ORIGINAL

In the

# Supreme Court of the United States

CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES,
Respondents.

No. 77-285

Washington, D.C.
March 28, 1978

Pages 1 thru 70



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IN THE SUPREME COURT OF THE UNITED STATES

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| CALIFORNIA, ET AL., Petitioners, | : | |
| v. | : | No. 77-285 |
| UNITED STATES, Respondent. | : | |

Washington, D. C.

Tuesday, March 28, 1978

The above-entitled matter came on for argument at 1:28 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Assocaite Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RODERICK E. WALSTON, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California; on behalf of the Petitioners

STEPHEN R. BARNETT, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in California v. United States.

Mr. Walston, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF RODERICK E. WALSTON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WALSTON: Mr. Chief Justice, and may it please the Court:

The issue before the Court today is whether section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior to comply with state regulatory water laws when it acquires and uses water under that particular Act

Section 8 embodies a fundamental historical principle of the federal reclamation laws, the principle that within some yet undefined limits the states have some measure of control over the use and distribution of such water; thus the principle in this case is one of ultimate historic significance, we believe. It is whether that principle, that substantive principle of the federal reclamation laws will remain a viable principle of those laws.

During my argument this afternoon, I intend to focus on what we consider to be the three major issues before the Court. First, did Congress in fact in 1902 establish a principle of state controlled waters, did Congress actually give

that power to the states? Second, if it did, how can we reconcile that principle with the many substantive congressional policies that Congress has enacted in the field of reclamation, both in the 1902 Act and in later Acts? In other words, how do we reconcile potential conflicts between state and federal policies? And, third, how do we reconcile the principle of state control with the broad discretion which Congress has given to the Secretary of the Interior to carry out the substantive congressional policies?

Now, let me turn to the facts of the case. The Reclamation Act of 1902 essentially provides for federal construction and operation of reclamation facilities in about 17 western states. Under the authority of that Act, Congress has authorized a number of reclamation facilities in California that are collectively known as the Central Valley Project.

The Bureau of Reclamation has always complied with California regulatory water laws in acquiring its water rights for the Central Valley Project. It has always submitted permit applications to the California Water Resources Control Board, the board has always granted permits to the bureau, the board has usually imposed conditions in those permits, the bureau has always complied with the conditions in the permits.

In fact, since 1927, the state board has issued 12 major decisions that result in the issuance of conditional permits to the Bureau of Reclamation.

Then in 1973, the United States filed its present action for declaratory judgment, and in this action it asks the court to determine that the Bureau of Reclamation need not comply with California's appropriation procedure and thus that it need not comply with conditions in the permits which have been issued to the bureau.

The effect of this position, of course, would be to avoid the conditions in all 12 decisions which have been issued by the state board. By way of illustration, the United States in its complaint referred to a specific decision called Decision 1422. This decision results in the issuance of conditional permits to the Bureau of Reclamation for the New Melones Project on the Stanislaus River in California. The New Melones Project is a dam and reservoir facility that was authorized by Congress in 1944, and it was reauthorized in 1962.

In its complaint, the United States argues that the state board lacks power under any and all circumstances to impose any kind of condition upon the federal water right. And Calfironia, by way of contrast, argues that California has a qualified power to impose conditions. It argues that it can impose conditions if those conditions do not impair or interfere with the basic congressionally authorized purposes of federal reclamation projects.

The lower court upheld the position of the United

States. It held that the state board is without power to impose conditions under any and all circumstances, that there is no circumstance where such a condition can be imposed upon an appropriated permit issued to the bureau, and on that basis the court granted summary judgment for the United States.

The court did not reach the question whether the conditions of Decision 1422 or, for that matter, any other decision issued by the state board in fact conflict with any congressionally authorized purposes of the project. It avoided that question because it held that the question was simply not relevant.

QUESTION: Was the phrase "congressionally authorized purpose of the project" one of -- gotten out of the legal literature or used originally by the State of California or by the United States?

MR. WALSTON: It reflects the position of the United States, Justice Rehnquist. We have maintained throughout this litigation that the state has the power to impose conditions under section 8 of the Reclamation Act, which I will momentarily describe. We also will point out momentarily that Congress has subsequent to 1902 adopted a number of reclamation policies and established a number of individual reclamation projects, and in our view every time Congress establishes such a policy or authorizes such a project, it subtracts from the authority which it originally gave the states in 1902.

QUESTION: Well, what if Congress said we want to have the New Melones Project and we are going to appropriate all vested water rights in the State of California that are inconsistent with the operation of that, would you think Congress could do that if it simply set forth that in the authorization act?

MR. WALSTON: Yes, very definitely.

QUESTION: Consistently with the Gerlach Live Stock case?

MR. WALSTON: Yes. As I understand Gerlach, the Court was merely holding that in that particular case section 8 required reference to state law. But you are suggesting in the hypothetical, Justice Rehnquist, that Congress might override section 8 in some particular fashion.

QUESTION: What power do you suppose they would be exercising if they did that?

MR. WALSTON: I think that it would have that power under either the Commerce Clause or the Property Clause of the United States Constitution. There are decisions of this Court, by the way, going back to 1907 that give a contrary view. For instance, in Kansas v. Colorado, this Court seemed to suggest that Congress didn't have that constitutional power.

QUESTION: And what subsequent cases have suggested that it does have that power?

MR. WALSTON: We think that a fair analysis of this

Court's decisions in Ivanhoe and Fresno would support the concept that Congress has this constitutional power, because in those cases the Court essentially held that Congress could override state water laws in specific areas.

QUESTION: Not vested water rights. Did you really mean to answer the Justice that if there had been adjudicated water rights in the State of California that without condemning them and buying them, Congress should appropriate them by an act?

MR. WALSTON: Congress can certainly condemn them under the --

QUESTION: I know, but that isn't what he asked you.

QUESTION: Can we simply say they are now ours, without condemning them?

MR. WALSTON: No, I don't think so.

QUESTION: Well, you answered that they could.

MR. WALSTON: Well, I was assuming a broader question perhaps than Justice Rehnquist. I thought you were talking about unappropriated water --

QUESTION: So you agree that if there had been appropriate rights that had been adjudicated, that the United States must buy them?

MR. WALSTON: Absolutely. Very definitely.

QUESTION: Now, let's talk about the unappropriated water rights.

MR. WALSTON: That's correct.

QUESTION: Now, that is the subject you are now addressing.

MR. WALSTON: Correct.

QUESTION: Now, what power do you say?

MR. WALSTON: With respect to unappropriated water, we think the United States would have the power under the Commerce Clause and the Property Clause of the U.S. Constitution to acquire such water.

QUESTION: Do you find any case in this Court that names those two particular powers?

MR. WALSTON: I would say that this Court's decision in the Beaver Portland case, for example, holds that the states essentially have the right to control the unappropriated water of the western states, but is subject to two major congressional constitutional limitations. One limitation is found in the Commerce Clause and the other is found in the Property Clause.

QUESTION: What power do you suppose the United States is exercising when it decides to build a reclamation project at all?

MR. WALSTON: I think it can exercise that power under either the Commerce Clause or the Property Clause.

QUESTION: You don't think the Welfare Clause is --

MR. WALSTON: Oh, possibly also. I know --

QUESTION: That is the way this Court has talked about reclamation project, isn't it?

MR. WALSTON: I think in the Ivanhoe case the Court did make reference to the Welfare Clause. But I think the traditional approach that this Court has taken in most cases has been to rely on the Commerce Clause and the Property Clause.

QUESTION: Well, what cases ever relied on the Commerce Clause to support the taking by the United States of unappropriated water in a situation that didn't involve a navigational servitude as well?

MR. WALSTON: That did not involve navigation servitude?

QUESTION: Yes.

MR. WALSTON: I can't think of any.

QUESTION: I can't either.

MR. WALSTON: The Court has usually held that the Commerce Clause and navigational servitude are essentially the same, and in the 1899 decision in Rio Grande it seems to suggest that there might be a Commerce Clause power to take water as part of navigational servitude. But I don't think this Court has ever held that where navigation is not concerned Congress has powers under the Commerce Clause to take unappropriated water. I hate, of course, to be defending the position of the United States in this litigation at this point, but

essentially what we are really talking about in this case is whether Congress in fact required the Bureau of Reclamation to comply with state law in acquiring unappropriated water.

