fish species from DFW.

First, inclusion of CESA within the language of section 8 of the Reclamation Act is consistent with the plain language of the statute. Section 8's deference principle applies to the "laws of any State or Territory relating to the *control, appropriation, use*, or *distribution* of waters."[132] At least two California appellate decisions confirm that CESA is a state law that relates to the italicized words in this section. In *Department of Fish & Game v. Anderson-Cottonwood Irrigation District*, the irrigation district argued that CESA's take prohibition was limited to hunting and fishing activity and did not apply to fish mortality resulting

[129] The DFW Permit recognizes that "there may be instances when operational requirements stated in" the permit "are different from operational requirements of the applicable ESA authorizations, which govern the operations at the CVP as well as the SWP." *Id*. at 96. If DWR cannot force the Bureau to operate the CVP consistent with the DFW Permit requirements by conditioning the Bureau's use of SWP facilities on DFW Permit compliance, then the DFW Permit cuts back the SWP's obligation to reduce exports to between thirty-five and forty percent of the export reductions needed to meet the permit's OMR requirements, percentages agreed upon in the amended Coordinated Operations Agreement between the State of California and the United States. *Id*. at 96-97. This permit provision appears to mean that, absent Bureau compliance with the permit's OMR criteria, full satisfaction of the permit's OMR criteria may not occur where federal and state OMR fish protections diverge.

[130] 35 Cong. Rec. 6770 (1902).

[131] *California,* 438 U.S. at 667-668.

[132] 43 U.S.C. § 383, emphasis added.

from irrigation diversions from the Sacramento river.[133] The Court of Appeal for the Third Appellate District rejected the irrigation district's argument, noting that CESA's "intent is to protect fish, not punish fishermen," and concluded that CESA's take prohibition "applies to the destruction of fish incidental to lawful irrigation activity."[134]

In *Watershed Enforcers v. Department of Water Resources*, the Court of Appeal for the First Appellate District held that DWR was a "person" for purposes of CESA compliance and rejected arguments that CESA was not intended to apply to the SWP. The Court of Appeal reasoned that it would be "illogical" in the context of

> preservation of endangered and threatened species . . . to exempt government agencies from the CESA taking prohibition, when those agencies operate large enterprises (*dams, pumping stations, irrigation systems*, etc.) while covering individual hunters and fishermen and business associations, which would generally take species in fewer numbers.[135]

Thus, California courts have recognized that CESA applies to water diversion and storage activities, and thus to the "control, appropriation, use, or distribution" of water.

Second, DFW's administrative practice supports the inclusion of CESA within state laws "relating to the control, appropriation, use, or distribution" of water. As noted above, DFW has issued to DWR a CESA incidental take permit under section 2081 of the Fish and Game Code for the SWP's take of the long-fin smelt resulting from the SWP's diversions.[136] Similarly, DFW has granted to DWR consistency determinations under section 2080.1 of the Fish and Game Code to cover the SWP's take of CESA-listed species that are also ESA-listed species.[137] Finally, on March 31, 2020, DFW issued to DWR a new section 2081 incidental take permit for the long-term operation of the SWP in the Delta covering all applicable CESA-listed fish species.[138] DFW's longstanding interpretation of CESA as applying to water diversion and storage activities is entitled to "great weight."[139]

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[133] *Department of Fish & Game v. Anderson-Cottonwood Irrigation District*, 8 Cal.App. 4th 1554, 1562 (1992).

[134] *Id*. at 1563, 1568.

[135] *Watershed Enforcers*, 185 Cal.App. 4th at 982, emphasis added.

[136] *See supra* note 113.

[137] *See supra* note 114.

[138] *See supra* note 112.

[139] *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal.4th 1, 19 (1998).

Third, an interpretation of section 8 of the Reclamation Act of 1902 that excludes CESA and limits the section to traditional state water right law renders the words "control," "use," and "distribution" in the section superfluous and denies them separate meaning. This result follows because, at the time of the act's passage, Congress understood the term "appropriation" to represent the preferred water right system of the western states.[140] As the U.S. Supreme Court observed in *California Oregon Power Co.*, "[t]he rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection, and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes."[141] In most of the west, this rule resulted in "the complete subordination of the common law doctrine of riparian rights to that of appropriation."[142]

Thus, if the drafters of section 8 intended the section's deference principle to require federal deference only to traditional state water right laws, then reference to the word "appropriation" in the section would have been sufficient and the remaining words would have been superfluous.[143] It is a settled rule of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[144] A reading of section 8 that limits the deference principle to traditional state water right laws and excludes CESA would treat the words "control," "use," and "distribution" as superfluous, and therefore contrary to that rule. Furthermore, section 8 separates the words "control," "appropria-

[140] During the Congressional debates over the Reclamation Act of 1902, Congressman Mondell recognized the value of appropriative water rights and spoke disparagingly of the English common law doctrine of riparian rights. According to Mondell, "[t]he Celt, the Briton, and the Saxon occupied a territory watered by the rain of heaven, and not only had no practice, but lacked even legend or tradition of irrigation. On the contrary, they laid down and established a rule of law relative to rights in water essentially fatal to the development of irrigation." 35 Cong. Rec. 6675 (1902). In contrast, Mondell observed that "[e]very Act [of Congress] since that of April 26, 1866 has recognized the local laws and customs appertaining to the appropriation and distribution of water use in irrigation." *Id.* at 6679.

