**2020 California Water Law Symposium**

**Golden Gate Law School**

**February 1, 2020**

**Federalism and Water under the Trump Administration: Has the Long Peace Come to an End?**

**Deputy Attorney General Clifford T. Lee (ret.)[[1]](#footnote-1)**

“The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.” *California v. United States*,438 U.S. 645, 653 (1978)

**I. The Origin of Congressional Deference to State Water Law**

**A. Predecessors to Section 8 of the Reclamation Act of 1902 and the Federal Reclamation Principle of Congressional Deference to State Water Law**

**1. The Equal Footing Doctrine**

Congress admitted California to the Union as a state “on an equal footing with the original states in all respects whatever.” 9 Stat. 452 (Sept. 9, 1850). Under this doctrine, Congress granted to the western states, upon their admission into the Union, exclusive sovereignty over the unappropriated waters in their streams. *Kansas v. Colorado*, 206 U.S. 46, 95 (1907); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894); *Pollard v. Hagan*, 44 U.S. 212, 229 (1845). The doctrine provides that “the people of each State, based on principles of sovereignty, ‘hold the absolute right to all their navigable waters and the soils under them,’ subject only to the rights surrendered and powers granted by the Constitution to the Federal Government.” *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012), citing *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842).

In *Kansas v. Colorado*, a case involving a dispute over the Arkansas River, Kansas argued that Congress had expressly applied English common law to both states and that the common law included the riparian system of water rights. The U.S. Supreme Court rejected this view and held that:

[Each state] may determine itself whether the common law rule in respect to riparian rights of that doctrine which obtains in the arid regions of the West of appropriation of water for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State.

*Kansas v. Colorado*, 206 U.S. at 94.

**2. The Severance Doctrine**

Congress reaffirmed the policy of deference to state law in the Desert Land Act of 1877. The Desert Land Act followed numerous other mining and homestead acts enacted in the late 19th century to reclaim and settle public land by authorizing the entry onto and cultivation of such land. *California v. United States*, 438 U.S. 645, 655-657 (1978). Upon compliance with certain conditions, a settler would receive a land patent. With regard to water, the Desert Land Act authorized settlers to appropriate water for irrigation and reclamation, and specifically provided that all sources of water on public lands were to “be held free for appropriation and use of the public.” 19 Stat. 377 (Mar. 3, 1877).

In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935), the U.S. Supreme Court interpreted the Desert Land Act as establishing a “severance doctrine” that affirmed Congressional deference to state water law. At issue in *California Oregon Power* was whether a federal land patent carried with it a common law riparian water right. After reviewing the Act’s language concerning the appropriation of water on federal lands, the Court held that the Desert Land Act severed the right to water from public domain land and delegated to the states the power to allocate their water resources. *Id*. at 164.

**B. Section 8 of the Reclamation Act of 1902**

Congress reaffirmed this deference to state authority regarding water resources in the Federal Reclamation Act of 1902. The 1902 Act authorized the federal government to construct water resource development projects through the U.S. Bureau of Reclamation (Reclamation), known as reclamation projects, and initially to finance these projects through the sale of public lands. 43 U.S.C. § 391. Section 8 of the Act provides 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.

43 U.S.C. § 383.

State water law applies to both the acquisition of a water right and the distribution of water after its release from a dam.

“The bill provides explicitly that even an appropriation of water can not be made except under State law.”

56 Cong. Rec. 6687 (1902) (Remarks of Congressman Mondell).

"[It] is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. To take from these experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal.”

56 Cong. Rec. 2222 (1902) (Remarks of Senator Clark).

As noted above, section 8 of the 1902 Act is part of a long-standing Congressional pattern of deference to state water law. In *United States v. New Mexico*, the U.S. Supreme Court observed that “[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.” *United States v. New Mexico*, 438 U.S. 698, 702 (1978); see also *Id*. at 702, fn. 5 [citing Congressional sources “listing 37 statutes in which Congress has expressly recognized the importance of deferring to state water law,” commencing with the Mining Act of 1866.].