So the issue in the case is precisely that, did Congress in section 8 provide that the states must comply with the -- that the Bureau of Reclamation must comply with state water laws. If the state board lacks a qualified power to impose any kind of conditions on the federal water right, then the conditions of all 12 decisions which the state board has issued, including Decision 1422, would be valid. And if, on the other hand, the state board has that power, then the conditions of all 12 decisions we think are beyond collateral attack for the reason that the United States has never chosen to seek direct judicial review of any of those decisions.

In any event, assuredly the Court cannot examine the conditions of any particular decision in this case because that matter was not before the lower court and the lower court didn't take any evidence on the question.

Now, this brings is to what I consider to be the first major question before the Court and that is whether Congress in fact in 1902 established the principle that the states have the right to control water from federal reclamation projects under the 1902 Act. Section 8 specifically provides that the Secretary shall "proceed in conformity with state laws relating to the control, appropriation, use or

distribution of water.

QUESTION: Well, let me ask you one question which is -- I see you are starting a new part of your argument -- a follow-up of the earlier colloquy we had. Supposing the State of California had a homesteading program whereby state owned land was made available to citizens of California who were willing to reside there for two years, and the United States came in and said we find that it is just necessary to take a lot of this homestead land for the New Melones Project. Do you think it would have a right to do that without paying California for it?

MR. WALSTON: No, I don't believe that it would. I don't believe that there is any decision of this Court which would support the United States in that endeavor. Of course, the --

QUESTION: Well, why do you think Congress has a right to take unappropriated water from the state? There has never been -- maybe because there has never been an adjudication in this Court as to who owns the water in non-navigable streams.

MR. WALSTON: Well, that's true, and this Court has always avoided that question. In fact, in the 1945 decision in --

QUESTION: There has been one as to who owns the water in the navigable streams, hasn't there?

MR. WALSTON: I don't recall that offhand.

QUESTION: Just who has the navigational servitude.

MR. WALSTON: Not in terms of ownership. The Court has never --

QUESTION: Not in terms of ownership.

MR. WALSTON: Pardon me?

QUESTION: Not in terms of ownership.

MR. WALSTON: Correct. The Court has never held that the United States owns the unappropriated water of the western states. It has held, however, that the United States might have some overriding constitutional powers that enable it to act and establish a certain degree of control over those waters, but has not actually established that the United States has the power to actually own the water itself.

Let me turn now to the language of section 8 itself. The section on its face requires the Secretary to proceed in conformity with state laws relating to the control, appropriation, use or distribution of water. On its face, this section clearly requires federal compliance with state appropriation laws. The state appropriation laws in turn provide for state regulatory control of water. This is the way the states control the water. They control the water through their appropriation laws. They determine the beneficial use of their water, they thus manage and control their limited water supply, and thus the section on its face requires the federal government

to be treated as a private appropriator under the state's appropriation laws.

Essentially the United States makes two arguments with respect to the meaning of section 8. First, it argues that the section does not require the Secretary of the Interior to comply with state laws relating to unappropriated water, but that the Secretary merely does so as a matter of comity. He doesn't have to do it, he simply does it because he chooses to do it.

Secondly, the United States argues that section 8 actually requires him to comply with state laws, it requires him only to comply with the so-called forms of state law, and the forms of state law are defined by the United States as consisting of all state laws other than those that provide for regulatory control of water.

Now, this conclusion we think is wholly consistent with the language of section 8 itself. The language says that the Secretary shall proceed, not may proceed or could proceed or should proceed but shall proceed in conformity with state law, and thus suggests that he does not do so as a matter of comity.

Secondly, the section specifically refers to state laws relating to the control of the use and the distribution of water. Those are the words in the section itself, control, use and distribution. These are terms obviously that include

state regulatory control.

The result which we suggest is even more clear we think under the legislative history of the Reclamation Act of 1902. And with the Court's indulgence, I would like to just briefly make reference to a couple of selected portions of the legislative history that we think shows the overwhelming sentiment of the 1902 Congress for the principle state control. If the Court would, I would like to refer to my brief in the case, which is the blue brief, the brief for the petitioners. Let's turn first, if you would, to page 25, and just listen to the language Congressman Mondell of Wyoming, who was the floor leader for section 8 and in fact the entire Reclamation bill when it was before the House of Representatives.

QUESTION: Page 25 of your brief, right?

MR. WALSTON: Yes, that is correct, the blue brief.

About half-way down, in the italicized portion of the brief, Congressman Modell states, "the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works are located."

Now, the United States essentially concedes that that language is not consistent with its comity argument, but it makes the argument that this language is consistent with its so-called form argument.

But without arguing that point, without arguing whether Congressman Mondell actually meant to suggest a distinction between the forms and the substance of state law, it is very clear from other portions of the legislative history that no such distinction was intended.

For instance, refer to page, say, 27 of our opening brief. Again, Congressman Mondell speaking -- and this is the quote that appears near the top of the page -- "Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws."

Page on page 24, the floor leader for the bill in the Senate, Senator Clark, of Wyoming, stated -- and this quotation appears about half-way down the page -- "It is right that the General Goverment should control, should conserve, and should reservoir the head waters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters...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."

The United States makes no response --

QUESTION: Mr. Walston, would you undertake to tell me what you think the Senator meant precisely by that? What kind of conditions? Is he talking about Minnesota, where we have a surplus of water as compared with a state where they have a shortage of water, or just what?

MR. WALSTON: Well, essentially Senator Clark was referring to all the western states, we believe, which all have a lack of water. There is very little water in all the western states. But essentially the water he was talking about was unappropriated water, because that is the water that the federal government normally acquires.

QUESTION: But the differences that he seemed to be emphasizing, what differences do you suggest he was talking about?

MR. WALSTON: The differences between what, Mr. Chief Justice?

QUESTION: Well, what would be applicable in one locality, totally and absolutely inapplicable in another?

MR. WALSTON: Well, some states and some portions of states have highly developed metropolitan areas. Other states and other portions of other states have undeveloped rural areas and --

QUESTION: This might be comparing Montana or Wyoming with California?

MR. WALSTON: Right. Exactly. In California, for

example, we need water for purposes that may not exactly apply in Montana or Wyoming. Wyoming needs water for argiculture and irrigation primarily. California, especially the developed metropolitan areas of California need water for municipal use. Because of certain environmental balances and in fact in some cases imbalances in these states, water in some instances must be made available for environmental protection, because --

QUESTION: Was this all apparent to Congressman Mondell in 1902?

MR. WALSTON: No, not at all. I think in 1902 Congress was just getting this program off the ground and they felt that the best way to proceed would be to proceed by having the Secretary of the Interior comply with state law because the states had always controlled their unappropriated waters. In fact, this Court had recognized the tradition a number of times that the states traditionally control their unappropriated waters, and the same tradition was recognized by Congress back in the Mining Acts of 1866 and 1870, and the Desert Land Act of 1877.

The states essentially have traditionally controlled their unappropriated waters, and Congress in 1902 quite evidently wanted to continue and extend that tradition.

An examination of the administrative practice that occurred after the 1902 Act was passed shows I think quite convincingly that Congress was actually successful in its

effort to provide for state control of water. But the Secretary of the Interior has in fact consistently and fully complied with state regulatory water laws in acquiring and using his water under the Act. For instance, in California, the Bureau of Reclamation has always acquired appropriated permits from California. California has traditionally imposed conditions in those permits, and the bureau has always complied with those conditions. Until this case, they never sought to destroy those conditions. But in this case, the United States is advancing the argument that the Secretary only complied with those state laws as a matter of comity, and we think that is entirely inconsistent with everything that the Secretary of the Interior has said ever since 1902 onward with respect to his obligation under section 8.

In fact, even the current operating regulations of the Secretary of the Interior embrace the principle of state control. Let me just read from these. These appear at page 39 of our opening brief. These are the current regulations of the bureau:

"The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources and requires the Bureau, in carrying out provisions of the Act, to proceed in conformity with State water laws. Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally

entails stream regulation, it is necessary to reach an understanding with the States regarding reservoir operating limitations."

Thus, the Secretary has always complied with state law, has always said that he is required to do so under section 8. And in this case the United States is essentially trying to change the rules of the game 76 years, as it were, after the game was started, essentially trying to break and destroy the historic relationship that has guided through the ages --

QUESTION: Of course, there is no problem unless there is a conflict?

MR. WALSTON: Pardon me?

QUESTION: There is no problem unless there is a conflict?

MR. WALSTON: That is our position, Justice Marshall. Let me turn to that just briefly.