[141] *California Oregon Power Co.*, 295 U.S. at 154.

[142] *Id*. at 158.

[143] California's recognition of riparian rights along with appropriative rights does not alter this conclusion. *Lux v. Haggin*, 69 Cal. 255, 338 (1886). California courts have held that the "seasonal storage of water" is not a proper riparian use, but instead may only be secured by way of appropriation. *Colorado Power Co. v. Pacific Gas & Electric Co*., 218 Cal. 559, 564-565 (1933); *Seneca Consolidated Gold Mines Co. v. Great Western Power Co*., 209 Cal. 206, 219 (1930). As water storage projects, California reclamation projects therefore can never invoke or benefit from riparian rights and can only hold appropriative rights.

[144] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Corley v. United States*, 556 U.S. 303, 314 (2009). This rule is a "cardinal principle of statutory construction." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

tion," "use," and "distribution" with the word "or."[145] It is also a settled rule of construction that the use of the word "or" is "almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'"[146] This rule further argues that limiting the section 8 deference principle to traditional state water right laws would deny the words "control," "use," and "distribution" their separate meanings.

Fourth, more recent federal statutes relating to the CVP have adopted a broad reading of the deference principle. Section 3406(b) of the CVPIA uses open-ended language when it requires the CVP to comply with "*State* and Federal *law, including but not limited to* the Federal Endangered Species Act, 16 U.S.C. 1531, et seq., and *all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project*."[147] After providing detailed direction to the Secretary of the Interior regarding the operation of the CVP, the WIIN Act includes a broad state law savings clause that provides that "[t]his subtitle shall not be interpreted or implemented in a manner that—-preempts or modifies any obligation of the United States to act in conformance with *applicable state law, including applicable State water law*."[148] Both the CVPIA and the WIIN Act could have been written to limit the deference principle to traditional state water right law. Congress, instead, chose to take a broader approach.

Fifth, the Ninth Circuit in *Houston* and *Haugrud* expanded the reach of section 8 outside of traditional state water right laws to include section 5937 of the California Fish and Game Code.[149] In applying the section 8 deference principle, the Ninth Circuit in *Haugrud* was asked to determine whether the Bureau, as an appropriative water right permittee, must first obtain a change in its water right permit under the California

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[145] 43 U.S.C. § 383.

[146] *United States v. Woods*, 571 U.S. 31, 43 (2013), citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

[147] Central Valley Project Improvement Act, Pub. L. 102-575, § 3406(b), 106 Stat. 4706, 4714 (1992), emphasis added.

[148] Water Infrastructure Improvements for the Nation Act, Pub. L. 114, §§ 4001-4014, 130 Stat. 1851, 1882 (2016), emphasis added. Section 4005(b)(2) of the WIIN Act does contain a provision that "ma[kes] available" to SWP water contractors any additional CVP "yield" that the CVP may accrue if WIIN Act implementation "results" in DFW taking CESA actions directed at the SWP, but not the CVP, that reduce SWP water supplies when compared to the supplies that would have been available to the SWP under the ESA biological opinions for the CVP and the SWP. *Id.* at 1859. However, nothing in section 4005 requires DFW to apply CESA to the SWP and the CVP in an asymmetric fashion or alters the state law deference principle. To the contrary, section 4005(b)(4) states that "[n]othing in the applicable provisions of this subtitle shall have any effect on the application of the California Endangered Species Act." *Id.* at 1860. Section 4005(c)(2)(A) further provides that "[n]othing in the applicable provisions of this subtitle affects or modifies any obligations of the Secretary of the Interior under section 8 of the Act of June 17, 1902." *Id.*

[149] *Houston*, 146 F.3d at 1132; *Haugrud*, 848 F.3d at 1234-1235.

Water Code before releasing fish flows for the protection of fish in the lower Klamath river, or whether section 5937 allows the Bureau to make such releases without first complying with the water right permit change requirements.[150] The Ninth Circuit responded that not only did section 5937 *allow* the Bureau to release the fish flows, but the section *required* the Bureau to release those flows.[151] In applying the section 8 deference principle, the Ninth Circuit in *Haugrud* thus held that section 8 allowed a California Fish and Game Code fishery protection provision to displace a traditional California Water Code water right provision in determining a reclamation project's "control, appropriation, use, or distribution" of water. At least in the Ninth Circuit, the expansion of the section 8 deference principle beyond traditional state water right law appears settled.[152]

Sixth, a reading of section 8 that excludes CESA from state laws relating to the "control, appropriation, use, or distribution" of water would produce anomalous and inconsistent outcomes depending upon the particular state agency enforcing state law. As noted above, DFW has already issued a CESA incidental take permit applicable to the long-term operations of the SWP.[153] The DFW permit limits SWP exports from the southern Delta to increase Delta outflow for the protection of CESA-listed species through OMR, Fall X2, and other flow-related requirements.[154] These flow-related requirements are similar in kind to the flow-related requirements historically imposed upon the CVP under the State Water Board's water right decisions to protect fishery resources.[155] It would be anomalous and inconsistent for section 8 to be read to include flow-related requirements as conditions contained in a State Water Board water right permit, but to exclude the very same requirements as

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[150] *Haugrud*, 848 F.3d at 1234.

