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Ray G. Huffaker

B. Delworth Gardner

RAY G. HUFFAKER* and B. DELWORTH GARDNER**

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INTRODUCTION

This article considers whether the so-called "hammer" clause[1] of the Reclamation Reform Act of 1982 (RRA)[2] violates constitutional due process in retroactively restructuring the terms of preenactment federal water contracts.

The RRA restructured eighty years of reclamation law.[3] The restructuring was motivated by intense public controversy over the discrepancy between the original 1902 Act's[4] broad social and economic development goals and its actual implementation by the Bureau of Reclamation (Bureau). The poor financial condition of some projects, particularly the Central Valley Project (CVP) in California, the largest of the Bureau's projects, also fueled the impetus for reform.

Implementation of the RRA is complicated by long-term water delivery contracts predating its enactment. Most of the existing federal water contracts do not expire until after the year 2000.[5] Congress, wary of breaking preenactment contracts outright,[6] added the RRA's controversial "hammer" clause" in a conference committee.[7] The clause induces water districts with existing water contracts to voluntarily amend them into compliance with the restructured law. Amending districts are eligible under the RRA to receive subsidized water for up to 960 acres owned or

*Department of Agricultural Economics, University of California at Davis.
**Department of Agricultural Economics, University of California at Davis.

1. 43 U.S.C. § 390dd (1982).

2. 43 U.S.C. § 390 (1982).

3. The Reclamation Act of 1902, 32 Stat. 388, as amended by the Omnibus Adjustment Act of 1926, 44 Stat. 636 and the Reclamation Project Act of 1939, 53 Stat. 1187, constituted the body of federal reclamation law previous to the RRA.

4. 32 Stat. 388 (1902).

5. Natural Resources Defense Council, Inc., Comments of the Natural Resources Defense Council, Inc. on the Bureau of Reclamation's CVP Ratesetting Policy Proposal 25 (1984) [hereinafter cited as NRDC].

6. Congress asked the Comptroller General of the United States to determine the rights water recipients in the Westlands reclamation area have under their water contracts. The Comptroller General's response is found in 128 CONG. REC. S8324 (daily ed. July 15, 1982) [hereinafter cited as Comptroller General].

7. S. CON. REP. No. 568, 97th Cong., 2d Sess. 5 (1982).

leased but must pay the "full cost of water"[8] for leased lands in excess of 960 acres and owned land under "recordable contract."[9] Districts not amending before mid-1987 will receive water under a restrictive interpretation of the 1902 Act. Irrigators in non-amending water districts will be allowed subsidized water for 160 acres owned or leased, but must pay "full cost" for leased land in excess of 160 acres.[10] Critics contend that this restriction "hammers" districts into amending their water contracts before normal dates of expiration.

The "full cost" of water is considerably higher than the subsidized rate in many reclamation areas.[11] Thus farmers throughout the West will have to pay substantially higher prices under the new law to irrigate their current holdings, many of which are leased, and may therefore face restructuring of their operations. Farmers who find it more profitable to remain under their existing contracts can therefore be expected to attempt to repeal the "hammer" clause.

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8. The term 'full cost' means an annual rate as determined by the Secretary that shall amortize the expenditures for construction properly allocable to irrigation facilities in service, including all operation and maintenance deficits funded, less payments, over such periods as may be required under Federal Reclamation Law or applicable contract provisions, with interest on both accruing from October 12, 1982, on costs outstanding at that date, or from the date incurred in the case of costs arising subsequent to October 12, 1982. Operation, maintenance, and replacement charges required under Federal Reclamation law shall be collected in addition to the full cost payment.

43 C.F.R. § 426.4(i) (1984).

9. "The term 'recordable contract' means a contract between the Secretary [of the Interior] and a landowner in writing capable of being recorded under State law providing for the sale or disposition of lands held in excess of the ownership limitations of Federal Reclamation law. . ." 43 U.S.C. § 390bb(10) (1982).

10. *See supra* note 1.

11. *See* United States Dept. of the Interior, Draft Environmental Impact Statement (DEIS), Acreage Limitation, Westwide Report Appendix G (Full Cost Pricing Option), Table 2 (1980). The DEIS estimated subsidized and "full cost" water rates per acre-foot for eighteen reclamation districts:

District	*Subsidized Rate*	*"Full Cost" Rate*
Black Canyon	$ 1.41	$ 15.77
Coachella	7.00	26.27
Columbia Basin East	4.19	41.16
Elephant Butte	6.45	24.43
Farwell	10.50	135.50
Glenn-Colusa	1.46	17.85
Goleta	59.24	263.12
Goshen	4.22	22.96
Grand Valley	1.18	31.10
Imperial	4.75	11.00
Lower Yellowstone	5.28	34.62
Lugert-Altus	18.58	143.19
Milk River	7.79	119.13
Moon Lake	1.75	7.04
Oroville-Tonasket	11.47	21.33
Truckee-Carson	2.19	33.46
Wellton Mohawk	4.80	29.58
Westlands	15.80	67.56

Initially, this article traces the development of the essential elements of reclamation law from the original 1902 Act to the RRA of 1982. Then it analyzes the constitutionality of the "hammer" clause from the perspective of the two standards of review the United States Supreme Court has applied to due-process challenges of retroactive legislation. Next, the article predicts which landowners and tenants can be expected to fight for repeal. Finally, it suggests ways that amending contract holders may be able to use Bureau regulations to mitigate the impact of the RRA's restrictive leasing provisions.

DEVELOPMENT OF RECLAMATION LAW

Acreage Limitation

A landowner was eligible for project water under the 1902 Act if he did not own more than 160 acres within the project area,[12] and resided on or near his land.[13] The original Act's objectives were to: (1) distribute widely the benefits of publicly-financed reclamation projects, (2) promote owner-operated family farms, and (3) preclude speculative gain in the disposition of owned land over acreage limitations.[14] The Omnibus Adjustment Act of 1926,[15] an amendment to the 1902 Act, provided the basis for administration of the 160-acre limitation by requiring recipients with owned land in excess of 160 acres (excess lands) to enter into "recordable contracts"[16] with the Secretary of the Interior (Secretary). Owners of excess lands agreed to sell their excess within ten years for a price reflecting the value of the land before the project was built.[17] The Secretary agreed to supply the excess lands with subsidized water for the duration of the contract, usually ten years. If the excess acreage was not sold before the end of the contract, power of attorney vested in the Secretary to sell the land by lottery or other impartial means. The RRA preserves the concept of the recordable contract but shortens its duration from ten to five years.[18]

Prior to adoption of the RRA, the Bureau did not regulate leasing of acreage receiving project water beyond prohibiting leasebacks. Leasebacks occur when buyers of excess land lease the land back to sellers as part of the consideration for the sale transaction. Therefore, eligible federal water users applied subsidized water not only to their 160 acre entitlements, but also to their leaseholdings, provided the corresponding landowners were eligible to receive project water.

12. Act of June 17, 1902, ch. 1093, 32 Stat. 389 (1902).
13. *Id.*
14. *See* 35 Cong. Rec. 6758 (daily ed. June 13, 1902) (statement of Rep. Martin).
15. 44 Stat. 478 (1926).
16. *Id.* at 483.
17. *Id.*
18. 43 U.S.C. § 390ii (1982).

