STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 24578 and 24579 to Appropriate from the Underflow of the Santa Ynez River,	Order: WR 79-16
SANTA YNEZ RIVER WATER CONSERVATION DISTRICT, IMPROVEMENT DISTRICT NO. 1, Applicant,	Source: Santa Ynez River
	County: Santa Barbara
UNITED STATES BUREAU OF RECLAMATION, et al., Protestants.	

ORDER AMENDING AND AFFIRMING,
AS AMENDED, DECISION 1486

BY THE BOARD:

Three petitions for reconsideration of Decision 1486, which approved Applications 24578 and 24579 and authorized the issuance of permits therefore, having been filed, the Board having adopted Order No. WR 78-19, which granted the petitions for reconsideration, the Board having requested the filing of opening briefs and reply briefs concerning one issue raised in the petitions for reconsideration, the parties having filed briefs in the above-entitled matter, the Board having reviewed the administrative record in the above entitled matter finds as follows:

1. The three petitions for reconsideration were filed on behalf of the following:

(a) Interested party Santa Ynez River Water Conservation District (SYRWCD);

(b) Protestant Cachuma Conservation Release Board (CCRB); and

(c) Protestant United States Bureau of Reclamation.

Although the applicant Santa Ynez River Water Conservation District Improvement District No. 1, did not file a separate petition for reconsideration, the SYRWCD indicates that the applicant joins in the petition submitted on behalf of the SYRWCD.

2. In summary, the petition submitted by the SYRWCD requests some technical changes in Decision 1486; the petitions submitted by the CCRB and by the Bureau raise, with one exception, points considered and rejected by the Board in Decision 1486. The exception relates to issues raised by the United States Supreme Court's opinion in California v. United States, 98 S.Ct. 2985, decided July 3, 1978.

3. After careful consideration, we conclude that Decision 1486 should be modified in accordance with the technical changes requested by the SYRWCD and that all other requests for modificaton of Decision 1486 should be denied. In addition, our review of Decison 1486 indicates that an inadvertent omission and some minor errors should also be corrected. Finally, while we believe that Decision 1486 adequately addresses all but one point now raised by the CCRB and Bureau, we will reiterate our previous conclusions to assure that there is no doubt about our conclusion in this matter.

4. The petitions filed by the Bureau and CCRB raise the following basic issues

(a) Was State Water Rights Board authorized to condition the approval of Applications 11331 and 11332 to subordinate

the permits issued on said applications to later appropriations from the underflow of the Santa Ynez River watershed?

(b) Did the State Water Rights Board subordinate the permits issued on Applications 11331 and 11332 to later appropriations from the underflow of the Santa Ynez River for use within the Santa Ynez watershed?

(c) Does substantial evidence support the Board's findings that the only shortages to the South Coast area resulting from approval of the instant applications would be of surpluses and not of firm yield?

(d) Is Decision 1486 contrary to the public interest because it deprives an existing economy in the South Coast area of the County of Santa Barbara of water from the Cachuma Project in order to allow future development in the Santa Ynez River watershed?

(e) Is Decision 1486 inconsistent with Congressional directives for the Cachuma Project?[1/]

5. The Board addressed the first issue principally in paragraph 27 of Decision 1486. We concluded that the first in time, first in right, rule contained in Water Code Sections 1450 and 1455 must be read together with Water Code Section 1253 (authority to impose public interest conditions), Section 1255 (authority to reject applications not in the public interest), Section 1256 (duty to

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1. The issues enumerated in paragraphs 3(a) 3(b), etc. will be referred to for convenience as the "first issue", "second issue", etc., respectively.

consider the California Water Plan in determining the public interest), and Section 1257 (duty to consider the relative benefit to be derived from all beneficial uses of water), and that said authorities authorized but did not require the State Water Rights Board to protect the watershed of origin from diversions of water for use outside the watershed of origin. Neither the Bureau nor the CCRB in their petitions for reconsideration respond to the above legal analysis; rather they merely offer the bald conclusion that Water Code Sections 1450 and 1455 preclude the State Water Rights Board from taking such actions. If a petitioner desires this Board to change its decision on reconsideration, at least some analysis to respond to the Board's conclusions is necessary.[2/]

6. The second issue relates to whether the State Water Rights Board exercised its public interest authority to subordinate the permits issued on Applications 11331 and 11332 to later appropriations from the underflow of the Santa Ynez River for use

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2. The Board expects that a petitioner for reconsideration comply with the simple procedural and format requirements for petitions for reconsideration contained in Article 14.5, Subchapter 2, Chapter 3 of Title 23, California Administrative Code, commencing with Section 737.1, that a petitioner have a substantive basis for his petition, and that a petitioner provide sufficient analysis of such substantive basis. A reiteration of previous arguments with no new analysis is insufficient.

