
NATURAL RESOURCES JOURNAL

Volume 13
Issue 1 *Winter 1973*

Winter 1973

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Recommended Citation
Paul S. Taylor, *Water, Land, and Environment Imperial Valley: Law Caught in the Winds of Politics*, 13 Nat. Resources J. 1 (1973).
Available at: https://digitalrepository.unm.edu/nrj/vol13/iss1/2

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natural resources journal

Published four times a year by The University of New Mexico School of Law

Vol. 13 January 1973 No. 1

WATER, LAND, AND ENVIRONMENT IMPERIAL VALLEY: LAW CAUGHT IN THE WINDS OF POLITICS**

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PUBLIC RECLAMATION

> These lands are being opened to settlement for all the people, whether they now reside in the East, South, or West. The farm boys in the East want farms of their own . . . where they can . . . build homes without being driven into the already overcrowded cities. . . . If this policy is not undertaken now, this great Western desert will ultimately be acquired by individuals and great corporations. . . . [The National Reclamation Act] is in the interest of the man who earns his bread by his daily toil. It gives him a place where he can . . . be free and independent . . . an owner of the soil. . . . Those are the class of men we must rely on for the safety of the nation. (Congressman Oscar Underwood, of Alabama. 1902)[1]

Water and land are separated west of the hundredth meridian. It is costly to bring them together at the place and time needed to render them productive, and the costs—with scarcely an exception—are beyond the resources of local interests. A decade of popular agitation was needed to persuade Congress to open the door to the national treasury to finance reclamation. Before consenting, Congress insisted upon the explicit condition that the benefits should be distributed to the many, not monopolized by the few.

The Homestead Act of 1862[2] offered a precedent: its aim was to assure widespread distribution of benefits from the disposal of public lands. To achieve this Congress offered a quarter section of land (160

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**Martha Chase assisted in preparation of this paper and the Institute of Business and Economic Research, University of California, Berkeley, gave support.

1. S. Doc. No. 446 Ser. 4249, 57th Cong., 1st Sess. 376 (1902). Southern support of western reclamation was essential. The authorization bill passed by only 146 to 55—150 recorded as present or not voting. Of the yea votes 57, or 39 percent, came from South Atlantic and South Central states. Congressman Underwood was a member of rising influence in the House.

2. Act of May 20, 1862, ch. 75, 12 Stat. 392.

acres) to any family which would live upon and develop it. The citizens who gathered almost annually at Irrigation Congresses during the 1890's pointed repeatedly to the already marked concentration of western land ownership in private hands, a concentration planned largely in anticipation of the coming of water and the "many fold" increases in land values to the owners it would bring with it. In light of this concentration of land ownership the Irrigation Congresses insisted time and again that reclamation plans should not promote a similar concentration of benefits from the arrival of water.[3]

Congress and the White House made clear that they shared the conception of public policy held within the citizens' movement. The House Committee on Reclamation of Arid Lands rejected private construction of irrigation works, not as financially infeasible, but as a step toward private monopoly. It declared:

> If we were willing to abandon our time-honored policy of inviting and encouraging small individual land holdings, and were prepared to turn over all of the public lands under a large irrigation system to the control of a single individual or a corporation, we could undoubtedly secure the construction of extensive works which can not be profitably constructed by private enterprise under present conditions, but no one contemplates paying so stupendous a price as this for irrigation development.[4]

As the reclamation bill was moving through Congress President Theodore Roosevelt made plain to its sponsors that he, too, wanted to assure adequate safeguards against private monopolization of benefits.[5] On the floor of Congress western spokesmen gave emphatic assurance that the acreage limitation and residency provisions in the bill would guard "against the possibility of speculative landholdings and . . . compel the division into small holdings of any large areas . . . in private ownership which may be irrigated under its provisions."[6]

Eastern opponents of the reclamation bill remained skeptical of the adequacy of these provisions. Their spokesman charged that:

> We find behind this scheme, egging it on, encouraging it, the great railroad interests of the West, who own millions of acres of these arid lands, now useless, and the very moment that we, at the

3. Taylor, *Water, Land, and People in the Great Valley*, 5 American West 24 (1968); Taylor, *Reclamation: the Rise and Fall of an American Idea*, 7 American West 27 (1970); Taylor, *Reclamation: Aspirations vs. Achievements*, 115 Cong. Rec. 34489 (1969).

4. H.R. Rept. No. 794 Ser. 4402, 57th Cong., 1st Sess., 3 (1902). *See also* Taylor, *Central Valley Project: Water and Land*, 2 Western Pol. Q. 241 (1949).

5. 35 Cong. Rec. 6674 (1902).

6. 35 Cong. Rec. 6677 (1902).

> public expense, establish or construct these irrigation works and reservoirs, you will find multiplied by 10, and in some instances by 20, the value of now worthless land owned by those railroad companies. . . . [7]

Congress overrode these doubts and launched reclamation as a nationally financed program in 1902. The condition upon which it was willing to do so is set out in the following public policy statement, found in the National Reclamation Act:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant hereof residing in the neighborhood . . . .[8]

PRIVATE RECLAMATION

Congressman Gilbert M. Hitchcock, of Nebraska: "Then, you think there should not be any limit to the profits that the private corporation should be permitted to earn while taking the public waters of the river and irrigating and controlling largely the public lands?" Anthony Heber, California Development Company, Imperial Valley: "I am opposed to the Government interfering, in every instance, with the private property and the private profits of any private corporation.—Congressional hearing, 1904."[9]

In the history of western reclamation the Imperial Valley is a great exception. The Desert Land Act[10] made public land available to settlers on condition they would irrigate it. Motivated by prospects of speculative gain, private capital undertook to supply the water to the coming settlers. At the beginning, the necessity for construction of a reservoir to store floodwaters was not evident. The initial cost of diverting public water from the nearby Colorado River for sale to the settlers was low, and within the grasp of private capital. Water began to flow into the Valley in 1901, one year before Congress laid down public policy in the National Reclamation Act. Consequently, controls were absent.

The feasibility of private development at the beginning was a product of exceptional geographic factors, and men experienced in

7. 35 Cong. Rec. 6685 (1902).

8. *Reclamation and Irrigation of Lands by Federal Government*, 43 U.S.C. 431 (1971). Not until 1926 did Congress control speculative profits from sale of "excess" lands by setting pre-project value as the sale price. Reclamation and Irrigation of Lands by Federal Government, 43 U.S.C. 423(e) (1971). *See also* Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L. J. 477 (1955).

9. *Hearings Before House Committee On Irrigation Of Arid Lands*, H.R. Doc. No. 13627, 58th Cong., 2nd Sess. 63 (1904).

10. 43 U.S.C. 321 *et seq.* (1964).

administration of large landholdings took advantage of them.[11] Imperial Valley lay well beneath the bed of the Colorado River, and mostly below sea level.The necessary original investment, therefore, was modest—a few hundred thousand dollars. With teams and scrapers the developers made a cut in the soft silt of the river embankment and dug a short canal. This sufficed to release a stream of water which ran down hill through the canal, into a cleared-out old overflow channel and onto the desert below. Upon arrival of the first waters the developers encouraged settlers to buy government land at $1.25 an acre. To reward their own investment they sold the settlers rights to receive delivered water without which their land was toally unproductive.

Privately-provided irrigation produced the effects Congress had anticipated and sought to avoid. By the late twenties Imperial Valley was not a traditional homogeneous community of farmers working their own land, but a polarized, divided society. Operation and ownership of land were concentrated in few hands; the laboring landless were numerous. About a third of the population was of Mexican origin, largely of Mexican birth, and composed almost entirely of field laborers. Control of production of two principal crops—melons and lettuce—already was concentrated in the hands of as few as 56 and 67 growers, respectively, with average acreages of 667 and 336. Investigation at the height of the Valley's private development revealed that:

> Mexicans come principally as . . . gangs of hand laborers . . . a class apart . . . the coincidence of class, racial, and cultural differences . . . combine to maintain a social ostracism, which . . . accentuate[s] the domiciliary . . . isolation, . . . delay[s] the rapprochement of the two cultures . . . and retard[s] the blurring of the class line.[12]

Concentration of land ownership and operation has continued to grow. By 1969. the size of the average irrigated farm in Imperial County was 494 acres, more than three times the 142-acre average in the State of California. Of the 438,000 irrigated acres in the Valley, about 800 owners held 233,000, or more than half, in parcels exceeding 160 acres.

From the beginning the developers of the Valley found the uncertainty of their right to divert Colorado River water to be an

11. "The men who brought the first farmers into the Colorado Desert in 1901 . . . Charles Robinson Rockwood and C. N. Perry were construction engineers for the Southern Pacific Railroad, familiar with handling men, money, and materials. Anthony Heber and Sam Fergusson were land agents of the Kern County Land Company." Hosmer, *Triumph and Failure in the Colorado Desert*, 3 American West 34, 38-39 (1966).

12. Taylor, Mexican Labor in the United States: Imperial Valley 33, 94 (1928).

impediment in their efforts to raise capital.[13] To remove this obstacle they appealed to Congress in 1904 to declare the Colorado River "non-navigable," and consequently beyond federal jurisdiction. After a hearing marked by opposition from the newly formed Reclamation Service and its supporters, Congress rejected the appeal.[14] Thereupon the developers turned to Mexico and cut an intake beyond the jurisdiction of the United States, just below the international boundary.[15]

The new cut in riverbank silt was made without a protective headgate, and disaster soon struck. In 1905 the river's floodwaters widened the intake into a breach that poured the entire flow of the Colorado into the Valley to form a fast enlarging Salton Sea. Complete inundation of Imperial Valley impended. The original developers, aided by (and ultimately controlled by) the Southern Pacific Company, whose railroad tracks traversed the Valley, worked to close the breach. This finally was accomplished in 1907.

