ACREAGE, RESIDENCY AND EXCESS-LAND SALE: STRIKING A BALANCE BETWEEN MODERN AGRICULTURE AND HISTORIC WATER POLICY

Three issues in current reclamation debate are the 160-acre water limitation, residency, and equitable sale and distribution of project land not meeting acreage and residency conditions. This Comment proposes that a water allotment of 1000 acres per farmer would allow efficient and rewarding farming without violating settlement, anti-speculation, subsidy, and family-farm policies. Arguably, residency is neither required by statute nor necessary to further these policies. If required at all, residency should be liberally defined to allow farmers flexibility in choosing homesites. The Comment concludes by examining current proposals for strict land-price control and for governmental purchase and resale to qualified would-be farmers.

INTRODUCTION

> Everywhere the family farm, defined as the entrepreneurial family farm rather than the agrarian mythic family farm, has competed successfully. In fact, . . . the success of American agriculture *is* the success of the entrepreneurial family farm . . . .[1]

In *National Land for People, Inc. v. Bureau of Reclamation*,[2] the federal district court in Washington, D.C. directed the Bureau of Reclamation (Bureau)[3] to enforce the excess-land provisions of federal reclamation law[4] by initiating public rule-making proceedings.[5]

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1. H. HOGAN, ACREAGE LIMITATION IN THE FEDERAL RECLAMATION PROGRAM 65 (1972) (*emphasis original*).

2. 417 F. Supp. 449 (D.D.C. 1976), *vacated as moot*, No. 76-2027 (D.C. Cir., Jan. 20, 1978).

3. The Bureau of Reclamation is part of the Department of the Interior. The Secretary of the Interior supervises the operations of the Bureau. He is authorized to perform such acts and to make such rules and regulations as are required to implement the purposes and the provisions of reclamation law. 43 U.S.C. § 373 (1970). The Secretary of the Interior is authorized to delegate his powers and duties under reclamation law to the Commissioner of Reclamation. 16 U.S.C. §§ 590z-11 (1970).

4. Reclamation law is defined by statute as "the Act of June 17, 1902 . . . , and all Acts amendatory thereof or supplementary thereto." 43 U.S.C. § 371(b) (1970).

5. 417 F. Supp. at 453.

On August 25, 1977, the Bureau responded by publishing its proposed Reclamation Rules and Regulations for Acreage Limitation (1977 Proposed Rules).[6] The Bureau proposes to enforce the 160-acre limitation to the receipt of federal water.[7] Any purchaser of excess land would be required to reside within fifty miles of the land.[8] The Bureau also proposes new procedures for the sale of excess land.[9]

The Bureau plans, finances, constructs, and operates about 150 water-resource projects in the arid and semiarid lands of seventeen western states.[10] The bulk of the water from the projects is sold to local irrigation districts created under state law to contract with the Bureau for water purchase and distribution to farmers.[11]

Massive redistribution of land will occur if the 160-acre water limitation[12] and the residency requirement are enforced. Approximately 1.2 million acres of land will be sold if federal water is withheld pursuant to the excess-land provisions of reclamation law.[13] Eighty percent of the excess land lies in California, mostly in the Westlands Water District and in the Imperial Irrigation Dis-

6. 42 Fed. Reg. 43,044 (1977) (to be codified in 43 C.F.R. § 426). Promulgation of the 1977 Proposed Rules will be delayed because a federal district court has enjoined Secretary of the Interior Andrus from continuing rule-making proceedings until the government prepares, circulates, and considers an adequate environmental-impact statement. County of Fresno v. Andrus, No. F-77-202 (E.D. Cal., Dec. 7, 1977) (order granting preliminary injunction). The creation of many smaller farms could result in excessive use of pesticides. Affidavit of William W. Wood, Jr. in Support of Application for Temporary Restraining Order and Preliminary Injunction at 5, *id.* Affidavit of Claude Finnell in Support of Application for Temporary Restraining Order and Preliminary Injunction at 4, *id.* The reclaimed land could revert to desert. Excess owners may choose to retain their land even without water in order to take advantage of possible geothermal development in the Imperial Valley. Affidavit of Donald Cox in Support of Application for Temporary Restraining Order and Preliminary Injunction at 2, *id.* The government's failure to appeal the injunction provides time for Congress to consider changing reclamation law before the 1977 Proposed Rules are promulgated.

7. 42 Fed. Reg. 43,044, 43,046 (1977) (to be codified in 43 C.F.R. § 426.4(b)).

8. *Id.* at 43,046 (to be codified in 43 C.F.R. § 426.4 (j)-(*l*)).

9. *Id.* at 43,048 (to be codified in 43 C.F.R. §§ 426.9(b), .10, .12).

10. U.S. DEP'T OF AGRICULTURE, THE UNITED STATES DEPARTMENT OF INTERIOR'S PROPOSED RULES FOR ENFORCEMENT OF THE RECLAMATION ACT OF 1902: AN ECONOMIC ANALYSIS at iv (1978) [hereinafter cited as 1978 USDA STUDY].

11. COMP. GEN. OF THE U.S., CONGRESS SHOULD REEVALUATE THE 160-ACRE LIMITATION ON LAND ELIGIBLE TO RECEIVE WATER FROM FEDERAL WATER RESOURCES PROJECTS 5 (1972).

12. Reclamation law does not limit ownership of land. However, it does limit the *use of water* from federally constructed irrigation projects. In an arid climate, the effect of limiting water to a certain number of acres is to limit the number of acres that can be profitably owned. Therefore, in most cases reclamation law results in an ownership limit. *See* Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 486 & n.38 (1955).

13. 1978 USDA STUDY, *supra* note 10, at v.

trict.[14] A residency requirement would render ineligible for federal water approximately one-third of the land in the Westlands[15] and one-fourth of the land in the Imperial Valley.[16]

Redistribution of land would have significant economic effects. California is the leading agricultural state in the United States, producing over 250 crop and livestock commodities and more than twenty-five percent of the nation's fresh fruit and vegetables.[17] The creation of smaller farms would reduce farm income.[18] The supply of some crops would decline, and the price of many crops would increase.[19] Local communities could experience economic depressions.[20]

It has been suggested that the entire federal program of subsidized irrigated farming should be dismantled because the policies effectuated by reclamation law are outdated.[21] Under this view, acreage limits and required residency are unnecessary and counter-productive to efficient market operation.[22] The farmer, it is argued, should bear the full cost of his water, allowing food production and land development to be subject to normal market forces.[23]

However, the scope of this Comment is limited. Acreage and residency limitations on federal water, if modified to reflect modern farming needs, may further some important national policies. The first major issue this Comment addresses is whether the present 160-acre irrigation entitlement should be raised to conform with modern

14. *See id.*, at iv.

15. *See* COMP. GEN. OF THE U.S. APPRAISAL PROCEDURES AND SOLUTIONS TO PROBLEMS INVOLVING THE 160-ACRE LIMITATION PROVISION OF RECLAMATION LAW 22 (1976) [hereinafter cited as 1976 GAO REPORT].

16. *See* Hearings Before the Water and Power Resources Subcomm. of the House Comm. on Interior and Insular Affairs (Palm Springs, Cal., Jan. 6, 1978) [hereinafter cited as 1978 Palm Springs Hearings] (unpublished statement of Louise Willey on file with the *San Diego Law Review*).

17. R. FELLMETH, POLITICS OF LAND 26 (1973). The success of California agriculture is critical to the economy of the nation because California is the primary source of alfalfa, almonds, apricots, artichokes, asparagus, avocados, lima beans, broccoli, Brussels sprouts, carrots, cauliflower, celery, cherries, cut flowers, dates, eggs, figs, garlic, grapes, lemons, lettuce, cantaloupes, nectarines, olives, onions, navel oranges, peaches, pears, chili peppers, persimmons, plums, pomegranates, spring potatoes, prunes, safflower, spinach, strawberries, sugar beets, tomatoes, turkeys, and walnuts. *Id.*

18. 1978 USDA STUDY, *supra* note 10, at vii.

19. *Id.*, at 23-26.

20. 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Lewis Bacon on file with the *San Diego Law Review*).

21. H. HOGAN, *supra* note 1, at 292.

22. *Id.*

23. *Id.*; R. FELLMETH, POLITICS OF LAND 60 (1973).

agriculture. The legal validity of the current limit is not disputed. However, the proper acreage figure should be determined by balancing the farmer's need for larger farms against the policies the water limitation was designed to serve.

The second major issue is the residency requirement. In 1972, a federal district court in *Yellen v. Hickel*[24] held that reclamation law requires landowner residency. However, in *United States v. Imperial Irrigation District*, the Court of Appeals for the Ninth Circuit reversed and vacated *Yellen* on the ground that the plaintiffs lacked standing to sue.[25] The standing issue is examined. The statutory and legislative history of the residency question is then surveyed to determine whether residency is a current legal requirement. Residency is also viewed in light of the national policies it is purported to execute.

After discussing the acreage limitation and residency questions, this Comment concludes by examining current proposals for sale of excess project land owned by persons not meeting the acreage limitation and by non-residents. The Bureau's traditional methods of determining the value of excess land violate the anti-speculation provisions of reclamation law. Current proposals to regulate appraisal are examined. This Comment also examines legislation recommending government purchase of excess land, sale to would-be buyers lacking money and financing, and federally guaranteed loans to buyers.

The Basic Acreage Entitlement

Current law limits the use of federal reclamation-project water to 160 acres per owner. The Reclamation Act of 1902 (1902 Act) provides that "[n]o right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner . . . ."[26] The Omnibus Adjustment Act of 1926 (1926 Act) provides that no federal water may be supplied to any one owner for land in excess of 160 acres unless the owner executes a recordable contract to sell the land at a price and under terms and conditions satisfactory to the Secretary of the Interior (Secretary).[27] The contracts typically give the Secretary a power of attorney to sell the land if the owner does not sell within ten years.[28]

24. 352 F. Supp. 1300 (S.D. Cal. 1972), *vacated sub nom.* United States v. Imperial Irrigation Dist., 559 F.2d 509 (9th Cir. 1977).

25. 559 F.2d 509, 542 (9th Cir. 1977).

26. 43 U.S.C. § 431 (1970). One hundred and sixty acres is equivalent to a square one-half mile on each side. *See* Webster's Third New International Dictionary 2052 (Cove ed. 1967).

27. 43 U.S.C. § 423e (1970).

28. Renda, *Owner Eligibility Restrictions—Acreage and Residency*, 8 Nat. Resources Law. 265, 274 (1975).

The 160-acre figure derives from the federal Homestead Act of 1862.[29] In the nineteenth century, this figure was generally assumed to be adequate.[30] The 160-acre water limit has captured national interest through publicity concerning *United States v. Imperial Irrigation District*.[31] The acreage issue in *Imperial Irrigation District* is limited to an alleged special exemption from all acreage limits.[32] However, the appellate court's application of the 160-acre limit to the Imperial Valley[33] serves to illustrate the broader problem. The 160-acre limit is outdated. Congress should now raise the water entitlement in *all* projects to conform with modern agriculture.

