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OPINION	:	No. 80-320
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of	:	<u>August 20, 1980</u>
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SUBJECT: DAM OPERATION AND MAINTENANCE; CONSTRUCTION APPLICATION FEE—Generally, the provisions of division 3 of the California Water Code apply to the operation and maintenance by the Los Angeles Flood Control District of dams designed and constructed by the United States Army Corps of Engineers, whether or not such dams are nonfederal facilities, owned by the district, and designated in the National Inventory of Dams as within the jurisdiction of State of California; a construction application fee is not required for such dams, the design and construction of which were not subject to the regulatory jurisdiction of the State of California.

The Honorable Ronald B. Robie, Director, Department of Water Resources, has requested an opinion on the following questions:

1. Do the provisions of division 3 of the California Water Code apply to the operation and maintenance by the Los Angeles County Flood Control District of dams designed and constructed by the United States Army Corps of Engineers, where the corps has determined that such dams are nonfederal facilities, owned and operated by the district, and designated in the National Inventory of Dams as falling within the jurisdiction of the State of California?

2. Is a construction application fee required for such dams, the design and construction of which were not subject to the regulatory jurisdiction of the State of California?

CONCLUSIONS

1. In the absence of any perceived conflict with applicable federal law, interference with the exercise of a proper federal function, or impairment of any federal reserved right, the provisions of division 3 of the California Water Code apply to the operation and maintenance by the Los Angeles County Flood Control District of dams designed and constructed by the United States Army Corps of Engineers, whether or not such dams are nonfederal facilities, owned by the district, and designated in the National Inventory of Dams as falling within the jurisdiction of the State of California.

2. A construction application fee is not required for such dams, the design and construction of which were not subject to the regulatory jurisdiction of the State of California.

ANALYSIS

We are advised that the Los Angeles County Flood Control District operates and maintains several flood control debris dams which were designed and constructed by the United States Army Corps of Engineers in the early 1950's as component units of federal flood control projects pursuant to federal flood control acts (e.g., 55 Stat. 647 (1941); 58 Stat. 900 (1944)). (Cf. 25 Ops. Cal. Atty. Gen. 97 (1955).) The present inquiry concerns the supervisory jurisdiction over the operation and maintenance of such dams¹ by the Division of Safety of Dams of the Department of Water Resources (hereinafter, "department") under the provisions of division 3 of the Water Code², commonly referred to as the Dam Supervision Act (hereinafter, "Act"). Section 6075 of the Act provides generally:

"The department, under the police power of the state, shall supervise the construction, enlargement, alteration, repair, *maintenance*, *operation*, and removal of dams and reservoirs for the protection of life and property as provided in this part." (Emphasis added.)

¹ It is assumed that such dams fall within the definition set forth in section 6002 of the Water Code. (Cf. 25 Ops. Cal. Atty. Gen., *supra*, at p. 98.)

² Hereinafter, all section references are to the Water Code unless otherwise indicated.

Section 6076 provides that all dams and reservoirs in the state are under the jurisdiction of the department. Further, it is unlawful to construct, enlarge, repair, alter, remove, *maintain, or operate* any dam or reservoir except upon approval of the department. (§§ 6077, 6427.) Other provisions pertain specifically to the construction or enlargement,³ and to the repair, alteration, or removal⁴ of a dam, and to the inspection of completed dams.⁵ With regard specifically to the operation and maintenance of dams, section 6100 provides:

“Supervision over the maintenance and operation of dams and reservoirs insofar as necessary to safeguard life and property from injury by reason of the failure thereof is vested in the department.”

Section 6101 provides:

“The department may require owners to keep records of, and to report on, maintenance, operation, staffing, and engineering and geologic investigations and shall issue such rules and regulations and orders as necessary to secure maintenance and operation and to require staffing and engineering and geologic investigations which will safeguard life and property. In addition, the owner of a dam or reservoir or his agent shall fully and promptly advise the department of any sudden or unprecedented flood or unusual or alarming circumstance or occurrence affecting the dam or reservoir.”

