RECLAIMING THE RIGHT OF BENEFICIAL USE

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Under the doctrine of prior appropriation, those that divert and apply water resources to a beneficial use gain a future right of use. Further, individuals may contract with the federal Bureau of Reclamation (BOR) for the delivery of federal project water. Under either method, individuals are required to use their water appropriation for a beneficial purpose to acquire and maintain their rights of use. What constitutes a beneficial purpose or a beneficial use of water resources has traditionally been defined by state law.

Following some states' legalization of marijuana, the BOR announced a new policy with regard to water use, one that prohibits the use of federal project water subject to the BOR's regulatory authority to grow marijuana. This policy directly contradicts the historical right of the western states to define for themselves what constitutes a beneficial use of water resources.

This Comment takes no position on the propriety or validity of state laws that legalize marijuana; rather, it seeks to examine the issue of state and federal power over water use as it has arisen in the context of BOR policy. Ultimately, this Comment concludes that the ability of states to define beneficial use should and likely does take precedence over the limited authority of the BOR to control federal project water.

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INTRODUCTION

The recent legalization of medicinal and recreational marijuana by a growing number of states[1] has prompted concern over the viability and practicality of state laws that directly contradict federal regulations.[2] Though such laws could be rendered void if challenged under the Supremacy Clause, this result has largely been avoided due to federal guidance issued by Deputy Attorney General James Cole.[3] In a

1. *See State Policy*, MARIJUANA POL'Y PROJECT, http://mpp.org/states/ [https://perma.cc/AMN5-SGY3].

2. *See* Trevor Hughes, *Legal Pot, Murky Jobs: Marijuana Laws Put Workers in a Tough Spot*, USA TODAY, (Sept. 4, 2014, 9:23 PM), http://www.usatoday.com/story/news/nation/2014/09/04/legal-marijuana-workers/15000903 [https://perma.cc/4CVP-CH65] (describing the legal uncertainty caused by conflicting federal and state marijuana laws).

3. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all United States Attorneys, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf [https://perma.cc/M9ZR-E4YT] ("In jurisdictions

memo distributed to all US Attorneys, Cole indicated that under the Obama administration, the US Department of Justice would not seek to interfere with state law by prosecuting marijuana growers and consumers in states that have legalized the drug.[4] Despite this, the federal Bureau of Reclamation (BOR) announced that water supplied via federal water projects—water that is contracted for delivery with individual states and users—may not be used to grow marijuana.[5] Currently, the BOR's stated policy is enumerated in the Reclamation Policy Handbook, a guidebook of reclamation policies and directives that describes "Bureau of Reclamation-wide methods of doing business."[6] The policy is marked for temporary release and is set to expire in May 2016,[7] at which time the agency will need to renew the ban, either by extending the effect of the current statement or through a more formal rulemaking process.[8] It is important to note at the outset that the BOR's stated policy was issued via an informal process that leaves open to question both the legal

that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten . . . federal priorities . . . . In those circumstances . . . enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.").

4. *Id.*

5. Andres Stapff, *Feds Ban Marijuana Growers from Using Government Water Supply*, RT (May 21, 2014, 6:42 PM), http://rt.com/usa/160560-reclamation-water-bureau-marijuana/ [https://perma.cc/JG6Y-ZV26].

6. *Reclamation Manual*, U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/recman/index.html (last visited Nov. 1, 2015).

7. U.S. BUREAU OF RECLAMATION, PEC TRMR-63, USE OF RECLAMATION WATER OR FACILITIES FOR ACTIVITIES PROHIBITED BY THE CONTROLLED SUBSTANCES ACT OF 1970 (2015), www.usbr.gov/recman/temporary_releases/pectrmr-63.pdf [https://perma.cc/P5WZ-Q9FG].

8. *Id.* Since the policy is set to expire, the agency will need to take further action if it wishes to extend its effects. Informally, the agency could simply extend the duration of the policy's effectiveness. Alternatively, the agency could promulgate a rule satisfying the requirements of the Administrative Procedure Act. *See* 43 U.S.C. § 373 (2012) (granting the Secretary of the Interior the authority to promulgate rules and regulations under the Reclamation Act); 5 U.S.C. § 553 (2012) (defining the substantive requirements for legislative rules); Cmty. Nutrition Inst. v. Butz, 420 F. Supp. 751 (D.D.C. 1976) ("When a regulatory agency exercises its statutory authority to set standards and prescribe conduct it must do so in accordance with substantive rule-making provisions of the APA."). *But see* 5 U.S.C. § 533(b)(3)(A) (excepting from these requirements "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

weight of the policy as well as its availability for certain kinds of judicial review.[9] The policy looks at first glance like the kind of "statement of general policy" that would exempt it from the rulemaking procedures mandated by the Administrative Procedure Act (APA), as well as limit its efficacy as a legally binding rule.[10] However, because it directly affects the legal rights of the public by limiting an otherwise legally available use of federal project water, the rule could be considered a legislative rule with the force of law—a designation that would require the BOR to issue the rule via the notice and comment process for it to withstand judicial review.[11]

This Comment assumes that, as an administrative matter, the BOR will likely need to initiate a rulemaking process eventually, both to satisfy the APA and for the purposes of bolstering the legal effect of the BOR's new policy.[12] As the level of formality in the rulemaking process primarily affects the availability of *Chevron* deference during judicial review, an informal rule would be subject to the same concerns as a more formalized rule, but would receive less deference by a reviewing court.[13] Thus, even if the BOR chooses not to initiate this process, arguments relating to the invalidity of a rule promulgated through notice and comment procedures apply with even greater force to the kind of less formal rule represented by the BOR's statement of policy. If the BOR wishes to maintain the ban permanently and avoid unfavorable action by a ruling court, it could decide to initiate a formal rulemaking process to insulate its decision from strict judicial review.[14]

The BOR's actions highlight an inherent weakness in the

9. The policy is currently set out in the BOR's "Reclamation Manual." According to the BOR, the manual "assign[s] program responsibility and establish[es] and document[s] Bureau of Reclamation-wide methods of doing business. All requirements in the Reclamation Manual are mandatory." *Reclamation Manual*, *supra* note 6. Because this policy was not promulgated via the legislative rulemaking process of the APA, but was rather issued by the agency informally, it is likely to receive less deferential judicial review. *See* United States v. Mead Corp., 533 U.S. 218, 229–30, 234–35 (2001).

10. RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 502–03 (Vicki Been et al. eds., 6th ed. 2011).

11. *See id.* (noting the difference in the legal impact of legislative rules and interpretive rules).

12. *See id.*

13. *See id.*

14. *See Mead*, 533 U.S. at 229–30 (2001) (explaining the applicability of *Chevron* deference to rules carrying the "force of law").

Obama administration's policy of non-enforcement: the potential ability of agencies to withhold federal benefits to states and marijuana users under the guise of the Controlled Substances Act.[15] In addition, this policy sets a dangerous precedent for the future application of federal water use doctrine to the western states.[16] The BOR's attempt to limit the availability of water for a specific use exposes an as-yet unresolved issue of federal control over state water resources, namely, the question of what constitutes a beneficial use of water.[17] Where a state relies on federal infrastructure to deliver water, does the federal government always have the right to dictate its use?

This Comment examines the validity of the BOR's policy, questioning its ultimate authority to restrict state citizens' otherwise lawful use of federally contracted water to grow marijuana. The BOR's statutory mandate does not expressly authorize the BOR to enforce federal drug policy via the appropriation of water.[18] More importantly, the BOR's

15. Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 646 (2011).

16. Though the BOR has traditionally (and appropriately) refrained from limiting state use of federal project water, its ability to do so could have far-reaching consequences for state water users. Under current policy, the BOR could, subject to the same reasoning demonstrated here, restrict the use of project water where it facilitates any activity that breaks federal law. Imagine, for example, if the BOR restricted the use of project water on any otherwise lawful agricultural land that used labor from undocumented immigrants. While the use of undocumented labor is generally unlawful, it is not the purview of the BOR to enforce immigration law. More broadly, the BOR could limit state use of water to a list of its own proscribed beneficial uses if the power it currently asserts goes entirely unchecked, a list that could exclude other lawful uses under state law. Though none of these scenarios have happened or are imminent, they nonetheless serve to demonstrate the importance of checks to agency actions that exceed the bounds of agency statutory authority.

17. *See generally* Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363 (1997) (discussing the debate surrounding the limits of the Bureau's authority). Appropriators in the western states may use water only for activities the state defines as "beneficial." *Id.* at 417–18. In general, water is beneficially used when it is usefully employed by the appropriator without waste. *See, e.g.*, COLO. REV. STAT. § 37-92-103(4) (2015) (defining "beneficial use" as "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made"); 94 C.J.S. *Waters* § 384, Westlaw (database updated Dec. 2015); *see also* discussion *infra* Section I.B.

18. *See, e.g.*, Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) ("[N]o matter how 'important, conspicuous, and controversial the issue,' and regardless of how likely the public is to hold the Executive Branch

authorizing statute explicitly delegates to the states the power to define the parameters of appropriate and lawful use of water.[19] The states' power to define what is a lawful beneficial use of water is enumerated in both statutory provisions and federal precedent. According to its own statutory mandate, the BOR must operate pursuant to state law that dictates what purposes constitute permissible use of water.[20] Though the BOR has justified its policy based on its general obligation to "adhere to federal law,"[21] this general statement is insufficient to justify the BOR's action in the face of clear statutory restrictions on the agency's power. Finally, this Comment offers an argument in favor of states' rights to define the parameters of beneficial use.

Part I of this Comment provides a summary of water law as it has developed in the western United States, as well as a brief history of the BOR and its role in administering reclamation project water. Part I also examines the statutory, regulatory, and jurisprudential powers and rights of the BOR, the states, and individuals over the use of federally appropriated water. Part II provides factual background regarding the legalization of marijuana in some states. Part III asserts that any prohibition on the use of federal project water by the BOR for a purpose that state law has deemed beneficial likely exceeds the authority Congress has delegated to the BOR and is thus legally impermissible. This Part also addresses some possible alternative sources of the BOR's authority and the effect of federal preemption on state regulation of water used to grow marijuana. Part IV highlights the importance of clarity in the administration of western water resources and argues in favor of the right of states to define for themselves what constitutes a beneficial use of water resources. Part IV further proposes a possible solution to the issue: a congressional directive in the form of a statutory amendment that more clearly directs the BOR to defer to the judgment of

politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. . . . Courts must take care not to extend a statute's scope beyond the point where Congress indicated it would stop.") (citing United States v. Article of Drug . . . Bacto-Unidisk . . ., 394 U.S. 784, 800 (1969)).

19. 43 U.S.C. § 383 (2012). *See* discussion *infra* Section I.C.2.

20. 43 U.S.C. § 383.

21. Stapff, *supra* note 5.

the states in determining beneficial use in all circumstances.[22]

I. BACKGROUND

Over the last ten years, state legalization of marijuana for medicinal and recreational use has become a growing trend.[23] This trend has emerged against a background of increasing environmental and water use concerns, particularly in the West, where marijuana growers represent an additional agricultural claim on coveted state water resources.[24] The unavoidable need for water in the production of marijuana products makes the industry reliant in part on the legal procurement of water resources.[25] The following sections provide: (A) background information concerning the foundational principles of water law that govern the allocation and use of water in the majority of the western states; (B) a brief overview of the history and structure of the BOR; and (C)

22. Given the current political environment, this is, admittedly, unlikely. However, marijuana advocates may find bipartisan support for marijuana-related legislation by mobilizing both states' rights and legalization advocates.