On the eve of the final effort toward closure, President Theodore Roosevelt advised Congress that the making of the cut in Mexico:

> in a bank composed of light soil above a depression . . . without controlling devices, was criminal negligence. . . . The ownership of the property in Imperial Valley, both farmers and towns-people, together with the Southern Pacific company, and the California Development have combined to call upon the government to assist the California Development Company to the extent of erecting permanent works to insure protection in the future.

The President recommended that:

> The reclamation service should be authorized to take steps at once for the construction of an irrigation project under the terms of the Reclamation Act for the lands in the Imperial Valley, and in the lower Colorado River Valley.[16]

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13. "The bankers tell me, 'You get Congress to simply declare that stream is not navigable, and then you can have all the money you want.' " *Supra* note 9, at 60.

14. "If this legislation should be enacted, you will have granted away forever the entire magnificent Colorado River." Hearings on H.R. 13627, *supra* note 9 at 88. "If the policy of the Government is to be sustained and carried out, the Reclamation Bureau will have to take up this enterprise, because the small enterprises will get just enough land in frequent spots and just enough water to make it impossible for the Government to carry out on proper lines what would be absolutely impossible for the individual or corporation here to carry out." Hearing on H.R. 13627, *supra* note 9, at 59.

15. "It is my earnest desire to worship at our own altar and to receive the blessing from the shrine of our own Government, but if such permission is not granted, of necessity I will be compelled to worship elsewhere." Hearing on H.R. 13627, *supra* note 9, at 87.

16. Message on the Imperial Valley situation sent to Congress on January 12, 1907 by President Roosevelt, on the unfriendly attitude of the United States Government towards the

Congress did not follow the President's recommendation of a federal reclamation project, but in 1910 authorized him to spend up to one million dollars—most of which he expended—for the purpose of protecting lands in the Imperial Valley and elsewhere along the lower Colorado River.[17]

LEGISLATION

> Allow the water sources . . . to pass under unrestricted control of monopolists, and the land to be reclaimed . . . might as well be granted to them at once, for the ownership of the water virtually gives them the land, and that is what they expect to achieve.[18]

The danger to the Imperial Valley from inundation by flood waters had been merely postponed, and after an interval of years, California spokesmen in Congress raised the hazard and proposed a remedy. Congressman Phil D. Swing, representing the Valley, and Senator Hiram Johnson, of California, became sponsors of bills to authorize the Secretary of the Interior to construct a dam and reservoir to restrain flood waters at Boulder Canyon, and a canal to conduct water from the Colorado River to the Valley without passing through Mexico. A canal entirely on American soil would forestall enlargement of Mexican water rights beyond those created by the original developers when they cut the intake south of the border.[19] The reservoir not only would protect the Valley from repetition of the 1905-07 disaster, or worse, but also would provide water needed for irrigation in the slack season.

> Secretary of Interior Hubert Work reported on January 4, 1928: Imperial and Coachella Valleys, during May, June, and July of each year, are threatened by destruction by flood. In September and October Imperial Valley is threatened by, and has actually suffered, millions of dollars loss from drought. . . . The great reservoir will catch and hold the flood water [and] will guarantee

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Imperial Valley. (April 1907,42-45). Imperial Valley spokesmen rejected the President's charge of "criminal negligence." They said that since by refusing to declare the Colorado River "non-navigable" the Government had "ruined the credit of . . . [the California Development] company and made it powerless to build suitable headworks, it is not extravagant to state that the Government is responsible for the runaway Colorado River and the Salton Sea." Letter from L. M. Holt to President Roosevelt, *Id.* at 17.

17. Law of June 25, 1910, ch. 441, 36 Stat. 883.

18. H.R. Rep. No 3767, 51st Cong., 2nd Sess., (5); *Report of House Select Committee on Irrigation of Arid Lands in the U.S.*, H.R. 12210 (1891).

19. Senator Sam G. Bratton, of New Mexico, described the purpose of the All-American Canal: "to discontinue the enlargement of these [water] rights in Mexico." 70 Cong. Rec. 326 (1928).

> lower basin communities, especially Imperial Valley, a dependable water supply. . . .[20]

The Supreme Court noted additional benefits received by Imperial Valley lands from construction of Hoover Dam, which checked "erosion of land and the deposit of silt which fouled waters, choked irrigation works, and damaged good farm land and crops."[21]

Reservoir storage was important to irrigate land already under cultivation, as well as to reclaim new land. Senator William H. King, of Utah, supporting the project, told Congress:

> The low water is wholly inadequate to irrigate the land in the Imperial Valley. . . . The result is that there is a diminution of the quantity of crops produced upon all of the land. Therefore it is important not only for the bringing new lands under cultivation that there should be storage facilities, but it is vitally important to those who have primary rights that they should have storage facilities and storage of water.[22]

In 1928, after several years' deliberation, Congress passed the Boulder Canyon Project Act [23] authorizing the Secretary of the Interior to build a reservoir, a power plant, and an All-American Canal. The Act provided: that the project was to be "reimbursable, as provided in the reclamation law:" for "payment of all expenses of contruction, operation and maintenance of said canal and appurtenant structures in the manner provided in the reclamation law;" that reclamation law is defined as the 1902 law and acts "amendatory and supplementary thereto;" and that "this act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."[24] "Reclamation law" thus includes the acreage limitation and residency requirements adopted in 1902.

PUBLIC ADMINISTRATION

> I conceive it to be . . . my duty as Secretary, to exert every effort to see that applicable laws are complied with. Where discretion may be vested in the Department or the Secretary, that discretion should be exercised to obtain compliance with the principles on which the legislation is enacted. What I am concerned about is a process by which inferences are based on inferences and there is a whittling away at a principle until all

20. 70 Cong. Rec. 8541-2 (1928).
21. Arizona v. California, 373 U.S. 546, 553 (1962).
22. 70 Cong. Rec. 74 (1928).
23. Boulder Canyon Project Act, 45 U.S.C. 617a, 617c(b), 617k, 617m (1964).
24. *Id.*

> that is left is a pile of shavings. (Secretary of the Interior Fred A. Seaton, 1957)[25]

The initial response at the Department of the Interior to the references to reclamation law in the Boulder Canyon Project Act[26] was one of the acceptance and apparent approval. Attorney Northcutt Ely, Interior Secretary Ray Lyman Wilbur's Executive Assistant and representative in negotiation of water contracts under the act, recorded these views on November 4, 1930:

> The Reclamation Law's limitation of 160 acres to a particular owner presents a serious problem, in view of the fact that this, being an existing project, includes many farms with larger area. I see nothing to do but enforce it unless the Imperial Irrigation District can get new legislation. In any event, enforcement of this requirement would undoubtedly have a salutary effect on suspected speculative activities in that locality.[27]

In due course, however, an Imperial Irrigation District attorney solicited an opposite response, i.e., that the 160-acre limitation did not apply.[28] Following an exchange of views within the Interior Department, but without a formal solicitor's legal opinion, Ely ordered for the Secretary's signature a letter approving nonapplication of acreage limitation to Imperial Valley. Secretary Wilbur signed it on February 24, 1933.[29]

In 1944, fourteen years after he had written that Congress had indeed applied acreage limitation to Imperial Valley, and that its application would be a "salutary" control over speculation, Ely testified to Congress that in administering reclamation law to Imperial Valley, acreage limitation simply "has been ignored."[30]

Coachella Valley is served by an extension of the All-American Canal northward beyond the Imperial Valley. Secretary Wilbur's 1933 letter had covered an early impending contract between the United States and the Imperial Irrigation District only. In 1945, his successor, Secretary Harold L. Ickes, faced a similar decision of whether or not to apply acreage limitation to Coachella Valley as the All-American Canal was extended to that area. The opinion of

25. *Hearings Before Senate Subcommittee on Irrigation and Reclamation,* on S. 1425, 2541, and 3448, 85th Cong., 2nd Sess., Appendix C, 26, 27 (1958).

26. 45 U.S.C. 617 *et seq.* (1964).

27. 71 Interior Dec. 528 (1964).

28. "He doesn't want any formal ruling, of course, if the Solicitor were to hold that the limitation applies so far as Imperial Irrigation District is concerned." Richard Coffey, District Counsel, to Porter W. Dent, Assistant Commissioner, Bureau of Reclamation, Feb. 4, 1933. 71 Interior Dec. 527 (1964).

29. 71 Interior Dec. 529-30 (1964).

30. *Hearings on H.R. 3961 Before Senate Commerce Subcommitee,* 78th Cong., 2nd Sess., 632 (1944).

Solicitor Fowler Harper, upon which Secretary Ickes relied as to Coachella Valley, repudiated the Wilbur ruling on Imperial Valley:

> . . . the letter of Secretary Wilbur . . . was written solely for the purpose of giving partisan help to the Imperial Water District, as the delay of the final confirmation of the contract held up construction of the All-American Canal. Besides, the time of the Hoover Administration was near its close . . . in view of section 14 of the Boulder Canyon Project Act, which makes that act supplementary to the Federal reclamation law, the excess-land provisions contained therein are carried into operation with respect to the Coachella Valley . . . .[31]

The mid-forties was a period of extended public debate over application of acreage limitation law. Its focus at that time was the Central Valley Project in California, but the implications and repercussions of the contest were far broader. Attempts to obtain Congressional exemption of Central Valley Project were pressed hard, especially in 1944 and 1947, but they failed. President Harry S. Truman's prospects for election to another term were in great doubt, and in 1948 his support of acreage limitation was to become an issue.[32]

In the midst of this situation a spokesman for the Veterans of Foreign Wars—an organization supporting acreage limitation, with veterans given preference in access to land—asked now Secretary of Interior J. A. Krug to follow the logic of the Harper decision of 1945, reverse Secretary Wilbur's ruling of 1933, and apply acreage limitation to Imperial as well as to Coachella Valley. In response, Secretary Krug stood by the Ickes decision to apply acreage limitation to Coachella Valley, but declined to reverse Secretary Wilbur's Imperial Valley decision, saying "we must allow that inconsistency, if such there be, to continue." He explained that

> . . . inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely upon advice from the Secretary and thus establish an economy in the district consistently with that advice, they should not now be abruptly advised that the economy of the project is to be changed under a

31. 71 Interior Dec. 533, 548 (1964).

