

THE EXCESS LAND LAW: EXECUTION OF A PUBLIC POLICY

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I

LAND, WATER, LANGUAGE

"Monopoly of land need not be feared. The question for legislators to solve is to devise some practical means by which water rights may be distributed among individual farmers and water monopolies prevented."

—Major J. W. Powell¹

A GREAT confusion pervades discussion of the excess land law and threatens disaster to public policy regarding disposing of public domain. Congress has declared this policy to be the widespread distribution of benefits, and the curbing of monopoly and speculation, whether the domain is in form of land, water, or both. The excess land provision of the National Reclamation Act of 1902 is a means of attaining these ends in the public disposal of water.

General and legal acceptance have joined to confer authority upon either of two descriptive titles—"excess land law" or "160-acre limitation"—both of them equally deceptive. The law is not really a *land* law, and it places no limitation whatsoever upon the *acreage* a man may own. The restraint is neither upon acreage of land nor upon water, but upon the *individual*. No individual is entitled to receive more than an equitable share of the water distributed under reclamation law. The maximum *individual* share is set at an amount of water necessary to irrigate 160 acres of land.

Among the sources of this confusion of language, two are "accidents"—one physical, the other historical. The first is the unequal geographical distribution of water. Water and land are two halves of a productive whole everywhere. East of the one hundredth meridian nature has joined them, and any description or analysis of agricultural land can assume water. West of the hundredth meridian water and land are separate. Man-made works—reservoirs and canals—are required to join them. Water and land, therefore, must be treated separately, whether as physical entities, objects of private ownership, or the concern of public policy. Water cannot be assumed as the natural, inevitable

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1. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 41 (2d ed. 1879).

and permanent adjunct of land. *Land* ownership does not equal *water* ownership west of the hundredth meridian.

The second source of confusion is an historical accident. Policy was debated and formulated in the nineteenth century when settlement was still east of the hundredth meridian, and water was not a concern. The great legislative landmarks in the nation's policy favoring actual settlers are land laws—the Pre-emption Act of 1841² and the Homestead Act of 1862.³ After these acts were passed, settlement crossed the hundredth meridian, and water became the primary concern. General policy was not altered with the movement to the arid belt, but the techniques and devices for implementing it had to change. The artificial union of land and water required more complex thought and language than was necessary where land and water are joined naturally. The means of applying public policy to water had to be declared separately, spelled out in new terms. Chief among the new techniques was the excess land law.

It took something of a mental wrench to turn American lawmakers and administrators from land policy to water policy. The natural tendency was to carry over the language of earlier land problems to the more complex problems of water. A result of this inertia has been confusion in thought as well as in language west of the hundredth meridian, where thinking in terms of land policy overemphasizes land and underemphasizes water. Some persons have found it advantageous to exploit the confusion. Those who achieved what Major Powell called "monopoly of land" utilize this habit of thinking in terms of *land* policy to confuse the public, to suggest that private landowners have a moral claim to water in proportion to their landholdings whatever their size, and to defeat the efforts of legislators who seek equitable distribution of water among individuals. Even administrators do not find it easy to remember that the essential question is not, who owns the land, but who gets the water.

The fact of importance above all others in federal reclamation is that the landowner calls upon the government to provide him with water. It is for Congress representing the general interest, and not for the landowner, to say upon what terms, in what amount, and in accord with what policy the public will supply water. This is a first principle inherent in a relationship between the public that gives and an individual who receives. The concern of the law is to distribute water equitably among individual landowners, not—except below 160 acres—in proportion to their holdings of land. This principle is accepted without question by most landholders seeking water under reclamation law; the few who object usually are holders of excess land.⁴

THE ISSUE

"If we had a right to dispose of the land—not absolute but on condition that certain requisites are complied with, doing that in the interest of the democracy as a whole, we have a right to dispose of the land with a proviso

2. 5 STAT. 453 (1841).

3. 12 STAT. 392 (1862).

4. *I.e.*, those whose holdings exceed 160 acres.

as to the use of the water running over it, designed to secure that use for the people as a whole and to prevent it from ever being absorbed by a small monopoly."

—Theodore Roosevelt ⁵

On May 12, 1903, President Theodore Roosevelt addressed the students of Stanford University on conservation. After noting that the early land laws had been "twisted into an improper use, so that . . . they tend to create a class of men who . . . obtain large tracts of soil for speculative purposes, or to rent out to others," he charged the students to take leadership in "securing the right use of the waters, and of seeing to it that our land policy is not twisted from its original purpose, but is perpetuated . . . to turn the public domain into farms each to be the property of the man who actually tills it and makes his home on it."⁶ He put his finger upon the crucial weakness, saying that "good laws alone will not secure good administration," and adding, two days later in San Francisco, that "no public man worth his salt will be other than glad to be held accountable" by private citizens.⁷

Less than a year earlier President Roosevelt had signed the National Reclamation Bill to accomplish the very objectives he described at Stanford. "If it was not for the national irrigation act, we would be about past the time when Uncle Sam could give every man a farm."⁸ Under that law the federal government undertook to prepare arid lands for settlement by constructing reservoirs and canals. In order to bring the price within reach of settlers it advanced the cost of construction free of interest, the capital alone to be repaid, and that only after a period of years. Public lands so irrigated were to be distributed in small units to actual settlers under the homestead laws, and private lands were to receive water in limited quantities. The urge was strong to repair the damages of "laws twisted into an improper use," to curb land monopoly, and to favor the homemakers. The chief provisions of the law—construction by public enterprise, waiver of interest, settlement on public land under the homestead laws, limitation of private landowners' right to water—singly and in combination had the same purpose. Of all these devices the "excess land law," or "acreage limitation," has become the most famous—mainly because of the strenuous, protracted, and pervasive efforts by the large landholders it was designed to control, to overthrow and escape it.