23. *State Policy*, *supra* note 1. States that have legalized marijuana for medicinal use only include: Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and the District of Columbia. *Id.* States that have legalized marijuana for both medicinal and recreational use include: Alaska, Colorado, Oregon, and Washington. *Id.* Additionally, D.C. voters have approved a measure to legalize recreational marijuana. *Id.* The broad and expanding scope of quasi-legal marijuana regulatory schemes illustrates the potential scope of the issue. As more states legalize marijuana, the BOR's decision to restrict the use of project water to grow cannabis becomes more impactful.

24. Jennifer G. Hickey, *Study: Pot Cultivation Worsening California Drought*, NEWSMAX (Apr. 9, 2015, 11:36 AM), http://www.newsmax.com/US/California-drought-marijuana-cultivation/2015/04/09/id/637459/ [https://perma.cc/4TSV-RDKB]. Some state commentators argue that California's current marijuana market is exacerbating the effects of the state's historic 2015 drought. *Id.* Despite growing water shortages, as of yet there is no evidence that the California marijuana market is suffering because of limited access to water resources. *See* Jillian Singh, *Drought Impact on Marijuana Prices Still Unclear; Market Already Saturated,* UKIAH DAILY J. (Apr. 4, 2014, 12:01 AM), http://www.ukiahdailyjournal.com/ general-news/20140401/drought-impact-on-marijuana-prices-still-unclear-market-already-saturated [https://perma.cc/EP3N-EK9A]. Rather, there is speculation that the drought may cause an increase in the price of legal medicinal marijuana. *Id.*

25. *See* Hasani Gittens, *U.S. Says Legal Marijuana Growers Can't Use Federal Irrigation Water*, NBC NEWS (May 21, 2014, 6:09 AM), http://www.nbcnews.com/news/us-news/u-s-says-legal-marijuana-growers-cant-use-federal-irrigation-n110381 [https://perma.cc/3CDY-MXBE].

a summary of the overlapping powers and responsibilities of the states and the BOR over western water resources.[26]

A. The Structure of Western Water Rights

States have jurisdiction over the water resources within their territorial boundaries and have the power to develop their own statutory systems of water management and distribution.[27] Historically, Congress has deferred to state primacy over issues of water rights, specifically regarding allocation and use.[28] Private water rights in most states in the West developed as a product of Western expansionism; in order to encourage the settlement and development of the West, water rights were allocated based on the doctrine of prior appropriation.[29] The doctrine of prior appropriation grants water rights to individuals when they appropriate, or divert, water from a natural source and apply it to a beneficial use.[30] This system stands in contrast to the riparian doctrine, the legal structure used predominantly in the eastern United States that allows landowners along the banks of a natural river or stream to use water that flows past their property.[31] According to the doctrine of prior appropriation, senior water appropriators are given priority over junior appropriators, a system popularly characterized as "first in time, first in right."[32] This system both accommodates and exacerbates the unique problems associated with aridity in the West.[33] Most

26. Though several eastern states have also legalized recreational or medicinal marijuana, the focus of this Comment is on those western states whose water resources are affected by the infrastructure and thus policy decisions of the BOR.

27. COLO. FOUND. FOR WATER EDUC., CITIZEN'S GUIDE TO COLORADO WATER LAW 4–6 (2d ed. 2004).

28. *See* California v. United States, 438 U.S. 645, 674 (1978) (holding that states may attach conditions on a federal reclamation project); United States v. New Mexico, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.").

29. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 232–35 (1992).

30. Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 250–51.

31. *Id.* at 250.

32. *Id.*

33. *See* WILKINSON, *supra* note 29, at 242–43 (describing the consequences of the prior appropriation doctrine).

appropriators of water in the West are entitled to a specific quantity of water; in years of low rainfall, senior appropriators are entitled to their full historical appropriation of water before junior appropriators may divert water according to their own rights of use.[34]

B. The Doctrine of Beneficial Use

Water rights in the West are usufructary rights, meaning that owners of water rights own only a right of use,[35] which is subject to regulation by the state. In order to gain and maintain a water right, appropriated water must be put to some beneficial use, the parameters of which are defined by state law.[36] In general, water is beneficially used "when it is usefully employed by the appropriator. . . . [T]he use cannot include any element of 'waste' which, among other things, precludes unreasonable transmission loss and use of cost-ineffective methods."[37] Beneficial use may vary somewhat throughout the western states according to what kinds of "use" each state deems to be beneficial; however, the basic concept of the doctrine is largely the same throughout the West. Colorado, for example, defines "beneficial use" broadly as "a lawful appropriation that employs reasonably efficient practices to put

34. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882) ("The priority of right mentioned in this section is acquired by priority of appropriation, and the provision declares that appropriations of water shall be subordinate to the use thereof by prior appropriators."); C. Carter Ruml, *The Coase Theorem and Western U.S. Appropriative Water Rights*, 45 NAT. RESOURCES J. 169, 174 (2005) ("Rights with . . . earlier priority dates are 'senior' to rights with subsequent priority dates, which are 'junior.' When the flow of the river is not enough to meet all appropriative rights, the burden of the shortage falls completely on junior appropriators. While senior appropriators are still permitted their full appropriation, diversions are cut off in inverse order of priority, so that diversions with the most recent priority dates are the first to be affected.").

35. WILKINSON, *supra* note 29, at 240–43.

36. Benson, *supra* note 17, at 418. Some western states have statutorily listed specific water uses that are per se beneficial (for example, mining and agriculture), and uses that are not (evaporation of water from gravel pits), supplementing these lists over time to reflect changing community values. *See* Michael Toll, Comment, *Reimagining Western Water Law: Time-Limited Water Right Permits Based on a Comprehensive Beneficial Use Doctrine*, 82 U. COLO. L. REV. 595, 602–06 (2011). Other states, however, define the concept broadly, leaving interpretation of the doctrine to the courts. *Id.*

37. United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983).

that water to use without waste."[38] In Colorado, what is reasonable depends on how the water is withdrawn and applied for the benefit of the water rights holder.[39] Similarly, in California, property interests in water are limited to what can be "reasonably used for a beneficial purpose."[40] Beneficial purpose is defined broadly, looking to community standards to determine what is reasonable.[41]

Because many states have broad or vague statutory definitions of "beneficial use,"[42] the task of defining the parameters of the beneficial use doctrine has frequently fallen to the courts.[43] Generally, water must be used in a way that is "socially acceptable" and must be used in an actual amount that is not wasteful.[44] Where types of acceptable uses are statutorily listed by the state, the role of the court is limited. However, where an individual's water use is of a type not listed by statute, courts must clarify the beneficial use doctrine by determining the types of uses that are legally beneficial.[45] In most states, the use of water for agriculture is a per se beneficial use; thus, in states that have legalized the

38. COLO. FOUND. FOR WATER EDUC., *supra* note 27, at 7. Colorado defines beneficial use as "a *lawful* appropriation" of water that is put to some reasonably efficient use. *Id.* (emphasis added). The question of whether a use that is illegal under federal law can be considered a lawful appropriation under state law is as yet unresolved. Brent Gardner-Smith, *Can Colorado Approve a Water Right to Grow Marijuana?*, ASPEN TIMES (Jan. 2, 2015), http://www.aspentimes.com/news/14455352-113/valley-marijuana-farms-colorado [https://perma.cc/2ALD-RLSG]. Arguments against the BOR's policy could very well hinge on whether Colorado courts consider marijuana cultivation a beneficial use.

39. COLO. FOUND. FOR WATER EDUC., *supra* note 27, at 7. Colorado has recognized many different kinds of beneficial uses, the definition of which has changed with the times and with prevailing community values within the state. *Id.* Recognized beneficial uses now include: commercial, domestic, and agricultural use, municipal use, recreation, irrigation, flood control, in-stream flow, fish and wildlife culture, fire protection, power generation, snowmaking, and other uses. *Id.*

40. Dana Kelly, *Bringing the Green to Green: Would the Legalization of Marijuana in California Prevent the Environmental Destruction Caused by Illegal Farms?*, 18 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 95, 101 (2012).

41. *Id.* Under the California Water Code, the use of water for agriculture is a beneficial purpose; the code makes no distinction between what kinds of crops are grown. *See* CAL. WATER CODE § 13050(f) (West 2014); Cal. Code Regs. tit. 23, § 661 (2015).

42. *See* Toll, *supra* note 36, at 601–06.

43. *Id.* at 604.

44. *Id.* at 604–05.

45. *Id.* ("[C]ourts have helped to clarify the beneficial use doctrine by determining the types of uses—in addition to any constitutionally or statutorily listed types of per se beneficial uses—that are legally beneficial.").

cultivation and sale of marijuana, the use of water to grow marijuana (as an agricultural use) would most likely legally be considered a beneficial use.[46]

For example, Colorado defines "beneficial use" as "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made."[47] What constitutes a beneficial use of water is determined by "legislative enactments, court decisions, and the acts of appropriators who control the water to their purpose."[48] These decisions are made on a case-by-case factual basis.[49] Agricultural uses have traditionally been deemed per se beneficial; though the state has not explicitly defined "agricultural use," the need for the use of irrigated water to grow crops in large part prompted the development of the current legal scheme, indicating that the term should be considered broadly.[50] Though it could be argued that marijuana is not an agricultural crop in the traditional sense, it can be assumed that, having legalized the growth and use of marijuana, the State of Colorado meant also to grant the legal means with which to cultivate the crop.[51] This necessarily requires that the state deem the growth of marijuana a beneficial use in order to sanction the means by which marijuana is grown.

Given the states' traditional role in the development of water law, any attempt to limit water appropriations in a way considered beneficial by state law undermines the ability of the states to define the parameters of beneficial use. However, in some instances, state authority must cede to the power of the federal government, including federal administrative agencies.

46. *See* COLO. FOUND. FOR WATER EDUC., *supra* note 27, at 7.

47. COLO. REV. STAT. § 37-92-103(4) (2015).

48. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 53 n.9 (Colo. 1999).

49. Toll, *supra* note 36, at 605–06.

50. *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443, 449–50 (1882).

51. For example, the legalization of marijuana prompted the Colorado legislature to develop a plan for a banking system for marijuana businesses to ensure that these businesses, legal under Colorado law, had the ability to utilize bank accounts. *See* Kristen Wyatt, *Colorado Approves First Marijuana Banking System*, HUFFINGTON POST (May 7, 2014, 8:11 PM), http://www.huffingtonpost.com/2014/05/07/colorado-marijuana-banking_n_5284442.html [https://perma.cc/5FTG-F2X7].

C. History and Authority of the BOR

The BOR was created in 1902 by the passage of the Reclamation Act in response to a growing need for a reliable agricultural water supply in the arid West.[52] The following sections describe the origins of the BOR, its statutory authority, and the limits to that authority that define the scope of the agency's power.