QUESTION: I mean the possibility was that all along it worked because there was no conflict in these seventy-some years.

MR. WALSTON: Well, I think that is true. In other words, the states were traditionally imposing conditions that did not conflict with specific congressional policy and thus under those circumstances the Secretary complied with those conditions.

QUESTION: Well, in other forms, when state rules

conflict with Congress' rules, what happens?

MR. WALSTON: Pardon me?

QUESTION: Usually when the state conflicts with Congress, Congress prevails.

MR. WALSTON: Oh, absolutely, and we concede that the same result applies here, Mr. Justice Marshall. Let me address that question more in detail.

QUESTION: I would appreciate it.

MR. WALSTON: Obviously, since 1902 Congress has established a number of subsidy reclamation policies. It has established and enacted, in fact, four different acts that essentially amend the Reclamation Act of 1902. On top of that, it authorized individual reclamation projects that have basic congressional policies behind them. And some experts in the field of water law, and especially some advocates of the states rights position have argued that section 8 literally imposes no limits on state control and therefore none should be implied, thus under that view the states would have the right to override substantive congressional policies and have the right to exercise the veto power over the project.

The difficulty with that view, of course, is what you are suggesting, Justice Marshall, and that is that the states could under those circumstances completely obliterate congressional objectives that led to the act and to the federal reclamation program in the first place.

QUESTION: Well, in addition, I think it would be hard put to find a western state law school that didn't teach water law, and you won't find many eastern ones who do. Isn't that just a fact?

MR. WALSTON: Well, that is certainly true. I suppose that is true. I think that there are some staunch advocates of the position I have just pointed out, certainly in the western water school. But at the same time, that is not the view we are urging, Mustice Marshall, I want to make that very clear.

QUESTION: Well, you recognize the fact that California needs water?

MR. WALSTON: Right.

QUESTION: And what eastern state needs water?

MR. WALSTON: The eastern states just don't have a problem like the western states do.

QUESTION: Right.

MR. WALSTON: So that is why the entire Reclamation Act only applies to the western states. The United States, by the way, made the argument that in order to preserve these congressional objectives I just talked about, the Secretary of the Interior should have absolute control, absolute control over water uses under the Reclamation Act of 1902.

Now, that might be a very good policy argument, but it is simply inconsistent with what Congress did in 1902. It

is inconsistent with section 8 and then the principle of state control that is embodied in section 8. And our view is this: We think that these various principles can be harmonized and reconciled. We think that the principle of state control should apply only to the extent that it's consistent with what Congress actually intended to accomplish in the field of reclamation. In other words, where there is a clash or a conflict between congressional policy and state policy, then obviously congressional policy overrides. On the other hand, if there is no such conflict, then state law applies. And that is to say that the states cannot override what Congress has done, but by the same token the Secretary of the Interior cannot override what the states have done if the states have acted consistently with basic congressional policy.

In other words, a federal bureaucrat in Sacramento cannot decide to sell water to an irrigation district on the north side of the Sacramento River rather than the south side, and then claim that his decision represents congressional policy and then claim that because his decision represents congressional policy, his decision overrides state law. Because if he has that power, the Secretary has that power, then state law has no room in a federal reclamation scheme, and under those circumstances the principle of state control in section 8, which has been honored for 76 years, simply does not exist.

In fact, this I think was the approach which this

Court took in two cases in the 1950's and 1960's, the Ivahoe and the Fresno cases. In Ivanhoe, state law conflicted with the basic congressional policy that provides for an acreage limitation, and that is found in section 5 of the Reclamation Act of 1902. The Court said state law does not apply, it cannot conflict with a specific congressional policy.

In Fresno, state law conflicted with a specific principle of the federal reclamation laws found in the 1939 Act that provides a preference for water for irrigation purposes over municipal purposes, and the Court again said state law cannot apply under those circumstances.

QUESTION: Well, what if your water -- who did the adjudication here, the water board?

MR. WALSTON: The California State Water Resources Control Board.

QUESTION: Suppose that there had been a determination by the federal authority so that these deficiencies in the federal scheme that the board found were resolved, that they did have a need for the water, they established a need for the water, et cetera, and suppose the need had been irrigation and the Fed rules have done as much as they possibly could to establish this need. Now, could the -- I take it you wouldn't suggest that the board could say, well, we just don't allow water to be used for irrigation in the state?

MR. WALSTON: That is a correct statement of our

position, Mr. Justice White.

QUESTION: And because of some specific provision of the federal act, I take it?

MR. WALSTON: No, because of an interpretation of section 8 in light of the purposes of the Act which authorized the individual project in question. In other words, Congress, in authorizing specific reclamation projects, always has basic purposes in mind.

QUESTION: So the state's position is that if Congress makes a determination that it -- if there is any unappropriated water in California and it decides clearly and finally to use some water for irrigation and they have a project to develop the water, that the California board must appropriate the water to them for use of irrigation, even though some state agency wanted to use it, it would have to save it for municipal purposes?

MR. WALSTON: That's correct.

QUESTION: And on what basis do you answer that, give that answer to that question?

MR. WALSTON: Well, we think, going back to the original question, Justice Rehnquist, we think that Congress has the power under the Commerce, Property and General Welfare Clauses to use the western states' unappropriated water in whatever ways that are consistent with those particular --

QUESTION: Well, as I understand the General Welfare

Clause as interpreted in United States v. Butler, it was said that it gave Congress the power to tax and spend for the general welfare without being required to find further authority under the Commerce Clause or some other affirmative grant of power. But do you conceive what Justice White's hypothetical poses to you as simply being an exercise of the power to spend?

MR. WALSTON: Well, that is the way I read this Court's decision in the Ivanhoe case.

QUESTION: You would say that it could also be sustainable under the Commerce Clause?

MR. WALSTON: Right. If the Court wants to back off of that, we are certainly not going to try to dissuade the Court from doing so.

QUESTION: You would be delighted, I suppose.

MR. WALSTON: Pardon me?

QUESTION: You would be delighted.

MR. WALSTON: Well, I should think so. It would certainly give the states more control. But at the same time I think it is very important for the Court to bear in mind that California is equally interested in the achievement of basic reclamation objectives established by Congress.

QUESTION: And water saving?

MR. WALSTON: That's correct. And we don't really perceive that there is any conflict between what California is trying to accomplish in this field and what Congress is trying

to accomplish.

QUESTION: But Justice White's question did pose to you a conflict, I would think, where the federal government comes in and says we want to use this water for irrigation and the law says domestic use has priority, and the water appropriation board says we have 18 applicants for domestic use who can be only partially satisfied, you say nonetheless the government's claim must prevail for irrigation?

MR. WALSTON: Yes, that's correct. We are conceding hypothetically that there could be a conflict, and if there is a conflict, then it must be resolved in favor of Congress. But I am pointing out, Justice Rehnquist, that in actual fact there have been no such conflicts of any measurable degree between what the states have been trying to accomplish and what Congress has been trying to accomplish, and there is no such conflict even in this case.

The conflict in this case is not between Congress and the State of California. It is between the State of California and the Secretary of the Interior. The Secretary of the Interior is essentially trying to proceed with a number of plans in California that have no mandate under congressional law. He is trying to proceed with plans that were not considered or mandated by Congress, and thus we feel what we are doing is quite consistent with what Congress had in mind in the field of reclamation, and thus there is no clash ultimately

in this case between federal and state policy.

That brings me, I think, to the third major question which I would like to address today, and that is how we actually resolve the principles we've been talking about with the broad grant of discretion which has been given to the Secretary of the Interior by Congress.

The United States' argument essentially is this: It argues that Congress has established the very broad comprehensive reclamation scheme and has vested the Secretary of the Interior with raw discretion to carry out that scheme. This scheme is so broad, according ot the United States, that it leaves no room for state control at all. The Secretary of the Interior has discretion to override state water laws whenever he chooses to do so, and thus the United States is really posing perhaps the ultimate issue in this case, and let me phrase it this way: Has Congress in fact enacted a comprehensive reclamation scheme that in fact leaves no room for state regulatory control, or instead does the comprehensive scheme established by Congress include state regulatory laws?

To phrase that proposition differently, does the Secretary have a plenary discretionary authority to override state law whenever he wants to do so? Or instead, does section 8 limit his discretion by requiring him to comply with state law where there is no basic conflict between state law and congressional policy?