Today, fifty years after President Theodore Roosevelt enunciated the policy of the excess land law during his visit to California, Secretary Douglas McKay has brought that policy to the edge of destruction in administering reclamation law on the Kings River and Tulare Lake. Secretary McKay has left excess landholders the choice, either to dispose of their excess holdings in accordance

5. Roosevelt, *Conservation*, 7 TRANSACTIONS OF THE COMMONWEALTH CLUB OF CALIFORNIA 107 (1912).

6. CALIFORNIA ADDRESSES BY PRESIDENT ROOSEVELT 72, 73 (1903).

7. *Id.* at 121.

8. *Id.* at 72.

with the law, or to obtain relief from the excess land law at once and permanently, by prepaying construction charges of Pine Flat dam in a lump sum. The Secretary opened the second alternative when he authorized the Bureau of Reclamation on November 9, 1953, to negotiate the Kings River and Tulare Lake Project on the basis that "the repayment contract will provide for repayment of the irrigation allocation in 40 years without interest, with the option on the part of the water users organizations to make a lump sum payment in advance and that the excess land laws become inoperative upon payment in full of the \$14,250,000."⁹

If the excess landholders should elect to make a lump-sum payment, and the Secretary should hold to his present view, then the opportunity for home-making which President Roosevelt expected to flow from the law will shrivel. Plainly, the Secretary's action raises fundamental questions of policy and principle. Can he be right, that the reclamation law places the opportunity for the "makers of homes" at the mercy of the preferences, financial capacity, and ultimate decision of private excess landholders? Or did Congress assert its preference for the homemaker over the excess landholder? Is the purpose of reclamation law fulfilled when the government has recouped its financial outlay in construction in the same manner as a private construction contractor? Or does public policy transcend the fiscal arrangement between government and water user?

The Secretary's action involves not only principle, but material stakes as well. Bringing water to land increases its value substantially. In the Tulare Lake area, nine excess landholders owned 109,019 acres in 1947, the smallest of these holdings being 7,209 acres and the largest 19,317 acres.¹⁰ The Tulare Lake Basin Water Storage District, consisting of 300 square miles with scarcely a home upon it, is held ninety percent "in excess"—in 1947 twenty-five corporations owned nearly fifty-five percent of the area, 102 individuals held another thirty-five percent and the remaining ten percent was owned by 635 individuals in tracts under 160 acres.¹¹ Thus, the Secretary has

9. Letter from Secretary of the Interior Douglas McKay to C.J. Haggerty, Secretary of the California State Federation of Labor, dated March 2, 1954 [hereinafter cited as McKay-Haggerty Letter]. Copies of all letters and memoranda cited herein are on file in the University of California Library. See also *Kings River Questions Answered*, Western Water News, July 1954, pp. 1-2.

Apparently directors of Kings River Conservation District signed a contract in November 1954, allowing water users "to escape" the excess land law, "subject to approval by the interior department." *Sacramento Bee*, Nov. 19, 1954, p. 2, col. 8. See also *San Francisco Chronicle*, Nov. 9, 1954, p. 8, cols. 5-7.

10. DOWNEY, *THEY WOULD RULE THE VALLEY* 164 (1947), presenting statistics recast from testimony of Paul H. Johnstone, in *Hearings before Subcommittee of the Senate Committee on Public Lands on S. 912*, 80th Cong., 1st Sess. 864 (1947). Whether these nine holdings lie entirely within the Tulare Lake Basin Water Storage District is not stated.

11. Letter from Commissioner of Reclamation Michael W. Straus to Senator Paul H. Douglas, dated Feb. 2, 1949, p. 2.

left to a few excess landholders the power to decide whether between 900 and 1,000 "makers of homes" will be able to obtain quarter-section farms.¹²

The Secretary has stated that he feels "constrained to follow" the administrative steps he authorized for Kings River and Tulare Lake Project "after very thorough consideration."¹³ But the history of excess land law will show that he has misinterpreted it and that the accumulated effect of his erroneous interpretation, plus his own decision to permit prepayment, is the complete subversion of the law.

ENACTMENT

"The greatest interest in the Reclamation Act centers around the fact that it is clearly a conscious and salutary step in the direction of a national policy of conservation. It was passed soon after the conservation principles were first prominently expounded, and embodies unmistakably the essence of those principles as applied to the use of water on the western arid lands. The purpose of the act is broad and fundamental, providing for the use of natural resources, a wide diffusion in ownership, and in consequence an opportunity to a large number of people."

