

SECTION 10 OF THE RIVERS AND HARBORS ACT AND WESTERN WATER ALLOCATIONS — ARE THE WESTERN STATES UP A CREEK WITHOUT A PERMIT?

Michael G. Proctor*

I. INTRODUCTION

The development of the arid and semiarid western United States has largely depended upon the manner in which the area's limited water resources were used and controlled.¹ Questions relating to the use and control of water have thus been matters of great concern to the western states.² In response to this concern, these states have developed a unique system of water rights generally responsive to the needs of their semiarid land.³ Most have enforced this water rights system by enacting comprehensive statutory schemes for the allocation and administration of their limited water supplies in accordance with state-defined goals.⁴

The federal government historically has deferred to the western

* Staff Member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

1. *Cal. v. United States*, 438 U.S. 645, 647-53 (1978) (general discussion of the problems faced by westerners and the steps taken to surmount the difficulties). For a general description of water conditions in California and California's answer to them, see E. COOPER, *AQUEDUCT EMPIRE* (1968).

2. The "western states," for the purposes of this article, are the 17 contiguous western states that follow the doctrine of prior appropriation in allocating surface water resources. They are: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

See generally Morreale, *Federal-State Conflicts over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423 (1966); Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751 (1980); Note, *Federal-State Conflicts over the Control of Western Waters*, 60 COLUM. L. REV. 967 (1960).

3. See *infra* text and notes at notes 35-45.

4. See *infra* text and notes at notes 46-51; see generally 3 W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 141-649 (1971) (appendix with summary of all the western states water rights systems).

states' control of their water resources.⁵ In recent years, however, the federal government has become less willing to defer to state water law.⁶ The expansion of federal activity in the west has led to an increasing federal demand for western water.⁷ This increased need has resulted in federal claims to water independent of state water allocation law.⁸ More recently, concern for the environment⁹ and the ever-increasing need for conservation of water resources have intensified the federal interest in western water decisions.¹⁰ This interest culminated in 1977, when President Carter initiated a review and establishment of a "national water resources management policy."¹¹ One of the major objectives of this review was a modification of state water law to ensure better protection of the environment and conservation of water resources.¹² However, the mere suggestion that federal policies would force a reform of state water laws caused such a storm of protest that the idea was subsequently dropped.¹³ Nevertheless, the recognized need for reform and

5. *Cal. v. United States*, 438 U.S. 645, 653-63 (1978). For a detailed discussion of this deference see *infra* text and notes at notes 52-78.

6. See, e.g., *Cal. v. United States*, 438 U.S. 645 (1978); *United States v. N.M.*, 438 U.S. 696 (1978); see generally sources cited *supra* note 2. See also *infra* text and notes at notes 82-128.

7. See, e.g., *United States v. N.M.*, 438 U.S. 696 (1978) (federal needs for water to maintain public lands, in this case a national forest); *Winters v. United States*, 207 U.S. 564 (1908) (water needed on indian reservation for irrigation purposes); see generally Trelease, *supra* note 2 (large amounts of water needed for the proposed MX missile system in Utah); Tarlock, *Western Water Law and Coal Development*, 51 U. COLO. L. REV. 511 (1979) (potential conflict over the water needed for coal development).

8. See, e.g., *Cal. v. United States*, 438 U.S. 645 (1978) (federal government claimed that states had no control over water needed for and developed in federal reclamation projects); *United States v. N.M.*, 438 U.S. 696 (1978) (federal claims under the reserved rights doctrine). See generally sources cited *supra* note 2 (for discussions of the legal bases of federal claims to control of water).

For more detailed discussion of federal-state conflict over control see *infra* text and notes at notes 82-128.

9. See *infra* text and notes at 129-43.

10. "[P]ure water is becoming a critical commodity whose abundance is about to set an upper limit of economic evolution in a few parts of the nation and inevitably will do so rather widely within half a century or less." Piper, *Has the U.S. Enough Water?* in UNITED STATES GEOLOGICAL SURVEY WATER SUPPLY PAPER NO. 1797 at 22 (1965). See also Comment, *Arizona's Coming Dilemma: Water Supply and Population Growth*, 2 ECOLOGY L.Q. 357 (1972); Lilly, *Protecting Stream Flows in California*, 8 ECOLOGY L.Q. 697 (1980) (in California, water demand may severely tax dependable supplies by the year 2000) (citing GOVERNOR'S COMMISSION TO REVIEW CAL. WATER RIGHTS LAW, FINAL REPORT 1 (1978)).

11. Water Resources Policy Study; Issue and Option Papers, 42 Fed. Reg. 36,788 (1977) [hereinafter cited Policy Study]. See generally Aiken, *The National Water Policy Review and Western Water Rights Reform: An Overview*, 59 NEB. L. REV. 327 (1980) (discussion of proposals made). See *infra* text and notes at notes 129-43 for a more detailed discussion of the problems cited and proposals made.

12. Policy Study, *supra* note 11, at 36,792-95.

13. Aiken, *supra* note 11, at 328.

the federal need for water may induce the federal government to take on a greater role in western water law in the future.

The federal government seemingly has the potential power to take a more active regulatory role in western water law.¹⁴ The most obvious means of exercising this power—comprehensive federal legislation regulating the use and control of water—is not likely to occur in the near future.¹⁵ A recent case suggests, however, that new legislation may not be required for federal control over western waters. This decision raises the possibility that an already existing statute could serve as the vehicle for an increased federal role in the allocation of western waters.¹⁶

In April 1981, the Supreme Court of the United States rendered its decision in *California v. Sierra Club*.¹⁷ The case involved a suit by private parties under section 10 of the Rivers and Harbors Act¹⁸ to enjoin the construction and operation of certain water allocation facilities authorized by the state of California.¹⁹ The Rivers and Harbors Act is the primary federal statute for the protection of the nation's navigable waters. Section 10 of the Act²⁰ bars any unauthorized obstructions to the navigable capacity of "any of the waters of the United States" and makes it unlawful to excavate, or fill, "or in any manner to alter or modify" any navigable water without the approval of the United States Army Corps of Engineers (Corps).²¹ The plaintiffs alleged that California had failed to apply for a Corps' permit for its facilities as required by section 10.²²

14. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404-05, 423-27 (1940) (commerce power gives Congress broad authority over waterways); *United States v. Garlach Live Stock Co.*, 339 U.S. 725, 737-38 (1950) (spending power as basis for federal power to construct reclamation works); *Fed. Power Comm'n v. Or.*, 349 U.S. 435, 442-43 (1955) (power of Congress to regulate use and disposition of federal property). See generally Morreale, *supra* note 2; Note, *supra* note 2; Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts Over Western Waters*, 23 RUTGERS L. REV. 33 (1968).

This article will not be dealing with the extent of congressional power over western waters that may be exercised in the future. Rather it will only examine the extent to which the federal government can use an already existing statute, § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976) to assert a greater degree of control.

15. See *infra* text and notes at notes 444-55.

16. *Cal. v. Sierra Club*, 451 U.S. 287 (1981), *rev'g*, *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), *rev'g in part, aff'g in part*, *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975).

17. 451 U.S. 287 (1981).

18. 33 U.S.C. § 403 (1976).

19. *Cal. v. Sierra Club*, 451 U.S. at 289. See *infra* text and notes at notes 314-74 for more detailed discussion of the factual background of the case.

20. 33 U.S.C. § 403 (1976). See *infra* text and notes at notes 144-313 for more detailed discussion of the Act.

21. 33 U.S.C. § 403 (1976). For text of statute see *infra* note 150.

22. *Cal. v. Sierra Club*, 451 U.S. at 290.

In *California v. Sierra Club* the Supreme Court did not reach the underlying merits of the case before it.²³ The Court, instead, held that the plaintiffs had no right to bring suit under the Rivers and Harbors Act.²⁴ Although this refusal to imply a private right of action under the Rivers and Harbors Act was initially viewed as a blow to environmentalists,²⁵ the decision in *California v. Sierra Club* seems more important for the question it left unresolved: to what extent, if at all, will state water allocations and projects authorized by western state water law be subject to the requirements of the Rivers and Harbors Act?

This article will analyze the specific issues left unresolved by the Supreme Court and examine the extent to which the Rivers and Harbors Act can and should be used by the federal government to expand its role in western water allocations. The first section of the article will begin with a discussion of the history and development of western water law and the traditional role of the federal government in western waters. A discussion of the growing conflict over control of western waters and the possible motivation for an increased federal role will follow. The next section will examine the Rivers and Harbors Act in detail. This examination will focus on the potential applicability of section 10 of the Act to state water allocations. Accordingly, the territorial and subject matter jurisdiction of the Act and the permit process will be discussed in detail. The next section will closely examine *California v. Sierra Club* and analyze the unresolved issues of that case. Finally, the article will conclude with an examination of the extent to which the Rivers and Harbors Act can, and should, be used in the context of the western water allocations.

23. *Id.*

24. *Id.* The decision made by the Court not to imply a private right of action was not unexpected. The circuit courts had split on the issue, compare *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth.*, 359 F. Supp. 611, 638-39 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973) (allowing private right), with *Red Star Towing & Transp. Co. v. Dep't of Transp.*, 423 F.2d 104, 106 (3d Cir. 1970) (private suit not allowed). The Supreme Court had shown a decided trend against implication of private rights of action. See, e.g., *Touche Ross & Co. v. Reddington*, 442 U.S. 560 (1979). See generally Comment, *Supreme Court Finds No Implied Right of Action Under § 10 of the Rivers and Harbors Act*, 11 ENV'T L. L. REP. 10,098 (1981) (early commentary on the ramifications of the decision).

25. Borbash, *Supreme Court Curbs Environmentalist Suits*, Boston Globe, Apr. 29, 1981, at 11, col. 1; Wermiel, *Supreme Court Eliminates Option Used to Challenge State, Local Water Projects*, Wall Street Journal, Apr. 29, 1981, at 18, col. 1. In recent years the Rivers and Harbors Act had served as a tool for environmental protection at the hands of private parties. See *infra* text and notes at notes 450-51; see generally Barker, *Sections 9 and 10 of the Rivers and Harbors Act of 1899: Potent Tools for Environmental Protection*, 6 ECOLOGY L.Q. 107 (1976).

II. WESTERN WATER LAW

The scarcity of water in the arid and semiarid western states²⁶ has necessitated the diversion of water from streams and rivers to satisfy the demands of mining, agriculture, and residential areas.²⁷ The development of many portions of the west has required the transportation of this surface water over vast distances in order to reclaim otherwise unusable arid land.²⁸ As the west developed, it became clear that the limited water supplies had to be controlled and allocated in accordance with centralized goals.²⁹ This need for control resulted in the development of western water rights law and the enactment of statutes in most of the western states to govern the administration and allocation of water.³⁰ In order to understand more fully the conflict over the control of western waters and the need for reforms in water policy, it is important to examine in greater detail the development of western water law and the history of federal involvement.

A. History and Development of Western State Water Law

Western water rights law is quite different from the common law which still prevails in the more humid eastern states. At common law, water rights are based on the riparian theory.³¹ Under the

26. See *supra* note 2 for list of the western states. Land is considered arid or semiarid if potential evapotranspiration (the total water dissipated from an area by evaporation from water and land surfaces and by transpiration from plants) exceeds average precipitation, and the total water supply is insufficient for the cultivation of otherwise arable land. This is the situation which prevails in much of the west and explains why water must be diverted from streams and rivers for irrigation and other purposes. In the eastern United States, the land is far more humid. Land is classified as humid if precipitation is ordinarily greater than potential evapotranspiration. Note, *supra* note 2, at 967 n.2.

27. Much of the water used in the western states is diverted from surface streams. In 1970, over 370 billion gallons each day were diverted from surface streams for use. The National Water Commission estimated in 1973 that withdrawals in the year 2000 could exceed 1200 billion gallons per day. See 1 WATERS AND WATER RIGHTS 13-16 (R. Clark ed. 1967 & Supp. 1978) [hereinafter cited as CLARK].

28. See *infra* text and notes at notes 321-32 for a brief discussion of the huge California Water Project, an example of the kind of efforts the west has undertaken.

29. See, e.g., CAL. WATER CODE § 1257 (West 1971) which outlines the purpose of California's water laws. Basically the purpose of the system is to recognize the competing interests in a limited water supply and to promote the maximum beneficial use of the state's water resources consistent with the public interest. *Id.*

See *infra* text and notes at notes 38-51 for a more detailed discussion of the consideration behind an appropriation of water.

30. See *infra* text and notes at notes 46-51.

31. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-45 (1950). See generally 1 CLARK, *supra* note 27, at 34.

riparian doctrine, the right to use water is a property right which does not depend on the actual use of water.³² Thus, owners of property adjacent to bodies of water have the right to the use of this water, but only to the extent that they do not substantially diminish the quantity of water flowing through the land of property owners downstream.³³ The early settlers of the west, however, found that the riparian doctrine of water rights was not well suited to those arid lands.³⁴ As a consequence, these settlers developed a new custom for settling water rights; the first settler to arrive and divert water to his claim had superior rights to the water against all latecomers.³⁵ This custom was adopted by the early western courts³⁶ and eventually ripened into a formal legal doctrine, the doctrine of prior appropriation.³⁷

The doctrine of prior appropriation presently forms the basis for most of the water rights laws of the western states.³⁸ Under the doctrine of prior appropriation, the first person to appropriate or divert water from a stream for a beneficial use is entitled to the continued use of the amount appropriated for so long as his beneficial use of it continues.³⁹ The concept of "beneficial use" is basic to the appropriative right.⁴⁰ Beneficial use is defined generally as any use of water

32. 7 CLARK, *supra* note 27, at 309-10.

33. *Id.*

34. *See* Cal. v. United States, 438 U.S. 645, 653-54 (1978); Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 153-57 (1935). The reasons for the general inadequacy of the riparian doctrine to the situation faced are twofold. First, the scarcity of water did not allow the luxury of nonuse of water and the riparian doctrine does not require use of water. *See supra* text at note 32. Second, the riparian doctrine, insofar as it is based on the notion that the right to water is a property right, presupposes private ownership of land. *See* Note, *supra* note 2, at 969. Because much of the land was not legally open for settlement before 1862, many of the early settlers, in particular the miners of the Gold Rush of 1848, could not claim riparian rights.

See infra text and notes at notes 55-59 for a general discussion of how this second factor made the early federal acquiescence to state water law important.

35. *See generally*, 1 CLARK, *supra* note 27, at 77-82.

36. *See, e.g.*, Irwin v. Phillips, 5 Cal. 140, 146 (1855).

37. *See* Cal. v. United States, 438 U.S. 645, 653-63 (1978); Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. at 153-57.

38. The appropriation doctrine is recognized by all of the western states. 1 CLARK, *supra* note 27, at 80-81. However, some of the semiarid western states still recognize riparianism in a limited way. For example, California still recognizes riparian rights in certain circumstances but limits this recognition to reasonable beneficial use. *Id.* The eight most arid states have repudiated the riparian doctrine totally. *Id.* at 80; *see also*, 2 HUTCHINS, *supra* note 4, at 6-14.

39. *See, e.g.*, *United States v. Gerlach Live Stock Co.*, 339 U.S. at 742-50; Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. at 153-57.

40. "[S]tatutes of nearly all western states contain either positive declarations of the relationship between appropriative rights and beneficial use of water or incidental references to beneficial use in the procedures for appropriating water or both." 1 CLARK, *supra* note 27, at 86. *See generally* 2 HUTCHINS, *supra* note 4, at 104.

that is reasonable, useful, and beneficial to the appropriator, and is, at the same time, consistent with the public's interest in the best utilization of water supplies.⁴¹ Traditionally, beneficial use has been equated with productive use; the term did not include instream uses of water.⁴² Similarly, the public interest in utilization of water supplies and the public economic interest were generally considered synonymous by state water rights administrators and courts.⁴³ Today, some states recognize instream, noneconomic uses of water as beneficial and, therefore, valid appropriations;⁴⁴ in a growing number of states, "public interest" has been broadened to include consideration of noneconomic social values.⁴⁵

Originally, no federal, state, or territorial statutes declared what steps had to be taken to acquire a right to water.⁴⁶ Controversies arising over rights to the use of water had to be settled in individual lawsuits.⁴⁷ The development of new water uses and an ever-increas-

41. *Tulare Irrig. Dist. v. Lindsey-Strathmore Irrig. Dist.*, 3 Cal.2d 489, 567, 45 P.2d 972, 1007 (1935); *Finney County Water Users' Ass'n v. Graham Ditch Co.*, 1 F.2d 650, 652 (D. Colo. 1924); see generally 1 CLARK, *supra* note 27, at 86; 1 HUTCHINS, *supra* note 4, at 493-503.

Several states have attempted to codify a definition of beneficial use. In California, for example, the established policy of the state is that use of water for domestic purposes is the highest use and use for irrigation the next highest. CAL. WATER CODE § 1254 (West 1971). See also TEX. WATER CODE ANN. § 5.002(3) (Vernon 1972) ("beneficial use" means use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose; . . .').

42. Prior to World War II, little thought was given to instream values such as recreation and propagation and maintenance of fish and wildlife resources. As a result, there was depletion of streams and significant interference with instream values. Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 ECOLOGY L.Q. 695, 710-11 (1972). See also Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211, 213 [hereinafter cited as Tarlock]; Lilly, *supra* note 10; Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 UTAH L. REV. 871 [hereinafter cited as *Recent Developments*].

43. Robie, *supra* note 42, at 701-02; Aiken, *supra* note 11, at 327.

44. See, e.g., CAL. WATER CODE §§ 1243, 1243.5 (West 1971 & Supp. 1982); TEX. WATER CODE ANN. § 5.002(3) (Vernon 1972). See generally Tarlock, *supra* note 42.

45. See, e.g., NEV. REV. STAT. § 533.370(1) (1979); OR. REV. STAT. § 537.190(1) (1979); WASH. REV. CODE § 90.03.290 (1974). The public interest review of California's water law extends to a wide range of factors including water quality, CAL. WATER CODE § 1258 (West 1971); domestic needs, *id.* § 1254; the protection of fish and wildlife and recreational needs, *id.* § 1243; and environmental concerns, CAL. PUB. RES. CODE § 2100 (West 1982). If the appropriation is not in the "public interest," the appropriation will not be allowed. CAL. WATER CODE § 1255 (West 1971).

46. 1 CLARK, *supra* note 27, at 97. Early congressional legislation authorized, confirmed, and protected appropriative water rights acquired on the public domain that had vested under local law and customs, but this legislation did not prescribe modes for acquiring rights. 1 CLARK, *supra* note 27, at 94-95. See *infra* text and notes at notes 52-64 for discussion of importance of these early federal statutes to the development of water law in the west.

47. 1 CLARK, *supra* note 27, at 93-94. "On a particular stream, many decrees of adjudication might be rendered, each of which necessarily bound only the litigants named therein. One's

ing demand on existing water supplies, however, made apparent the need for formalized appropriation procedures.⁴⁸ In the late nineteenth century, the western states began to respond to this need by enacting water administration laws.⁴⁹ Today, all potential appropriators of surface water must apply to their states for permission to appropriate water.⁵⁰ Each of the western states' administrative systems determines water appropriation on the basis of the doctrine of the prior appropriation of water for beneficial use.⁵¹ Thus, each state has a comprehensive water rights system with certain common elements: a theoretical premise—prior appropriation; a standard of enforcement—beneficial use; and an appropriation procedure—application to the state.

B. The Federal Role in Western Water Law

1. The History of Federal Deference to State Water Law

The role of the federal government in the reclamation and development of the arid lands of the west has been long and active, but always restrained. For, through this relationship, runs the consistent theme of purposeful and continued deference to state water law by Congress.⁵² This federal deference can be traced back to early

claim to a single water right might have to be asserted or defended against different adversaries in several unrelated . . . lawsuits."

48. *Id.* at 99-100.

49. *Id.* at 102-07; see also 1 HUTCHINS, *supra* note 4, at 298-306.

50. 1 HUTCHINS, *supra* note 4, at 302. Of the 17 western states, all but 2 require appropriators of surface water to obtain an appropriative permit. The exceptions are Colorado and Montana, which have judicial rather than administrative systems for statutory adjudications of appropriative rights. *Id.*

The permit procedures of the states vary widely in their particulars, see generally *supra* note 4, but it is instructive to see how they work in general. California's system can serve as an example.

In California, all potential users of water must apply to the State Water Resources Control Board (SWRCB) for a permit to appropriate the necessary water. CAL. WATER CODE § 1225 (West 1971) (the requirements of state water law apply to state water projects, see Note, *The Delta Water Rights Decision*, 2 ECOLOGY L.Q. 733 (1972), as well as to federal reclamation projects. See *Cal. v. United States*, 438 U.S. 645 (1978)). The SWRCB determines first whether there is enough unappropriated water to fill the needs of the applicant. CAL. WATER CODE § 1375(d) (West 1971). All water flowing in natural channels, except that necessary for prior appropriations, is available for appropriation. *Id.* § 1201. The SWRCB then examines the costs and benefits associated with granting the permit against the context of the state's needs as a whole. *Id.* § 1257. See *supra* note 45 for discussion of public interest review. If the SWRCB determines that sufficient unappropriated water exists and that the proposed use is in the public interest, it will grant a permit. *Id.* §§ 1375(d), 1380.

51. See *supra* note 38.

52. *Cal. v. United States*, 438 U.S. 645, 653-79 (1978) (detailed discussion of this congressional deference). The Supreme Court has generally strongly upheld this congressional deference to state water law. See, e.g., *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295

statutory recognition of state control of water resources.⁵³ It continues in numerous statutes directly and indirectly involving the use and control of water, expressing Congress' intent not to impinge upon the states' general control of their waters.⁵⁴

The earliest federal enactments regarding western water law represented congressional authorization for the states to adopt nonriparian systems of water rights.⁵⁵ Prior to 1862, the settlers of the western territories had no legal right to settle on the public lands and, thus, had no vested rights to the water except against each other.⁵⁶ Therefore, when the federal lands were formally opened to private settlement,⁵⁷ the water rights previously acquired under the law of prior appropriation were theoretically subject to divestment⁵⁸ by the riparian rights of the grantees of the federal land.⁵⁹ In 1866, Congress addressed this potential problem by acknowledging the superiority of the water rights previously recognized by state law.⁶⁰ The Desert Land Act of 1877⁶¹ further established the federal

U.S. 142 (1935); *Kan. v. Colo.*, 206 U.S. 46 (1907); *cf.* *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899) (the Supreme Court carves out two exceptions to state control).

53. *See infra* text and notes at notes 55-64.

54. *See infra* text and notes at notes 65-78.

55. *Gutierrez v. Albuquerque Land & Irrig. Co.*, 188 U.S. 545 (1903); *see generally* Note, *supra* note 2, at 971-77.

56. Prior to 1862, much of the lands in the west were owned by the federal government. The western courts in adjudicating water rights and applying the doctrine of prior appropriation did so with the caveat that this federal ownership prevented absolute vesting of such rights. *See Kidd v. Laird*, 15 Cal. 161, 181 (1860). *See generally* Note, *supra* note 2, at 970-71. *See also supra* note 34.

57. In 1862, the Homestead Act, ch. 75, 12 Stat. 392 (1862) opened federal lands to private acquisition.

58. Some later federal cases suggested that this fear was unfounded; that the federal government had by inaction acquiesced in the state-recognized rights. *See, e.g., Broder v. Water Co.*, 101 U.S. 274, 276 (1879).