Section 6102 provides:

“The department, from time to time, shall make inspections of dams and reservoirs at state expense for the purpose of determining their safety but shall require owners to perform at their expense such work as necessary to disclose information sufficient to enable the department to determine conditions of dams and reservoirs in regard to their safety and to perform at

³ “Section 6200:

“Construction of any new dam or reservoir or the enlargement of any dam or reservoir shall not be commenced until the owner has applied for and obtained from the department written approval of plans and specifications.”

⁴ Section 6225:

“Before commencing the repair, alteration, or removal of a dam or reservoir, including the alteration or removal of a dam or reservoir so that it no longer constitutes a dam or reservoir as defined in this part, the owner shall secure the written approval of the department, except as provided in this article.”

⁵ Sections 6350–6355.

their expense other work necessary to secure maintenance and operation which will safeguard life and property.”

Finally, the term “owner” is defined in section 6005:

“‘Owner’ includes any of the following who own, control, operate, maintain, manage, or propose to construct a dam or reservoir:

“(a) The state and its departments, institutions, agencies, and political subdivisions.

“(b) Every municipal or quasi-municipal corporation.

“(c) Every public utility.

“(d) Every district.

“(e) Every person.

“(f) The duly authorized agents, lessees, or trustees of any of the foregoing.

“(g) Receivers or trustees appointed by any court for any of the foregoing.

“‘Owner’ does not include the United States.

In 25 Ops. Cal. Atty. Gen. 97 (1955) we concluded that the State Engineer⁶ did not have jurisdiction over either the design and construction or the maintenance and operation of the dams which are the subject of the present inquiry. With respect to the maintenance and operation of such dams, we stated in part (*id.* at p. 100):

“ . . . a consideration of the policy underlying the exemption of the United States contained in section 6005 indicates that the Legislature did not contemplate -the assertion of regulatory jurisdiction by the State Engineer over the operation and maintenance of dams constructed by the United States in furtherance of a program such as is here involved. We take the section

⁶ The Act was then administered by the Department of Public Works acting through the agency of the State Engineer. (Stats. 1929, ch. 766, § 1; and *cf. Department of Public Works v. City of San Diego* (1932) 122 Cal. App. 159.)

6005 exemption of the United States from the act as an expression of legislative unwillingness to attempt to apply the State's dam control regulations to installations constructed by the United States and activities undertaken by it in the exercise of the federal power over navigable waters. If this be the policy of the act, what difference is there between the present situation and one where the United States itself chooses to operate the dam, and in which case the act would clearly be inapplicable? The dams were constructed and are operated as component units of an integrated federal program. The federal program is a continuing one in which the construction of the dams is not a final but merely a preliminary step. The Secretary of Army has promulgated extensive regulations governing the details of maintenance and operation of the dams (see 33 Code Fed. Regs., ch. 2, Pt. 208). In this construction the fact that the United States has chosen to carry out its program by utilizing the services of the Los Angeles Flood Control District to operate the dams, rather than those of some federal agency for the purpose, is not a factor which the Legislature has made clearly determinative of the applicability of the act. Therefore, a proper interpretation of section 6005 suggests the conclusion that its exemption of the United States from the provisions of the Dam Supervision Act operates to deprive the State Engineer of jurisdiction over the maintenance and operation of the dams by the district in the present situation."

We are now asked to reconsider the meaning and effect of the term "owner" as set forth in section 6005, which expressly includes "every district" which "operates" or "maintains" a dam, in view of certain conflicting advisements.

On the one hand, the United States Army Corps of Engineers has recently advised this state that nineteen retention dams and debris basins within the jurisdiction of the Los Angeles County Flood Control District, federally constructed and turned over to the district for operation and maintenance, are, and at all times during and after construction have been owned by the district, are subject to the jurisdiction of the State of California, and are so designated in the National Inventory of Dams. We are advised by the district, on the other hand, that the dams, constructed on lands owned by the district, designed by the Corps of Engineers without consultation with the district, constructed under the exclusive supervision of the Corps as components of an integrated federal program, were turned over to the district only for purposes of operation and maintenance, no transfer of ownership being expressed or implied. The district contends that the assertion by the Corps that the dams are not federally owned "has no evidentiary support," and that such dams are not, therefore, subject to the jurisdiction of the State of California. We are not presented with documentary or other evidence in support of the respective claims, and do not purport to

resolve the dispute as to ownership.⁷

The applicability of the state statutes do not, however, depend solely or primarily upon considerations of ownership or title, but also on the extent to which the application of such statute would infringe upon or impair the federal function, (57 Ops. Cal. Atty. Gen. 42, 45 (1974); 5 Ops. Cal. Atty. Gen. 304, 306, *supra*.) Hence, state jurisdiction may attach notwithstanding federal ownership, while such jurisdiction may be precluded in spite of ownership by the state or its political subdivision.