—Benjamin Horace Hibbard¹⁴

Passage of the National Reclamation Act in 1902 was the culmination of long years of study and a decade or more of popular education and agitation. Organized efforts of citizens to inaugurate a plan for irrigating the arid lands of the West had been launched in 1891 when the first Irrigation Congress met in Salt Lake City.¹⁵ A series of annual congresses had followed in various cities, including one as far east as Chicago in 1900. By 1902 a solid western bipartisan congressional bloc known as the Committee of Seventeen had been formed to promote reclamation. A new President of the United States, the first to know the needs of the arid West personally, had entered office and was giving the movement support. Congressional committees had been at work, and on February 6th of that year, a co-sponsor, Senator Hansbrough of North Dakota, introduced the reclamation bill in the Senate: "Mr. President, the purpose of this measure is to assist in providing homes for the rapidly increasing population of the country."¹⁶

12. Pine Flat dam alone fails to provide sufficient dependable irrigation water for family farms in the Tulare Lake Basin Water Storage District, and sufficient "flood control" for a portion of the Tulare Lake area. But other projects, either in progress or planned, can remedy both situations, making the area suitable for family farms. See, e.g., S. DOC. NO. 113, 81st Cong., 1st Sess. 132 (1949); CALIF. DEP'T PUB. WORKS, DIV. WATER RES., SAN JOAQUIN RIVER BASIN, 1931, Bull. No. 29, pp. 483, 496 (1934).

13. McKay-Haggerty Letter.

14. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 443 (1924).

15. See OFFICIAL REPORT OF THE IRRIGATION CONGRESS (1891). See also Taylor, *Central Valley Project: Water and Land*, 2 WESTERN POL. Q. 238 (1949), and *The 160-Acre Water Limitation and the Water Resources Commission*, 3 WESTERN POL. Q. 435-50 (1950).

16. 35 CONG. REC. 1383 (1902).

The bill was in the hands of a generation of men thoroughly familiar with the rapid agglomeration of western landholdings during the nineteenth century under defective statutes and loose administration by the General Land Office. In 1885, its Commissioner, William A. J. Sparks, lent his official voice to those of numerous others, before and since, that have told the story:

"I found that the magnificent estate of the nation in its public lands had been to a wide extent wasted under defective and improvident laws and through a laxity of public administration astonishing in a business sense if not culpable in recklessness of official responsibility. [T]he land department has been very largely conducted to the advantage of speculation and monopoly, private and corporate, rather than in the public interest It seems that the prevailing idea running through this office and those subordinate to it was that the government had no distinctive rights to be considered and no special interests to protect I am satisfied that thousands of claims without foundation in law or equity, involving millions of acres of public land, have been annually passed to patent upon the single proposition that nobody but the government had any *adverse* interest."¹⁷

Paul Wallace Gates has set down the historian's corroborating verdict on the fate of the Homestead Act of 1862:

"The land reformers reckoned too lightly . . . with the astuteness of the speculators who in the past had either succeeded in emasculating laws inimical to their interests or had actually flouted such laws in the very faces of the officials appointed to administer them The administration of the law, both in Washington and in the field, was frequently in the hands of persons unsympathetic to its principle, and Western interests, though lauding the act, were ever ready to pervert it."¹⁸

From the first Irrigation Congress until after passage of the Act of 1902, the proceedings were punctuated with references to land monopoly from the nineteenth century back to the fall of Rome and the dangers of permitting monopoly of either water or land in the arid West. As far as the record shows, no one disagreed with this thesis. Many gave it vocal support. At the very first Irrigation Congress at Salt Lake City, a warning against land monopoly was combined with an appeal for irrigation: "The tendency of the great West . . . is the accumulation of vast estates in land. The object of good government is to stop this in so far as it can and to give . . . the poor man a chance to own ten, twenty, forty, sixty or a hundred acres if it is in his power to cultivate it" ¹⁹

The proceedings of the irrigation congress for the decade disclose repetitious insistence, explicitly as well as implicitly, that preventive measures against water monopoly must be effective *permanently*. Thus Delegate Blowers of

17. ANN. REP. COMM'R GEN. LAND OFFICE 3-4 (1885) (emphasis in original).

18. Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV., 655-56 (1936).

19. Statement of Morris Estee (Calif.), OFFICIAL REPORT OF THE IRRIGATION CONGRESS 26 (1891).

California told the 1893 Irrigation Congress, "I am not working for the purpose of keeping this in the possession of any one corporation, or any one people. I want the whole people, from now on—from generation to generation—to own that water—own that power."²⁰ Col. Hinton of New York said at the same congress: "we want to make that water *forever* what it is in law, in jurisprudence, in history . . . the public property of the people, to be . . . transferred, *under proper regulations*, to 'beneficial uses' for the people who own the land."²¹ And a year later Governor Waite of Colorado expressed his doubt that the provisions of the homestead law could preserve the lands from monopoly and suggested that ultimate title be retained in the nation or state.²² The same type of permanently effective legal measures was advocated to prevent monopoly of grass. George H. Maxwell, the "Father of Reclamation," received applause from the Irrigation Congress of 1896 when he said that arid pasture lands for sheep "should be kept *forever* as the common heritage of the people, never to be sold but to be leased only to actual settlers living upon the adjoining farms"²³

Delegates at the last Irrigation Congress prior to passage of the National Reclamation Act regarded past land legislation as a guide to what ought to be avoided and sought to find fresh measures offering greater prospect of permanent effectiveness. Frederick H. Newell, later chief of the Reclamation Service, stressed the need for new methods: "it is impossible to trust to speculative enterprise, because of the fact that profits can not be made in the construction of a work unless the population becomes tenants of a great land-owning monopoly."²⁴ A delegate from Montana voiced fears that after the Government had borne all the expenses of construction, the water would inure to the profit of a few. He recommended a resolution that water conserved by the Government should "*always and forever* be under the control and distribution of the United States Government."²⁵ To quiet these fears, George H. Maxwell explained that the original resolution of the congress secured the end desired by the delegate from Montana in a different way:

"[The resolution provides that] the water of all streams should *forever remain subject to public control*, and the right to the use of water for irrigation should *inhere in the land* irrigated. That means, no man can own the right for speculative purposes, and beneficial use should be the

20. OFFICIAL REPORT OF THE INTERNATIONAL IRRIGATION CONGRESS 27 (1893).

21. *Id.* at 83 (emphasis added).