1. Grant of Statutory Authority

Originally, the BOR's mission was "the reclamation of arid lands through the storage and distribution of irrigation water."[53] Towards this goal, the BOR supervised the construction of water storage projects, primarily dams and other large facilities, throughout the American West.[54] Reclamation project facilities are located in seventeen different western states and include 347 storage reservoirs, 254 diversion dams, over 25,000 miles of canals and pipelines, and over 17,000 miles of drains.[55] While the mission of the agency has since expanded to include flood control, power generation, navigation, recreation, fish and wildlife conservation, and municipal water supply development,[56] its original purpose of promoting settlement of the West was largely fulfilled.[57]

The scope of the authority granted to the BOR can be found by examining its authorizing statute. In general, the power and authority of an agency is limited to what powers have been delegated to it by Congress via its statutory

52. BARBARA T. ANDREWS & MARIE SANSONE, WHO RUNS THE RIVERS? DAMS AND DECISIONS IN THE NEW WEST 171–75 (Marc E. Jones et al. eds., 1983).

53. *Id.* at 167.

54. *See id.* at 175–88.

55. Benson, *supra* note 17, at 366. Reclamation projects include most major western dams (for example, the Hoover Dam, the Yellowstone River Diversion Dam, and the Lake Tahoe Dam), storage facilities, water projects (such as the Colorado River Basin Project), and hydroelectric power plants (such as the Folsom power plant). *See About Us*, U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/main/about/ [https://perma.cc/2PHP-ZTN5] (last updated July 8, 2015) [hereinafter *BOR About Us*].

56. *BOR About Us*, *supra* note 55 (listing the BOR's primary programs and activities and describing the agency's mission as "to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public").

57. *See* ANDREWS & SANSONE, *supra* note 52, at 194.

mandate, also known as the agency's organic act.[58] Under the BOR's organic act, the Reclamation Act, the Secretary of the Interior is authorized to "make examinations and surveys for, and to locate and construct . . . irrigation works for the storage, diversion, and development of waters," to withdraw lands from public entry (homesteading) required to complete these irrigation works, and to enter into contracts for the construction and payment of said projects.[59] Additionally, the Secretary is granted broad rulemaking authority to "perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of [the Act] into full force and effect."[60] Further, the Act gives the Secretary the specific authority to issue regulations "necessary to maintain law and order and protect persons and property *within* Reclamation projects and *on* Reclamation lands."[61] This authority includes the ability of the Secretary to employ law enforcement officers on Bureau land.[62] The Act goes on to outline a comprehensive reclamation scheme, providing for the survey of lands and for the construction and maintenance of irrigation projects.[63]

Further, the BOR may exercise authority over water via specifications in water delivery contracts. Reclamation project water is delivered through federal contracts between the Bureau and other entities throughout the western states, usually local bodies known as irrigation districts, though individual irrigators may directly contract with the BOR for water delivery.[64] Typically, water is delivered subject to one of

58. In general, the non-delegation doctrine restricts the scope of an agency's authority to that which it has been granted by Congress. *See* Am. Bar Ass'n v. FTC, 430 F.3d 457, 467–70 (D.C. Cir. 2005) (holding that the FTC did not have the power to regulate attorneys where there was no statutory delegation from Congress of this authority).

59. 43 U.S.C. § 411 (2012).

60. 43 U.S.C. § 373 (2012). This kind of broad rulemaking authority is common among federal agencies; it has been interpreted by the courts as sufficiently broad to "allow the promulgation of rules that are necessary and reasonable to effect the purposes of the Act." *See* Nat. Res. Def. Council, Inc. v. EPA, 22 F.3d 1125, 1148 (D.C. Cir. 1994).

61. 43 U.S.C § 373b(a) (emphasis added).

62. 43 U.S.C. § 373b(c).

63. 43 U.S.C. §§ 371–616yyy.

64. 43 U.S.C. § 511 (2012). Local irrigation districts are cooperative, self-governing public corporations set up to obtain and distribute water for irrigation of lands within the district; these local bodies contract with the BOR for the delivery of project water. Suzanne Lieberman, *Water Organizations in Colorado:*

two kinds of water service contracts. The first and most common kind of contract is a repayment contract, which entitles an organization to receive water in exchange for making payments over a set period of time that contribute to the overall cost of the project that facilitates water delivery.[65] The other type of contract, the service contract, entitles an organization to receive annual water deliveries in exchange for an agreed upon rate.[66] The repayment contract has been described as "analogous to a mortgage, while a water service contract is more like a lease."[67] Both types of water delivery contracts may include contractual limits on the rights of irrigation districts to use project water.[68] Where project water is distributed by contract with the BOR, the water user has a right to receive the amount of water due under the contract.[69] As the beneficial owner of this water, the water user has control over the use or nonuse of that water.[70] The federal government retains only a legal interest in the water user's property right to the water, subject to the contract, and has no control over the water after releasing it for use.[71]

Finally, Congress has the power to include project-specific regulations on water use at the time each new project is authorized, as well as to enact new provisions of federal reclamation law.[72] As discussed above, the Secretary has the

A First Look into Water Organizations' Control of Agricultural Water Rights and Their Transfer Potential in the Colorado River Basin, 15 U. DENV. WATER L. REV. 31, 57 (2011). Where an end water user contracts with a water conservancy district for the use of project water, the district acts as a middle man between the BOR and the end user, with the district owning the appropriation rights to the water. *Id.* The beneficial use of the water, however, is vested in the end user. *Id.* Though no local irrigation district has yet challenged the BOR's policy on marijuana growth, the policy has already affected the way some districts and local utility companies that rely on project water distribute water to customers. *See* Joel Warner, *From Steel to Pot, Pueblo Seeing Resurgence*, SUMMIT DAILY (Sept. 6, 2015), http://www.summitdaily.com/news/18063715-113/from-steel-to-pot-pueblo-seeing-resurgence [https://perma.cc/D3B5-5TFW] (describing the efforts of the Pueblo Board of Water Works to accommodate marijuana growers "without running afoul of the feds").

65. Benson, *supra* note 17, at 371.

66. *Id.*

67. *Id.*

68. *Id.* at 397–401.

69. Gregory Harwood, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation*, 29 IDAHO L. REV. 153, 175 (1992).

70. *Id.*

71. *Id.*

72. *See, e.g.*, 43 U.S.C. § 390h-12j (2012) (authorizing the Orange County Regional Water Reclamation project but limiting the use of federal funds for the

power to make rules and regulations that enforce existing reclamation law, meaning that the extent of the BOR's power over project water is defined by existing federal reclamation law.[73]

2. Limitations to Authority

There are several significant statutory limits to the authority of the BOR and the Secretary of Interior under the Reclamation Act and subsequent reclamation legislation. The notion of beneficial use, a general rule of western water law, was incorporated into the Act, which stipulates that "[t]he right to 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."[74] Further, the original 1902 act included a savings provision, noting that:

> Nothing in this Act shall be construed as affecting . . . 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 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.[75]

This provision simultaneously recognizes state law providing for the appropriation of its waters and requires the Secretary of Interior, in carrying out the provisions of the Act, to abide by these laws.[76]

Further, the authority of the BOR over water is limited to

operation and maintenance of the project). Where Congress has given the BOR a specific statutory instruction on a matter that conflicts with state law, state law must yield; otherwise, the BOR is obliged to abide by state law. California v. United States, 438 U.S. 645, 673–74 (1978) (holding that the United States must follow state law where it does not interfere with "congressional directives").

73. 43 U.S.C. § 373 (2012).
74. 43 U.S.C. § 372 (2012).
75. 43 U.S.C. § 383 (2012).
76. *Id.*

a specific kind of water that runs through its facilities. The BOR has authority *only* over water flow that is designated project water.[77] In accordance with the Reclamation Act and under the direction of the Secretary of the Interior, the BOR built facilities across the West for the storage and delivery of project water for irrigation uses.[78] Prior to the completion of a project, the BOR is required to obtain water rights under state law for the diversion of water into its facilities; these rights are held in the name of the United States.[79] *Only* water to which the United States is the water-rights holder is considered project water.[80]

Federal project water, then, is legally different than water in a naturally flowing stream; it has been diverted, stored, and redirected through federal projects. Project water would not exist where it is found but for federal facilities.[81] This gives the United States certain powers over the acquisition and use of project water.[82] The degree of control the BOR has over water that runs through federal projects is related to the distinction between project and non-project water.[83] Arguably, the BOR has a greater degree of control over project water because the BOR acts as the facilitator of this water, the use of which would not be possible without the assistance of the federal government.[84] This distinction further complicates the issue, as any restrictions on the use of water imposed by the BOR would likely be limited to project water, a limitation that invariably sparks confusion and inconsistency among users.[85]

This, of course, makes distinguishing between project and non-project water essential in determining the degree of control

77. Benson, *supra* note 17, at 370–72.

78. *Id.* at 365–66.

79. *Id.* at 373.

80. *See id.* at 373–74.

81. *Id.* at 369–70 (citing Israel v. Morton, 549 F.2d 128, 132–33 (9th Cir. 1977)).

82. *Id.*

83. *Id.*

84. *Id.* at 370. The federal government's authority, while likely still limited by the congressional directive to the BOR to defer to state law, is greatest over project water. *Id.* at 373. The BOR could prohibit the use of project water to grow marijuana through, for example, specific contract provisions with individual water users as a product of this authority.

85. *See* California v. United States, 438 U.S. 645, 668–69 (1978) ("A principal motivating factor behind Congress' decision to defer to state [water] law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.").

the BOR has over any one water diversion, as not all water that flows through a federal reclamation project is burdened with this same legal distinction. There is no simple, bright-line definition of project water. Rather, it is easier to start with the assumption that all water diverted, stored, and/or delivered via a federal project is project water—unless, of course, it is not.

For example, some federal projects contain only water that has been appropriated by (and the rights to which are vested in) private users.[86] These users contract with the BOR for delivery or storage only, and since the BOR does not own rights to this water, it is not legally considered project water.[87] Further, any amount of water that historically flowed naturally through the river system and was used by an irrigation district prior to the completion of a federal project is likely not project water, as the irrigators' diversion predates—and would exist without—federal assistance.[88] Some irrigation districts' use of water from a particular river predates the construction of a federal project, meaning that their water is not considered project water.[89] Additionally, a few states separate the right to store water from the right of beneficial use.[90] In these states, storage facilities own the right to store water, where irrigators and other users own secondary beneficial use permits.[91]

Finally, some courts have held that certain water may be project water even if it issues from a spring or other seemingly natural source where the water has seeped from a federal reclamation project onto private land.[92] To complicate matters further, some federal projects contain federally reserved

86. Benson, *supra* note 17, at 371–73.

87. *Id.* at 371–72.

88. *Id.* at 372 (describing the ability of irrigators whose use predates the construction of a federal project to specify in contracts with the BOR that their contracts are for delivery only, and that the water delivered is not legally project water).

89. *Id.*; *see also* Westlands Water Dist. v. Patterson, 900 F. Supp. 1304, 1321 (E.D. Cal. 1995) (describing the contractual rights of prior appropriators and "the distinction in reclamation law between surplus water obtained by the construction of the [Cenral Valley Project] and water that belongs as a matter of right to prior appropriators"), *rev'd on other grounds*, Westlands Water Dist. v. United States, 100 F.3d 94 (9th Cir. 1996).