**II. The Decline of Section 8 of the 1902 Act, State Acquiescence, and the Rise of Federal Dominion**

**A. *Ivanhoe, City of Fresno,* and *Arizona* and the Rise of Federal Dominion**

In a trio of mid-twentieth century cases, the U.S. Supreme Court minimized the effect of section 8 of the Reclamation Act. In *Ivanhoe Irrigation Dist. v. McCracken,* the Court held that “[w]e read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.” *Ivanhoe Irrigation Dist. v. McCracken*,357 U.S. 275, 292 (1958). In *City of Fresno v. California*, the Court rejected the argument that section 8 limited “the United States from exercising the power of eminent domain to acquire the water rights of others” and held that “the effect of § 8 in such a case is to leave to state law the definition of the property interest, if any, for which compensation must be made.” *City of Fresno v. California*, 372 U.S. 627, 630 (1963). Finally, in *Arizona v. California*, the Court held that “[s]ince § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the [Boulder Canyon] Project Act.” *Arizona v. California*, 373 U.S. 546, 587 (1963).

**B. An Example of the Effect of Federal Dominion: Limits on the Application of State Law to the Friant Dam Project.**

Through passage of the Central Valley Project Authorizing Act of 1937, Congress authorized the construction and operation of a series of reclamation facilities, including Friant Dam and the Madera and Friant-Kern distribution canals, facilities located in the southern Central Valley of California. Act of August 26, 1937, ch. 832, 50 Stat. 844. Reclamation commenced construction of Friant Dam in 1939, the Madera Canal in 1940, and the Friant-Kern Canal in 1945. Water deliveries commenced in 1944. State Water Rights Board, Water Right Decision 935 at 14-15. However, the State Water Rights Board did not issue water rights for the Friant project until June 2, 1959. (*Id.*)

The effect of allowing construction and operation of federal reclamation projects to precede the issuance of projects’ state water rights and the 1958 *Ivanhoe* decision was to limit the state law terms and conditions that California could impose on the projects. 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) argued that operation of Friant Dam had eliminated the San Joaquin River spring-run salmon fishery in violation of state law. 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.” State Water Rights Board, Water Right Decision 935 at 40. The State Water Rights Board then concluded that “[i]n view of the foregoing the Board concludes 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.” *Id.* at 41, italics added.

**III. The Resurrection of Section 8 of the 1902 Act and Federal Deference to State Law**

**A. *California v. United States***

It was not until the 1978 U.S. Supreme Court decision in *California v. United States* that the Court granted meaningful effect to section 8 of the 1902 Act. *California,* 438 U.S. at 674. At issue in *California*, was whether section 8 required Reclamation, as the operator of the New Melones Project on the Stanislaus River, to comply with state law terms and conditions imposed by the State Water Resources Control Board on the water right permits issued for the project. Characterizing the preemptive language in its earlier cases as “dictum,” the Court stated, “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.” *Ibid.* 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.” *Id*. at 675. In rejecting the United States’ argument that more recent legislative enactments altered the federalism balance regarding reclamation projects, the Court concluded 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.*” *Id.* at 678, italics added.[[2]](#footnote-2)

On remand, the Ninth Circuit confirmed that an “inconsistent congressional directive” referred to an expressly conflicting federal statute. *United States v. State Water Resources Control Board*, 694 F.2d 1171, 1176 (9th Cir. 1982) (“The question before us, therefore, is whether state law, otherwise applicable by virtue of section 8, is displaced by subsequent congressional action.”). However, note the Ninth Circuit’s cautionary language that “State law, where not inconsistent with federal law, was to control only the impoundment of water into the dam and the distribution of water from the dam to individual landowners. We doubt California was intended to play a significant role in influencing the later operations of the dam.” (*Id.* at 1182.)

**B. Recent Examples of Reclamation Savings Clauses related to the Central Valley Project that Defer to State Law**

**1. The Central Valley Project Improvement Act of 1992**

Section 3406(b) of the Central Valley Project Improvement Act of 1992 (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.*” Central Valley Project Improvement Act of 1992, Pub. L. 102-575, § 3406(b), 106 Stat. 4706, 4714, italics added.

**2. Water Infrastructure Improvements for the Nation Act of 2016**

Section 4012 of the recently-enacted California rider to the Water Infrastructure Improvements for the Nation Act of 2016 (WIIN Act) declares, in part, that:

This subtitle shall not be interpreted or implemented in a manner that---

(1) preempts or modifies any obligation of the United States to act in conformance with applicable state law, including applicable State water law;

WIIN Act, Pub. L. No. 114-322, § 4012(a), 130 Stat. 1628, 1882.