22. OFFICIAL PROCEEDINGS OF 3RD NATIONAL IRRIGATION CONGRESS 11 (1894). Occasionally difference of opinion was expressed over whether 40 acres, say, or 160 acres was the proper size tract to be permitted. Senator Boyd of Colorado was virtually unique in expressing the view that with farm machinery a tract of three or four hundred acres was reasonable. *Id.* at 70.

23. OFFICIAL REPORT OF 5TH NATIONAL IRRIGATION CONGRESS 41 (1896) (emphasis added).

24. PROCEEDINGS OF 9TH ANNUAL SESSION OF NATIONAL IRRIGATION CONGRESS 230 (1900). See also statement of Delegate Newlands, *id.* at 116.

25. *Id.* at 303-04 (emphasis added).

basis and measure—that means to the extent you use the water beneficially, is all that you can have, and the limit to the right.

“Now there you have the fundamental principle upon which you can build irrigation institutions in these western states that will *endure as long as the human race occupies them and water monopoly will be an impossibility* I do not want anybody to go away from this congress with the idea that this subject has not been considered *and the solution of it found*.”²⁶

The sponsors of the reclamation bill in the fifty-seventh Congress adhered closely to the objectives described in the proceedings of the irrigation congress during the prior decade. They presented their measure as one drawn with unusual care to prevent monopoly of water on reclaimed public lands and to break up existing monopoly on private land by denying water to it. Their look was a long one, to the past and to the future. Their goal was an enduring solution to an age-old problem of concentrated holdings, not a quick thrust at a current evil. And they believed they had found the solution: “It is a step in advance of any legislation we have ever had in guarding *against the possibility* of speculative landholdings and in providing for small farms and homes on the public land, while it will also compel the division into small holdings of any large areas . . . in private ownership which may be irrigated under its provisions.”²⁷ Congressman Newlands said, “Lord Macauley said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That will be the test *of the future*, and the very purpose of this bill is *to guard against land monopoly and to hold* this land in small tracts . . . to give to each man only the amount of land that will be necessary for the support of a family”²⁸

The draftsmen of the reclamation bill employed at least five distinctive devices aimed at prevention of monopoly. First was the use of public enterprise to supplement private enterprise in irrigation development. While showing

26. *Id.* at 304 (emphasis added). In laying this cornerstone of anti-monopoly policy, Maxwell wanted to avoid federal interference with vested water rights under state law. His language was followed closely in § 8 of the Act of 1902, 32 STAT. 390, as amended 43 U.S.C. § 372 (1952), which forbids federal interference with vested water rights, and makes the right to water acquired under the act “appurtenant to the land irrigated.” In 1901, the well-known anti-monopolist Congressman Newlands introduced a bill in Congress providing “That the right to the use of water shall be perpetually appurtenant to the land irrigated” SMYTHE, *THE CONQUEST OF ARID AMERICA* 344 (rev. ed. 1905). It is indeed strange that a few years later Will R. King, Counsel of the new Reclamation Service, seized upon the device of making water rights appurtenant to the land as an authorization for weakening the excess land provision to the point of its virtual destruction. See text at notes 74-80 *infra*.

27. Congressman Frank Mondell (Wyo.), 35 CONG. REC. 6677 (1902) (emphasis added). To the same effect with a challenge to any one to draft a bill providing more effective protection against monopolization, see statements of Senator W.A. Clark (Wyo.), *id.* at 2222-23, 2224.

28. *Id.* at 6734 (emphasis added).

energy in completing less costly projects, private enterprise had exhibited a reluctance to undertake the larger ones. The sponsors of the bill might have suggested giving large blocks of public land to corporations, enabling them to recoup the cost of constructing irrigation works by lease or sale of the land. Congress had used that method to get railroads built, but was not prepared to repeat it to promote irrigation. The House Committee on the reclamation bill rejected the use of land grants specifically because the sacrifice of "our time-honored policy of inviting and encouraging small individual land holdings" was too "stupendous a price" for irrigation development.²⁹ Instead public enterprise was to be financed by a reclamation fund consisting of revenues from the sale of public lands in the western states.³⁰ This fund was to recover project construction costs from the benefiting water users in annual installments, not exceeding ten, without interest.³¹ In this way the fund would revolve and provide continually for new projects.