90. Benson, *supra* note 17, at 373.

91. *Id.*

92. *See generally* Ide v. United States, 263 U.S. 497 (1924) (holding that the United States was entitled to recapture and utilize seepage from an irrigation project); Dep't of Ecology v. U.S. Bureau of Reclamation, 827 P.2d 275 (Wash. 1992) (same).

water—any unappropriated water that exists appurtenant to federal lands at the time of their withdrawal from the public domain.[93] This water is subject to federal use and control according to the reserved rights doctrine.[94]

In sum, authority over the appropriation, control, and use of water that at some point flows through a federal reclamation project is shared between the states and the federal government through the BOR.[95] The parameters of an entity's authority depend largely on the nature of the right being implicated and the strength of government control over the particular water appropriation at issue.[96]

D. Fragmented Authority over Project Water

As discussed above, authority over water delivered via a federal project is shared among the federal government through the BOR, the states, and the final water user.[97] The scope of the BOR's authority over the use of this water is thus difficult to clearly define. Understanding this authority requires an in-depth analysis of the breadth of authority over project water reserved to the BOR, the states, and the individual water user, respectively. The following sections summarize the overlapping authority of the BOR, the states, and the water user over federal project water.

1. Federal Powers

As previously discussed, the United States owns reclamation project works and property, including dams, irrigation canals, and the lands on which these projects are located. Further, the BOR holds project water rights in the name of the United States.[98] Despite this, the BOR gains little regulatory authority over the *use* of project water by simply owning the water rights to, and the facilities used to transport, project water.[99] Rather, the Supreme Court has determined

93. United States v. City & Cty. of Denver, 656 P.2d 1, 17 (Colo. 1982).
94. *Id.*
95. *See generally* Benson, *supra* note 17.
96. *Id.*
97. *See* discussion *supra* Sections I.C.1, I.C.2.
98. *See* discussion *supra* Sections I.C.1, I.C.2.
99. *See* discussion *supra* Sections I.C.1, I.C.2; *see also* Ickes v. Fox, 300 U.S. 82, 95 (1937) ("Appropriation was made not for the use of the government, but,

that project water rights of use legally vest in the individual landowners who contract for and put the water to beneficial use under state law.[100] While at least one court has held that these rights do not limit the right of the BOR to enforce federally-imposed controls over the use of project water,[101] this case was largely limited to issues of appropriation[102] and beneficial use as they have been defined previously in reference to state law.[103] Essentially, federal law limits the authority of the BOR to determine how project water is ultimately put to use.[104]

The primary basis for the BOR's authority over project water is the government's ownership and control over reclamation projects.[105] Because the United States has expended funds to build the mechanisms through which water users receive their water, project water is perceived as a federal benefit, subsidized by the government.[106] This

under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.") (citations omitted).

100. *See* United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877, 879–80 (D. Nev. 1980) ("The water rights . . . covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project."); Nebraska v. Wyoming, 325 U.S. 589, 615 (1945); *Ickes*, 300 U.S. at 94.

101. *See* Benson, *supra* note 17, at 387 (citing Pyramid Lake Tribe of Indians v. Hodel, 878 F.2d 1215 (9th Cir. 1989)).

102. *Pyramid Lake*, 878 F.2d at 1216–17. In this case, the Court upheld the power of the Secretary to require that users of project water have water rights under state law to appropriate water. *Id.* at 1217. Further, the court upheld requirements that the water delivered to the tribes be used for beneficial agricultural purposes, a use defined by and accepted under state law. *Id.* While this case seemingly acknowledges the right of the Secretary of the Interior to place conditions on the use of project water in accordance with state law, nothing in this case suggests that the Secretary may limit the rights of a water rights holder as they are defined by state law.

103. *See id.*

104. *See* Nevada v. United States, 463 U.S. 110, 126 (1983) (describing the line of cases interpreting the limits on ownership and use placed on the federal government by the Reclamation Act).

105. *See* discussion *supra* Sections I.C.1, I.C.2.

106. *See* Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. . . . [T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.")

empowers the United States to attach certain conditions on the receipt of that benefit.[107] The regulatory power of the BOR is further codified in section 10 of the 1902 Reclamation Act, which authorizes the Interior Department to issue regulations "as may be necessary and proper for the purpose of carrying out the provisions of this Act in full force and effect."[108] These powers may be expanded on a project-by-project basis according to the terms and conditions of specific federal reclamation project authorizations.[109] While the 1902 Reclamation Act authorized the Interior Department to use its discretion to build federal irrigation projects,[110] many projects were instead initiated through specific acts of Congress following the adoption of the 1902 Act.[111] Project water from these facilities is governed in accordance with federal directives under their authorizing statutes.[112]

In recognition of federal power over project water, courts have enforced actions taken on behalf of the BOR to place conditions on water deliveries from reclamation projects, including conditions that specify payment terms, mandatory reporting, and limits on water diversions.[113] Further, the BOR has the power to negotiate the terms and conditions of water project contracts, including negotiating and re-negotiating payment obligations.[114] For users who refuse to comply with project-specific regulations on water use, fail to submit required forms, or have no contractual right to receive project water, the Bureau is within its authority to stop delivery of

(citations omitted), *overruled on other grounds by* California v. United States, 438 U.S. 645, 674–75 (1978).

107. *Id.* at 295.

108. 43 U.S.C. § 373 (2012).

109. *See, e.g.*, Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156 (authorizing the Secretary of the Interior to construct the San Luis Unit of the Central Valley Project).

110. Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388.

111. *See, e.g.*, Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156.

112. *See California*, 438 U.S. at 674–75 (holding that a State may impose any condition on "control, appropriation, use or distribution of water" in a federal reclamation project that is not inconsistent with clear congressional directives respecting the project). This holding indicates that congressional directives as to the project in question constitute controlling law. *Id.*

113. *See* Benson, *supra* note 17, at 413.

114. *Id.* This power is significant but limited. Congress may "change federal policy, but it cannot write on a blank slate." *Id.* at 413–14 (citing Madera Irrigation Dist. v. Hancock, 985 F.2d 1397, 1400 (9th Cir. 1993)). Congress' ability to re-negotiate water contract conditions and other policies is limited by the reliance of irrigators on past policies. *Id.* at 395–96.

project water.[115] Finally, courts have shown deference to the authority of the Bureau to implement water policy that implicates issues of regional- or basin-wide concern, including its authority to allocate water supplies under federal contracts during periods of drought,[116] to deliver water for tribal and environmental needs, and to respond to the environmental and water needs of endangered species.[117]

Overall, it is difficult to describe the extent of the BOR's authority to regulate and control the use of project water, in part because the Bureau historically has not been particularly active in exercising broad control over its domain.[118] However, one clear limitation on federal control stems from the original 1902 Reclamation Act: the savings provision of Section 8.[119]

Section 8 of the 1902 Reclamation Act stipulates that state law governs the appropriation and use of federal project water; under this provision, the Secretary is to "proceed in conformity with such laws."[120] Later interpretation of this provision by the courts makes it clear that state law controls where there is *no* specific congressional directive on the subject.[121] In the absence of a congressional directive, the BOR may regulate the distribution, acquisition, and use of project water only if its regulations are not inconsistent with state law.[122]

However, where Congress *has* issued a declaration concerning a particular subject governing water distribution and use in the form of a new statute, this directive must

115. *Id.* at 414 (citing United States v. Quincy-Columbia Basin Irrigation Dist., 649 F. Supp. 487, 492 (E.D. Wash. 1986)).

116. *See, e.g.*, Westlands Water Dist. v. U.S. Bureau of Reclamation, 805 F. Supp. 1503, 1507 (E.D. Cal. 1992), *aff'd sub nom.* Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667 (9th Cir. 1993).

117. *See* Benson, *supra* note 17, at 420–26.

118. *See id.* at 419 (discussing the BOR's failure to enforce reclamation laws that are unpopular with irrigators).

119. 43 U.S.C. § 383 (2012). The savings provision is codified at 43 U.S.C. § 383; however, the original provision was found under § 8 of the Reclamation Act and is commonly referred to as "Section 8." This article uses "Section 8" to refer to 43 U.S.C. § 383; however, citations will direct the reader to the statute in its current form to ensure ease of access.

120. *Id.*

121. California v. United States, 438 U.S. 645, 674–75 (1978).

122. United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 212 (9th Cir. 1989) ("State law regarding the acquisition and distribution of reclamation water applies if it is not inconsistent with congressional directives. . . . Conversely, in the absence of congressional directives, [the Department of the Interior] can regulate distribution, acquisition, and vested water rights if its regulations are not inconsistent with state law.") (citations omitted).

control.[123] In these circumstances, state law applies to project water if it is not inconsistent with these directives.[124] Essentially, congressional control over project water supersedes state authority where Congress has spoken on the issue.[125] Where it has not, state law governs; the BOR must regulate first in conformance with federal reclamation law and then in conformance with state law.[126]

The Reclamation Act also imposes a duty on the BOR to ensure that project water is used in accordance with the doctrine of beneficial use.[127] Though this seems to indicate an affirmative grant of power to the agency, this provision does not give the BOR the authority to *define* beneficial use.[128] The Ninth Circuit, in its opinion in *United States v. Alpine Land & Reservoir Co.*, described the requirement of beneficial use as the "necessary rationale and source of the right [to use water]."[129] According to the court, the legislative history of the 1902 Reclamation Act clearly indicates that "the 'principles underlying and governing water rights' under the Act were to be the existing beneficial use concepts of western water law."[130] Thus, the Ninth Circuit held that "beneficial use itself was intended to be governed by state law."[131] This indicates that Section 8 itself imposes an affirmative duty on the Secretary of the Interior to distribute project water according the state-defined doctrine of beneficial use.[132]

2. Powers of the State

A state, upon entry into the union, obtains from the United

123. *California*, 438 U.S. at 674–75.

124. Benson, *supra* note at 17, at 410.

125. *See California*, 438 U.S. at 670–76.

126. *See id.*

127. 43 U.S.C. § 372 (2012). The Reclamation Act imposes an affirmative duty on the BOR to ensure that: (1) project water rights are appurtenant to the land irrigated; and (2) that the use of project water does not exceed beneficial use, stating that, "[t]he 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." *Id.*

128. *See id.*; 43 U.S.C. § 371 (2012) (the definitions section of the Reclamation Act).

129. 697 F.2d 851, 853 (9th Cir. 1983).

130. *Id.* (citing 35 CONG. REC. 6677 (1902) (statement of Rep. Mondell)).

131. *Id.* at 854 (citing 35 CONG. REC. 6677 (1902) (statement of Rep. Mondell); 35 CONG. REC. 2222 (1907) (statement of Sen. Clark)); *California*, 438 U.S. at 645.

132. *See* 43 U.S.C. §§ 372, 383 (2012).

States title to all navigable waters and the beds and banks beneath the water lanes for the benefit of the public.[133] While this seemingly indicates that states "own" all of the water within their territorial boundaries, courts have indicated that this idea is "merely a legal fiction" intended to ensure that states retain regulatory authority over their waters.[134] The nature of state ownership of water resources is thus more of a jurisdictional authority than ownership in the sense of a property right. States do, however, have broad and, in most cases, primary authority to regulate water use within the state.[135]

Specifically, states have control over how water within the state is appropriated, how water rights are transferred and adjudicated, and, importantly, for what purposes an appropriator may apply water in order to satisfy the requirement of beneficial use.[136] State authority over water rights derives primarily from state police powers; thus, states have specific authority to require compliance with state laws regarding the manner of appropriation and distribution of water, as well as the conditions of the water right itself.[137] State authority to regulate water use under existing rights is far-reaching, and is absolute, absent action by Congress to preempt state laws.[138] State regulation and control over project

133. 43 U.S.C. § 1311(a) (2012).