59. *See* Note, *supra* note 2, at 970-71. *See also* text and notes at notes 32-33. *See generally* Walston, *Reborn Federalism in Western Water Law: The New Melones Dam Decision*, 30 HASTINGS L.J. 1645, 1653 (1979).

60. The Mining Act of 1866, ch. 262, 14 Stat. 253 (1866) (codified at 43 U.S.C. § 661 (1976)). This act for the first time expressly opened the mineral lands of the public domain to exploration and occupation by miners. Because of the fear that this Act might in some way interfere with the water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law and priority of those vested water rights. *See Cal. v. United States*, 438 U.S. at 656; *see also* *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 705 (1899) (The Act "was a voluntary recognition of a preexisting right of possession constituting a valid claim to its continued use").

Four years later, in the Act of July 9, 1870, 16 Stat. 218, Congress reaffirmed that occupants of federal public land would be bound by state water law, providing that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights."

61. Ch. 107, 19 Stat. 377 (now codified at 43 U.S.C. §§ 321-323 (1976)). The primary objective of this Act was to provide for reclamation of desert land by granting such land to

recognition of state control of water by making it clear that the reclamation of the desert lands of the west would generally follow state water law.⁶² The Supreme Court interpreted the Desert Land Act as giving the western states plenary control over the unappropriated nonnavigable waters within their boundaries.⁶³ The Court has, however, consistently carved out two important exceptions to this state control of waters. First, the Court recognized that the states' control over their waters could not operate to deny the federal government water for beneficial use on government property. Second, and more important, the Court held that the states' control of their waters was limited by the federal power to protect navigation.⁶⁴ In summary, in this early legislation Congress recognized the doctrine of prior appropriation and gave the states virtually unlimited authority to make laws controlling the use and disposition of their waters.

The establishment of state control of its waters in the nineteenth century was followed by a broad expansion of federal activities directly and indirectly involving the use and control of western waters.⁶⁵ Many of the statutes authorizing these activities included

whomever wanted it. The Act provided that the settlers' rights would depend on prior appropriation and that unappropriated, nonnavigable waters not acquired by settlers were free for the appropriation and use of the public.

62. *Cal. v. United States*, 438 U.S. at 657. See also *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158-62 (1935).

63. In *Cal. Or. Power Co.*, 295 U.S. at 162, the Supreme Court interpreted the statute as having "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself" and that these nonnavigable waters hereby severed were "reserved for the use of the public under the laws of the states and territories named." *Id.* at 158, 162 (emphasis added).

What we hold is that following the Act of 1877, if not before, all *non-navigable* waters then a part of the public domain became *publici juris*, subject to *plenary control of the designated states*, The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, . . . to the states and local doctrine of appropriation.

Id. at 163-64 (emphasis added).

64. In *Rio Grande*, 174 U.S. at 703, the Supreme Court stated:

First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all the navigable streams within the limits of the United States.

Id. at 703.

See also *Cal. Or. Power Co.*, 295 U.S. at 159; *Cal. v. United States*, 438 U.S. at 662.

65. Note, *supra* note 2, at 970.

Primary among these activities were those that stemmed from the Reclamation Act of 1902, Ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.) (authorized

statements indicating that, by these enactments, the federal government was not seeking to displace state control of water; rather, state law would continue to govern the appropriation, use, and distribution of water.⁶⁶ The decisions of the Supreme Court over the past one hundred years generally reflect this congressional policy that authority over intrastate waterways lies with the states.⁶⁷ Up until the present time, then, the federal legislature and judiciary both accepted the notion that, in most situations, state water law controls.

Federal deference to state authority has not prevented conflicts between the two levels of government over western water use. Recently, for example, a controversy arose over the meaning of the congressional statement of deference contained in the Reclamation Act of 1902.⁶⁸ In 1902, Congress passed the Reclamation Act⁶⁹ to provide federal funding for and development of massive reclamation projects in the arid lands of the west.⁷⁰ Section 8 of the Act clearly provides that state law will control the appropriation and later distribution of the water involved in the projects.⁷¹ In *California v.*

federal development of facilities to reclaim arid lands); the Federal Water Power Act of 1920, 16 U.S.C. §§ 791a-793, 796-818, 820-823 (1976) (authority to license private power projects), and other acts which provided for construction of power developments. *See, e.g.*, The Boulder Canyon Project Act of 1928, 43 U.S.C. §§ 671-671t (1976).

66. In *United States v. N.M.*, 438 U.S. 696, 702 n.5 (1978), the Supreme Court cited a Senate hearing report containing a list of 37 statutes recognizing "the importance of deferring to state law" as support for the Court's assertion that Congress has invariably intended state law to govern the federal acquisition of water. *See, e.g.*, 43 U.S.C. § 383 (1976); 16 U.S.C. § 821 (1976); 43 U.S.C. § 617L(d) (1976). *But see generally* Note, *Federal Acquisition of Non-Reserved Water Rights After New Mexico*, 31 STAN. L. REV. 885, 907-11 (1979) (this commentator disputes the assertion by the Court that the 37 statutes constitute the broad policy of deference that the Court attributes to them).

67. *See, e.g.*, *Cal. v. United States*, 438 U.S. 645 (1978); *United States v. N.M.*, 438 U.S. 696 (1978); *Kan. v. Colo.*, 206 U.S. 46, 92 (1907). In *Kan. v. Colo.*, the Court held the federal legislation could not "override state laws in respect to the general subject of reclamation Each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." 206 U.S. at 92. *But see, e.g.*, *United States v. N.M.*, 438 U.S. at 696 (the doctrine of implied reservation of water).

68. Ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.).

69. *Id.*

70. The Reclamation Act of 1902 and its amendments only establish the foundation of the federal reclamation program; the program is implemented by individual projects that are authorized by individual acts of Congress. *See, e.g.*, Boulder Canyon Project Act of 1928, 43 U.S.C. § 617-617t (1976). *See generally* Walston, *supra* note 59, at 1664; Note, *State Control over the Reclamation Waterhole: Reality or Mirage?*, 78 MICH. L. REV. 227 (1979).

71. Section 8 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 water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws and nothing herein shall in any

United States,⁷² the Supreme Court examined the extent to which a federal reclamation project would be subject to state water law.⁷³ The Court held that, under section 8, the federal government had to conform to state water law in two important respects.⁷⁴ First, the federal government must conform with state water laws in appropriating the water necessary for a project. Second, once these appropriated waters are released, their distribution is also controlled by state water law.⁷⁵ The Court thus held that section 8 allows the western states to "impose any condition on the 'control, appropriation, use, or distribution of water' through a Federal reclamation project that is not inconsistent with clear congressional directives respecting the project."⁷⁶ Commentators saw this decision as a broad statement reaffirming federal deference to state water law.⁷⁷ The conflict underlying *California v. United States*,⁷⁸ however, is only one of several unresolved issues between the federal government and western states over control of water and water policies that have emerged despite the history of congressional deference.

way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Section 8, 32 Stat. 390 (1902) (codified as amended at 43 U.S.C. §§ 383, 372 (1976)).

72. 438 U.S. 645 (1978).

73. The project in question was the New Melones dam which was part of the Central Valley Project (CVP) and authorized pursuant to the 1902 Act. The SWRCB issued an appropriation permit, *see supra* note 50, which imposed 25 conditions on water use by the project. The Federal Reclamation Bureau filed for a declaratory judgment that it could appropriate water without a permit, or, in the alternative, if it did apply for a permit as a matter of comity, the state should not be able to attach conditions to the permit. *See generally* Note, *supra* note 70, at 234-38.

74. *Cal. v. United States*, 438 U.S. at 665-67. In reaching its decision, the Supreme Court outlined in detail the legislative history of § 8. In doing so they relied heavily on the history of federal deference to state water law which preceded the 1902 Act. *Id.* at 653-63. *See supra* the discussion at text and notes at notes 52-68.

75. *Cal. v. United States*, 438 U.S. at 665-67. One of the primary reasons cited by the Court for their holding, and one of the main purposes behind § 8, is the practical consideration that the states are the best qualified to control the water. The Court found that: "A principal motivating factor behind Congress' decision to defer to state law was . . . the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *Id.* at 668-69.

See infra text and notes at notes 472-97 for a consideration of this factor as militating against application of the Rivers and Harbors Act to state water law.

76. *Id.* at 672. *See generally* Walston, *supra* note 59, at 1673-80 (the question of what constitutes a clear congressional directive sufficient to override state water law is bound to raise new problems); Note, *supra* note 70, at 238-47. (This commentator also sees difficulties arising from application of the California holding).

77. *See generally* Walston, *supra* note 59; Note, *supra* note 70.

78. *See supra* text and note at note 73.

2. Federal-State Conflicts Over Use and Control of Western Waters

Despite the long history of congressional deference to the western states' control of their water resources, the division of power between the federal and state governments over water allocations has become less clear in more recent years due to increasing conflict over the use and control of western waters. At present, the main source of this conflict is increasing federal demand for water and a concomitant reluctance on the part of the federal government to submit to state water laws to acquire this water.⁷⁹ Another source of conflict, one potentially more important than the first, is the need for reform in national water policies and, particularly, in western state water laws.⁸⁰ Recent federal proposals have explicitly recognized the need for such reforms and have raised the possibility, and the fears of the western states, that the federal government may in the future take an active role in instituting these reforms in derogation of state control.⁸¹ In order to better understand the present state of the federal-state relationship, and thus the possible motivation for a more active federal role in instream water allocations, it is necessary to examine further the sources of conflict over western water.

The primary source of conflict over the control of western waters is federal claims to proprietary rights to water. The claims of federal water rights stem from the federal need for water for the vast amounts of reserved⁸² and unreserved public land⁸³ in the western states. Early in this century, most federal agencies in need of water for use on federal lands applied to the states for water rights.⁸⁴ More recently, however, the federal need for water on these lands has increased, and the federal government has become less willing to subject itself to state water law for rights to appropriate such waters.⁸⁵

79. See *infra* text and notes at notes 81-128.

80. See *infra* text and notes at notes 129-42.

81. *Id.*; see also *supra* text and notes at notes 9-13.

82. Federal Reserved lands are those lands in the public domain withdrawn from sale or settlement and appropriated to specific public uses; such as parks, national forests, military posts, and Indian lands. See *United States v. N.M.*, 438 U.S. 696 (1978).

83. Federal nonreserved lands are those parts of the federal domain which are not statutorily reserved.

Theoretically, much of it can still be privately acquired under a series of old land settlement and mining laws, although this is becoming increasingly difficult. The old policy of disposition of the public land to encourage settlement and development of the west has given way to a new policy of retention and management.

Trelease, *supra* note 2, at 757.

84. See *United States v. N.M.*, 438 U.S. at 702-03.

85. See, e.g., *United States v. N.M.*, 438 U.S. 696 (1978); *Ariz. v. Cal.*, 373 U.S. 546 (1963). See also *Nev. v. United States*, 165 F. Supp. 600, 601 (D. Nev. 1958), *aff'd on other grounds*,

The main reason for this reticence seems to be the federal concern that many of the purposes for which it wants water⁸⁶ would either not be recognized by state water law to the extent necessary, or would lead to inconsistent results from state to state.⁸⁷ There are two theories through which the federal government has sought to authorize and protect water rights for federal lands independent of state law: the reserved rights doctrine; and the federal nonreserved right.⁸⁸

Much of the controversy that now exists between the states and the federal government over water allocations has been generated by the reserved rights doctrine.⁸⁹ The federal government has used this judicially created doctrine⁹⁰ to authorize and protect federal water use in connection with federal reserved lands.⁹¹ The doctrine holds that Congress, in authorizing the creation of reserved lands, impliedly reserved sufficient water resources to accommodate the purposes for which the lands were specifically withdrawn.⁹² Under

279 F.2d 699 (9th Cir. 1960) (military post did not file for state water permit).

86. For example, federal agencies have become increasingly aware of the desirability of in-stream flows on federal lands for recreational uses, or scenic and aesthetic purposes and fear that such rights will not be recognized by state water laws which are geared generally to more utilitarian purposes and designed for diversion and development. See *United States v. N.M.*, 438 U.S. 696 (1978) (the federal government wanted water for, among other things, wildlife maintenance and aesthetics). See generally *supra* text and notes at notes 42-45 and *infra* at notes 129-34; Trelease, *supra* note 2, at 756-57.

87. See Trelease, *supra* note 2, at 773 (citing a federal report which argues that, if federal agencies must follow state law, the application of federal law will not be uniform throughout the states and thus the effect of federal programs will differ from state to state). See also Moreale, *supra* note 2, at 469 (citing a federal official who argued that following state law would hamper national defense).

88. See *infra* text and notes at notes 118-28.

89. The reserved rights doctrine is also known as the doctrine of implied reservation of water. See generally Elliot, *United States v. New Mexico: Purposes That Hold No Water*, 22 ARIZ. L. REV. 19 (1980); Trelease, *supra* note 2; Morreale, *supra* note 2.

90. The underpinnings of the doctrine are found in *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899) where the Court found that a state's right to appropriate water is limited by the federal power to secure water for government property. See *supra* note 64.

In *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court recognized the reserved right explicitly in the Indian reservation context, holding that enough water for irrigation purposes was impliedly reserved, dating back to the date on which the reservation was created. Thus, priority of federal interest was secured over the state-created interests.

In the Polten Dam case, *Fed. Power Comm'n v. Or.*, 349 U.S. 435 (1955), the doctrine was held applicable to all federally reserved lands. See also *Cappaert v. United States*, 426 U.S. 128, 141 (1976); *Ariz. v. Cal.*, 373 U.S. 564 (1963).

91. See, e.g., *United States v. N.M.*, 438 U.S. 696, 700 (1978); *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 805 (1976); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. Dist. Court in and for Water Div. No. 5*, 401 U.S. 527 (1971). See generally Trelease, *supra* note 2; Elliot, *supra* note 89.

92. *United States v. N.M.*, 438 U.S. at 700. See also *Cappaert*, 426 U.S. at 138.

the doctrine, the federal government has a right to the quantity of water impliedly reserved, independent of state law.⁹³ The doctrine is, then, an exception to the usual rule of federal deference to state control of water.

The doctrine of reserved rights conflicts with the interests of the western states in two ways. First, use of the reserved rights doctrine has put the federal government in conflict with the general principle favoring a state's control of its own waters. The federal proprietary claims are independent of state water law⁹⁴ and, absent a full quantification of the federal claims under the doctrine, unpredictable as well.⁹⁵ If water were abundant the federal claims would pose no problem. In the arid lands of the west, however, the federal claims inescapably vie with other public and private claims for the limited quantities of water available.⁹⁶ They thus undermine the western states' attempts to define the direction and form of their growth through centralized water allocation policies.⁹⁷ This basic disruption is compounded by the sheer quantity of reserved lands in the western states.⁹⁸ Second, the doctrine of reserved rights is (at least theoretically⁹⁹) incompatible with western state water law in four ways.¹⁰⁰ First, with a reserved right to water, the federal government is not subject to the beneficial use requirement as defined under state law.¹⁰¹ Second, the right to the water is not dissipated by nonuse as it would be under the doctrine of prior appropriation.¹⁰²

93. *United States v. N.M.*, 438 U.S. at 698-700. See Note, *Water in the Woods: The Reserved Rights Doctrine and National Forest Lands*, 20 STAN. L. REV. 1187, 1195-98 (1968) (for a discussion of typical agency practice and use of doctrine prior to *United States v. N.M.*).

94. See *supra* cases cited at notes 90-91.

95. Hanks, *supra* note 14, at 43 ("[w]ater use will vary from relatively predictable, minor amounts in national forests to less predictable, substantial amounts on Indian Reservations and lands held by the Defense Department. Understandably, the states are concerned that they do not know the extent of the federal claim").

96. *United States v. N.M.*, 438 U.S. at 699.

97. See *Ariz. v. Cal.*, 373 U.S. 546 (1963) (holding that under the reserved rights doctrine the Secretary of the Interior had the power to allocate waters of the Colorado River among users in Arizona, California, and Nevada). See generally Trelease, *supra* note 2, at 772-73; Hanks, *supra* note 14, at 43-44.

98. *United States v. N.M.*, 438 U.S. at 699-700.

99. Some commentators have suggested that because the non-Indian federal rights involved are often relatively small (the amounts of water claimed in *United States v. N.M.* for example were relatively small, see Trelease, *supra* note 2, at 759), the perceived theoretical incompatibility between state water law and the reserved rights doctrine is largely overplayed. Trelease, *Federal Reserved Water Rights Since the PLLRC*, 54 DEN. L. J. 473, 491-92 (1977). See also Elliot, *supra* note 89, at 19.

100. Elliot, *supra* note 89, at 19-20.

101. *Id.* See *supra* text and notes at notes 90-95; see generally Hanks, *supra* note 14, at 41.

102. Elliot, *supra* note 89, at 20.

Third, unlike state law, where the amount of water to be appropriated is based on the amount of water available, quantification of the reserved right depends upon the amount necessary to fulfill the purposes for which the land was withdrawn.¹⁰³ Finally, and most important, the reserved right has priority as of the date the reservation of land is made; not when the water use begins.¹⁰⁴ Thus, a holder of a state-authorized appropriative right to water, awarded after a federal reservation is created, may lose his priority to the water even though he is the first actual taker.¹⁰⁵ The doctrine of reserved rights, therefore, impinges on the state's general authority to regulate water use and on particular aspects of state water law.

The potential impact of the federal reserve right on state control and state water law prompted many congressional proposals in the late 1950's and early 1960's to neutralize the rights, none of which passed.¹⁰⁶ However, the most recent Supreme Court decision to address the reserved rights doctrine—*United States v. New Mexico*¹⁰⁷—suggests that the doctrine has limits. The Supreme Court, in that case, indicated that it will take a restrictive approach in implying the purposes for which water can be reserved.

In *United States v. New Mexico*, the Supreme Court examined the federal claims for reserved rights to water for use in the Gila National Forest.¹⁰⁸ The federal government claimed that Congress, in setting aside the forest,¹⁰⁹ impliedly reserved the use of water from the Rio Mimbres River for several purposes, including wildlife maintenance, aesthetics, stock-grazing, and recreation.¹¹⁰ The Court, relying heavily on the history of congressional deference to state water law,¹¹¹ held that only those quantities of water necessary to fulfill the *primary purpose* of the original reservation could be reserved.¹¹² In determining the primary purposes of the original

103. *Id.* See *United States v. N.M.*, 438 U.S. at 700.

104. Elliot, *supra* note 89, at 19-20. See Cappaert v. United States, 426 U.S. 128, 138 (1976).

105. See Trelease, *supra* note 2, at 756. Conversely, state water rights created prior to the reservation still have priority.

106. See generally Morreale, *supra* note 2; Hanks, *supra* note 14.

107. 438 U.S. 696 (1978).

108. *Id.*

109. The Gila National Forest was set aside pursuant to the Organic Administrative Act of 1897, 30 Stat. 34 (codified as amended in scattered sections of 16 U.S.C.). See *United States v. N.M.*, 438 U.S. at 706-07, 718.

110. *United States v. N.M.*, 438 U.S. at 698.

111. *Id.* at 701-02. The decision in this case was rendered on the same day as *Cal. v. United States*, 438 U.S. 645 (1978), and it incorporated by reference that decision's extensive discussion of congressional deference. See *supra* text and notes at notes 52-78.

112. *United States v. N.M.*, 438 U.S. at 702.

reservation, the Court gave the enabling statute a very strict reading.¹¹³ As a consequence, the Court denied most of the federal claims, holding that the statute impliedly reserved water only for the more limited purposes of insuring favorable conditions of water flow and furnishing a continuous supply of timber.¹¹⁴ The decision by the Supreme Court in *United States v. New Mexico* was viewed by the western states as significantly increasing state control of western water.¹¹⁵

United States v. New Mexico severely cuts back on the use of the reserved rights doctrine and, thus, on the possibilities for federal-state conflict over the use of that doctrine. It seems likely, however, that there will be future conflicts over the federal need for water.¹¹⁶ The actions of the federal government after the decision indicate that the reserved rights doctrine will still be used¹¹⁷ and that the federal government will seek other theories on which to base its claim to water rights independent of state law. This latter point is illustrated by a claim by the Interior Department of a new type of federal water right, the so-called federal nonreserved right.¹¹⁸

The federal "nonreserved water right" would allow the federal government to claim water for secondary—as opposed to primary—purposes on reserved lands and for use on unreserved public lands.¹¹⁹ The basis of the federal claim to a federal nonreserved right to water is that the national government has a right "to carry out congressional authorized management objectives" on federal

113. The Court, looking only to the subjective intent of the statute as reflected in its legislative history and not at the broad language on the face of the statute, found the implied rights to be limited. *Id.* at 706-711. Commentators have generally been critical of the Court's construction of the Acts under which the National Forests were created. *See, e.g.,* Elliot, *supra* note 89; Note, *United States v. New Mexico: The Beginning of a Trend Toward Favoring State Water Rights Over Federal Water Rights*, 9 N.M. L. REV. 361 (1979).

114. *United States v. N.M.* 438 U.S. at 716-18.

115. *See In New Mexico, Water is Valuable Resource—And So Is Water Boss*, Wall St. J., May 1, 1980, at 1, col. 1. *See generally* Comment, *Federal Non-Reserved Water Rights*, 48 U. CHI. L. REV. 758, 760 (1981).

116. *See generally* Trelease, *supra* note 2, at 760-75.

117. Shortly after the decision in *United States v. N.M.*, the federal government made claims to two new types of reserved rights. First, it asserted that there is a federal reserved right to sustain a "groundwater level for general ecosystem maintenance." Trelease, *supra* note 2, at 760-61. Second, the Interior Department made a broad claim of a reserved right relating to "public water holes and springs." Department of the Interior Solicitor's Opinion No. M-36914, Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (1979) [hereinafter cited Solicitor's Opinion].

118. Solicitor's Opinion, *supra* note 117, at 574; *see generally* Trelease, *supra* note 2; Comment, *supra* note 115.

119. Trelease, *supra* note 2.

lands.¹²⁰ In the exercise of the nonreserved right, compliance with state law, although desirable, is not required.¹²¹ Therefore, under this claim to a water right, the federal government can appropriate water for its purposes¹²² without regard to whether the state recognizes that purpose as a beneficial use, or whether the state laws would create and protect such a water right.¹²³ This claim to a new federal right to water has met with considerable opposition from the proponents of state control of water¹²⁴ and early commentators.¹²⁵ At this time, the status of the new claim is not clear; because of the opposition, the Secretary of the Interior has decided to postpone pursuing claims under this theory.¹²⁶ Whether this claim to a new type of federal water right will be successfully used is, therefore, uncertain.¹²⁷ It serves to illustrate, however, both the continued reluctance of the federal government to submit to state water law for a determination of its water needs and the conflict that has resulted between the state and federal governments over the control of western waters.¹²⁸ This conflict over federal needs may ultimately

120. Solicitor's Opinion, *supra* note 117, at 574; *see also* Comment, *supra* note 115, at 761.

121. Solicitor's Opinion, *supra* note 117, at 571, 577; *see* Comment, *supra* note 115, at 761.

122. The Solicitor's major claim to water, indeed the federal need for water often identified the one most likely to suffer from state laws, is for instream flows. The Solicitor claims that water for instream flows are needed to meet the "management objectives" of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976). Solicitor's Opinion, *supra* note 117, at 614-15. *See generally* Trelease, *supra* note 2, at 771. Professor Trelease suggests that the nonreserved right would be used to justify large federal projects like the MX missile. *Id.* at 770.