Some water recipients were successful in irrigating vast landholdings with federally subsidized water through unrestricted leasing, recordable contracts, and the Bureau's lax enforcement of the 1902 Act's acreage and residency requirements. Public interest groups in the mid-1970s generally contended that a stricter enforcement of the 1902 Act's requirements was necessary to promote its still important broad social and economic goals.[19] Landowners argued that a stricter interpretation of the original act would be inconsistent with modern farming practices and unfair because they decided to participate in federal projects based on past interpretations of the law.[20]

The RRA accommodated both sides by increasing the acreage limitation but redefining it to include leased as well as owned land,[21] and abandoning the residency requirement.[22] Section 390dd of the RRA divides recipients into "qualified recipients," entities benefitting twenty-five individuals or less, and "limited recipients," entities benefitting more than twenty-five individuals.[23] The former are entitled to irrigate 960 owned and leased acres with subsidized water; the latter are entitled to 640 acres. Section 390nn excludes individual or corporate trustees from the ownership limitations.[24]

Repayment

The 1902 Act was not originally intended to create a system of large subsidies.[25] Water users were expected to repay construction cost, not including interest costs, within ten years. The repayments would constitute a revolving reclamation fund which would be used to finance future projects.[26] The revolving fund concept did not work out. A 1945 study predicted that the four projects with the slowest payout records at that time would require more than 250 years to meet the total amount repayable.[27]

The Omnibus Adjustment Act of 1926 significantly increased the interest subsidy by extending the original ten year repayment period to forty years.[28] The Reclamation Project Act of 1939[29] also increased the subsidy

19. LeVeen, *Reclamation Policy at a Crossroads* in C.J. MEYERS & A. DAN TARLOCK, WATER RESOURCE MANAGEMENT 507, 509 (2d ed. 1980).
20. *Id.* at 509.
21. 45 U.S.C. § 390bb (1982).
22. 43 U.S.C. § 390kk (1982).
23. 43 U.S.C. § 390dd (1982).
24. 43 U.S.C. § 390nn (1982).
25. Act of June 17, 1902, ch. 1093; 32 Stat. 388-89 (1902).
26. *Id.*
27. Joss, *Repayment Experience on Federal Reclamation Projects,* 27 J. FARM ECON. 153-67 (1945).
28. Act of May 10, 1926, ch. 277, 44(2) Stat. 453, 479 (1926).
29. 53 Stat. 1187 (1939).

by requiring irrigators to repay only a fraction of construction costs with the remainder being paid out of revenues for hydroelectric projects,[30] and authorizing the Secretary to schedule repayment on an "ability to pay" basis.[31] The Secretary also was authorized by the 1939 Act to defer repayment of construction charges to prevent "inequitable pyramiding of payments."[32]

The 1902 Act also required recipients to pay operations and maintenance (O&M) costs.[33] The failure of the CVP to reimburse O&M costs alone, for example, has been blamed on the Bureau's method of setting water prices under contract.[34] Prior to 1970, water rates were set to cover annual O&M costs and the capital repayment obligation. The major problem with the policy was that water delivery contracts did not include provisions for rate changes. Fixed water rates, combined with greater-than-projected inflationary increases in O&M costs, resulted in the recipients' inabilities to cover both increasing O&M costs and their capital repayment obligations.[35] Furthermore, the fixed rates were based on project feasibility study data which were five to ten years old at the time of initial contracting. The Bureau mitigated the immediate fiscal impact of annual operating deficits by shifting funds out of the CVP capital repayment account.[36]

The revised CVP rate-setting policies of the 1970s called for rates based on current costs of service and payment capacity determinations, and included provisions for rate modification. However, these policies had little impact on the deteriorating financial condition of the CVP. The revised policies applied only to newly executed contracts or existing contracts which were renegotiated or expired. Few new contracts were executed in the 1970s.[37] Furthermore, most significant existing contracts expire after the year 2000.[38] A Bureau rate-setting proposal in 1981 concluded that the repayment objective would "be realized by negotiating new contracts and amending or renegotiating existing water service contracts under [revised] policy as the opportunity occurs."[39]

The RRA sets out the revised repayment policy. Section 390hh provides that water rates be at least sufficient to cover O&M charges.[40] The Sec-

30. 53 Stat. 1194 (1939).
31. 53 Stat. 1189 (1939).
32. 53 Stat. 1191 (1939).
33. 32 Stat. 389 (1902).
34. U.S. Bureau of Reclamation, CVP Water Service Rate Policy (Draft) 5 (Jan. 8, 1981) [hereinafter cited as Bureau-Rate Policy].
35. NRDC, *supra* note 5, at 5.
36. *Id.* at 4.
37. Bureau-Rate Policy, *supra* note 34, at 3.
38. NRDC, *supra* note 5, at 25.
39. Bureau-Rate Policy, *supra* note 34, at 5.
40. 43 U.S.C. § 390hh(a) (1982).

retary is also empowered under the section to make yearly modifications in water rates necessary to cover changes in O&M costs.[41]

For the first time, water rates are tied to land tenure. Leased acreage beyond the "qualified recipient" and "limited recipient" limitation is irrigated at full cost under section 390ee.[42] Bureau regulations administering the RRA[43] hold that full cost rates run with the leased land, thereby ensuring that leasing will not be used to escape full cost pricing on the landowners' excess lands.[44] Activities not considered to be leasing under the regulations are management or consulting agreements in which the manager or consultant is salaried and assumes no risk in the operation of the land, and incidental uses such as grazing or the use of crop residue from irrigated crops grown on the land.[45]

IMPLEMENTATION OF THE RRA

Section 390cc restricts the RRA's implementation to subsequent "new" contracts, and existing contracts which districts amend to receive additional benefits or to conform to the RRA. Most significant contracts predate RRA enactment and do not expire until after the year 2000.[46] Thus, the RRA will have a delayed impact unless districts can be induced to amend their existing contracts into conformity with it. The "hammer" clause provides such inducement. The clause states:

> Within a district [which has an existing contract] that does not enter into an amendment of its contract [for the purpose of conforming to the provisions of this Act] . . . within four and one-half years of the date of enactment of this Act, irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres only if full cost . . . is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres. . .[47]

Section 390cc also permits an individual in a non-amending district to elect to be subject to the RRA by "executing an irrevocable election."[48]

The Bureau's regulations administer the "hammer" clause by establishing the category of "recipients subject to the 160-acre ownership limitation established by prior law."[49] This category is composed of parties

41. *Id.* § 390hh(b).
42. *Id.* § 390ee(a).
43. Rules and Regulations for Projects Governed by Federal Reclamation Law, 43 C.F.R. §§ 426.1-.23 (1984) [hereinafter cited as Rules].
44. *Id.* § 426.7(d).
45. *Id.* § 426.7(a)(1).
46. NRDC, *supra* note 5, at 25.
47. 43 U.S.C. § 390cc (1982).
48. *Id.*
49. Rules, *supra* note 43, at § 426.6(d).

who are in water districts electing to remain under their existing contracts and who do not make an "irrevocable election" to come under the RRA individually. Parties who acquired their land before December 6, 1979 are allowed to own up to 160 acres in each water district. Those acquiring their land later are restricted to 160 acres owned "westwide" throughout the seventeen western states in which reclamation projects are located. Land under the limit can be irrigated with subsidized water. Land leased over the limitation is irrigated at full cost. Trust beneficiaries in this category are restricted to an interest of 160 acres in combination with their other holdings.

The following section considers whether the RRA's revised repayment policy as implemented by the "hammer" clause is consistent with the substantive due process guarantees of the federal Constitution.[50]

STANDARDS OF JUDICIAL REVIEW

In *Nebbia v. New York*[51] the Supreme Court set out the typical "rational relationship" standard of review for economic legislation: "The guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be [obtained]."[52] The Court presumes legislation to be constitutional and the plaintiff has the burden to show that it is not rationally related to a legitimate government purpose.[53] The Supreme Court's use of substantive due process to test the constitutionality of economic legislation had its highwater mark in the early part of this century and has declined ever since.[54] Recent cases appear to show that no effective review is undertaken by the Court.[55] However, an important element distinguishing the "hammer" clause from other economic legislation is that the federal government is party to the contracts which the clause modified. Nowak, Rotunda, and Young conclude:

> The Court has used a higher level of review to legislation that modifies the government's own contractual obligations than it does to federal legislation that alters or regulates private contracts . . . [I]t will require more than a rational relationship between the modifying statutes and a governmental purpose before it will sustain the measure . . . [I]t will give force to its traditional bias against retroactive

50. U.S. Const. amend. V ("no person shall . . . be deprived of life, liberty or property without due process of law.").

51. 291 U.S. 502 (1934).