within the Santa Ynez River watershed. As pointed out in paragraph 20 and the immediately following paragraphs of Decision 1486, the Bureau and CCRB principally rely on their interpretation of the agreement dated October 7, 1949, between the Bureau and the SYRWCD, which is commonly known as the "Live Stream Agreement", to support their conclusion that Condition 11 of Decision 886 only protected "vested rights". As the Board pointed out in Footnote 11 of Decision 1486 there is no question that a purpose of the Live Stream Agreement was the protection of vested rights. The factual issue is whether it was the exclusive purpose. The Board cited pages 32 and 46 of House Document No. 587, 80th Congress Session as containing statements in support of the Board's conclusion that "the objective of the Cachuma Project...was to divert waters principally for use within the south coast area, that would otherwise waste to the ocean, and not to divert water which would normally flow down the Santa Ynez River and be beneficially used in that watershed." (See Footnote 11, page 15 of Decision 1486.) The CCRB asserts that pages 32 and 46 of said document support the CCRB's and Bureau's position that protection of vested rights was the only purpose of the Live Stream Agreement and do not support the Board's analysis, The CCRB cites specific statements' from those pages.[3/]

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3. The two references of the CCRB are as follows:

Paragraph 21 on page 32 states in part:

"Water would he released downstream to meet rights prior to those of the Bureau, and additional release

(continued on next page)

As Footnote 3 points out, the statements on those pages to which the Board was referring were not those cited by the CCRB. While selective references from the Board record in this matter arguably support either view as to what was the objective of the Cachuma

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3. (continued from page 5)

> would be made to the extent that the Santa Ynez district desires to purchase water from the development. The remaining water would be diverted to the south coast area...."

Paragraph (C) of the resolution adopted by the SYRWCD and reprinted on page 46 states in part:

> "...no water will be impounded by said reservoir which would otherwise flow past said dam site and be beneficially used by the riparian owners, overlying owners, and holders of other prior water rights below the dam." (Emphasis omitted.)

While these statements are contained on these pages, the Board was specifically referring in Footnote 11 to the following two statements on pages 32 and 46, respectively, of said document

Paragraph 21 on page 32 states in part:

> "The initial program herein recommended would include as its primary feature Cachuma Reservoir, with a capacity of 210,000 acre-feet, to store floodwaters of the Santa Ynez River which now waste to the ocean." (Emphasis added.)

The last whereas clause of the resolution adopted by the SYRWCD and reprinted on page 46 states in part:

> "Whereas this Board of Directors has been assured from time to time that said proposed dam will not impound any watters other than flood waters which would otherwise waste to the ocean, and that there will be released from such dam all the water which would normally flow down the Santa Ynez River and be beneficially used in this watershed." (Emphasis added.)

Project, or the intent of the parties to the Live Stream Agreement, a better approach is to consider all the references together, Such a review indicates that there is nothing in the record to persuade us that our previous conclusion regarding the Live Stream Agreement or Condition 11 was not supported by substantial, although conflicting, evidence in the record.

7. Several further comments concerning the second issue are appropriate.

(a) The CCRB charges that there is no reasonable basis for the alleged speculation in Footnote 11 concerning the distinction drawn by the Attorney General between "inchoate priority" and "water right". The Board did not decide in Decision 1486 whether there was a reasonable basis for that analysis. Rather, the Board pointed out the argument because it is one which is raised in interpreting the Live Stream Agreement and because it illustrates the difficulty in interpreting the Live Stream Agreement almost 30 years after its execution. The Board expressly declined to proffer an opinion on the validity of that analysis.

(b) Paragraph 28 of Decision 1486 discusses whether Condition 11 incorporated the entire provisions of the Watershed Protectionstatutes and concludes that it does not.
The CCRB alleges that it is illogical for the Board to conclude that Condition 11 applied the principle of the Watershed Protection Statute and that Condition 11 is inconsistent with the principle of the Watershed Protection Statute. The CCRB mischaracterizes the Board's conclusions contained in paragraph 28 of Decision 1486. The