[151] *Id*. ("This code section not only allows, but requires BOR to allow sufficient water to pass the Lewiston Dam to maintain the fish below the Dam. . .Therefore, section 5937 permitted BOR to release water from the Lewiston Dam to 'keep in good condition' the fish in the lower Klamath River without changing its water rights permits.")

[152] That the drafters of the Reclamation Act of 1902 may not have "anticipated" that section 8 would include state fishery protection laws such as CESA or section 5937 of the Fish and Game Code does not prevent the inclusion of such laws within section 8. Statutory interpretation is driven by a statute's "meaning," not by the statute's anticipated "result." As the U.S. Supreme Court has recently observed in applying the Civil Rights Act of 1964 to workplace discrimination against gays, lesbians, and transgender people, "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands." *Bostock v. Clayton County*, No. 17-1618, slip op. at 2, 24-26 (U.S. June 15, 2020).

[153] *See supra* note 112.

[154] DFW Permit at 71, 82, 85-88, 92-94, and 114-115.

[155] Revised Water Right Decision 1641, California State Water Resources Control Board 183-187 (2000).

conditions contained in a DFW incidental take permit.[156] Section 8 does not identify which state agencies must implement state laws relating to the "control, appropriation, use, or distribution" of water. It only requires that the Bureau comply with state laws that relate to the "control, appropriation, use, or distribution" of water.[157]

Finally, the requirement in *California* that state laws apply to reclamation projects unless such laws are "directly inconsistent" with congressional directives regarding the project provides no obstacle to DFW's assertion of CESA authority over the CVP.[158] The ESA cannot constitute a conflicting congressional directive because section 6(f) of the act provides that "[a]ny state law or regulation respecting the endangered or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter."[159] The biological opinions also cannot constitute conflicting directives because they are not "a preempting federal statute."[160]

While it is not inconceivable that in implementing CESA, DFW might issue an incidental take permit or other requirement directed at the CVP that contained conditions that were "directly inconsistent" with a congressional directive regarding the CVP, no such preemption claim would be ripe until after the United States had submitted to DFW jurisdiction under CESA and DFW had taken final action. As the U.S. Supreme Court in *California* noted, any determination as to whether "conditions actually imposed are inconsistent with congressional directives" is a determination that "may well require additional factfinding."[161] In the absence of actual DFW conditions, no such a determination could be made.

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[156] This reading of section 8 is consistent with the Ninth Circuit decision in *Wild Fish Conservancy v. Jewell*, 730 F.3d 791 (9th Cir. 2013). In *Wild Fish*, the Ninth Circuit rejected the plaintiffs' claim that a Washington state law mandating the construction of a "durable and efficient fishway" across a Bureau fish hatchery was a state law concerning "the control, appropriation, use, or distribution" of water. *Id.* at 800. However, *Wild Fish* declined to address the question of whether a separate state law that required the Bureau to "supply existing fishways with adequate water" was properly a state law relating to the "control, appropriation, use, or distribution" of water because that claim was deemed not reviewable under the federal Administrative Procedure Act. *Id*. at 800-801. In addition, the Ninth Circuit noted that the State of Washington's failure to join with the plaintiffs in their reading of section 8 and state law reduced the "cooperative federalism and respect for separate sovereignty" concerns raised by the plaintiffs' section 8 claims. *Id*. at 798-799.

[157] 43 U.S.C. § 383.

[158] *California*, 438 U.S. at 678.

[159] 16 U.S.C. § 1535(f).

[160] *United States v. State Water Resources Control Board*, 694 F.2d at 1176.

[161] *California*, 438 U.S. at 679.

VI. Conclusion

178 years ago, the U.S. Supreme Court in *Martin v. Lessee of Waddell* held that the thirteen colonies, freed from English rule, "took into their own hands the powers of sovereignty" and "the prerogatives and regalities which before belonged either to the Crown or the Parliament became immediately and rightfully vested in the state[s]."[162] In a case involving the right to shellfish, the *Martin* court recognized that part of this sovereign power included the right of the "common people of England" to the "the public common of piscary" and that freedom from English rule transferred those rights to the states.[163] The deference to state water law principle in section 8 of the Reclamation Act of 1902 formally recognized that transfer of sovereign power to the states as to reclamation projects. As the above has shown, CESA is a state law relating to the "control, appropriation, use, or distribution" of water under section 8. The CVP's submission to DFW's fishery protection authority under CESA fully conforms with the deference principle's historical legacy and should be upheld.

[162] *Martin*, 41 U.S. at 416.
[163] *Id*. at 412.