Now, I hope the Court has no illusions with respect to the effect of the argument being advanced by the United States. If that argument is upheld, then section 8 will have no practical effect because the entire principle of state control will be subservient to the discretion of the Secretary of the Interior and thus will not exist.

QUESTION: Well, what if under a particular reclamation act, however, the Congress gives to the Secretary rule-making authority to do certain things and until he does them there is no conflict with the state, and when he does there is a conflict? Then arguably at least Congress has overridden section 8 itself?

MR. WALSTON: Well, perhaps that raises --

QUESTION: Section 8, after all, is just a statute and Congress can amend it expressly or impliedly.

MR. WALSTON: But under the circumstances you gave, Justice White, we don't see that there would be a potential conflict between state and congressional policy. We think that the Secretary would be required in exercising his discretion to carry out state policy if he can possibly do so; thus, the question is whether it is possible for the Secretary to carry out his obligations under both state and congressional policy.

QUESTION: You say that section 8 is an implied circumscription of the Secretary's authority?

MR. WALSTON: Right. Correct. In other words, when Congress gives discretion to the Secretary, it limits it by requiring him to comply with state law to the extent that he can do so consistently with his other obligations under the congressional mandate.

QUESTION: In some statutes they have repeated section 8 but not in all of them.

MR. WALSTON: When you say "some statutes," you mean statutes that authorize individual projects?

QUESTION: Exactly.

MR. WALSTON: I think, Justice White, that in all statutes the Secretary is required to operate the projects "pursuant to the federal reclamation laws," which includes section 8.

QUESTION: But if there happened to be a specific provision in a future reclamation statute, a specific congressional provision that would require something that wouldn't be required --

MR. WALSTON: Absolutely.

QUESTION: -- then it would override section 8?

MR. WALSTON: Precisely. In other words, if Congress instructs the Secretary of the Interior in its authorizing act to provide water in Area A of the State of California, for sure, the State of California cannot come along and say that water has to be used other areas.

QUESTION: Well, what if it says in such areas as the Secretary shall in his complete discretion determine?

MR. WALSTON: That is a very good question, Justice White, and I think there you get into the question of how you interpret section 8 in light of the discretion given to the Secretary.

Our view would be that under those circumstances, the Secretary's discretion is still limited by section 8 in that if he can comply with state law without violating a specific congressional mandate, he must do so. Because if the result is otherwise, then section 8 just doesn't mean anything, and the reason I say that is because the Secretary has broad discretion under the various federal reclamation laws. Congress has given him discretion to sell water; Congress has given him discretion to get money from people who purchase the water. Well, if that discretion in simply selling the water is deemed to override state laws that might otherwise condition the sale of that water, then section 8 simply does not exist. And Congress has constantly reaffirmed the principle of state control and therefore we don't believe that it meant to thus repeal section 8 by implication.

That is what the United States is really arguing in this case. It is arguing that section 8 has been repealed by implication. And in our view the section mandates a partnership between Congress and the states, and under that partnership

it is Congress and not the states which set the basic reclamation policies of this country, but within that framework, the states are free to act. The Secretary does not have discretionary authority to destroy that partnership by coming in and overriding a state law that may be fully within that congressional parameter. And the result which we are suggesting to the Court is one we think harmonizes and reconciles the various reclamation laws that have been established by Congress, and thus --

QUESTION: Could I interrupt? It all sounds very easy, but you often get ambiguous statutes and you often defer to the cecretary or the head of an agency in construing his authority. How do you resolve, how do you decide which way to resolve a conflict? Does the state water board always resolve the dispute or do you get these borderline decisions determine? Who has the dispute resolution power under your argument?

MR. WALSTON: Well, they haven't really worked out -- they really haven't existed in the past too much because there has been a greater accommodation between federal and state --

QUESTION: Well, I think we have to assume that this case indicates there are such possible conflicts.

MR. WALSTON: Well, I am not sure there is such possible conflicts. I think this case raises the question of

whether the states have the right to impose any kind of conditions on the federal water right, regardless of whether those conditions may or may not impair congressional policy, and that is --

QUESTION: You say you have the power to impose some conditions?

MR. WALSTON: Yes.

QUESTION: But not conditions which conflict with congressional policy?

MR. WALSTON: Right.

QUESTION: And if the Secretary takes the view that the condition does conflict with congressional policy, how do you decide whether it does or does not? Who decides that?

MR. WALSTON: Ultimately that question would have to be answered by the Court.

QUESTION: And you always have litigation over it?

MR. WALSTON: Well, I don't think there would always be litigation. In fact, as I say, the case comes to this Court on the bare legal question of whether the states have the right to impose any kind of conditions under any circumstances. Once that question is established, I don't think the federal government and the western states are going to be running to the Court all the time to determine whether a particular condition or conditions are consistent with --

QUESTION: Well, the potential for that dispute

produced a 170-page brief in this case.

MR. WALSTON: That is for sure. Yes, the potential is there, Mr. Justice Stevens, I can't ignore that. We are not asking the Court to adopt an easy view. If the Court wants to adopt the easy view, then obviously it ought to uphold the position of the United States, because there is no conflict under the United States' view. All conflicts would be resolved in favor of the Secretary's discretionary authority. The states would have no control at all.

But we think that section 8 imposes upon this Court an obligation to examine such potential conflicts as may exist. Section 8 can be read no other way.

QUESTION: Just so I get it in mind, the state imposes the conditions -- say we agree with you, and can impose some conditions, and you propose ten conditions, and the United States thinks four of them conflict with the policy of the Act, and they then have to file a declaratory judgment action, is that the way they do it?

MR. WALSTON: Well, no, we think they would be required to pursue California's mandamus remedies. In other words, the federal government would be required to seek direct judicial review of those particular conditions.

QUESTION: They would have to get review in the state judicial system, they couldn't bring suit in a Federal District Court and ask for declaratory judgment?

MR. WALSTON: Well, we think that the suit in the first instance ought to be brought in the state court, but, of course --

QUESTION: It would present a federal question, wouldn't it?

MR. WALSTON: Well, I was going to say that certainly there would be no problem with the United States removing such a case to the federal courts, however.

QUESTION: Or even starting it in the federal courts?

MR. WALSTON: Pardon me?

QUESTION: Or starting it in the federal courts?

MR. WALSTON: Or starting it in the federal courts. That raises the question of whether the United States would be required to pursue its state judicial remedies as well as comply with state administrative procedures.

QUESTION: I see.

MR. WALSTON: Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Walston.

Mr. Barnett.

ORAL ARGUMENT OF STEPHEN R. BARNETT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BARNETT: Mr. Chief Justice, and may it please the Court.

QUESTION: Mr. Barnett, do you think up to now the states have just operated at the sufferance of the federal

government in these areas? Somewhere in your discussion, if you could treat that question.

MR. BARNETT: Mr. Chief Justice, and may it please the Court: I do not think there was a case, Mr. Chief Justice. I do not agree with Mr. Walston that if the Court holds for the United States in this case that means that the United States sweeps the field and that the states are completely excluded from any role in the planning of reclamation projects or in the formulation of reclamation policy.

On the contrary, we submit that there is and always has been a coordination and a consultation between the states and the federal government, and that is illustrated by this very case. Indeed, there are aspects of this case which demonstrate that what the State of California is trying to do here is to upset and override accommodations -- at least one accommodation that had been reached with respect to the New Melones Project. And if you will, I will get to that in time, but I am referring to the water quality agreement which was an actual memorandum of agreement made between the United States Bureau of Reclamation and the California Central Valley Regional Water Quality Control Board with respect to water quality functions of the New Melones Dam.

What the state board has done in Decision 1422, as I will elaborate in more detail perhaps later, is to simply override that agreement, unilaterally rewrite it, and thus we

would submit that what the state is trying to do here is to change the rules. It is the state and not the federal government which is trying to change the rules that have existed for the last seventy-odd years and that have amounted to a rough accommodation of the conflicting state and federal interests in this area.

It is the United States submission, of course, that all four of the judges who ruled on this case in the courts below were correct, that section 8 of the Reclamation Act of 1902 does not authorize a state to impose conditions on a federal reclamation project such as the 25 conditions that were imposed here.

On the point on which the two courts below differed, we do not here challenge the ruling of the Court of Appeals. That is the Court of Appeals rule that the United States is required by section 8 to file applications with the state board for permits to appropriate the water it needs for its reclamation projects. We had contended, as Mr. Walston said, in the District Court that we are not required by law to do that, that we simply do it as a matter of comity. We have in either event always done it.