principal purpose of the Watershed Protection Statute is "to reserve for areas where water originates some sort of right to such water for future needs which is preferential or paramount to the right of outside areas, even though the outside areas may be the areas of greatest need or the areas where the water is first put to use as the result of operations of the Central Valley Project." (28 Ops.Cal.Atty.Gen. 8, 10, 1955)[4/] This is the principle of the Watershed Protection Statute and it was incorporated into Condition 11. The principle is implemented in the Watershed Protection Statute by specifying a level of protection. As pointed out in Decision 1486, the level of a protection provided by the Watershed Protection Statute differs from that provided by Condition 11. This alleged anomaly, if that is what it is, may be simply explained. The State Water Rights Board possessed the authority but was not required to protect the Santa Ynez River watershed from diversions of water to the South Coast area. Assuming that the State Water Rights Board under its public interest authority could have fully applied the Watershed Protection Statute, a fortiori, it could provide less protection. Simply stated, the State Water Rights Board fashioned Condition 11 to meet the specific concerns and needs of the Santa Ynez River watershed. If the State Water Rights Board had intended to incorporate the entire Watershed Protection Statute into Condition 11, a discussion in Decision 886 concerning whether

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4. The Cachuma Project is not part of the Central Valley Project.

the South Coast area is an "area immediately adjacent thereto [that is to the watershed or origin] which can conveniently be supplied with water therefrom" would have been warranted. Neither the CCRB nor the Bureau offer a reasonable explanation why Decision 886 is silent on this issue, if Condition 1.1 was intended to incorporate the entire Watershed Protection Statute.

8. The third issue concerns the impact of the approval of Applications 24578 and 24579 on the firm yield of the Cachuma Project. The record amply reflects the fact that both the CCRB and Bureau characterized the impact of the approval of Applications 24578 and 24579 as a reduction in the firm yield of the Cachuma Project. Nonetheless, this characterization simply is not supported by the technical evidence submitted.

9. The Bureau prepared two operation studies for the Cachuma Project. The first or base study used the following assumptions and conditions:

(a) The criteria contained in Order No. 73-37 governed the release of water from Cachuma Reservoir. (1978 RT, p. 127, lines 2-6.)

(b) The previous seven-year critical dry period from October 1944 through September 1951 was assumed to recur. (1978 RT, p. 128, lines 3-5.)

(c) A return flow of 20 percent was assumed to occur. (1978 RT, p. 138, lines 15-22.)

(d) A downstream pumping demand of 18,400 afa was assumed to remain constant.[5] (1978 RT, p. 136, lines 25-28; 1978 RT, p. 137, lines 1-17.)

(e) Eight thousand acre-feet of water could be extracted from the Santa Ynez Sub-basin at a 20-foot depth.

The second study added a downstream pumping demand of 5,600 afa to the existing demand of 18,400 afa. (1978 RT, p. 127, lines 16-18.) Consequently, these two operation studies calculated the pumping demand with and without Applications 24758 and 24579. The results of these studies are tabulated in Table 1. Table 1 indicates that there will be delivered to the South Coast area an average of more than 22,000 afa under either study. The 22,000 afa safe yield delivery to the South Coast is based on the Bureau's study in 1969 which shows the safe yield of the Cachuma Project. to be 27,800 afa consisting of 24,800 afa from the reservoir (22,000 afa to the South Coast and 2,800 to SYRWCD) and 3,000 afa from Lecolote Tunnel (1978 RT, p. 126, 268 and 287). The evidence in the two operation studies is the basis for the Board's conclusion that the Bureau can deliver the firm yield of about 22,000 afa to the South Coast area during the seven-year critical dry period

(See Table on next page)

5. Assuming a return flow of 20 percent of the gross diversion would occur, the net downstream consumptive demand would be the amount of 14,820 afa. (1978 RT, p. 137, lines 18-23; 1978 RT, p. 138, lines 15-22.) The Toups Corporation recalculated the downstream consumptive demand in about 1972 to be 16,900 aga. (1978 RT, p. 251, lines 4-7.)

TABLE

Data Taken from Bureau's Exhibit 7 and 8

Year	South Coast Demand From Cachuma Reservoir	South Coast Diversions Without Pumping	South Coast Diversions With Pumping
1944-45	22,000	25,500	24,500
1945-46	22,000	28,000	28,100
1946-47	22,000	25,000	23,700
1947-48	22,000	21,900	21,300
1948-49	22,000	21,300	21,300
1949-50	22,000	21,300	21,300
1950-51	22,000	21,300	21,400
TOTAL	154,000	164,300	161,600
AVERAGE	22,000	23,400	23,000

This conclusion was confirmed in the examination of Darold Arbuthnot, a witness for the Bureau. This examination states in part:

"BY MR. RICE:

"Q. What is your name?

"A. Darold Arbuthnot.

"Q. What is your position?

"A. I am an engineer in the Bureau of Reclamation, Regional Irrigation, O&M Branch of the Water and Land Division.