32. Taylor, *Excess land law: Legislative Erosion of Public Policy*, 30 Rocky Mt. L. Rev. 1, 11-13 (1958); Taylor, *Excess Land Law: Execution of a Public Policy*, 64 Yale L. J. 477, 501-503, text at n. 144 (1955).

> contrary ruling of the present officer charged with the adminstration of the law.[33]

In declining to follow the clear import of Harper's 1945 opinion that acreage limitation law applied to Imperial Valley as well as to Coachella, Secretry Krug thus gave weight to two practical aspects of the situation stemming from the Wilbur decision. The first was concern for the injury that reversal would do to "owners and subsequent purchasers" of Imperial Valley land. The second was the fifteen-year duration of an administrative interpretation upon which he believed they now "were entitled to rely." Although declining to disturb the Wilbur administrative ruling, Secretary Krug did not close the legal issue, adding, "that action might now be subject to valid question."[34]

Thus the Secretary left the final outcome in a shroud of uncertainly that prevails to this day. In balancing interests affected by his decision, he chose to give greater weight to the interest of land "owners and subsequent purchasers" in nonenforcement than to the opposed interest of the "man who earns his bread by his daily toil" seeking through access to the land "a place where he can . . . be free and independent." The latter were not vocal and he did not mention them.[35]

In 1957, nine years after Secretary Krug declined to apply acreage limitation to Imperial Valley, Solicitor General J. Lee Rankin examined the Wilbur decision critically, and arrived at the same conclusion as Solicitor Harper, that the law applied to Imperial Valley:

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33. Secretary J. A. Krug to M. C. Hermann, Department Quartermaster Adjutant, Veterans of Foreign Wars, California, April 27, 1948, 71 Interior Dec. 548-9 (1964).

34. *Id.* at 549. Surviving uncertainty over application of acreage limitation to Imperial Valley soon was reflected in political campaigning, as reported in a Valley newspaper: "Rep. Richard Nixon visited Saturday in the Valley with members of the Imperial County Republican Central Committee . . . regarding his possible candidacy for senator in the 1950 election. . . . Two statements made by Nixon should prove popular with people of Imperial Valley. Nixon declared he is against the 160-acre limitation of ownership of lands demanded by the bureau of reclamation, and that he is against the Department of Interior's grab for power." Brawley News, Oct. 31, 1949.

35. *See supra* note 32 and epigraph at *supra* note 1. In 1958, a decade later, Chief Counsel Harry W. Horton, of Imperial Irrigation District, was to tell Congress that whatever the economic hardship suffered by owners of excess land from compliance with acreage limitation, it is balanced by the economic gains received from reclamation of their lands. Explaining the avowed readiness of a prominent San Joaquin Valley owner of excess lands to comply with the law by selling them within the customary ten years after receiving water, Horton said: "Let us lay the cards on the table. . . . I will give you my own opinion of Jack O'Neill's willingness to sign the 160-acre limitation. He thinks if he gets water for 10 years on there without having to sell it, he can make enough money out of it so he can afford to sell the land at any old price." *Hearings on S.1425, S.2541, and S.3448 Before the Senate Subcommittee on Irrigation and Reclamation*, 85th Cong, 2nd Sess. 87-8 (1958).

> [F]or the reasons stated in Solicitor Harper's opinion, as well as for others, no conclusion seems permissible other than that the limitations of the reclamation law upon the quantity of privately owned lands which might receive irrigation water under the All-American Canal are applicable in the Imperial Valley . . . .[36]

The Interior Department administrators of reclamation law, however, were unmoved. Early in 1958, within months of the issuance of Solicitor General Rankin's opinion, Solicitor of Interior Elmer F. Bennett repeated the reasons given by Secretary Krug in 1948 for not enforcing the law, notwithstanding the Wilbur "decision might now be subject to valid question." Bennett said he had:

> not had occasion to undertake a legal analysis of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper. Whatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so . . . The negotiations leading to the [original] contract were lengthy and extensively in the public view. . . . Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160 acre limitation to the lands of the Imperial Irrigation District. . . . There must surely arise a point of time, again I believe long since past, when the contract . . .became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effects.[37]

Continuance of administrative inaction in applying acreage limitation to Imperial Valley, however, did not suffice to assure owners of excess lands there that they could rely confidently on survival of the Wilbur opinion and regard the issue as permanently at rest. A year after Solicitor General Rankin said the limitation legally applies to the Valley, Senator Clinton P. Anderson, as chairman of the Senate Subcommittee on Irrigation and Reclamation, issued a memorandum reprinting the opposed Wilbur and Harper opinions.[38]

Five days later, on April 30, 1958, the Subcommittee opened hearings on three acreage limitation bills. Imperial Irrigation District Chief Counsel Harry W. Horton appeared as witness on the opening

36. Memorandum in behalf of the United States with respect to relevance of noncompliance with acreage limitations of reclamation law, No. 10 Original, Arizona v. California 357 U.S. 902 (1957); 71 Interior Dec. 466, 555 (1964).

37. 71 Interior Dec. 550-53 (1964).

38. Acreage limitation-reclamation law. Memorandum of the Chairman of the Subcommittee on Irrigation and Reclamation to Members of the Senate Committee on Interior and Insular Affairs, Apr. 25. 1958, 11-24.

day to say, "I hope that in any report made by this committee there will be no presumptions indulged in in favor of Mr. Harper's opinion."[39]

After the lapse of another three years Senator Anderson again raised the question of applicability of the law. In a letter to Secretary of the Interior Stewart L. Udall, he stated:

> I have had some complaints from Southern California that the acreage limitation provisions of the Reclamation law have not been enforced in . . . the Coachella and Imperial Valleys. Would you kindly advise me if these areas are subject to acreage limitation provisions, and if so, the status of land ownership within them?[40]

Secretary Udall responded nine months later, on May 15, 1962, regretting that the Senator's letter "unfortunately" had been "misplaced," and mentioning the Wilbur, Harper and Rankin opinions and the Krug letter to the Veterans of Foreign Wars. The Secretary concluded:

> The continuing press of other matters has caused us to defer a current study of the Imperial situation. We hope, however, to go into it in the future, as circumstances of available staff and time permit.[41]

Two and a half years later Solicitor of Interior Frank J. Barry issued an opinion thoroughly covering administrative action and inaction between 1930 and 1964. After reviewing the Wilbur ruling, Harper opinion, Krug letter, Rankin opinion, Bennett letter, and Anderson-Udall exchange, he came to this unqualified conclusion:

> The Boulder Canyon Project Act by its plain terms incorporates those provisions of law which impose acreage limitations on lands served from federal reclamation projects. The Boulder Canyon Act works, including the All-American Canal, Imperial Dam and appurtenant structures, are federal reclamation facilities. Nothing in the history of the Project Act and nothing in the legislative history of reclamation law modifies what has been expressed by Congress as its plain intent.
>
> The interpretation in the Wilbur letter of the meaning of the Project Act was clearly wrong and could not effect a change in the statutes enacted by Congress. The fact that the Department has

39. *Hearings on S.1425 et al., supra* note 25, at 83.

40. 71 Interior Dec. 496, 556 (1904). "This question arose again at the Senate hearings on S.1658 last April (1964) when Senator Kuchel of California asked if the excess land laws apply under the Boulder Canyon Project Act. The Senator stated that the question was, in his view, an important one." 71 Interior Dec. 499 (1964).

41. 71 Interior Dec. 556-58 (1964).

> failed for over 30 years to enforce the excess land laws acreage limitations in Imperial Valley cannot legitimize a violation of public policy contrary to the spirit and the letter of the law.[42]

Secretary Udall accepted the Barry opinion. The statute, now validated for at least the time being, gave the Secretary of Interior the responsibility and power to deny water to those owners of excess lands failing to execute recordable contracts complying with the law.[43] Had he chosen to cease delivery of water to lands not in compliance, the courts were open to owners of excess lands in order to contest the denial immediately. However, the administrative arm of government followed another and slower procedure. The Interior Department attempted for several years to negotiate a contract with Imperial Irrigation District incorporating acreage limitation.

Failing these efforts, it brought suit to enforce compliance, meanwhile continuing delivery of water to excess lands. Years elapsed after the Barry opinion before the suit finally came up for trial in 1970; it was decided in its fourth year of litigation on January 5, 1971.[44]

JUDICIAL REVIEW: I

> If no action were taken at all . . . to [exempt] Central Valley [from acreage limitation law], I imagine that the course would be exactly as it has been on the Salt River project and in Imperial Valley: that the law would remain on the books, the prohibition of delivery of water to holdings in excess of 160 acres, and that somehow the lands under cultivation would continue to be cultivated . . . the law would simply have to be ignored, as it has been ignored on these other supplemental water projects. (Northcutt Ely, 1944)[45]

In its 1970 argument before federal district Judge Howard B. Turrentine in United States v. Imperial Irrigation District[46] the Justice Department characterized the 1933 Wilbur ruling that the acreage limitation did not apply to Imperial Valley as politically motivated:

42. M-36675, Dec. 31, 1964. 71 Interior Dec. 496, 518 (1964).

43. Barely two years prior to enactment of the Boulder Canyon Project Act, Congress had restated acreage limitation law in these words: ". . . no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior . . . ." Reclamation and Irrigation of Lands by the Federal Government, 43 U.S.C. 423(e)(1971).

44. United States v. Imperial Irrigation District 322 F. Supp 11 (S.D. Cal. 1971), came before Judge Howard B. Turentine, nominated to the federal bench in San Diego by President Richard Nixon on Feb. 19, 1970. *Cf. supra* note 34.