The 160-acre issue may be framed as whether water should be supplied to any one *owner* beyond 160 acres. The flaws in this approach are that there have been no legal restraints on water to *leased* land[34] and forms of multiple ownership have been allowed which permit the farming of huge acreages,[35] thereby violating reclamation policy.[36] Discussion of the adequacy of the number "160" is irrelevant because leasing and multiple ownerships circumvent *any* ownership limitation. This Comment advocates a new approach to the acreage-limitation issue. This approach bases the water limit on the *farming* unit, not on the *ownership* unit.[37] Four steps in analysis are required. First, the proper farming acreage consistent

29. Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. § 161 (1970)).

30. 1 PUBLIC LAND LAW REVIEW COMMISSION, PUBLIC LAND LAW AND POLICIES RELATING TO INTENSIVE AGRICULTURE 212 (1969). *But cf.* Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 483 n.22 (1955) (at the Third National Irrigation Congress, Senator Boyd said that a tract of 300-400 acres was reasonable when machinery was used).

31. 559 F.2d 509, 520 (9th Cir. 1977). The appeal in *Yellen* was consolidated with the appeal in *Imperial Irrigation District*. In *Imperial Irrigation District*, another district court had held that acreage limitations did not apply to the Imperial Valley. Persons who were substantially identical to the *Yellen* plaintiffs were allowed to intervene in the *Imperial Irrigation District* appeal. *Id.* The appellate court reversed both judgments, *id.* at 542, holding that the plaintiffs lacked standing to bring the residency action but that acreage limitations applied in the Imperial Valley.

32. *Id.* at 524, 535-36.

33. *Id.* at 542.

34. *Acreage Limitation Provisions of Reclamation Law: Their Administration and Suggested Changes: Oversight Hearings Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 8 (1976) [hereinafter cited as *1976 Oversight Hearings*] (statement of Gilbert Stamm).

35. *See* Office of the Solicitor, Bureau of Reclamation, Basic Solicitor's Opinions (Jan. 1976), *reprinted in 1976 Oversight Hearings*, *supra* note 34, at 58.

36. For a discussion of basic reclamation policies, *see* text accompanying notes 61-87 *infra*.

37. *See* 124 CONG. REC. S2532 (daily ed. Feb. 28, 1978).

with valid policy should be determined. Second, a multiplier for family size should be provided. Third, the basic entitlement should be increased for inferior local growing conditions. Fourth, leasing should be limited.

The Proper Farm Size Consistent with Valid Policy

The first step in acreage-limitation analysis is determining the proper farm size consistent with reclamation policies. At a minimum, a farm should be large enough to provide an adequate living. Two basic problems hinder determination of the adequate farm size. The first is the inherent difficulty, if not impossibility, of defining "adequate living." The second is sharp disagreement over the economic viability of the small farm.

The Bureau has stated that the farm size should be "adequate to support a family and pay water charges,"[38] but the Bureau has not defined "adequate." "Adequate" might be defined as "above the poverty line."[39] Subsistence-level farming may have been justifiable in 1902 when a farmer produced much of his clothing, food, and tools.[40] However, the modern farmer relies on a cash economy, buying a large proportion of living necessities with crop income.[41] The creation of rural slums through forced subsistence-level farming should not be federal policy. The United States Department of Agriculture has implied that the basic farm income should be at least equal to the regional median family income.[42] Under this definition, 160-acre farmers in the Imperial Valley[43] and in the North Platte Project do not make an adequate living.[44]

The second problem is determining the minimum viable farm size. Many studies indicate that an Imperial Valley farm of 320 acres or less cannot make a profit.[45] However, a recent government study

38. *E.g.*, 42 Fed. Reg. 43,044, 43,049 (1977) (to be codified in 43 C.F.R. § 426.13 (c)).

39. 2 PUBLIC LAND LAW REVIEW COMMISSION, FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO INTENSIVE AGRUCULTURE 161 (1969).

40. *1976 Oversight Hearings*, *supra* note 34, at 186-87 (statement of Ralph Brody).

41. *Id.*

42. 1978 USDA Study, *supra* note 10, at 20.

43. *Id.*, at 55.

44. *Id.*, at 38.

45. A 1978 report by the Agricultural Commissioner of Imperial County indicated that a new farmer, even with a good credit rating, would lose $86,905 in the first year on a 320-acre plot in Imperial Valley at 1977 costs and prices. 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Claude Finnell on file with the *San Diego Law Review*). At 1977 costs and prices, a 320-acre farm with 40 acres in sugar beets, 80 acres in alfalfa, 80 acres in milo, 40 acres in cotton, and 80 acres in barley would yield $101,935 but would cost $188,840 in mortgage debt service and borrowed production costs. This calculation does not include the farmer's down payment on his land and his family living expenses. Thus, few farmers beginning with 160-acre plots could survive. *Id.* One typical

concluded that profits could be made on 160-acre plots in all reclamation projects.[46] Differences can be attributed, in part, to the fact that the studies derive price and cost figures from different years.[47] At the very least, the profit discrepancies show that small-farm net income is highly sensitive to price and cost variations because losses in one area or in a particular crop cannot be counterbalanced by other gains. No study based on only one year's profit can adequately reflect the high risk involved in farming.[48] As the recent government study conceded, larger farm units may be necessary to maintain a viable farming operation over time.[49] A 1977 University of California Cooperative Extension study verified this conclusion by showing a net loss of over $15,000 during a recent ten-year period on an average 320-acre farm in the Imperial Valley.[50]

Small-farm success is also hampered by the fact that farm owners naturally designate 160 acres of their *best* land as "non-excess"[51] when their excess land is sold pursuant to the recordable contract

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Imperial Valley farmer, in 1977, lost money on tomatoes, onion seed and cotton, recouped his costs on wheat, sugar beets and market onions, and made a profit only on dehydrated onions. *Id.* (unpublished statement of Arthur Caston on file with the *San Diego Law Review*). A 1977 University of California farm extension study reported that the owner of a typical 320-acre Imperial Valley farm lost money in at least five of the 10 years between 1967 and 1976. Von Maren, An Economic Analysis of Typical Farming Operations in the Imperial Valley 1-2 (Dec. 15, 1977) (Imperial County Cooperative Agricultural Extension report on file with the *San Diego Law Review*).

46. 1978 USDA STUDY, *supra* note 10, at v. Returns to management and to operator at 1977 land prices and costs on 160-acre plots were $6,000 in the Imperial Valley, $7,000 in the North Platte Project, $15,000 in the Westlands, and $19,000 in the Columbia Basin Project. On 320-acre plots, the returns ranged from $14,000 in the North Platte Project to $53,000 in the Columbia Basin Project. On 640-acre plots, the returns ranged from $23,000 in the North Platte Project to $125,000 in the Columbia Basin Project. *Id.* These returns increased when based on the most recently approved pre-project land price. *Id.*

47. The price figures used in the 1978 USDA Study were projections for 1977 based upon pre-1977 prices. *Id.*, at 51. The price figures in the study by the Imperial County Agricultural Commissioner were actual 1977 prices. 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Claude Finnell on file with the *San Diego Law Review*).

48. 1978 USDA STUDY, *supra* note 10, at vi.

49. *Id.*

50. Von Maren, An Economic Analysis of Typical Farming Operations in the Imperial Valley 1 (Dec. 15, 1977) (Imperial County Cooperative Agricultural Extension report on file with the *San Diego Law Review*).

51. 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of William W. Wood, Jr. on file with the *San Diego Law Review*).

provision of the 1926 Act. Therefore, some new farm units created by excess-land sales will be disproportionately composed of less fertile land. Standing alone, inferior land which can be farmed profitably as an adjunct to better land through cost-spreading may be inadequate for small-farm success.[52] This unfortunate result is due to the unrealistically low water entitlement.

In addition to the determination of the adequate farm size, the role of technological efficiency must be considered. It is well documented that economies of scale[53] requires a farm of more than 160 acres to produce maximum output per unit of cost. Recent studies indicate that maximum efficiency is achieved on farms ranging from 440 to 2000 acres, depending on the location of the land and the crops grown.[54] Percentage return on net assets, one measure of efficiency, steadily increases as annual gross sales increase.[55] Certain types of farming require expensive machinery[56] which must be applied to larger acreages to reduce unit costs.[57] The increase in the average size of irrigated farms in the seventeen reclamation-project states shows the effect of economies of scale. The percentage increase between 1935 and 1964 ranged from 71% in Nebraska to 742% in Arizona.[58] The average size of irrigated farms is over 500 acres in fourteen of the seventeen reclamation states.[59] Larger farms exist because they are more efficient.

The real issue is not whether efficiency affects small-farm viability but whether it is relevant in light of the reclamation policies.[60] The

52. *Id.*

53. "Economies of scale" is a term of art describing the relationship between the number of units produced and the cost per unit.

54. Maximum cost-output advantages occurred at 1500-2000 acres in the Imperial Valley, 600-700 acres in Yolo County, 640-1000 acres in Kern County, 640-1280 acres in the San Joaquin Valley Eastside, 440 acres in the irrigated cotton farms of the Texas high plains, and 1600 acres in the wheat and dry pea farms in Washington and Idaho. 2 PUBLIC LAND LAW REVIEW COMMISSION, FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO INTENSIVE AGRICULTURE 111-64 (1969).

55. In 1976, the United States Department of Agriculture reported that farms with annual sales of less than $10,000 had an average return on net assets of minus .1% to minus 6%, farms with annual sales of $10,000 to $19,999 returned 2.9%, farms with annual sales of $20,000 to $39,999 returned 4.4%, and farms with annual sales of $100,000 or more returned 6.9%. *1976 Oversight Hearings*, *supra* note 34, at 214.

56. *Id.*, at 56-57 (statement of Gilbert Stamm).

57. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 183 (1970); 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Loucille Purdy on file with the *San Diego Law Review*). *But cf.* 1978 USDA STUDY, *supra* note 10, at 20 (purchase of equipment is not always necessary due to the availability of hiring certain custom planting and harvesting operations).

58. 2 PUBLIC LAND LAW REVIEW COMMISSION, FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO INTENSIVE AGRICULTURE 116 (1969).

59. *Id.*

60. *See* Taylor, *The Excess Land Law*, 30 ROCKY MTN. L. REV. 480, 515 (1958).

Bureau has stated that reclamation law executes four national policies: (1) the maximization of the number of settlers on the land, (2) the prevention of speculative gain on sales of project lands, (3) the wide distribution of the governmental subsidies involved in interest-free construction loans and low-cost water, and (4) the promotion of the family farm.[61]

The first policy is to provide for maximum settlement.[62] Proponents of the 160-acre limit argue that efficiency is irrelevant because a policy of reclamation law is to promote maximum settlement.[63] This policy may no longer be necessary because the westward expansion of the nineteenth century, during which the policy originated,[64] has long since ceased.[65] Even if settlement policy simply furthers a current entrepreneurial ideal by increasing the number of farm owners, raising the water entitlement to some reasonably efficient size still would further settlement policy by dissolving many of the largest farms.[66]

The second policy is anti-speculation.[67] In an arid climate, the right to receive a reliable supply of federal water is a valuable asset which increases the value of the land.[68] An essential policy of federal reclamation law is the prevention of windfall profits occuring when speculators buy land at pre-water prices and sell it at post-water prices.[69] However, the number of acres per farmer for which water is supplied need not be limited to prevent huge profits upon resale.