A second measure to prevent monopolization and assure occupation of irrigated lands by actual settlers was a ban on the commutation provisions of the homestead law when applied to reclamation projects.³² The commutation privilege offered a cash alternative to the requirement of personal inhabitancy of a claim. In practice it resulted in the barter of public policy favoring actual settlers for the monopolists' ready cash. Congress, fully aware of this, forbade commutation on reclamation projects in 1902.³³

As a third step toward encouragement of settlers and discouragement of speculators and monopolists, the sponsors of reclamation stiffened the inhabitancy requirements of the earlier homestead law. They prescribed that an entryman must be either a "bona fide resident on such land, or occupant thereof residing in the neighborhood . . ." and must reclaim for agricultural purposes

29. H.R. REP. No. 794, 57th Cong., 1st Sess. 3 (1902).

30. Section 1, Act of June 17, 1902, 32 STAT. 388, as amended, 43 U.S.C. § 391 (1952).

31. Section 4, 32 STAT. 389 (1902), 43 U.S.C. § 419 (1952). The longer the repayment period, of course, the greater the subsidy to the water user. The original 10-year period has been extended. Assuming an interest rate of 3% and a 10-year development period in which no payments are made, a 40-year interest-free repayment period represents a 57% subsidy, and a 50-year period 62%. *ACREAGE LIMITATION IN THE CENTRAL VALLEY, A REPORT ON PROBLEM 19, CENTRAL VALLEY PROJECT STUDIES 29* (Sept. 25, 1944).

32. Section 3, 32 STAT. 388 (1902), as amended, 43 U.S.C. §§ 416, 432, 434 (1952). George H. Maxwell had proposed abolition of the commutation privilege on *all* public lands to the eleventh Irrigation Congress in 1903. *OFFICIAL PROCEEDINGS OF 11TH NATIONAL IRRIGATION CONGRESS 77* (1904). The repeal of the commutation clause had been recommended by the General Land Office as early as 1883. *ANN. REP. COM'FR GEN. LAND OFFICE 7* (1883). See also Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 655, 656 (1936).

33. Secretary McKay's offer to accept cash prepayment on Kings River and Tulare Lake Project resembles commutation closely, including its devastating effect on anti-monopoly policy.

at least one-half of the total irrigable area of the entry.³⁴ Furthermore, their bill authorized the Secretary of the Interior to lower the maximum area per entry to the acreage "reasonably required for the support of a family . . ."³⁵ They recognized that the traditional quarter-section granted in the humid belt was often too large for a family farm on irrigated land.

The sponsors' fourth anti-monopoly and anti-speculation provision was that water rights shall be "appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."³⁶ Early irrigationists had been greatly dissatisfied with dependence on others in control of their water supply, and regarded tying water and land together in common ownership as among the surest of anti-monopoly devices.³⁷

The sponsors' fifth measure against monopoly, the one that has become most famous of all, was the "excess land" provision. It prescribed that "no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner . . . and no such right shall permanently attach until all payments therefor are made."³⁸ This law neither confiscates land nor limits the amount of land an individual may own. It merely places a limit on the amount of land owned by any *individual* which may receive *water* from a federal reclamation project. The principle upon which it rests is that no individual should obtain more public water than his equitable share. It is unfortunate that the complexity of language required to translate this simple principle into the specifics of acre-feet of water, land and individuals owning land, invites unintentional confusion and facilitates the spread of misconceptions by special interests.

34. Section 5, 32 STAT. 389 (1902), 43 U.S.C. §§ 381, 392, 431, 439, 476 (1952).

35. Section 4, 32 STAT. 389 (1902), 43 U.S.C. § 419 (1952).

36. Section 8, 32 STAT. 390 (1902), 43 U.S.C. § 372 (1952).

37. George H. Maxwell told the Irrigation Congress in 1900: "It simply means that water shall not be a mere personal commodity to be bought or sold like milk or beer." PROCEEDINGS OF 9TH ANNUAL SESSION OF NATIONAL IRRIGATION CONGRESS 99 (1900). He presented his thesis to the Irrigation Congress again in 1903 saying, "Speculation and monopoly in these lands *or in the water* must be rigidly guarded against. The irrigated lands must be subdivided into small farms. The ownership of land and water must be united. Speculation in water as a commodity must be made impossible. Floating water rights must be done away with and beneficial use must be the limit of all rights to water." OFFICIAL PROCEEDINGS OF 11TH NATIONAL IRRIGATION CONGRESS 78 (1904) (emphasis added).

38. Section 5, 32 STAT. 389 (1902), 43 U.S.C. §§ 381, 392, 431, 439, 476 (1952). Misconceptions as to the true nature of this law are so pervasive and persistently repeated that a regional counsel of the Bureau of Reclamation in Sacramento made this unofficial clarification: "All three terms ['160-acre limitation,' 'acreage limitation,' 'excess-land limitation'] are unrealistic in that they seem to imply that the law has said something about how much land one may *own*. The limitation neither legally nor factually is one on the ownership of land—it rather is one on the amount of the owned land which may *receive water from a federal reclamation project*." Graham, *The Central Valley Project: Resource Development of a Natural Basin*, 38 CALIF. L. REV. 588, 604 (1950) (emphasis in original). The author finds it difficult, as does Graham, to use precise descriptive language each time he refers to the excess land limitation.

The bill passed both houses of Congress after much debate, without amendment. The only opposition was in the House, where the bill carried by 146 to 55.³⁹

Reclamation law, however, is more than the single enactment of 1902 and in order to test the validity of Secretary McKay's present interpretation of the excess land law, it is necessary to examine two of the early legislative additions to the original Act. The first relevant modification was the Warren Act of 1911.⁴⁰ By enlarging the scope of the excess land law, it furnishes additional evidence of the intention of Congress to erect an enduring barrier against water monopoly. In 1902 Congress had applied the excess land law to "new" water developed by a federal reclamation project. The Warren Act expanded the provision to cover water already in private ownership when "impounded, stored or carried" by federal reclamation works.