"To clarify the question about delivering more than the safe yield on the first two years of the critical dry period, this has been practiced in the past. There is a higher -- excuse, me, there is a lesser risk in the first few years of the critical dry period.

"Just because it's calculated that the critical dry period is a seven-year period, doesn't mean it's always going to exist. And it's been discussed in the past that meetings with Santa Barbara County Water Agency each year annually, as far as I know. It has been the last two years -- I have been at both meetings requesting what degree of risk the water agency would like to take upon themselves in determining how much is sold.

"The 27,800 is what has been calculated as the safe yield that can be supplied for the seven-year period, but with this first few years they have taken chances and so they have sold more water, the Bureau has sold more water to them the first few years.

* * *

"MR. HATCH: You are saying this is a chance which the member units are willing to take even though they might end up short in a particular year thereafter?

"A. Right, but as a guide to go by, they are adding these annual purchases up and comparing them with the addition of the 27,800 for the same number of years.

* * *

"MR. HATCH: But if, in fact, they hadn't run the risk and they had stuck with 22,000 acre-feet per year during the first few years, you wouldn't have had these problems, these shortages, these reductions, would you, under either program?

"A. I think they would still have shortages because I think they are capable of using more water than that.

"MR. HATCH: They would have had shortages, but would the project have had shortages, would the project have been unable to deliver the Cachuma safe yield of 22,000 acre-feet to the Bureau every year?

"A. For seven years they would not have a problem delivering that. If the drought would have gone on they could have had problems in, say, the eighth year.

"MR. HATCH: But it is based on a seven-year period and that's what we are worrying about here?

"A. Yes." (1978 RT, pp. 168-171; emphasis added.)

10. The CCRB prepared their own study concerning the impact of the approval of Applications 24578 and 24579. The CCRB projected a loss of yield of about 1,000-1,650 afa, which they characterized as a loss of firm yield. (1978 RT, p. 257, lines 17-20.) The amount of the loss varies with the projected extent of return flow to the Santa Ynez River. However, these projections do not take into account the additional water available under Board Order No. WR 73-37, hereinafter referred to as the "New Release Schedule water". The New Release Schedule water was estimated initially to be an increase of yield of 1,500-3,000 afa and later to be an increase of 2,000-2,480 afa. (1978 RT, p. 241, lines 23-27; 1978 RT, p. 265, lines 7-28; 1978 RT, p. 266, lines 1-3; 1978 RT, p. 273, lines 21-26; 1978 RT, p. 275, lines 19-20.) While the Bureau apparently does not consider the New Release Schedule water for purposes of calculating firm yield, the Board knows of no reason not to consider the impact of Board Order No. WR 73-37. Accordingly, the Board concluded in Decision 1486 that the actual impact of the approval of Applications 24578 and 24579 is to reduce surpluses and not firm yield. This conclusion is based on the fact that the worst case impact projected by the CCRB of 1,650 afa is less than the average increase of yield from the New Release Schedule water of 2,000-2,480 afa. Even if the Board's conclusion to consider the impact of Board Order No. WR 73-37 is in error, automatic rejection of Applications 24578 and 24579 is not warranted for the reasons expressed in paragraph 34 of Decision 1486.

11. The Board discussed the fourth issue in paragraphs 31 through 35 of Decision 1486. The CCRR responds to the Board's analysis in Decision 1486 in part as follows:

> "If it [the State Water Rights Board and now the State Water Resources Control Board] has the authority to impose a watershed reservation under its public interest powers, it can also impose conditions on the exercise of the watershed reservation if the public interest would otherwise be impaired."

We agree. The Board acknowledged this legal conclusion when it stated in paragraph 35 of Decision 1486 on page 32 in part as follows:

> "This Board continues to exercise the authority of its predecessor, and we find no justification in the instant proceedings for reversing our predecessor's public interest determination." (Emphasis added.)

The question in our mind is not one of authority but of exercise of discretion lawfully residing with this Board. In other circumstances we may become convinced that thepublic interest would require that a water right entitlement for diversion of the underflow of the Santa Ynez River for use on non-riparian land within the Santa Ynez River watershed be conditioned in the manner recommended by the CCRB. But on the record before us, we find nothing to persuade us to exercise our discretion in that manner and we deem it inappropriate to speculate as to what circumstances may convince us to change our mind.

12. In California v. United States, ____ U.S. ____, 98 S.Ct. 2985 (1978) the Court concluded that the Board may impose any condition in a water right entitlement issued to the Bureau which is not inconsistent with clear Congressional

directives.[7] Accordingly, the Bureau and the CCRB to prevail on the last issue must establish that a condition or provision in Decision 1486 exists which is inconsistent with clear Congressional directives for the Cachuma Project. The resolution of this issue depends in part on the definition of several crucial terms or phrases. The Board requested opening and reply briefs on this issue and specifically requested the parties to discuss the following:

(a) What does the term "directive" mean?