61. 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.1).
62. *Id.* (to be codified in 43 C.F.R. § 426.1(a)).
63. *See* Taylor, *The Excess Land Law*, 30 ROCKY MTN. L. REV. 480, 515 (1958).
64. *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 177-84 (1970); S. DOC. NO. 446, 57th Cong., 1st Sess. 376 (1902); BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, REPORT ON LANDOWNERSHIP SURVEY ON FEDERAL RECLAMATION PROJECTS 67 (1946) [hereinafter cited as 1946 LANDOWNERSHIP SURVEY].
65. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 177-84 (1970); 1 PUBLIC LAND LAW REVIEW COMMISSION, PUBLIC LAND LAW AND POLICIES RELATING TO INTENSIVE AGRICULTURE 318-19 (1969).
66. 1978 USDA STUDY, *supra* note 10, at 27.
67. 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.1(d)). *But cf.* H. HOGAN, *supra* note 1, at 204-09 (arguing that the entire reclamation program is an unjust enrichment program of federal subsidy to the *small* farmer). Section 46 of the 1926 Act does not control the sale price of *non*-excess land. 43 U.S.C. § 423e (1970). Therefore, the non-excess owner can capitalize the subsidy into the selling price. About 79% (8.7 million acres) of all project land is non-excess. 1978 USDA STUDY, *supra* note 10, at iv.
68. Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13, 13 (1965).
69. *Id.* at 13-14.

Anti-speculation policy is furthered by the requirement that excess project land, when sold, must be sold at a price not reflecting the benefit of federal water.[70] Where the sale price is limited to pre-project value, the landowner cannot make windfall profits regardless of the number of acres sold.

The third policy is the wide distribution of irrigation subsidies. Reclamation projects offer irrigators three types of subsidies. One type of subsidy is direct transfer from hydroelectric power revenue and from municipal and industrial water revenue.[71] The reason for the direct transfer is that irrigators were unable to repay their share of the irrigation-project construction costs in the early years of federal reclamation.[72] Power revenue is the principal source of funding for project operation, paying not only its own costs but part of the cost originally allocated to irrigation.[73]

Another type of subsidy is direct transfer of funds from the United States Treasury.[74] Treasury appropriations provide one-third to one-half of the annual reclamation expenditures.[75] A third type of subsidy is interest-free money. When the government constructs a reclamation project, it charges no interest on that part of the cost the irrigation district is obligated to repay.[76] The interest-free loan is a subsidy to water-users.[77] This aspect of subsidy policy can be furthered without acreage limits by applying the Engle formula, which requires that the landowner repay his ratable share of the interest.[78]

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70. *See* text accompanying notes 247-84.
71. 2 WATERS AND WATER RIGHTS § 123.2(I) (R. Clark ed. 1967).
72. *Id.*
73. *Id.*
74. *Id.* § 111.1.
75. *Id.*
76. 43 U.S.C. § 485h(d) (1970).
77. Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13, 13 n.4 (1965).
78. Interest payments coupled with the lifting of acreage limitations are known as the "Engle formula," named after the sponsor of the Small Reclamation Projects Act, 43 U.S.C. § 422a-k (1970). This statute allows water delivery to excess land in certain small projects if the landowners forgo the statutory governmental subsidy represented by interest-free financing of construction costs and pay interest on their allotted share of the project costs. The benefit of the interest subsidy is thereby limited to 160 acres per owner. The Engle formula has been adopted in three specific projects. *See* 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.3(d)(1), (3), (4)). According to one commentator's calculations, the interest subsidy amounts to 91% of the total cost when spread over the statutory 50-year repayment period. R. BERKMAN & W. VISCUSI, DAMMING THE WEST 136 (1973). The California Chamber of Commerce has recommended broad use of the Engle formula. Public Hearings on the Proposed Rules and Regulations Governing Acreage Limitation for Federal Reclamation Projects, U.S. Dep't of the Interior, Bureau of Reclamation 57 (Imperial, Cal., Nov. 21, 1977) (official reporter's transcript) (statement of Warren Brock on file with the *San Diego Law Review*).

The hydroelectric revenue and the United States Treasury transfers provide a substantial subsidy even without the interest-free loan.[79] As an illustration of the cumulative benefit from all three types of subsidies, farmers in the Westlands Water District reportedly pay $3.50 to $7.50 per acre-foot for water that costs the government approximately sixteen dollars per acre-foot to provide.[80] However, the fact that the federal government subsidizes irrigated farming does not require a low-acreage limit. The federal government subsidizes many enterprises because it believes benefits thereby accrue to the public. Examples of government-subsidized activities serving both public and private interests include postal services, highways, waterways, and crop allotments.[81]

The real issue is not whether subsidies should be given but rather how much any one recipient should benefit. Private gain must be balanced against public good. The public benefit from federally irrigated farming is plentiful, low-cost food available throughout the year because of modern technological efficiency.[82] The proper solution to the subsidy problem is to provide water to farm operators up to the most efficient acreage size and to withhold water to acreage beyond this range because further gain accrues to the farmer and not to the public.

The fourth reclamation policy is to promote the family farm.[83] However, promotion of the family farm concerns the *mode* of operation, not the size of the farm. Many large and highly efficient farms are operated by families. The average size of a family-operated farm in the Imperial Valley is 449 acres.[84] According to a 1978 study, seventy-seven percent of the farms in the Imperial Valley are single-family operations.[85]

79. R. BERKMAN & W. VISCUSI, DAMMING THE WEST 134, 137, 145 (1973).
80. L.A. Times, Apr. 28, 1978, § 1, at 3, col. 3.
81. STATE OF CALIFORNIA, REPORT OF THE GOVERNOR'S TASK FORCE ON THE ACREAGE LIMITATION PROBLEM 6-9 (1968).
82. *Contra*, R. BERKMAN & W. VISCUSI, DAMMING THE WEST 14-24 (1973) (food surpluses and low prices caused by agricultural overproduction create an artificial need to subsidize irrigated farming with tax and power revenues).
83. 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.1(c)).
84. 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Louise Willey on file with the *San Diego Law Review*).
85. *Id.* Single-family operators farm 49% of the total irrigated acres. Multi-family farmers constitute an additional 17% of the operators and farm an additional 44% of the acreage. Only 6% of the operators are non-family partnerships,

Extreme positions characterize the debate over the proper farm size. Representatives of the agricultural industry argue that the large farmer's ability to produce large quantities of high-quality, low-priced food for national and world markets should not be restricted by *any* arbitrary acreage limitation.[86] Proponents of the 160-acre size contend that 160 acres are adequate and that efficiency is irrelevant because overriding social policies control reclamation law. The solution lies somewhere in the middle. One hundred and sixty acres probably is not a practical size over a period of time. The determination of the proper farm size involves the interplay of technology and social policy. Larger farms do not violate family-farm and anti-speculation policies. Maximization of settlers on the land may not be necessary today and therefore should not limit acreage. Subsidy policy does require some limitation on farm size. Even if maximization of settlement is a currently valid policy, a basic water entitlement of 1000 acres[87] provides an adequate living, allows reasonable efficiency, limits subsidies to a fair level, and prevents great stretches of uninhabited land.

Multiplier for Family Size

The second step in determining the proper acreage entitlement is allowing for the income needs of larger families. Although technically unnecessary because current law limits owners and not families,[88] a separate spousal multiplier has long been recognized in Bureau practice.[89] The separate spousal multiplier continues to exist in the proposed rule permitting a husband and wife to own jointly 320 acres.[90] The Bureau's traditional approach allowed ownership of large acreages by partnerships, trusts, and corporations without requiring family ties among the participating members.[91] The use of non-family partnerships, corporations, and trusts to circumvent the 160-acre limitation is well documented.[92] However, the only justifi-

trusts, and public corporations, farming only 7% of the total acreage. Together, single- and multi-family farmers operate 94% of the farms and 93% of the acreage. *Id.*

86. STATE OF CALIFORNIA, REPORT OF THE GOVERNOR'S TASK FORCE ON THE ACREAGE LIMITATION PROBLEM 9 (1968).

87. Secretary of the Interior Andrus recently proposed to Congress that the maximum family water entitlement should be raised to 960 acres. L.A. Times, Apr. 14, 1978, § 1, at 1, col. 5.

88. *See* H. HOGAN, *supra* note 1, at 81-82.

89. 1946 LANDOWNERSHIP SURVEY, *supra* note 64, at 56.

90. 42 Fed. Reg. 43,044, 43,046 (1977) (to be codified in 43 C.F.R. § 426.4(b)).

91. Office of the Solicitor, Bureau of Reclamation, Basic Solicitor's Opinions (Jan. 1976), *reprinted in 1976 Oversight Hearings*, *supra* note 34, at 58.

92. *See* R. BERKMAN & W. VISCUSI, DAMMING THE WEST 141 (1973); 1976 GAO REPORT, *supra* note 15, at 3.

cation for these forms of ownership under reclamation policy is to reflect family dependence on the land.

The Bureau's 1977 Proposed Rules provide that partnerships, corporations, and trusts may own project land only where there is a spousal or a direct lineal-descent relationship among all the participants.[93] The organization may not hold more than 160 acres for each qualified participant.[94] Although the 1977 Proposed Rules properly limit the acreage multiplier to family-farm situations, the definition of family as lineal descendants and spouse is arbitrarily restrictive. Siblings, uncle and nephew, and other combinations of more distant relatives may in fact live and farm together as a family. However, these combinations are excluded from the family-multiplier provisions of the 1977 Proposed Rules.[95]

Both the spousal and direct lineal-descendant multiplier concepts are rejected by the 1977 Senate Bill 1812 (The Nelson-Haskell Bill).[96] Instead, the family multiplier would be limited to the purchase by the family farmer of an additional 160 acres for at *most* one dependent with whom he or she has permanently resided for at least one year prior to the purchase.[97]

Spousal and family multipliers effectively provide for the income needs of larger families and should be retained. Partnerships, corporations, and trusts should receive water for excess land only if all participants are members of the same extended family, and the organization does not hold more than 160 acres for each member.

Acreage Equivalencies

The third step in analysis is increasing the basic water entitlement for inferior local growing conditions. The principle that the maximum acreage should be raised when required by poor growing conditions is well accepted.[98] Factors to be considered are latitude,

93. 42 Fed. Reg. 43,044, 43,046, 43,047 (1977) (to be codified in 43 C.F.R. §§ 426.4(h), .7(b)).

94. *Id.* at 43,047 (to be codified in 43 C.F.R. § 426.7 (b)-(e)).

95. Public Hearings on the Proposed Rules and Regulations Governing Acreage Limitation for Federal Reclamation Projects, U.S. Dep't of the Interior, Bureau of Reclamation 22 (Imperial, Cal., Nov. 21, 1977) (official reporter's transcript) (statement of John Stull on file with the *San Diego Law Review*).

96. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300 (daily ed. June 30, 1977).

97. *Id.* at S11,301.