We begin with the assumption of federal ownership. (See 33 U.S.C. §§ 701c, 701c-1.) The first question is whether the state statute extends by its own terms to federally owned dams. Section 6076 provides unequivocally that “[a]ll dams and reservoirs in the state are under the jurisdiction of the department.” (Emphasis added.) Section 6079 provides that “[i]n carrying out the provisions of this part the department may cooperate with the United States or any of its agencies.” The fact that the term “owner,” wherever it may appear in the statutory scheme, does not include the United States (§ 6005), does not contraindicate the express extension of jurisdiction. Neither the provisions of section 6075 nor 6100, *supra*, providing that the department shall supervise the operation and maintenance of dams for the protection of life and property contain any reference to the term “owner.” In our view, therefore, the statutory scheme does extend, by its own terms, to all dams, including federal dams, for the protection of life and property of the people of this state.⁸

The second question concerns the extent to which state law in force at the time of acquisition by the United States conflicts with applicable federal law. The principle statutes hereinabove set forth were enacted in substantially equivalent form in 1943, based on chapter 766 of the Statutes of 1929. Whether the federal legislative power is exclusive⁹ or

⁷ Inasmuch as any cession to the United States of jurisdiction over the lands upon which the dams were constructed would have occurred after 1940, express statutory notice of acceptance by the United States would have been required. (*Cf.* 8 Ops. Cal. Atty. Gen. 304 (1946); 57 Ops. Cal. Atty. Gen. 42, 46 (1974).) Since 1951, the description of any lands acquired by the United States, and the degree of jurisdiction in each case, is required to be indexed by the State Lands Commission. (Gov. Code, §§ 126, 127.) Moreover, at least since 1967, the acceptance of any retrocession would be filed with the Secretary of State. (Gov. Code, §§ 113, 115.) Retrocession may occur, however, by operation of law. (*Cf.* 8 Ops. Cal. Atty. Gen. 304, *supra*.)

⁸ Certain statutory provisions which pertain specially to “owners” do not, of course, include the United States. To the extent, however, that our prior opinion, 25 Ops. Cal. Atty. Gen. 97, *supra*, suggests on the basis of state law, a lack of jurisdiction over federal dams as such, it is disapproved.

⁹ The Congress shall have the power “[t]o exercise exclusive legislation in all cases, whatsoever, over . . . all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful

subject to reservations contained in the act of cession,¹⁰ it is generally held that the law of the state in force and applicable to the enclave at the time of acquisition by the United States remains so applicable to the extent that it is not in conflict with federal law. (*Stewart & Co. v. Sadrakula* (1940) 309 U.S. 94, 99–100; 58 Ops. Cal. Atty. Gen. 384, 385 ((1975); 57 Ops. Cal. Atty. Gen. 42, 47 (1974); 24 Ops. Cal. Atty. Gen. 103, 104 (1954).) Consequently, even assuming federal ownership, the state Act, in force now and at the time of acquisition by the United States, in the absence of any conflict with federal law, applies. We do not perceive, nor has any such conflict been suggested.

Finally, a substantial part of lands acquired by the United States is held under a federal proprietary interest only. (*Johnson v. Morrill* (1942) 20 Cal. 2d 446, 455–456; 58 Ops. Cal. Atty. Gen. 384, 385, *supra*; 57 Ops. Cal. Atty. Gen. 42, 46, *supra*.) In such cases, the state has not ceded, and the United States has not accepted any degree of legislative jurisdiction; the state may enforce its laws and regulations on the land. (60 Ops. Cal. Atty. Gen. 162, 166 (1977); *Cf. People v. Brown* (1945) 69 Cal. App. 2d 602, 605.) Unless the United States has filed a notice of acceptance of a cession with the governor of a state, or has otherwise followed the procedure for acceptance set forth in the state cession statute, it is conclusively presumed that the property is held in a proprietary capacity only. (*People v. Brown*, *supra*; 58 Ops. Cal. Atty. Gen. 384, 386, *supra*; 57 Ops. Cal. Atty. Gen. 42, 46, *supra*.)