**C. Examples of California’s Judicial Efforts to Protect Environmental Values through Application of the Deference to State Law Principle**

California has repeatedly invoked the principle of congressional deference to state water law set forth in *California* to require federal reclamation projects to comply with the environmentally-protective provisions of state water law.

**1. *United States v. State Water Resources Control Board* (1978 Delta Water Quality Standards)**

In *United States v. State Water Resources Control Board,* the California Court of Appeal for the First Appellate District adopted the State Water Resources Control Board’s arguments and rejected the “Bureau’s contention that the Board-imposed conditions for salinity control [in the Delta] are inconsistent with congressional directives.” *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 135 (1986). After reviewing the federal statutes authorizing the Central Valley Project (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.” *Id.* at 136.

**2. *Natural Resources Defense Council v. Houston* (Restoration of San Joaquin River Fisheries)**

In *Natural Resources Defense Council v. Houston,* the State Water Resources Control Board, as an amicus, argued and the U.S. Court of Appeals for the Ninth Circuit adopted a reading of *California* and the CVPIA that mandated the Reclamation to operate Friant Dam in compliance with state water law, including section 5937 of the Fish and Game Code. *Natural Resources Defense Council v. Houston*,146 F.3d 1118, 1132 (9th Cir. 1998). 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.” Fish & G. Code, § 5937. Section 5937 is a legislative manifestation of the California public trust doctrine. *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal.App.3d 585, 626 (1989). On remand, the district court affirmed the State Water Resources Control Board’s view that reclamation law as interpreted by the Supreme Court in *California* and modified in the CVPIA deferred to state water law, and held that the Bureau was required to operate Friant Dam consistent with section 5937 of the Fish and Game Code. *Natural Resources Defense Council v. Patterson*, 333 F.Supp.2d 906, 919-921 (E.D. Cal. 2004).) This litigation resulted in a settlement that led to a joint federal and state program to restore the San Joaquin River as habitat for a self-sustaining chinook salmon population.

**3. *San Luis & Delta Mendota Water Auth. v. Haugrud* (Supplemental Fishery Flows in the Trinity/Klamath River Watershed)**

The California Department of Fish and Wildlife (DFW), as an amicus, argued in federal litigation that Reclamation was justified in its 2013 decision to release supplemental flows from Trinity Dam to protect returning salmon from the risk of a devastating fish kill due to low flow conditions in the lower Klamath River because the California public trust doctrine and section 5937 of the Fish and Game Code required such fish flow releases. Central Valley agricultural interests had opposed Reclamation’s fishery protections as being inconsistent with federal reclamation law. In *San Luis & Delta Mendota Water Auth. v. Haugrud,* the Ninth Circuit affirmed Reclamation’s decision to release supplemental fishery flows, in part, based upon DFW’s state water law arguments. *San Luis & Delta Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1234-1235 (9th Cir. 2017).

**IV. Tenth Amendment Bar Against Commandeering State Agencies and Officials to Implement Federal Policies**

**A. *New York v. United States***

In *New York v. United States*, the U.S. Supreme Court invoked state sovereignty principles arising in part from the Tenth Amendment of the U.S. Constitution and enunciated an anti-commandeering limit on congressional power to mandate state implementation of federal legislation. *New York v. United States*,505 U.S. 144, 175 (1992). At issue in *New York* was a provision in the federal Low-Level Radioactive Waste Policy Amendments Act that required the states to either regulate low-level radioactive waste consistent with federal policy or to take title of the waste generated within their borders, an action that could subject them to damage liability. *Id.* at 153-154, 175. The Court in *New York* recognized that Congress may condition a state’s receipt of federal funds or may offer states the choice of either direct federal regulation or state self-regulation consistent with federal standards. However, Court held that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” *Id.* at 166-167.[[3]](#footnote-3)