52. *Id.* at 525.

53. *Id.*

54. J.E. NOWAK, R.D. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 418 (2d ed. 1983) [hereinafter cited as NOWAK].

55. E.L. BARNETT & W. COHEN, CONSTITUTIONAL LAW 539 (7th ed. 1985).

> legislation, and rely on the due process clause of the fifth amendment to test the constitutionality of the impairing legislation."[56]

The higher standard of review traditionally applied to retroactive legislation is set out below.

Justice Brennan broke with the traditional higher standard in a 1984 opinion[57] holding that retroactive legislation need only meet the "rational relationship" burden:

> [t]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.[58]

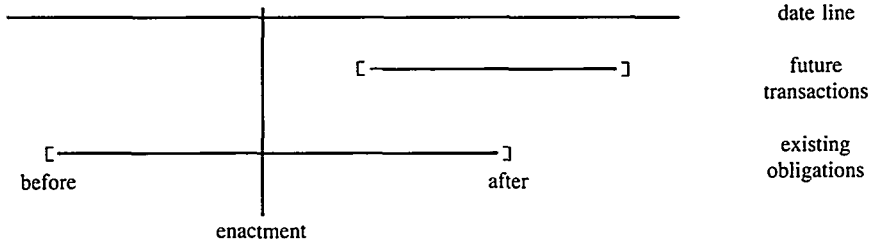
The extent to which Justice Brennan's recent opinion will cause a permanent shift in the standard the Court has traditionally applied to retroactive legislation is unknown. Thus, the "hammer" clause will be analyzed under both "rational relationship" and "higher" standards of review. The inquiry under the higher standard of review is whether the "hammer" clause retroactively alters Congress' own obligation under contract and, if it does, whether such retroactivity is unconstitutional according to a specialized due-process analysis for retroactive legislation. Whether the clause can be categorized as retroactive legislation depends on the authority the 1902 Act gave the 1982 Congress to regulate the leasing of farmland receiving project water. Whether the clause is impermissibly retroactive depends on the balance the Court finds between public and private interests. In considering whether the "hammer" clause is rationally related to a legitimate legislative purpose, the article critiques the implicit economic assumptions underlying Congress' rationale for the clause.

THE HIGHER STANDARD OF REVIEW: IS THE "HAMMER" CLAUSE RETROACTIVE LEGISLATION?

Common law courts have traditionally opposed legislation with a retroactive impact as being unfair and perhaps unconstitutional.[59] The federal Constitution expressly provides against *ex post facto* laws[60] and state legislation which impairs the obligations of contract.[61] The Supreme Court has also used the due process clauses of the fifth and fourteenth amend-

56. NOWAK, *supra* note 54, at 476-77.
57. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., ___ U.S. ___, 104 S. Ct. 2709 (1984).
58. *Id.* at 2718.
59. Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 660 (1978) [hereinafter cited as Cunningham].
60. U.S. Const. art I, § 9, cl. 3; § 10, cl. 1.
61. U.S. Const. art I, § 10, cl. 1.

FIGURE 1. DEFINITION OF RETROACTIVITY.



ments to void retroactive legislation not explicitly mentioned in the Constitution.[62]

Given the dearth of clearly defined constitutional prohibitions against retroactive impacts, federal courts confronted with retroactive statutes have proposed numerous tests. Modern federal courts have relied on a variety of factors to balance the public and private interests affected by the legislation. Hochman[63] defined a retroactive statute as "one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute. The most obvious kind of retroactive statute is one which reaches back to attach new legal rights and duties to already completed transactions."[64]

Figure 1 illustrates Hochman-retroactivity. The brackets on either end of the "future transactions" and "existing obligations" line reflect the fixed terms of these arrangements. A statute regulating only future transactions is prospective by definition. Regulation of existing obligations is Hochman-defined retroactive if the transaction giving rise to the purported obligations is completed before enactment,[65] and parties' obligations arising from completed transactions are changed after enactment.

62. U.S. Const. amend. XIV, § 1, cl 2 ("nor shall any State deprive any person of life, liberty, or property, without due process of law. . .").

63. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 694 (1960). Hochman stated a version of the modern "due-process" test which Cunningham, *supra* note 59, at 663, reports has been explicitly adopted by a number of federal courts.

64. Hochman, *supra* note 63, at 692.

65. Congress has often left courts to determine whether preenactment transactions between a claimant and the federal government have sufficiently progressed to constitute valid existing rights under the grandfather clauses of various natural resources acts: "Any application for preference right leases based on [valid prospecting permits] could be adjudicated on their merits and preference right leases issued." S. 391, 94th Cong., 1st Sess. 121 CONG. REC. 26370 (daily ed. July 31, 1975).

See also Hickel v. Oil Shale Corp., 400 U.S. 48 (1970) (token assessment work insufficient to bring plaintiff's claim under the savings clause of the Mineral Lands Leasing Act); American Nuclear Corp. v. Andrus, 434 F. Supp. 1035 (D. Wyo. 1977) (filing of an application permit under the Mineral Lands Leasing Act does not give rise to valid existing rights under the savings clause of the Coal Leasing Amendments Act); Freese v. U.S., 639 F.2d 754, *cert denied*, 454 U.S. 827 (1981) (plaintiff's discovery and location of claims insufficient for obtaining a patent and therefore for protection as valid existing right under saving clause of the "Sawtooth" Act, 16 U.S.C. § 460aa (1983)).

FIGURE 2. TEST FOR RETROACTIVITY OF "HAMMER" CLAUSE.

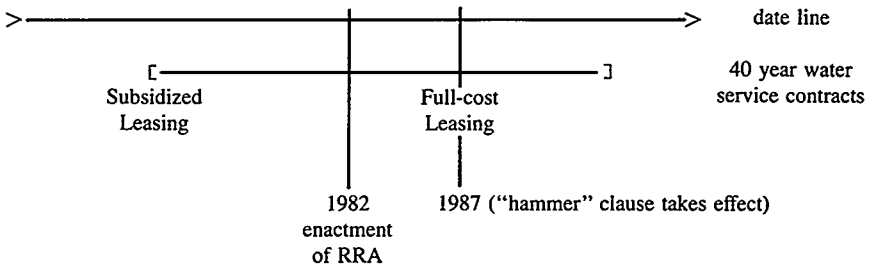


Figure 2 applies Hochman-retroactivity to the "hammer" clause. Water service contracts between the Bureau and water districts are the transactions giving rise to existing obligations.[66] Hochman's first condition for retroactivity is met since the transactions giving rise to the government's existing contractual obligations were completed at the time of the RRA's enactment. The contracts fix the maximum rate and the maximum quantity the United States can charge and is obligated to deliver, respectively.[67] The contracts also fix a term of forty years and provide for termination on conditions specific to each district.[68]

Hochman's second condition is satisfied if the parties' obligations arising from completed transactions change after enactment. The "hammer" clause takes effect in mid-1987 only for members of those districts which do not elect to amend their existing contracts to come under the provisions of the RRA. Under the 1902 Act these recipients are permitted to lease and irrigate land exceeding 160 acres at a subsidized rate. Under the "hammer" clause the recipients must pay higher rates to irrigate leased land than they pay to irrigate owned land. Thus, a basic term of federal water delivery contracts is substantially modified: rate setting terms are made variable with land tenure. Existing contract holders, therefore, have their rate terms restructured whether they amend or not.