We proceed next upon the contrary hypothesis, based on the uncontroverted premise that the dams were constructed on lands owned by the Los Angeles County Flood Control District, the absence of any indication that such title was ever acquired by the United States, and the unequivocal denial of ownership by the Corps of Engineers, that the district, which operates and maintains the dams in question, does not act in such capacity as an office or agency of the United States and is an owner' thereof within the plain and unambiguous meaning of section 6005 which draws no distinction between dams federally constructed and those which were not. The department is statutorily authorized and required to supervise such operation and maintenance for the protection of life and property. (§§ 6075,

buildings. . . ." (U.S. Const., art. I, § 8, cl. 17.)

Further, the Congress shall have the power to "make all needful Rules and Regulations respecting the Territory or either property belonging to the United States..(U.S. Const., art. IV, § 3, cl. 2.) (See 63 Ops. Cal. Atty. Gen. 115, 116 (1980); 60 Ops. Cal. Atty. Gen. 162, 167 (1977).)

¹⁰ Government Code section 110 provides:

The sovereignty and jurisdiction of this State extends us all places within its boundaries as established by the constitution. The extent of such jurisdiction over places that have been or may be ceded to, purchased, or condemned by the United States is qualified by the terms of the cession or the laws under which the purchase or condemnation is made."

6100.) Nevertheless, we must examine the nature and scope of federal regulatory jurisdiction over such dams in order to determine whether the exercise of such state authorized supervision is constitutionally precluded.

Exclusive authority over intrastate waterways lies with the states, subject to two basic limitations. The first consists of the authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes. (*United States v. Rio Grande Irrigation Co.* (1899) 174 U.S. 690, 703; *United States v. New Mexico* (1978) 438 U.S. 696, 698.) We are presented with no facts which would indicate, nor do we perceive any issue regarding the impairment, by virtue of the exercise by the department of supervisory jurisdiction over the operation and maintenance of the dams, of federal reserved rights. The second is the federal power under the commerce clause (U.S. Const., art. I, § 8, cl. 3) to secure the uninterrupted navigability of all navigable, water courses within the limits of the United States. (*United States v. Rio Grande Irrigation Co.*, *supra*; *California v. United States* (1978) 438 U.S. 645, 662.) In this regard, we must inquire whether the state statute serves a legitimate local purpose, whether its impact upon interstate commerce is substantial or incidental, whether such burden is evenhanded or discriminatory against commerce either on its face or in practical effect, and whether alternative means could promote the local purpose as well without such discrimination against commerce. (*Hughes v. Oklahoma* 1979) 441 U.S. 322, 336; *City of Philadelphia v. New Jersey* (1978) 437 U.S. 617, 623; *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142; and *Cf.* 62 Ops. Cal. Atty. Gen. 351, 3 53–355 (1979).) In the absence of further specific information it is assumed, solely upon reasoned hypotheses, that even if the water courses are navigable the exercise of supervisory jurisdiction by the state over the operation and maintenance of the federally constructed barriers, for the protection of life and property, does not constitute an impermissible burden upon commerce.

The Congress has, however, enacted specific legislation pertaining to the inspection of dams for the protection of life and property. Prior to analysis of such legislation, we reiterate the basic premises of the federal preemption doctrine. The supremacy clause of the constitution, article IV, clause 2, upon which the doctrine is based, provides in pertinent part:

“This Constitution, and the laws of the United States . . . shall be the supreme law of the land; . . . anything in the Constitution or laws of any State to the contrary notwithstanding.” see also Cal. Const., art. III, § 1.) In *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 157–158, the Supreme Court set forth the principles of federal preemption:

“The Court’s prior cases indicate that when a State’s exercise of its police power is challenged under the Supremacy Clause, ‘we start with the

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in *Rice*, *supra*, at 230:

“‘[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm’n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant; that the federal system will be assumed to preclude enforcement of state laws of the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W.C.R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*.’