123. In contrast to the reserved right, the federal nonreserved right would bear a priority as of the date of actual use or claim. *See* Trelease, *supra* note 2, at 757. *See supra* text and notes at notes 104-05.

124. *See* Comment, *supra* note 115, at 761.

125. *See generally* Trelease, *supra* note 2; Simms, *National Water Policy in the Wake of United States v. New Mexico*, 20 NAT. RESOURCES J. 1 (1980); Comment, *Federal Non-Reserved Water Rights*, 15 LAND & WATER L. REV. 67 (1980); Aiken, *supra* note 11.

126. Comment, *supra* note 115, at 761-62.

127. The theory has not yet been explicitly tested by the courts. *But see* Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1333 (E.D. Wash. 1978) ("where water is not explicitly or impliedly reserved, it must be appropriated under state water laws even when needed by the Federal sovereign for a federal reserve").

128. In 1961, a Senate Committee addressed the problems of federal state relations:

Clarification of the Federal position in connection with water rights.—With demand for water far outreaching increases in present sources of supply, conflicts between the States and the Federal Government over the control and use of water are growing sharper and more serious. The problem is a national one, but its threat is especially grave in the public land States of the semiarid West, where not only is water even more scarce than elsewhere in our country but where Federal ownership of millions upon millions of acres of land give the Federal Government an asserted basis for claiming proprietorship, 'paramount rights,' or title in fee simple absolute to all unappropriated waters in many of our States.

Inevitably, such sweeping claims by the Federal Government might retard State

lead the federal government to assert more control over western waters.

The tension between the federal and state governments over control of western waters is likely to be exacerbated by the need for reform in state water law and pressure to create a national water policy. State water law has been noted for its failure to provide adequate protection for the environment,¹²⁹ to promote conservation of water resources,¹³⁰ and to respond to modern problems such as the need to manage groundwater resources.¹³¹ The basic reason for these shortcomings is that the doctrine of prior appropriation for beneficial use, on which western water rights law is based, was designed to promote the economic development of the west, using the available water resources to their fullest extent.¹³² As a result, western water rights law still reflects the original emphasis on

plans and projects for development of their own water resources to meet local needs and conditions for their own citizens in accordance with their own local law and custom.

SENATE SELECT COMM. ON NAT'L WATER RESOURCES, S. REP. NO. 15, 87TH CONG., 1ST SESS. 65 (1961) [hereinafter cited as 1961 COMM. REPORT].

129. The National Water Commission pointed out this shortcoming in state water law:

The water law systems of most of the States . . . are deficient in that they fail to give appropriate recognition to social values of water. These values arise primarily from such instream uses as fish and wildlife propagation, recreation, and esthetics. The appropriation law of the Western States generally requires diversion of water from the stream or lake and its application to beneficial use in order for water rights to be created. Instream values are thus heavily discounted; water has been diverted from streams to such an extent that instream values which should have been protected frequently have been impaired, and sometimes destroyed.

U.S. NAT'L WATER COMM'N, NEW DIRECTIONS IN U.S. WATER POLICY 63 (1973). *See also supra* text and notes at notes 9-13, 42-45; *see generally* Aiken, *supra* note 11; Tarlock, *supra* note 42; Robie, *supra* note 42; Lilly, *supra* note 10; Hanks, *supra* note 14, at 48-49.

130. In fact, western water law has been seen to provide disincentives to conserve water.

The present system of water rights, which provide for diversions first in time to have the most secure rights, provides little stimulus toward more efficient use of water, and, in fact, may promote inefficient and wasteful use of water in order to perfect larger rights. As the demands on the water resources of the West grow it may well be an economic necessity for some of the Western States to review their water laws with a view to changes which will bring about more efficient use of water, or else accept a ceiling on their potential growth.

1961 COMM. REPORT, *supra* note 128, at 54. *See also* Aiken, *supra* note 11, at 329-34 (this commentator looks at the water use efficiency of irrigation and finds it lacking); Comment, *supra* note 10, at 367 (the law now promotes maximum use of water resources).

131. *See generally* Aiken, *supra* note 11; Comment, *supra* note 10. Ground water mining is a potentially serious problem in the west which the states have not yet heavily regulated. Aiken, *supra* note 11, at 334. *See generally* Aiken & Supalla, *Ground Water Mining and Western Water Rights Law: The Nebraska Experience*, 24 S. D. L. REV. 607 (1979).

132. *See supra* text and notes at notes 41-45. *See also* Aiken, *supra* note 11, at 327-28. Federal water policies accepted and helped to promote the emphasis on development and use of water through programs like the Reclamation Act of 1902. *See supra* text and notes at notes 65-71.

economic development despite the obviously increasing need to conserve water and to account for noneconomic values such as environmental protection.¹³³ Some of the western states have begun to reform their laws to take such matters into account, but, in general, western water law has been slow to respond to the needs for reform.¹³⁴

Various federal proposals¹³⁵ and studies¹³⁶ have recognized the problems with state water law and with national water policy. These past federal initiatives inevitably raise questions concerning the scope of federal power over water and the possibility that the federal government will ultimately take a more active role in the management of western waters in derogation of state control.¹³⁷ Most recently, in 1977, President Carter initiated a review and establishment of a "national water resources management policy."¹³⁸ The major objectives of the proposed new policy¹³⁹ included modifying state water laws to achieve environmental protection and water use efficiency objectives.¹⁴⁰ The mere suggestion that federal water

133. "In most states, water rights administration follows traditional economic concepts of cost-benefit analysis, which do not consider values such as scenic beauty and fish and wildlife resources to the extent that readily measurable irrigation, and municipal and industrial water benefits are considered." Robie, *supra* note 42, at 705; Lilly, *supra* note 10, at 693-700.

134. See *supra* text and notes at notes 42-45. See generally Tarlock, *supra* note 42; Aiken, *supra* note 11.

135. See, e.g., Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCE J. 1 (1963) (cites President Kennedy's *Special Message on Natural Resources* which proposed measures for better water conservation including the development of comprehensive river basin plans by 1970); Policy Study, *supra* note 11.

136. Morreale, *supra* note 2, at 424-38 (discussing the 1961 COMM. REPORT, *supra* note 128); See also NAT'L WATER COMM'N, NEW DIRECTION IN U.S. WATER POLICY (1973) (a summary of conclusions and recommendations of the National Water Commission report); see generally 1 CLARK, *supra* note 27, at 1-6 (1978 Supp.).

137. See generally Hanks, *supra* note 14; Aiken, *supra* note 11.

138. Policy Study, *supra* note 11. See generally Aiken, *supra* note 11.

139. Other major objectives of the Policy Study included:

1.) Giving environmental and water conservation objectives greater emphasis in federal water project planning. Policy Study, *supra* note 11, at 36,788-90.

2.) Reducing the federal share in financing water resource development projects by requiring increased state and private financing. *Id.* at 36,790-92.

140. *Id.* at 36,792-95.

Specifically, state water laws were characterized as generally:

1.) not reflecting or accommodating environmental values;
2.) not addressing interrelationships between surface water and ground water;
3.) not facilitating the conjunctive (i.e., integrated) use of surface water and ground water;
4.) not requiring or encouraging a high degree of water use efficiency; and
5.) being too inflexible to permit effective water management.

Aiken, *supra* note 11, at 328 (citing Policy Study, *supra* note 11, at 36,792-95).

policies would force substantive reforms in state water rights law, however, raised such a storm of protest in the western states that the idea was subsequently dropped as an explicit objective in the national water policy review.¹⁴¹ A clear need still exists, however, for reform in state and national water policies to bring about better protection of the environment and conservation of water resources.¹⁴² It is difficult to predict whether the impetus for these reforms ultimately will come from the states¹⁴³ or the federal government, but the potential for conflict over the need for reform remains, as does the possibility that the federal government will take a more active role in water allocations to bring these reforms about.

In summary, while Congress has historically deferred to state control and allocation of water, there has been growing conflict and confusion in more recent years over the division of power over western waters. The source of this conflict, the federal reluctance to submit to state water law for a determination of federal water needs and, potentially more important, the need for reform in state and national water policies, suggests that in the future the federal government may seek to take a more active role in western water allocations. While the federal government almost certainly has the potential power to take a more active role, it seems unlikely that new federal legislation authorizing the use of that power will be passed in the near future. Therefore, the federal government may seek to assert a greater degree of control over western water allocations through already existing statutes. The remainder of the article will examine one particular statute, section 10 of the Rivers and Harbors Act of 1899, which was recently applied to a western water allocation project, to see the degree to which that Act may apply to state water allocations and provide the mechanism for increased federal control over western waters.

III. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899

A. *The Act Generally*

The Rivers and Harbors Act of 1899¹⁴⁴ (RHA) is the principal federal law for the protection of our nation's navigable waterways

141. Aiken, *supra* note 11, at 328.

142. *Id.* at 328-29.

143. *See supra* text and notes at notes 42-48, 134 (states have taken some steps toward reform).

144. 33 U.S.C. §§ 401, 403-404, 406-409, 411 (1976).

from obstructions.¹⁴⁵ Two factors prompted the initial passage of the RHA.¹⁴⁶ First, there was a growing recognition of the need to protect waterways from man-made obstructions.¹⁴⁷ Second, and more important, a series of Supreme Court cases had held that the federal government had no common law authority to protect navigable waters from obstructions.¹⁴⁸ The RHA consists of several distinct provisions;¹⁴⁹ this article will focus on section 10 of the Act.¹⁵⁰

145. There are other federal laws which regulate development in and around navigable waters. See The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344 (1976) (regulating discharge of dredge or fill materials into navigable waters).

The constitutional authority for the RHA is the federal commerce power. U.S. CONST. art. I, § 18. That the commerce power included the powers to regulate and protect navigation and navigable waters was decided in 1824 by the Supreme Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); See also *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) (more recent affirmation of navigation power as the basis of law for the RHA). See *infra* text and notes at notes 195-230.

146. The RHA was not the first attempt at regulation; it had its genesis in the Rivers and Harbors Act of 1890, ch. 907, 26 Stat. 426. The 1890 Act, however, proved unsatisfactory, being very poorly drafted. As a result, the 1899 Act was enacted to correct some of the inadequacies. See generally Barker, *Sections 9 and 10 of the Rivers and Harbors Act of 1899: Potent Tools for Environmental Protection*, 6 ECOLOGY L. Q. 109, 111-15 (1976) (discussion of the evolution of the RHA and how it differs from the 1890 Act). See also *infra* text and notes at notes 244, 385-86.

147. See G. KOONCE, *FEDERAL LAWS AFFECTING RIVERS AND HARBORS WORKS* (1926), reprinted in *Water Pollution Control Legislation—1971 (Oversight of Existing Program): Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 284, 287 (1971) [hereinafter cited as KOONCE LECTURE]; see generally Barker, *supra* note 146, at 111-12; 20 Op. Att'y Gen. 448, 489-90 (1892).

148. *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888) (in the absence of a statutory enactment by Congress, state legislatures were free to authorize or prohibit the construction of dams and other structures in or over waters within the state, regardless of whether such structures obstructed navigation); *Cardwell v. Am. Bridge Co.*, 113 U.S. 205, 208 (1885).

149. There are several other provisions which were part of the 1899 Act. Some of the more important of these sections include:

Section 9 (codified at 33 U.S.C. § 401 (1976)) outlines the requirements for approval of dams, dikes, bridges or causeways to be constructed over or in navigable waters. Before such structures can be erected permission must be granted by the Secretary of the Army and, depending on whether the waterway is interstate or not, by either Congress or the state as well;

Section 11 (codified at 33 U.S.C. § 404 (1976)) gives the Secretary of the Army the power to establish harbor lines beyond which no structures may extend. Section 10 permits are now required for structures within the harborlines, although they were not necessary until 1970. See *infra* text and note at note 447;

Section 12 (codified at 33 U.S.C. § 406 (1976)) makes violations of sections 9, 10, and 11 criminal acts and imposes fines up to \$2,500 or imprisonment or both. This provision also allows for the removal or treatment of offending structures. See *infra* text and notes at notes 181-85;

Section 13, commonly known as "The Refuse Act" (codified at 33 U.S.C. § 407 (1976)) prohibits the discharge of "any refuse matter of any kind or description" into navigable waters. See *infra* note 448.

150. Section 10, 33 U.S.C. § 403 (1976) provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall

Section 10 of the RHA is a "permit statute;" the structures and activities enumerated in the provision are unlawful until the requisite permission is obtained.¹⁵¹ Section 10 consists of three clauses.¹⁵² The first clause contains a broad prohibition of all "obstructions" to the "navigable capacity" of any navigable water of the United States unless the obstruction is affirmatively authorized by Congress.¹⁵³ The second clause restricts the building of "structures" such as wharves, piers, and breakwaters in navigable waters.¹⁵⁴ The third clause restricts excavating, filling, or any other "work" which in any manner alters or modifies the course, condition, or capacity of any navigable waterway.¹⁵⁵ In contrast with the first clause restriction on obstructions which requires congressional approval, the structures and activities restricted under the latter two clauses can be approved by the United States Army Corps of Engineers (Corps).¹⁵⁶ As water allocation activities arguably fall within the restrictions of the third clause,¹⁵⁷ and thereby require the approval of the Corps, it is important to outline the Corps' permit procedures.

not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

151. *Id.* § 9, 33 U.S.C. § 401 (1976) is also a permit statute in form, but by its terms is limited to larger obstructions. It has limited applicability to state water allocations. *See infra* text and note at note 337 (§ 9 permit required for one of the structures originally at issue in *Cal. v. Sierra Club*).

152. 33 U.S.C. § 403 (1976). *See* *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (discussion of the three clause construction of § 10); *see infra* text and notes at notes 251-55, 276-83 (for more detailed discussion of the three clause construction and the activities restricted under § 10).

153. 33 U.S.C. § 403 (1976).

154. *Id.* *See* 33 C.F.R. § 322.2(b) (1981) (definition of structures for the purposes of the Corps permit process).

155. 33 U.S.C. § 403 (1976), *see* 33 C.F.R. § 322.2(c) (1981) (Corps' definition of third clause "work").

156. 33 U.S.C. § 403 (1976). In 1971, the Secretary of the Army delegated his authority to issue or deny § 10 permits to the Chief of Engineers and his authorized representative. 33 C.F.R. § 322 (1981) (app. B). *See also id.* § 325.8 (1981) (§ 10 permits to be authorized by Corps, not Secretary). The Corps does not have the authority to allow obstructions prohibited by the first clause of § 10; such obstructions can only be approved by Congress. *See* *Wis. v. Ill.*, 278 U.S. 367, 412-13 (1929).

157. *See infra* text and notes at notes 269-75.

B. The Corps' Permit Process

The traditional role of the Corps,¹⁵⁸ and the one for which it is probably most noted, is that as a developer of water development projects.¹⁵⁹ The Corps has been called the world's largest civil engineering firm.¹⁶⁰ Since the original passage of the RHA in 1890,¹⁶¹ the Corps has also had the major statutory responsibility for protection of the nation's waterways.¹⁶² The Corps' regulatory authority lies primarily in the permit process of the RHA¹⁶³ and section 404 of the Federal Water Pollution Control Act.¹⁶⁴ The Corps' regulations set out a detailed permit procedure¹⁶⁵ for compliance with both of these statutes.

In its most basic form, the permit process for activities under section 10 operates in the following manner. When an activity requires Corps' authorization,¹⁶⁶ the person or entity undertaking the activity must apply to the District Engineer for a permit.¹⁶⁷ When a District Engineer receives a completed application, a public notice is generally issued to notify all interested parties that the application has been made and to solicit the comments and information necessary to evaluate the probable impact of the proposed activity.¹⁶⁸ The District

158. The civil functions of the Department of the Army are carried out by the Corps. See Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19, 20 (1973).

159. The Corps was created by Congress in 1802. Act of Mar. 16, 1902, ch. 9, § 26, 2 Stat. 132, 137. Its original duties included construction of defense structures but evolved to encompass primarily improvements in rivers and harbors and providing for flood control. See generally Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 504-07 (1977); Hoyer, *supra* note 158, at 20.

160. See Power, *supra* note 159, at 504.

161. See *supra* note 146.

162. Hoyer, *supra* note 158, at 20.

163. 33 U.S.C. §§ 401, 403, 407-408 (1976); see 33 C.F.R. § 320.2(a)-(f) (1981).

164. 33 U.S.C. § 1344 (1976). This provision authorizes the Corps to issue permits for the discharge of dredge and fill material into the waters of the United States. See 33 C.F.R. § 320.2(g) (1981); see generally Power, *supra* note 159, at 521-26. This article will not deal with the Corps' powers under § 404; see also § 103 of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1413 (1976) (authority to issue permits for transportation of dredged material for ocean dumping).

165. 33 C.F.R. §§ 320, 322, 325-329 (1981).

166. At this point in the article only the basics are being laid out. This discussion presupposes jurisdiction of the Corps. See *infra* text and notes at notes 192-283 (for more detailed discussion of the territorial and subject matter jurisdiction of the Corps).

167. 33 C.F.R. § 325.1(b) (1981). The application must include a complete description of the proposed activity; the location, purpose, and intended use of the proposed activity; and any other information that the District Engineer may require for his evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites. *Id.* § 325.1(d).

168. *Id.* § 325.3. There are exceptions to the general rule that public notice be given. For example, when an activity can be validly authorized by a letter of permission, no public notice is necessary. *Id.* § 325.5(b). A letter of permission is issued if "in the opinion of the District Engi-

Engineer must also prepare an environmental assessment¹⁶⁹ and make a determination as to whether a public hearing is necessary.¹⁷⁰

Upon completion of these preliminary steps, the District Engineer begins the process of determining whether a permit should issue. The decision is based on an evaluation of the proposed activity and of the potential impact of that activity on the public interest.¹⁷¹ To evaluate the proposed activity, the Corps considers certain general criteria such as the extent of the need, the desirability of alternatives, and the cumulative effect of the activities authorized.¹⁷² In addition to these general criteria, the public interest requires consideration of all specific factors relevant to the particular case, including such matters as conservation, economics, and fish and wildlife values.¹⁷³ In making this broad review of the public interest, the Corps must consider all comments received in response to the public notice¹⁷⁴ and consult with the appropriate federal and state agencies.¹⁷⁵ After considering all relevant factors, the District

neer, the proposed work is minor, will not have significant impact on environmental values, and should encounter no opposition, the District Engineer may omit the publishing of a public notice and authorize the work by a letter of permission." *Id.*

169. *Id.* § 325.2(a)(4). The Environmental Assessment is the first step in the two-step process of determining whether an Environmental Impact Statement (EIS) is necessary. *Id.* § 325.4(b)(1). See *infra* text and notes at notes 300-04 (more detailed discussion of the process by which it is decided whether an EIS is required).

170. 33 C.F.R. § 327 (1981).

171. *Id.* § 320.4. See generally Power, *supra* note 159, at 528-30, 547-56 (Professor Power discusses and critiques the permit process).

172. 33 C.F.R. § 320.4(a)(2) (1981).

The following general criteria will be considered in the evaluation of every application:

- (i) The relative extent of the public and private need for the proposed structure or work;
- (ii) The desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;
- (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited; and
- (iv) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

Id.

173. *Id.* § 320.4(a)(1).

All factors which may be relevant to the proposal must be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

Id. See also *id.* § 320.4(b) (special consideration is to be given to wetlands if they are implicated in the proposed activity).

174. *Id.* § 325.2(a)(3).

175. *Id.* § 320.4(c). The Fish and Wildlife Coordination Act, 16 U.S.C. § 742(a) (1976), re-

Engineer determines whether a permit should issue.¹⁷⁶ The District Engineer has the authority to issue,¹⁷⁷ deny,¹⁷⁸ or condition¹⁷⁹ permits for section 10 activities. All such decisions to grant or deny permits are open to challenge by applicants.¹⁸⁰

Enforcement of the RHA is conducted solely by the Corps.¹⁸¹ Failure to apply for a permit is a criminal violation; the guilty party may be punished by fine and/or a court order to abate the unauthorized structure.¹⁸² When the Corps becomes aware of unauthorized activities it may conduct an investigation and decide on a course of action.¹⁸³ The District Engineers have the discretionary power to

quires the Corps to consult with the United States Fish and Wildlife Service, National Marine Fisheries Service, and the appropriate state agencies when deciding whether to grant a permit. 33 C.F.R. § 320.3 (1981) (list of related legislation, much of which requires consultation with other agencies and other statutory requirements). *Id.* § 320.4(j) (consultation with state agencies and consideration of its laws). See generally Power, *supra* note 159, at 547-56. Professor Power sees the Corps' role in the permit process as a mediator. The circulation of the permit application among various state and federal agencies is, in his view, the major strength of the process; in this circulation the permit is looked at from different perspectives and, accordingly, with different emphasis.

176. 33 C.F.R. § 325.8(b) (1981). If another federal agency objects to issuance and wants to refer it to a higher level of authority for review, the District Engineer may not issue the permit. *Id.*

177. *Id.* § 325.8(b). There are three forms of § 10 authorizations.

1.) Individual permits—a standard form permit issued for a particular project after an individual evaluation.

2.) Letters of permission, see *supra* note 168.

3.) General Permits—after compliance with all procedures of the regulations, the District Engineer may issue a general permit. After a general permit has been issued, individual activities falling within those categories that are authorized by such general permits do not have to be further authorized unless the District Engineer determines, on a case-by-case basis that the public interest requires an individual permit.

Id. § 325.5(a).

178. *Id.* § 325.8(b). A permit may be denied if it is found to be not in the public interest for the application to be granted.

179. *Id.* District Engineers may condition permits as necessary to protect the public interest. See also *id.* § 325.6-.7 (permits may be given subject to automatic expiration or revocation).

180. An unsuccessful applicant has standing to challenge a final agency decision under the Administrative Procedure Act, 5 U.S.C. § 702 (1976), but in order to prevail the applicant must show that the administrative decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* § 706(2)(A). See, e.g., *DiVosta Rentals, Inc. v. Lee*, 488 F.2d 674 (5th Cir. 1973), *cert. denied*, 416 U.S. 984 (1974). Challenges may be mounted on other grounds as well, such as lack of jurisdiction. See, e.g., *Nat'l Wildlife Fed. v. Alexander*, 613 F.2d 1054 (D.C. Cir. 1979); cf. *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976) (the court rejected argument that canals were not within the Corps' jurisdiction).

181. 33 C.F.R. § 326 (1981) outlines the enforcement mechanism of the Corps. After *Cal. v. Sierra Club*, 451 U.S. 287 (1981), private parties may no longer bring a suit to enforce the RHA. See *supra* text and notes at notes 24-25, and *infra* text and notes at notes 372-74.

182. 33 U.S.C. § 406 (1976). See *supra* note 149.

183. 33 C.F.R. § 326.3 (1981).

take legal action¹⁸⁴ or to grant an after-the-fact permit.¹⁸⁵

In its most basic form then, the RHA is a regulatory statute which seems relatively simple; certain obstructions to navigable waters are prohibited unless approved. Nothing on the face of the statute suggests that section 10 could be used by the federal government to take a more active role in western water allocations. However, the expansive language of section 10 provides little guidance as to the actual extent of the Act's coverage.¹⁸⁶ This lack of clarity in its draftsmanship has caused many difficulties of interpretation.¹⁸⁷ The legislative history of the statute provides little help in resolving the ambiguities;¹⁸⁸ all that is clear from the legislative history is that the statute was enacted to protect the navigability of the nation's waterways.¹⁸⁹ Therefore, one must look beyond the statute to court decisions and Corps' practice to determine the scope of the Act's coverage. In resolving the interpretive problems of section 10, the courts have consistently read the statute broadly to effectuate its purpose¹⁹⁰ and have more recently expanded that purpose.¹⁹¹ In

184. *Id.* § 326.4.