45. Testimony given as attorney for the State of California Water Project Authority at the *Hearings on H.R. 3961, 632 Before Senate Commerce Subcommittee, 78 Cong., 2d Sess., (1944).* 322 F. Supp. 11 (S.D. Cal. 1971).

46. 322 F.Supp. 11 (S.D. Cal. 1971).

> Thus, the Wilbur letter must be considered for what it was: A partisan effort by a lame duck administration to effect, by administrative interpretation, an exemption that proponents of the [Boulder Canyon] Project Act never dared risk seeking directly.[47]

Judge Turrentine chose to define the issue otherwise. His goal, he said, was to determine "whether Congress intended in the Project Act to apply acreage limitation to privately owned lands in the Imperial Valley."[48] In deciding in favor of the Wilbur ruling that the acreage limitation was inapplicable, he at first rejected the argument that the decision should rest upon the reasonableness of an administrative practice of long-standing, a ruling deferred to by Secretary Krug in 1948,[49] and by Solicitor Bennet in 1958.[50] Nevertheless, returning later to the same question, Judge Turrentine noted that the Wilbur "interpretation was followed during the incumbencies of six successor Secretaries and four Presidential administrations" despite "doubts [that] never crystallized into an official repudiation."[51]

Enactment of a law does not assure its enforcement. Congress, having opted for acreage limitation in order "to prevent monopoly and to diffuse ownership,"[52] was vetoed by administrators of both

47. U.S. Plaintiff's reply brief to landowners' brief no. 1, and landowners' brief no. 2, 124, United States v. Imperial Irrigation District, 322 F Supp. 11 (S.D. Cal. 1971). "As former counsel for Imperial Irrigation District, Congressman Swing had devoted a major protion of his professional life toward obtaining federal assistance for Imperial Valley interests. . . . As congressional sponsor of the Boulder Canyon Project Act bills, he desires to protect large landowners in his district from a settled policy of federal reclamation law (in enacting section 46 of the 1926 Omnibus Adjustment Act only two months later, the same Congress reaffirmed its policy of restricting the distribution of federal benefits from reclamation projects), yet he is astute enough to realize that a specific congressional exemption from acreage limitations would not be enacted; hence, he inserted measures that incorporate generally the reclamation law but leaves certain specific policies of that law unstated, the calculated risk being that an exemption stands a better chance of being effected through administrative or a judicial construction than it does through congressional enactment. . . . This is the classic case of an attempt to obtain 'by ingenious interpretation and insinuation, that which cannot be obtained by plain and expressed terms.' Dubuque & Pac. R.R. v. Litchfield, 64 U.S. 66, 88-90 (1860)." United States Plaintiff's Reply Brief, 4, 5, United States v. Imperial Irrigation District, 322 F. Supp. Reply Brief, 4 , 5, United States v. Imperial Irrigation District, 322 F. Supp 11 (S.D. Cal. 1971).

48. United States v. Imperial Irrigation District 322 F. Supp. 11 (S.D. Cal. 1971).

49. *See* text at notes 28, 34, 42.

50. *See* text at note 37.

51. United States v. Imperial Irrigation District, 322 F. Supp. 11 (S.D. Cal. 1971). The decision finds support in United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1914) from which it quotes as follows, that "government is a practical affair, intended for practical men . . . officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself even when the validity of the practice is the subject of investigation."

52. USDI-BR Landownership survey on federal reclamation projects, 66 ff. (1946).

parties. When the issue came before Judge Turrentine, he sided with the administrators, citing as his support the administrative decisions, rather than the legislative enactment.

Describing his task as one of statutory interpretation, Judge Turrentine took note of language in the Boulder Canyon Project Act[53] that made it "a supplement to the reclamation law,""reclamation law" being described as the original 1902 Act and acts "amendatory thereof and supplemental thereto." "Reclamation law," it said, "shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."[54] Judge Turrentine emphasized the final excepting clause.

The Project Act spelled out numerous details of constructing, contracting, and repayment applicable to Boulder Canyon Project. It made no express mention of acreage limitation which, by contrast, is applicable generally to all reclamation projects. Judge Turrentine, however, recognized no distinction between a manifest necessity to recite in each project act those provisions applicable uniquely to it, on the one hand, and an absence of necessity to repeat in each project act those provisions applicable to all projects generally, on the other. On the contrary, he argued that because a provision of general application such as acreage limitation was so "important," it was as necessary to recite it in each project statute as to recite those provisions that were of unique application. He said:

> . . . the only item in sec. 46 [of the Omnibus Adjustment Act of 1926] not expressly provided for in the Project Act is the acreage limitation, an issue of social policy and not mere technical details of contracting. It is unlikely that Congress would relegate an issue as important as acreage limitation for private lands to indirect inclusion.[55]

Thus the decision rests on the faulty argument that since no acreage limitation was written into the statute, an acreage limitation would not apply. A more reasoned approach would be to note the distinction between provisions of reclamation law uniquely applicable and those generally applicable, then the logical search would have been for a *specific exemption,* which is absent from the statute.[56]

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53. Reclamation and Irrigation of Lands by Federal Government, 43 U.S.C. 431 (1971).

54. United States v. Imperial Irrigation District, 322 F. Supp. 11 (S.D. Cal. 1971).

55. *Id.* at 17-18.

56. The Turrentine decision recited other arguments in justification of its conclusion, *e.g.*: the Justice Department's contention that because the Project Act "created a federal subsidy . . . the Act must be strictly construed against" those receiving subsidized water as invalid, because "the Act set in motion a great project conferring many and important benefits on all parties involved, including the United States;" Congress "for more than 30 years was fully aware" of the Wilbur ruling, which was called to its attention at appropriation and other

JUDICIAL REVIEW: II

> In short, this timely movement, looking to the reclamation of Arid America, thus giving "land to the landless," ranks in real importance with the foremost public measures of the times . . . . (Harrison Gray Otis, Ninth National Irrigation Congress, Chicago, 1900.)[57]

A second decision by Judge Turrentine soon followed. Dr. Ben Yellen and several score landless persons in Imperial Valley, participating in *Imperial Irrigation District* Case originally as *amicus curiae,* sought change of status. Their purpose was to be able to appeal the decision, should the government decide against doing so. On March 29, 1971, with the government's decision yet unannounced, Judge Turrentine denied Yellen *et al.* the right to intervene.

The court held that the"interest" of the Valley residents was"extremely speculative and remote," and "no greater than that possessed by the general public." Furthermore, the probable course of litigation, and of administration of sale of excess lands, should his previous decision be reversed, would be lengthy. Also, the "applicants have shown no present ability to purchase and no prior offers within the past twenty years to purchase farm land in the Imperial Valley at market value." Besides, exercise of the "usual right of a seller to choose his purchaser" might exclude the particular applicants for intervention. The court added "there would quite likely be a veterans' preference for entry which would put a large class ahead of the present applicants." Finally, the court noted that it "has observed the vigorous representation by counsel for United States in urging that acreage limitation applies . . . and finds that the interest of applicants, if any, has heretofore and is now being adequately represented. . . ."[58]

A few days later the Justice Department, supported by Solicitor of the Interior Mitchell Melich, abandoned its representation of the

hearings, yet it took no action; a Congressional practice of express exemption, project by project, is not controlling because it did not "come into vogue until 1938," a decade after passage of the Boulder Canyon Project Act; Senator Johnson in 1928 (although assuring the Senate that two bills before it held "like purposes and like designs") substituted ("to preserve orderly legislative procedure") the one "without an express acreage limitation provision" for the other containing one, yet no one pointed to or objected to "this significant difference"; the Bureau of Reclamation "never flagged in its support of the Wilbur ruling"; Imperial Valley lands held "perfected rights" to receive water under the Colorado River Compact which acreage limitation would invade. (In adopting 43 U.S.C. 528 (1911) Congress found "perfected rights" no impediment to limitation of the acreage on which an individual landowner might have the right to receive water.) United States v. Imperial Irrigation District, 322 F. Supp. 11 (S.D. Cal. 1971).

57. Proceedings of the Ninth National Irrigation Congress at Chicago, at 240 (1900).

58. United States v. Imperial Irrigation District, Civil No. 67-7-T (S.D. Cal., filed Mar. 29, 1971).

interests of persons seeking access to land by announcing it would not appeal the loss of the government's case.

> CONGRESS
>
> Senator John H. Overton, of Louisiana: You say the act . . . [authorizing Central Valley Project in 1937] made no reference to the reclamation law?
>
> Northcutt Ely: Not the excess-land provision. It provided that the project should be contructed in accordance with the reclamation law . . .
>
> Senator Overton: Well, the reclamation law contained the excess land, does it not?
>
> Mr. Ely: Yes. . . .
>
> Senator Overton: So that if it was subject to the reclamation, it would be subject to the excess land.
>
> Mr. Ely: Well, I think the correct legal opinion is exactly what you have expressed. (Congressional hearing, 1944.)[59]
>
> While the inapplicability of the acreage law to Imperial Valley was repeatedly cited to Congress, the validity of that position went unchallenged. *(United States v. Imperial Irrigation District,* 1971.)[60]

In 1971, while the Justice and Interior Departments were pondering the loss of the government's case, one interested member of Congress addressed letters to each department urging that they appeal the Turrentine decision. Senator Clinton P. Anderson, chairman of the Senate subcommittee on water and power resources, was pressing further a question he had raised in 1958 and in 1961. His earlier inquiries had contributed to the government's decision to attempt to enforce the law in the suit which met defeat in the decision of 1971.[61]

Each branch of government was being drawn more tightly into the vortex of the excess land issue. The legislative branch had written the laws establishing policy beginning in 1902. The administrative branch had said in 1933 that Congress failed to apply this policy to Imperial Valley, in 1945 that it had applied it to Coachella Valley served by the same project works, and in 1964 that Congress had intended to apply it to Imperial Valley as well. The judicial branch, which had not spoken until 1971, sided with the original administrative interpretation of 1933, and against those of 1945 and 1964.