98. Secretary of Agriculture Bergland has recommended that water eligibility be made on an area-to-area basis rather than by a strict acreage maximum,

climate, soil, topography, drainage, water quality, land-development costs, and farm production costs.[99] Congress has exempted seven projects from the acreage limitations,[100] sometimes using the rationale that growing conditions require such exemptions.[101]

Express adjustments through acreage equivalencies are another way of accounting for variations in growing conditions. In 1949, President Truman stated that larger acreages might be necessary to support a family on some project lands and that Congress should authorize appropriate adjustments in maximum acreages where necessary under carefully constructed standards.[102] Congress has made upward adjustments in eighteen specific projects under the "acreage equivalency" concept.[103] Acreage equivalency allows varying amounts of less productive land over 160 acres to be declared "non-excess" by definition.[104]

In 1964, the Department of the Interior recommended that Congress vest the power to declare certain land "non-excess" under acreage equivalency in the Secretary rather than require an act of Congress.[105] The disadvantage of this procedure is that the Secretary may be subject to constant pressure by special-interest lobbies to grant or to repeal equivalencies.[106] However, the advantages of administrative power to set equivalencies are greater flexibility and expertise.[107]

Legislation allowing the Secretary to set acreage equivalencies on a project-by-project basis is currently before Congress.[108] Equivalencies would be limited to projects with growing seasons of 180 days or

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noting that the average gross crop value in California is $781 per acre compared with $128 per acre in South Dakota. U.S. Dep't of Agriculture News Release No. 263-78 (Jan. 26, 1978) (on file with the *San Diego Law Review*).

99. 42 Fed. Reg. 43,044, 43,049 (1977) (to be codified in 43 C.F.R. § 426.13(a)).

100. *Id.* at 43,045 (to be codified in 43 C.F.R. § 426.3(b)).

101. Congress exempted the Kendrick Project in Wyoming, for example, from the 160-acre limit because the marginal quality of the project lands in a short growing season made it difficult if not impossible for a 160-acre farm to furnish a reasonably adequate standard of living. S. REP. No. 838, 85th Cong., 1st Sess. 5 (1957).

102. 95 CONG. REC. 15,045-46 (1949).

103. *See* 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.3(c)).

104. *Id.*

105. *See* DEP'T OF THE INTERIOR, 88TH CONG., 2D SESS., ACREAGE LIMITATION POLICY STUDY PREPARED FOR THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS at ix (Comm. Print 1964).

106. 1 PUBLIC LAND LAW REVIEW COMMISSION, PUBLIC LAND LAW AND POLICIES RELATING TO INTENSIVE AGRICULTURE 331 (1969).

107. *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 183 (1970).

108. *E.g.*, S. 2606, 95th Cong., 2d Sess., 124 CONG. REC. S2532 (daily ed. Feb. 28, 1978); S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,301 (daily ed. June 30, 1977).

less.[109] One hundred eighteen projects are within 180-day frost-free areas.[110] Under one plan, no equivalency could exceed 240 acres.[111]

Leasing

The fourth step in acreage limitation analysis is determining whether leasing should be allowed. Current law does not regulate water to leased acreage where the owner is a non-excess holder.[112] The law regulates ownership, not leasing. Thus, a farmer may now receive water for only 160 acres of his own land but may operate an unlimited number of leasehold acres. The only restriction on leasing is that sale and leaseback arrangements are strictly scrutinized by the Bureau.[113] Leaseback may be disallowed if the seller transfers less than full title, the leaseback is part of the consideration for the sale, or the lease period is greater than ten years.[114]

The 1977 Proposed Rules impose limits on leasing. A person or legal entity could lease no more than 160 acres of land served by federal reclamation water.[115] Because the rules would also allow federal water for 160 *owned* acres,[116] an individual could *farm* a total of 320 acres. A husband and wife could lease 320 acres[117] and *farm* a total of 640 acres. Although a family partnership, corporation, or trust may own 160 acres for each qualified family member,[118] the legal entity could lease only 160 acres.[119] Thus, a five-member family corporation could own 800 acres and lease only an additional 160 acres. The 1977 Proposed Rules limit leasebacks.[120] However, the only restriction is that the lessee must not have sold the land to the lessor. Therefore, a farmer can avoid the leaseback restriction by selling the land and leasing it back from his buyer's buyer.[121]

109. S. 2606, 95th Cong., 2d Sess., 124 CONG. REC. S2532, S2534 (daily ed. Feb. 28, 1978); S. 1812, 95th Cong., 1st Sess., 123 CONG REC. S11,300, S11,301 (daily ed. June 30, 1977).
110. *1976 Oversight Hearings*, *supra* note 34, at 10 (statement of Gilbert Stamm).
111. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,301 (daily ed. June 30, 1977).
112. *1976 Oversight Hearings*, *supra* note 34, at 8 (statement of Gilbert Stamm).
113. *Id.*
114. *Id.*
115. 42 Fed. Reg. 43,044, 43,047 (1977) (to be codified in 43 C.F.R. § 426.8).
116. *Id.* at 43,046 (to be codified in 43 C.F.R. § 426.4(b)).
117. *Id.* at 43,047 (to be codified in 43 C.F.R. § 426.8).
118. *Id.* (to be codified in 43 C.F.R. § 426.7(b)-(e)).
119. *Id.* (to be codified in 43 C.F.R. § 426.8).
120. *Id.* at 43,048 (to be codified in 43 C.F.R. § 426.10(e)).
121. [1977] 7 ENVIR. L. REP. (ELI) 10,189, 10,190.

The Nelson-Haskell Bill would limit water to 160 acres of land leased from the government[122] but would not expressly limit private leasing.[123] Nevertheless, private leasing would be restricted to two years of any ten-year period, with exceptions for extreme hardship to the family-farmer lessor.[124] The two-year limit applies to the land,[125] not to the tenant farmer, preventing arrangements by which leaseholds could be rotated every two years to circumvent the leasing limit.

Leasing must be examined in light of reclamation policies. The large-scale leasing the Bureau has permitted in the Imperial Valley has not violated family-farm policy. Families farm ninety-three percent of the total acreage,[126] and tenant families farm fifty-eight percent of the land.[127] Economies of scale encourage a family to lease as many acres as possible.[128] Leasing violates no anti-speculation policy because speculation gains accrue to a seller of land, not a tenant. Speculation gains are properly prevented by monitoring the sale price,[129] not by limiting the size or the mode of operation.

However, large-scale leasing violates maximum-settlement policy[130] by allowing a small number of resident farmers to control huge tracts. Furthermore, unlimited leasing arguably violates reclamation policy in favor of spreading the government subsidies among the greatest number of farmers[131] (as does unlimited ownership). Although the subsidies initially accrue to the *operator* in the form of cost-reducing low-priced water,[132] the practice of sharing cost and profit passes the subsidies to the owner. Where the Engle formula[133] is used, the interest subsidy is repaid. However, the power, water, and Treasury-revenue subsidies still accrue unfairly to the operator and to the owner when unlimited leasing is allowed.[134]

122. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,302 (daily ed. June 30, 1977).
123. *Id.* at S11,301.
124. *Id.*
125. *Id.*
126. *See* 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Louise Willey on file with the *San Diego Law Review*).
127. *Id.*
128. *See* text accompanying notes 53-59 *supra.*
129. *See* text accompanying notes 247-84 *infra.*
130. *See* text accompanying notes 62-66 *supra.*
131. *See 1976 Oversight Hearings*, *supra* note 34, at 32 (statement of Gilbert Stamm).
132. *Will the Family Farm Survive in America?: Joint Hearings Before the Senate Select Comm. on Small Business and the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess., pt. 3, at 82 (1976) (statement of Robert Palmer).
133. *See* note 78 *supra.*
134. *See* text accompanying notes 71-79 *supra.*

Large-scale leasing has been necessary under an artificially low ownership limitation which has prevented an adequate living and thwarted the use of economies of scale. If the basic water entitlement, adjusted for family size and for growing conditions, were increased to a reasonably adequate and efficient size, large-scale leasing would be unnecessary. Proponents of unrestricted leasing argue that leasing is often a more practical plan for beginning farmers because higher income can be generated by renting land and investing limited capital in machinery and production expenses.[135] In partial recognition of the validity of this argument, both the 1977 Proposed Rules[136] and the Nelson-Haskell Bill[137] allow leasing a maximum of 160 acres. A better plan provides water for 1000 acres per farm *operation*. The adjusted basic entitlement should be determined, and a family should not be allowed federal water for any owned *or* leased acreage in excess of that adjusted acreage figure. Senate Bill 2606, introduced by Senator Church in 1978, would allow water for 1280-acre farms created by any combination of ownership and leasing.[138] A new farmer could then either buy or lease his full entitlement depending on his capital capabilities.

In the first section of this Comment, the authors have proposed that the basic water entitlement should be raised. A farm of 1000 acres is adequate and efficient and does not violate federal reclamation policy. The second section of this Comment addresses the issue of whether the owner must reside on the land to receive federal irrigation water.

THE QUESTION OF RESIDENCE

Adding to the confusion caused by the haphazard interpretation[139] and the lax enforcement[140] of reclamation law over the years, the

135. 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Claude Finnell on file with the *San Diego Law Review*); H. Carter & G. Dean, Cost-Size Relationships for Cash Crop Farms in Imperial Valley, California 39 (May 1962) (on file with the *San Diego Law Review*).

136. 42 Fed. Reg. 43,044, 43,047 (1977) (to be codified in 43 C.F.R. § 426.8).

137. S.1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,302 (daily ed. June 30, 1977).

138. S. 2606, 95th Cong., 2d Sess., 124 CONG. REC. S2533 (daily ed. Feb. 28, 1978).

139. [1977] 7 ENVIR. L. REP. (ELI) 10,189.

140. Renda, *Owner Eligibility Restrictions—Acreage and Residency*, 8 NAT. RESOURCES LAW. 265, 280 (1975) (Bureau hasn't enforced residency since 1926 because it believed that the 1926 Act abolished the residency requirement). *Cf.* 2

courts have failed to clarify the residency issue. In *Yellen v. Hickel*,[141] a federal district court in California ruled that residency was a continuing prerequisite to the receipt of federal water. However, in *United States v. Imperial Irrigation District*, the Court of Appeals for the Ninth Circuit held that the plaintiffs in *Yellen* lacked standing to sue and vacated the judgment.[142] Thus, resolution of the residency issue has yet to occur.

Exactly one week after the decision in *Imperial Irrigation District*, the Bureau published its 1977 Proposed Rules.[143] The Bureau proposes that a purchaser of excess land must reside within fifty miles of the land.[144] However, there has been no judicial resolution of the residency issue. The Bureau has issued the regulations without knowing whether residency *is* a legal requirement. The Bureau recognized this precise dilemma when it stated that "[r]esidency is, however, *believed* to be a legally required condition of receiving federally-subsidized water . . . ."[145]

Standing: A Roadblock to a Judicial Decision on Residency

In *Yellen*, suit was brought by several individuals residing within the Imperial Irrigation District but owning no farmland.[146] The plaintiffs sought to compel the Secretary to enforce the residency requirement of section 5 of the 1902 Act, which states that "no such sale [of water rights] shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood . . . ."[147]

The government, and the intervening defendants whose lands would be affected by reinstating residency, challenged the plaintiffs' standing to sue.[148] The district court found that the plaintiffs were within the class of people protected by section 5 of the 1902 Act.[149] "If the plaintiffs are not granted standing to bring this suit, the

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WATERS AND WATER RIGHTS § 110.3, at 124 (R. Clark ed. 1967) ("This difficulty is compounded by the fact that there is no official, authoritative list of the laws amendatory of and supplementary to the Reclamation Act of 1902, and therefore nobody knows precisely what comprises that body of law which is described in the statutes as 'the reclamation law'.").