185. *Id.* § 326.5. The processing of the "after-the-fact applications" follows the standard procedures set out in the regulations and discussion above. If authorization of an after-the-fact permit is not in the public interest, the denial of permit will prescribe the corrective action that must be taken in connection with the work already completed. After a denial the possibility of legal action is again considered.

186. 33 U.S.C. § 403 (1976), *see supra* note 150 for text.

187. *See, e.g.*, *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *Wis. v. Ill.*, 278 U.S. 367 (1929); *see also* *United States v. Moran Towing & Transp. Co.*, 374 F.2d 656, 670 (4th Cir. 1967) (J. Sobeloff, dissenting) ("clarity of draftsmanship is not a hallmark of the Act").

188. The legislative history of the RHA is sparse due to the circumstances of the Act's passage. The RHA was a last minute addition to the 1899 Rivers and Harbors Appropriations Act. *See* KOONCE LECTURE, *supra* note 147, at 288. The new provisions were represented as containing no significant changes of earlier laws, 32 CONG. REC. 2923 (1899) (statement of conference committee), and the Senate adopted them without having heard them read out loud. *Id.* at 2297. As a result there was little debate. In addition, the Act, notwithstanding the protestations of its sponsors, did contain significant changes. *See* Comment, *Sections 9 and 10 of the Rivers and Harbors Act of 1899: The Erosion of Administrative Control By Environmental Suits*, 1980 DUKE L. J. 170, 180-81. *See infra* text and notes at notes 385-86.

189. *See* *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967). *See supra* text and notes at notes 146-48. *See generally* Comment, *supra* note 188.

190. *E.g.*, *Wyandotte Transp. Co.*, 389 U.S. at 201. The Court said, "despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad." In *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960), the Court stated:

We read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes in *New Jersey v. New York*, 283 U.S. 336, 342, that a river is more than an amenity, it is a treasure, forbids a narrow, cramped reading either of § 13 or of § 10.

See also *United States v. Am. Cyanamid Co.*, 480 F.2d 1132, 1133 (2d Cir. 1973); *United States v. Ohio Barge Lines, Inc.*, 432 F. Supp. 1023, 1025-26 (W.D. Pa. 1977). *But see infra* text and notes at notes 221-31.

191. *See, e.g.*, *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). *See infra* text and notes at notes 292-313.

order to see how the RHA may apply to western water allocation projects it is thus necessary to examine the scope of the Corps' territorial and subject matter jurisdiction under the Act as it has been determined by the courts. In addition, the scope of the Corps' public interest review powers will be examined at greater length.

C. The Jurisdictional Reach of the RHA

An activity is not subject to the permit requirements of section 10 unless it comes within the jurisdictional reach of the Corps under the RHA. The prerequisites for Corps' jurisdiction under the RHA are twofold.¹⁹² First, the structure or activity must be within the territorial jurisdiction of the Corps; it must be in or affect a navigable waterway. Second, the structure or activity in question must be within the subject matter jurisdiction of the Corps; it must be one restricted by section 10. In order to see the breadth of the Corps' jurisdiction under the Act, and therefore section 10's potential applicability to state water allocations, it is necessary to examine both aspects of the Act's coverage in greater detail.

1. Territorial Jurisdiction

Only those waterways which are "navigable waters of the United States" come under the protective jurisdiction of the Corps under section 10.¹⁹³ The limits of this territorial jurisdiction, however, have been the subject of much dispute and consequent interpretation at the hands of the courts.¹⁹⁴ An analysis of the present breadth of the territorial jurisdiction of the Corps requires the consideration of two distinct questions. First, what waterways are deemed to be navigable waters of the United States? Second, what are the boundaries of these navigable waters for jurisdictional purposes?

a. Navigable Waters of the United States

The Corps' power over the nation's waters stems from the Commerce Clause.¹⁹⁵ As a consequence, this power extends only to navigable waters.¹⁹⁶ Therefore, the test of what makes a waterway navi-

192. 33 U.S.C. § 403 (1976).

193. *Id.* See *supra* note 150 for text of section 10.

194. See, e.g., *United States v. Diamond*, 512 F.2d 157, 160 (5th Cir. 1975), *cert. denied*, 423 U.S. 928 (1975); *Nat'l Wildlife Fed. v. Alexander*, 613 F.2d 1054, 1057-66 (D.C. Cir. 1979); *United States v. DeFelice*, 641 F.2d 1169, 1174-75 (5th Cir.), *cert. denied*, 452 U.S. 325 (1981).

195. U.S. CONST. art. I, § 18. See *supra* note 14 for brief discussion of the other bases for federal power over waters.

196. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); see generally Morreale, *supra* note 135.

gable at law is important not only in the context of the RHA,¹⁹⁷ but to all other assertions of federal dominion over water under the commerce power.¹⁹⁸

The "classic formulation" of what makes a waterway navigable at law, and therefore within the reach of federal power under the Commerce Clause, was set by the Supreme Court in 1851 in *The Daniel Ball*.¹⁹⁹ In that case, the Court construed the reach of two statutes which regulated ships moving on the "navigable waters of the United States."²⁰⁰ The Court held that a waterway would come within the scope of these statutes if it satisfied two requirements. First, the waterway had to be "navigable in fact;" it had to be susceptible for use as a "highway for commerce."²⁰¹ Second, the Court held that a waterway which was navigable in fact would be a "navigable waterway of the United States" within the meaning of the two statutes if it formed a continuous water highway over which commerce could be carried between states.²⁰² Both aspects of *The Daniel Ball* formulation have proven important to the definition of the territorial jurisdiction of the Corps under the RHA.

The first part of *The Daniel Ball* test, the test of "navigability in fact," has been the basis for determining the extent of the federal navigation power in general²⁰³ and, until recently, seemed to define

197. The RHA is based on the commerce power. *See supra* note 145.

198. Because of their common issue—namely, what is navigable water—many of the cases which make up the basis of the definition of navigable waters are not cases dealing with the RHA. Except insofar as more recent cases have limited the Act's coverage to waterways which are "navigable waters of the United States," *see infra* text and notes at notes 221-32, the RHA's territorial jurisdiction has expanded as the general definition of navigable waters has expanded.

199. 77 U.S. (10 Wall.) 557, 563-64 (1870).

200. *Id.* at 562-64. The Court was interpreting the Act of July 7, 1838, ch. 191, § 2, 5 Stat. 304 (which required licenses for ships carrying cargo or passengers on "navigable waters of the United States"), and the Act of Aug. 30, 1852, ch. 106, 10 Stat. 61 (which compelled a limited safety inspection for ships moving on "navigable waters of the United States").

201. The Court stated:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

77 U.S. at 563. *See also* *The Montello*, 87 U.S. (20 Wall.) 430, 440-42 (1874).

202. 77 U.S. at 63. The Court said:

And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried.

Id.

203. In other words, if a waterway is navigable in fact, the federal government has power over its entire course under its navigation power. *See supra* text and notes at notes 195-98. *See, e.g.*, *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

the scope of the territorial jurisdiction under the RHA as well.²⁰⁴ As defined in *The Daniel Ball*, to be navigable in fact, a waterway had to carry or be susceptible of carrying interstate commerce in the present.²⁰⁵ Since that decision, the definition of navigability in fact has expanded on two points: first, what constitutes interstate commerce; and second, when does the waterway have to support the interstate commerce. Virtually any kind of interstate commerce is now enough to satisfy the test of navigability in fact. For example, in *United States v. Appalachian Electric Power Co.*,²⁰⁶ the Supreme Court found a sufficient degree of commerce in the historical use of canoes, bateaux, and other frontier craft on the waterway.²⁰⁷ In other cases, logs floating downstream presented sufficient evidence of commerce²⁰⁸ and use of recreational craft showed the potential for commerce.²⁰⁹ Further, the waterway does not have to be capable of supporting commerce in the present. In *Economy Light & Power Co. v. United States*,²¹⁰ the Court held that once a waterway has supported interstate commerce it always remains a navigable river for the purpose of federal control.²¹¹ The Court, in *United States v. Ap-*

204. See, e.g., *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth.*, 359 F. Supp. 611 (E.D. Va.), *aff'd per cur.*, 481 F.2d 1280 (4th Cir. 1973) (a parking lot is not a navigable waterway); *United States v. Diamond*, 512 F.2d 157 (5th Cir.), *cert. denied*, 423 U.S. 928 (1975); *United States v. Cannon*, 363 F. Supp. 1045 (D. Del. 1973). But see *infra* text and notes at notes 221-31.

205. See *supra* note 201. It is important to distinguish the two requirements. Under *The Daniel Ball* definition of "navigability in fact," the waterway must be capable of carrying interstate commerce. Under the definition of "navigable waters of the United States," see *infra* text and notes at notes 221-31, the waters themselves must be capable of carrying commerce interstate.

Under the present definition of navigability in fact, which has expanded much as the federal power under the commerce clause has expanded, the waterway need not be an interstate waterway. Only those goods which are carried, were carried, or may be carried on the waterway need theoretically move in interstate commerce. See generally Morreale, *supra* note 135.

206. 311 U.S. 377 (1940).

207. *Id.* at 414-16.

208. Compare *St. Anthony Falls Water Power Co. v. St. Paul Water Comm.*, 168 U.S. 349, 359 (1897) (logs floating downstream are sufficient to show commerce if connected with a commercial venture), with *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 698 (1899) (it is not enough that logs float downstream at high water). See also 33 C.F.R. § 329.6(a) (1981).

209. *United States v. Utah*, 283 U.S. 64, 82 (1931); see also 33 C.F.R. § 329.6(a) (1981) ("the presence of recreational craft may indicate that a water body is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time").

210. 256 U.S. 113 (1921). In this case, the United States had invoked § 9 of the RHA, 33 U.S.C. § 401 (1981), to prevent construction of a dam in the Des Plaines River.

211. 256 U.S. at 123-25. The Des Plaines River had been used in the past, from about the late 17th century to the first quarter of the 19th century, by early trappers in canoes and other boats having light drafts. *Id.* at 117. But the river, at the time of the decision, had not been

palachian Electric Power Co.,²¹² went even further. It held that a waterway, otherwise nonnavigable, is navigable if reasonable improvements or artificial aids would make it so.²¹³ Courts have also made it clear that a waterway need not be natural in order to be considered navigable at law. Artificial waterbodies, such as canals, are subject to Corps' jurisdiction if they are navigable in fact.²¹⁴ The present test of navigability in fact is thus quite broad compared to that formulated by *The Daniel Ball* court.

The definition of navigability in fact, as it has evolved since *The Daniel Ball*, can thus be summarized as a three part test. A waterway is navigable in fact if (1) it is *presently* being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* with reasonable improvements.²¹⁵ A waterway is navigable in fact if it satisfies any one prong of this past, present, or future test of commercial use. This formulation has been followed by most courts²¹⁶ and has been adopted by the Corps in its regulations.²¹⁷ As a result, virtually all but the most insignificant streams are navigable in fact and thus within the federal navigation power.²¹⁸ One commentator has suggested that realistically, navigability is now no more than a base that courts and Congress feel obligated to touch when clearing the path for federal programs involving use and control of waters.²¹⁹ Thus,

used commercially for over 100 years. It fell into disuse as physical changes and man-made obstructions made commercial use impracticable, if not impossible. *See also* *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940).

212. 311 U.S. 397 (1940).

213. *Id.* at 407.

214. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (privately developed marina held to be navigable under the RHA); *see also* 33 C.F.R. § 329.8(a) (1981) (the artificial waterway must be capable of use to support interstate commerce. Canals which connect two navigable waters are navigable as is a canal open on only one end which supports interstate commerce); *see generally* Power, *supra* note 159, at 518-20.

215. *Rochester Gas and Elec. Corp. v. Fed. Power Comm.*, 344 F.2d 594, 596 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965).

216. *See, e.g.*, *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900, 908 (4th Cir. 1968), *rev'd on other grounds*, 396 U.S. 212 (1969); *Spiller v. Thomas M. Lowe, Jr. and Assoc., Inc.*, 328 F. Supp. 54, 60 (W.D. Ark. 1971).

217. 33 C.F.R. 329.4 (1981).

218. *See generally* Hoyer, *supra* note 158, at 23; Morreale, *supra* note 135. *But see* *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F. Supp. 25 (N.D. Ga. 1972), *app. dismissed*, 474 F.2d 200 (5th Cir. 1972).

219. Hoyer, *supra* note 158, at 23. *See also* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 436 (1970).

Despite the breadth of the past, present, and future test of navigability, the doctrine is not without limits. The absurdities that could result from literal application of the present test prompted one court to say: "[T]his Court cannot overlook the simple fact that the geographic

the requirement that a waterway be navigable in fact before coming under the protection of the RHA poses a rather insignificant limitation on Corps' jurisdiction.

Until recently, the Corps' jurisdiction over a waterway could be established merely by a showing that a waterway was navigable in fact.²²⁰ *The Daniel Ball*²²¹ held, however, that "navigable waters of the United States" are those waterways which are navigable in fact and which form, by themselves, or by uniting with other waters, a continuous interstate water highway.²²² Until recently, the second part of *The Daniel Ball* test for "navigable waters of the United States" did not play a decisive role in any cases.²²³ Several recent circuit court decisions have held, however, that the Corps may not assert jurisdiction under section 10 unless both parts of *The Daniel Ball* test are satisfied.²²⁴ The cases maintain that the phrase "navigable waters of the United States," as defined in *The Daniel Ball*, had acquired a "well settled judicial meaning" by the time the RHA was enacted.²²⁵ Accordingly, every circuit court addressing the issue has held²²⁶ that use of this phrase in the RHA²²⁷ indicates that

entity in question in this case is a parking lot, and a parking lot, despite the most sophisticated legal arguments, buttressed by the most vivid of imaginations, is not a navigable water of the United States." *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth.*, 359 F. Supp. 611, 640 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973) (the lot had been a canal before 1880). See also *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610-11 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (the Corps lacks authority over tidal wetlands that became fastland prior to Corps' assertion of regulatory power in the area); 33 C.F.R. § 329.13 (1981).

220. See *supra* note 204.

221. 77 U.S. (10 Wall) 557, 563-64 (1970). See *supra* text and notes at notes 199-202.

222. See *supra* text and note at note 202.

223. Several cases after *The Montello*, 87 U.S. (20 Wall.) 430 (1874), quoted the language containing the second part of the test but none relied on it. See, e.g., *United States v. Apalachian Elec. Power Co.*, 311 U.S. 377 (1940).

The District of Columbia Circuit in *Nat'l Wildlife Fed. v. Alexander*, 613 F.2d 1054, 1063 (D.C. Cir. 1979), suggested that this silence as to the second part of the test is due to the fact that all that was at issue in the many intervening cases was navigability in fact. The court noted that no case had been found which expanded the definition of "navigable waters of the United States" by dropping the requirement of an interstate connection by water.

224. *Nat'l Wildlife Fed. v. Alexander*, 613 F.2d 1054, 1057-66 (D.C. Cir. 1979); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-24 (8th Cir. 1979); *Hardy Salt Co. v. S. Pacific Transp. Co.*, 501 F.2d 1156, 1167-68 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

225. See *supra* cases cited at note 224. The Court in *Alexander* makes this argument most forcefully with a detailed discussion of the federal regulation of internal navigation before 1890 which focuses on the decisions in *The Daniel Ball* and *The Montello*. *Alexander*, 613 F.2d at 1057-62.

226. See *supra* cases cited note 224; see also *United States v. DeFelice*, 641 F.2d 1169, 1174-75 (5th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 474 (1981). This case, however, finds navigability under the RHA strictly on the old ebb and flow test while seemingly approving the *Alexander* approach for "landlocked, non-tidal waterbodies."

227. See *supra* note 150 for text of section 10.

the framers of the statute intended the coverage of the Act to be limited by both parts of *The Daniel Ball* test.²²⁸ To date, the Corps has not explicitly adopted this interpretation of its territorial jurisdiction.²²⁹ It is difficult to judge what practical consequences²³⁰ the revival of the second part of *The Daniel Ball* test will have on the extent of the Corps' jurisdiction under the RHA; it remains a largely undefined limitation on jurisdiction. Thus far, only totally landlocked intrastate lakes have been found to be outside Corps' jurisdiction under the bipartite test.²³¹ Even with this additional limitation, however, the territorial jurisdiction of the Corps is quite broad.

b. The Boundaries of Navigable Waters

The requirement that a waterway be a navigable water of the United States is the threshold issue of territorial jurisdiction under the RHA. Once a waterway meets this requirement, it is clearly

228. *Nat'l Wildlife Fed. v. Alexander*, 613 F.2d at 1061-62. The court cites a debate in the House prior to passage of the 1890 Rivers and Harbors Act which quoted *The Daniel Ball* and its construction of the navigable waters of the United States. *See also* 20 Op. Att'y Gen. 101, 105 (1891) (the earliest reported interpretation of the 1890 Act by the Attorney General used the language of *The Daniel Ball* in deciding whether particular rivers were navigable waters of the United States).

When words used in a statute have a well settled judicial meaning at the time the statute was enacted, courts presume that the legislature intended to continue the existing interpretation in the new statute absent contextual or historical evidence to the contrary. *See, e.g.*, *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939); *The Abbotsford*, 98 U.S. 440, 444 (1878).

229. The current Corps' regulations are in fact in direct opposition to this view. 33 C.F.R. § 329.7 (1981). The regulations state: "Nor is it necessary that there be a physically navigable connection across a state boundary." *Id.*

230. This limitation of Corps' jurisdiction, however, must be noted for its less tangible implications. First, it must be noted as virtually the only exception to the generally consistent, broad reading the statute has received over its long history. *See supra* text and note at note 190. This "revival" of the second prong of *The Daniel Ball* test, in conjunction with the recent decision in *Cal. v. Sierra Club*, discussed *infra* at notes 372-74, may mark the beginning of a trend to define the outer limits of the RHA.

Second, on a less speculative level, this limiting construction of the territorial jurisdiction of the RHA indicates that the RHA, despite its expansion, does not have the reach that new legislation passed under the commerce clause would have; rather, it will be held to be limited, in at least some ways, by the law which prevailed at the time of its passage. For example, in *Hardy Salt Co. v. S. Pacific Transp. Co.*, 501 F.2d 1156, 1169 (10th Cir. 1974), the court stated: "And we need not and do not [sic] decide whether the Congress *could* constitutionally regulate commerce on the Lake." *See also* *Nat'l Wildlife Fed. v. Alexander*, 613 F.2d 1054, 1060 (D.C. Cir. 1979); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608-09 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). *See infra* text and notes at notes 458-66 for discussion of what this aspect of the RHA may mean to its potential utilization as a tool for greater federal regulation of state water allocation projects.

231. *See Nat'l Wildlife Fed. v. Alexander*, 613 F.2d 1054 (D.C. Cir. 1979) (Devils Lake, while navigable in fact and large, was located wholly in North Dakota; no stream or river

within the Corps' protective jurisdiction under the Act. Two important and distinct questions remain as to the scope of the Corps' jurisdiction over a navigable waterway. First, what are the physical boundaries of a navigable waterway for jurisdictional purposes? Second, to what extent may the Corps' restrict activities which are not within navigable waters?

There has been much litigation in recent years over the physical boundaries of navigable waters. Specifically, questions have developed over where the navigable water ends and the land, which is generally outside Corps' jurisdiction, begins.²³² Most of the disputes have arisen in the context of the development of wetland or tidal marsh areas adjacent to navigable waters.²³³ The Corps' regulations reflect the prevailing judicial interpretation of what the shoreward extent of a navigable water should be.²³⁴ In the case of nontidal waters,²³⁵ such as rivers and streams, navigable water is considered to extend to the "ordinary high water mark."²³⁶ All activities prohibited by section 10 and located below the ordinary high water mark are thus subject to the permit requirements of the RHA whether or not the water at that point is navigable.²³⁷ As a result of this definition, the Corps has been able to assert its jurisdiction to protect wetlands and tidal marshes, regardless of their past, present, or future susceptibility to navigation.²³⁸

flowed in or out of the lake that was navigable out of state); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (8th Cir. 1979) (totally intrastate lake, only an unnavigable creek flowed out of it); *Hardy Salt Co. v. S. Pacific Transp. Co.*, 501 F.2d 1156 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974) (Great Salt Lake of Utah).

232. *See, e.g.*, *United States v. Joseph G. Moretti, Inc.*, 526 F.2d 1306 (5th Cir. 1976) (Moretti II); *Leslie Salt Co. v. Froelke*, 578 F.2d 742 (9th Cir. 1978); *United States v. Baker*, 1 ENV'T L. REP. 20,378 (S.D.N.Y. 1971).

233. *See, e.g.*, *United States v. Joseph G. Moretti, Inc.*, 478 F.2d 418 (5th Cir. 1973) (Moretti I). But much litigation has also involved the question of whether canals, dredged shoreward of navigable waters come within the Corps' jurisdiction. *E.g.*, *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976).

234. 33 C.F.R. § 329.11 (1981).

235. For tidal waters the shoreward limit of jurisdiction extends to the line on the shore reached by the plane of the mean (average) high water. *Id.* § 329.12(a).

236. The ordinary high water mark

is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

Id. § 329.11; *see United States v. Rands*, 389 U.S. 121, 123 (1967); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 628 (1961).

237. *See, e.g.*, *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915). *See generally, Barker, supra* note 146, at 125.

238. This definition of the geographic extent of Corps' jurisdiction, in conjunction with the

The second and more important question about the potential applicability of the RHA to water allocation projects is the extent to which the Corps' may require permits for activities that do not take place in navigable waterways.²³⁹ Courts have found that the Corps' jurisdiction extends to activities in the nonnavigable portions of waterways²⁴⁰ and to activities shoreward of the ordinary high water mark²⁴¹ if those activities affect a navigable waterway.²⁴² The leading case on this point is *United States v. Rio Grande Dam & Irrigation Co.*²⁴³ This case involved the applicability of the Rivers and Harbors Act of 1890²⁴⁴ to a dam in a nonnavigable portion of a river. The Supreme Court held that the location of an obstruction was not the sole determinant of the applicability of the Act. The Court instead found that the proper way to view the restrictions of the Act was to look at the effect of the particular obstruction on the navigable portion of the river.²⁴⁵ Thus, before the dam in question

expansion of the decision criteria, see *infra* text and notes at notes 292-313 and *supra* text and notes at notes 145-80, has made the Corps' regulatory program under § 10 an important tool for protection of wetlands. See 2 CLARK, *supra* note 27, at 5-17 (1978 Supp.). See generally, Barker, *supra* note 146; Casto, *The Use of the Corps of Engineers Permit Authority as a Tool for Defending the Environment*, 11 NAT. RESOURCES J. 1 (1971); Kramon, *Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes*, 33 MD. L. REV. 229 (1973).