The "hammer" clause arguably does not operate retroactively because it invokes leasing restrictions that irrigators were already obligated to meet under the 1902 Act. The argument that leasing restrictions were

66. Section 9(e) of the Reclamation Projects Act of 1939, 53 Stat. 1157, 1195 (1939), is the legal authority for contracting for water service from the CVP. The Act of July 2, 1956, 70 Stat. 483 (1956), which amended § 9(e) of the RPA, assures the right of contract renewal for successive forty-year periods.

67. The 1963 Water Service Contract with the Westlands Water District (Contract No. 14-06-200-495A), for example, fixes a maximum rate of $8/acre-foot (art. 5) and a maximum delivery of 1,008,000 acre-feet/year (art. 3). The contract is reproduced in U.S. Bureau of Reclamation, Special Task Force Report on San Luis Unit, CAP, California (U.S. GPO, Stock No. 024-003-00126 (1964) [hereinafter cited as Bureau-Task Force].

68. *Id.* Article 2 of the Westlands Water Service Contract provided that it be terminated if the district did not complete distribution facilities necessary to serve all irrigable portions of the district within five years of initial delivery.

envisioned under the 1902 Act has been well articulated.[69] Proponents generally contend that the 1902 Act's broad social and economic development goals, as expressed in the legislative history, are best accomplished by reading the statute to restrict leasing.

Justice Mosk of the California Supreme Court applied such a method of statutory construction in *Friends of Mammoth v. Board of Supervisors*.[70] His task was to define "project," a term used but not defined in the California Environmental Quality Act (CEQA). He relied on a "cardinal principle of statutory construction: that absent 'a single meaning of the statute apparent on its face, we are required to give it an interpretation based upon the legislative intent with which it was passed.'"[71] Justice Mosk concluded that "project" must be given broad meaning to be read consistently with legislative intent that CEQA afford the fullest possible protection to the environment.

The "legislative intent" principle of statutory construction, as illustrated in *Friends of Mammoth,* is used to supply meaning to unclear statutes. "Plain meaning" is a competing cardinal principle of statutory construction. The "plain meaning" principle holds that plain and unambiguous statutory language must be given effect.[72] The 1902 Act is not unclear regarding farmland leasing. It does not mention or allude to leasing.[73] Application of the "plain meaning" principle of statutory construction suffices to show that the original Act only regulated ownership through the 160-acre limitation. The "legislative intent" principle should not be used in this case to add leasing restrictions not existing in the original statute.

Even if the "legislative intent" principle is applied, leasing restrictions are not necessarily consistent with the intent of the enacting 56th Congress, which did not address leasing in any of the 1902 Act's legislative history uncovered by research for this article.This is not because leasing was an uncommon farming practice in reclamation areas in 1902.[74] Con-

69. Frampton, *The Enforcement of Federal Reclamation Law in the Westlands Water District: A Broken Promise* 13 U.CAL. DAVIS L. REV. 89, 111 (1980).

70. 8 Cal.3d 247, 104 Cal. Rptr. 16 (1972).

71. *Id.* at 256, 104 Cal. Rptr. 22 (quoting Benor v. Board of Medical Examiners, 8 Cal. App. 542, 546-47, 87 Cal. Rptr. 415, ___ (1970)).

72. S. MERMIN, LAW AND THE LEGAL SYSTEM 263 (2d ed. 1982).

73. Act of June 17, 1962, ch. 1093 (1902), 32 Stat. 388. The Reclamation Act of 1902 states that "[n]o right to the use of water for land in *private ownership* shall be sold for a tract exceeding one hundred and sixty acres to any one *landowner.*" *Id.* at 389. (emphasis added).

74. A 1917 study used U.S. census data to show that:

> [d]uring the period from 1890 to 1900 there was a more marked increase in the percentage of tenantry than during any other recent census period, and this applies to all sections of the country. This was the period when the exhaustion of the public domain began to make itself felt and when a large number of men began to [use tenant farming as a step toward ownership]."

Spillman & Goldenweiser, *Farm Tenantry in the U.S.*, U.S. DEPT. AGRIC. Y.B. 1916 at 32146 (1917), *reprinted in* RASMUSSON, AGRICULTURE IN THE UNITED STATES: A DOCUMENTARY HISTORY 2001 (1975) [hereinafter cited as RASMUSSON].

temporaneous congressional debate over the 1902 Act indicated great concern over the specter of private land monopoly. Representative Newlands (Nevada), who introduced the House bill, argued that public development of irrigation water was necessary to prevent the land monopoly which would accompany private water development—since the latter would not be profitable without getting control of large areas of land.[75]

Leasing was probably not mentioned because Congress believed that disposal of public land in tracts of 160 acres, along with public water development, was sufficient to prevent private monopolization of irrigated land. Newlands argued, after explaining how the Mexican land grant system had "steadily retarded the progress and development" of California, that Iowa had not suffered similarly because it "was entered up in tracts of 160 acres."[76] The final bill, which passed both Houses by wide margins, only included the 160-acre ownership restriction.

Furthermore, leasing was viewed in the first quarter of the century as a stepping stone toward ownership, not as a desirable alternative to ownership.[77] Leasing may not have been restricted under the 1902 Act because it expanded the number of farmers beyond those owning land. The 56th Congress could have reasonably believed that leasing was consistent with the 1902 Act's social and economic development goals.

Finally, Senate debate over the defeated Exon amendment to the RRA, which would have prohibited unlimited leasing even at full cost, demonstrates that 1982 lawmakers disagreed about their predecessor's intent regarding leasing restrictions under the old Act. Nebraska Senator Exon contended, "[a]lthough no specific provisions of the 1902 reclamation law addresse[d] the issue of leasing, it was the intention of the law that the acreage limitation not be circumvented through this device."[78] On the other hand, Idaho Senator McClure urged that "[t]here is unlimited leasing under the present law [1902 Act]."[79]

Conclusion: Retroactivity

The preceding argument supports a finding that the "hammer" clause satisfies the second condition for Hochman-retroactivity; namely, that parties' obligations arising from completed transactions are changed after enactment. The clause alters Congress' contractual obligation by tying previously fixed water rates to land tenure through leasing restrictions.

75. 35 CONG. REC. 841 (daily ed. Jan. 21, 1902) (statement of Rep. Newlands).
76. *Id.*
77. RASMUSSON, *supra* note 74. *See also* EMERICK, AN ANALYSIS OF AGRICULTURAL DISCONTENT IN THE UNITED STATES, 616 (1897) ("farm tenants are most numerous where the conditions are most favorable to their becoming farm owner.").
78. 128 CONG. REC. S8466 (daily ed. July 16, 1982) (statement of Sen. Exon).
79. *Id.* at S8469.

There is no statutory authority under the 1902 Act for imposing these restrictions. The clause, therefore, should be found retroactive.

IS THE "HAMMER" CLAUSE IMPERMISSIBLY RETROACTIVE?

Retroactive legislation is constitutional under a higher standard of review if the public interest served by applying the legislation retroactively outweighs the harm to private interests.[80] Private interest factors considered in the constitutional analysis are the nature and strength of rights affected and the extent of the abrogation of those rights.[81] The nature and strength of the public interest served depends on whether the retroactive legislation is categorized as curative, emergency, or general. The categorization determines the extent to which private interest factors are allowed to be weighed against public interest factors. Public interest categorization of the "hammer" clause will therefore be discussed first.

The Public Interest: Curative Legislation

Hochman defines curative statutes as those designed retroactively to cure defects in an administrative system.[82] The Supreme Court, in dealing with curative statutes, has developed an irrebuttable presumption that the public interests served are not outweighed by the undesirable retroactive consequences.[83] Thus, any retroactive legislation falling into this category is *per se* valid.