141. 352 F. Supp. 1300, 1319 (S.D. Cal. 1972), *vacated sub nom.* United States v. Imperial Irrigation Dist., 559 F.2d 509 (9th Cir. 1977).

142. 559 F.2d 509, 542 (9th Cir. 1977).

143. 42 Fed. Reg. 43,044 (1977) (to be codified in 43 C.F.R. § 426).

144. *Id.* at 43,046 (to be codified in 43 C.F.R. § 426.4(j)-(*l*)). The 1977 Proposed Rules require residency of future buyers but not of present owners. *Id.* The Bureau intends to propose additional rules in the near future requiring residency of all owners. *Id.* at 43,044.

145. *Id.* (emphasis added).

146. 352 F. Supp. at 1312.

147. 43 U.S.C. § 431 (1970).

148. 352 F. Supp. at 1303.

149. *Id.*

Department of Interior will in effect be given a license to disregard the law, as well as an immunity from challenges by the intended beneficiaries of the legislation in question."[150]

The Court of Appeals for the Ninth Circuit reversed,[151] denying standing on the basis of a test it had enunciated earlier in *Bowker v. Morton*.[152] In *Bowker*, a group of small farmers requested an injunction forcing the sale of excess land in a state irrigation project receiving water from a joint state-federal reservoir.[153] The plaintiffs sought application of the 160-acreage and residency limitations.[154] The court did not reach the merits because it held that the plaintiffs did not have standing.[155] The *Bowker* test for standing is that the plaintiff plead (1) a particularized injury, (2) concretely and demonstrably resulting from the defendant's action, which (3) will be redressed by the relief sought.[156] The plaintiff in *Bowker* stated that the government's failure to enforce reclamation law prevented family farmers from purchasing project land at reasonable prices.[157] However, the plaintiffs failed to allege a particularized injury resulting from governmental action because they neither alleged a desire to buy land in the state service area nor alleged what price they could afford. The plaintiffs did not show that the injury would be redressed by the relief sought because discontinuance of water to ineligible owners would not force a sale at reasonable prices.[158]

In *Yellen*, the plaintiffs alleged that they resided within the boundaries of the water district, that they desired to own land in the district, and that the only source of water was the federal project.[159] The essence of the plaintiffs' case was that enforcement of the residency requirement would result in making farmland available at prices the plaintiffs could afford.[160] The plaintiffs attempted to distinguish their status from the plaintiffs in *Bowker* by alleging that

150. *Id.* at 1303-04.
151. 559 F.2d at 542.
152. 541 F.2d 1347 (9th Cir. 1976).
153. *Id.* at 1348.
154. *Id.*
155. *Id.*
156. *Id.* at 1349. *See also* Flast v. Cohen, 392 U.S. 83 (1968) (the "gist of the question of standing" is whether the party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . . ." *Id.* at 99).
157. 541 F.2d at 1350.
158. *Id.*
159. 559 F.2d at 518.
160. *Id.*

they desired to buy farmland.[161] However, nothing in the record indicated what price the aggrieved parties could afford or that enforcement of the residency requirement would decrease land prices to a level the plaintiffs could afford.[162] The appellate court noted that the price of land is determined by the relationship between the supply of and demand for land, based on the assumption that the market would naturally adjust to a new residency requirement at indeterminable levels.[163] Even if the price were reduced, the plaintiffs might not have sufficient income to purchase land.[164] Therefore, the plaintiffs did not satisfy the first two parts of the *Bowker* standing test: the injury was neither particularized nor did it flow concretely and demonstrably from the government's failure to require residency.[165] The plaintiffs did not satisfy the third part of the *Bowker* test because discontinuance of water to non-residents would not necessarily redress the plaintiffs' alleged injuries.[166] Requiring residency would not force landowners to sell their land. Some landowners might elect to use the land for such non-agricultural purposes as industry or residences and would no longer need federal irrigation water.[167] The court summarized its holding on the standing issue by quoting its earlier opinion in *Bowker*:

> It is a mere speculative possibility that any relief which is appropriate under the statute will bring about the result sought by plaintiffs. . . . [T]he solution to plaintiffs' problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by plaintiffs.[168]

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 519.
166. *Id. See* Harrington v. Bush, 553 F.2d 190, 206 (D.C. Cir. 1977) (the standing doctrine maintains that the plaintiff must have such a strong connection to the controversy that the holding will demonstrably cause him to win or lose in some measure). *See also* Flast v. Cohen, 392 U.S. 83, 101 (1968).
167. 559 F.2d at 519.
168. *Id.* It is important to note that the appellate court granted standing to the Yellen intervenors in the acreage case. United States v. Imperial Irrigation Dist., 559 F.2d at 523 (consolidated on appeal with *Yellen* because of inconsistent district court holdings). The Yellen intervenors in the acreage case were substantially identical to the plaintiffs in *Yellen*, the residency case. *Id.* at 520. The Yellen group had standing in the acreage case but not in the residency case because different interests were alleged. In the residency case, the plaintiffs asserted an interest in reducing land prices to an *affordable level*. Standing was denied because the plaintiffs neither alleged what price they could afford nor proved that enforcement of residency would reduce prices to an affordable level. *Id.* at 518. In contrast, the Yellen intervenors in the acreage case asserted an interest limited to *some* reduction in land prices. *Id.* at 522. Land sold under acreage-limitation law is necessarily below current market value because by statute the price must be the appraised value minus the value attributable to the availability of federal water. 43 U.S.C. § 423e (1970). The court found that statu-

The plaintiffs in *Yellen* might not contest the Ninth Circuit's holding on standing because the Bureau's provision for residency in the 1977 Proposed Rules may enforce residency at less expense to the plaintiffs. However, if *Yellen* is taken to the United States Supreme Court, standing again should be a key issue.

A final judicial resolution of the residency question on the merits may be necessary if the United States Supreme Court finds that the *Yellen* plaintiffs have standing. Furthermore, the validity of the residency provision in the Bureau's 1977 Proposed Rules depends on

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tory price control gave the Yellen intervenors the necessary stake in the outcome of the lawsuit to confer standing. 559 F.2d at 523.

The significance of the contrary standing holdings at the appellate level is not that typical would-be purchasers have no standing to raise the residency issue. The lesson is that the residency plaintiffs alleged too broad an interest. Reduction of land prices to an affordable level is an interest which can not be satisfied by court-ordered enforcement of residency. Had the Yellen group in the acreage case alleged an interest in reducing prices to an affordable level, the court should have denied standing on authority of *Bowker* because sale at a controlled price under 43 U.S.C. § 423e would not necessarily reduce land prices to an affordable level. Likewise, the plaintiffs might have had standing in the residency case had they alleged the more limited interest in some reduction of land prices because a residency requirement would cause some indeterminable reduction in prices. Would-be purchasers raising residency or acreage issues in the Ninth Circuit should limit their alleged interest to *some* reduction in land prices.

Although the Yellen group alleged different interests in the residency and in the acreage cases, relief in the acreage case may be as speculative as relief in the residency case. The court denied standing to the plaintiffs in the residency case on the ground that the most it could order was a discontinuance of water deliveries to nonresidents. *Id.* at 519. Nonresidents would not be forced to sell. It is mere speculation that enforcement of the residency requirement would enable the plaintiffs to afford the land. *Id.*

The court distinguished the acreage from the residency case by finding that enforcement of the acreage limitation definitely would reduce land prices. *Id.* at 522. However, the excess landowners may wish to cultivate different uses, as may the nonresident landowners. *E.g.*, Affidavit of Donald Cox in Support of Application for Temporary Restraining Order and Preliminary Injunction at 2, County of Fresno v. Andrus, No. F. 77-202 (E.D. Cal., Dec. 7, 1977). The most the court could order in the acreage case is a discontinuance of water deliveries to excess owners. Neither the nonresident landowners nor the excess landowners could be forced to sell the land. Relief is speculative in both cases.

The court admitted that the relief in the acreage case is somewhat speculative. 559 F.2d at 523. However, the court minimized the speculative element by stating that the Yellen group need not show with certainty that they will be able to purchase the excess lands if the 160-acre limit is enforced. *Id.* All that must be shown is that the Yellen intervenors could never buy at below current prices unless the acreage limit were enforced. *Id.* The court found that the plaintiffs in the residency case could have obtained relief by other means. Prices could become affordable through changes in federal tax or in loan regulations, or through changes in the crop-support system. *Id.* at 518-19. However, this argument can be applied equally to acreage. The alleged interest in some reduction of land prices could be satisfied by tax, by loan, or by crop-support changes.

whether residence is required by statute. Therefore, the statutory and legislative history of the residence requirement must be examined.

Did the 1926 Omnibus Adjustment Act Abolish the Residency Requirement of the 1902 Reclamation Act?

Section 5 of the 1902 Act restricted the sale of water rights to residents on the land or in the neighborhood.[169] Section 46 of the 1926 Act makes joint-liability contracts mandatory in all projects begun after May 25, 1926.[170] Section 46 contains detailed provisions for a 160-acre limitation, but omits mention of a residency requirement.[171] However, there are no provisions in the 1926 Act specifically repealing the 1902 Act. Thus, an examination of the legislation preceeding the 1926 Act is necessary to understand congressional intent in failing to require residency.

The Warren Act of February 21, 1911 (Warren Act) was the first departure from the individual contracting system.[172] The Warren Act gives the Secretary power to enter into contracts with existing irrigation districts for the construction and operation of irrigation and drainage facilities.[173] Section 2 of the Warren Act provides that "water shall not be furnished . . . to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres."[174] The Warren Act does not impose a residency limitation on water deliveries.[175] The residency requirement of the 1902 Act is limited to *individual* water-right sales. Because individual water-right sales were not made in Warren Act projects, no basis existed for imposing the residency requirement. In 1915, the Idaho Supreme Court stated that "the act of Congress of February 21, 1911, known as the Warren Act, and the subsequent act of Congress passed August 13, 1914, known as the Reclamation Extension Act, make no provision for residence upon the lands to be irrigated from the waters of a governmental project."[176]

169. 43 U.S.C. § 431 (1970). For a discussion of the duration of the residency required by the 1902 Act, *see* text accompanying notes 192-208 *infra*.

170. Joint-liability contracts require the Secretary to contract with the irrigation district, rather than with individuals, before water is delivered from any new project. *See* 43 U.S.C. § 423e (1970). A major advantage of joint-liability contracts is that all lands within an irrigation district are obligated to pay the cost of providing water, thereby eliminating problems when large numbers of landowners do not desire to participate in the project. H.R. REP. No. 1065, 66th Cong., 2d Sess. 1, 4 (1919) (statement of Secretary of Interior Lane).