Congress made a second important addition to the excess land law with the Act of August 9, 1912. Whether this amendment is to stand as a strong reaffirmation of what the original sponsors of reclamation thought they were doing to prevent monopoly permanently, or whether it is to be the vehicle for monopolization depends largely on whether the Secretary of the Interior adheres to his present interpretation of the proviso in section 3 of that act. It reads as follows:

*"Provided, That no person shall at any one time or in any manner . . . acquire, own, or hold irrigable land for which entry or water right application shall have been made . . . before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior, as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished . . . nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States . . . and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this act."*⁴¹

The italicized phrase has been the center of controversy over the interpretation of this proviso. Is it overriding, so that in no case whatsoever shall a person "acquire, own, or hold irrigable land" in excess of 160 acres? Or does it modify only the clause beginning with "before," so that in no case shall a person own in excess of 160 acres of irrigable land "before final payment in full of all installments" of building charges for that excess? Because of this controversy and because the latter interpretation is the basis of Secretary

39. 35 CONG. REC. 6778. Eighteen answered "present," 132 not voting.

40. Act of Feb. 21, 1911, 36 STAT. 925, 43 U.S.C. § 524 (1952).

41. 37 STAT. 266 (1912), 43 U.S.C. §§ 543, 544 (1952) (emphasis added).

McKay's offer to excess landholders at Kings River and Tulare Lake Project to permit them to pay cash rather than dispose of excess land, the legislative history of the Act of August 9, 1912 deserves examination at least equally with that of the original Act of 1902.

The Act of 1912 began as two similar bills, one introduced in each house, the avowed purpose of which was to give settlers on public land in reclamation projects an earlier title, permitting earlier mortgaging or disposition of a portion of the land, while protecting the government's financial interest by a lien on the land and appurtenant water rights.⁴² The Senate bill passed first and went to the House where sharp opposition developed. With fore-knowledge of the objections to come, "a perfected substitute" was held in readiness to be offered in lieu of the Senate bill. But two members of the House objected at once that a bill so far-reaching in potential effect ought to be sent back to committee for thorough consideration. Both professed a primary interest in the original purpose of reclamation law—to promote settlement by home-makers. Congressman John J. Fitzgerald of New York implied that the public interest in obtaining actual settlers was endangered by the bill: "Some persons other than those representing those desiring to get these lands wish to have an opportunity at least to examine the legislation"⁴³

The second opponent of the substitute bill, Congressman John E. Raker of California, objected strenuously that it would undo the work of the original reclamation law by permitting monopolization of farms on reclamation projects. The intention of the reclamation law was "that each man should have a homestead, and that he should not barter or sell it." Because a tract could be sold or mortgaged under the bill, "anyone owning a dozen other tracts might bid in that tract," and might come eventually to own "all the homes under that project . . . and therefore control the dam."⁴⁴ When he was asked whether under the existing excess land law, land and water holdings could not be accumulated "in regard to *private lands*, and . . . with *entrymen who have complied with the law*," Raker replied, "it could *not* be done under the present law."⁴⁵ He proceeded to emphasize the importance of the anti-monopoly features of the original reclamation law. "I admit under the general

42. S. 5545 & H.R. 23242, 62d Cong., 2d Sess. (1912). The report of the House Committee on Irrigation of Arid Lands on S. 5545 as it came from the Senate, stated its ostensible purposes as follows: "As the law now stands, a patent can not be issued to homesteaders under reclamation projects until full and final payment is made to the Government for the amount due for the water right . . . which may be . . . from 10 to 20 years from the date of the original entry If this act shall become a law, it will give the settler an opportunity to mortgage his land or to sell a part of it and much more readily pay the Government." H.R. REP. No. 867, 62d Cong., 2d Sess. 2, 4 (1912). Also see statement of Congressman Taylor (Colo.), reporting for the Committee. 48 CONG. REC. 9083 (1912).

43. *Ibid.*

44. *Id.* at 9083, 9038, Raker was apprehensive that defaulted titles might also be gathered up to concentrate landholdings. See *id.* at 9082.

45. *Id.* at 9038 (emphasis added).

law one man can buy as much land with his money as will enable him to monopolize the community, and this reclamation bill [law] was to prevent that very thing."⁴⁶ The bill was sent back to committee and two weeks later the committee reported a substitute bill which the House adopted without a dissenting voice.⁴⁷

This new bill was the first to mention the excess land provision in the proviso, and except for the ambiguous "before" clause, the proviso is a clear expansion of the excess land law. It spelled out some new restrictions on acquisition of additional land or water prior to final payment of construction charges. It added to the prohibition against "sale" of water in excess of 160 acres, a provision that such a water right would not be "recognized," nor would the water be "furnished" to the excess. It prescribed that the text of the proviso should be recited "in every patent and water-right certificate issued" under the act.