(b) What directives are "clear Congressional directive"?

(c) What does the term "inconsistent" mean?[8]

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7. The CCRB argues that the word "clear" is not part of the Court's holding. The Court's decision indicates the contrary. The Court used the word "clear" at p. 3000 of 98 S.Ct. 298-5; the phrase "directly inconsistent" at p. 3002; the word "explicit" at p. 2999; the word "specific" or "specifically" at p. 2999, at p. 2999 fn 25, and at 2996, fn. 19. Thus, the Court's holding is that State law is applicable unless there is a clear conflict between State and Congressional law. The Court's failure to use the word "clear" or any equivalent terminology at all places in its decision obviously reflects only an attempt to avoid needless repetition, not an ambivalence in the holding.

8. The applicant and Bureau submitted briefs which respond to issues outside the scope of the issues on which the Board requested briefing. The portions of the briefs which are outside the scope of the said issues are as follows:

(a) Applicant's Opening Brief, Part II.

(b) Bureau's Opening Brief from line 18 at p. 9 through the end of the sentence begun on line 5 at p. 11.

Accordingly, the Board did not consider said portions of those briefs

13. The Bureau and CCRB both argue that Decision 1486 is inconsistent with Congressional directives for the Cachuma Project and that Decision 1486 must be revised to eliminate the alleged inconsistency. Although the Bureau and CCRB agree on the ultimate conclusion, their analysis differs. The applicant argues that Decision 1486 is not inconsistent with the Congressional directives for the Cachuma Project.

14. The Bureau's analysis may be summarized as follows:

(a) "Directives" can mean a direct order or merely set forth guidelines which are advisory only." (Opening Brief of Bureau, at p. 1.) The Bureau argues that Congressional directives include specific statutory provisions such as the requirement in Section 9(d) of the Reclamation Project Act of 1939 (53 Stat. 1187, 1195; 43 U.S.C. Section 485h(d)) that no project water be delivered until the recipient has entered into a repayment contract with the Bureau in a form satisfactory to the Secretary of Interior. The Bureau further argues that when the Secretary of Interior has filed his report and finding of feasibility, as required by Section 9(a) of the Reclamation Act of 1939 (53 Stat. 1187, 1193; 43 U.S.C. Section 485h(d)), the project became authorized as though Congress authorized it and that the project report becomes a source of Congressional directives for the project.

(b) The Bureau contends that Decision 1486 is inconsistent with Congressional directives because it requires the Secretary of Interior to deliver project water to water users who have not entered into repayment contracts with the Bureau and because it takes

water designated in the project report for the South Coast area of the County of Santa Barbara and allocates it for use within the applicant's place of use.

15. The CCRB's analysis may be summarized as follows:

(a) Congressional directives include "... provisos or stipulations-which can be discerned Congress' decision to cause the project to be constructed." (Opening Brief of CCRB, at p. 6.) The Board understands this argument to mean that at least statutory provisions are Congressional directives.

(b) The CCRB then quotes the following language from the Court's opinion:

> "Indeed, until the unnecessarily broad language of the court's opinion in Ivanhoe, both the uniform practice of the Bureau of Reclamation and the opinions of the court clearly supported petitioner's argument that it may impose any conditions not inconsistent with congressional directive." California v. United States, U.S._, 98 S.Ct. 2985, 3001 (1978). (Emphasis added.)

From this, the CCRB argues that the phrase "... 'congressional directive' was designed as a shorthand term to summarize the position taken by the petitioner State of California in its briefs and arguments to the Court". (Opening Brief of CCRB, at p. 7.) The CCRB quotes extensively from the briefs filed by the Board and concludes that the phrase "congressional directives" are broader than just provisions of federal law. The CCRB then defines the phrase "congressional directives" for the Cachuma Project in the following statement:

"Based on the language of the Supreme Court decision and the brief filed on behalf of the BOARD, congressional directives in the context of the facts surrounding the Cachuma Project would be actions by Congress in approving construction of that project by which Congress has manifested the intent that the project waters be used for particular purposes within a particular service area. If such directives exist, the State cannot impair them by acts which impede accomplishment of the stated purposes." (Opening Brief of CCRB, at p. 8.) (Emphasis added.)