171. 43 U.S.C. § 423e (1970).

172. 43 U.S.C. §§ 523-525 (1970).

173. *See* New York Trust Co. v. Farmers' Irrig'n Dist., 280 F. 785, 795 (8th Cir. 1922).

174. 43 U.S.C. § 524 (1970).

175. 43 U.S.C. §§ 523-525 (1970).

176. Nampa & Meridian Irrig'n Dist. v. Petrie, 28 Idaho 227, 240, 153 P. 425, 429 (1915).

Congress authorized joint-liability contracts on the Rio Grande Project in 1917.[177] The resulting appropriations statutes did not require residence.[178] The Act of May 15, 1922 (1922 Act) extended the joint-liability contract procedure by empowering the Secretary to contract with any irrigation district and to release the government lien in individual contracts after contracts are made with the appropriate irrigation district.[179] Because the 1922 Act does not mention residency, it may imply that Congress was establishing a practice of imposing no residency requirements on projects developed under joint-liability irrigation contracts. However, the 1922 Act neither limits acreage nor is otherwise repugnant to the 1902 Act. Therefore, repeal of residency may not be a proper inference.[180]

Shortly after the passage of the 1922 Act, Congress formed the Committee of Special Advisors on Reclamation (Fact Finders Committee) to criticize reclamation law and to make recommendations for its revision.[181] Nowhere in the 1924 report of the Fact Finders Committee[182] appeared proposals for a residency requirement. The Fact Finders Committee did not conclude that the 1902 Act mandated more than a threshold residency requirement. The Fact Finders Committee made no recommendations to Congress to apply residency requirements to joint-liability contracts. Arguably, the Fact Finders Committee would have included a perpetual-residency requirement had it believed one required by the 1902 Act.

Even assuming that the Fact Finders Committee believed that the 1902 Act required perpetual residency, it did not believe it necessary to retain a residency requirement. Joint-liability contracts omitting residency had been used for thirteen years when, in 1924, the Fact Finders Committee stated that "no better conditions with respect to tenancy could be expected under the conditions of American life."[183] The Fact Finders Committee accepted the tenancy conditions resulting from removal of a residency requirement under joint-liability contracts. Although a goal of the 1902 Act was to discourage tenancy

177. Ch. 27, 40 Stat. 148 (1917).
178. *E.g.*, ch. 113, 40 Stat. 674 (1918).
179. Ch. 190, 42 Stat. 542 (codified at 43 U.S.C. § 512 (1970)).
180. *See* Recent Developments, *Reclamation Law in Litigation: Acreage and Residency Limitations on Private Lands*, 21 S.D. L. REV. 695, 724-28 (1976).
181. *See* 1946 LANDOWNERSHIP SURVEY, *supra* note 64, at 45.
182. *See* S. DOC. No. 92, 68th Cong., 1st Sess. 24-40 (1924).
183. *Id.* at 96.

and to encourage owner operation,[184] it appears that the Fact Finders Committee believed that water rights under the emerging joint-liability contract system did not and should not require residency.

In the 1926 Act, Congress made joint-liability contracts mandatory on all subsequently constructed projects and did not require residency.[185] Shortly after Congress passed the 1926 Act, it appropriated funds for projects on the Sun River,[186] the Vale,[187] the Salt Lake Basin[188] projects, and the Kittikas division of the Yakima project.[189] None of these acts included a residency requirement.

Congress long has been aware that the Bureau has not required residence as a condition for water in joint-liability projects, yet Congress never has reinstituted a general residence requirement. In 1944, opponents of the excess-land law had argued before the Senate Commerce Committee that reclamation law would impose a residency requirement in the Central Valley of California. Assistant Commissioner of Reclamation Warne clearly stated that the residency requirement had not been applied to any project since 1922.[190] The 1977 Proposed Rules mark the first time since the advent of joint-liability contracts that the Bureau has proposed to require residency.[191] Congressional acquiescence in the longstanding Bureau assumption that residency is not required in joint-liability contracts may imply congressional belief that the 1926 Act abolished the residency provisions of the 1902 Act.

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184. *E.g.*, 35 CONG. REC. 1386 (1902) (statement of Rep. Henry C. Hansbrough of North Dakota).

185. *See* 43 U.S.C. § 423e (1970).

186. Ch. 27, 44 Stat. 958 (1927).

187. *Id.* at 959.

188. *Id.* at 960.

189. *Id.*

190. *Hearings on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 1st Sess. 761-62 (1944) (statement of William Warne, Assistant Commissioner of the Bureau of Reclamation). Mr. Warne stated:

> The Act of May 15, 1922 (42 Stat. 541), authorized water right applications signed by the individual landowners to be dispensed with when the United States enters into a contract with an irrigation district to pay construction charges. Since the act of 1922, almost all of the projects have been developed under it.
>
> As a result of the act of 1922, where individual water right applications with private landowners are dispensed with, the residence requirement, which is an incident of water right applications, is also not applicable, and it has not been required in connection with any project since the act of 1922 where the United States relies solely upon a contract with an irrigation district for the return of the construction cost of a project.

191. *See* Renda, *Owner Eligibility Restrictions—Acreage and Residency*, 8 NAT. RESOURCES LAW. 265, 280 (1975).

Is the Residence Requirement of the 1902 Act Lifted After the Initial Water Application Is Approved?

If the 1926 Act abolished the residence requirement of the 1902 Act, the residency provision in the Bureau's 1977 Proposed Rules is invalid. However, assuming arguendo that reclamation law requires residence, the issue of the length of residency required by the 1902 Act remains. Section 5 of the 1902 Act provides for two separate forms of contract.[192] Subsection 1 of section 5 deals only with homesteaders of public land; subsection 2 deals exclusively with purchase of water rights for private land under the federal reclamation program. Subsection 1 contains no explicit residency requirement.[193] However, a homesteader under the 1902 Act was under a five-year residency requirement because subsection 1 of the 1902 Act expressly required compliance with other homestead provisions[194] and because an 1866 homestead statute required residence for five years.[195] Once the five-year requirement was satisfied, the homesteader was free to leave without fear of losing his water patent. The distinction between public-land homesteaders and private landowners is important. Homesteaders were under a five-year residency requirement. The residency requirement for private lands, however, is merely actual residence at the *time of sale* of the water right.[196] Thus, the duration of residency depends on the date at which the "sale" occurs. Unfortunately, the 1902 Act does not define sale.

If sale occurs upon completion of all payments, the 1902 Act requires residency only until all payments are completed.[197] This interpretation is plausible in light of the provision in section 5 that a permanent right to the use of water attaches when all payments are made.[198] Thus, a bona fide resident buyer could make all his payments at once and leave the area without losing his water right.

192. 43 U.S.C. §§ 431, 439 (1970).
193. 43 U.S.C. § 439 (1970).
194. *Id.*
195. *See* ch. 127, 14 Stat. 67 (1866). In 1912, Congress passed the Three-Year Homestead Act, ch. 153, 37 Stat. 123 (codified at 43 U.S.C. § 164 (1970)). The Three-Year Homestead Act reduces the five-year homestead residency requirement to seven months in each of three years.
196. 43 U.S.C. § 431 (1970).
197. *See* Recent Developments, *Reclamation Law in Litigation: Acreage and Residency Limitations on Private Lands*, 21 S.D. L. REV. 695, 730 (1976).
198. 43 U.S.C. § 431 (1970).

The Department of the Interior defines the time of the water-right sale as the date of approval and the recordation of the water application.[199] Under this definition, residency is merely a condition precdent to approval of the water application. In the now-vacated *Yellen* opinion, Judge Murray rejected the interpretation of the Department of the Interior and ruled that the residency requirement in section 5 of the 1902 Act was a continuing restriction upon the right to receive water in perpetuity.[200] Judge Murray reasoned that limiting residency to a threshold requirement would be contrary to the whole tenor of reclamation law.[201] Judge Murray believed that threshold residency would violate anti-speculation policy because investors could establish residence, buy at low pre-water prices, move away, and later sell the land at high post-water prices.[202] However, proper price-monitoring, not continuing residency, guards against speculation.[203] Because *Yellen* is vacated, residency (if not abolished by the 1926 Act) remains merely a threshold requirement under the Department of the Interior's interpretation.

The history of the Act of August 9, 1912[204] (1912 Act) may indicate that Congress did not believe residency to be a continuing requirement for water rights under the 1902 Act. Section 1 of the 1912 Act can be interpreted to impose acreage limitations and residency as threshold requirements only.[205] For this reason, Congressman Raker feared that section 1 would emasculate the 1902 Act.[206] In response, Congress passed section 3 of the 1912 Act, which makes the 160-acre limitation a continuing restriction on water until the landowner makes the final repayment.[207] However, section 3 of the 1912 Act does not make residency a continuing requirement.[208] The extension of the 160-acre limitation without a similar extension of the residency requirement may imply congressional belief that residency under the 1902 Act was limited to a threshold requirement.

Does a Residency Requirement Serve any Current Policies?

The outcome of the residency question should turn on the current validity of the policies residency was designed to effectuate. In 1971,

199. 1 U.S. DEP'T OF THE INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED 67 (1972). *But see* 2 WATERS AND WATER RIGHTS § 121 (R. Clark ed. 1967).
200. 352 F. Supp. at 1319.
201. *Id.* at 1306.
202. *Id.*
203. *See* text accompanying notes 247-84 *infra*.
204. 43 U.S.C. §§ 541-546 (1970).
205. 43 U.S.C. § 541 (1970).
206. *See* 48 CONG. REC. 9083 (1912).
207. 43 U.S.C. § 544 (1970).
208. *Id.*

the *Yellen* court upheld the residency requirement because the "policy behind reclamation law to aid and encourage owner operated farms requires enforcement of the residency requirement . . . ."[209] Although the Ninth Circuit dismissed and vacated *Yellen* for lack of standing, other courts may look to policy if confronted with the residency issue. Also, Congress is examining reclamation policy as it considers legislation requiring residency.[210]

The first policy, maximization of settlers,[211] may no longer be a valid national policy because the west was settled long ago.[212] The second policy is the prevention of speculative gain.[213] It may be true that some prospective speculators would not buy if they were required to reside on or near the land. However, investors may already live within fifty miles of the property.[214] Furthermore, even bona fide resident farmers can realize speculative gains unless speculation is prevented by another device. This device is control of the sale price. Speculative gain occurs when land is bought at a pre-water price and sold at a higher price reflecting the value of a reliable water supply. Anti-speculation is indeed an important policy. However, speculation is controlled only if the sale price is monitored to exclude value attributable to federal water.[215] Requiring residency adds nothing. The third reclamation policy is the wide distribution of the federal subsidy benefits accruing to the owner and to the operator.[216] Limiting the number of acres for which federal project water will be supplied is the only practical way to further this subsidy policy.[217] A residency requirement will not promote wide distribution of subsidy benefits because these benefits will accrue to owners and to operators irrespective of their places of residence.