59. *Senate Commerce Subcommittee Hearings on H.R. 3961, supra* note 45, at 624-25.
60. 322 F. Supp. at 27.
61. *See* text at notes 38 & 40.

It was becoming evident that reclamation policy was at stake, not only in Imperial Valley but elsewhere as well. First to point this out was Chief Counsel Reginald L. Knox, of Imperial Irrigation District. Hardly had Solicitor Barry issued his 1964 opinion that the law applies to the Valley, than the Imperial Irrigation District News reported:

> If the opinion of Solicitor Frank Barry is correct, it also applies to all areas receiving water from the Colorado River, including land in the Metropolitan Water District which supplies water to some extremely large holdings on the coast. According to Knox, there has never been any reference to that area, but if the opinion is correct, it would necessarily apply there also.[62]

Senator Anderson went beyond Knox's inclusion of large southern California landholdings in assessing the potential impact of the Turrentine decision. The Senator pointed out that the decision undermined policy on reclamation projects generally throughout the West. He wrote the Attorney General:

> . . . nearly all Federal reclamation projects for many years have been authorized by statutes employing language similar to that used in the Boulder Canyon Project Act which the District Court held did not incorporate the excess-land limitations by reference. . . . It has never been questioned that the language in these authorizing acts which is substantially identical to section 14 of the Boulder Canyon Project Act makes the excess-land limitations of the Federal reclamation laws applicable. The District Court's opinion now, for the first time, raises a substantial question regarding whether the Department of the Interior, the Congress and the water user groups seeking project authorizations have been in error in assuming that authorizing a project subject to the Federal reclamation laws made excess-land limitations applicable.[63]

Among the projects to which the Turrentine decision on excess land law would apply, Senator Anderson named the Central Arizona Project and upper basin projects authorized in the Colorado River Basin Act, and the Central Valley Project in California. Furthermore, he said to Solicitor of Interior Melich:

> A second area of uncertainty introduced by the opinion deals with the relationship between excess-land limitations and pre-project use of water. These uncertainties are westwide in their implications. . . . Certainly, any suggestion that supplemental

62. 26 Imperial Irrigation District News 1 (Feb., 1965).

63. Letter from Senator Clinton P. Anderson to Attorney General John N. Mitchell, Mar. 26, 1971.

> water projects should be exempt from the excess land laws by Congress would engender great controversy. When such an attempt was made back in the middle '40's, involving principally the Central Valley Project, it was rejected by the Congress but the turmoil that ensued plagued the reclamation program for many years. A lower court holding that can be read as possibly having such an effect similarly can be expected to give rise to extensive controversy in connection with future authorizations which could have a substantial adverse impact upon the reclamation program. . . . As for the merits of the legal question, there is substantial doubt concerning the legal validity of the Court's holding as demonstrated by the fact that the Solicitor General of the United States in the Eisenhower Administration felt it necessary to state to the Supreme Court's Special Master hearing Arizona v. California that, in his opinion, excess-land limitations are fully applicable.[64]

The Justice Department, through the Assistant Attorney General, Land and Natural Resources Division, responded. Rejecting Senator Anderson's appeals to protect public policy from frustration by either the judicial or administrative branches of government, he placed responsibility for such a result upon the legislative branch itself. Specifically he charged Congress with failure to face the issue of policy squarely and to draft legislation clearly. He said:

> If the enforced subdivision and sale of privately owned lands in excess of a limited acreage which will receive the benefits of a federal reclamation project continues to be a viable and fundamental policy of the reclamation program, there is crying need for congressional action today so declaring and to preclude frustration of the policy by administrative or judicial interpretation of statutes the age of which leave them open to attack as allegedly archaic and not reflective of modern realities . . . the Statutes at Large are replete with case after case in which the Congress itself has omitted to address the problem. Indeed, in some instances where the problem has actually come up for debate, it has been left without resolution by the pending legislation, with both the proponents and the opponents of acreage limitation being content to avoid a showdown in the apparent hope that their remarks in the legislative history would lead to an administrative or judicial resolution in accord with their respective views.[65]

64. Anderson to Mitchell Melich, Mar. 26, 1971.

65. He added that "there is . . . need for modern legislation clarifying whether it continues to be congressional policy that the break up of pre-existing excess holdings of privately owned lands is a condition to their receipt of project benefits. There is also need for further legislation so that no funds will be appropriated for, and constjuction will not be begun on, any project to which Congress intends acreage limitation to apply without there first being executed the

Thus spokesmen for the judicial, the administrative and the legislative branches of government each sought to lay responsibility for the death of public policy upon the others. The judicial branch charged the legislative with defective bill drafting and an obligation, unfulfilled, to monitor enforcement by the administrative branch. The administrative branch laid blame on the legislative branch for having opened the door to frustration of policy by administrative and judicial interpretation. And a member of the Congress appealed vainly to the administration not to abandon its support of public policy as written, but to press on through the judicial hierarchy for a favorable decision.

The Justice Department, as noted above and after failure of landless applicants for intervention to gain a right to appeal in their own behalf, decided against appeal by the government. Solicitor General Erwin N. Griswold explained: "The decision does not in any way affect the Government's position with respect to reclamation projects in other areas where different facts are involved."[66] He made no reference to Imperial Irrigation District Chief Counsel Knox's early warning that the decision would involve some extremely large holdings on the coast of southern California,[67] or to Senator Anderson's charge that the Turrentine decision already endangered public policy on Colorado Basin and Central Valley projects and jeopardized authorization of future reclamation projects.[68]

PUBLIC RELATIONS

> My feeling on this case is to get it tried and on its way to the Supreme Court.
> --Judge Howard B. Turrentine, San Diego Union, September 26, 1970.

> The decision favoring IID is expected to be appealed, perhaps as far as the U.S. Supreme Court. Both sides made statements in December they would appeal if they lost.
> --Brawley (California) News, January 6, 1971.

> . . . lifting of the 160-acre limitation is going to send land costs

contracts essential to the execution of this policy." Assistant Attorney General Shiro Kashiwa to Senator Clinton P. Anderson, Apr. 16, 1971. Reclamation and Irrigation of Lands by Federal Government 43 U.S.C. 418 (1971) states "That before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question . . . ."

66. United States Dep't. of Justice Release, Apr. 9, 1971. The Justice Department was faced by an opposite decision, whether or not to appeal, at the end of 1972. *See* note 106, *infra.*

67. 26 Imperial Irrigation District News 1 (Feb. 1965). Congressman Victor V. Veysey, Congressman representing Imperial Valley, and Senator John Tunney, formerly Congressman representing Imperial Valley, supported denial of appeal. Sacramento Bee, Feb. 25, 1971.

68. *See* note 58, *supra.*

> soaring—after years of comparatively low values while the ranchers sweated out their case.
> --Los Angeles Times, February 22, 1971.
>
> The Nixon administration has an agricultural time bomb in its pocket. Very soon, it will have to decide who to drop it on. . . .
> --Sacramento Bee, February 22, 1971.

The decision to abandon the government's case for applying acreage limitation to Imperial Valley met sharply opposed views. Carl Bevins, board chairman of Imperial Irrigation District, said promptly that the ruling "is very gratifying. . . . It was almost my feeling IID and Valley farmers had a just case inasmuch that, before the Department of Justice's action in 1964, our position was upheld by five Interior Secretaries."[69]

Once the decision against appeal was announced, criticism appeared from the other side. The New Republic carried an article on May 8 entitled "Water, Water for the Wealthy."[70] On May 28, Mrs. Stephen L. Stover, a protesting Kansas woman, brought the article to the attention of Solicitor General Griswold. He responded with an elaborate exposition in justification of his decision against appeal.

First, he characterized the New Republic article as a "one sided presentation" from which one "would not know . . . that . . . irrigation of the Imperial Valley was started about 1900 and was virtually completed by 1920, without any participation by the federal government." The development of "large land holdings" on the "expensive project" was "natural." Furthermore, while public construction of the All-American Canal "was undoubtedly an advantage for the Valley," it "did not result in the reclamation of a single acre of desert land."[71]

Application of acreage limitation law, however, is not dependent upon reclamation of land, but upon receiving water. The language of the statute is : "no such excess lands so held shall receive water . . . if the owners thereof shall refuse to execute valid"

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69. Brawley News, Jan. 6, 1971. Similarly, the California Feature Service published by Whittaker & Baxter on Apr. 26, 1971, issued a draft editorial stating:

> "In 1964 . . . someone in government for some incredible reason decided the Wilbur ruling was wrong and instigated a suit to impose the limitation, a move that would have wrecked the prosperity of the valley. It was that suit the judge rejected. Wisely, if belatedly, the government decided not to appeal. It would have been a tragic caricature of democratic government had the belated and unsupportable federal suit succeeded."

70. Water, Water for the Wealthy, The New Republic (1971).

71. Solicitor General Erwin N. Griswold to Mrs. Stephen L. Stover, June 1, 1971. 117 Cong. Rec. S21299, (daily ed. Dec. 10, 1971). Apparently the Congressional allocation of $1 million in 1910 to protect lower Colorado basin areas from flooding, and Imperial Valley from the hazard of complete inundation was either overlooked or regarded as irrelevant. *See* text at note 17.

contracts agreeing to disposal of the excess "on the basis of its actual bona fide value . . . without reference to the proposed construction of the irrigation works. . . ."[72]

The Solicitor General further advised Mrs. Stover that no question was seriously raised about it until about 30 years after Secretary Wilbur's decision.