239. See *infra* text and notes at notes 314-32 for discussion of the factual background of *Cal. v. Sierra Club*. The water diversion activity involved in that case, and much of the water diversion activity in the west, does not occur in navigable waterways. Rather, the water is diverted from streams and tributaries which feed into navigable waters. The only way the Corps can get jurisdiction over these diversions is to allege that they have impermissible impact on the navigable portions of the waterway. See *infra* text and notes at notes 276-83 for a discussion of what degree of effect must be shown.

240. See, e.g., *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899) (a dam in the nonnavigable portion of a river found to come under the RHA); *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964) (defendants' overloading of land with bricks, granite, and fill was alleged to have caused shoaling in an adjacent channel); *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975), *rev'd in part, aff'd in part sub nom.*, *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), *rev'd sub nom. Cal. v. Sierra Club*, 451 U.S. 287 (1981). See *infra* text and notes at notes 314-74.

241. See, e.g., *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *Weismann v. Dist. Eng'r, U.S. Army Corps of Eng'rs*, 526 F.2d 1302 (5th Cir. 1976); *United States v. Bailey*, 467 F. Supp. 925 (E.D. Ark. 1979).

242. See *infra* text and notes at notes 276-83, for discussion of the degree of effect on the navigable waterway which must be shown.

243. 174 U.S. 690 (1899).

244. Ch. 907, 26 Stat. 426 (1890). This case dealt with § 10 of the 1890 Act which had language very similar to the language now present in the first clause of § 10 of the present RHA. See *supra* text and note at note 146. The Supreme Court has held that the prohibitions of the two Acts are very similar. *United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960) ("[c]ertainly so far as outlawry of any 'obstructions' in navigable rivers is concerned there was no change relevant to our present problem").

245. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 708 (1899).

could be constructed there would have to be an inquiry into whether it would substantially diminish the navigability of the river.²⁴⁶ More recent cases have expanded the Corps' jurisdiction under the third clause of section 10 based on reasoning similar to that of the Supreme Court in *Rio Grande*; these cases focused on the effect of the activity rather than its location.²⁴⁷

To summarize, it seems clear that the Corps' jurisdiction under section 10 is quite broad; a significant portion of the waters of the United States will qualify as navigable waters and thus come under the protection of the Act. In addition, the Corps' jurisdiction extends to activities located outside the boundaries of navigable waters which affect navigable waters and to activities or structures in non-navigable areas which come within the broadly defined boundaries of navigable waters. It is important to note, however, that courts have imposed some limits on the territorial jurisdiction of the RHA; the scope of the RHA does not equal that of the modern federal navigation power.²⁴⁸ Once the waterways covered by the RHA are defined, the next task is to examine the subject matter jurisdiction of the Act and discover what protection the RHA provides to waterways.

2. Subject Matter Jurisdiction of the Corps Under Section 10

The RHA does not protect navigable waters from all types of harm. Section 10 sets out the structures and activities which may not lawfully be constructed or conducted without prior Corps' approval.²⁴⁹ As was the case with territorial jurisdiction, however, the RHA does not define well the scope of its coverage, and the legislative history offers little guidance on Congress' intent in this regard.²⁵⁰ In order to get a sense of the breadth of the statute's subject matter coverage, and the possible extent of its applicability to water allocation projects, it is necessary to examine how courts have interpreted this aspect of the coverage of section 10 in the past.

As discussed above,²⁵¹ section 10 of the RHA consists of three

246. *Id.* at 710.

247. *See supra* cases cited at note 241. *See also* *United States v. Joseph G. Morretti, Inc.*, 526 F.2d 1305 (5th Cir. 1976); *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975).

The court in *Sexton Cove Estates*, 526 F.2d at 1298 said: "The local origin of the activity or the source of its operation is thus not wholly determinative; of at least equal significance is the 'effect.'" It is not clear how much effect on the navigable portions of a waterway must be in evidence before the Corps may assert jurisdiction. This is a focus of recent controversy which will be discussed at greater length below. *See infra* text and notes at notes 276-83.

248. *See supra* note 230.

249. *See supra* text and notes at notes 150-57.

250. *See supra* text and notes at notes 187-88.

251. *See supra* text and notes at notes 152-55.

clauses restricting activities in the navigable waters of the United States. The first clause contains a broad prohibition of all "obstructions" to "navigable capacity;" the second clause restricts the building of "structures" such as wharves and piers; and the third clause restricts activities such as excavations and fills which alter or modify the condition or capacity of a navigable water.²⁵² Activities under the latter two clauses can be authorized by the Corps; activities which constitute obstructions to navigable capacity, but do not come within the scope of the latter two clauses, must be approved by Congress.²⁵³ The determination of what activities are restricted under the broad language of section 10²⁵⁴ and the degree of authorization sufficient for those activities have provided interpretative difficulties for courts over the history of section 10.²⁵⁵ As will be seen below, however, the courts have given the entire provision a generous reading.

The term obstruction to navigable capacity, as used in the first clause of section 10, has been interpreted broadly by the courts.²⁵⁶ In *United States v. Rio Grande Dam & Irrigation Co.*,²⁵⁷ the Supreme Court found that the statute was applicable to a proposed dam in a nonnavigable part of a waterway by construing the "any obstruction" language in section 10 as prohibiting "anything, wherever done or however done . . . which tends to destroy the navigable capacity of one of the navigable waters of the United States."²⁵⁸ The

252. See *supra* note 150 for text of statute.

253. *Id.*

254. *Id.* See also KOONCE LECTURE, *supra* note 147, at 289 (Judge Koonce notes the broad language of the Act).

255. The main difficulty in interpreting § 10 has stemmed from the ambiguity surrounding the interrelationship of the three clauses. The initial confusion was over what constituted proper authorization for a structure or activity covered by the second and third clauses; early courts construed § 10 to require Congressional authorization for all activities within its scope. See, e.g., *Hubbard v. Fort*, 188 F. 987, 997 (C.C.D. N.J. 1911). The Supreme Court resolved this ambiguity in *Wis. v. Ill.*, 278 U.S. 367, 412-13 (1929), in which it held that the obstructions within the purview of the second and third clauses need only be approved by the Corps of Engineers. In the opinion of the Supreme Court, the second and third clauses, by requiring only Corps' authorization, are qualifications of the presumably more difficult approval requirements of the first clause. *Id.* See *infra* text and notes at notes 276-83 for discussion of a more recent controversy arising out of the interrelationship of the clauses.

256. See generally Comment, *supra* note 188; Barker, *supra* note 146; Kramon, *supra* note 238.

257. 174 U.S. 690 (1899).

258. *Id.* at 708. The Court said: "The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity." *Id.* The Court in this case was construing § 10 of the 1890 Rivers and Harbors Act. But the words of that section are very similar to the words of the first clause of § 10 in the 1899 Act and the Supreme Court has adapted the interpretation in *Rio Grande* in subsequent interpretations of the RHA. See, e.g., *United States v. Republic Steel Corp.*, 362 U.S. at 486. See *supra* note 244.

Court stressed that the criteria for determining whether the statute had been violated was the effect of the structure on navigable capacity.²⁵⁹ The Supreme Court has continued to read the "any obstruction" language broadly.²⁶⁰

Given the Supreme Court's broad reading of the "any obstruction" language, lower courts have found that all manner of activities and structures come within the scope of section 10. For example, courts have imposed liability under section 10 for deliberately scuttling a ship in a navigable water,²⁶¹ for dumping fill on land which caused shoaling in a nearby navigable water,²⁶² and for diverting water.²⁶³ All such obstructions to navigable capacity require congressional authorizations unless they are within the purview of the second and third clauses. In the latter case they need only be approved by the Corps of Engineers.²⁶⁴ In their analysis, then, the courts will generally look first at whether the particular obstruction comes within the scope of the second or third clauses. In ascertaining whether an obstruction is a "structure" under the second clause, courts have generally applied the customary definitions to the structures specified in that clause.²⁶⁵ In addition, the Corps' licensing power in the second clause seems to relate only to structures

259. The Court in *United States v. Rio Grande Dam & Irrig. Co.*, said:

[I]t would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact.

174 U.S. at 708-09.

260. In *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925), the Court, interpreting the 1899 Act and citing *Rio Grande* with approval, characterized § 10 as a "broad expression of policy in unmistakable terms." *Id.* at 429. The Court, in this case relying on the third clause to find water diversions within the scope of § 10, read the entire section broadly. *Id.* See also *Wis. v. Ill.*, 278 U.S. 367, 414 (1929) (specific reaffirmation of *Sanitary Dist.*'s broad construction of the first and third clauses in a related case).

In *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), the obstruction in question was caused by an unauthorized deposit of industrial wastes which caused a decrease in the depth of a navigable water. *Id.* The Court, in finding these deposits within the scope of the first clause, rejected arguments that the scope of § 10 was limited to the obstructions enumerated in the latter two clauses and that "obstruction" meant some kind of structure. *Id.* at 486-87. The Court held that the generalized prohibition of the first clause was aimed at protecting navigable capacity from the adverse effects of *any* activity. *Id.*

261. *United States v. Ravens*, 500 F.2d 728 (5th Cir. 1974).

262. *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964); see also *United States v. Kane*, 461 F. Supp. 554 (E.D.N.Y. 1978) (chain link fence caused obstruction).

263. *Sanitary Dist. of Chicago*, 266 U.S. 405 (1925); see *Conn. v. Mass.*, 282 U.S. 660 (1931); 34 Op. Att'y Gen. 410 (1925).

264. See *Wis. v. Ill.*, 278 U.S. 367, 412-13 (1929); *United States v. Kane*, 461 F. Supp. 554, 556 (E.D.N.Y. 1978).

265. See *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211 (1900).

touching navigable waters rather than structures affecting navigable waters.²⁶⁶ In this, the second clause differs from the first and third clauses. As a result, the second clause has not received the expansive interpretation that has been received by the third.

The third clause explicitly restricts excavations and fills in navigable waters,²⁶⁷ but the clause also contains broader, less specific language, restricting work which "in any manner alters or modifies the course, location, condition or capacity" of a navigable water.²⁶⁸ This language has been read by the Supreme Court to apply to water diversions²⁶⁹ and by lower courts to apply to activities conducted outside the boundaries of navigable waters which alter or modify the condition or capacity of a navigable water.²⁷⁰

The leading case on this aspect of section 10 is *Sanitary District of Chicago v. United States*.²⁷¹ In this case involving unauthorized water diversions from Lake Michigan into a drainage canal,²⁷² the Supreme Court held that the lowering of the lake constituted a change in the condition of the lake and, therefore, violated section 10.²⁷³ More recent decisions, relying on the third clause of section 10,

266. See *supra* note 150 for text of act.

267. See *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); see also *Am. Dredging Co. v. Dutchyshyn*, 480 F. Supp. 957 (E.D. Pa. 1979); *United States v. Weiszmann*, 489 Supp. 1331 (M.D. Fla. 1980).

268. That altering and modifying the course of a navigable water constitutes a separate offense under the third clause, and is not merely stating different ways in which excavations and fills can affect a navigable water, has been long established. See *F.D. Gleason Coal Co. v. United States*, 30 F.2d 22 (6th Cir. 1929); *United States v. Benton and Co., Inc.*, 345 F. Supp. 1101 (M.D. Fla. 1972). The third clause is potentially limited to work within the "channel" of a navigable water. The courts have not, however, defined channel in the way it was intended—the channel of navigation or customary route taken by ships. Instead, the courts have defined it as the bed of a stream between the two banks. See generally *Kramon, supra* note 238, at 232-33.

269. See *Wis. v. Ill.*, 278 U.S. 367 (1929); *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925); *accord Conn. v. Mass.*, 282 U.S. 660 (1931). See also *Cal. v. Sierra Club*, 451 U.S. 287 (1981) (discussed *infra* text and notes at notes 314-74).

270. See, e.g., *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *Weiszmann v. Dist. Eng'r, U.S. Army Corps of Eng'rs*, 526 F.2d 1302 (5th Cir. 1976); *United States v. Joseph G. Moretti, Inc.*, 526 F.2d 1306 (5th Cir. 1976). See *infra* text and notes at notes 314-74.

271. 266 U.S. 405 (1925).

272. *Id.* at 428-32. The Sanitary District had already received Corps' permission to divert a set amount of lake water, but applied for permission to divert more. The Secretary of War denied this application "on the overwhelming evidence that it would affect navigation." *Id.* at 430-31. When the Sanitary district was found to be diverting more water than it was authorized to, the Secretary charged it with violation of § 10 and moved for an injunction. *Id.*

273. *Id.* at 426, 428. In granting the injunction for failure to get Corps' authorization the Court said: "Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water . . . threatens and will affect the level of the lakes, and that is a matter which cannot be

have required Corps' approval for the dredging of canals outside the boundaries of navigable waters.²⁷⁴ The courts held that, if activities outside the boundaries of navigable waters were shown to have some third clause effect on navigable waters, then they would come within the jurisdiction of the Corps.²⁷⁵ A controversy recently emerged, however, over the degree of interference an activity would have to have on a navigable water before Corps' jurisdiction under the third clause would be triggered.

The District Court in *California v. Sierra Club*,²⁷⁶ required a finding of a substantial impact on the navigable capacity of the waterway before a Corps' permit would be necessary for the water diversions

done without the consent of the United States, . . ." *Id.* at 426 (emphasis added). The Court went on to say: "There is neither reason nor opportunity for a construction that would not cover the present case. As now applied *it concerns a change in the condition of the Lakes . . . , and, if that be necessary*, an obstruction to their navigable capacity. . . ." *Id.* at 429 (emphasis added). In holding in this manner the Court indicates that water diversions come under the third clause and suggests strongly that such activities would come under Corps jurisdiction independent of any showing that the diversions threatened navigable capacity in the meaning of the first clause. In this case, evidence had apparently been presented that the withdrawals would effect navigation. *Id.* at 430. *See infra* text and notes at notes 276-83.

274. *See supra* cases cited at note 270.

275. In *United States v. Joseph G. Morretti, Inc.*, 526 F.2d at 1309, the Fifth Circuit Court stated:

[T]he Corps may under certain circumstances exercise jurisdiction over dredging and filling operations above MHTL under [§ 10] of the Rivers and Harbors Act. Prerequisites for such jurisdiction are factual circumstances showing *some effect* upon navigable waters, *some alteration or modification of either course, location, condition or capacity of those waters*. These statutory terms are broad and undefined. So long as activities fall within this generous scope, those activities are subject to the jurisdiction of the Corps.

Id. (emphasis added). *See also Weizmann*, 526 F.2d at 1305 (the court found several canals connected to a navigable waterway to be within the Corps' jurisdiction under the third clause).

The Supreme Court of Maine in *Maine Water Co. v. Knickerbocker Steam Towing Co.*, 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section *were not intended to limit the second and third clauses* and that Congress's purpose was a *direct prohibition* of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.

278 U.S. 367, 413 (1929) (emphasis added). Similarly, in *Sanitary Dist.*, 266 U.S. at 426, 429, the Supreme Court found the water diversions to come under the third clause and indicated that, while evidence of obstruction to navigable capacity was present, a violation of the first clause was not necessary to their finding of a violation of § 10. *See supra* note 273. Finally, in *Republic Steel*, 363 U.S. at 486-87, the Supreme Court lent strong support to the notion that the activities mentioned in the second and third clauses are presumed to be obstructions to navigable capacity. The Court said: "[T]he first clause being specifically aimed at 'navigable capacity' . . ." *Id.*

276. *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975). The factual background and decisions in this case, as well as the main issue left open will be discussed *infra* text and notes at notes 314-417.

at issue in that case.²⁷⁷ On appeal, the Ninth Circuit²⁷⁸ disagreed with this reading of the statute, holding instead that activities within the purview of the latter two clauses were presumed to be obstructions to navigable capacity and thus automatically subject to the jurisdiction of the Corps.²⁷⁹ In the view of the Ninth Circuit then, no finding of an obstruction to navigable capacity would be necessary to trigger the Corps' jurisdiction if the activity comes within the terms of the second or third clauses. The great weight of judicial authority²⁸⁰ and Corps' practice as reflected in its regulations²⁸¹ sug-

277. The court said: "Under Section 10 . . . the question before the court . . . is whether the structure itself or its operational effect is an obstruction to the navigable capacity of any navigable water." 400 F. Supp. at 630. Implicit in the court's holding on this point is the assumption that the requirements of the third clause of § 10 are dependent on the first clause being operative. The court found the requisite obstruction to navigable capacity. *Id.* at 630-32.

278. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), *rev'd sub nom.* *Cal. v. Sierra Club*, 451 U.S. 287 (1981).

279. 610 F.2d at 594-95. The Court said:

[W]e interpret clauses 2 and 3 of section 10 as constituting a legislative enumeration of specific obstructions to navigable capacity that require Corps authorization. In other words, the building activities mentioned in clauses 2 and 3 are *presumed* to be obstructions to navigable capacity Thus, the facts in this case should be analyzed from the standpoint of whether there has been any modification or alteration of the condition or capacity of a navigable stream, rather than first determining whether there has been an obstruction to navigable capacity.

Id.

280. The Supreme Court decisions dealing with § 10 tend to support the view that activities within the scope of the second and third clauses are directly prohibited, independent of the first clause, subject to the Corps' approval. In *Wis. v. Ill.* the Court said:

[The clause] serves an end that may at times be broader than those served by the other clauses. Some structures mentioned in the second clause may only deter movements in commerce, *falling short of adversely affecting navigable capacity*. And navigable capacity of a waterway may conceivably be affected by means other than the excavation and fills mentioned in the third clause In short, the first clause is aimed at protecting 'navigable capacity,' *though it is adversely affected in ways other than those specified in the other clauses*.

Id. at 486-87 (emphasis added).

Numerous lower court decisions and the comments of one of the draftsmen also support the notion that the activities of the second and third clauses are subject to Corps' approval regardless of actual effect on navigable capacity. *See supra* cases cited at notes 270, 275. *See also Zabel v. Tabb*, 430 F.2d 199, 207. "The Act covers both building of structures and the excavating and filling in navigable waters. It is structured as a flat prohibition *unless*—the unless being the issuance of approval by the Secretary after recommendation of the Chief of Engineers." *Id.*; *United States v. Benton and Co.*, 345 F. Supp. 1101, 1104 (M.D. Fla. 1972).

Finally, the views of one of the principal draftsmen of the Act also support the view of the circuit courts. Judge Koonce stated, "the effect of this latter clause is to *necessitate the submission of every project of the kind* to the Chief of Engineers and the Secretary of War, and to commit to them the duty of investigating and determining whether or not the project will obstruct or injure navigability." KOONCE LECTURE, *supra* note 197, at 289 (emphasis added). *But see United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 709 (1899).

281. The Corps Regulations contain no limitation such as that proposed by the district court

gest that the Ninth Circuit's reading of the statute is the correct one. To date, the Ninth Circuit's interpretation has been adopted by the only other circuit court to address the issue explicitly.²⁸² The Ninth Circuit's reading of section 10 is clearly an expansive interpretation of the Corps' subject matter jurisdiction. Under this reading, the Corps could theoretically assert jurisdiction over activities which alter or modify a navigable waterway, but which have no effect on the navigable capacity of the waterway. In fact, under either interpretation of the statute, the Corps' subject matter jurisdiction under section 10 is quite broad.²⁸³ The standard set up by the district court is not one likely to limit drastically the jurisdiction of the Corps.

Section 10, and more specifically the third clause of that section, has been interpreted broadly by the courts to restrict water diversions and any other activity which alters the condition or capacity of a navigable waterway, whether such diversions are from the navigable water itself or from a nonnavigable tributary. In summary then, both the territorial and subject matter jurisdiction of the Act are quite broad; the Corps may require permits for a wide range of activities affecting a large portion of our nation's waters. In order to see what this means to the possible utility of the Act as a tool for a greater federal control over water allocations, it is necessary to examine the evolution and present extent of the Corps' review powers under section 10.

D. The Public Interest Review of the Section 10 Permit Process

Once a proposed structure or activity is found to be within the jurisdiction of the Corps under section 10, a permit must be obtained before that proposal can be lawfully carried out.²⁸⁴ The Corps'

on the assertion of jurisdiction over activities *within navigable waters*. 33 C.F.R. § 322.3(a) (1981). However, as *presently promulgated*, the Corps regulations do limit assertion of jurisdiction over activities *affecting* navigable waters to those which affect the "navigable capacity of the waterbody." *Id.* at § 322.3(a)(1) (1981). The new regulations proposed at 45 Fed. Reg. 62,732 (1980) contain no such limitation; activities outside the boundaries of the navigable waterway will need only to affect the "physical capacity of the waterway."

282. *Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1210-11 (6th Cir. 1980).

283. The requirement that an activity obstruct the navigable capacity is also a concept susceptible of broad interpretation. Navigable capacity means the capacity for navigation over any part of the waters in question when in their normal condition. *Hubbard v. Fort*, 188 F. 987, 996 (C.C.D. N.J. 1911). The district court in *Cal. v. Sierra Club* found the obstruction in the tendency of the facilities in question to lower water levels and to cause net flow reversals. The court said: "Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of *de minimis* exception established by *Rio Grande*." 400 F. Supp. at 632.

284. See *supra* text and notes at notes 166-67.

regulations²⁸⁵ set out a complex procedure by which the Corps determines whether a permit should be issued or denied, and if it is granted, the terms of the permit.²⁸⁶ In its evaluation of a permit application, the Corps has always considered the effect of the proposed activity on navigation and navigable capacity.²⁸⁷ In more recent years, the factors which the Corps can and must consider in reviewing an application have expanded dramatically.²⁸⁸ To understand the impact of the permit requirement and the potential utility of the permit process as a tool for federal regulation of western water allocations, the present scope of the Corps' review powers under section 10 must be examined.

For many years after passage of the RHA, permit applications were reviewed only to determine whether the structure or activity would actually impede navigation or obstruct navigable capacity.²⁸⁹ This limited view stemmed from the early belief that section 10 only empowered the Secretary of War to grant or deny permits on the basis of effect on navigation;²⁹⁰ there is nothing in the legislative history to suggest that the framers had anything else in mind.²⁹¹ This early approach has long since been abandoned.

285. 33 C.F.R. §§ 320-29 (1981). *See supra* text and notes at notes 158-91.

286. As one commentator has noted, the number of permit applications, over 20,000 in 1976 under § 10 and § 404 of the Clean Water Act, coupled with the "imprecise" nature of the standards for evaluating permits, has meant that in many cases the permit review may prove more procedural than substantive. Power, *supra* note 159, at 526-45.

287. *See* Wis. v. Ill., 270 U.S. 367 (1929).

288. *See infra* text and notes at notes 300-22.

289. *See generally* Power, *supra* note 159, at 526. Professor Power cites the old licensing criteria of the Corps' Baltimore District office; the Baltimore "test" employed four main criteria:

1. The structure could not exceed one-third the width of the waterway;
2. the applicant could not enter the deepest portion of the waterway;
3. the applicant could not build within 15 feet of a dredged channel way;
4. the applicant, in general, had to avoid causing any hazard to navigation.

Id. Some districts did not even adopt such "formal" criteria at all. *Id.* Section 11 of the RHA, *see supra* note 149, further reduced the workload by authorizing the Corps to draw harbor lines within which work could be done without specific permission. Power, *supra* note 159, at 527.

290. *See, e.g.,* Miami Beach Jockey Club, Inc. v. Dern, 86 F.2d 135, 136 (D.C. Cir. 1936); Port of Seattle v. Or. & Wash. R.R., 255 U.S. 56, 63 (1921). *See also* 27 Op. Att'y Gen. 284 (1909).