(c) The CCRB then argues that the feasibility report and administrative authorization of the Cachuma Project established Congressional purposes and directives for the Cachuma Project. This conclusion is based on two separate analyses. First, an administrative authorization of a project, under a Congressional statute which validly delegates the power of authorization to the Secretary of Interior is on an equal footing with a Congressional authorization. (Opening Brief of CCRB, at p. 12.) Second, the appropriation statutes constitute a ratification of administrative authorization of the Cachuma Project. (Opening Brief of CCRB, at p. 13.)

(d) Finally, the CCRB reviews the statements of witnesses to the Subcommittee of the Committee on Appropriations, House of Representatives 80th Cong. 2nd sess. on the Interior Department Appropriation Bill for 1949 and House Document No. 587, 80th Cong. 2d sess., which is the project report on the Cachuma Project. From this review, the CCRB concludes as follows:

"Given the fact that a pressing need for water exists today, just as it existed in 1948 when that need provided the basis for building the Cachuma Project, it cannot be reasonably contended that Congress directed construction of the project merely to provide a temporary water supply to be withdrawn as new demands of junior appropriators develop downstream in the Santa Ynez Valley. Such a contention is wholly inconsistent with the legislative history of the Cachuma Project and its consequence would violate the directives as to project purpose which were enunciated when the project was authorized and were ratified by Congress when the funds were appropriated for its construction." (Opening Brief of CCRB, at p. 23.)

16. A direct definition of the phrase "Congressional directive" does not exist. However, as all the parties recognize the Court did cite several examples of Congressional directives. The Court stated in part as follows:

"Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States. Congress provided in § 8 itself that the water must be appurtenant to the land irrigated and governed by beneficial use, and in § 5 Congress forbade the sale of reclamation water to tracts of land of more than 160 acres." (California v. United States, supra, at 2997.)

The Court further stated as follows:

"It is worth noting that the original Reclamation Act of 1902 was not devoid of such directives. That Act provided that the charges for water should 'be determined with a view of returning to the reclamation fund the estimated cost of construction of the project and...be apportioned equitably' and that water rights should 'be appurtenant to the land irrigated, and beneficial use... the basis, the measure, and the limit of the right'; the Act also forbade sales to tracts of more than 160 acres. Despite these restraints on the Secretary however, it is clear from the language and legislative history of the 1902 Act that Congress intended state law to control where it was not inconsistent with the above provisions." California v. United States, supra, at 3002.

From these examples, the Board concludes that a Congressional directive as used in the Court's opinion means a prohibition or requirement

contained in a law adopted by Congress. The Bureau's argument that a "Congressional directive" can be either a "direct order" or merely "guidelines which are advisory" and that "a directive can be mandatory or advisory" is not persuasive. An "advisory directive" is a contradiction in terms. If Congress has directed the Secretary to achieve a particular result, it has not advised him to do so; if it has merely advised him to do so, it has not directed that result.

17. The Bureau and CCRB argue that the project report (House Document No. 587, 80th Congress, 2nd Session) for the Cachuma Project constitutes some of the Congressional directives applicable to the Cachuma Project. However, a project report is in no sense a directive. Rather, it is a description of a proposal and an encyclopedia of often inconsistent comments about the proposal. For example, here the project report contains resolutions of local agencies in California and the comments of the State of California. (See pages 9-18 and 43-47 of House Document No. 587, 80th Congress, 2nd Session.) To ascribe to them the status of "directives" is preposterous; they are comments. Assuming that not all the contents of a project report are directives; the task arguably becomes one of separating the chaff from the grain. But what criteria are used? Are all statements by a federal official or agency a directive and all statements by others not? If that be the rule, how do you resolve inconsistent statements by different federal officials and agencies resolved? Obviously, the conclusion

can only be thatsuch project reports cannot be considered a directive.9/

18. The record amply reflects that contrary to the arguments of the Bureau, the Bureau does not operate the Cachuma Project as if the project report contains "Congressional directives". One example will suffice. The project report at 118-120 contains a "Report of the Fish and Wildlife Service" on the effect of the proposed projects in Santa Barbara County on fish and wildlife resources. This report recommended a minimum release of 15 cubic feet per second (cfs) for fishery maintenance. Since such a flow release would require an annual release of almost 11,000 acre-feet per annum (afa), it was unacceptable to the Bureau. The Regional Director's report, commencing at 27 in the project report, contains a section entitled "United States Bureau of Reclamation Recommendations for Fishery Maintenance, Santa Ynez, California". These recommendations include the following statement:

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9. Assuming that a project report is not a Congressional directive, what are the Congressional directives for the Cachuma Project? The answer is simple. The Cachuma Project was authorized for construction under the authority granted the Secretary of Interior in the Reclamation Project Act'of 1939 (53 Stat. 1187). That Act authorized the construction of reclamation projects in accordance with the federal reclamation laws, which was defined by Section 2(a) of the Act to mean "...the Act of June 17, 1902 (32 Stat. 388), and all Acts amendatory thereof or supplementary thereto". The federal reclamation laws, including the Reclamation Project Act of 1939 (53 Stat. 1187) establish many Congressional directives for the Cachuma Project.