The Court of Appeals ruled that we are required by law to do it and, as we state in our brief, we do not contest that ruling here, since --

QUESTION: The Court of Appeals came out about a

hundred percent opposite from this Court in Hancock v. Train, didn't it? The Court of Appeals in this case said you had to go through the form but you don't have to follow the substance, and this Court in Hancock v. Train said you don't have to go through the form but you do have to follow the substance.

MR. BARNETT: There is no that apparent anomaly, Mr. Justice Rehnquist. But in any event, we don't think it makes any difference here, since we did in this case apply to the state board for our permits, since it is our policy to do so. We do not contest the ruling that we were required to do so. If a case were to arise where the state took such a position that we felt that we could not do so, that would be the case on that record in which the Court should decide whether we are indeed required to do so.

Now, Mr. Walston has said little in his argument and little in his brief about the 25 conditions that were imposed here by the state board on the New Melones Project. We feel it necessary to look with some detail at those conditions, because, as Mr. Justice Stevens suggested, it may seem fine in the abstract to argue, as Mr. Walston has, that the federal -- that Congress can make the policy and the states can fill the gaps, it may not be so easy in practice in reality when you are building a dam. And we submit that the facts of this project illustrate that difficulty and illustrate, just as

Mr. Justice Stevens suggested, that there would be a lot of court cases on precisely such issues as whether four of ten conditions were or were not consistent with what petitioners refer to as the specific or the basic congressional policies behind a project.

QUESTION: Mr. Barnett, in the District Court or in the Court of Appeals, did you take the position as you do here that one must study the 25 conditions to decide whether the state can impose any conditions or not?

MR. BARNETT: We took the position in both courts that the state had no right to impose any conditions. It was petitioners, the State of California, who moved for summary judgment in the District Court, and the District Court granted summary judgment in our favor. We did not move for summary judgment.

QUESTION: But if you still maintain that they have no power to impose any condition, why do we have to study the 25 conditions?

MR. BARNETT: Well, for two reasons. One is that the Court might not agree with us, and we might therefore --

QUESTION: But you are going to the conditions without even arguing the first point. That is why I was puzzled about it.

MR. BARNETT: Well, the other reason is that I think you have to look at the conditions to show why the state should

have no power to impose any of them. It is only by getting down into the dirt, so to speak, and looking at the nitty-gritty details that one sees of what would be involved in the legal conclusion that petitioners are asserting, and we think it is necessary to look at the conditions in order to see just what the difficulties would be that would arise.

First of all, as Mr. Walston has stated, the New Melones Dam is a project that was authorized first by Congress in 1944 and reauthorized in 1962. The project as reauthorized calls for a dam with a reservoir having a storage capacity of 2.4 million acre-feet. This is on the Stanislaus River in California, of course.

The project as authorized in 1962 tentatively called for a hydroelectric power plant with a capacity of 150,000 kilowatts. That was stated as tentative and as a result of subsequent consultations with the Federal Power Commission, between the Federal Power Commission and the Bureau of Reclamation, it was decided to raise the power capacity, and it was raised to 300,000 kilowatts.

QUESTION: Mr. Barnett, is it the government's position that it will own the 2.5 million square-feet of water that is stored behind the dam?

MR. BARNETT: That it will own the water? No, that is not our position. That raises the question which was mooted with Mr. Walston and which the Court has really --

QUESTION: It was never answered with respect to non-navigable waters.

MR. BARNETT: It has never answered the question of who owns unappropriated water. Now, here the water would have been appropriated by the government, but I would say we would still not claim that we own it. We would be in a sense, I should think, trustees for the people to whom we would sell the water or contract for the water pursuant to the congressional legislation.

QUESTION: But you could, for instance, decided that that water should be used for irrigation and sell it to people who wanted to use it for irrigation, even though under California law domestic use took higher priority, and if that law prevailed they couldn't use it.

MR. BARNETT: That would be our position, but that is not because we own the water, it is because Congress in the Act has authorized us to build the dam and appropriate the water for the purpose of irrigation, among others.

QUESTION: It is appropriated, you say. It isn't bought, it isn't condemned.

MR. BARNETT: No, because it wasn't owned.

QUESTION: Because it wasn't owned, and yet it is simply somehow transmogrified by the existence of this project into something that is made available to people in California under a system of law that is not consistent with California's.

MR. BARNETT: Well, that is true and that system of law arises, the law of this project arises from the acts of Congress authorizing the project.

QUESTION: I take it then that you would think that Congress could constitutionally pass an act that says that we know the western states have been appropriating -- managing the appropriating of waters, but we are going to have a national system to appropriate the waters from all the -- all of the unappropriated water that exists in the western streams, we are going to have a national administrative operation to do it.

MR. BARNETT: And Congress would pay just compensation for --

QUESTION: No, unappropriated water.

MR. BARNETT: Unappropriated waters. I would think Congress could do that constitutionally.

QUESTION: Well, at least that is what you are saying. You answered that question before when you answered Justice Rehnquist, that in the Reclamation Act to some extent Congress does that.

MR. BARNETT: Yes, I think that is correct.

QUESTION: What power is it acting under when it does that?

MR. BARNETT: Well, I think it is clear from cases like Ivanhoe that the general -- the power is spent through the General Welfare and the Property Clauses are two --

QUESTION: It hasn't spent any money in buying these water rights though.

MR. BARNETT: It is not buying the water rights, but it is buying a dam, it is spending money on the dam.

QUESTION: Well, take the example of a California homesteading project, supposing it builds a big dam right in the midst of a California state forest and says we need the land from the state forest to carry out the purposes of this dam, do you think they can just take that?

MR. BARNETT: Then they have to pay for it. But here we have got unappropriated water, which is not owned. This is the basic question that the Court has never decided, the ownership of unappropriated water. The Court has avoided the question in Nebraska v. Wyoming, and in Ivanhoe, and it is one of those very basic, very controversial questions that we think are best avoided. We contend here that when Congress authorizes a reclamation project, the effect of that authorization is to assert a federal claim to the water that is needed for that project.

Now, to the extent that that water has been appropriated, the federal government has to pay for it. To the extent that that water is unappropriated, we say that Congress has authorized a federal claim which the states must exceed to and thereby must grant the federal government a permit for the unappropriated water if it is available. But in --

QUESTION: Would you turn it over to third parties for their actual use?

MR. BARNETT: Yes, depending on the purposes of the particular authorizing act. Now, in this case, the purposes of the particular authorizing act are clearly that the water be turned over to third parties except to the extent that it is to be used for recreation and the reservoir, for example. Indeed, the purposes of the Act are what I would now like to mention, because it is with them that the particular conditions have to be compared.

Now, the petitioners here concede that the authorizing Act of this project had eight purposes -- flood control, agricultural use of the water, although it is irrigation, municipal use and industrial use, then fish and wildlife protection, water quality control, power generation, and recreation.

Well, pursuant to the act's authorizing the project, the United States duly applied to the State Water Resources Control Board for permits authorizing it to appropriate the water needed for the project. The United States filed four such applications, two of which were applications for transfers of applications previously filed by a state board.

In brief, and rubbing out some of the details, what the United States asked for in these applications was the following: It asked for the right -- it asked for a permit to

store 2.4 million acre-feet annually, which would be in the reservoir behind the dam, and it asked for the right to divert from the river 8,000 cubic-feet per second. Both of these requests were for all eight of the project purposes, although I am oversimplifying somewhat.

Now, with respect to the purposes, there is a distinction that has to be borne in mind, and that is between in-stream and consumptive uses of the water, for example, when it is sought to divert water for the purposes of fish culture or downstream recreation or water quality control, for those purposes the water is released back into the river. It is stored up in the spring when the water is high and then released in the summer when the river is low for water quality control or for fish or whatever. Those thus are in-stream uses. To be distinguished are consumptive uses whereby the water does not go back into the stream and the consumptive uses are agricultural use, that is irrigation, or municipal or industrial consumption of the water.

The other of the eight uses, that is the use for power, is really an in-stream use. The water is diverted only momentarily through the penstocks of the hydroelectric plant and then goes into the stream.

Now to the look at the conditions, the 25 conditions that the state board imposed in granting these permits. And I, of course, do not propose to discuss all 25 of them. We

have discussed most of them in our brief. I propose here to focus only on two or three of the most important.