Until the mid-1960's, public notice announcing the filing of applications "defined the Corps' interest as being confined to issues of navigation, and requested comments from the public only on such issues." HOUSE COMM. ON GOV'T OPERATIONS, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. REP. NO. 917, 91st Cong., 2d Sess. 2 (1970) [hereinafter cited as H.R. REP. NO. 917].

291. *See supra* text and notes at notes 188-89. *See generally* Zabel v. Tabb, 430 F.2d at 207-14 (general discussion of authority to consider nonnavigation factors); Barker, *supra* note

Despite this history of limited review, the scope of review in the permit process has expanded dramatically in recent years. The first indication from the courts that more than navigation would be considered in evaluating a permit application came in 1933, in *United States ex rel. Greathouse v. Dern*.²⁹² In this case the Corps denied a permit for construction of a wharf. The wharf was not a hazard to navigation, but its construction would substantially increase nearby land values; land which was going to be condemned by the government in order to build a road.²⁹³ The permit was denied on the basis that the construction of the wharf would needlessly cost the government more money.²⁹⁴ The Supreme Court upheld the denial of the permit, thereby opening the door for the Corps to consider non-navigational factors in evaluating a permit.²⁹⁵

Over twenty-five years later, Congress took the first of several steps which proved important in the expansion of the Corps' review powers under the RHA. First, in 1958, Congress passed an amendment to the Fish and Wildlife Coordination Act.²⁹⁶ This Act provided that "wild life conservation shall receive equal consideration and be coordinated with other features of water-resource development."²⁹⁷ Although Corps compliance with the spirit of this Act was slow at first,²⁹⁸ consultation with the Fish and Wildlife Service of the Department of the Interior is now considered to be common practice when the Corps evaluates permit applications.²⁹⁹ Second, and

146, at 136-38. On the other hand, § 10 is not restricted by its specific terms to activities which actually affect navigation. See *Zabel v. Tabb*, 430 F.2d at 207-08.

292. 289 U.S. 352 (1933).

293. *Id.*

294. *Id.*

295. *Id.*; see also *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423-27 (1940). The Supreme Court in this case explicitly rejected the view that Congress may regulate navigable waters only for the purpose of navigation. This decision was not a RHA decision and, thus, did not squarely decide whether the Corps has the authority to deny a permit on the basis of nonnavigational factors. The sweeping declaration of power in this case, however, clearly opened the door for the Corps to use its authority under § 10 for purposes other than the protection of navigation. *Id.* See generally *Zabel v. Tabb*, 430 F.2d at 207-14 (general discussion of authority to consider nonnavigation factors); Barker, *supra* note 159.

296. 16 U.S.C. §§ 661-664 (1976).

297. *Id.* § 661(1). The Fifth Circuit in *Zabel v. Tabb*, 430 F.2d at 209-10, found direct support in the legislative history of this Act for the interpretation that Congress intended the Corps to consult with the Fish and Wildlife Service *before* issuing a permit for a private dredge and fill operation.

298. Power, *supra* note 159, at 527.

299. 33 C.F.R. § 320.4(c) (1981); see *supra* text and note at note 175. In a 1967 memorandum of understanding, the Corps agreed to consult with the Fish and Wildlife Services of the Department of the Interior before issuing permits. See Power, *supra* note 159, at 527.

perhaps more important, was the passage of the National Environmental Policy Act of 1969 (NEPA).³⁰⁰ NEPA requires all federal agencies to make a detailed environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment.³⁰¹ The Corps' regulations were amended in response to NEPA's requirements by providing for a two-step environmental review process.³⁰² First, the District Engineer makes an "environmental assessment" of the likely impact of the proposed activity.³⁰³ Then, if the District Engineer believes that granting the permit may be warranted, but that the proposed activity would significantly affect the quality of the human environment, an EIS must be prepared.³⁰⁴ Both of these Acts thus required the Corps to consider nonnavigational factors in making permit decisions.

In 1970 and again in 1972, Congress pressured the Corps to follow these statutory dictates strictly. The House Committee on Government Operations urged the Corps to intensify its environmental review in order to protect wetlands and to require applicants to demonstrate that the proposed work was in the public interest.³⁰⁵ The same Committee repeated itself in 1972, urging that the Corps "exercise its jurisdiction over navigable waters of the United States to the fullest extent available."³⁰⁶ Thus, Congress made explicit the

300. Jan. 1, 1970, P.L. 91-190, Title I, § 101, 83 Stat. 852 (codified at 42 U.S.C. §§ 4331-4347) (1976).

301. 42 U.S.C. § 4332 (1976). While NEPA seems to leave the agency with discretion, the courts have interpreted its requirements as allowing a minimum amount of discretion. In the opinion of the district court in *Cal. v. Sierra Club*, if a project under the RHA has or will have significant impact on the environment, then issuance of a permit by the Corps is automatically a major federal action requiring an EIS. 400 F. Supp. 610, 644 (N.D. Cal. 1975). See also *Rucker v. Willis*, 484 F.2d 158, 161-62 (4th Cir. 1973) (Corps had to do more than make a cursory review of generally favorable comments about the environmental impact of proposed construction); see generally Power, *supra* note 159, at 530-34.

302. 33 C.F.R. § 325.4(b)(1) (1981). See also *supra* text and note at note 169.

303. 33 C.F.R. § 325.4(b)(1) (1981). If the assessment indicates no significant effect on the environment, the assessment may serve as the EIS. *Id.* § 325.4(b)(2).

304. *Id.* § 325.4(b)(3).

305. H.R. REP. NO. 917, *supra* note 290, at 2-6. Prior to this prodding the Corps had, in 1968, instituted its own "public interest review." See Comment, *supra* note 188, at 182-83; Power, *supra* note 159, at 527-28. The House Committee urged vigorous application of this review by advocating that the Corps "increase its consideration of the effects which the proposed work will have, not only on navigation, but also on conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway." H.R. REP. NO. 917, *supra* note 290, at 2 (emphasis added).

306. HOUSE COMM. ON GOV'T OPERATIONS, INCREASING PROTECTION FOR OUR WATERS, WETLANDS, AND SHORELINES: THE CORPS OF ENG'RS, H.R. REP. NO. 1323, 92d Cong., 2d Sess. 6 (1972) [hereinafter cited H.R. REP. NO. 1323].

desire implicitly expressed in the statutes that the Corps should review nonnavigation factors in its permitting process.

Court decisions and active Corps enforcement have translated these congressional directives into action. First, the landmark decision by the Fifth Circuit in *Zabel v. Tabb*³⁰⁷ confirmed the Corps' broad power³⁰⁸ to consider more than factors of navigation and impact on navigation in determining whether or not to grant a section 10 permit.³⁰⁹ Basing its decision primarily on the application of NEPA and the Fish and Wildlife Coordination Act to the RHA rather than the RHA itself,³¹⁰ the court upheld the denial of a permit on environmental grounds alone.³¹¹ Second, the Corps of Engineers, in response to *Zabel* and NEPA, published new regulations detailing the Corps policy in evaluating permit applications; these regulations reflected, at least theoretically, an aggressive commitment to use the RHA to serve ecological values.³¹² In some areas of the country, primarily in the Fifth Circuit, the theoretical commitment to ecological values has been translated into an active use by the Corps of its permit authority to protect the environment.³¹³ Thus, both the courts and the Corps have acted on the broad mandate to consider nonnavigational factors in their evaluation of whether or not to issue a permit.

307. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). This decision prompted a great deal of academic commentary speculating on the ramifications of the RHA's use as a tool for environmental protection. See, e.g., Goldstein, *Environmental Law—Consideration Must Be Given to Ecological Matters In Federal Agency Decisions—Zabel v. Tabb*, 3 ENV'T L. L. REV. 575 (1972).

308. The court in *Zabel* stressed, however, that both NEPA and the Fish and Wildlife Act require consideration of nonnavigational factors in the permit process. 430 F.2d at 213.

309. The activity at issue in this case was a permit application to fill in eleven acres of tidelands. There was evidence that the fill would do extensive ecological damage but no evidence of interference with navigation. *Id.* at 201.

310. The court did find that the RHA does not restrict the basis for denial of a permit to navigation factors. *Id.* at 207. In addition, the court considered House Report No. 917, H.R. REP. NO. 917, *supra* note 290 as evidence of how Congress construes the Corps' duty under the RHA.

311. 430 F.2d at 214. The court said: "When the House Report and the National Environmental Policy Act of 1969 are considered together with the Fish and Wildlife Coordination Act and its interpretations, there is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act." *Id.*

312. See Barker, *supra* note 146, at 141. See *supra* text and notes at notes 171-80 for a discussion of the public interest review currently in place in the Corps regulations.

313. See *supra* cases cited at notes 270. See also *United States v. Lewis*, 355 F. Supp. 1132, 1138-40 (S.D. Ga. 1973); *United States v. Cannon*, 363 F. Supp. 1045, 1049-50 (D. Del. 1973); *United States v. Baker*, 1 ENV'T L. L. REP. 20,378 (S.D.N.Y. 1971); *Deltona Corp. v. Alexander*, 504 F. Supp. 1280, 1282-83 (M.D. Fla. 1981). See generally Barker, *supra* note 146, at 143-47 (discussion of Corps' denial of a permit for a dredge and fill project which would have destroyed more than 2,000 acres of wetlands. Based on a complete administrative record

The RHA is potentially applicable to much of the western states' water allocation activities. Many of the waterways in the west come within the protective reach of the Act. Water diversions, which make up much of the western states' water allocation activity, are within the Corps' jurisdiction. In the exercise of this jurisdiction, the Corps may consider a wide range of factors to determine whether or not to issue a permit. The breadth of the Corps' review powers suggests that the permit process may be adaptable for use as a tool for a greater measure of federal control of western water allocations. However, the recent Supreme Court case of *California v. Sierra Club* left open the question whether the application of the RHA to western water allocations would be limited, or even barred. Before examining the degree to which the RHA can and should be used in the context of western water law, it is thus necessary to examine the issues left open by the decision in *California v. Sierra Club*.

IV. CALIFORNIA V. SIERRA CLUB

A. Factual Background

Western water rights law and section 10 clashed in the litigation culminating before the Supreme Court in *California v. Sierra Club*.³¹⁴ The suit was initiated in 1971 when two environmental groups and two individuals³¹⁵ brought an action to contest the construction and operation of three facilities of the California Water Project (CWP).³¹⁶ The primary cause of action³¹⁷ alleged that the state and federal defendants³¹⁸ failed to comply with the requirements of sections 9 and 10 of the RHA in constructing and operating the Tracy and Delta pumping plants.³¹⁹ Further, it was

which balanced all of the factors in its regulations, the Corps concluded that the permit was *not* in the public interest. Despite the Corps' action in this case, however, this commentator sees the Corps' performance as inconsistent).

314. 451 U.S. 287 (1981).

315. The Sierra Club, Friends of the Earth, Hank Stram (fisherman), and William Dixon (landowner). *Sierra Club v. Morton*, 400 F. Supp. 610, 619 (N.D. Cal. 1975).

316. *Id.* The three facilities in question were the Delta Pumping Plant, the Tracy Pumping Plant, and the proposed Peripheral Canal.

317. Six claims were made as part of the original complaint. *Id.* at 620. The primary claim was the one based on § 10 since it was the only one at issue before the Supreme Court.

318. The federal defendants were the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, the Secretary of the Army, and the Chief of Engineers. The state defendants were California's Secretary for Resources and the state's Director of the Department of Water Resources. *Id.*

319. The Tracy Plant had been operating at least partially for 20 years at the time of suit. The Delta Plant had been operating since 1967 and the addition of more pumps was planned as of the time of the suit. *Id.* at 620-21.

alleged that the proposed construction of the so-called Peripheral Canal would be unlawful without Corps' approval.³²⁰

All three facilities at issue in this case are part of the CWP.³²¹ The CWP is a mammoth water development project constructed to alleviate California's water problem; its basic goal is the redistribution of water from the water-abundant north and central parts of the state to the water-deficient areas in the central and southern portions of the state.³²² The CWP consists of both federal and state facilities. The Tracy Pumping Plant is part of the federal component of the CWP known as the Central Valley Project (CVP),³²³ while the Delta Pumping Plant is the core of the state component, the State Water Project (SWP).³²⁴ The Peripheral Canal, if built, would be financed, constructed, and operated by the state of California.³²⁵ Water allocations from both the federal and state components of the CWP are subject to state water law.³²⁶

The function of both the Tracy Pumping Plant and the Delta Pumping Plant is the exportation of water from the Sacramento San Joaquin Delta (Delta) to the water deficient portions of the state.³²⁷ The Delta consists of approximately 700 miles of waterways, only some of which are navigable.³²⁸ The Tracy Plant, which is located on a nonnavigable inlet channel of Old River in the Delta, diverts water from the Delta by pumping it into the 115-mile Delta Mendota canal.³²⁹ The Delta Plant, located on the edge of the Delta about two miles from navigable waters, diverts water from the Delta by pumping it into the California Aqueduct.³³⁰ Most of the water diverted

320. To date, the Peripheral Canal has not been constructed. The project will be put before the voters of California in a June, 1982, statewide referendum. *Id.*

321. See Note, *supra* note 50 (discussion of history of the CWP).

322. *Sierra Club*, 400 F. Supp. at 618.

323. The CWP consists of dams, reservoirs, pumping plants, canals, and other facilities to supply water for irrigation and other uses in the Central Valley of California. To this end, excess water is stored behind dams in the Sacramento River and then released, as needed, to flow down river and into the Sacramento-San Joaquin Delta (Delta). *Id.* at 618.

324. The CWP was created by the Burns-Porter Act of 1959. CAL. WATER CODE §§ 12930-12942 (West 1971), as the analogue to the CVP. It consists of dams, canals, pumping plants, and other facilities designed to generate power, CVP provide flood control, and transfer water from the Delta to the more arid regions of central, coastal, and southern California. *Id.*

325. *Id.* at 621-22.

326. See *supra* note 50.

327. *Sierra Club*, 400 F. Supp. at 618-20 (description of the geography of the Delta).

328. *Id.* at 619.

329. *Id.* at 618. The canal takes the water to Central Valley, one of the more arid regions of California.

330. *Id.* at 618-19. A majority of the water transported from Northern California to southern and central California travels through the Delta Pumping Plant and the California Aqueduct. *Id.* at 619.

from the Delta by the SWP is contracted for by water districts in the south and central portions of the state.³³¹ The Peripheral Canal, as proposed, would be a 42-mile canal allowing California to divert high quality fresh water from the Sacramento River directly to the Tracy and Delta Plants.³³²

B. The District and Circuit Courts' Opinions

The federal district court had three main issues to resolve regarding the plaintiffs' claim that the operation and construction of the three facilities were in violation of the RHA. First, the court had to determine, as a procedural matter, whether the private plaintiffs had a right of action under the RHA.³³³ Second, it had to determine whether any of the three facilities came within the scope of either section 9 or 10 and thus required Corps authorization.³³⁴ Finally, if authorization was required for any of the structures, the court had to determine whether such authorization had been obtained.³³⁵ The court held in the plaintiffs' favor on all three issues.

First, the court found as a threshold matter that the plaintiffs had a right to sue under the RHA.³³⁶ After making this determination, the court examined the merits of the claim that the facilities were in violation of the RHA. Toward this end, the court evaluated each of the facilities to see if they came within the scope of section 9. The court determined that neither of the pumping plants were within the scope of section 9, but the Peripheral Canal was found to be clearly prohibited by the section.³³⁷ The court then examined whether any of the structures came within the scope of section 10.³³⁸ In discussing the scope of section 10, the court addressed two threshold questions concerning its coverage. First, the court dismissed the defendant's argument that the pumping plants were not within the territorial jurisdiction of the Corps because they were not actually over or in a navigable waterway.³³⁹ The court held that jurisdiction of the Corps

331. *Id.*

332. *Id.* at 621.

333. *Id.* at 622-25.

334. *Id.* at 626-32.

335. *Id.* at 632-38.

336. *Id.* at 622-25.

337. *Id.* at 626-28. The court found that the canal as planned would constitute a "dike" within the meaning of § 9. The pumping plants, however, were not "over or in" any navigable water and thus did not constitute the kind of structure regulated by § 9. *Id.*

338. *Id.* at 628-32. The court was unsure whether the necessity to obtain authorization under § 9 for the Peripheral Canal preempted the need for § 10 approval. It was the opinion of the court that no such preemption occurred. *Id.* at 628 n.21.

339. *Id.* at 628. Both plants were over two miles from a navigable portion of the Delta.

under section 10 was not determined by physical location, but rather depended on operational effect.³⁴⁰ Second, the court rejected the contention that the Corps' subject matter jurisdiction extends only to those activities which actually affect navigation.³⁴¹ The court found that the plain wording of the statute prohibits obstructions to *navigable capacity* and was thus at odds with the defendant's interpretation.³⁴² After rejecting both suggested limitations on Corps' jurisdiction, the court found that both pumping plants affected the navigable capacity of the navigable portions of the Delta³⁴³ and were therefore subject to the approval requirements of the third clause of section 10.³⁴⁴

Finally, the court examined the record to see if any of the structures had received the proper authorization from the Corps under the third clause of section 10. This examination revealed that no authorization had been obtained.³⁴⁵ The court therefore found the plants to be in violation of section 10 and ordered that the proper authorization be obtained.³⁴⁶

On an appeal by the federal and state defendants, the Ninth Circuit Court affirmed the lower court's decision in part and reversed it in part.³⁴⁷ The circuit court upheld the district court's finding that the plaintiffs had a right of action under the RHA³⁴⁸ and found that the plaintiffs had proper standing for their suit.³⁴⁹ The appellate

340. *Id.* The Court said:

The test of whether a Section 10 permit is required for a particular project is not wholly dependent upon the location of specific structures but looks also to the operational effect of the project If the functional effect of these structures (*i.e.*, water diversions) is to obstruct navigable capacity in the Delta, then Section 10 approval will be required.

Id. at 628-29.

341. *Id.* at 629-30.

342. *Id.* See *supra* note 150 for text of § 10. The section prohibits obstructions to navigable capacity, *not* navigation.

343. The court found two effects on the navigable waters of the Delta caused by the operation of the pumping plants: "(1) It tended to lower the water levels in the Delta; and (2) it caused net flow reversals. A net flow reversal occurs when the net flow for a given tidal cycle is in a different direction than the normal direction." *Id.* at 630.

However, by finding it necessary to establish that the operation of the pumping plants constituted an obstruction to navigable capacity for the activity to be within the scope of the Corps' subject matter jurisdiction, the district court would be in disagreement with the Circuit Court. See *supra* text and notes at notes 276-83.

344. *Sierra Club v. Morton*, 400 F. Supp. 610, 632 (N.D. Cal. 1975).

345. *Id.* at 632-38.

346. *Id.* at 651.

347. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979).

348. *Id.* at 587-92.

349. *Id.* at 592-93.

court did not address the section 9 issue,³⁵⁰ but did agree that the two pumping plants came within the scope of third clause of section 10,³⁵¹ for different reasons than those cited by the district court on that point.³⁵² The court found, however, that congressional authorization existed for the Tracy Plant and, thus, overturned the district court's finding that that plant was in violation of section 10.³⁵³

In upholding the district court's finding that the state's pumping plant was in violation of section 10, the circuit court rejected an argument made by the state of California that the RHA should have only limited applicability to water diversions made pursuant to state water law.³⁵⁴ The state argued that the congressional policy of deference to state regulation of water required that application of section 10 be limited to those cases where there is a demonstration of substantial tangible interference with navigable capacity by the water diversion.³⁵⁵ The Ninth Circuit Court found no support for such a limitation.³⁵⁶

C. Argument Before the Supreme Court and The Supreme Court Opinion

In its petition for certiorari³⁵⁷ and in its briefs before the Supreme Court,³⁵⁸ the state of California focused its attention on one issue.³⁵⁹ The state urged that, notwithstanding how the RHA applied in

350. *Id.* at 585. The district court's ruling as to the Peripheral Canal was not challenged on appeal.

351. *Id.* at 593-600.

352. *Id.* at 594-97. *See supra* text and notes at notes 276-83.

353. *Id.* at 600-05.

354. *Id.* at 597-600. *See infra* text and notes at notes 359-417 for a more detailed discussion of the related argument the state made before the Supreme Court.

355. *Sierra Club*, 610 F.2d at 597-600.

356. *Id.* The court said: "The congressional policy of compliance with state law for the appropriation, purchase, condemnation, and distribution of water rights, in the absence of express congressional provision to the contrary, cannot be lifted from the context of reclamation so as to encroach upon the express provisions of the Rivers and Harbors Act." *Id.* at 598. "The federal authority set forth in the Rivers and Harbors Act of 1899 reigns paramount. Congressional deference to traditional state regulation of water rights, a consideration of significance in other contexts, does not operate to restrict the express policy of section 10." *Id.* at 600.

357. State of California's Petition for writ of certiorari, Cal. v. Sierra Club, 451 U.S. 287 (1981) [hereinafter cited as State Petition].

358. Brief for Petitioner, State of California, Cal. v. Sierra Club, 451 U.S. 287 (1981) [hereinafter cited as State Brief]; Reply Brief of Petitioner, State of California, Cal. v. Sierra Club, 451 U.S. 287 (1981) [hereinafter cited as State Reply Brief].

359. The state briefed other arguments in addition to the federalism argument. Chief among these was one on statutory construction which disputed the Ninth Circuit's expansive reading of the scope of the third clause. State Brief at 52-58. *See supra* text and notes at notes 276-83.

general, the Supreme Court should fashion a common law rule either exempting state-authorized water allocation projects from the requirements of the Act altogether,³⁶⁰ or, in the alternative, limit the application of the statute to situations where actual navigation was placed in jeopardy.³⁶¹ The state argued that application of the RHA to state-authorized water diversions would conflict with the established congressional policy of deference to state water law.³⁶² In support of its position, the state cited the early federal statutes which recognized the state's power to make its own water law³⁶³ and the many statutes and court decisions which subsequently recognized state authority to control the appropriation, use, and distribution of water.³⁶⁴ The basis of the state's argument was the principle of federalism, allegedly affirmed by these congressional and judicial actions.

Furthermore, the state argued that this established federal policy indicates that the RHA was not intended to apply to projects authorized by state water law.³⁶⁵ Instead, the preferable construction of Section 10 would be to exempt state-authorized water allocations from the coverage of the Act and, thus, to follow the congressionally chosen policy of deference.³⁶⁶ In the alternative, the state argued that, if the RHA does apply to state-authorized water allocations, the potential conflict between the Act and the congressional policy of deference requires that the Act receive a limiting construc-

California also made an ill-considered argument that the RHA was not meant to cover state activities at all. State Brief at 48-50. This position was seemingly dropped in the state's Reply Brief. It is clear that states are under the restrictions of the RHA. *See, e.g.*, *United States v. Ariz.*, 295 U.S. 174, 184 (1935); *N.J. v. N.Y.*, 283 U.S. 336, 344-45, 348 (1931).

California did not address the private right of action issue. The federal respondent argued against finding a private right of action and supported granting of cert. for this reason alone. Brief for Federal Respondents, *Cal. v. Sierra Club*, 451 U.S. 287 (1981) [hereinafter cited as Federal Respondents Brief].