The three "curative statute" cases Hochman studied are distinguishable from the "hammer" clause situation. In *Paramino Lumber Co. v. Marshall,*[84] the Court held that an employer was not denied due process when Congress directed review of a compensation order under the Longshoremen's and Harbor Worker's Compensation Act after the normal time for review had expired. Congress allowed the case to be reopened when it appeared that the claimant's injuries were more severe than reported by the employer's physician—whose report formed the basis of the earlier award.[85] The Court stressed that no new obligations were imposed on the employer.[86]

In *Graham & Foster v. Goodcell*[87] a curative statute was permitted to remedy the Internal Revenue Commissioner's mistake in allowing the statute of limitations to run on certain tax claims. The Court stated a

80. Hochman, *supra* note 63, at 693-95.
81. *Id.*
82. *Id.* at 704.
83. *Id.* at 701.
84. 309 U.S. 370 (1940).
85. *Id.* at 376.
86. *Id.* at 378.
87. 282 U.S. 409 (1931).

general rule applicable to curative statutes: "Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law. . ., the legislature is not prevented from curing the defect in administration. . ."[88]

Finally, Chief Justice Holmes held that the legislature should be able to make "small repairs" to cure inadvertent defects in statutes or their administration.[89] The three cases seem to limit application of the irrebuttable presumption to curative statutes which, (1) although formulated retroactively, do not impose new obligations on the regulated parties and (2) make small procedural-type repairs.

The RRA concededly seeks to cure problems arising under the old reclamation laws. However, the circumstances surrounding the RRA are distinguishable from the three cases above. First, as argued above, the clause imposes a new obligation—full cost rates for irrigating excess leased land—on nonamending water service contract holders. Second, the clause does not make a small procedural-type repair in the administration of reclamation law. Congress, in the cases cited by Hochman, did not act to change the substantive law. Rather, Congress changed procedure to allow for the just application of the substantive provisions. The "hammer" clause, on the other hand, entails a large repair to the substantive provisions of the old reclamation law. Districts unwilling to amend preexisting government contracts are refused subsidized water for excess leased acreage for the first time in reclamation history. As argued above, this represents a change in contractual obligation and not a change in the Bureau's enforcement of the 1902 Act. Restructured contractual water rate terms do not represent a small repair considering that full cost rates are expected to be significantly greater than existing contractual rates, many operators lease significantly beyond their 160 acre limitation, and the majority of important contracts predate the RRA's enactment.

The Public Interest: Emergency Legislation

Hochman's studies led him to conclude that: "when the legislature acts to remedy serious substantive evils resulting from an emergency situation, the Supreme Court is more likely to be sympathetic to retrospective legislation."[90] Hochman illustrated this point with Supreme Court decisions sustaining depression legislation limiting the right to withdraw subscriptions in building and loan associations[91] and affording relief to mortgagors in arrears with their payments.[92]

88. *Id.* at 429.

89. Danforth v. Grotop Water Co., 178 Mass. 472, 477, 59 N.E. 1033, 1034 (1901) (Holmes, C.J.).

90. Hochman, *supra* note 63, at 698.

91. Veix v. Sixth Ward Bldg. & Loan Ass'n., 310 U.S. 32 (1940).

92. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

The "hammer" clause is not a congressional reaction to an emergency situation. First, the poor financial condition of federal reclamation projects is not nearly as devastating as the Great Depression of the 1930s. Second, Congress probably would not have waited to reform reclamation law until President Reagan was elected if it viewed the situation as an emergency. Finally, the legislative history of the RRA does not indicate that Congress thought that an emergency existed.[93]

The Public Interest: General Retroactive Legislation

In the majority of retroactive-legislation cases, Hochman found that the legislative purpose was neither curative nor intended to alleviate emergency conditions.[94] When the Court confronts general retroactive legislation it considers (1) the strength of the public interest served by the legislation and (2) whether the legislation must be retroactive to achieve its public purpose.[95]

The "hammer" clause serves a strong public interest in the speedy implementation of a comprehensive regulatory scheme. Both water interests and public interest groups requested Congress to restructure reclamation laws. Congressional efforts to reconcile both interests will have limited current effect if the large number of long-term existing contracts are not amended to comply with its provisions. The "hammer" clause induces this compliance. Legislation must clearly be designed retroactively to reach existing contracts.

However, the public interest in speedy implementation of the new reclamation program is inconsistent with another important and long-standing public interest, that of recognizing valid rights created under the previous statutory regime.[96] Congress recently rejected retroactive legislation and recognized valid existing rights in enacting the Coal Leasing Amendments of 1975.[97] Some of the reasons for the amendments were strikingly similar to those for reforming the 1902 Act.[98] The previous coal leasing program was undermined by speculation,[99] coal leasing was

93. The legislative history does not show Congress rushing to put together an emergency reclamation law. Rather, it shows Congress carefully pounding out a compromise between updating the 1902 law and respecting its fundamental social policies. *See* debates over Amendment 1935 (acreage limits on which partial and full construction costs are paid, S8314-48); Amendment 1937 (reduce ownership and leasing acreage allowances from those suggested in proposed bill, S8464-71); Amendment 1094 (apply "full" cost pricing on certain Corps of Engineers projects, S8473-87); and Amendment 1095 (retain the residency requirement, S8489-95) in 128 CONG. REC. (daily eds. July 15-16, 1982).

94. Hochman, *supra* note 63, at 700.

95. *Id.* at 701.

96. *See supra* note 65.

97. 90 Stat. 1083 (1975).

98. *See* H.R. REP. No. 681, 94th Cong., 1st Sess. (1975).

99. *Id.* at 14.

highly concentrated,[100] and the government was not receiving a fair return from its tenants.[101] Despite these grave problems of exploitation of important national resources, Congress stressed the public policy of recognizing valid existing rights in the 1975 amendments.[102]

The Private Interest: The Nature of the Right Affected

Hochman's study showed that the Court considered the following issues important: (1) whether the right has been asserted and enforced prior to enactment of the statute; (2) whether the asserted right is against the legislating authority; and (3) whether the asserted right is linked to a "substantial equity."[103]

Consider the first issue. A letter from the Comptroller General of the United States to the Acting Chairman of the Westland Hearings in the Senate indicates the strength of the rights asserted by water districts.[104] The Comptroller General was asked to "study the question of which rights are vested in the landowners in the district with respect to the Westlands contract."[105] The Comptroller General was also asked whether (1) the Secretary or Congress could unilaterally change water rates and (2) there were any other means by which Congress could recover a portion of the subsidy.[106]

The Comptroller General responded:

> [l]andowners in Westlands may be regarded as having a vested interest in the rate specified in the water service contracts, since neither past nor future rates may be changed [unilaterally by the Secretary or Congress] without the consent of Westlands . . . nor are we aware of any other unilateral method by which the United States might recover such subsidy.[107]

A different conclusion was arrived at in another study.[108] The study contended that a 1977 9th Circuit decision[109] held that federal water project beneficiaries do not have vested property rights in federal water. A second look at the case reveals that the study may have drawn the wrong conclusion.

In *Israel v. Morton*,[110] plaintiff sought a declaratory judgment affirming his right to (1) sell excess land at an unrestricted price with (2) assurance

100. *Id.* at 15.
101. *Id.* at 17.
102. 121 CONG. REC. 26370 (1975).
103. 282 U.S. at 109.
104. Comptroller General, *supra* note 6.
105. *Id.* at S8324.
106. *Id.*
107. *Id.* at S8324-25.
108. Frampson, *supra* note 69, at 111-12.
109. Israel v. Morton, 549 F.2d 128 (9th Cir. 1977).
110. *Id.*

that the land would carry the right to receive project water if sold to a farmer under the limit.[111] The Columbia Basin Project Act of 1937[112] established the reclamation project covering Israel's land. The Act was amended in 1943[113] to limit service to 160 acre irrigation blocks.[114] Recipients were required under the Act to enter into recordable contracts for both their excess and non-excess lands. They contracted not to sell any of their land for a price in excess of the Secretary's appraised value for a period of five years after initial delivery.