Nothing in the legislative history of the Act of August 9, 1912, suggests that Congress intended to weaken excess land law. Under the charge that it might do so, the first draft of the bill was rejected. Congressman Raker, the man whose criticism was responsible for this rejection had been a public supporter of the excess land provision at least as early as 1905.⁴⁸ In his remarks on the 1912 reclamation bill he interpreted the original excess land law strictly, maintaining that the limitation continued to apply *after* the conditions of the law had been complied with. He was a member of the House Committee to which the bill was recommitted. He was present on the floor of the House on the day the revised bill passed without dissenting voice.⁴⁹ It seems fair to deduce that Congressman Raker's views of the intent and meaning of the excess land provision were embodied in the proviso to section 3 of the Act of August 9, 1912.⁵⁰

II

INTERPRETATION

"'Magnificent,' said the two officials already duped. 'Just look, Your Majesty, what colors! What a design!' They pointed to the empty looms, each supposing that the others could see the stuff.

"'What's this?' thought the Emperor. 'I can't see anything. This is terrible! Am I a fool? Am I unfit to be the Emperor? What a thing to happen to me of all people!—Oh! it's very pretty,' he said. 'It has my highest

46. *Ibid.*

47. *Id.* at 9822.

48. In that year he helped to defeat an attempt to persuade the National Irrigation Congress to oppose the excess land law. OFFICIAL PROCEEDINGS OF 13TH NATIONAL IRRIGATION CONGRESS 60-62 (1905).

49. 48 CONG. REC. 9822, 9847 (1912).

50. Yet this proviso is now recited by the Secretary of the Interior to support the view that Congress intended the limitation on furnishing water to private lands to be ephemeral in its operation, terminating entirely upon final payment of construction charges.

approval.' And he nodded approbation at the empty loom. Nothing could make him say that he couldn't see anything.

"His whole retinue stared and stared. One saw no more than another, but they all joined the Emperor in exclaiming, 'Oh! It's very pretty,' and they advised him to wear clothes made of this wonderful cloth especially for the great procession he was soon to lead!"

Hans Christian Andersen⁵¹

In the course of administering the excess land law a question of interpretation has arisen as crucially important to the effectiveness of reclamation law as was the commutation privilege to the effectiveness of homestead law. The question is whether completion of full and final payment of the construction charges allocated to a private landowner receiving reclamation project water renders the excess land provision inoperative. The question finds its source in the ambiguous language of the 1912 proviso to the excess land provision. Ordinarily, administrators, like judges, look to legislative history when unclear language obfuscates congressional policy. Yet nothing in the public record indicates that the Interior Department ever has thought such examination necessary to ascertain the meaning of the excess land law. This assumption of clarity in the language of the statute is extraordinary in the face of two flatly contradictory official interpretations by Interior itself.

The first occasion for answering the question came not long after the Act of August 9, 1912 added the proviso on the excess land law. Settlers on early reclamation projects began to seek permission to transfer their public land farm-units or to acquire water rights for private land, and confronted the Interior Department with the necessity of interpreting the proviso. In making these early decisions the Department said, in essence, that the reclamation law was intended to erect *permanent* limitations on an individual's share of project water.

The first case to receive Departmental review was *Amaziah Johnson*,⁵² an application of two settlers on a reclamation project, each of whom had "made proof" on a farm-unit of public land, one desiring to sell his farm-unit and water right to the other. The would-be seller had 56 irrigable acres, the buyer 69.95 irrigable acres. Although the total irrigable acreage of the two tracts combined was less than 160 acres, the Department held that before the transfer would be permitted, it was necessary under the proviso to pay in full all installments due on the water right for the tract purchased or sold. Having passed on the particular application before it, the opinion declared a general interpretation of the proviso: even after all installments had been paid "the water rights purchased for the lands in excess of one unit shall be limited to a supply sufficient for one hundred and sixty acres."⁵³ In stating this rule

51. ANDERSON, *THE COMPLETE ANDERSON* 81 (Hersholt ed. 1949).

52. 42 L.D. 542 (1913). Decisions of the Department of the Interior relating to public lands are referred to as Land Decisions, and are cited herein as L.D.

53. *Amaziah Johnson*, 42 L.D. 542, 543 (1913).

the Department distinguished carefully between government regulation of the amount of privately owned *land* transferred, a power it disclaimed, and permanent limitation of the amount of *water* allowed to any individual from a reclamation project, a power it asserted.

The second case, *Keebaugh and Cook*,⁵⁴ was a decision upon an application by two holders of farm-units for which water rights had not been paid up, to obtain a water right for additional private land they already owned jointly. The Department rejected the application on the ground that a person could not obtain water rights for a farm-unit of public land and a tract of privately owned land, unless he had paid all installments for the private land, "not exceeding 160 acres." It declared itself in no doubt as to the meaning of the proviso: "The language on this point is susceptible of but one construction, namely, that the same person or association of persons can, prior to the time all charges have been paid, hold but one farm unit of public land and acquire a water right therefor unless the water rights for the additional lands are paid for in full, and then not to exceed water rights for 160 acres for such excess."⁵⁵ It construed the words in the proviso—"nor in any case in excess of one hundred sixty acres, nor shall water be furnished . . . nor a water right sold or recognized for such excess . . ."—to require observance of the excess land provision *whether the financial obligation to the government for construction had been met fully or not.*

Notwithstanding these two decisions, the Department reversed itself eight months later. In his *Instructions*,⁵⁶ Chief Counsel of the Reclamation Service Will R. King overruled the interpretation sanctioned in *Johnson* and in *Keebaugh* and held that the excess land law does permit "the furnishing of water for land on which *payment in full has been made* of building and betterment charges *even when more than 160 acres* of such land is owned by one person . . ."⁵⁷ The Department had ruled that the effect on the excess land provision of completing payment was nil; King said it was fatal. The Department had been confident that the language of the statute was "susceptible of but one construction"; King said that construction lacked support of "a plain intent expressed in the law." First Assistant Secretary A. A. Jones, who had approved *Johnson* and *Keebaugh*, made a personal about-face to give official approval to King's ruling. There departmental approval has rested.