134. James S. Lochhead, *The Role of the Federal Government in Western Water Law*, *in* WESTERN WATER LAW E4-1, E4-1 (2000).

135. *See* Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 159 (1935) (noting that federal statutes on the subject "approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states"); Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 613–14 (1978) (finding that water is not subject to the same federal control as mining, because "water is not a locatable mineral under the law and . . . private water rights on federal lands are instead governed by local customs and laws") (citing Charles Lennig, 5 Pub. Lands Dec. 190, 191 (1886)); Arizona v. California, 373 U.S. 546, 601 (1963) ("[A]ll uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States.").

136. Benson, *supra* note 17, at 381–82. Notably, there is even some question as to whether the BOR may contractually limit the ultimate use of BOR project water. *See generally* David Osias & Thomas Hicks, *43 C.F.R. Part 417 Does Not Authorize Federal Agency Adjudication of IID Beneficial Use of Colorado River Water*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1499 (2008) (discussing the as yet unresolved legal issue of whether the BOR has the authority to make reasonable beneficial use adjudications under 43 C.F.R. Part 417). The historical deference to state beneficial use doctrine is well established. *Id.* at 1517–19.

137. Benson, *supra* note 17, at 380–81.

138. *Id*. at 381 n.90 (citing Brian E. Gray*, The Modern Era in California Water*

water is no exception; the state may regulate the use of project water *except* where that regulation is contrary to congressional directives concerning water policy.[139] This power has been described as authority to "'fill in the gaps left by federal directives that apply to the entire reclamation program or a specific project in question."[140]

In sum, though states have a traditionally strong power over water usage, this power may be curtailed in certain circumstances where the water involved is considered project water. The BOR has not historically interfered with the states' ability to define beneficial use, even as it relates to project water—until now. The following provides a brief summary of the marijuana legalization movement in the United States that triggered the BOR's decision to prohibit the use of federal project water to grow marijuana, thereby forbidding at least one use of water otherwise legal under state law.

II. POLICY WARS: MARIJUANA AS A BENEFICIAL USE?

The Federal Controlled Substances Act (CSA) strictly prohibits the possession, cultivation, and distribution of marijuana, and classifies the drug as a Schedule I controlled substance.[141] Violation of the CSA is a federal crime that can carry harsh criminal penalties, including fines and imprisonment.[142] Federal law does not differentiate between medicinal and recreational uses of the drug and does not authorize any state-sanctioned exceptions to the Act.[143] Despite

Law, 45 HASTINGS L.J. 249 (1993)).

139. California v. United States, 438 U.S. 645, 674–75 (1978); Benson, *supra* note 17, at 381.

140. Benson, *supra* note 30, at 284–85.

141. 21 U.S.C. §§ 812, 841 (2012). The CSA places controlled substances into five broad categories, or "schedules," based on their medical or therapeutic value, safety, and potential for abuse. 28 C.J.S. *Drugs and Narcotics* § 221, Westlaw (database updated July 2015). Schedule I is reserved for dangerous drugs that have no currently accepted medical or therapeutic use and have a high potential for abuse. *Id.* Schedule I drugs are subject to the most restrictive government regulations. *Id.*

142. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1435–36 (2009) (discussing the possible criminal sanctions for the possession, use, and distribution of marijuana under the CSA). Punishment for particularly severe manufacturing- and distribution-related offenses can include life imprisonment and fines of up to $20 million. *Id.* at 1436.

143. *Id.* at 1422.

this, a growing number of states have enacted laws that permit the growth, use, and sale of both medicinal and recreational marijuana.[144] As of 2016, twenty-four states have passed laws legalizing the use of medical marijuana, recreational marijuana, or both.[145] While states strictly regulate the growth and distribution of state-legalized marijuana, to date, such states do not regulate the use of water to grow marijuana.[146] The marijuana plant needs a considerable amount of water to grow: as much as a gallon of water per day for a large plant.[147] Because of this, obtaining a reliable source of water is essential for a successful marijuana operation to flourish.[148]

Federal response to the state legalization of marijuana has varied according to the policy priorities of successive presidential administrations. Under the Clinton and George W. Bush administrations, the Drug Enforcement Administration vigorously pursued enforcement of the CSA, "conduct[ing] nearly two hundred raids on medical marijuana dispensaries in California alone."[149] Notwithstanding the arguments of states' rights advocates maintaining state supremacy over drug enforcement laws, the Supreme Court consistently upheld the federal government's power to prosecute persons caught violating the CSA by possessing, growing, or distributing

144. *See State Policy*, *supra* note 1 (providing a map showing states that have enacted marijuana laws in contravention of the CSA).

145. *Id. See also supra* note 23 and accompanying text.

146. *See, e.g.*, COLO. CODE REGS. § 212-2.504(B)(10) (2015) (detailing the requirements for retail marijuana cultivation facilities). Colorado regulations only provide "[t]hat the water supply shall be sufficient for the operations intended and shall be derived from a source that is a regulated water system. Private water supplies shall be derived from a water source that is capable of providing a safe, potable, and adequate supply of water to meet the Licensed Premises [sic] needs." *Id.* Colorado has not otherwise restricted the use of water to grow marijuana.

147. Kelly, *supra* note 40, at 101. In contrast, a stalk of corn (a crop that is typically grown in semi-arid regions) needs around four gallons of water per week (about half a gallon per day) to produce two ears of corn. John Pohly, *How Much Water?*, COLO. ST. U., http://www.colostate.edu/Depts/CoopExt/4DMG/Xeris/howmuch.htm [https://perma.cc/9MRM-H8HS] (last updated Jan. 5, 2010).

148. *See* Nicholas K. Geranios & Gene Johnson, *Feds Don't Want Irrigation Water Used to Grow Pot*, DENV. POST (May 20, 2014, 11:18 AM), http://www.denverpost.com/marijuana/ci_25799421/marijuana-growers-colorado-and-washington-cant-use-federal [https://perma.cc/ANC9-KAV7] (discussing the efforts of marijuana growers in Washington and Colorado to secure water for their grow operations).

149. Mikos, *supra* note 15, at 637–38 (citing MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS app. S, at S-1 (2008), http://docs.mpp.org/pdfs/download-materials/SBSR_NOV2008_1.pdf [https://perma.cc/VAP4-EQBQ]).

marijuana, even where their actions were legal under state law.[150] Thus, according to the Court, the federal government has supreme authority to regulate the use, growth, and distribution of marijuana within the states.[151]

Regardless, under the Obama administration, the Department of Justice (DOJ) has explicitly stated that blanket enforcement of marijuana prohibitions under the CSA will no longer be a federal priority.[152] In a 2009 memorandum (the "Cole Memo"), Deputy Attorney General James Cole directed all US Attorneys in states that have legalized marijuana to focus their investigative and prosecutorial resources on enforcing only selective parts of the CSA against marijuana users.[153] In accordance with this directive, the federal government will prosecute only those offenses that are considered to be federal priorities, including the sale of marijuana to minors, drugged driving, and the use of marijuana sales to fund criminal enterprises.[154] Effectively, this policy of non-enforcement directs federal authorities to defer to the states in regulating and enforcing state marijuana law against individual and retail operations, focusing federal law enforcement efforts on activity that implicates one of the DOJ's stated priorities.[155] The Cole Memo further stipulates that it "does not alter in any way the Department's authority to

150. *Id.* at 638; Gonzales v. Raich, 545 U.S. 1, 16–22 (2005) (upholding the authority of Congress to regulate and prosecute the non-commercial, intra-state cultivation and consumption of marijuana); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (holding that medical marijuana dispensaries cannot claim medical necessity to avoid prosecution under the CSA).

151. Mikos, *supra* note 15, at 638.

152. Memorandum from James M. Cole, *supra* note 3.

153. *Id.* at 1–2.

154. *Id.* Federal marijuana enforcement priorities include:

> preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; preventing the diversion of marijuana to states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.

Id. at 1–2.

155. *Id.* at 2.

enforce federal law, including federal laws relating to marijuana, regardless of state law[,]" reiterating the ultimate power of the federal government to prosecute federal crimes, regardless of the legality of marijuana-related activity under state law.[156]

Subsequent to the issuance of this memorandum, the DOJ issued additional guidance regarding the prosecution of financial crimes, prompting the Department of the Treasury to announce new policies regarding the imposition of the Bank Secrecy Act on financial institutions seeking to service marijuana-related businesses.[157] Significantly, while the Cole Memo ostensibly reflects administration policy regarding the enforcement of federal marijuana law, it does not by itself bind the actions of other government agencies.[158] Rather, other administrative agencies, including the Department of the Treasury, may independently impose civil sanctions and deny federal benefits to marijuana users within the scope of their statutory authority.[159] For example, the Department of the Treasury, which has independent legal authority to sanction and control financial institutions, would be within its discretion to take action against banks that knowingly provide services to

156. *Id.* at 4.

157. DEP'T OF THE TREASURY, GUIDANCE ON BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014) [hereinafter TREASURY GUIDANCE], www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf [https://perma.cc/F56P-NSVT]. Under the Bank Secrecy Act, banks are required to file suspicious activity reports with the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) if they suspect deposits would implicate federal restrictions on, for example, money laundering. *See* Alan K. Ota, *Lew Defends Marijuana Transaction Rules for Banks*, CONG. Q., Apr. 30, 2014, 2013 WL 1688529. The DOT memorandum specifies FinCEN will not target banking transactions with legitimate marijuana-related businesses when scanning bank filings of suspicious activity reports. TREASURY GUIDANCE, *supra*, at 3–4. The use of federally insured banking services has been one major barrier to the growth of marijuana-related businesses, as banks that provide support for illegal drug activity can face federal prosecution and sanctions. *See* Serge F. Kovaleski, *U.S. Issues Marijuana Guidelines for Banks*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/15/us/us-issues-marijuana-guidelines-for-banks.html?_r=0 [https://perma.cc/J5G5-EKUD].

158. *Agencies*, U.S. DEP'T OF JUST., http://www.justice.gov/agencies [https://perma.cc/3ABA-TDHB] (listing agencies organized under the authority of the DOJ). Despite this, the Cole Memo is likely a good indication of the Obama administration's intent to focus enforcement of the CSA on the areas listed.

159. *See* Mikos, *supra* note 15, at 634. For example, the Department of Housing and Urban Development may deny federal housing subsidies to medical marijuana users. *Id.*

marijuana-related businesses.[160] This kind of action would be permissible because it is within the specific congressionally granted authority of the Department of Treasury, in contrast to the current actions of the BOR. Agency enforcement authority was the basis of early federal strategy to limit the activities of marijuana users in states that chose to implement legalization; however, the use of civil enforcement mechanisms were previously limited to those agencies whose statutory authority includes measures intended to combat the sale of illegal drugs.[161]

Contrary to the recent trend of agency acquiescence to state marijuana laws, the BOR issued guidelines in 2014 restricting the use of water from federal water projects to grow marijuana.[162] The agency announced this policy after conducting a review "at the request of various water districts in the west," stating that:

> As a federal agency, reclamation is obligated to adhere to federal law in the conduct of its responsibilities to the American people . . . . [The Bureau] will operate its facilities and administer its water-related contracts in a manner that is consistent with the Controlled Substances Act of 1970, as amended. This includes locations where state law has decriminalized or authorized the cultivation of marijuana. Reclamation will refer any inconsistent uses of federal resources of which it becomes aware to the Department of Justice and coordinate with the proper enforcement authorities . . . .[163]

A BOR spokesman announced this policy, which is set to expire in May 2016, to members of the press. This announcement did not include any statutory or regulatory

160. *See, e.g.*, 31 U.S.C. § 5321 (2012) (granting the Department of Treasury authority to impose civil monetary penalties for violations of the Banking Secrecy Act).

161. Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (1997) (outlining administrative action that could be used to curtail marijuana operations in the states, including the enforcement of federal tax provisions that discourage illegal drug activities and the enforcement of U.S Postal Service policies that forbid the shipping of illegal drugs through the US mails).

162. Stapff, *supra* note 5.

163. *Id.*

justifications for the legality of the agency's action.[164] However, further implementation of the policy after its expiration could, and arguably should, involve an inquiry into the statutory authority of the BOR to restrict the use of water provided to the states through the use of federal projects. This authority, if present, exists in relation to water rights granted to individuals by the states.

III. EXAMINING THE BOR'S PROHIBITION

Considering the parameters of state and federal authority over water that flows through a federal project, the BOR's authority to enforce provisions of the CSA by denying marijuana growers their rights to use federal water is unclear. This Comment examines the BOR's ultimate authority to regulate the use of water for an agricultural purpose that falls within the scope of state definitions of beneficial use.[165]

164. U.S. BUREAU OF RECLAMATION, *supra* note 7.

165. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* establishes a familiar two-step process for judicial review of agency decision-making. 467 U.S. 837 (1984). In the first step, the reviewing court asks if the statute that authorizes agency action is ambiguous, *id.* at 842–43; this involves a determination as to whether Congress has "directly and plainly granted" the agency the authority it seeks to exercise, Am. Bar Ass'n v. FTC, 430 F.3d 457, 467 (D.C. Cir. 2005). If the answer is "no," the court must ask if the words of the statute are ambiguous in such a way as to make the agency's decision worthy of deference under the second step of *Chevron*. *See Chevron*, 467 U.S. at 843. Deference to the agency's interpretation under *Chevron* is warranted only where "Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 843–44); *Chevron* "comes into play, of course, only as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit delegation of authority to the agency." Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 645 (D.C. Cir. 1998). Relevant to this step is whether or not Congress has spoken directly on the issue, either in the statute, legislative history, or by reserving authority over the issue to another entity. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000). If the statute is unambiguous and does not demonstrate a delegation of express or implied authority by Congress for the agency's action, the inquiry is over, and the agency's action cannot stand. *Chevron*, 467 U.S. at 842–43. If ambiguity is found in the statute in conjunction with evidence of an implied grant of authority by Congress, the Court next asks whether the agency's interpretation of the statute is "reasonable." *Id.* at 843–45. Agency decision making is given a high degree of deference in this second step. *Id.* However, certain kinds of agency action are not entitled to *Chevron* deference regardless of statutory ambiguity. *Id.* Agency decisions that do not carry the force of law (for example, guidance or other policy choices that do not go through the notice and comment process) may not be entitled to *Chevron* step-two deference. United

Ultimately, it provides an argument that the policy is an infringement on the historical and statutory right of the states to define the parameters of beneficial water use. The following sections describe how and why such actions could fall outside the scope of the BOR's authority and analyze the likely outcome of a challenge to these actions. Further, Sections B, C, and D address three possible legal sources of BOR authority to restrict the use of project water: federal preemption, the CSA itself, and the agency's asserted general obligation to uphold federal law.

A. The 1902 Reclamation Act's Limitation on the BOR's Authority

As discussed above, agency authority is limited to the power enumerated in its organic act. "Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."[166] Although agencies are generally entitled to deference in the interpretation of the statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[167] As previously mentioned, the Reclamation Act of 1902 authorizes the Secretary to promulgate general rules and regulations "as may be necessary and proper for the purpose of" carrying the Act into effect.[168] The text of the act and its legislative history describe its purpose as being to effectuate the development of the western states through the construction and oversight of public projects for the delivery of water to individual agricultural users.[169] The Reclamation Reform Act of 1982 further authorizes the Secretary to issue regulations related to federal reclamation law by stating that "the

States v. Mead Corp., 533 U.S. 218, 233–34 (2001). This Comment argues that the statute is unambiguous on its face and clearly does not grant the BOR the authority to restrict the use of project water to grow marijuana. Moreover, even if an ambiguity could be found such that application of the *Chevron* doctrine were to be appropriate in analyzing the decision-making authority of the agency, Congress has spoken directly on the issue, determining that state law is to govern absent a direct congressional directive. *See* 43 U.S.C. § 383 (2012).

166. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125.

167. *Chevron*, 467 U.S. at 842–43.

168. 43 U.S.C. § 373 (2012).

169. *See* ANDREWS & SANSONE, *supra* note 52, at 172.

Secretary may prescribe regulations and shall collect all data necessary to carry out the provisions of this title and other provisions of federal reclamation law."[170] Thus, the Secretary is expressly authorized to adopt regulations regarding the delivery of reclamation project water, as well as regulations related to project facilities.[171]

However, congressional authorization for the Secretary to withhold reclamation project water from states or users based on agency standards of use is found nowhere in the statute.[172] The Reclamation Act gives the agency no authority over the specific agricultural use to which project water is put, nor does it give the agency the authority or the prerogative to enforce federal law via the appropriation or denial of contract water.[173] Further, there is nothing in the statute to indicate that the BOR has the implied authority to take such action; the existence of the savings provision in which the Secretary is instructed to "proceed in conformity with" state law relating to the use of water stands in opposition to any such implication.[174] Rather, as two scholars recently noted, "the adoption of federal reasonable, beneficial use standards . . . is a radical departure from historical state, judicial, and contractual provisions and cannot be implied from the statutory language granting the Secretary a general power to adopt necessary regulations."[175]

Thus, far from meriting judicial deference, the decision of the BOR to ban the use of project water for growing marijuana, a legal agricultural use under the state law of many western states, reaches outside the congressionally delegated regulatory power of the agency to oversee the distribution of project water.[176] No ambiguity or implied delegation of power exists in the BOR's statutory authorization that suggests there is a congressional intent to use the agency as a mechanism for enforcing federal drug laws. In the words of the United States Court of Appeals for the D.C. Circuit:

170. Reclamation Reform Act of 1982, Pub. L. No. 97-293, § 224, 96 Stat. 1261, 1272–73 (codified as amended in scattered sections of 43 U.S.C.).

171. *See id.*

172. *See* 43 U.S.C. §§ 371–616yyy (2012).

173. *See id.*

174. 43 U.S.C. § 383.

175. Osias & Hicks, *supra* note 136, at 1556.

176. *See* discussion *supra* Parts I–II.

> To find this interpretation deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.[177]

Further, even if there was some degree of ambiguity in the statute, the presence of Section 8 of the 1902 Reclamation Act clearly evinces congressional intent with regard to the use of federal project water.[178] The courts have interpreted this section as making it clear that Congress has unambiguously addressed the question of what law is to govern the use of project water, coming down on the side of the states.[179]

Additionally, Congress has indicated through the passage of other legislation that it intends to defer to state governance over water appropriation and use.[180] Congressional intent may be surmised by examining its treatment of a particular subject on the whole; where Congress has consistently acted (or failed

177. Am. Bar Ass'n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005) (holding that that attorneys engaged in practice of law are not "financial institutions," within meaning of Federal Financial Modernization Act (FFMA) provisions requiring protection of consumer financial information). In this case, the court expounded on the limitations of *Chevron* deference, refusing to interpret a financial law to include lawyers, a profession traditionally regulated by the states, absent clear congressional intent. *Id.* "Federal law 'may not be interpreted to reach into areas of state sovereignty unless the language of federal law compels the intrusion.'" *Id.* at 471 (citing City of Abilene v. FCC, 164 F.3d 49, 52 (D.C. Cir. 1999)).

178. 43 U.S.C. § 383 ("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 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.").

179. *See* United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877, 884 (1980); California v. United States, 438 U.S. 645, 645, 667–69, 674–75 (1978) (noting that state law governs unless Congress has directly spoken on the issue).

180. 33 U.S.C. § 1251(g) (2012) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired . . . . [N]othing in this chapter shall be construed to supersede . . . rights to quantities of water which have been established by any State."); United States v. New Mexico, 438 U.S. 696, 702 n.5 (1978) (referring to a list of "37 statutes in which Congress has expressly recognized the importance of deferring to state water law").

to act) on a subject, it signals its intent to control or delegate control of that particular subject.[181]

B. Agency Authority to Uphold Federal Law

The BOR, as justification for its policy against the use of federal project water, has cited its role as a federal agency in upholding the requirements of other federal laws.[182] Indeed, it may be argued that the BOR has implied authority to regulate the water that states use in accordance with federal law; this power could be derivative of the Secretary's statutory authority to "make such rules and regulations as may be necessary and proper for the purposes of carrying out [the Reclamation Act]."[183] It could also be derivative of the general duty of the executive, and thus the Secretary of the Interior, to "take Care that the Laws be faithfully executed."[184] However, by denying state water users the ability to use project water in a particular way, the BOR is effectively promulgating a rule that directly affects the rights of individuals—a rule that dictates and defines the bounds of beneficial use.[185] This is a legislative act, the authority for which must be derived from more than an implied grant to "uphold federal law."[186]

An agency's authority is confined to the area described in its organic act to satisfy the constitutional requirement of non-delegation.[187] The separation of powers that defines our government requires that all legislative power be vested in

181. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26 (2000) (holding the FDA could not regulate cigarette advertising where Congress had explicitly and consistently indicated its intent to exclusively control the regulation of tobacco products).

182. Stapff, *supra* note 5.

183. 43 U.S.C. § 373 (2012).

184. U.S. CONST. art. II, § 3.

185. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 293 (Robert C. Clark et al. eds., 2010) (describing an agency "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy") (citing 5 U.S.C. § 551(4) (2006)); *see also* ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 302–03 (4th ed. 1997) (describing a legislative rule as a rule with binding effect whose "nature and purpose is to alter citizens' legal rights in a decisive fashion").

186. *See* GLICKSMAN & LEVY, *supra* note 185, at 292.

187. *Id.* at 89 ("The rule of law perspective on separation of powers contemplates that the legislative power is the antecedent power and that agencies are bound by statutes.").

Congress—agencies are mere subsidiaries of that power and must therefore be constrained by statute.[188] Thus, agencies are strictly limited to actions taken within the bounds of their authority, which must be limited by a statutory intelligible principle that confines and limits the agency's authority to an area of specified jurisdiction.[189]

The BOR is confined by its statutory mandate—a mandate that does not grant it the authority to enforce any and all federal law by restricting the use of project water.[190] The purpose of the requirement of an intelligible principle is to define and limit the authority of individual agencies.[191] This purpose could be easily circumvented if an agency were allowed to generate rules under the auspices of enforcing unrelated federal law that is clearly under the jurisdiction of another agency. Imagine, for example, the expansive power that could be achieved by the Environmental Protection Agency (EPA) under the pretense of enforcing federal criminal law. The scope of an agency's power is arguably limited by jurisdictional bounds to preclude this exact kind of extra-jurisdictional authority.