The plaintiff Israel owned both excess and non-excess land in the project area. His excess land was never entitled to and never received project water. The five year sales moratorium for his excess land terminated December 31, 1960. Unfortunately for Israel, an amendment[115] providing that the Columbia project was to be governed by federal reclamation laws became effective before he could sell his land. The amendment extended the moratorium on unrestricted sales to the time when one-half of the project construction charges were paid.[116]

Israel contended that once the five-year moratorium had passed he became vested with the unrestricted right to sell his excess lands along with entitlements to project water. The court disagreed, reasoning that:

> Project water . . . would not exist but for [development] by the United States. It is not there for the taking [unlike appropriation] . . . but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix.[117]

Israel is distinguishable from the present situation. The "hammer" clause, by definition, affects landowners in reclamation project areas who also hold valid federal water service contracts. Israel did not hold a water service contract for his excess land. Israel was in the extremely weak position of demanding federal water without a contract in an effort to sell land around the new amendment.

The court[118] held that the United States (1) does not have to sell water to anyone and (2) may fix the terms of usage when it sells water. In other words, landowners without water service contracts do not have vested rights in project water. The court did not hold that the United States is free to renounce the agreement once it decides to sell water at given terms.

111. *Id.* at 129.
112. Columbia Basin Projects Act, 16 U.S.C. § 835 (1982).
113. 57 Stat. 14 (1943).
114. *Id.* at 15.
115. 76 Stat. 677 (1962).
116. *Id.* at 678.
117. 549 F.2d 132 (9th Cir. 1977).
118. *Id.* at 132-33.

Consider now the second issue. Hochman found that the Court has tended to apply a stricter standard to statutes abridging rights against the government.[119] The stricter standard likely reflects the Court's belief that it is more inequitable to permit a party to a contract to modify its terms than for the legislature, as a disinterested body, to alter private contractual rights. Congress, through the "hammer" clause, unilaterally modified the terms of contracts to which it is party.

Consider the third issue. An asserted right is based on "insubstantial equity" if it was created contrary to the party's bona fide expectations at the time the contract was formed.[120] Did irrigators rely in good faith upon representations made by regulators to incur the extensive leasing obligations existent in reclamation areas? Regulators' statements regarding leasing were as inconsistent as those made by Congress. The Associate Solicitor issued an opinion in 1970 stating "[l]arge scale leasing operations wherein the right of control of the owner-lessor largely is passed to the lessee, are not questioned."[121] The Commissioner of Reclamation, testifying in 1976 before the House Subcommittee on Water and Power, stated:

> In regard to leasing of land, reclamation law imposes no restrictions on the leasing of privately owned project lands. Consequently, an individual operator may lease a number of non-excess landholdings and farm several tracts as a single farming operation as long as the lessee does not acquire control over the land for a long period of time.[122]

Finally, Secretary of the Interior Andrus, testifying in 1978 before the Senate Committee on Energy and Natural Resources, stated: "[l]easing has become perhaps the principal vehicle for frustrating the intent of reclamation law. In too many cases it has provided the haven for the nonresident investor-farmer and the land speculator."[123]

Tenants arguably could have relied on these inconsistent statements in operating large leaseholds. First, the commissioner's statement shows that the agency believed leasing to be unrestricted under the 1902 Act. The policy was presumably known to his agency and represented to customers. Second, Secretary Andrus admitted in committee that corporations that had entered into recordable contracts with the Secretary were in compliance with the law notwithstanding large scale leasing.[124]

119. Hochman, *supra* note 63, at 723.
120. *Id.* at 720.
121. Bureau-Task Force, *supra* note 67, at 312, 313.
122. *Id.*
123. Andrus, quoted in Frampton, *supra* note 69, at 29.
124. *See* 128 CONG. REC. H1885 (daily ed. May 6, 1982) (statement of Rep. Pashayan).

Finally, the Bureau had already banned leasebacks as the most flagrant use of leases to circumvent the excess land provisions of the law.[125]

Private Interest Factors: The Extent of the Abrogation of the Asserted Preenactment Right

Hochman found that: "[Supreme Court] cases clearly indicate that the closer a retroactive statute comes to extinguishing the substance of a preexisting right through destruction of the legal incidents of that right, the less likely is the Court to sustain the application of the statute."[126]

The "hammer" clause will not completely extinguish the vested rights recipients have in the price terms of their existing contracts. They will still receive subsidized water for their 160-acre allotment. However, the "hammer" clause may, in tying rate structure to land tenure, destroy a legal incident of the right—paying a flat contractual rate for all water delivered—by abrogating subsidized excess leasing in existing contracts. Existing contracts do not tie the flat rates charged to the tenure of the land upon which the water is applied. Eligible land (owned land below 160 acres or under recordable contract, and all leased land not excess to the landowner) receives subsidized water; ineligible land receives none at all.

The "Higher" Standard of Review: Conclusion

The "hammer" clause is arguably unconstitutional retroactive legislation. Water districts have vested rights in the rate setting terms of their existing federal contracts. In enacting the "hammer" clause Congress disregarded the strong public interest in recognizing these valid existing rights. Protection of this interest recently controlled Congress' decision not to attach a "hammer" type clause to the Coal Leasing Amendments of 1975. The conference committee report giving birth to the "hammer" clause does not explain why this public interest did not predominate in the new reclamation legislation.

Finally, Congress is party to contracts creating the rights it abrogates via the "hammer" clause. Congress' decision to extend repayment contracts to forty years is the major source of the RRA's implementation problem. In fairness, Congress should not be allowed to solve a problem of its own creation by reneging on the rate setting terms of its contracts. The federal government's private contracting partners should not be compelled to "bail out" of valid federal contracts.

125. Bureau-Task Force, *supra* note 121, at 313.
126. Hochman, *supra* note 63, at 714.

THE "RATIONAL RELATIONSHIP" STANDARD OF REVIEW

The "rational relationship" standard of review, recently applied by Justice Brennan to retroactive legislation in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,[127] requires only that the retroactive application of the "hammer" clause be rationally related to a legitimate government purpose.[128] The "hammer" clause is retroactively applied by imposing farmland leasing restrictions on nonamending preenactment contractees. The rapid implementation of a comprehensive regulatory scheme is concededly a legitimate government purpose. However, the existence of a legitimate government purpose is only the beginning of the inquiry. Retroactive leasing restrictions can be upheld only if they are reasonably designed to implement the RRA. The conference report giving birth to the "hammer" clause uncovers Congress' rationale for designing the clause with retroactive farmland leasing restrictions:

> The bill approved by the conference committee also reduces the subsidy for leased lands in those districts not amending their contracts. The conferees agreed that the larger farming operations in such districts which lease lands over and above the basic ownership limitation of 160 acres should not, in the future, receive the subsidy benefit for the additional leased lands.[129]

In sum, the committee believed that imposing farmland leasing restrictions on nonamending contract holders is reasonable because they do not deserve the subsidy benefit for their leased lands in excess of the 1902 ownership restriction. The committee's reasoning is based on two implicit assumptions concerning the agrarian economy of reclamation areas: (1) the project benefits that participants receive equal the reclamation subsidy; and (2) farmland lease markets always operate to give project benefits to large-tenant farm operations.