360. State Brief at 37-39. In this part of the alternative argument the state was not arguing that the states were not subject to the federal navigation power but "only" that the RHA should not apply. They argued that the federal navigation interests in this age were neutral, *i.e.*, not at stake, and that when and if navigability was threatened the federal government had the power to rectify it independent of the 1899 Act. State Brief at 41-43.

361. State Brief at 39-43; State Reply Brief at 6-8.

362. State Brief at 36-37.

363. State Brief at 14-17. *See supra* statutes discussed at notes 55-64.

364. State Brief at 14-19. *See supra* statutes and cases discussed at notes 65-78, 107-15.

365. State Brief at 36-41.

366. *Id.* at 37-39. The essence of the state's argument in this regard is that, in the light of expressed deference to state water law prior to passage of the 1890 and 1899 Acts, the absence of expressed intent in the Act or legislative history to regulate state water diversions means that such regulation was not intended.

tion, one which would accommodate both the need to protect navigability and allow the states to retain control of their waters.³⁶⁷ The state maintained that the only way this could be done would be to limit the assertion of Corps' jurisdiction over water allocations to cases where the navigability of a waterway was truly in jeopardy.³⁶⁸ Such a balancing or harmonizing accommodated conflicting policies, was clearly within the Court's power,³⁶⁹ and was not inconsistent with the RHA.³⁷⁰ Finally, the state argued that either alternative would be more consistent with the traditional roles of the states and the Corps than the decision reached by the lower courts.³⁷¹ The state's argument was twofold: first, the RHA should not apply to state-authorized water allocations because of federalism concerns; and second, even if federalism was not an issue, Congress never intended the RHA to apply to state-authorized water allocations.

The Supreme Court in *California v. Sierra Club* reversed and vacated the decision by the Ninth Circuit and remanded the case to the district court.³⁷² The Court held simply that there was no implied private right of action under section 10 of the RHA.³⁷³ In so holding, the Supreme Court explicitly did not reach the underlying merits of the case before it: the extent to which state water allocations are subject to the permit requirements of section 10.³⁷⁴ The following section seeks to resolve the issue left open by the Supreme Court.

367. State Brief at 39-43.

368. *Id.*

369. *Id.* at 36-37, 40-42; State Reply Brief at 4-5. The state cites cases and rules of statutory construction that hold that when there is a potential conflict between statutes they should be interpreted, if possible, in a way that harmonizes and accommodates their purpose and meaning. *See, e.g.,* Cox v. Roth, 348 U.S. 207, 208-09 (1955); 2A SUTHERLAND, STATUTORY CONSTRUCTION § 53.01 (C. Sands ed. 1973).

More specifically, California argues that where the statutes conflict, the court has the power to make a common law rule to the extent necessary to achieve Congress' broad goals in the fields of reclamation, water allocation, and navigation. *See, e.g.,* Ill. v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972). *See infra* text and notes at notes 378-415 for a discussion of whether there is a conflict.

370. State Brief at 41-43.

371. *Id.* at 44-48.

372. Cal. v. Sierra Club, 451 U.S. 287 (1981).

373. *Id.* *See supra* text and notes at notes 16-25.

374. Cal. v. Sierra Club at 1781. The court said:

Petitioner the State of California urges that we reach the merits of this case—whether permits are required for the state water allocation projects—regardless of our disposition of the private cause of action issue. This we decline to do . . . [W]e cannot consider the merits of a claim which Congress has not authorized respondents to raise.

Id.

D. The Unanswered Question: Should the RHA Apply to Water Diversions Authorized by Western State Water Law?

An analysis of the merits of the state's arguments for an exception to the general application of the RHA is best done in three steps. First, the question of the application of federalism principles to this situation must be addressed. Second, an analysis must be done of the merits of the state's preferred argument that Congress did not intend the RHA to apply to state water allocations. Third, assuming that its preferred interpretation is without merit, the state's last argument must be examined. Namely, should the application of the section 10 permit requirements to state water allocations be limited to situations where actual navigation interests are at stake?

1. Does Federalism Prevent the Application of the RHA to State Water Allocations?

The state's argument that state-authorized water allocations should be exempted from the permit requirements of the RHA in order to be consistent with principles of federalism is contradicted by several Supreme Court decisions which suggest that the navigation power, as exercised under the RHA, overrides state concerns.³⁷⁵ For example, in *Sanitary District of Chicago v. United States*,³⁷⁶ section 10 was applied to a state-authorized diversion of water from Lake Michigan. The Supreme Court, in this case, explicitly held that the power of section 10 was superior to the state's power to provide for the welfare of its citizens. The Court said: "This is not a controversy between equals . . . [T]he main ground [of the action] is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants."³⁷⁷ Thus, there is little judicial support for the argument that principles of federalism should limit the federal navigation power as that power has been exercised in the RHA. The state's other argument, that the statute's application in this context should be either limited or barred, remains to be discussed.

375. See, e.g., *Wis. v. Ill.*, 278 U.S. 367 (1929); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899); see also *United States v. Ariz.*, 295 U.S. 174, 184 (1935).

376. 266 U.S. 424 (1925).

377. *Id.* at 425-26. See also *Rio Grande*, 174 U.S. at 709 (the Supreme Court used a state water diversion to illustrate the extent of jurisdiction under § 10 of the 1980 Act); see *infra* text and notes at notes 396-98.

2. Did Congress Intend for the RHA to Reach State Water Allocations?

The consistent congressional policy of deference to western state water law cannot be ignored.³⁷⁸ The statutes cited by the state in its briefs before the Court clearly evidence the intent of Congress to allow the western states to govern the appropriation and allocation of their surplus waters.³⁷⁹ This history of deference does not, however, necessarily support an argument that the RHA should not apply in the context of state water allocation projects.

Neither the RHA, nor its legislative history, expressly addresses the issue of whether Congress intended the RHA to cover water diversions authorized by state water law.³⁸⁰ The great weight of authority suggests, however, that Congress intended the RHA to apply to state-authorized water allocation projects in the same manner the Act would apply to any other activity coming within its restrictions. First, the legislative history of the RHA indicates that no such general exception to the coverage of the Act was intended. Second, the deference to state water law expressed in other federal statutes does not warrant an implication that the RHA should not apply to such water diversions. Third, a special construction of the statute would be contrary both to the established policy of reading the RHA broadly and to the clear weight of precedent. Each of these elements must be considered at greater length.

a. Legislative History

The legislative history of the RHA does not expressly indicate that state water diversions are included under the Act.³⁸¹ However, the history of the Act suggests in several ways that an exemption of all state water diversions was not contemplated by this omission. First, the RHA was, at least in part, a response to a series of Supreme Court decisions which held that a specific congressional statute was needed to abate or prevent obstructions to navigable waterways.³⁸²

378. *See supra* text and notes at notes 62-78.

379. *Id.*

380. 33 U.S.C. § 403 (1976). *See supra* note 150 for text of Act, *see supra* text and notes at notes 188-89 for discussion of the Act's legislative history.

381. California argued that in the light of the established federal policy of deference, the absence of express inclusion means that state water projects were not intended to be covered by the Act. *See supra* text and notes at notes 365-70.

382. *See supra* notes 146-48.

No nonstatutory means of protecting navigability has arisen since these decisions. Thus, the primary motivation for the initial passage of the Act undermines the state's contention that the federal interests in navigation can be protected by some means other than the RHA.

Moreover, the obstructions that abounded prior to passage of the original RHA were largely authorized by state laws or state franchises.³⁸³ The intent of Congress to assert the paramount federal authority over navigation and thus to override *all* forms of state-authorized interference was expressed during debate on the 1890 Act on the floor of Congress.³⁸⁴ Despite this legislative history, the Supreme Court interpreted the poorly drafted 1890 Act as not prohibiting state-authorized obstructions.³⁸⁵ This interpretation of the 1890 Act led to one of the changes made for the 1899 Act. In that legislation, Congress explicitly limited the states' ability to authorize obstructions.³⁸⁶ This change underlines the intent of Congress to protect the navigability of its waterways from all forms of interference. Thus, the legislative history of the RHA, while not specifically stating that water allocations were to be included, suggests that a broad exclusion of all state water diversions from the provisions of the Act was not intended by its framers.

b. Other Federal Statutes

The deference to state water law expressed in other federal statutes does not warrant an implication that the RHA should not apply to state-authorized water diversions. The petitioners in *California v. Sierra Club* argued that the broad congressional delegation of authority to the western states to make their own water law indicates that any intent to limit this authority with the

383. See *supra* cases cited at note 148. See generally Power, *supra* note 159, at 506.

384. See 21 CONG. REC. 8605 (1890). Indeed, the structure of the 1899 Act suggests that when Congress intended state authorization to be enough they stated so outright. Section 9 contains the limits on state ability to authorize obstructions. 33 U.S.C. § 401 (1976). See *supra* note 149.

385. *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211, 215 (1900). Section 10 of the 1890 Act stated that the prohibited obstructions must be "affirmatively authorized by law." The Supreme Court interpreted this ambiguous language to mean that either state or federal authorization would be sufficient. *Id.* at 215.

386. The language "affirmatively authorized by law" in the 1890 Act was changed to read "affirmatively authorized by Congress" in the 1899 Act. 33 U.S.C. § 403 (1976). See generally Comment, *supra* note at 188. See also KOONCE LECTURE, *supra* note 147, at 287, 289 (Judge Koonce, one of the principal draftsmen of the 1899 Act supports this reading of the legislative history).

RHA would have to be clearly expressed.³⁸⁷ However, a careful examination of the statutes in which this deference appears, and of the court opinions interpreting these statutes, indicates that the federal power to protect navigable waters, exercised by the enactment of the RHA, is not limited by the policy of deference.³⁸⁸ It is important to examine in greater detail how the federal policy of deference relates to the federal power to protect navigation.

The Mining Act of 1866³⁸⁹ and the Desert Land Act of 1877³⁹⁰ were the early federal statutes recognizing the western states' right to make their own water law.³⁹¹ Neither statute, however, suggests that the federal government intended to limit its ability to protect navigable waters in any way.³⁹² In fact, Supreme Court decisions interpreting these statutes have held that they do not restrict the federal government's power over navigable waters.³⁹³ For example, in *United States v. Rio Grande Dam & Irrigation Co.*,³⁹⁴ the defendant argued that these early acts conferred upon the states the unrestricted right to appropriate waters of a navigable stream.³⁹⁵ The Supreme Court, while affirming the broad control of the states over their waters, rejected the idea that the federal government had given up control over navigable waters in this legislation.³⁹⁶ Further, the Court held that even if these early statutes could be construed as having limited the ability of the federal government to protect

387. State Brief at 37-39.

388. This position is well supported by an early, leading authority on western water law and advocate of local control over western waters. 1 KINNEY, IRRIGATION AND WATER RIGHTS 578, 588-97, 1155 (2d ed. 1912).

389. Ch. 262, 14 Stat. 253 (1866). See *supra* note 60.

390. Ch. 107, 19 Stat. 377 (1877). See *supra* note 61.

391. See *supra* text and notes at notes 55-64. See also *Cal. v. United States*, 438 U.S. 645, 656-58 (1978); *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

392. By its terms, the Desert Land Act was limited, giving state control over only surplus nonnavigable waters. See *supra* notes 61-63.

393. See, e.g., *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 159 (1935). In this case the Court explicitly recognized the strong power of the states to control their water but found one limitation on that power to be "that of the general government to secure the uninterrupted navigability of all navigable streams." See also *Kan. v. Colo.*, 206 U.S. 46, 86 (1907) (recognizing same exception to states power); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899). Accord *Cal. v. United States*, 438 U.S. 645, 662 (1978). See *supra* note 64.

394. 174 U.S. 690 (1899).

395. *Id.* at 702-08.

396. The Court said:

Obviously by these acts [the Desert and Mining Acts], so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to the continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant

navigability at the time they were enacted, the later passage of the 1980 Rivers and Harbors Act would be controlling;³⁹⁷ the RHA was, in the Court's opinion, clearly intended to limit the state's ability to interfere with the navigability of a stream.³⁹⁸

Similarly, the statutes enacted after the passage of the RHA in 1899³⁹⁹ do not indicate that Congress, in expressing its policy of deference to state management of its water resources, in any way limited the coverage of RHA.⁴⁰⁰ In its argument, the state relied heavily on the statement of congressional policy in section 8 of the Reclamation Act of 1902⁴⁰¹ which, as discussed above,⁴⁰² recently received an expansive interpretation by the Supreme Court in *California v. United States*.⁴⁰³ However, not only is there no express statement in that statute limiting the scope of the RHA, but the expression of policy in section 8 is limited by its terms to a restriction of federal interference with state law arising out of the operation of the Reclamation Act itself.⁴⁰⁴ In addition, the Supreme Court in *United*

... the right to appropriate the waters or the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits.

Id. at 706.

397. The Court said:

But whatever may be said as to the true intent and scope of these various statutes, we have before us the legislation of 1890 As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage;

....

Id. at 70.

398. The Court said:

Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of state statutes, it is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent.

Id. at 708.

399. See *supra* text and notes at notes 65-78.

400. Were the statutes enacted after passage of the 1899 Act to be construed as the state urged, they would necessarily operate as implicit partial repeals of that statute. Repeals by implication are not favored. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978); *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974).

In addition, when Congress has desired to remove Corps jurisdiction over activities falling within the scope of § 10, it has done so directly. See, e.g., § 154 of the Water Resources Development Act of 1976, 33 U.S.C. 591 (1976) (§ 10 prohibitions of wharves and piers shall not apply to any intrastate water which is only "navigable" on basis of historical use); see also *Nat'l Wildlife Fed. v. Alexander*, 613 F.2d 1054, 1064 (D.C. Cir. 1979).

401. 43 U.S.C. § 383 (1976). See *supra* note 71 for the text of this provision.

402. See *supra* text and notes at notes 73-78.

403. 438 U.S. 645 (1978).

404. Section 8 states: "Nothing in this Act [is intended to interfere with state law] relating to the control, appropriation, use, or distribution of water used in irrigation." § 8, 32 Stat. 390 (emphasis added).

States v. California, while enunciating a broad statement on the federal policy of deference to state water law, explicitly recognized that state power over its streams was limited by the federal power to protect navigability.⁴⁰⁵

3. Should the Corps' Jurisdiction Over State Water Diversions Be Limited?

In its briefs before the Supreme Court, California argued that, if the RHA was applicable to state-authorized water diversions, its restrictions should be limited in application to those diversions which substantially impair actual navigation.⁴⁰⁶ The state argued that such a common law rule of construction was necessary to avoid conflict with the congressional policy of deference and that it was more consistent with the purpose of the RHA.⁴⁰⁷ The basis for this argument is thus the same as that used in the state's intent of Congress argument.

The state's argument that a common law rule should be made limiting the jurisdiction of the Corps depends on the existence of a conflict between the literal application of the RHA and the congressional policy of deference.⁴⁰⁸ This argument seems bound to fail for two reasons. First, the congressional policy of deference to state water law does not conflict with application of the restrictions of section 10.⁴⁰⁹ As discussed at length above, the deference accorded by Congress to state management of western water resources is distinct from Congress' power to protect navigation.⁴¹⁰ Thus, requiring a permit for water allocation activities within the scope of the Corps' jurisdiction will not conflict with the congressional policy of deference to state control of its water resources. Moreover, it is clear that the congressional policy of deference can be accommodated by adding the state's interests in allocating water to the balancing process which attends review of permit applications.⁴¹¹ Therefore, a

405. 438 U.S. at 662. The court explicitly acknowledged the existence of two exceptions to state control of waters which were carved out by the Supreme Court in *Rio Grande*, 174 U.S. at 703. See *supra* note 64 for the two exceptions carved out by the Court in *Rio Grande*.

406. State Brief at 39-44; State Reply Brief at 6-8.

407. *Id.* See *supra* text and notes at notes 362-74.

408. As support for the adoption of a common law rule, the state cited the rule of statutory construction that, where literal application of a statute would lead to absurd results or conflict with other statutes, the two conflicting policies or statutes should be harmonized. See *Cox v. Roth*, 348 U.S. 207, 208-09 (1955); 2A SUTHERLAND, STATUTORY CONSTRUCTION § 53.01 (C. Sand ed. 1973). See also *supra* note 369.

409. Absent such a conflict between the assertion of jurisdiction by the Corps and the congressional policy of deference there need be no harmonizing. *Id.*

410. See *supra* text and notes at notes 389-405.

411. See *supra* text and notes at notes 165-76 for discussion of the review process. See *infra*

special rule of construction limiting the application of the RHA is not needed to avoid conflict with the congressional policy of deference.

Second, assuming *arguendo* that the normal operation of the RHA does conflict with the congressional policy of deference, limitation of the Corps' jurisdiction in the manner suggested by the state would be inconsistent with the form and purpose of the RHA. The state argued that, in order to avoid the conflict, the Corps' ability to assert jurisdiction over state water allocation activities should be limited to those "obstructions that *substantially* affect the 'capacity' of the waters to support *actual* navigation in the area *where commerce actually takes place*."⁴¹² This limitation of the Corps' ability to assert jurisdiction conflicts with the form of the statute. The RHA is a permit statute; the Corps is supposed to determine whether an activity coming within the scope of its jurisdiction is a reasonable or unreasonable obstruction to navigable capacity.⁴¹³ To limit the Corps' assertion of jurisdiction over an activity normally within its scope by requiring a preliminary finding of a particular degree of interference confuses the criteria for assertion of jurisdiction with those for denying a permit.⁴¹⁴ Moreover, a limitation on the ability of the Corps to assert jurisdiction over activities normally within its purview will conflict with the statute's purpose of effectively protecting the navigable capacity of this nation's waterways.⁴¹⁵ A limitation of the Corps' jurisdiction to activities which significantly affect navigable capacity ignores the problem of the cumulative effects of water allocations. The cumulative effects of individual water diversions, which would not by themselves come under the Corps' review under the limiting construction proposed by the state, may cause significant damage to the navigable capacity of a waterway. In the normal course of events, the Corps must consider the cumulative effect in determining whether to issue a permit to an activity within its

text and notes at notes 435, 442-45 for discussion of how the federal policy of deference and the states interests will be considered in the review process.

412. State Reply Brief at 6.

413. *Wis. v. Ill.*, 278 U.S. 367, 413 (1929). The Court said:

The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.

Id.

414. *Id.* See also *United States v. Republic Steel Corp.*, 362 U.S. 482, 486-87 (1980); *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 429 (1925); KOONCE LECTURE, *supra* note 147.

415. See *supra* text and note at note 190.

jurisdiction.⁴¹⁶ Finally, a requirement that a water project or diversion, otherwise within the scope of section 10, be found to have a particular degree of effect on a waterway *before* the Corps may assert jurisdiction conflicts with the purpose of the statute by the sheer inefficiency of regulation such redundancy would promote.⁴¹⁷ Thus, a limitation of the ability of the Corps to assert jurisdiction over activities already within its jurisdiction would conflict with the purpose of the RHA to protect navigable waters.

In summary, the primary legal question left open by the Supreme Court decision in *California v. Sierra Club* seems unlikely to be resolved by imposing a limitation of the RHA's applicability to state-authorized water allocations. Rather, the Corps should be able to require permits for any water allocation activity coming within the broad scope of its authority under section 10. The degree to which section 10 can, should, and is likely to be used by the federal government to assert a greater measure of control over the allocation of western waters will be the focus of the final section of this article.

V. IS THE RHA A VIABLE TOOL FOR A GREATER MEASURE OF FEDERAL CONTROL OVER WESTERN WATER ALLOCATIONS?

A. *Can the RHA be Used to Affect a Greater Degree of Federal Control Over Western Waters?*

The potential utility of section 10 as a tool for greater federal control over water allocations lies in the breadth of its jurisdiction⁴¹⁸ and in the broad public interest review of its permit process.⁴¹⁹ Given the broad interpretation of the Act's territorial and subject matter jurisdiction, it seems clear that much of the *prospective* water allocation activity in the western states could be subjected to the permit requirements of section 10.⁴²⁰ The permit process provides the means

416. 33 C.F.R. § 320.4(a)(2)(IV) (1981). See *supra* text and note at note 172.

417. Such determinations of effect on a navigable waterway are generally reserved for the permit process itself. A court rule of interpretation which would limit the RHA in this way would thus go against the general court policy of reading this statute broadly to effectuate its purpose. See *supra* note 190.

418. See *supra* text and notes at notes 191-283.

419. See *supra* text and notes at notes 284-313.

420. The Corps probably would not assert jurisdiction over many of the water allocations already authorized by state law. First, the Corps may be estopped in many cases from prosecuting failure to apply for a permit for past water allocations as such enforcement of the act would be a radical departure from past practice. *United States v. Penn. Indus. Chemical Corp.*, 411 U.S. 655, 670-75 (1973) (the Supreme Court ruled that in a criminal prosecution under § 13 of the Rivers and Harbors Act for the discharge of refuse, the trial court erred in excluding evidence that the defendant was affirmatively misled by the Corps' past administrative prac-

by which the federal government can take a greater measure of control over western water allocations.⁴²¹ The actual amount of federal control over water allocation depends on the extent to which western water allocations would be within the Corps' jurisdiction and the extent to which the permit process could be used by the federal government to regulate water allocations.

The territorial jurisdiction of the Corps under the RHA is quite broad. Except for the possible limitation that the waterways be "navigable waters of the United States,"⁴²² the current definition of navigability at law brings many of the waterways in the west under the direct protective jurisdiction of the Corps.⁴²³ In addition, the Corps can indirectly assert jurisdiction over land or nonnavigable waters if activities or structures in those areas affect a navigable waterway in a prohibited fashion.⁴²⁴ Thus, the Corps' territorial jurisdiction is potentially broad enough to encompass a major portion of the west's waterways.

Furthermore, a large portion of the water allocation activities in the west potentially fall within the subject matter jurisdiction of the Corps and are subject to the permit requirements.⁴²⁵ As discussed above,⁴²⁶ much of the west's water supply is diverted from surface streams and then allocated to various uses according to state law.⁴²⁷ Section 10 has been interpreted broadly to cover water diversions both from navigable portions of a waterway and from nonnavigable tributaries if the diversion affects the navigable portions.⁴²⁸ All

tion). *But see, e.g.,* Weiszmann v. Dist. Eng'r, 526 F.2d 1302, 1305-06 (5th Cir. 1976) (the Fifth Circuit rejected such a defense to Corps' prosecution for failure to acquire a permit).

It seems more likely that a decision to regulate state waters allocation activities more actively would be gradually phased in via "grandfather clauses." *See, e.g.,* 33 C.F.R. § 328.5(b) (1981). These regulations stipulate that a permit will not be required for work commenced or completed before a certain date within established harbor lines. Work within these harbor lines had traditionally been exempt from permit requirement, but new regulations required permits for such activities. Hence the "grandfather clause" to excuse those persons who relied on old regulations.

421. *See supra* text and notes at notes 284-313.

422. *See supra* text and notes at notes 221-31.

423. *See supra* text and notes at notes 218-19.

424. *See supra* text and notes at notes 239-47.

425. *See supra* text and notes at notes 267-83.

426. *See supra* text and notes at notes 26-28.

427. *See, e.g.,* Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).

428. *See, e.g.,* United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 708-09 (1899); Cal. v. Sierra Club, 451 U.S. 287 (1981).