Further, though the Constitution commands that the President "take care" that the laws of the United States are faithfully executed,[192] this does not, by itself, vest the BOR, a subordinate executive agency, the power to unilaterally enforce federal law outside its statutory jurisdiction.[193] If there is an Article II issue with the Obama administration's policy on marijuana, it is outside the scope of the BOR's authority to remedy that issue. Executive authority has been defined in recent decades in relation to congressional approval of executive action.[194] Where the executive acts with the authorization of Congress or in the absence of congressional action on an issue, its authority is at its height.[195] Where, however, the executive branch acts in opposition to a

188. *Id.*
189. *Id.* at 90.
190. *See* discussion *supra* Part II through Section III.A.
191. *See* GLICKSMAN & LEVY, *supra* note 185, at 292.
192. U.S. CONST. art. II, § 3.
193. *See id.* (failing to explain the applicability of the "Take Care" Clause to administrative agencies); *see also* discussion of the Secretary's power under the Reclamation Act, *supra* Section I.C.
194. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953).
195. *Id.* at 635 (Jackson, J. concurring)

congressional directive, its authority to act is at its lowest ebb.[196] Here, the BOR has acted not only in contravention of an explicit congressional directive, but in a manner that contradicts the Obama administration's stated policy on legalized marijuana.[197] Its power to act under the Article II authority of the executive branch is thus minimal at best.

This principle is supported by the overall structure of the administrative state. Congress frequently enacts legislation that delegates enforcement responsibilities to more than one administrative agency.[198] In these types of situations, Congress will delegate shared regulatory and enforcement authority to one or more agencies or will delegate specific powers and responsibilities to each agency.[199] "For example, both the DOJ and the Federal Trade Commission (FTC) are responsible for antitrust enforcement . . . ."[200] More than fifteen different agencies are charged with ensuring food safety, including the FDA, the USDA, the Department of Homeland Security (DHS), the EPA, and the National Marine Fisheries Service (NMFS).[201] In each of these cases, each agency is given specific authority by Congress to administer statutes governing, for example, antitrust enforcement or food safety.[202] These specific delegations ensure a comprehensive regulatory scheme for each issue and define the parameters of each agency's role to ensure effective interagency cooperation. Agencies are granted authority over statutes consummate with their expertise.[203] However, these complex regulatory regimes would not be necessary if, as asserted by the BOR, each agency had a prerogative to "enforce federal law" outside their statutorily defined roles. Statutory delegations are both the grant and the limit of agency authority so that agency actions reflect their own individual expertise, as defined by Congress.

196. *Id.* at 637.

197. *See* Memorandum from James M. Cole, *supra* note 3, at 3.

198. Amanda Shami, Note, *Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court*, 83 FORDHAM L. REV. 1577, 1589–90 (2014).

199. *Id.* at 1589.

200. *Id.* at 1590.

201. *Id.*

202. *See, e.g.*, 21 U.S.C. §§ 393 (2012) (establishing the Food and Drug Administration and outlining the areas over which it has authority).

203. Paul Chaffin, Note, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations of the INA?*, 69 N.Y.U. Ann. Surv. Am. L. 503, 531 (2013).

C. Applicability of Section 8 of the Reclamation Act

Though Section 8 of the Reclamation Act unambiguously directs the BOR to defer to state law regarding beneficial use,[204] it could be argued that the use of federal project water to grow marijuana frustrates the federal purpose represented by the Controlled Substances Act and does not qualify for protection under Section 8. Though courts have seemingly made it clear that the BOR must follow state water law definitions of beneficial use in the absence of a direct federal directive,[205] it is unclear whether such federal directives must be in the context of reclamation law to have preemptive authority.

The Ninth Circuit has previously described the bounds of state authority over water appropriated for a federal project, noting that a state law requirement is preempted only "if it clashes with the express or clearly implied congressional intent, or works at cross-purposes with an important federal interest served by the congressional scheme."[206] According to the court, the BOR is limited in its ability to regulate in contravention of state law. Thus, in *United States v. California State Water Resources Control Board*, the court held that California could impose conditions on the provision of water rights to a federally authorized reclamation project, where those conditions were not inconsistent with specific congressional directives relating to the project at issue.[207] In that case, California was permitted to condition the BOR's provision of water rights to restrict the use of the water for hydropower where the state's conditions did not frustrate any specific congressional plan or purpose.[208] The opinion indicates that congressional directives that specifically refer to *reclamation* law may override state law.[209] The court analyzes the state's restrictions as they relate to provisions in the

204. *See* 43 U.S.C. § 383 (2012).

205. California v. United States, 438 U.S. 645, 674–75 (1978).

206. United States v. Cal. State Water Res. Control Bd., 694 F.2d 1171, 1177 (9th Cir. 1982) (holding that California could impose conditions on the provision of water rights to a federally authorized reclamation project, so long as those conditions were not inconsistent with specific Congressional directives relating to the project at issue).

207. *Id.* at 1182.

208. *Id.*

209. *Id.*

authorizing statute for the project at issue.[210] However, it can fairly be said that state law may be preempted where it works "at cross-purposes," or, in the case of marijuana law, directly adversely to other federal priorities.[211]

However, nothing in the *California State Water Resources* opinion suggests an interpretation that would require the BOR to analyze and enforce the entire United States Code in conducting its operations.[212] A more reasonable interpretation of the case law suggests a different result: that while federal directives regarding reclamation law will preempt state water law, unrelated federal policies were not intended to invite preemption by being superimposed over a dominion traditionally left to the states.

D. Marijuana Policy and Federal Preemption

Though the BOR may be prohibited from denying marijuana growers the use of project water under its own statutory authority, it is clear that the growth of marijuana remains illegal under federal law.[213] Federal law clearly preempts state laws that authorize marijuana growth; similarly, federal drug policy could also preempt state beneficial use designations.[214] Essentially, the question here is whether states may categorize an activity that is illegal under federal law as a beneficial use of water resources.

Federal preemption of state law can occur in one of three primary ways: express preemption, field preemption, and conflict preemption.[215] Express preemption of a state law

210. *See id.* This opinion addressed specifically whether California's restriction on the use of water for hydropower "clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." *Id.* at 1777. Though the case does not clearly state what "congressional scheme" is implicated, the court analyzes the California law in relation to the Reclamation Act and the statutory authorization for the project at issue, indicating its concern only with reclamation law for the purposes of its analysis. *See id.* at 1777–78.

211. *See* 21 U.S.C. § 812 (2012) (classifying marijuana as a Schedule 1 controlled substance); 21 U.S.C. § 841(a) (2012) (criminalizing the manufacture, distribution, and possession of controlled substances).

212. *See Cal. State Water Res. Control Bd.*, 694 F.2d at 1171.

213. 21 U.S.C. §§ 812, 841(a).

214. *See id*.

215. Osias & Hicks, *supra* note 136, at 1515.; Amy K. Kelley, *Federal Preemption and State Water Law*, 105 J. CONTEMP. WATER RES. & EDUC. 4 (1996), http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1309&context=jcwre

occurs in the face of congressional legislation that unambiguously asserts exclusive federal authority over a particular legal domain.[216] In this type of situation, Congress has explicitly forbidden state legislative activity in this area. Similarly, field preemption occurs where Congress has expressed an intent to solely occupy a particular legal domain.[217] However, field preemption is based on an implied intent to preempt state authority in a particular, rather than an express prohibition.[218] Finally, conflict preemption may occur where a specific provision of federal law conflicts with state law.[219] "State law that is in direct conflict with, inconsistent with, or frustrates the implied intent and purpose" of congressional legislation is preempted by federal law.[220]

The CSA likely constitutes a "conflict preemption" of state laws that allow the cultivation and use of marijuana.[221] However, the CSA does not suggest any intent by Congress to occupy the field of water law or to dictate the terms of beneficial use.[222] Likewise, nothing in the Reclamation Act suggests a congressional intent to limit the states' ability to control the use of federal project water; rather, as previously discussed, the Act specifically reserves this right to the states in Section 8.[223]

Nevertheless, under a conflict-preemption analysis, federal law may preempt state law that describes marijuana growth as a beneficial use of water. Allowing marijuana growers that use federal project water (or indeed any water) to facilitate the illegal growth of a substance that is illegal to possess under federal law not only frustrates the "implied intent and purpose" of the Controlled Substances Act, but directly assists marijuana growers in perpetrating a federal crime.[224] Thus, to

[https://perma.cc/8LSG-RKFP].

216. Osias & Hicks, *supra* note 136, at 1516.

217. *Id.* For example, federal nuclear regulation. *Id.* at 1516 n.77.

218. *Id.* at 1516.

219. *Id.*

220. *Id.*

221. 21 U.S.C § 841 (2012).

222. *See id.* Nothing in the statutory text of the CSA indicates a relationship between federal drug policy, federal reclamation law, and state water use law.

223. *See* 43 U.S.C. § 383 (2012).

224. *See* 21 U.S.C. § 903 (2012) ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the

the extent that state law is inconsistent with the CSA in this regard, it may be preempted by the CSA. However, nothing in the Reclamation Act itself is inconsistent with state laws describing marijuana as a beneficial use.[225] Rather, the Reclamation Act was passed in part to aid in the cultivation of land and the spread of agriculture; to the extent that the BOR's prohibition frustrates the growth of marijuana and industrial hemp as crops, it runs contrary to its statutory purpose.[226] Thus, if state beneficial use law is preempted by federal law, it is preempted by the CSA—not the Reclamation Act. Since as previously discussed, the Reclamation Act does not authorize the BOR to enforce the CSA in this way, the BOR itself does not necessarily have preemptive authority to restrict the use of water to grow marijuana.[227]

Additionally, it is important to note exactly what the BOR is doing in this circumstance. The agency has created a policy through which it prohibits the use of project water to grow marijuana by refusing to condone the practice and by referring violators to the DOJ.[228] It is not actually enforcing the CSA in any meaningful way, as evidenced by the fact that the agency's policy relies on action by the DOJ.[229] The issue of whether the CSA preempts the marijuana laws of states like Colorado is wholly distinct from the issue of water policy in this circumstance. Thus, it becomes a question of whether the BOR's policy preempts state water law—and not an issue of whether the CSA preempts state drug law. Even if we accept that the CSA likely preempts state marijuana law, the BOR's policy is still outside the scope of its authority.

Further, although it may be appropriate for the BOR to issue regulations that directly concern the maintenance, construction, and security of reclamation facilities, the BOR should not be used as a funding source for nonreclamation

authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."). Courts have interpreted this language to indicate conflict preemption wherever the state law "makes compliance with federal law impossible or if it undermines the full achievement of Congress's objectives." Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 14 (2013).

225. *See* 43 U.S.C. §§ 371–616yyy (2012).

226. *See* ANDREWS & SANSONE, *supra* note 52, at 167–72.

227. *See* discussion of BOR authority, *supra* Sections I.C.1, I.C.2.

228. Geranios & Johnson, *supra* note 148.

229. *See id.*

activities. Any unauthorized utilization of BOR funds would effectively circumvent the federal budgetary process through which funds are appropriated (and voted on by the legislature) for specific agency programs.[230] Nothing in federal reclamation law explicitly or impliedly suggests that the BOR should act as an enforcement agency for the implementation of any other federal policy.[231] Denying state water users access to federal project water to grow marijuana suggests an intent on behalf of the BOR to enforce by proxy provisions of the CSA that are being handled very differently by other agencies in the current administration, most notably the DOJ. Under current law, the BOR has no clear authority to carry out such activities.