Against this statement must be set, *inter alia,* Solicitor of Interior Harper's decision in 1945, Solicitor General Rankin's opinion in 1957, and Senator Anderson's memorandum of 1958 and inquiry of 1961 addressed to the Secretary of the Interior.[73]

Summarizing his justification, Solicitor General Griswold stated:

> I considered the matter carefully and thoroughly, and over a considerable period of time. As a result of my consideration, I became convinced that (a) we would not win the case in the court of appeals, and (b) we should not win it.

This statement contrasts sharply with much evidence that was available at the time. Perhaps most notable of all, it contrasts with statements by Executive Assistant Northcutt Ely, who facilitated effectuation of the Wilbur ruling of 1933. As noted before, Attorney Ely in 1930 recorded as his view (a) that he could "see nothing to do but enforce [acreage limitation in Imperial Valley]. . . unless the Imperial Irrigation District can get new legislation," and (b) that enforcement "would undoubtedly have a salutary effect on suspected speculative activities in that locality."[74]

JUDICIAL REVIEW: III

> Let's ask ourselves "what is the environment?" In short, it is everything—everything that was here before man—plus all the changes man has wrought, both directly and indirectly. In addition, and not to be overlooked, it must include man himself. (Secretary of the Interior Rogers C. B. Morton, 1971)[75]

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72. Reclamation and Irrigation of Lands by Federal Government 43 U.S.C. §423(e) (1971). "Occasionally one recalls the warnings he received in law school, among them the danger in paraphrasing statutory language. . . . I recall no general provision in the law that limits the excess land law to lands 'reclaimed through a federal project. . . .' Of course a great many reclamation projects involve the supply of supplementary water to land already in cultivation. To the best of my knowledge it has never been thought that this fact exempted the project from the provision of the excess land law." Joseph L. Sax, Professor of Law, University of Michigan, to Solictor General Griswold, September 1, 1971. 117 Cong. Rec. S21299 (daily ed. Dec. 10, 1971).

73. *See* text at notes 31, 36, 38, 40.

74. 71 Interior Dec. 496, 528 (1964).

75. Remarks before Great Issues Forum, University of Southern California, United States Dep't of Interior Release, Apr. 22, 1971.

The 1902 Reclamation Act establishes in the same sentence two requirements that a landowner must meet to be entitled to receive water from a reclamation project. The first is acreage limitation. The second is residency, *i.e.*, he must "be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land."[76]

On April 9, 1971 Solictor General Griswold announced his decision not to appeal the Turrentine ruling. Griswold, after studying the problem "carefully and thoroughly, and over a considerable period of time," based the decision not to appeal on his professed belief that the appeal could not be won.[77]

On November 23, 1971, barely six months later, another judge, sitting in the same Federal District Court as Judge Turrentine, and likewise interpreting reclamation law, held that the residency requirement applied to Imperial Valley and to other lands receiving water under the Boulder Canyon Project Act.[78]

This second suit, *Yellen v. Hickel,* was before Visiting Judge William D. Murray, of Montana. Plaintiffs were the same landless Imperial Valley residents to whom Judge Turrentine previously had denied right to intervene. The government, as defendent charged with failure to enforce the law, argued unsuccessfully that they should be denied standing in court again.[79] The court granted plaintiffs summary judgment.

Many conclusions reached in the two decisions were directly opposed. On the central issue—the applicability of national reclamation policy to Imperial Valley—the first held that the Boulder Canyon Project Act did not apply acreage limitation; the second held that the same act applied residency.

Reclamation law provides both national policy and the details of financial repayment; the latter often vary from project to project. Both are important, but they are not identical in nature. Policy is distinguished largely by its general and enduring application. Financial arrangements are of more particular and immediate application. Judge Murray observed that the Omnibus Adjustment Act of 1926,[80] for example, had as a main purpose "to provide relief to settlers then residing on the land. There is no indication the Act was intended to change the policy of the reclamation law."[81] Similarly, the Boulder Canyon Project Act freed Imperial and Coachella Valley

76. 43 U.S.C. 431 (1971).
77. Griswold to Stover, *supra,* note 70.
78. Yellen v. Hickel, 335 F. Supp. 200 S.D. Cal. (1971).
79. *Id.* at 203.
80. Act of May 25, 1926, ch. 383, 44 Stat. 636.
81. Yellen v. Hickel, 335 F. Supp. (S.D. Cal. 1971).

lands of obligation to pay for water delivered through the All-American Canal.[82]

Quoting water law authority Joseph L. Sax, Judge Murray pointed to the fundamental distinction between policy and finance: "It is important to note . . . that reclamation laws are 'designed to promote federal policies of permanent importance and not merely to secure an investment interest.' "[83]

The Murray opinion counters one line of argument after another employed in the Turrentine decision. The Department of the Interior, Murray held,

> . . . cannot repeal an Act of Congress. . . . The fact that residency has not been required by the Department of Interior for over 55 years cannot influence the outcome of this decision. Failing to apply the residency requirement is contrary to any reasonable interpretation of the reclamation law as a whole, and is destructive of the clear purpose and intent of national reclamation policy. It is well settled that administrative practice cannot thwart the plain purpose of a valid law.[84]

Judge Turrentine attached weight to "Congressional knowledge and approval of the Wilbur interpretation" that removed acreage limitation from Imperial Valley, observing that:

> At no time from 1933 to the present has Congress taken any action in derogation of the propriety of the Wilbur interpretation or of the long standing administrative practice which followed it . . . Congress would hardly have ignored the Department's failure to enforce an important provision of reclamation law.[85]

Judge Murray, on the contrary, refused to lay responsibility to monitor enforcement on Congress. He said:

> It has been held that an administrative interpretation of a statute was binding on the court where it has been impliedly upheld by re-enactment of the statute. . . . However, Congressional re-enactment of a statute, without expressed consideration or reference cannot give controlling weight to an originally erroneous administrative interpretation of the statute.[86]

Further, he found the initial 1902 policy enactment by Congress to be in full force and effect, not superseded by any subsequent enactment:

> Statutory construction of Section 5 [1902] and Section 46 [1926] reveals no repugnancy whatever. Section 5 requires that there is

82. Boulder Canyon Project Act, 43 U.S.C. §617 (1971).
83. Yellen v. Hickel, 335 F. Supp. 200, 205 (S.D. Cal. 1971).
84. *Id.* at 207, 208.
85. United States v. Imperial Irrigation District, 322 F. Supp. 11, 26-27 (S.D. Cal. 1971).
86. Yellen v. Hickel, 335 F. Supp. 200, 207 (S.D. Cal. 1971).

> no right to use water on tracts of any one owner of over 160 acres and no water shall be sold to anyone not occupying the land or residing in the neighborhood. Section 46 establishes a system whereby the Secretary no longer sells to individuals, but to irrigation districts instead, and provides for a situation not contemplated in the original Act where water would be supplied through the irrigation district to private landowners of more than 160 acres in addition to settlers on public lands opened up for entry under the original reclamation law. There is no inconsistency in applying the requirements of Section 5 at the same time with those of Section 46. . . . A literal reading of both statutes then reveals no implied intent on the part of Congress that the earlier statute would be repealed by Section 46. . . . The plain language of the Omnibus Adjustment Act of 1926 does not repeal Section 5 of the 1902 Act, nor is any legislative intent to do so exhibited in the Act's background.[87]

Conspicuous aspects of the history of reclamation in Imperial Valley are the absence between 1902 and 1971 of a challenge in the courts by the landless themselves, and of relaxed administration of a law designed to provide settlers with ready access to land. As if to answer Judge Turrentine's denial of intervener status to landless Imperial Valley residents, Judge Murray pointed out that the greater the difficulty of citizens in obtaining standing, the greater would be the latitude given bureaucratic officials to defeat legislative policy:

> National policy, as expressed in the reclamation laws, is to provide homes for people. Homes are possible only where speculation and monopolization are not possible. The 160 acre limitation and the national policy which it reflects have been upheld by the Supreme Court. . . . The residency requirement in Section 5 . . . is a second expression of that national policy. Its repeal by implication would be contrary to the purpose for which Section 5 was enacted. . . . Failure to enforce residency subverts the excess land limitation. . . . Through the use of corporations, trusts and cotenancies flagrant violations of the purpose of this limitation are possible. Each of these farms may be used to by-pass the acreage limitation. The policy behind reclamation law to aid and encourage owner operated farms requires enforcement of the residency requirement to prevent these violations. See Sax, The Federal Reclamation Law in 11 Waters to Water Rights . . . 217-224. . . . Rather than indicate the validity of the administrative ruling [against residency], the lapse of time serves to dramatize the unavailability of relief in the past and points toward the need for increased access to the court in the future.[88]

87. *Id.* at 203, 204. *Cf.* Kashiwa to Anderson, *supra*, text at note 64.
88. Yellen v. Hickel, 335 F. Supp. 200, 208 (S.D. Cal. 1971).

Both Turrentine and Murray emphasized the importance of national reclamation policy. From this common ground their conclusions diverge. Judge Turrentine argued that, considering the importance of national policy of acreage limitation, its express inclusion in the Boulder Canyon Project Act was to be expected and its absence in express language was evidence that Congress had intended not to apply it to the project. Judge Murray argued the opposite; absence of its express repeal was evidence of Congressional intent to include it by reference. It sufficed that "The Boulder Canyon Project Act . . . provides that the Act shall be deemed a supplement to reclamation law which shall govern the construction, operation and management of the works authorized."[89]

JUDICIAL REVIEW: IV

. . . [i]t is conceded by all thinking men that the comfort and contentment of our laboring classes depend upon keeping open opportunities for all who want them to get homes on the land. As Carlyle said:

> Ye may boast o' yer dimocracy, or any ither 'cracy, or any kind o' poleetical rubbish; but the reason why your laboring folks are so happy is that ye have a vast deal 'o land for a verra few people. —Congressman William A. Reeder, of Kansas, speaking on the Reclamation bill, 1902[90]

The landowners of Imperial Valley, believing that their interests were not sufficiently protected by the government, requested and were granted permission to intervene on their own behalf. A full trial on the merits was then held. (Judge William D. Murray, 1972)[91]

The 1902 Congress prescribed the acreage limitation and the residency requirement in the same sentence, but these two related issues were raised separately in the two district court decisions discussed above. As the Imperial Valley litigation proceeded, these issues came closer together, the lines between those affected by the litigation became more distinct, and the interested parties began increasingly to question the role that the executive branch of government was playing. First the landless had sought to intervene in court to protect their own interests in acreage limitation fearing, justifiably, that the government would fail their cause by declining to appeal the Turrentine decision. Now in the Murray court it was nonresident landowners who were unwilling to leave protection of

89. *Id.*
90. 35 Cong. Rec. 6739 (1902).
91. Yellen v. Hickel, 352 F. Supp. 1300 (S.D. Calif. 1972).

their interests solely in government hands even though the government remained a party to the case and technically on their side.