The policy best served by a residency requirement is the promotion of the family farm. A recently updated study of two farming

209. 335 F. Supp. at 208.
210. *See, e.g.*, S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,294, S11,300 (daily ed. June 30, 1977).
211. 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.1(a)).
212. *See* text accompanying notes 62-66 *supra*.
213. 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.1(d)); *see* text accompanying notes 67-70 *supra* & 247-84 *infra*.
214. 124 CONG. REC. S2533 (daily ed. Feb. 28, 1978).
215. *See* text accompanying notes 67-70 *supra* & 247-84 *infra*. *But cf.* 124 CONG. REC. S2532 (daily ed. Feb. 28, 1978) (speculation could be controlled by requiring owner to derive income from the land rather than from renting it out at fixed fee).
216. 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.1(b)). *See* text accompanying notes 71-82 *supra*.
217. *See* text accompanying notes 79-82 *supra*.

communities in California suggests that small-acreage family farming creates a better community atmosphere than does large-acreage corporate or investor farming.[218] The small farm community supports a larger local business district[219] and more than four times the number of social and civic organizations.[220] There are more schools, parks, and playgrounds in the small farm community.[221] The small farm community is relatively self-sufficient, while the large farm community is more dependent on outside sources of capital.[222]

The family-farm policy has often occupied a central place in official statements concerning residency. Supporters of the 1902 Act clearly intended it to promote the family farm.[223] The 1910 Bureau rule that the owner must reside within fifty miles of the subject land was expressly designed to promote the family farm.[224] Family-farm policy continues to be a major theme in recent debate.[225] A recent attempt to revise reclamation law, the Nelson-Haskell Bill, is entitled "The Reclamation Lands *Family Farm* Act of 1977."[226] If the Nelson-Haskell Bill becomes law, only individuals meeting certain qualifications as "family farmers" will be eligible to buy excess land.[227]

Despite the evident importance Congress places on family-farm policy, the congressional vision may be unrealistic. Congress seems to envision a "mythic family farm" where family ownership, family operation, and family residence coincide.[228] However, marketing, unionism,[229] and economies of scale have in fact transformed farming into a modern industry. In the market-oriented family farm, the place of residence of either the owner or the operator is irrelevant.[230] The Bureau's refusal to enforce a residency requirement[231] may have reflected a belief that in America it was neither possible nor desirable to create a version of Old World peasantry tied to the land.[232] Owner residence on or near the farm is unnecessary if a farm is

218. *See* 1978 USDA STUDY, *supra* note 10, at 30.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *E.g.*, 35 CONG. REC. 6758 (1902) (statement of Rep. Martin).
224. Para. 44, Reg. of May 31, 1910, 38 Pub. Lands Dec. 637. *See also* 42 Fed. Reg. 43,044, 43,046 (1977) (to be codified in 43 C.F.R. § 426.4(k)).
225. *E.g.*, *1976 Oversight Hearings*, *supra* note 34, at 145 (statement of John Krebs).
226. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300 (daily ed. June 30, 1977) (emphasis added).
227. *Id.*
228. *See* 35 CONG. REC. 6751-58 (1902); H. HOGAN, *supra* note 1, at 6.
229. *See generally* CAL. LAB. CODE §§ 1140-1166.3 (West Supp. 1977).
230. H. HOGAN, *supra* note 1, at 6.
231. *See* notes 190-91 and accompanying text *supra*.
232. H. HOGAN, *supra* note 1, at 79.

treated as income-producing property in the American entrepreneurial tradition.[233]

A 1978 Senate Bill, S.2606,[234] would abolish any residency requirement. In introducing the Bill, Senator Church indicated that "the law must be changed to conform with present-day realities."[235] These realities include non-enforcement of residency and the fact that many farmers now live well over fifty miles from their farms.[236] The Church Bill would abolish residency because it no longer effectuates reclamation policy.[237]

However, assuming that Congress continues to pursue the disputable family-farm policy, what residency provisions are appropriate? Residency on the farm itself is unnecessary. Farms can be successfully operated by owners living where they please within commuting distance. It would be unwise to prevent farmers from living in town or in another nearby area. The Bureau's 1977 Proposed Rules recognize this fact by allowing residence within a fifty-mile radius of the farm.[238] The Nelson-Haskell Bill allows residence "on or near the land."[239]

In addition, a special residency provision should be created for retired farmers and for widows wishing to reside outside the fifty-mile limit. Sale and reinvestment, although not prevented, are not always practical for an older person.[240] The Nelson-Haskell Bill would provide water to non-excess land owned by a retired farmer only if he continued to reside on the land.[241] A family farmer could lease the land for two years of any ten-year period, with extentions for hardship to the owner,[242] but an owner would have to live on or near the land to qualify as a family farmer.[243] Thus, it appears that the Nelson-Haskell Bill makes no provision for the retiree or for the

233. *Id.*
234. S.2606, 95th Cong., 2d Sess., 124 CONG. REC. S2533 (daily ed. Feb. 28, 1978).
235. *Id.* at S2532.
236. *Id.*
237. *Id.* at S2533.
238. 42 Fed. Reg. 43,044, 43,046 (1977) (to be codified in 43 C.F.R. § 426.4(k)).
239. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300 (daily ed: June 30, 1977).
240. *1976 Oversight Hearings*, *supra* note 34, at 170-71 (statement of Ralph Brody).
241. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,301 (daily ed. June 30, 1977).
242. *Id.*
243. *Id.* at S11,300.

widow wishing to move elsewhere. This problem can be solved by providing that residence is not a prerequisite to the receipt of project water for land owned by retired farmers or by widows who evidence their status as bona fide family farmers by residing on or near their land for some specified length of time.[244]

CURRENT PROPOSALS IN EXCESS-LAND SALE PROCEDURE: SPECULATION CONTROL AND GOVERNMENTAL FINANCING

The first restriction on the receipt of federal reclamation water is the acreage limitation. Residency, if required, would place a second restriction on receipt of water. Non-residents and owners of excess land are not required by reclamation law to sell their land. The only direct sanction against ineligible owners is that federal water will not be supplied for the excess acreage.[245] Nevertheless, few owners can afford to retain arid or semiarid land without water. Section 46 of the 1926 Act provides that water will be delivered to excess land if the owner executes a recordable contract to sell the land to an eligible buyer under terms and conditions satisfactory to the Secretary of the Interior.[246] The final section in this Comment examines two problems occurring in the sale of excess lands: speculation control and financing.

Speculation Control: Time to Get Tough

Prevention of windfall, speculative gains from dealing in reclamation-project land is a cornerstone reclamation policy.[247] Congress drafted section 12 of the Reclamation Act of August 13, 1914[248] to curb speculation by controlling the sale price of excess land, but section 12 failed to achieve its purpose because no subsequent sales were monitored.[249] The 1924 report of the Fact Finders Committee documented the gross speculation that continued.[250] Congress passed section 46 of the 1926 Act to end speculative ownership.[251] Section 46

244. *Cf.* S. 2606, 95th Cong., 2d Sess., 124 CONG. REC. S2533 (daily ed. Feb. 28, 1978) (residency would be abolished but 10-year proprietorship would be required).

245. 42 Fed. Reg. 43,044, 43,047 (1977) (to be codified in 43 C.F.R. § 426.6(a)).

246. 43 U.S.C. § 423e (1970). The Bureau has traditionally placed a 10-year limit on water delivery to excess land under a recordable contract. Renda, *Owner Eligibility Restrictions—Acreage and Residency*, 8 NAT. RESOURCES LAW. 265, 274 (1975). The 1977 Proposed Rules would allow water delivery under a recordable contract for only five years. 42 Fed. Reg. 43,044, 43,046 (1977) (to be codified in 43 C.F.R. § 426.5(a)(2)(i)).

247. 42 Fed. Reg. 43,044, 43,045 (1977) (to be codified in 43 C.F.R. § 426.1(d)). *See* text accompanying notes 67-70 *supra*.

248. Ch. 247, 38 Stat. 686, 689-90 (1914).

249. 1946 LANDOWNERSHIP SURVEY, *supra* note 64, at 48.

250. *Federal Reclamation by Irrigation*, S. DOC. No. 92, 68th Cong., 1st Sess. 38-39 (1924).

251. 1946 LANDOWNERSHIP SURVEY, *supra* note 64, at 29.

provides for price control in *all* sales of excess land until one-half of the construction charges against the excess land are paid.[252]

The record of the Bureau in enforcing the resale price controls of the 1926 Act is poor.[253] The 1976 GAO Report indicated that the Bureau's appraisal techniques failed to control speculation in the Westlands Water District of the Central Valley Project in California.[254] The court in *National Land for People, Inc. v. Bureau of Reclamation of the Department of the Interior* cited the 1976 GAO Report with approval, criticized the Bureau's appraisal techniques, and directed the Bureau to initiate public rule-making proceedings as to criteria and procedures for approval of excess-land sales.[255] In 1977, the Bureau admitted that speculative second sales have not been monitored.[256]

The 1977 Proposed Rules mark a major change in appraisal procedure. The Bureau proposes to control speculation by exercising continuing supervision over the sale price of land *after* it is sold into non-excess status.[257] A two-tier price approval policy is established. Former excess land resold within ten years after acquisition must be sold at a dry-land price.[258] Land that is resold after ten years and before one-half of the construction charges allocated to irrigation have been paid is to be sold at a price that does not reflect "unreasonable profit."[259] This provision reverses the current practice of allowing an excess-land purchaser to realize the windfall profits represented by low-priced federal water in an immediate resale.[260] Thus,

252. 43 U.S.C. § 423e (1970).
253. *E.g., Hearings on H.R. 6522 Before the House Comm. on Irrigation and Reclamation*, 77th Cong., 2d Sess. 41 (1943) (statement of Commissioner Page).
254. 1976 GAO REPORT, *supra* note 15, at 5.
255. 417 F. Supp. 449, 453 (D.D.C. 1976), *vacated as moot*, No. 76-2027 (D.C. Cir., Jan. 20, 1978). *National Land For People, Inc.* was vacated as moot because in June, 1977, the Secretary placed a moritorium on sales approval of all project land and had issued the 1977 Proposed Rules. Telephonic interview with Nicholas Goschy, Attorney, Dept. of the Interior, Washington, D.C. (March 10, 1978). Therefore, the Secretary of the Interior is no longer enjoined from approving sales of excess lands under prior guidelines such as *Basic Solicitor's Opinions*. However, the court lifted the injunction on the condition that the government not approve any sales in the Westlands until adequate public rule-making proceedings were completed. *Id.*
256. 42 Fed. Reg. 43,044 (1977).
257. *Id.*
258. 42 Fed. Reg. 43,044, 43,048 (1977) (to be codified in 43 C.F.R. § 426.9(b)).
259. *Id.*
260. *Id.* at 43,044.

the second-sale protection of the 1926 Act will finally be enforced.