However, the degree of effect on the navigable waters caused by the diversion which is necessary to trigger Corps' jurisdiction has recently been the cause of dispute. *See supra* text and notes at notes 276-83. The better supported view is that if the diversion, whether from a navigable water or from a nonnavigable tributary, alters or modifies the condition or capacity of the navigable water then it is automatically within Corps' subject matter jurisdiction. *Id.*

water diversions and like activities which alter or modify the condition or capacity of navigable waters are within the jurisdiction of the Corps.⁴²⁹ A lowering of the level of a waterway is an alteration or modification under section 10.⁴³⁰ This effect almost automatically follows from a diversion of water from a waterway or one of its supplying tributaries.⁴³¹ Thus, the Corps potentially may require permits for much of the water diversion activity of the western states.⁴³²

Once state water allocations projects are considered within the jurisdiction of the Act, the federal government will be able to affect a greater measure of control over state water allocations through the permit process itself. The primary mechanism through which this control would be exercised is the broad public interest review.⁴³³ In the public interest review the Corps must consider and balance all factors relevant to the particular permit request.⁴³⁴ In this broad review of a permit application the Corps must consider not only the state's interests in allocating its water⁴³⁵ and the effect of the diversion on navigable capacity, but must also consider a broad range of other factors.⁴³⁶ The Corps is required by law to consider the environmental effects and to consult with other federal agencies;⁴³⁷ further, the Corps' review power is expansive enough for it to consider any conflicting federal or interstate need for the water involved in the proposed diversion, as well as the growing need for conservation of water resources.⁴³⁸ In short, the permit process can function as a federal overview of state water law.

429. See *supra* cases cited at notes 427-28.

430. See *Sanitary Dist.*, 266 U.S. at 423-26; *Sierra Club v. Morton*, 400 F. Supp. at 632.

431. *Id.*

432. The state of California in its briefs before the Supreme Court indicated its belief that the statute, read broadly, would apply to much of the state's water allocation activities. State Brief at 13.

433. See *supra* text and notes at notes 166-80, 284-313.

434. See *supra* text and notes at notes 172-76, 296-313.

435. See 33 C.F.R. § 320.4(j) (1981). It is at this point that the federal policy of deference and the concerns which underlie it will have to receive consideration, rather than before the Corps asserts jurisdiction. Given the strong policy of deference to state control recognized by the Supreme court in the recent cases of *Cal. v. United States*, 438 U.S. 645 (1978) (discussed *supra* text and notes at notes 72-78) and *United States v. N.M.*, 438 U.S. 696 (1978) (discussed *supra* text and notes at notes 107-15), it seems clear that the state's interests in allocating water as it sees fit will have to be given great weight. See *infra* text and notes at notes 442-43.

436. 33 C.F.R. § 320.4 (1981). See *supra* text and notes at notes 172-76, 296-313.

437. *Id.*

438. In regard to the consideration of competing federal needs for water, the Supreme Court has upheld denial of a § 10 permit for analogous reasons. In *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933), the Court upheld denial of a permit for nonnavigational concerns specifically because the construction of the wharf would increase land values of land soon to be condemned by the federal government. See *supra* text and notes at notes 292-95.

Not only can the federal government thus make sure that its interests in water and matters of environmental protection and conservation are considered, it can also see that they are protected. If the Corps determines that the balance of interests weighs against the issuance of a permit, it can deny the application or issue the permit with conditions imposed to protect the public interests.⁴³⁹ Thus, the Corps has veto power over state-authorized water allocations should they conflict with other interests.⁴⁴⁰ Perhaps more importantly, the Corps could use its open-ended power of review to condition permits so as to protect federal interests, protect the environment, and to promote water conservation.⁴⁴¹ Of course, the Corps' decisions are fully reviewable.⁴⁴² It seems likely that, given the congressional policy of deference to state water law, the Corps' decisions to deny or condition permits would receive close judicial scrutiny.⁴⁴³ Still, the RHA is theoretically adaptable for use by the federal government to achieve a greater measure of control over western water allocations. It is not clear, however, that the federal government will use the RHA in this manner.

B. Is the RHA Likely To Be Actively Used in the Context of Western Water Allocations in the Near Future?

In the recent past, section 10 has been the focus of attempts to use the RHA for more active federal protection of nonnavigable in-

In the context of a review of an application for a water allocation permit the Corps would thus be able to consider the possibility of competing demands for the water in question.

439. See *supra* text and notes at notes 176-80, 307-11.

440. See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (Corps' permit denied for nonnavigational concerns). See *supra* text and notes at notes 307-11.

441. 33 C.F.R. §§ 325.2(a)(6), 325.5(a)(2), 325.8(b) (1981).

Aside from the reviewability of any Corps' action to determine reasonableness of an action there is no apparent limit on the Corps' power to condition permits to protect the public interest. See *supra* text and notes at notes 176-80.

442. See *supra* text and note at note 180.

443. The Supreme Court in *Cal. v. United States*, 438 U.S. 645 (1978) and *United States v. N.M.*, 438 U.S. 696 (1978), has indicated that it takes the congressional deference to state water law seriously; thus, it seems likely that a denial or conditioning of a permit will receive close scrutiny.

The decision in *New Mexico* may indicate the degree of scrutiny to which Corps' actions in this context may be subject. As discussed above, see *supra* text and notes at notes 107-55, the statute under which the federal government was claiming an implied reserved right to water was subjected to a very strict and literal interpretation by the Supreme Court. The Supreme Court's method in that case might also apply in the context of the review of a Corps' permit denial. Insofar as the permit is denied or conditioned to protect navigation, the Corps is likely to be upheld as this was the purpose of the RHA as originally enacted. Similarly, insofar as a permit is denied for environmental reasons, the Corps would appear to be on solid ground as the impetus for this aspect of the public interest review comes from clearly identifiable con-

terests.⁴⁴⁴ Because it is a permit statute with broad jurisdiction, the RHA is a prime candidate for use beyond its original purpose. The impetus for the activist use of the statute has come from both within and without the federal government, primarily in the context of environmental protection.

In 1970, the House Committee on Government Operations urged the Corps to expand its permit process to consider more actively the environmental effects of projects within its jurisdiction.⁴⁴⁵ Specifically, it suggested that the Corps be especially solicitous of the effects of projects on wetlands and other ecologically delicate areas.⁴⁴⁶ At the same time, the Committee urged that the Corps reevaluate its laissez-faire attitude towards drawing harbor lines⁴⁴⁷ and more vigorously enforce the Refuse Act.⁴⁴⁸ Two years later, the same committee urged the Corps to use its jurisdiction to its fullest extent to protect the environment.⁴⁴⁹ Thus, there is precedent for an expansive use of the RHA by the federal government.

Through the 1970's, an expansive interpretation of the RHA was the theoretical basis of private parties and public interest groups for many environmental suits. The willingness of many courts to imply a private right of enforcement under the Act⁴⁵⁰ prompted increasing use of the RHA by environmental groups to force consideration of

gressional policies and statutes. However, if a permit is denied for other reasons, such as protection of federal needs for water, it seems likely that, on the basis of *New Mexico*, such a decision would be carefully scrutinized and, thus, may not survive.

444. See *infra* text and notes at notes 448-51. See also *supra* text and notes at notes 314-54. *Cal. v. Sierra Club* is an example of such use.

445. H.R. REP. NO. 917, *supra* note 290.

446. *Id.* at 6.

447. *Id.* at 6. See *supra* note 199. See generally Power, *supra* note 159, at 509-10 for a discussion of harbor lines.

448. H.R. REP. NO. 917, *supra* note 290, at 14-18. The Committee suggested that the Refuse Act, § 13 of the RHA, 33 U.S.C. § 407 (1976) constituted a potentially powerful weapon for combating pollution in navigable waters. Section 13, like § 10, received broad interpretations over the years. See *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). The next two years saw the attempted use of the so-called Refuse Act to prevent water pollution. President Nixon established a formal § 13 permit program on Dec. 23, 1970. See Comment, *supra* note 188, at 170. Problems arose with these attempts and the permit process under § 13 ended with passage of the 1972 Amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1342 (1976). For a criticism of the use of the Refuse Act in this manner, see Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483, 485 (1972).

449. H.R. REP. NO. 1323, *supra* note 315, at 16-26. Some Corps' districts have proven more committed to the protection of the environment than others. See Barker, *supra* note 146, at 142.

450. *E.g.*, *Potomac River Ass'n, Inc. v. Lundberg, Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 357 (D. Md. 1975), see also *Lavagino v. Porto-Mix Concrete, Inc.*, 330 F. Supp. 323, 325-26 (D. Colo. 1971). Cf. *Red Star Towing & Transp. Co. v. Dep't of Transp.*, 423 F.2d 104, 106 (3d Cir. 1970).

the environmental impact of various activities arguably within Corps' jurisdiction.⁴⁵¹ Despite the broad use of the RHA in the recent past and the present motivation for such expansive application in the context of water allocations, however, it seems unlikely that the RHA will be actively applied in this context in the near future.

The primary reason for this conclusion lies in the recent decision by the Supreme Court in *California v. Sierra Club* not to allow private enforcement of the Act.⁴⁵² This decision effectively precludes the possibility that expansive application of the RHA will come from the private sector. Without private enforcement of the Act, it seems unlikely that the purview of the Act will be enlarged in the near future. At this time, the federal government is in a period of retrenchment; the Reagan administration is cutting back on federal regulation in the area of environmental protection⁴⁵³ and is in the process of handing power back to the states.⁴⁵⁴ In this atmosphere, the Corps is not likely to actively regulate state water allocations absent a significant threat to navigation interests.⁴⁵⁵

Despite the present political atmosphere, the RHA still provides the federal government with the potential power to take a more active role in western water allocations without passing new legislation. As long as conflicts exist over the use and control of western waters and the need exists to reform water policies, the RHA could be used actively by the federal government. The wisdom of using this statute to foster greater federal involvement in water law is questionable. The final section of this article will address the problems inherent in such a use of the RHA.

451. See, e.g., *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth.*, 359 F. Supp. 611, 639 (E.D. Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973); *Alameda Cons. Ass'n v. Cal.*, 437 F.2d 1087 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971), as interpreted by *Sierra Club v. Leslie Salt Co.*, 354 F. Supp. 1099, 1104 (N.D. Cal. 1972).

452. See *supra* text and notes at notes 23-25, 372-73.

453. See generally Peters, *What's Watt in Surface Mining Regulation—The Unsteady Balance of State and Federal Authority Under SMCRA*, 10 B.C. ENV'T'L. AFF. L. REV. _____ (1982) (a discussion of the recent cutbacks in federal regulation of strip mining). See also 47 Fed. Reg. 1,689-1,739 (1982). The President's Task Force on Regulatory Relief has prompted a great many proposed changes to government regulations. One agency threatened by the proposed regulation reform is the Corps' permit program. *Id.* at 1,697-98.

454. President's State of the Union Address, 18 WEEKLY COMP. PRES. DOC. 76 (Jan. 26, 1982).

455. See *supra* note 453. The Corps' permit program is unlikely to escape the present "reforms" unscathed.

*C. Should the RHA Be Used by the Federal Government
to More Actively Oversee Western Water Allocations?*

While active use of the RHA by the federal government to gain a greater measure of control over western water allocations seems both plausible and supportable in law, it is not clear that the Act should be used in this manner. There are serious questions whether the oversight available through the RHA would just create another layer of confusing, redundant regulation exacerbating the federal-state conflict over control of water while alleviating few of the identified problems.⁴⁵⁶ The factors militating against such use of the RHA arise out of the inherent limitations of using a statute for purposes for which it was not intended, and from weaknesses in the permit process.

Difficulties arise from using a statute to achieve ends for which it was not intended. If it is assumed that the answer to present conflicts over western waters is a centralization of power in the federal government,⁴⁵⁷ the RHA has major limitations. First, the RHA is only indirectly applicable to water allocations. Unlike a statute expressly enacted to regulate water diversions,⁴⁵⁸ the section 10 permit process requires a demonstrated effect on a navigable water before the Corps may assert jurisdiction and regulate water diversions. This indirect nature of the federal control seems likely to limit the usefulness of the statute. In addition, and perhaps more important, the indirect nature of the control seems likely to result in inconsistent enforcement.⁴⁵⁹ The enforcement mechanism of the Corps depends to a large degree on complaints of other public agencies and public interest groups.⁴⁶⁰ Thus, enforcement of the Act is generally inconsistent, depending more on the degree of public op-

456. See *supra* notes and text at notes 79-143; see also Harrison & Woodruff, *supra* note 420 at 1978-80 (suggesting that, in addition to causing delay and inconvenience, regulation may interfere with property rights).

457. It is not in fact clear that a shift of power to the Federal government in this area is desirable.

458. See Hanks, *supra* note 14, at 35 (a hypothetical posed of what new legislation to regulate this area would be like, the major difference being that a new statute would be applied directly to regulate water allocations and would probably go to the full scope of the federal navigation power).

459. See *supra* text and notes at notes 312-13.

460. See 47 Fed. Reg. 1,697-98 (1982). Dependence on outside pressure for enforcement is one of the problems with the Corps regulating program identified by the Presidential Task Force on regulatory relief. See also Power, *supra* note 159, at 554-55.

position than the degree of public interest involved. States are unlikely to apply voluntarily for the Corps' permits for water allocations only arguably within the ambit of the Act.⁴⁶¹ Therefore, the application of the Act in this context is likely to depend a great deal on the enforcement mechanism of the Act, resulting in inconsistent application of the section 10 restrictions.

In addition, there is a problem, perhaps not insurmountable, with the use of the Corps as the agency asserting federal control over state water allocations. The Corps' traditional area of expertise is in protection of navigation and development, not in weighing the competing needs and uses for water resources.⁴⁶² Thus, the Corps may not be qualified to make these determinations, at least not initially.

Finally, insofar as the motivation for increased federal control of western waters is reform of the problems of western water law,⁴⁶³ the RHA seems likely to fall short. Despite the breadth of its potential coverage, it will not cover all water allocation activities;⁴⁶⁴ nor does it seem adaptable to consideration or rectification of all of the problems in western water.⁴⁶⁵ Thus, the likely result of these limitations is exacerbation of the confusion already attendant to the federal-state division of power over western waters,⁴⁶⁶ with limited benefits.

Despite these limitations inhering in the RHA as a general federal regulatory tool over western waters, the Act still seems adaptable for use by the federal government to achieve at least some of its potential goals. Weaknesses in the permit process as it works in

461. See, e.g., *Cal. v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775 (1981).

462. However, to varying degrees, the Corps has adapted itself to its expanded permit process and public interest review. One commentator considers the greatest strength of the permit process to be the Corps' role as a mediator, balancing the conflicting views of the public and other agencies with its own fundings on the effect of navigation. Power, *supra* note 159, at 547-56.

Were the federal government to adopt a clearer policy toward water allocations the Corps could probably adapt to a greater role in western water allocations.

463. See *supra* text and notes at notes 79-143.

464. For example, in the opinions of several recent court decisions, the RHA is limited in application to "navigable waters of the United States," see *supra* text and notes at notes 221-31. Under the modern interpretation of the extent of the federal navigation power, a new federal regulatory statute would have no such limitation. Despite the evolution of many aspects of the RHA, the Act is likely to be limited by its place in history. See *supra* note 230.

465. Most notably, it is not clear that the broadest interpretation of the RHA would allow Corps' intervention into the area of ground water mining. Ground water mining—withdrawals from aquifers made at rates greater than net recharge—is a growing problem in the western states. The problems stemming from such mining were a major focus of President Carter's Water Policy Review. See *supra* note 140.

466. See *supra* text and notes at notes 76-143.

practice suggest, however, that the greater measure of federal control available through active use of the RHA may not serve any useful purpose.⁴⁶⁷ The weaknesses of the permit process can be illustrated by examining the degree of environmental protection afforded by the Act.

The shortcomings of many of the western states' laws in adequately considering the environmental effects of water allocations have been discussed.⁴⁶⁸ The Corps' permit process, which requires compliance with NEPA and consultation with other federal agencies, would theoretically alleviate this state weakness by providing a broader, more uniform review of the environmental impact of a particular project.⁴⁶⁹ It is not clear, however, whether the Corps' review of the environmental effects of water allocation projects would result in substantially better protection of the environment. First, despite the existence of federal environmental standards, the federal government has been as culpable as the states in putting environmental values second to economic concerns in the context of water development.⁴⁷⁰ Second, the Corps' commitment to environmental protection has been inconsistent, notwithstanding NEPA and the expanded decision criteria.⁴⁷¹ The inconsistent application of environmental protection is attributable to the decentralized character of the Corps' permit process which has led the different districts to take a variety of positions on the weight to be given to environmental factors.⁴⁷² One commentator has suggested that the degree of environmental commitment shown by a particular district office is closely related to the interest of the residents of the area.⁴⁷³ Therefore, insofar as a greater degree of federal involvement in western water allocation may be desirable for purposes of en-

467. Some of the problems with the permit process outlined below would be alleviated if the federal government adopted clearer standards and a clear policy toward the relative interests in the context of water allocations.

468. See *supra* text and notes at notes 42-45, 129-34.

469. See *supra* text and notes at notes 169-75, 296-306. Independent federal review of the environmental effects would theoretically have the added virtue of being less influenced by the traditional state emphasis on economic development.

470. See Policy Study, *supra* note 11 at 36,788-90. See generally Aiken, *supra* note 11.

471. See generally Barker, *supra* note 146, at 142-48. This commentator cited interviews with unidentified Corps officials of one district who admitted that EIS's were prepared only for projects which generated public opposition. Such a practice is clearly unacceptable under NEPA. *Id.* at 147.

472. *Id.* See generally Liroff, *Administrative, Judicial and Natural Systems: Agency Response to the National Environmental Policy Act of 1969*, 3 LOY. U. CHIC. L.J. 19, 29-30 (1972); Hoyer, *supra* note 158, at 29-35; Power, *supra* note 159, at 526-36, 547-56.

473. Barker, *supra* note 146, at 147; see Power, *supra* note 159, at 554-55.

vironmental protection, it is not clear that application of the RHA would result in more environmentally sensitive decisions.

The problems underlying the Corps' environmental review process carry over to the permit process as a whole and suggest that an expansive application of the RHA to state water allocations would, to a large extent, be redundant⁴⁷⁴ and, at worst, promote confusion and inconsistency. The open-ended decentralized nature of the permit process allows consideration of a broad range of criteria and promotes flexibility in the decision process; but it also has some negative implications. First, there is little guidance in the regulations for deciding what factors are relevant to proposed activities, or on how to weigh the relevant factors.⁴⁷⁵ The resulting uncertainty promotes narrow, ad hoc decision making,⁴⁷⁶ inconsistent results amongst the various districts, and an inordinate degree of influence by public interest groups and other public agencies.⁴⁷⁷ In summary, a broad application of the RHA to state water allocations, without changes in the permit process,⁴⁷⁸ would not necessarily serve any useful purpose. The likely result would be merely to add another layer of sometimes redundant regulation with inconsistent results.

VI. CONCLUSION

The scarcity of water in the western United States has made the use and control of the available water supplies matters of great concern to the western states. In response to the scarcity of water, a unique system of water rights developed in the western states. Most

474. See *supra* note 50 (general description of how one state's permit process operates). But see 33 C.F.R. § 320.4(j)(7) (1981) (district engineer can enter into an agreement with the states to process Army and state permits jointly, thereby cutting down on redundancies).

475. See 33 C.F.R. § 320.4 (1981).

476. See Power, *supra* note 159, at 551-56. "This fragmentation of decision making creates both the possibility of overlooking cumulative effects and the tendency to ignore some of the higher order questions. *Id.* at 552.

477. *Id.* at 551-66. Professor Power suggests that the major problem with the permit process is that the procedures are better designed to veto projects than to expedite them.

The procedures are well designed to allow the Corps to pick out and arrest projects that public agencies or significant private interest groups consider contrary to the public interest; but the procedures are not well designed to approve projects that, on balance, are in the public interest, but involve significant social costs and engender substantial opposition.

Id. at 554.

478. However, within the very real limitations of using the statute in a broader way at all, if the Corps adopted an express, detailed policy for dealing with water allocations in the permit process, a degree of federal oversight for environmental protection and water conservation purposes could prove valuable in the short run.

of the western states have also enacted comprehensive statutory schemes to administer the use and allocation of water in accordance with state defined goals. The federal government acquiesced in the development of western water laws and has, in many Congressional enactments directly and indirectly dealing with western waters, indicated that it would defer to the states' control of the use and distribution of their waters.

In more recent years, however, the federal and state governments have clashed over the use and control of western waters. The main source of the conflict has been the increase in federal need for water. The federal government has shown an increasing reluctance to submit to state water law to satisfy its needs and has employed several means to acquire rights to water independent of state law. In addition, a potentially more potent source of conflict lies in the need for a national water policy and for reforms of state water law. Recent years have seen several aborted federal initiatives for better protection of the environment and greater consideration of the need for conservation of water in water resource development. These conflicts and potential conflicts have left the division of power over western waters uncertain; the sources of the conflict raise the possibility that the federal government may in the future seek to take a more active role in the allocation of western waters.

While the federal government seems to have the power to take a more active role, it seems unlikely to exercise it in the form of new legislation in the near future. However, a recent case raised the possibility that an existing federal statute, section 10 of the Rivers and Harbors Act, could be employed by the federal government to achieve much the same purpose.

The Rivers and Harbors Act is the primary federal statute for the protection of navigable waters. Section 10 of the Act is a permit statute. Certain activities or structures in, or affecting, navigable waters are prohibited unless they have the prior approval of the Corps of Engineers. Section 10 is a broadly worded, but ambiguous statute. Courts, however, have consistently interpreted the coverage of the Act expansively. While the Act has no particular application to state water allocations on its face, court interpretations of the territorial and subject matter jurisdiction of the Act suggest that much of the west's water allocation activities are within the scope of its restrictions. Once a water project is subject to the restrictions, the federal government can assert a greater measure of control through the Corps' permit process. Although the statute was initially enacted to protect navigation, the Corps' power to review a project prior to

issuance of a permit has evolved far beyond consideration of only the effect that a proposed project has on navigation. Thus, section 10 of the RHA, given the breadth of its coverage and of its permit process, seems adaptable for use by the federal government to assert a more active role in western water allocations. *California v. Sierra Club*, however, a case involving application of section 10 to state water allocations, left open the question of the extent to which the RHA applied to state water allocations. In that case, the Supreme Court did not reach the State of California's argument that federalism concerns, namely the long history of Congressional deference to the state control of its waters, required either a complete exemption of state water allocations from the coverage of the Act or a limitation on the normal extent of the Corps' jurisdiction. An analysis of the state's argument, however, indicates that it should not prevail.

Nevertheless, while the statute can thus be used by the federal government to achieve a greater measure of control over western waters, and indeed the statute has been used to achieve nonnavigational goals in the past, it does not seem likely that it will be used actively in this context in the near future. As this article is written, the federal government is scaling down its regulatory efforts and is handing power back to the states. In addition, the Supreme Court has refused to imply a private right of enforcement under the Act; impetus for active use thus cannot come directly from the private sector.

Even if the government does sometime in the future attempt to actively employ the statute in this context, there are serious questions remaining as to the wisdom of such use. If a greater measure of federal control in the area of western water allocations is desirable, the RHA would not be the best vehicle for federal regulation. The RHA would add a layer of regulation while only partially addressing the problems raised by state allocation of water and may only exacerbate the present confused division of power over western waters. It is, furthermore, not clear that centralization of federal control over western waters in the federal government is even desirable. Some western states have begun to reform their laws and the preferred federal role may be in the form of providing incentive and direction to more state reform rather than asserting a greater measure of control.