“‘Accord, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

“‘Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found ‘where compliance with both federal and state regulations is a physical impossibility . . . ,’ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963), or where the state ‘law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones Rath Packing Co.*, *supra*, at 526, 540–541. Accord, *De Canas v. Bica*, 424 U.S. 351, 363 (1976).”

See 62 Ops. Cal. Atty. Gen. 448, 452–453 (1979); 61 Ops. Cal. Atty. Gen. 159, 167–169 (1978).

In 1972, the Congress enacted the National Dam Inspection Act, title 33, United States Code, sections 467 to 467d, inclusive. Generally, the Secretary of the Army, acting

through the Chief of Engineers, is authorized thereunder to conduct a national program of inspection of dams in the United States, and to furnish the results of such inspections as completed to the governor of the state in which the dam is located, and during inspection to notify the governor immediately of any hazardous condition, and, upon request, to advise the governor relating to remedial measures necessary to mitigate or obviate any such hazardous conditions. The Secretary is also directed to provide to the Congress, prior to July 1, 1974, a report including an inventory of all dams in the United States, a review of each inspection made, the recommendations furnished to the appropriate governor and the implementation of such recommendations, and recommendations for a comprehensive national program for the inspection and regulation of dams, and the respective responsibilities which should be assumed by federal, state, and local governments and by public and private interests.

Upon the submission of such report to the Congress,¹¹ an on-going dam inspection program was authorized and funded.¹² Regulations adopted by the United States Army Corps of Engineers are found in title 33, Code of Federal Regulations, part 222. These comprehensive regulations define the objectives, policy, responsibilities, and procedures by which the Corps of Engineers carries 'out its responsibilities for assuring the continuing structural adequacy of its major civil works structures in service. (33 CFR, § 222.2(a).) Such structures include flood control dams, navigation locks, powerhouses, levees, floodwalls, pumping stations and similar facilities designed and constructed under the jurisdiction of the Corps. (33 CFR, § 222.2(e).) Section 222.2(e) (1) provides:

“For those projects constructed by the Corps of Engineers and then operated by others, transfer of this responsibility should not preclude Corps participation in the inspections, if desirable. At the time of transfer of the responsibility for operation, the operating entity should be informed of the inspections and observations considered appropriate, and arrangements should be made for any such participation by Corps of Engineers personnel. However, these inspections and observations will be the responsibility of the operating entity.”

It is apparent, upon review of the state and federal legislative schemes, that neither their purposes nor objectives are inconsistent, nor would the enforcement of the state Act impair the federal function. (*Cf. Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S.

¹¹ National Program of Inspection of Dams, Department of the Army, Office of the Chief of Engineers (May 16, 1975).

¹² Public Law 95-96 (Aug. 7, 1977), 91 Statutes 797; see House Conference Report No. 95-507 (July 20, 1977) to H.R. 7553 (Public Works for Water and Power Development and Energy Research Appropriation Bill, Fiscal Year 1978).

132, 142; 57 Ops. Cal. Atty. Gen. 42, 44 (1974).)

It is concluded that the department has supervisory jurisdiction over the operation and maintenance by the district of the subject dams without regard to ownership.

The second inquiry is whether a construction fee is required for such dams, the design and construction of which were not subject to the regulatory jurisdiction of the state.¹³ Section 6200 provides:

“Construction of any new dam or reservoir or the enlargement of any dam or reservoir shall not be commenced until the owner has applied for and obtained from the department written approval of plans and specifications.”
(Emphasis added.)

Section 6300 provides that the application for a new dam shall be accompanied by a filing fee as therein prescribed. The dams were designed and constructed by an agency of the United States. The state Act expressly provides that the term “owner” does not include the United States.

We need not determine whether the United States is or ever was the owner of the dams. Construction of the dams was clearly a federal function, authorized by an Act of Congress as hereinabove set forth. It is axiomatic that in the performance of its functions the United States is exempt from state interference. (*McCulloch v. Maryland* (U.S. 1819) 4 Wheat. 316, 401.) Hence, the United States was not required to obtain state approval for such construction. (*Arizona v. California* (1931) 283 U.S. 423, 451–452; 18 Ops. Cal. Atty. Gen. 31, 39 (1951).) Thus, a construction fee neither was not is now required.

¹³ The present inquiry is expressly limited to the initial or any subsequent construction or enlargement by the United States.