"In consideration of present Bureau of Reclamation plans for Cachuma Reservoir, the following recommendations are made. They recognize the fact that the section of Santa Ynez River below the dam is insufficient to support present steelhead populations.

"1. Flow in Santa Ynez River as measured just below the mouth of Santa Agueda Creek should be maintained as follows:

(a) December 16 to February 28 -- 15 second-feet as long as natural run-off below the dam is sufficient to maintain a flow of 35 second-feet at Robinson Bridge. Whenever the flow at Robinson Bridge becomes less than 25 second-feet during this period, supplemental releases should be made from the reservoir sufficient to maintain such a flow.

(b) March 1 to May 31 -- 10 second-feet.

(c) June 1 to December 15 -- 5 second-feet.' During the period of construction and initial filling, releases should be made from Cachuma Reservoir in accordance with this schedule.

"2. The flow in Santa Ynez River from Cachuma Dam to the mount of Santa Agueda Creek shouldneverbe less than 2 second-feet as measured immediately above the junction of the two streams." (House Document No. 587, 80th Congress, 2nd Session, at 42.)

While the statement is that of the Regional Director, it is not countermanded in any subsequent approval; under the analysis of the Bureau and of the CCRB it would be a Congressional directive. Yet, the Bureau does not operate the Cachuma Project to maintain these discharges; the Bureau operates the Cachuma Project in conformance with Board Order No. WR 73-37 which contains different schedules.

19. While the Board does not want to belabor the point that the project report is not a Congressional directive, a further brief response to the CCRB's analysis is appropriate. As earlier stated, the CCRB made two arguments as to why the project report is a "Congressional directive".

a. The CCRB's first argument was that an administrative authorization of a project, under a Congressional statute which validly delegates the power of authorization to the Secretary of Interior is on an equal footing with a Congressional authorization. While an administrative authorization such as that which occurred with the Cachuma Project is certainly effective in authorizing project construction, that does not mean that the project was authorized specifically by Congress such that the authorization document becomes a Congressional directive.

b. The CCRB's second argument was that the appropriation statutes constitute a ratification of the administrative authorization of the Cachuma Project. This argument is directly contrary to the Supreme Court's recent decision in TVA v. Hill, ____ U.S. ____, 98 S.Ct. 2279 (1978). There, it was argued by the United States that the Act of Congress, in appropriating funds for the Tellico Dam in Tennessee, should be deemed a Congressional directive that the project be operated without regard to the Endangered Species Act. The Supreme Court rejected this argument. It held that Congressional appropriation of funds for the dam could not be deemed a directive that would have the effect of overriding other directives, such as those protecting endangered species. By the same token, Congressional appropriation of funds for the Cachuma Project cannot be deemed a directive that has the effect of overriding the fundamental directive found in Section 8 of the Reclamation Act.

20. The CCRB also argues that the Board's position before the Supreme Court was in full accord with the CCRB's present argument. The CCRB misinterprets the Board's brief. The Board's position

before the Supreme Court was and our position now is that if Congress enacts a specific statute, the Board cannot include any terms or conditions in a water right entitlement which are inconsistent with said Congressional law. Our brief gave as an example the situation where Congress described in a specific federal statute a particular project purpose. We then concluded that "...the states cannot impair those purposes" (Brief for Petitioners, State of California et al., in the Supreme Court of the United States, at p.59). From this language the CCRB searches for the Cachuma Project purposes. But instead of looking in applicable federal statutes, it reviews testimony of witnesses and the project report discussed above. From the witnesses' testimony and from the project report, the CCRB then discerns certain project purposes with which it alleges Decision 1486 is inconsistent. Obviously, this analysis is a misapplication of our position before the Court.

21. The Bureau identifies two closely related Congressional directives which,it argues,are inconsistent with Decision 1486. Section ' of the 1902 Reclamation Act (32 Stat. 388, 389, 43 U.S.C. §461) requires that repayment by those using project water and that repayment be apportioned equitably. Section 9(d) of the Reclamation Project Act of 1939 (53 Stat. 1187, 1193, 43 U.S.C. §48h(d)) specifically states that no project water may be delivered until a repayment contract

has been entered into with the United States in a form satisfactory to the Secretary of Interior. To determine whether Decision 1486 is inconsistent with Congressional directives, the Board must define the term "inconsistent". While the term "inconsistent" presents some ambiguity, the examples cited by the Court in California v. United States, supra, support the following analysis: A provision in Decision 1486 is considered inconsistent with Congressional directives if the provision prohibits what the Congressional directive requires or if the provision requires what the Congressional directive prohibits. The Bureau's allegation is of the latter nature.