The 1976 GAO Report criticized other appraisal methods permitting speculative gains in the Westlands. The Bureau approved "package deals" in which the buyer was forced to purchase unwanted equipment and other chattels.[261] Inadequate techniques for valuing improvements, irrigation systems, equipment, cars, and machinery in combined land/chattel sales prevented the Bureau from determining whether the seller allocated an inaccurately low value to the land in order to comply with the "pre-project land value" requirement for Bureau approval.[262] The 1977 Proposed Rules solve these speculation problems by providing that no buyer shall be required to purchase non-fixture and personal property[263] and that non-fixture and personal property shall be appraised in accordance with the guidelines in the controlling water-service or repayment contract.[264] The 1977 Proposed Rules also provide that no post-sale appraisal will be approved.[265] The former practice was to give perfunctory "approval" to many sales which already had been consummated and recorded, often without consideration of the pre-project value.[266]

One weakness in the appraisal provisions of the 1977 Proposed Rules is that no attempt is made to specify *how* pre-project land value shall be calculated. A key element in speculation control is that the sale price of excess land shall be "fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works."[267] One thrust of the 1976 GAO Report is that the procedure for calculating the value of project enhancement is inadequate.[268] The 1977 Proposed Rules do not meet this criticism but simply repeat the statutory requirement that the price must not include enhancement attributable to the construction of the project.[269]

The Nelson-Haskell Bill specifies a method of calculation. The "value without project enhancement" is defined as the fair market value of the land at the initiation of actual construction of the project, indexed by the Consumer Price Index for the period between

261. 1976 GAO REPORT, *supra* note 15, at 14.
262. *Id.*, at 6.
263. 42 Fed. Reg. 43,044, 43,048 (1977) (to be codified in 43 C.F.R. § 426.10(f)).
264. *Id.* (to be codified in 43 C.F.R. § 426.10(g)).
265. *Id.* (to be codified in 43 C.F.R. § 426.12(f)).
266. 1976 GAO REPORT, *supra* note 15, at 7 (117 of the 442 proposed sales in the Westlands from 1965 to 1975 had been recorded before Bureau approval was sought).
267. 43 U.S.C. § 423e (1970).
268. 1976 GAO REPORT, *supra* note 15, at 5.
269. 42 Fed. Reg. 43,044, 43,048 (1977) (to be codified in 43 C.F.R. § 426.10(a)).

that owner's purchase and sale of the land.[270] The second-sale windfall would be eliminated by the provision that the owner who purchases excess land at a controlled price may not resell the land at a price greater than his cost, indexed for inflation during the period of ownership.[271] The Nelson-Haskell Bill would lift strict price controls after ten years, like the 1977 Proposed Rules,[272] except that the seller would be required to have actually farmed the land during the ten-year period.[273]

Two problems remain under any of the current proposals. First, none of the current proposals provide for reducing the sale price to exclude value attributable to the increase in ground-water supplies caused by federal irrigation. Ground water in the Westlands has increased dramatically since the federal water arrived, thus increasing land values.[274] However, the Bureau's appraisers did not reduce the approved sale prices to exclude this enhancement.[275] The 1976 GAO Report recommended that ground-water supply should be considered in estimating the value of the land without project enhancement.[276]

The second problem is that frequent land sales at market value in some older projects[277] have created a situation where present owners would be unfairly penalized by sales price control. The reason is that the value of federal water is capitalized into the sale price soon after the subsidy becomes known because the purchase price reflects the income that a buyer can expect to derive from the land.[278] The windfall accrues only to the person buying land at low prices before federal water is available and selling it at high prices afterward. Once the first windfall is made, the value of the federal subsidy no

270. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,302 (daily ed. June 30, 1977).

271. *Id.*

272. 42 Fed. Reg. 43,044, 43,048 (1977) (to be codified in 43 C.F.R. § 426.9(b)). However, the sale price would continue to be monitored for "unreasonable profit" under the 1977 Proposed Rules. *Id.*

273. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,302 (daily ed. June 30, 1977).

274. 1976 GAO REPORT, *supra* note 15, at 11.

275. *Id.*

276. *Id.*, at 14.

277. *E.g.*, a study conducted by Title Insurance and Trust Co. of El Centro, California revealed that 30% of a randomly selected sample of acres in the Imperial Valley were sold between 1970 and 1977. *See* 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of Eldon Phillips on file with the *San Diego Law Review*). This study implies a 100% turnover every twenty-five years.

278. *See* Palm Springs Hearings, note 16 *supra* (unpublished statement of William W. Wood, Jr. on file with the *San Diego Law Review*).

longer can be realized by subsequent sellers.[279] Their profit will merely reflect a general inflation in land prices. Many current Imperial Valley farmers will not realize any windfall because they paid fair market value prices reflecting project benefits.[280] Those who sold to them are beyond the reach of reclamation law because they have died, retired, or sold out.[281] It is inequitable to penalize a present owner while the true beneficiary escapes.

The proper solution might be to allow sale at fair market value in cases where the seller did not own the land when the project benefits were first capitalized into the land price. Where the land has been in the seller's family continuously since before the project became known, the sale should be subject to anti-speculation price controls because a landowner who bought at pre-project prices presumably would not capitalize the water value if he sold to a family member.[282] In such cases, the present owner could be presumed to have obtained the land at a pre-water price unless he could prove otherwise.

Government Purchase and Financing

The would-be family farmer will not benefit from reclamation law designed to help him if he can neither afford the land nor obtain financing. This problem is greater when improper appraisal techniques fail to reduce the sale price to pre-project levels. Improved appraisal techniques, promised by the Bureau[283] or required by statute,[284] could solve part of the price problem. However, the land still may be unaffordable for two reasons. First, the advent of project water may be discounted in land values long before federal water arrives.[285] In this case, the "land price before initiation of the project" still may be too high for many beginning farmers. Second, it

279. *Id.*

280. *E.g.*, 1978 Palm Springs Hearings, note 16 *supra* (unpublished statements of Robert Brown and John Kubler on file with the *San Diego Law Review*).

281. *Id.* (unpublished statement of William W. Wood, Jr. on file with the *San Diego Law Review*).

282. *But see id.* (unpublished statement of Eldon Phillips on file with the *San Diego Law Review*) (a recent study by Title Insurance and Trust Co. of El Centro, California indicated that the sale price of many land transfers within families in the Imperial Valley is approximately fair market value).

283. *See* BUREAU OF RECLAMATION, COMMENTS ON THE REPORT OF THE COMP. GEN. OF THE U.S. TO CONGRESS: "APPRAISAL PROCEDURES AND SOLUTIONS TO PROBLEMS INVOLVING THE 160 ACRE LIMITATION PROVISION OF RECLAMATION LAW", *reprinted in 1976 Oversight Hearings*, *supra* note 34, at 27.

284. *See* text accompanying notes 270-73 *supra*.

285. H. HOGAN, *supra* note 1, at 289; 1978 Palm Springs Hearings, note 16 *supra* (unpublished statement of William W. Wood, Jr. on file with the *San Diego Law Review*).

may be unfair to the current owner to appraise his land below current market value if the land has changed hands since the initial capitalization of project benefits. Financing presents an additional problem to the would-be farmer. Lending institutions may be reluctant to loan money to people without a record of successful farming.[286]

The best solution to these price and financing problems is federal purchase of excess land coupled with federal financing for eligible buyers. Congress incorporated a governmental purchase and financing provision in the Columbia Basin Project Act of 1943.[287] In 1964, Secretary of the Interior Udall recommended that Congress establish a purchase and resale fund that would apply to all the projects.[288] A broad governmental purchase and resale bill, House Bill 5236,[289] was introduced in 1971 but did not become law. House Bill 5236 would have prevented private speculative profit by empowering the government to buy excess land at pre-project prices.[290] However, the Bill would have allowed the government to sell the land to would-be farmers at the water-enhanced, current market value.[291] The government, not the private seller, would have realized the windfall.[292] The windfall funds were earmarked for public education, for conservation, and for economic development.[293] The justification for this Bill was that the public investment in reclamation-project construction should be returned to the public.[294] The flaw in House Bill 5236 was that the price of government land would have been too high for many would-be farmers to purchase.

The Nelson-Haskell Bill would solve these pricing and financing problems. Twenty-five million dollars would be appropriated for 1978-1982 for purchase of excess lands by the Secretary of the Interi-

286. San Diego Union, Aug. 28, 1977, § 1, at 10, col. 4 (statement of Bill Gentle, bank agricultural economist for Security Pacific Bank in Fresno).
287. 16 U.S.C. § 835a(c)(i) (repealed 1962).
288. DEP'T OF THE INTERIOR, 88TH CONG., 2D SESS., ACREAGE LIMITATION POLICY STUDY PREPARED FOR THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS at ix (Comm. Print 1964).
289. H. 5236, 92d Cong., 1st Sess., 117 CONG. REC. 11,201, 11,202 (1971).
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. AMERICA'S PUBLIC LANDS 352 (H. Nathan ed. 1972) (statement by Paul Taylor at the Conference on the Public Land Laws, Dec. 1970).

or.[295] The Secretary could lease the government lands to farmers lacking adequate resources or financing.[296] The lease period would be from two to seven years.[297] Leaseholders could buy the land from the government at the end of the tenancy for the same price the Secretary paid for the land, indexed for inflation.[298] Financing would be accomplished by means of federally guaranteed loans made upon certification of financial inability to buy.[299]

SUMMARY

Congress should revise reclamation law in light of modern agriculture.[300] Anti-speculation, subsidy, and family-farm policies can be effectuated by means far less inhibiting to efficient, rewarding farming than a 160-acre limit. The first step is to increase the basic water entitlement to a reasonably efficient and adequate level, possibly 1000 acres. Second, a multiplier for family size in the form of family partnerships, corporations, and trusts should be allowed. Third, Congress should expressly empower the Secretary of the Interior to account for variations in growing conditions by setting acreage equivalencies. The fourth step is to limit leasing. Leasing should be limited because valuable federal subsidies accrue to operators and to owners of large acreages even when the Engle formula is adopted. If the basic entitlement is increased to a reasonably high acreage, the operator should be restricted to any combination of ownership and leasing up to the basic entitlement. However, if the basic water entitlement is not raised, leasing should be allowed to permit efficient and adequate farm sizes.

The courts have failed to resolve the residency issue. Typical would-be purchasers may not have standing to maintain an action forcing interpretation of the statutes. Even if standing exists, the courts could find that reclamation law does not require perpetual residency. Congress should amend the law to clarify the residency issue. Residency may no longer further any valid policy. If Congress expressly reinstates residency, it should define the term liberally in order to allow farmers great flexibility in their choices of residence. Residency should not be a continuing prerequisite for project water for retired farmers and widows.

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295. S. 1812, 95th Cong., 1st Sess., 123 CONG. REC. S11,300, S11,302 (daily ed. June 30, 1977).
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* at S11,303.
300. As of the publication date of this Comment, about 35 different bills to reform reclamation law have been introduced in the 95th Congress. Although compromise legislation is expected, it is unknown whether any reclamation legislation will be enacted before the end of the current session. Early reform is

Once Congress amends the acreage and residency provisions of the excess-land law, it should provide means to prevent windfall gains in speculative sales and to enable would-be farmers of modest means to buy the land. Congress should adopt the appraisal and governmental loan-guarantee provisions of the Nelson-Haskell Bill.

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unlikely in light of the complexity of the problems outlined in this Comment and the press of other legislative matters. This Comment's treatment of two of these bills—the Nelson-Haskell Bill and the Church Bill—is intended to illustrate the nature of current congressional debate.