According to the Court, the Framers rejected a form of national government that would allow Congress to enlist the states to implement federal policy and instead “opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States.” *New York,* 505 U.S. at 165. Congressional enlistment of the states as enforcers of federal policy would diminish governmental accountability by requiring state officials, rather than federal officials, to “suffer the consequences” of “detrimental or unpopular” federal policy decisions. *Id*. at 168-169. For these reasons, the Court overturned the contested waste act provisions, concluding that any federal statute that “commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program” results in “an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.” *Id*. at 176. While states may be subject to generally applicable federal regulations, state sovereignty principles bar Congress from adopting laws that impose specific duties on state governments regardless of the strength of the federal interests. In the Court’s words, “[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” *Id*. at 178.[[4]](#footnote-4)

**B. *Printz v. United States***

In *Printz v. United States*, the U.S. Supreme Court affirmed the anti-commandeering limits on congressional power in overturning a provision of the Brady Handgun Violence Prevention Act that required local law enforcement officials to engage in “reasonable efforts” to research the background of handgun purchasers. *Printz v. United States*, 521 U.S. 898, 927-928 (1997). The Court declared that “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.” *Id.* at 928. Congress breaches that “independence and autonomy” where federal law has “dragooned” state officers “into administering federal law.” *Ibid.* The Court rejected the notion that state sovereignty allows Congress to balance the state’s autonomy against the importance of the federal interests at stake. Where federal law offends “the very principle of separate state sovereignty,” then “no comparative assessment of various interests can overcome that fundamental defect.” *Id*. at 932. The Court observed that “[w]e held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly.” *Id*. at 935.

**C. *Murphy v. National Collegiate Athletic Association***

At issue in *Murphy v. National Collegiate Athletic Association*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 1461 (2018) was whether the federal Professional and Amateur Sports Protection Act (PASPA) prohibited New Jersey from repealing a portion of the state’s law that had prohibited sports gambling. The National Collegiate Athletic Association (NCAA) challenged the New Jersey’s repeal of the gambling prohibition and the state raised an anti-commandeering defense. NCAA sought to distinguish *New York* and *Printz* on the grounds that the PASPA simply prohibits sports gambling and does not command the states to take an affirmative act. Without an affirmative federal command to do something, the plaintiffs contended, there can be no claim of commandeering. *Murphy,* 138 S.Ct. at 1471.

The Supreme Court expressly rejected the plaintiffs’ reading of *New York* and *Printz*. According to the *Murphy* court:

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded “affirmative” action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

(*Id.* at 1478.)

**D. Summary of Anti-Commandeering Principles**

**1. Prohibits Commandeering**

The federal government cannot command the state governments to implement federal policies unless Congress conditions a state’s receipt of federal funds on compliance with federal policies or offers states the choice of either direct federal regulation or state self-regulation consistent with federal standards. *New York*,505 U.S. at 166-167.

**2. The Prohibition is not Balanced Against Federal Interests**

The anti-commandeering principles do not allow the balancing of the state’s autonomy against the importance of the federal interests at stake. Where federal law offends “the very principle of separate state sovereignty,” then “no comparative assessment of various interests can overcome that fundamental defect.” *Printz,* 521 at 932.

**3. The Prohibition is not Limited to Affirmative Commands**

The principle that Congress cannot issue direct orders to state legislatures applies equally to congressional prohibitions on state actions as it does to affirmative congressional commands. *Murphy,* 138 S.Ct. at 1478.

**E. Possible Scenarios for Application of the Anti-Commandeering Principles to the U.S. Bureau of Reclamation’s Use of California State Water Project Facilities**

**1. The Central Valley Project’s Use of the Delta-Mendota Canal/California Aqueduct Intertie**

**2. The Central Valley Project’s Use of the Joint Point of Diversion Conditions in Revised Water Right Decision 1641**

**V. Current Developments and Future Conflicts**

**A. Reclamation Commissioner Brenda Burman’s July 27, 2018 Letter to Felicia Marcus, Chair of the State Water Resources Control Board, regarding the Proposed Final San Joaquin River Flows and Southern Delta Water Quality Amendments**

“Unless the Secretary of the Interior determines that operation of the Central Valley project in conformity with State water quality standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary is not consistent with the congressional directives applicable to the project, the Secretary is authorized and directed to operate the Project, in conjunction with the State of California water project, in conformity with such standards. *Should the Secretary of the Interior so determine, then the Secretary shall promptly request the Attorney General to bring an action in the court of proper jurisdiction for the purposes of determining the applicability of such standards to the project.*”

Commissioner Brenda Burman’s July 27, 2018 Letter at 3, emphasis added.