22. Does Decision 1486 require the Bureau to deliver project water to the applicant, who admittedly does not have a contract with the Bureau for the delivery of water sought under Applications 24578 and 24579? It does not. The applicant and SYRWCD acknowledge that the approval of Applications 24578 and 24579 and the subsequent diversion and use of water by the applicant pursuant to those applications will increase the required releases of water by the Bureau under Order No. WR 73-37. However, the applicant and SYRWCD argue that the releases of water under Order No. WR 73-37 are not releases of project water and that therefore Decision 1486 is not inconsistent with said Congressional directives. The parties' brief contains a thorough analysis of this conclusion,and we concur in it. We therefore conclude that Decision 1486 is not inconsistent with Congressional directives.

23. The SYWRCD requests the following changes in Decision 1486:

(a) The last sentence in Paragraph 6 on page 4 is requested to be modified as follows:

> "The Santa Ynez River Water Conservation District, hereinafter referred to as 'SYRWCD', has an ultimate entitlement pursuant to a contract for approximately 2,850 afa; the south coast area will receive the remaining 21,950 afa firm yield of the Cachuma Reservoir."

(b) Condition 3 on page 35 is requested to be modified as follows:

> "Actual construction work shall begin on or before May 1, 1990, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked."

(c) The last three lines of Condition 11 on page 38 arerequested to be modified as follows:

> "...to irrigate such land, provided that Myers and such successors pay to permittee what their costs would have been to pump such amounts of water from their own wells."

24. The Board, as indicated above, agrees that the above changes are appropriate. However, the first change warrants the addition of the following sentences to fully explain the situation:

> "The contract between the Bureau and the Santa Barbara County Water Agency establishes seven 5-year periods for the delivery of entitlement water. The entitlement water for each entity increases from each period to next, except for the SYRWCD for which it remains the same. Since the firm yield of the Cachuma Project was reduced by the Bureau in 1969 from over 30,000 afa to 27,800 afa, entitlement water is proportionally reduced for each agency. The above entitlement figures represent the reduced quantity of water to which each agency is entitled in the seventh period under the contract. In the record in this matter the parties rounded off these amounts for the seventh period as follows: 2,800 afa for the SYRWCD and 22,000 afa for the South Coast area."

25. The Board earlier indicated that there was an inadvertent error and a few minor changes in Decision 1486 that should be corrected as follows:

(a) The third sentence in Finding 13 on page 9 of Decision 1486 states:

> "To assure that the Board gained a complete understanding of the parties respective positions, brief and reply briefs were requested on all relevant issues." (Footnote omitted.)

The word "brief" should be the plural "briefs".

(b) Footnote 11 on page 15 states in part:

> "Nonetheless, the objective of the Cachuma Project, as we understand it was to divert waters principally for use within the south coast area that would otherwise waste to the ocean, and not to divert water which would normally flow down the Santa Ynez River and be beneficially used in that watershed. (See House Document 587, 80th Congress, 2d session; at 32, 46)"

The reference to the House Document should be amended to read as follows:

> "(See House Document No. 587, 80th Congress, 2d session; at 32, 46)"

(c) The fourth sentence in Finding 18 on page 13 of Decision 1486 states:

> "As a prerequisite to issuing a permit, this Eoard must find, and substantial evidence must support, a finding that unappropriated water is available to supply the applicant."

The comma following "support" should be deleted; a comma should be added after "finding".

(d) Finding 38 states:

> "From the foregoing findings, the Board concludes that Applications 24578 and 24579 should be issued to the applicant subject to the limitations and conditions set forth in the following orders."

The phrase "approved and that permits should be" should be inserted between the words "be" and "issued" in Finding 38. As modified, Finding 38 will read as follows:

> "From the foregoing findings, the Board concludes that Applications 24578 and 24579 should be approved and that permits should be issued to the applicant subject to the limitations and conditions set forth in the following orders."

Dated: JUNE 21, 1979

/S/ W. DON MAUGHAN
W. Don Maughan, Chairman

/S/ WILLIAM J. MILLER
William J. Miller, Member

/S/ L. L. MITCHELL
L. L. Mitchell, Member

/S/ CARLA M. BARD
Carla M. Bard, Member