In its decision, the state board found -- and this is at page 31 of the Appendix, Volume II of the Appendix -- the state board found, "There is unappropriated water available to satisfy the demands of the project as proposed." But, nonetheless, the state board did not proceed to grant the permits for that unappropriated water that the United States was seeking, rather, it imposed these 25 conditions.

Conditions one and two are the most important. They respond directly to the amounts of water that the United States was seeking, and they substantially deny those amounts, despite the board's finding that sufficient unappropriated water is available.

Again to oversimplify somewhat, what condition one does is that it grants permits for water but only for certain purposes, not for other purposes that were authorized in the Act. In brief, it grants permits for the in-stream purposes but it denies the United States the right to store or divert water for the consumptive purposes of irrigational use or municipal or industrial consumption.

QUESTION: Now, what do you understand to be their reason for that?

MR. BARNETT: Well, they give their reasons, Mr. Justice White, in their opinion. Their reasons are that --

for example, at page 23 of the opinion, they say, "The project's recreational features would not adequately substitute for the present recreational uses of the river in the upstream reach." That is they want to preserve the present white water rafting --

QUESTION: But what about the project -- there are some other reasons, that Congress has failed to appropriate money for part of the project --

MR. BARNETT: Well, that in fact is a reason that petitioners come up with in their brief. The board at no place made that argument. That is an argument that the board's counsel have made on appeal. The board did not say anything about Congress having failed to appropriate money for the East Side Division. The board did say, I should say, that the Secretary does not have a plan for the use of the water.

QUESTION: That is what I thought.

MR. BARNETT: Yes. And it was on that basis that they say since he does not have a plan for consumptive use of the water, we won't allow any water for consumptive use, especially since if we allow the water for consumptive use, that would fill the reservoir and that would wipe out the white water rapids.

QUESTION: So what is wrong with that reason?

MR. BARNETT: Well, there are several things wrong with that reason. One is that the Secretary in fact does have

a plan. The Act provides, the 1962 --

QUESTION: Well, suppose he didn't?

MR. BARNETT: Even if he didn't, we would submit that it is not up to the state board to trench on the authority that Congress has given the Secretary. If it is true, as Mr. Walston suggested at one point, that the Secretary is acting beyond his congressional authority, the remedy for that is not to go to the state board. The remedy for that would be to go to federal court under the --

QUESTION: That may be the remedy, but what is wrong with the board saying you have exceeded your authority, you shouldn't even be here asking for water as far as we can tell. Is that beyond their cognizance?

MR. BARNETT: Well, perhaps it wouldn't be, but the board here has not taken the position that the Secretary was acting beyond his congressional authority. They say that he doesn't have a plan for the use of the water, but there is nothing in the Act that requires him to have a plan before he gets the water. It has traditionally been the Secretary's practice to build the reservoir first and then make the contracts for the water, rather than vice versa. And indeed here the Secretary has various plans. The problem is that the Act provides that the Secretary must first determine the water needs of the Stanislaus River Basin before he can use the water for consumptive uses outside the basin.

QUESTION: Why is that, because Congress --

MR. BARNETT: That is what the Act says, the 1962 Act, Mr. Justice Rehnquist. And the Secretary is right now in the process, has right now on his desk, as it were, recommendations as to how to define the Stanislaus River Basin. Once he defines the basin, he will determine the needs of the basin and then he will determine how much water can be outside the basin --

QUESTION: How would he even know how much to ask for?

MR. BARNETT: Well, Congress authorized on the basis of the project document a reservoir of 2.4 million acre-feet on the basis of projected needs both within the basin and outside of it, on the basis of projected needs.

QUESTION: But part of that projected need is something that Congress hasn't appropriated the money for.

MR. BARNETT: Oh, no. Congress has appropriated the money for the --

QUESTION: At least the -- what is the project that your colleagues have referred to that was washed out?

MR. BARNETT: That is the East Side Division that they referred to in their brief. It was not thought up by the board. It is not the case, as petitioners claim, that the New Melones Dam was authorized only in connection with the East Side Division. The East Side Division, incidentally, is a canal,

a proposed canal to bring water southward to the east side of the San Joaquin Valley.

QUESTION: Is that outside the watershed?

MR. BARNETT: That would be outside the Stanislaus River Basin, that is true.

QUESTION: It would.

MR. BARNETT: But that was only one contemplated way of bringing water outside the Stanislaus River Basin to the service areas of the Central Valley Project. There were and are many others, and the board is considering many others. Indeed, at the beginning of Decision 1422 -- and this is at page 19 of Volume II of the Appendix -- the board itself states, "The Bureau has described the following areas within which the conservation yield of the New Melones Project may be used for irrigation or other consumptive purposes; the local service area consisting of Tuolumne, Calaveras, San Joaquin and Stanislaus Counties; southern San Joaquin Valley via the proposed East Side Canal or a Cross Valley Canal; San Felipe division of the CVP; San Luis unit of the CVP; the area served by the Delta Mendota Canal; the Montezuma Hills Unit of the CVP; and the Suisun Marsh area."

So it is not at all the case that simply because it may have been decided not to build the East Side Division, and indeed that decision was not made by Congress, that proposal never got to Congress, as I understand it, because the State

of California did not endorse it, but it is not the case that simply because that particular proposal may have fallen through there are no uses for this water outside the Stanislaus River Basin.

If I may return to these conditions which I think are the heart of the case, as I was saying, condition one simply prohibits the federal bureau from diverting or storing water for the consumptive purposes that were among the purposes of the Act, that is for irrigation or domestic, municipal or industrial consumption.

QUESTION: Well, it is consumptive purposes which have not been decided upon.

MR. BARNETT: But the Secretary is in the process of deciding on them after he defines the need --

QUESTION: I am just trying to get a full statement.

MR. BARNETT: Further, condition one, by limiting the size of the reservoir, it wibl limit it because water cannot be stored for consumptive purposes, the size of the reservoir would be only 1.1 million acre-feet and not 2.4 million, there is a tremendous impact on the power that can be generated by the project and power is also one of the admitted purposes of the project.

QUESTION: I know it would never happen, but if you did build a reservoir and dam that was too big, you couldn't make it smaller.

MR. BARNETT: Well, that is true but it seems unlikely in California --

QUESTION: Or any other place.

MR. BARNETT: -- in the country that there will be a lack of --

QUESTION: But don't you think California has a right to say what are you going to do with this water?

MR. BARNETT: Well, the Act says that the Secretary is to determine what to do -- to determine the needs of the basin and then to determine where to sell the water, and if California is trying to tell them they have to decide where to sell the water before you determine the needs of the basin, then California is going against the Act.

In addition, it must be recognized at the outset that the State of California has been in on the planning of this project all along. They endorsed it initially before Congress in 1962. This project has been no secret for the state.

QUESTION: Mr. Barnett, I think you said in substance that the conditions are the heart of this case. If your position is that California has no authority to impose any conditions, what difference does it make what these conditions provide?

MR. BARNETT: Well, as I said before, I think what these conditions provide is relevant to see why it should be

the law that California has no authority to provide, to impose any conditions. In addition, it is possible that the Court would want to look at the conditions individually and decide if some of them are acceptable and some are not.

QUESTION: Do you think the United States government is required to seek a permit from California?

MR. BARNETT: Well, as I said at the outset, we do not contest that in this case. We agree with --

QUESTION: Why not?

MR. BARNETT: Well, because the Court of Appeals so ruled, because we make it a practice to seek such a permit, because it serves legitimate federalism functions of informing the state of what we are doing.

QUESTION: But as a matter of power, what would your answer be?

MR. BARNETT: Well, as a matter of power for purposes of this case, we concede that we are compelled to. If another case came up where we thought that being compelled to was unacceptable to the federal policy involved, we would want to reserve the right on those facts to contest the issue. We do not contest it here.

QUESTION: I suppose the California board determines whether or not there is sufficient unappropriated water?

MR. BARNETT: Oh, yes, and the board so determined here, as I read, that there is sufficient unappropriated water.

I might mention that it isn't all the conditions here that we would contest. Insofar as conditions are concerned with whether unappropriated water is available, we do not contest those conditions.

For example, in this case there are three conditions -- two conditions, 14 and 19, which we would not contest. Condition 14 says that the Bureau of Reclamation is not authorized to collect water outside of the specified seasons, that is --

QUESTION: This goes back to the question I suggested at the outset. This is by the grace of the federal government as a matter of generosity, to inform the states but you don't necessarily do any more than inform them, and you accept their conditions when you find them acceptable.