**1. The United States’ Actions Challenging the State Water Resources Control Board’s San Joaquin River Flow and Southern Delta Water Quality Amendments Have To Date Avoided the Federal Preemption Issue.**

On March 28, 2019, the United States filed actions in federal and state courtschallengingthe StateWater Resources Control Board’s San Joaquin River flow and Southern Delta water quality amendments to the Bay-Delta water quality control plan. *United States v. State Water Resources Control Board*, U.S. District Court, Eastern District of California Case No. 2:19-cv-00547-LJO-EPG; *United States v. State Water Resources Control Board*, , Sacramento County Superior Court Case No. 34-201908000311. On June 18, 2019, the United States filed a first amended complaint in its federal court action. None of the federal complaints raises the preemption question of whether “operation of the Central Valley project in conformity with State water quality standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary is [] consistent with the congressional directives applicable to the project.” Burman July 27, 2018 Letter at 3.

**2**. **The Arguments Contained in the Bureau July 27, 2018 Letter that the Coordinated Operations Agreement Statute and the Central Valley Project Improvement Act Provide Conflicting Congressional Directives that Displace the Water Board’s 2018 Water Quality Amendments Are Without Merit.**

**a. COA Statute-Public Law 99-546, 100 Stat. 3050 (1986)**

The Bureau letter assert that the COA statute “left the Secretary with discretion to evaluate and determine whether the standards are consistent with congressional directives.” Burman July 27, 2018 Letter at 3. However, the COA statute makes clear that if the Secretary makes such a determination, the Secretary is to file a federal action “for the purposes of determining the applicability of such standards to the project.” 100 Stat. 3050 (1986). Thus the federal courts, not the Secretary, renders the legal determination of consistency.

**b. The Central Valley Project Improvement Act-Public Law 102-575, 106 Stat. 4706 (1992)**

The Bureau letter further asserts that section 3411(b) of the Central Valley Project Improvement Act “also makes clear that the Secretary retains discretion to review SWRCB licenses and permits for the project.” Burman July 27, 2018 Letter at 3, n. 3. However, section 3411(b) only requires the Secretary to comply with the Coordinated Operations Agreement and the COA statute. 106 Stat. 4706, 4731 (1992) The Bureau letter simply disregards Article 11(d) of the COA, which states that “**the parties do not intend by this agreement to confer any additional authority upon either the Secretary of the Interior or the State Water Resources Control Board beyond that derived from applicable statutory and decisional law**.”

**B. Does Section 8 of the Reclamation Act Require the U.S. Bureau of Reclamation to Comply with the California Endangered Species Act?**

**1. The United States’ Fall 2019 Efforts to Modify the Delta Smelt Fall X2 Salinity Habitat Protections Contained in the 2008 U.S. Fish and Wildlife Service’s Delta Smelt Biological Opinion**

**a. September 4, 2019 Memorandum from the U.S. Bureau of Reclamation to the U.S. Fish and Wildlife Service regarding Request for Reinitiation of Consultation over 2008 Delta Smelt Biological Opinion Action 4 (Fall X2)**

The Bureau of Reclamation’s September 4, 2019 memorandum proposes modification of the Fall X2 requirement for September and October of 2019 to allow the Bureau to operate the Central Valley Project at 80 km from the Golden Gate Bridge, instead of the previously mandated 74 km post-wet year requirement. The memorandum concedes that “the proposed action would adversely affect Delta smelt designated critical habitat.” Bureau September 4, 2019 Memorandum at 3.

**b.** **September 18, 2019 Memorandum from the U.S. Fish and Wildlife to the U.S. Bureau of Reclamation regarding Proposed Changes to Action 4 of the 2008 Biological Opinion**

The U.S. Fish and Wildlife Service September 18, 2019 memorandum approves the Bureau’s proposed modification “to allow for Reclamation to operate its facilities to achieve an average X2 location no greater (more eastward) than 80 km in September and October, 2019.”The U.S. Fish and Wildlife Service approves the modification even though the memorandum concedes that the proposed action would likely result in a percentage loss of low salinity zone habitat for the Delta smelt of between 7.7-13%. U.S. Fish and Wildlife Service September 18, 2019 Memorandum at 6.