In the full trial on the merits that followed his original partial summary judgement, Judge Murray gave careful attention to five specific contentions of the intervening landowners:

> The issues being reconsidered are: (1) the issues of standing and res judicata, (2) the scope of Section 5 of the 1902 Reclamation Act (the residency requirement), (3) the effect of the Boulder Canyon Project Act . . . on the Imperial Valley, (4) the rule of Udall v. Tallman, 380 U.S. 1 (1965) which requires deference to longstanding administrative constructions, and (5) the equal protection argument.[92]

A. *The Issues of Standing and Res Judicata.*

Nonresident Imperial Valley landowners sought standing to intervene before Judge Murray. They sought also to have standing denied to the landless plaintiffs, on the ground that only landowners were directly affected. The court, however, granted standing to both:

> Obviously the landowners, the beneficiaries of the present state of affairs, are not going to press for enforcement of Section 5. If the plaintiffs are not granted standing to bring this suit, the Department of the Interior will in effect be given a license to disregard the law, as well as an immunity from challenge by the intended beneficiaries of the legislation in question.[93]

As for res judicata, the court held that a 1933 California state court decision against applying Section 5 of the 1902 Reclamation law to Imperial Valley[94] was not binding upon federal courts. It held further that the state court's ruling already had been overthrown by the United States Supreme Court.[95] The latter, Judge Murray said, had decided that language authorizing the Central Valley project—language similar to that used in authorizing the earlier Boulder Canyon project—incorporated the acreage and residency provisions of Section 5 of the 1902 Reclamation law. "The precise question of whether the term 'construction, operation and maintenance' includes the delivery provisions of Section 5 has been decided by the United

92. *Id.*

93. *Id.*, at 1-3. "The present value of farm land in Imperial Valley ranges from $600 to $1200 per acre. When the Secretary of the Interior becomes obligated to prohibit the District from delivering irrigation water to lands owned by non-residents, there will be an immediate and substantial decline in the market value of farm land."

94. Hewes v. All persons, No. 15460 Dep't 2, (Super. Ct. Cal. County of Imperial, May 24, 1933).

95. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958).

States Supreme Court in Ivanhoe Irrigation District v. McCracken. . . ."[96]

B. The Scope of the Residency Requirement of Section 5 of the 1902 Reclamation Act.

Section 5 of the 1902 Reclamation law refers to the *sale* of water to landowners, who are required to be residents. The landowners contended there was no *sale* of water in Imperial Valley, only delivery, and that the residency requirement thus did not apply to them. They argued further that since Congress had reenacted the acreage limitation specifically, while failing to mention the residency requirement, Section 5 had been superseded.

The court rejected both contentions. Judge Murray noted that in Ivanhoe Irrigation District v. McCracken there was no *sale* of water, but only procedural prescriptions governing water deliveries. "The formation of 'districts,'" he said, "is merely for administrative expediency. It is not meant to thwart the policy of Section 5."[97] The court quoted from *Ivanhoe* the statement that "where a particular project has been exempted (from reclamation law) because of its peculiar circumstances, the Congress has always made such exemptions by express enactment."[98]

Judge Murray then noted the close relationship between acreage limitation and residency as twin instruments for effectuating reclamation policy. First he quoted the Supreme Court's description of Congressional policy as "requiring that the benefits . . . be made available to the largest number of people, consistent, of course, with the public good," and to be "accomplished by limiting the quantity of land in a single ownership to which project water might be applied."[99] Immediately he added: "Residency, the companion requirement of the 160 acre limitation, will also further the policy of making the benefits from the act available to the largest number of people."[100]

The nonresident landowners argued that the residency requirement was a mere threshold requirement, disappearing within a few years or upon completion of final payment. Rejecting this contention, the court declared: "To so limit it, would be contrary to the whole tenor of Reclamation Law."[101]

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96. Opinion, 118 Cong. Rec. E9067, E9068.
97. *Id.* at E9068.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

C. The Effect of Boulder Canyon Project Act on Imperial Valley.

The landowners contended specifically that they held perfected water rights, a claim barring enforcement of residency. The court doubted the existence of any such rights in Imperial Valley at the time of the passage of the Boulder Canyon Project Act, and, in any case held the right "irrelevant because it need only be shown that the Imperial Irrigation District is deriving a benefit from the use of a government facility for reclamation law to be applicable."[102]

D. The Rule of Udall v. Tallman,[103] *Requiring Deference to Long-standing Administrative Constructions.*

The landowners contended that the Supreme Court, by its decision in the *Tallman* case, required deference to the 1933 administrative interpretation of Secretary of the Interior Ray Lyman Wilbur, who said acreage limitation was inapplicable to Imperial Valley, an interpretation no Secretary challenged until 1964. Judge Murray rejected the relevance of *Tallman* to the case at bar since "*Tallman* dealt with the construction of an administrative regulation," whereas "Section 5, far from being an administrative regulation, is an expression of national policy."[104]

E. The Equal Protection Argument.

Landowners argued that "a durational residency requirement would penalize their constitutionally protected right to travel." Judge Murrary, however, found that the cases cited in support of their contention "involved laws which discriminate between *old* and *new* residents," and "say nothing about laws which discriminate between *residents* and *non-residents* as Section 5 does," which is "a permissible classification."[105]

Summing up, the court said:

> No conceivable purpose would be served by freeing the landowners from this [residency] requirement after they have acquired the immense benefits of federal subsidy. The law was not intended to provide supplemental income to former residents who have returned to San Diego, Burbank and other locations far removed from the Reclamation project. Accordingly, the residency requirement should not be waived upon final payment of construction costs of the project. Such a practice would reduce

102. Opinion, 118 Cong. Rec. E9069. "If this court had jurisdiction to determine this issue, it would hold that private landowners within the Imperial Valley Irrigation District have no vested and present perfected right to a continued supply of Colorado River water for irrigation purposes precluding application of the residency requirement of Section 5 of the Reclamation Act of 1902." Findings of Fact and Conclusions of Law, 16.

103. 380 U.S. 1 (1965).

104. Opinion, 118 Cong. Rec. E 9069.

105. *Id.*

> the statutory limitations to a mere sham. Section 5 would then be nothing more than a financial test tailored to suit the more affluent who can afford to accelerate their payments, move off the project and reap the benefits of a federal subsidy. The policy of the Reclamation Law will best be advanced by imposing a durational requirement upon recipients of water from federal projects, even after the construction costs have been paid.[106]

In conclusion, Judge Murray reemphasized his reliance upon the language of reclamation law and its interpretation by the United States Supreme Court:

> Over the years the interpretations of Section 5 have been very much in conflict . . . . As a consequence of these conflicts, this court must look at the law itself and interpret it consistently with the Supreme Court's holding in *Arizona v. California* and *Ivanhoe Irrigation District v. McCracken*. . . .[107]

PERSPECTIVE

> . . . the requirement of residence . . . and that relative to the holding of more than one farm unit . . . are specific requirements of law, which the Service is necessarily compelled to enforce. . . . These laws having been frequently discussed . . . during the last ten years and more, they should have been known to all . . . persons purchasing land within the project. . . . Personally I think the law as to residence should be repealed. (First Assistant Secretary of the Interior E. C. Finney to Senator Samuel D. Nicholson, of Colorado, January 20, 1923.)
>
> Property is vigilant, active, sleepless; if ever it seems to slumber, be sure that one eye is open. (William Ewart Gladstone.)[108]

In 1902 the political problem of persuading Congress to open the doors of the national treasury to bring public waters to arid private

106. *Id.*, E 9068.

107. *Id.*, E 9069.

The Justice Department is faced again, as by the Turrentine decision, with making its own decision whether or not to appeal. Commenting on the import of the pending determination by the Justice Department, Congressman Jerome R. Waldie observed:

> "Now if the Justice Department insists on appellate review of the Murray decision, then what it is really saying is that when the administration's policy of interpreting the Reclamation Act in a manner favorable to corporate interests is upheld at any judicial level, then such decisions will be embraced. But when the intent of the law is held to be inimicable to those powerful interests, then the Justice Department will pursue the case to great lengths, seeking a reversal, and rendering the decision meaningless in the interim. . . . I am embarrassed that private parties have had to assume what should be the proper role of the Government in seeking judicial enforcement of the Reclamation Act. I will do whatever I can to bring pressure upon the Justice Department . . . and to bring to the public's attention what I consider to be law enforcement for the privileged few." 118 Cong. Rec. E9257 (daily ed. Nov. 8, 1972).