MR. BARNETT: Well, I think that is correct, that is the way we read the legislation. We accept their conditions insofar as they relate to the availability of unappropriated water. We do not accept their conditions insofar as they would trench on the operation or the structure even of the federal project.

QUESTION: What if the California Legislature were to next week pass a law declaring that all unappropriated water in the state is hereby appropriated to beneficial use of users who will be determined by a commission appointed by the Governor on the basis of existing California water law?

MR. BARNETT: Well, that sounds as though that might pose the question that this Court has avoided deciding since the Desert Land Act of 1877, and that is whether by that Act the federal goverrment did give ownership of all unappropriated water to the states or not.

QUESTION: There is no question but that Massachusetts owns the unappropriated waters in its streams, is there?

MR. BARNETT: Well, Massachusetts has a riparian rights doctrine and I don't know the answer to that, Mr. Justice.

QUESTION: Mr. Barnett, can you put your finger in a second or two what you think it is that gives California or any of the other appropriation states the right to have a system of water law under which people can have their appropriations validated and acquire property rights?

MR. BARNETT: Oh, I think it is a stream of federal legislation beginning with the Mining Act of 1866, including the Desert Lands Act of 1877, and including the Reclamation Act of 1902. As we read the Act, the language that Mr. Walston was relying on, and as we point out in our brief, was simply designed to continue that tradition of making clear that private rights to water on public land could be established by the state doctrine of prior appropriation.

QUESTION: But those acts depended for their effect on the existance of public land in those states. Now, there

never was any public land in the thirteen original colonies, so surely they are not dependent on the sufferance of Congress or those Act for any authority to determine water ownership, are they?

MR. BARNETT: I suppose not, and I certainly cannot answer the question as to who owns the flowing waters in Massachusetts, Mr. Justice Rehnquist.

I was mentioning power, what conditions one and two would do to the power output. In the record, at page 146 of Volume II of the Appendix, there is an affidavit by J. Robert Hammond, who supervised the power operations of the Central Valley Project. As he points out, what the denial of the full water rights requested would mean would be that the firm capacity of the New Melons Power Plant would be reduced to zero, that is firm capacity is the capacity you can count on on any day. During the summer, when the river is very low, you need water in your reservoir if you are going to be able to sell power. He says, "the firm capacity would be reduced to zero." The average kilowatts put out per year would be reduced from 430 million to 192 million; the value of the power output would thereby be reduced from $5.5 million to $1.9 million a year. And he said, "This amount would not have justified the power plant investment in the first place."

So this is the kind of question that arises, Mr. Justice Stevens. Now, petitioners would say, well, it isn't

necessarily inconsistent with --

QUESTION: I think petitioner would say, if your facts are right, he would agree that the condition is improper.

MR. BARNETT: No, no, they certainly do not take that position.

QUESTION: I thought he said if the condition would interfere with a congressional determination of what the statute is supposed to accomplish, the state had no power to --

MR. BARNETT: No, but I think -- we could ask them, but I think they would take the position that since Congress did not specifically say that we want $5 million worth of power a year, that this does not conflict with a specific congressional purpose. But that is the kind of argument that the Court would be in, how specific does Congress have to be.

QUESTION: Turning it around for just a moment, what I understood part of their reasoning to be is that, while you have got a lot of other water in this overall project and so you don't need this specific source for the time being, at least for consumptive purposes, if they were right factually, would they not be right legally also?

MR. BARNETT: I don't think so, because Congress -- one of the specific provisions of the 1962 authorizing Act, written into the Act, is that the New Melones Project shall become an integral part of the Central Valley Project and shall be operated as such by the Secretary of the Interior.

Now, condition four countermands that. Condition four provides that no consumptive use of the water from New Melones may be made outside the Stanislaus River counties unless it is demonstrated that no other Central Valley source is available to supply water to those particular areas. Now, we submit that that directly contradicts the language in the Act that this project shall be integrated with the Central Valley Project. Petitioners would apparently say, well, it doesn't specifically contradict it for some reason because Congress didn't specifically say something or other. But we find it to be another --

QUESTION: But if it is an integrated project and the total project has enough water available for those four counties, why is this condition objectionable?

MR. BARNETT: Well, if Congress thought the total project had enough water available, it wouldn't have authorized this project.

QUESTION: Well, I think it is sort of a temporary thing, wasn't it? Didn't they say for the time being? I don't remember.

MR. BARNETT: What the Act says, what the 1962 Act says --

QUESTION: I mean the conditions, some of them were temporary.

MR. BARNETT: Well, they are temporary in that they

are subject to further order of the board. For example, condition two says these limitations on the amount of water that may be diverted and impounded are subject to further order of the board which shall be preceded -- I am reading from page 34 of Volume II of the Appendix -- such "Further order...shall be preceded by a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such other purposes."

So the federal government would have to convince the state board that the benefits of the use of this additional water outweigh the damages as the board sees them to the fish and wildlife and recreation in the watershed before this additional impoundment would be allowed. Now, we submit that this is the board, the state board asserting for itself the power to determine what should be done with this federal project, should it be used for power or should it be used to preserve the existing white water above the dam. And we submit that that is clearly inconsistent with the federal purposes behind this project.

Now, they would say, well, Congress didn't say in the Act that power is more important than white water rafting, therefore the state can fill in the gap. They talk a lot in their reply brief about how it has to be a specific federal

policy that the state is going against, page 58 to 59 of their reply brief, if the state laws do not contradict the specific purposes of the scheme, where specific elements of the congressional scheme make it impossible to apply the principle, with specific federal policy -- all of their emphasis, incidentally.

Now, we submit that it would be very difficult if not impossible a thing to decide when it is the specific federal policy and when it isn't. Further, petitioners apparently take the position that Congress to be sufficiently specific has to say it in the statute, Congress cannot delegate to the Secretary of the Interior any administrative authority to make specific decisions, because then they say the state decisions would override.

Now, we say that is why this whole scheme that they propose, while it may seem fine in the abstract, when you apply it to particular decisions of a particular project, it simply would not work, and the federal courts, as you suggested, Mr. Justice Stevens, would become the ultimate arbiters of does a particular condition -- is a particular condition inconsistent or not with a federal project, and I would submit that federal judges, even Judge McBride in Sacramento, are not suited to be the chief engineers of federal reclamation projects.

QUESTION: This only applies to California, this dam?

MR. BARNETT: This dam is only in California. This river is only in California. That is true.

QUESTION: Why does the federal government get the right to build a dam in the middle of a state without the state's cooperation?

MR. BARNETT: First of all, it gets the right from the Constitution as has been held in Ivanhoe and other cases. It is paying for the dam. In addition, it had the state's cooperation. In the appendix to our brief, we have the official statement of the State of California in 1962 endorsing this project.

QUESTION: Well, could Congress -- the simple answer to that would be yes -- cut off the water for three other states and leave it all in one state? Your answer has to be yes.

MR. BARNETT: Well, I think no. I think section 8 of the 1902 Act would prevent that, where it provides that nothing in the Act would impair the rights of another state on an interstate river.

QUESTION: I take it you think that this Court has already two or three times construed section 8 the way you think it should be construed?

MR. BARNETT: Oh, I do, and I would note how Mr. Walston, while he mentioned the Ivanhoe decision, did not mention at all City of Fresno, Arizona v. California, which

we, of course, think make it very clear that this question has been decided. In City of Fresno, one of the issues was whether the reclamation project water had to be delivered in accordance with California's county of origin law, the very law that is involved here to some extent, and the Court ruled no, it didn't, that the Secretary of the Interior did not have to follow that priority. Similarly, in Arizona v. California --

QUESTION: But to get back to my other question, take out the two states, they build a dam and flood half of the state to the benefit of the other half, there is nothing anybody could do about it?

MR. BARNETT: Well --

QUESTION: Then I would add to it that they would flood the Republican side --

[Laughter]

MR. BARNETT: Well, the reality of these things, Mr. Justice Marshall, is these projects do not get constructed by Congress unless the states support them. That is why this East Side Division has not been authorized, as I understand it. This project --

QUESTION: All I am trying to get to is we have got along fine up until now by cooperating, state and federal. Don't we have to get back to that?

MR. BARNETT: Well, we contend that that is where we

are, that it is California that is trying to upset the balance.

QUESTION: Well, doesn't it come down to this, doesn't your position necessarily come down to this, that you are partners except that when you disagree the federal government is the supreme partner?