**c. September 24, 2019 Letter from the California Department of Fish and Wildlife to the U.S. Bureau of Reclamation regarding Implementation of Fall X2 Action in the Fall of 2019**

The California Department of Fish and Game September 24, 2019 letter requests that the Bureau “immediately cease implementation of the U.S. Bureau of Reclamation’s (Reclamation) proposed change of …Action 4 (Fall X2) in the Fall of 2019.” Department of Fish and Wildlife September 24, 2019 Letter at 1. The Department of Fish and Wildlife concludes that implementation of the Fall X2 modifications “would undermine necessary species protections even as Delta smelt decline to record-low abundance.” *Id.* at 2.

**d. October 1, 2019 Letter from the U.S. Bureau of Reclamation to the California Department of Fish and Wildlife regarding the Department of Fish and Wildlife’s Response to the Bureau Fall X2 Action for 2019**

The Bureau’s October 1, 2019 letter expresses its disagreement with the Department of Fish and Wildlife’s biological assessment of the effects of the Fall X2 modifications. However, the Bureau letter concludes that “as a matter of comity and in response to your request, Reclamation no longer intends to implement its proposed Fall X2 action during October 2019.” U.S. Bureau of Reclamation October 1, 2019 Letter at 1.

**2. Threshold Issue: ESA Does Not Preempt More Restrictive State Endangered Species Laws.**

Section 6(f) of the ESA states that “[a]ny state law or regulation respecting the taking of an endangered species 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 but not less restrictive than the prohibitions so defined. 16 U.S.C., § 1535(f).

**3. But is the California Endangered Species Act a “State Law Relating to the Control, Appropriation, Use or Distribution of Water”?**

**a. The Plain Language of Section 8 Does Not Limit the Section to State Water Rights Laws**

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.

43 U.S.C. § 383, emphasis added.

**b. Section 3406(b) of the Central Valley Project Improvement Act Confirms a Broad Reading of Section 8**

Section 3406(b) of the Central Valley Project Improvement Act of 1992 (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.*” Central Valley Project Improvement Act of 1992, Pub. L. 102-575, § 3406(b), 106 Stat. 4706, 4714, emphasis added.

**c. Federal Case Authority**

1)*Natural Resources Defense Council v. Houston*,146 F.3d 1118, 1132(9th Cir. 1998) (Section 5937 of the Fish and Game Code is covered by Section 8 of the Reclamation Act.)

2) *Wild Fish Conservancy v. Jewell*,730 F.3d 791, 800 (9th Cir. 2013) (A Washington state law requiring the submittal of fishway plans and the maintenance of fishways on hatchery structures that obstruct fish passage was not a state law relating to the “control, appropriation, use, or distribution of water” under section 8 of the Reclamation Act because the law does “not relate to the creation or exercise of water rights.”)

**d. California Case Authority**

1) *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*,8 Cal.App.4th 1554, 1559-1560 (1992) (“[S]ection 2080 [of CESA]applies to the destruction of fish incidental to lawful irrigation activity.)

2) *Watershed Enforcers v. Department of Water Resources*, 185 Cal.App.4th 969, 978 (2010) (CESA applies to the State Water Project.)

1. After forty years as a deputy attorney general with the California Department of Justice, Clifford Lee retired from state service as of the end of 2019. The views expressed in this outline and in the panel presentation are the views of the author and do not necessary reflect the views of the State of California or any of its departments, agencies or boards. [↑](#footnote-ref-1)
2. Outside of the context of federal reclamation projects, the 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 saving 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].) [↑](#footnote-ref-2)
3. Subsequent to *New York,* a majority of the Court has held that federalism principles limit Congress’ power to condition state receipt of federal funds where such conditions are deemed “coercive.” *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 584-585, 681 (2012). [↑](#footnote-ref-3)
4. The Court has underscored the state sovereignty distinction between “generally applicable” federal laws and laws that specifically target the states, their agencies, or officials. In *Reno v. Condon*, the Court rejected a state sovereignty challenge to a federal driver’s license privacy statute on the grounds that it did not impose separate duties on the states, but instead generally imposed privacy duties on state officials and private persons in possession of the protected information. *Reno v. Condon*, 528 U.S. 141, 151 (2000). [↑](#footnote-ref-4)