Assumption 1: The Project Benefits that Participants Receive Equal the Reclamation Subsidy

Irrigators may not capture nearly so great a proportion of the reclamation subsidy as Congress thinks. Irrigators capture the difference between what the federal water is worth to them in production and what they pay to use it, defined here as "economic rents." Irrigators do not capture the difference between project water costs to the government and what is collected in water fees, usually defined as the "subsidy." There is no necessary economic relationship between the value of the water to irrigators and the cost to the government of providing it. Therefore, irrigators do not necessarily capture the entire subsidy. In fact, usually

127. ___ U.S.___, 104 S. Ct. 2709 (1984).
128. *Id.* at 2718.
129. Senate Report, *supra* note 7, at 30.

they capture only a fraction of it. To require irrigators to repay benefits not received is unreasonable and, in fact, may be impossible unless the economic rents approach the magnitude of the subsidy.

What happens to the difference between project costs and the value of the water to irrigators? The difference is a taxpayer loss because of the inefficient scale at which projects with financial problems were built initially. For example, a study shows that a public investment of over $2200 per acre in the Westlands Water District created benefits of less than $1000 per acre.[130] Thus, more than half the public cost is lost to inefficiency, a foregone capital cost and not a gain irrigators capture by their variable water use.

Assumption 2: Farmland Lease Markets Always Operate to Leave Project Benefits in the Hands of Large-Tenant Farm Operations

Whether the "hammer" clause's leasing restrictions are needed to strip away undeserved project benefits from large tenants in nonamending water districts depends on the performance of farmland lease markets in transferring project benefits from tenants to the landowners. If, for instance, landowners receive the bulk of project benefits in leases, leasing restrictions cannot spread total benefits significantly better than ownership restrictions. If, on the other hand, tenants secure a significant portion of the benefits, leasing resrictions can discourage their transfer to tenants. Congress apparently automatically assumed that reclamation area leasing markets operate in the latter fashion.

Determining the performance of regional farmland lease markets, however, is an empirical task, not an automatic assumption. Contrary to Congress' assumption, a study of the Imperial Valley, a reclamation area with underpriced water, extensive leasing, and a wide size distribution of tenants, showed that it had lease markets capable of transferring the bulk of project benefits to landowners.[131] A survey was taken from twenty-five tenants participating in 156 cash and 45 share leases. Tenant's expected economic rents from leasing were estimated from survey information and compared to the actual market rates they paid to landowners. Landowners in the sample captured 92 percent of total rents in both cash and share leases.[132] Thus, the results showed that a broad distribution of

130. Leveen, Some Economic Implications of the Current and Possible Future Administration of the Reclamation Act of 1902 (1978) (unpublished working paper, Dept. of Agric. & Resource Econ., Univ. of Calif., Berkeley).

131. Huffaker & Gardner, The Distribution of Economic Rents Arising from Subsidized Water when Land is Leased (forthcoming in AM. J. AGRIC. ECON. 1986).

132. The study tested the null hypothesis that landowners capture full economic rents in cash and share leases. Acceptance intervals were calculated by setting the probability of a type 1 error (incorrectly rejecting the null hypothesis) at 0.005. The 92 percent of total rents captured by both cash and share landowners was not significantly different from 100 percent given acceptance intervals estimated to be [83 percent, 117 percent] and [82 percent, 118 percent] respectively.

the benefits of underpriced water is most effectively promoted, at least in the Imperial Valley reclamation area,[133] by limiting the size of owned acreage and not the size of the sum of owned and leased acreage as required by the RRA.

"Rational Relationship" Standard of Review: Conclusion

The conference committee implied that retroactive leasing restrictions are a reasonable inducement because large nonamending tenants do not deserve the subsidy benefit for their excess leased lands. The committee's implicit assumption that tenants receive benefits equal to the reclamation subsidy is unreasonable since economic rents, not subsidy, are capitalized to some extent in lease values. The committee's over-estimation of the benefits available for tenant capture caused it to overshoot in specifying reasonable leasing restrictions in the "hammer" clause. The clause's 160-acre restriction on nonamending farmers is much tighter than that considered necessary in the RRA for viable modern farming. Thus, the clause unnecessarily burdens these farmers. The "hammer" clause's severe leasing restriction is also unreasonable because the available evidence indicates that landowners, not tenants, capture the bulk of project benefits in leasing.[134]

WHO WILL WORK FOR REPEAL OF THE "HAMMER" CLAUSE?

Farming interests can be expected to fight for repeal of the "hammer" clause given the substantially higher prices they will have to pay if the clause is implemented. Thus, it becomes relevant to discuss who will favor it and who will not. Whether certain landowners and tenants amend their contracts to come under the RRA, or remain under the 1902 Act and fight for repeal of the "hammer" clause, depends on which law they anticipate will benefit them most. Anticipated benefits may depend largely on the following factors:

The RRA's Effect on Expected Economic Rents

The previously cited finding[135] notes that landowners may capture the bulk of the economic rents in leasing. This implies that lease prices paid

133. Using the Imperial Valley as a case study has the shortcoming that it has been exempt from acreage limitations for all but a very brief recent period. Thus, the leasing agreements studied may not be fully representative of those in other reclamation areas fully subject to the law. Imperial Valley operators would not, for example, have the same incentives to engage in "sweetheart" lease-back arrangements to overcome acreage restrictions as those living under acreage restrictions. Despite its exclusion from acreage restrictions on ownership or leasing, the Imperial Valley study is noteworthy because it offers evidence that a farmland leasing market can be competitive in a reclamation area characterized by large tenants.

134. It appears that a farmland lease market study has not been attempted in any other reclamation area.

135. Huffaker & Gardner, *supra* note 131.

to landowners may decrease almost proportionately with the reduction in economic rents caused by an increase in water prices, i.e., by an increase in O&M water charges or the payment of full cost.

The Size of Landowners and Tenants in the Relevant Geographic Lease Market

Bureau regulations ensure that landowners and tenants will not misuse leasing to escape full cost pricing.[136] Thus, if a landowner rents out land subject to full cost, the full cost rate still applies even if the land is not excess vis-a-vis the lessee and vice-versa.

The Individual Farm Size Relative to Acreage Limitations of Each Law

Consider first those landowners who receive subsidized federal water but are not farm operators. Suppose they find themselves in lease markets characterized by tenants who do not exceed the 960 acre limitation of the new law. Suppose further the landowners have more than 960 acres that they lease. Under the old law, they have to dispose of acreage exceeding 160 acres. Under the new law they may own and lease out 960 acres. Thus, these landowners may prefer the new law.

Consider next landowners who have complied with the 160 acre limitation of the old act. This is probably the most common situation over the entire western United States where reclamation law applies. Under the new law these landowners can pay sales prices for land, and offer leases, reflecting their eligibility to receive subsidized federal water up to the 960 acre limit. Their sales bids might well be greater than those which landowners holding more than 960 acres can offer. Thus, smaller landowners may find their competitive position in both land sales and leasing markets enhanced under the new law relative to landowners that exceed the 960 acre limitation. They might therefore support the "hammer" clause which would induce their larger competitors to amend their contracts.

Suppose now that the above landowners are located in areas characterized by large tenants who exceed the 960 acre operating limitation. Economic rents and lease prices may be higher under the old law than if full cost prices must be paid for water delivered to land over 960 acres as required under the new act. Landowners amid large tenants may thus prefer nonamended contracts and repeal of the "hammer" clause that would force them to amend.

Consider, finally, tenant preferences for reclamation law. Tenants operating below 960 acres may be able to offer greater lease prices, depending on the strength of economies of scale, than those operating above 960 acres, since the latter must pay full cost for water on land in excess of 960 acres as required under the new law. Thus, tenants of lesser acreage

136. 43 C.F.R. 426.7(d).

may find their competitive positions enhanced under the new law relative to tenants who exceed the 960 acre limitation. They might support the "hammer" clause to cause amendment of their larger competitors' contracts. Tenants of under 960 acres, who lease from large landowners and must use full cost water, may join larger acreage tenants in preferring the old law, especially if the "hammer" clause is repealed.