MR. BARNETT: When we disagree about the operation or the uses of a federal reclamation project under the present federal reclamation law, yes, that is our position. Now, there are, of course, proposals pending, there are many pending proposals for changes in water policy. A number of them -- indeed, there are some on the President's desk right now, as I understand it -- a numberof them provide for the states to share the costs with the federal government of reclamation projects. Under that kind of a scheme, you might have a very different system. But our position is that under the present law, where the state attempts to restrict or control the uses and operations of a federal project, the federal government must prevail.

With respect to the state-federal cooperation aspect, I would like to mention also what I mentioned earlier, condition five has to do with water quality control. By condition five, the state board here would require the federal government to release certain amounts of water from the New Melones Dam to improve the quality downstream.

Now, the federal government in 1969 made an agreement,

the Bureau of Reclamation entered into a formal agreement, which appears in the record here, whereby it agreed with the Regional Water Quality Board of the Central Valley to release certain amounts of water from the New Melones Dam for the purposes of water quality. But that agreement had limitations. The bureau said it could not release more than 70,000 acre-feet a year, and that if conditions were made it would have to limit the releases to the irrigation time of year.

What the board has done here in condition five is rewritten that condition, rewritten that agreement requiring the federal government to release whatever amounts would be necessary to maintain certain concentrations in the river, without any such limitations. So this is an example of how you have existing cooperation, indeed in this case an existing formal agreement between the state and the federal government which this California state board here is purporting to override, and we submit that it isn't the federal government here which is against cooperation with the states, the whole entire scheme of the reclamation laws as we set out in our brief involves state participation, it is the state here which is trying to change the rules by asserting these unilateral conditions.

QUESTION: Mr. Barnett, can I ask one other question?

MR. BARNETT: Surely.

QUESTION: In just looking at your complaint, you

didn't ask for a declaration that all conditions be declared void, just those that were in contravention of federal law. And there was a summary judgment --

MR. BARNETT: No, I think there is an amendment to the complaint.

QUESTION: I'm sorry. I see, you're right. You're right. Well, it goes on, which are not specifically authorized.

MR. BARNETT: Yes, which are not specifically authorized. If they are not specifically authorized by federal law, then we submit the state cannot impose them.

QUESTION: I see. I am just wondering if it were possible if this case wouldn't be easier to decide if the trial judge had decided which conditions conflict with federal law and which don't.

MR. BARNETT: Well, we would submit that that is a terrible burden to impose on trial judges. It is not just this project, it is --

QUESTION: But you told us to study all 25 conditions in order to decide what the law is. You imposed an awful big piece of that burden on us.

MR. BARNETT: Well, it might be easier here and in a sense we have tried to take the burden that the trial judge did not take. We think he was wise in declining to do that, because he probably saw the difficulties it would entail. Notice

further that under petitioners' theory it would have to be done forever. They contend, for example, that you can't decide now whether some of these conditions are inconsistent with federal law, you have to wait and see if the conditions are put into effect. So it would not just be lots of conditions as to each reclamation project, but it would be a continuing series of operational decisions on their theory with respect to each project, all which would be brought into federal court, and we submit that because of the difficulties of that kind of a process that those difficulties demonstrate, why, the very suggestion is unacceptable and why the law should remain as this Court has held in its well-known section 8 cases that the states cannot impose conditions on federal projects.

If there are no further questions, I will sit down. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Walston, you have a few minutes left.

ORAL ARGUMENT OF RODERICK E. WALSTON, ESQ.,

ON BEHALF OF THE PETITIONERS--REBUTTAL

MR. WALSTON: Thank you, Mr. Chief Justice.

First, the United States makes the suggestion that there is no issue before this Court whether the federal government must in fact acquire appropriative permits under California law. I would respond to that simply that the United States

itself raised that very question in this litigation in its prayer for relief in its complaint for declaratory judgment, and that appears at Appendix I, page 19.

The lower court, responding to the United States argument, resolved the issue against the United States. Now the United States is arguing that the court should not consider the question here. We think that would be an inappropriate way to resolve and pass upon the lower decision in this case.

The United States also has discussed at some length the various conditions which were actually imposed upon the Bureau of Reclamation in Decision 1422. I caution the Court that there is much more at stake in this case than Decision 1422. There are in fact a total of 12 decisions issued by California's Water Resources Control Board that impose conditions upon the Bureau of Reclamation, and if the United States' claim is upheld in this case then presumably the conditions in all 12 of those decisions are invalid, not just the conditions in December 1422.

The lower court did not actually evaluate the conditions that are involved in Decision 1422, and thus we don't think there is any kind of adequate record for the Court to examine that question here. If the Court wants to consider that question, it should either decide that the matter has been resolved against the United States or must be resolved

against the United States because it did not seek direct judicial review of the conditions and therefore is barred by the doctrine os res judicata or alternatively should remand the case to the lower court so that it can itself consider the validity of those conditions.

QUESTION: To hold for you, would we have to disavow Arizona v. California to some extent and Ivanhoe?

MR. WALSTON: No, not at all, Mr. Justice White. Arizona involved a very peculiar situation that arose under the Boulder Canyon Project Act, and the Court in that case construed the meaning of the Boulder Canyon Project Act, which of course involved a reclamation project that utilized the waters of many different states, and the Court held that the legislative history showed that the federal government under that Act was to have absolute control of water, and that any other system wouldn't work because otherwise the project would be subject to the various and even inconsistent commands of different state legislatures. But the Reclamation Act of 1902 has an entirely different legislative history that --

QUESTION: How about Ivanhoe?

MR. WALSTON: In Ivanhoe and Fresno, as we view the Court's decisions, the Court merely held that states could not override specific congressional policy that had been established by Congress either in the Reclamation Act of 1902 or in later acts.

QUESTION: But they did say something about section 8 specifically. Do you agree with the language in those decisions?

MR. WALSTON: There was certain language that appeared in those decisions that was strictly dictum, Justice White.

QUESTION: But do you disagree with them?

MR. WALSTON: Well, if that dictum is construed against the position we are advocating, we certainly disagree with them. It is possible, however, to construe that language only as coming to the conclusion that the states had no right to exercise any veto power over federal projects. If that is the way you construe the language, then it is okay. If it is construed more broadly, as the United States would construe it, then we think it is inconsistent with the legislative history of the Reclamation Act of 1902 and thus is wrong.

QUESTION: Was the 160-acre limitation written in by Congress into the 1902 Reclamation Act?

MR. WALSTON: Yes, it was, directly.

I don't want to discuss the conditions at length, but I do think that I should note for the Court that the United States' argument before the Court today is somewhat different from representations it has already made to this Court with respect to the effect of the terms and conditions of Decision 1422.

The United States, in fact, advised this Court in another case that with respect to those conditions, its only effect -- that is Decision 1422's only effect would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes were permitted by the board's decision. The decision does not render the project useless or fundamentally alter its value. And actually if you examine the conditions themselves, you find that the United States's former statement was quite true. In fact, California provided we think a very balanced response in Decision 1422 to a situation that Congress completely overlooked and could not have foreseen when it authorized the New Melones Project.

Specifically, Congress when it authorized that project intended for the waters to be used in a particular unit of the Central Valley Project known as the East Side Division, and Congress later abandoned plans for that project, and the Bureau of Reclamation has not developed any kind of alternative plans for that water. And so all the state board did was this, it simply deferred the bureau's right to full impoundment of the water until the bureau came up with the plan and submitted the plan to the state board for its approval. We think this is a very modest exercise of the right which the states have been given by Congress under section 8 and that the United States in arguing that the states don't even have

this right are essentially asking this Court to abrogate a fundamental and historic principle of federal reclamation laws, and that principle which has always been observed in actual historical practice is that the states have an essential basic right to control how water is used under the Reclamation Act of 1902.

The United States in the final analysis is asking this Court to give it powers that it has never got from Congress, and we recommend that the appropriate solution for the United States is to go to Congress and not to come to this Court if it wants to overturn that principle.

QUESTION: And with respect to the interstate problem -- I want to be sure I understand your position -- that doesn't exist in this case and this is all intrastate, I presume?

MR. WALSTON: That's correct. Congress specifically amended section 8 during the course of its passage of section 8 during the 1902 Reclamation Act to specifically provide for that problem, and the final solution appears and is explained fully in our brief, Mr. Justice Stewart.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:58 o'clock p.m., the case in the above-entitled matter was submitted.]

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