108. Morley, 3 Life of William Ewart Gladstone 469 (1903).

lands west of the hundredth meridian was solved.[109] The solution was to condition the release of funds, and thus water, upon compliance by its beneficiaries with traditional American land policy favoring actual settlers over speculators and monopolists. The purpose, in words of the Supreme Court fifty-six years later, was to "benefit people, not land," to prevent "use of the federal reclamation service for speculative purposes," and to assure that "this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings."[110]

Linked to concern for equitable distribution of benefits was a desire to promote political stability. Congressman Francis G. Newlands of Nevada, sponsor of the reclamation bill, stressed the stabilizing influence of the public policy written into it:

> Lord Macauley said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. . . . Convey this land to private corporations and doubtless this work would be done, but we would have fastened upon this country all the evils of land monopoly which produced the great French revolution, which caused the revolt against church monopoly in South America, and which in recent times has caused the outbreak of the Filipinos against Spanish authority.[111]

The policy condition established by Congress rested on two requirements: a limitation on water deliveries to 160 acres per individual, and residency by the receiving landowner. Although the

109. Congressman James M. Robinson, of Indiana: "This bill affects us adversely who live outside the arid section." 35 Cong. Rec. 6734 (1902). In 1905 Judge (later Congressman) John E. Raker, of California, told the Thirteenth National Irrigation Congress: "The committee of seventeen that originally planned and arranged the adoption of the National Irrigation Law secured its adoption and presentation to Congress solely and entirely upon the question that the great land monopolies in the United States would be prohibited from getting the benefit of it." Proceedings of the Thirteenth National Irrigation Congress at Portland, Oregon, at 61 (1905).

110. Ivanhoe v. McCracken, 357 U.S. 275, 292 (1958).

111. 35 Cong. Rec. 6734 (1902). As President in 1902 Theodore Roosevelt signed the National Reclamation Law. In 1911 he gave the Commonwealth Club of California his reasons for approving its antimonopoly provisions:

> "I wish to save the very wealthy men of this country and their advocates and upholders from the ruin that they would bring upon themselves if they were permitted to have their way. It is because I am against revolution; it is because I am against the doctrines of the Extremists, of the Socialists; it is because I wish to see this country of ours continued as a genuine democracy; it is because I distrust violence and disbelieve in it; it is because I wish to secure this country against ever seeing a time when the 'have-nots' shall rise against the 'haves'; it is because I wish to secure for our children and our grandchildren and for their children's children the same freedom of opportunity, the same peace and order and justice that we have had in the past." 7 Transactions of the Commonwealth Club 108 (1912-13).

Supreme Court in 1958 had only the first of these requirements formally before it, the court's opinion referred approvingly to Section 5 of the 1902 Act which prescribed both "as re-enacted in the Omnibus Adjustment Act of 1926."[112]

Imperial Valley is but one among many localities served by federal reclamation where the condition attached by Congress to supplying public funds and water goes unobserved.[113] It is one of only three projects where the issue is currently under litigation.[114] So far, two opposed administrative rulings on the application of the law to Imperial Valley are matched by two opposed federal district court rulings. The outcome is pending on appeal.

This near-paralysis of public policy raises questions that go to the heart of the functioning of processes upon which democratic government depends. Does it suffice, as one court has suggested, to rest on the view that "law enforcement may better be left to the public officials. Any dereliction in duty by those officials is always subject to review by their superiors and to correction by impeachment, removal or by a refusal to re-elect"?[115] Are the "superiors" free of outside pressures or thoroughly resistant to them? "Washington is the political cynosure of the nation, and federal officials are . . . susceptible to the pressures of public exposure."[116] From which side do the strongest pressures come—from those favoring, or from those opposing observance and enforcement of law, and how much do pressures depend upon what law is in question?

John Gaus has suggested that public administration, its competence improved by a "good budget staff and a good personnel office," can "do more to preserve the liberties of the people than a good court, because they will be in operation long before a potential wrong is done." The question remains, however: Are pressures to undermine public policy from above and/or from the outside at times irresistible even by competent administrative staffs? Gaus himself answered the

112. Ivanhoe v. McCracken, 357 U.S. 275, 297 (1958).

113. For example: (1) Sacramento River diverters. *See* Taylor, *Testimony before House Subcommittee on Conservation and Natural Resources,* 91st Cong., 1st sess., 229-237 (1969); (2) San Luis unit, CVP. *See* Taylor, *Excess Land Law: Calculated Circumvention,* 52 Calif. L. Rev. 978 (1964); Taylor, Testimony Before Senate Committee on Interior and Insular Affairs, July 29, 1966; (3) Central Arizona Project. Congressman Donald L. Jackson, of California, quoting a Los Angeles Mirror editorial of July 9, 1949: "Some 55 percent of these 260,000 acres are owned by only 420 men. So what their scheme amounts to is simply subsidizing 420 wealthy landowners." 95 Cong. Rec. A4668 (1949).

114. U.S. v. Tulare Lake Canal Co. Civil No. 2483-ND (E.D. Cal. 1972) (Tulare Lake Basin); Bowker *et al.* v. Morton, Civil No. C-70 1274 (O.J.C. 1972) (California State Water Project).

115. State v. Miller, 164 Ohio St. 163, 128 N.E.2d 47, 51-52 (1955).

116. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). *See* Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 Harv. L. Rev. 1265, 1313 (1961).

question by hastening to add that staffs and courts are "not alternatives."[117]

Congress created the office of Comptroller General of the United States to oversee acts of administrators executing its laws. This official is charged with reporting to Congress "every expenditure or contract made by any department or establishment in any year in violation of law." But creation of machinery to oversee law enforcement does not assure its use for the purpose intended.[118]

In each of the three branches of government the availability of proper procedures is of greatest importance. But availability does not alone assure equitable protection of diverse interests and preservation of public policy. Speaking of the judicial branch, Louis Jaffe has observed that, "Reliance on judicial control means reliance on rather unusual spurts of energy and expenditures of time and money by individual citizens or taxpayers."[119] Besides a sense of injury,

117. Gaus, Reflections on Public Administration, 110, 115 (1947).

118. 31 U.S.C. §53(c) (1971). The Comptroller General reported to Congress that on the San Luis unit of Central Valley Project the Bureau of Reclamation

> "may have difficulty in obtaining recordable contracts from several ineligible landowners who own substantial acreage in the service area and that,therefore, 76 percent of the irrigable land in the Westlands service area may not become eligible for project water . . . three landowners who together owned about 25 percent of the acreage had not signed recordable contracts, although some of this land could be served by the existing distribution system if the land were owned by eligible landowners." He made no comment on the Bureau's failure to observe an unrepealed 1914 law prescribing that "before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question. . . ."

Reclamation and Irrigation of Lands by Federal Government 43 U.S.C. §418 (1971). Neither did the Comptroller General cite Senator Kuchel, of California, who said in debate on the Senate floor with Senator Paul H. Douglas, of Illinois, over the latter's doubt that acreage limitation actually would be enforced on San Luis unit:

> "The Senator from Illinois understands, does he not, that under Federal reclamation law, when a project such as this one is authorized by Congress, the Secretary of the Interior is required in advance of construction to enter into contracts with the landowners—the farmers—in the area, so that there will be no question about the engineering and economic feasibility of the project? The Senator is aware of that requirement of the law, is he not?" 105 Cong. Rec. 7862 (1959).

Instead, the Comptroller General suggested that Congress give consideration to a proposal by the largest corporate landowner on the project that, for a moderate payment, owners be allowed to retain and to receive water for their entire excess holdings. Questionable aspects concerning construction and operation of the San Luis unit CVP, 16. Feb. 12, 1970.

119. 74 Harv. L. Rev. 1265, 1287 (1961). Between service as President and as Supreme Court Justice, William Howard Taft said: "We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man; and under present conditions, ashamed as we may be of it, this is not the fact." Final report of the Commission on Industrial Relations, 52 (1915). In the same spirit the Senate Subcommittee on Migratory Labor entitled recent hearings *Migrant and Seasonal Farmworker Powerlessness* (1970).

knowledge of what to do, organization and financial resources are necessary to meet substantial costs of often prolonged procedures.

Imbalance in political power between the landed and the landless is notable. Awareness of this fact is the key to historic national land policy. In 1820 Daniel Webster, citing the first two centuries since arrival of the Pilgrims, said: "The consequence of all these causes has been a great subdivision of the soil, and a great equality of condition; the true basis most certainly of popular government."[120]

The importance of equitable distribution of landownership has not disappeared in the modern era of reclamation. Commenting on a proposed extension of reclamation in Arizona where acreage limitation and residency requirements have long gone unobserved,[121] Congressman Donald L. Jackson, of California, told the House in 1949:

> . . . it does seem that when a large number of individual landowners have substantial holdings in the proposed project and spend considerable money for the promotion of that project in lobbying the Congress of the United States it is something that should be looked into by the Members of the House of Representatives.[122]
>
> ° ° °
>
> Think of it, 140,000,000 American citizens paying income taxes for the benefit of 420 rich Arizonians, each one getting a $500,000 chunk of your money, for nothing.[123]

A decade later, in 1959, Senator Paul H. Douglas, of Illinois, spoke with equal emphasis of the relative political powerlessness of the landless to protect their own interest in the fruits of an enforced excess land law:

> I know of the pressure in California in support of large farms and large agricultural holding. . . . The advocates of such holdings are powerful, whereas the small farmers who might use that land are in the future; and they are therefore, for the present, nonexistent. It is always hard for the indefinite future to compete with the powerful present.

And again he said:

> I have seen enough of the operations of the Department of the Interior . . . to know it is one thing to get . . . [acreage

120. Webster, Discourse Delivered at Plymouth 53, 54 (3d ed. 1825). In commemoration of the first settlement in New England, given Dec. 22, 1820.

121. Statement of Klaus G. Loewald, *Hearings on S.1425, S.2541, and S.3448 Before Senate Subcommittee on Irrigation and Reclamation* 85th Cong., 2nd Sess., 230-238 (1958).

122. 95 Cong. Rec. 10131 (1949).

123. 95 Cong. Rec. A4668 (1949).

> limitation] in the law, and it is another thing to get it carried out as you face a mighty combination of landowners.[124]

The winds of politics have bent the law in Imperial Valley for a long time.

124. 104 Cong. Rec. 17732 (1958); 105 Cong. Rec. 7495 (1959).