A complication is that most tenants are also landowners who farm on whatever owned acreage is allowed under the relevant reclamation law. As owner-operators they may profit from an expansion of owned acreage with subsidized water permitted under the RRA, especially if they are at the end of their recordable contract. For them the wealth gain produced by the expanded acreage provisions of the RRA may be greater or less than the wealth loss produced by the increased water rates under the "hammer" clause.

In sum, only those small tenants and landowners who are not likely affected by the full cost provisions of the RRA will be apt to benefit from implementation of the "hammer" clause, since it will induce their larger competitors to amend contracts and force them to pay more for water. However, even small tenants or landowners may be gravely hurt by the "hammer" clause if their regional lease market is characterized by landowners over the limit or tenants over the limit, respectively.

MITIGATING THE IMPACT OF AMENDING CONTRACTS

If attempts to repeal the "hammer" clause fail, irrigators of all sizes may have several means under the Bureau's new regulations to mitigate the impact of amending their contracts to come under the restrictive leasing provisions of the RRA.

They can enter into section 426.7(2) management or consulting agreements in lieu of conventional leases.[137] These are agreements "in which the manager or consultant performs a service for the landowner for a fee but assumes no risk in the operation of the land . . ."[138] Small landowners surrounded by large tenants, for example, may benefit more from management agreements than conventional leases. The managed land is not counted against the manager's own entitlement and is thus eligible for subsidized water. Landowners benefit from increased rents due to lower water costs. However, landowners absorb more production risk in paying managers a cash rate. Thus, landowners have to soak up bad years. Their willingness to do so depends on the difference between full cost and subsidized water rates, and how the difference translates into increased rents.

137. *Id.*
138. *Id.*

Trusts are another vehicle to mitigate the restrictive leasing provisions of the RRA. The advantage of a trust is that it is exempted from the full cost pricing and ownership limitations of the RRA:

> The ownership and full cost pricing limitations of this title and the ownership limitations provided in any other provision of federal reclamation law shall not apply to lands in a district which are held by an individual or corporate trustee in a fiduciary capacity for a beneficiary or beneficiaries whose interests in the lands served do not exceed the ownership and pricing limitation imposed by federal reclamation law, including this title.[139]

The use of trusts to avoid the restriction provisions of the RRA was anticipated by one respondent at the public hearings held by the Bureau of Reclamation in the formulation of their regulations. The respondent "suggested that the rules should not allow trusts to become the means by which the RRA can be circumvented."[140] The Bureau justified its rule by answering that it was a restatement of the conditions set forth in the RRA concerning trusts.

The benefits which a farm operator creates by changing his operation into a trust depends upon farm size and the tax and liability benefits of the current organizational structure relative to those of a trust. Consider, for example, a sole proprietor of a federally irrigated farm which is significantly larger than the 960 acre limitation of the RRA. The farmer, by placing his excess land in trust, does not have to put it under a recordable contract. Each remaining family member can become the beneficiary of 960 acres of excess land, assuming each does not have other interests in federally irrigated land. The farmer-settlor can continue to control the operation of the former excess land and collect a salary by a "declaration of trust" in which he declares himself trustee. A declaration of trust will generally be recognized if the settlor sufficiently manifests a desire to create a trust. Such desire can generally be shown through notice to a third person of the trust's existence and separate bookkeeping of each beneficiary's interest. Alternatively, an independent trustee can hire the farmer-settlor to operate the trust farmland as a manager or consultant.

The disadvantage of placing excess land in trust is that the land can be lost if sold by beneficiaries or reached by their creditors. The land is also lost if sold pursuant to a recordable contract, but at least the farmer receives the non-project value. The danger may be mitigated if the farmer can set up some type of "constrained" trust, such as a revocable trust (settlor retains power to revoke the trust); a spendthrift trust (beneficiaries

139. 43 U.S.C. § 390nn (1982).
140. 43 C.F.R. 426.6(b)(4).

cannot sell the trust land and creditors cannot reach it for satisfaction of claims against beneficiaries); or a discretionary trust (trustee has discretion to withhold income so that beneficiaries do not have a right to it that creditors can reach).

Consider, now, a general farm partnership. Partnerships are limited to irrigation of 960 acres with subsidized water. Converting the partnership to a trust allows each partner-turned-beneficiary to hold an interest in 960 acres. There are also liability advantages to a trust over a partnership. Under the law of general partnerships, each general partner is subject to unlimited liability on all debts and liabilities of the partnership. The creditor of a beneficiary, on the other hand, can generally reach only that beneficiary's equitable interest in the trust.

Farm corporations with over twenty-five shareholders are limited to 640 acres under the RRA, only 320 of which can be irrigated with subsidized water. Rather than put excess land under recordable contract and pay full cost for half of its owned land and all of its leased, the corporation may possibly convert into a trust with shareholders-turned-beneficiaries. The new trust can irrigate a tremendous amount of acreage at the subsidized rate since the RRA puts no limit on the aggregate size of the trust.

Farm corporations with over twenty-five shareholders also have the option of reducing the number of their shareholders to twenty-five. This makes them eligible to receive subsidized water for 960 acres instead of only 320. They may still enjoy the advantages of corporate structure.

CONCLUSION

The "hammer" clause acts retroactively to restructure the rate setting clauses in contracts predating the RRA. Rate setting clauses in existing contracts set a flat charge for all water delivered. When the "hammer" clause is implemented the rate setting clauses will be restructured to tie water rates to land tenure. Irrigators will be required to start paying full cost for water on excess leased land.

The 1902 Act does not explicitly authorize restrictions on leasing. However, such a change may be justified, and may not change irrigators' legal obligations, if the 1902 Act was intended to regulate leasing. It appears that the 56th Congress did not intend to regulate leasing because of the following reasons: (1) leasing is not mentioned in the legislative history; (2) the specter of private land monopoly was likely believed to be sufficiently handled by the 160 acre ownership limitation; and (3) leasing, at the turn of the century, was viewed as a stepping stone to ownership and thus a practice which may have been consistent with the intent of the law.

Whether the "hammer" clause is unconstitutionally retroactive under a higher standard of judicial review depends on a balance of public and private interest factors. Relevant public interest factors are the speedy implementation of a comprehensive regulatory scheme and the recognition of valid rights outstanding at enactment. The "hammer" clause recognizes the former interest at the expense of the latter. Congress recently avoided a "hammer" type clause in enacting the Coal Leasing Amendments of 1975 in order to expressly protect valid existing rights. The conference committee giving birth to the "hammer" clause did not explain why the public interest in recognizing valid exisitng rights was sacrificed in the reclamation legislation.

Congress' decision not to recognize the rate setting terms of non-amended contracts is problematic for two reasons. First, Congress was advised by the Comptroller General that project participants have vested rights in the terms of water service contracts. Second, these vested rights are against the Congress itself. The "hammer" clause sets a dangerous precedent of Congress legislating to modify the terms of its own contracts.

The "hammer" clause is also arguably unconstitutional under the conventional "rational relationship" standard of judicial review. The clause's retroactive application of leasing restrictions is unreasonably severe because Congress overestimated the project benefits to be distributed in farmland leasing markets and the portion of those benefits captured by tenants.

The "hammer" clause itself may have a mitigated impact, however. Large irrigators, who will probably be hit the hardest by the clause, may be able to amend their contracts without coming under the restrictive leasing provisions of the RRA by using leasing substitutes condoned by Bureau regulations and restructuring their business organizations to profit from more favorable treatment of other types in the regulations.