IV. SOLUTION

A "solution" to this problem of agency overreach is difficult to articulate, as the term itself suggests choosing a side in what is essentially a battle over states' rights. A "solution" in the eyes of the BOR would necessarily be a problem for the western states, just as a "solution" for those states would likely be a loss in the eyes of the BOR. Therefore, the options available to the BOR and the western states are discussed separately below.

A. A "Solution" for the BOR

Currently, the BOR is free to maintain the status quo and reissue its policy statement until a challenge is brought against its actions in court. Given that there are significant standing, political, and other hurdles to a legal challenge, this is a likely course of action for the agency.[232] However, assuming that the

230. *See* GELLHORN & LEVIN, *supra* note 185, at 43 (describing the budgetary process as one aspect of congressional control over agency action).

231. *See* 43 U.S.C. §§ 371–616yyy (2012).

232. In order to bring suit against an agency under the APA, a litigant must establish standing. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990). This requires a showing of injury-in-fact, causation, and redressability, as well as a demonstration that the litigant was within the "zone of interests" protected by the statute under which he seeks redress. *Id.* at 883. Further, the agency's action must be "ripe" for review; this requires both that the agency's action be "final," and that the litigant exhaust any available administrative remedies. 5 U.S.C. § 704 (2012); Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733, (1998) (holding that reviewability is determined by examining: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3)

BOR does not have the authority to maintain its current policy, several options remain open to the agency and to Congress. If Congress wishes to restrict the use of federal project water to prohibit its use for growing marijuana, it can either: (1) explicitly and independently authorize the BOR to take actions to enforce the CSA; or (2) pass specific legislation restricting the use of federal project water to cultivate illegal substances. Each of these options is briefly discussed below.

Section 8 of the 1902 Reclamation Act requires the BOR to defer to state water law in the *absence* of a specific federal directive on the matter at hand.[233] If the BOR wishes to restrict the use of project water to grow marijuana, it needs an indication from Congress that the legislature no longer wants state law to control in this instance.[234] The power of Section 8 to curtail the actions of the BOR relies on congressional intent—an intent that has previously given deference to state water law that defines beneficial use.[235] However, were Congress to legislate on the matter—by, for example, passing legislation restricting beneficial use to legal activities under federal law, Section 8 would not apply. Authority for the BOR to restrict the use of federal project water to legal activities as defined by federal law is thus within the power of Congress to bestow.[236]

Alternatively, Congress could pass an amendment to the Reclamation Act specifically authorizing the BOR to restrict the use of project water to only those activities that the federal government (or the BOR) defines as beneficial use. This would confer authority on the BOR in its organic act to promulgate rules and regulations dictating the use of project water. Obviously, this would be a contentious move on behalf of Congress—one that delegations from the western states would likely oppose.[237] However, the implausibility of such an act

whether the courts would benefit from further factual development of the issues presented.").

233. 43 U.S.C. § 383; United States v. Cal. State Water Res. Control Bd., 694 F.2d 1171, 1176–77 (9th Cir. 1982) (interpreting Section 8).

234. *See* discussion *supra* Part III.

235. 43 U.S.C. § 383; California v. United States, 438 U.S. 645, 674–75 (1978).

236. 43 U.S.C. § 383.

237. Given the popular support for marijuana reform in the western states and the state income from marijuana tax, a measure to inhibit the growth of marijuana is likely to be opposed by legislators from states that have legalized marijuana. *See, e.g.*, Peter Marcus, *Proposition BB Passes Easily*, DURANGO HERALD (Nov. 3, 2015, 10:47 PM), http://www.durangoherald.com/article/

reiterates the essential problem with the BOR's overreaching policy—it lacks a congressional mandate.

B. A "Solution" for the Western States

A "solution" that seeks to benefit those western states that have legalized the growth of marijuana is less clearly defined. Currently, the policy of the BOR that bans the use of project water to grow marijuana lacks any real power to substantially threaten marijuana growers.[238] As of November 2014, the BOR has stated that it will limit its enforcement of its ban to "not approving" the use of its water for marijuana growth operations.[239] The agency has also stated that it will report any unauthorized water use to the DOJ (which is unlikely to pursue any significant action).[240]

Thus, one option for the western states would be merely to maintain the status quo. So long as the BOR declines to pursue aggressive enforcement of its ban on the use of project water to grow marijuana, the day-to-day operations of marijuana growers will likely not suffer from any serious consequences from the ban. Many marijuana growers likely do not use water that can be readily identified as project water at any rate, though the availability of non-project water, while relatively high in Colorado, decreases in the westernmost states like Washington.[241] Growers who do use project water could likely fly under the radar and continue to grow marijuana until and even after the BOR is alerted to their use, as the BOR's ability and willingness to enforce their own policy appears to be limited.[242]

However, the low level at which the BOR is currently

20151103/NEWS01/151109880/Proposition-BB-passes-easily-[https://perma.cc/V4RL-Z3K2] (describing the passage of legislation authorizing the state of Colorado to retain excess marijuana tax revenue.)

238. *See* Geranios & Johnson, *supra* note 148 ("The limit of our proactive stance is that if asked, we're not approving it, and if we become aware of it, we report it.") (quoting the spokesman for the BOR).

239. *Id.*

240. *Id.* Thus, the policy as it stands does not affect marijuana growers who use project water unless they 1) affirmatively ask permission from the BOR to use project water, or 2) are reported to and prosecuted by the DOJ (an outcome rendered unlikely by the Cole Memo). *See id.*; Memorandum from James M. Cole, *supra* note 3.

241. *See* Geranios & Johnson, *supra* note 148.

242. *Id.*

enforcing the ban is not an accurate reflection of the potential impact of the BOR's ban on the use of project water to grow marijuana. The real threat of the BOR's policy to marijuana growers lies in the uncertain future of federal drug enforcement policy.[243] Any change in presidential administration could bring about sweeping changes in the attitude of the DOJ towards marijuana growers who cultivate the drug legally under state law.[244] Though a change in administration would not affect the legality of the BOR's actions absent a congressional directive, it could render the point moot, as a crackdown would eliminate the supply for (legal) marijuana and thus the need for water to grow large crops of marijuana. Alternatively, depending on the intensity with which a new administration chooses to focus on cracking down on illegal grow operations, a scenario exists where federal enforcement focuses not on individual prosecutions, but on controlling the growth and distribution of marijuana through the denial of federal benefits and other civil remedies.[245] Aggressive enforcement of a ban on the use of project water to grow marijuana could result in some water users being denied service by the BOR, a move that would significantly curtail marijuana production, particularly in states in which federal reclamation projects dominate the deliverance of water.[246] This is why a preemptive challenge to the BOR's policy could prove essential to marijuana advocates and grow operations. A declaration by a court that the BOR has overstepped its authority would protect the water rights of growers even in the event of an administration with aggressive enforcement policies.

Alternatively, a state water user that wishes to use project water could institute an action against the BOR to strike down

243. *See* Mikos, *supra* note 15, at 637–38 (describing the ability of previous administrations to vigorously enforce federal drug policy despite state law).

244. *See id.* at 638 (discussing the Obama administration's shift in policy from previous administrations).

245. This kind of enforcement by proxy was utilized by the Clinton and Bush administrations to curtail the medical marijuana industry without expending federal resources to directly confront violators of the CSA. *See id.* at 637–38.

246. Though in some states, and particularly in some regions within individual states, marijuana growth will be unaffected due to the availability of other sources of water, industry in areas without alternative water sources would be highly restricted. *See* Geranios & Johnson, *supra* note 148 ("[A]ll of Colorado's 980 licensed pot growers operate in greenhouses that use water from local water districts, which include Reclamation water.").

its current policy as outside its scope of authority.[247] This could provide a solution both for marijuana growers and for the state at large. First, a declaration that the BOR lacks the authority to promulgate such a rule could stabilize the marijuana industry and allow growers to use both project and non-project water. Next, and more importantly, allowing a ban on the use of project water to grow marijuana to remain unchallenged strikes a blow to state independence with regards to natural resource decision-making. Though an important state policy choice, marijuana growth is neither the focus nor the limit of an administrative directive that seeks to dictate the boundaries of beneficial water use. In this instance, Congress has delegated the authority to define the term "beneficial use" to the states. Given the importance and power this seemingly innocuous decision could have on the freedom of the states to define beneficial use, it would be in the interest of the states that have legalized marijuana to support a challenge to any further permanent action taken by the BOR to codify or further enforce this ban.

The right of the states to define "beneficial use" should be defended and preserved for several reasons. First, water is a precious and essential natural resource with profound ties to local communities.[248] Communities have historically grown up around reliable sources of water.[249] The doctrine of beneficial use developed, and continues to develop, according to public values.[250] Water use is inextricably tied to many communities. For example, agricultural communities rely on their historic right to beneficially use water to grow crops. In the event of a prolonged water shortage or other substantial need to drastically limit the use of water—project or otherwise—it should be the role of the state to determine which historically

247. Notably, this course of action would require the challenger to overcome several significant hurdles in order to articulate a justiciable case, including establishing the finality of the BOR's action, as well as establishing standing, harm, and redressability. *See generally* CASS ET AL., *supra* note 10, at 231–373 (discussing in detail the availability of judicial review of administrative actions). Those issues, while essential to a legal challenge, are largely case-specific and are outside the scope of this Comment.

248. *See* Lieberman, *supra* note 64, at 32–33 (discussing the importance of water to the growth of early settlements in Colorado).

249. *Id.*

250. *See* D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 ENVTL. L. 1, 4–6 (1991).

beneficial uses of water should be eliminated in the interest of conservation. The state, as the unit of government closest in proximity to state water users, is the most legitimate entity to decide what uses of water are beneficial, particularly in the event of a water shortage. It is the state legislature—not the BOR, a largely unaccountable administrative agency—that should have the power to define "beneficial use" according to the needs of the state and the decision of the peoples' representatives, particularly in the likely event of water shortages in the future.

Further, vesting the ability to define beneficial use in the state allows the doctrine of beneficial use to remain flexible with time, so it may evolve with public ideals about what constitutes acceptable use of natural resources.[251] As time goes on, "a wider range of accepted uses [may be] recognized as beneficial . . . . [D]ue to changing values and increased knowledge, particular practices that may not have raised an eyebrow in earlier times [may be] . . . viewed [differently] with a more contemporary perspective."[252] The present issue reflects this point. The ability of the state to define "beneficial use" should be vigorously defended to preserve its role in dictating natural resource allocation and use within its jurisdiction. Though this issue has arisen in an unusual and socially controversial context, states' rights advocates and water rights holders should not lose sight of the bigger picture: defense of the states' right to define "beneficial use."

CONCLUSION

While the BOR has stated that enforcement of its policy banning the use of project water to grow marijuana will be limited, the effects of expanding the BOR's power to stipulate water use are far-reaching. In the event that administration views regarding state marijuana laws change with subsequent presidential elections, the denial of government benefits could prove a powerful enforcement tool to an administration hostile to state marijuana laws, particularly in areas that depend on project water for irrigation and municipal use. Further, the

251. *See* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 928 (1998).

252. *Id.* at 928.

implementation of a policy by the BOR that prohibits the use of water for a lawful state purpose sets a dangerous precedent under which a federal agency is allowed to dictate what constitutes beneficial use under state law. The expansion of BOR authority over western water use, absent clear congressional authorization, opens the door for agency oversight and authority over the previously discretionary use of water by the states.