King's opinion has enjoyed the intermittent genuflections of legal and lay students ever since, but apparently neither they nor the Interior Department have ever thought its foundations worthy of fresh inspection. The first reitera-

54. 42 L.D. 543 (1913).

55. *Keebaugh & Cook*, 42 L.D. 543, 545 (1913) ("prior" italicized in original; remaining emphasis added).

56. 43 L.D. 339 (1914). The *Instructions* approved the denial of the applications in *Johnson* and *Keebaugh* made before charges had been paid in full, but disapproved their interpretation that final payment had no effect on the excess land provision.

57. *Instructions*, 43 L.D. 339, 341 (1914) (emphasis added).

tion of King's ruling came six years after its issuance, in 1920, when Secretary John Barton Payne restated Department policy by a barren citation to King.⁵⁸

Twenty-three years later, in 1943, a legislative analyst of the Bureau of Agricultural Economics, reviewing the history of the excess land provision, devoted a short paragraph to the effect of King's ruling.⁵⁹ He recited the opinions in *Johnson and Keebaugh*. But under the authority of King's *Instructions*, he concluded that no limitation is imposed after all charges have been paid, and found no occasion to examine the basis of King's opinion.

In March of 1944, experts in the Bureau of Agricultural Economics prepared a report on economic aspects of excess land problems. Relying on the Bureau's legislative analysis of the previous year, they were critical of Congress because "no provision was made for the continuing control of size of land holdings."⁶⁰ This led them to speculate whether Congress anticipated additional controls to maintain small holdings, but it did not generate sufficient curiosity to produce an investigation of the legal soundness of King's *Instructions*, or to suggest that perhaps the *Instructions* was the real target of their attack and not the Acts of Congress.

King's *Instructions* was mentioned again, in August 1945, in a memorandum of the Interior Department Solicitor dealing with the effects of community property law on the excess land provision. It recited the *Instructions* in a footnote, without inquiry.⁶¹

The next year, 1946, in a survey of excess landholdings the Bureau of Reclamation went beyond merely citing King as precedent. It gave support to King's *Instructions* with its own interpretation of the 1912 proviso: "It is apparent, however, that the quoted proviso is qualified by the phrase 'before final payment in full of all installments of building and betterment charges.'"⁶²

58. "The Secretary has decided that the area which may be held by any one landowner after the construction charges have been fully paid may exceed 160 acres. (43 L.D. 339-341)." *Instructions*, 47 L.D. 417, 418 (1920).

59. Wertheimer, *Legislative and Administrative History of Acreage Limitations and Control of Speculation on Federal Reclamation Projects* 19, in *ACREAGE LIMITATION IN THE CENTRAL VALLEY, A REPORT ON PROBLEM 19, CENTRAL VALLEY PROJECT STUDIES* (1943).

60. *Acreage Limitation and Excess Land Problems, Central Valley Project* 33, in *ACREAGE LIMITATION IN THE CENTRAL VALLEY, A REPORT ON PROBLEM 19, CENTRAL VALLEY PROJECT STUDIES* (1944) (emphasis added).

Two months later an Assistant Commissioner of Reclamation apparently relied on King when he informed the owner of "a family-sized" farm of 42,000 acres who was testifying in favor of exempting Central Valley Project from the excess land law that "nowhere does this limitation apply after the project is paid for . . ." William E. Warne, in *Hearings before Subcommittee of the Senate Commerce Committee on H.R. 3961*, 78th Cong., 2d Sess. 698, 702-03 (1944).

61. Fowler Harper, Solicitor, Memorandum for the Commissioner, Bureau of Reclamation, No. M-34172, n.4, Aug. 21, 1945, printed in Answering Brief of People of California & Water Project Authority of California, pp. 140-46, Ivanhoe Irrigation Dist. v. All Parties & Persons, No. 39627, Super. Ct. Tulare County, filed Nov. 16, 1951.

62. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, *LANDOWNERSHIP SURVEY ON FEDERAL RECLAMATION PROJECTS* 40 (1946). The writer does not regard this

No reasoning was offered to justify why "it is apparent," and, like its predecessors, the statement can be regarded as hardly more than an official echo of King.

The very next year the Bureau of Reclamation made a formal inquiry reaching to the heart of the issue: the relation, if any, between final payment of construction charges and the excess land provision. The timing of the inquiry is noteworthy. The year 1947 marked the second phase of a great effort to persuade Congress to exempt Central Valley Project from the excess land provision. In the lull that followed extensive and acrimonious congressional hearings on the exemption bill, the Commissioner of the hard-pressed Bureau of Reclamation formally requested the Department Solicitor to answer this question: "Does the payment in full of construction charges against 'excess lands' free such lands of the acreage limitations of the reclamation laws . . .?"⁶³ The Commissioner divided his question into three parts, one relating to each type of legal authorization under which individuals could obtain irrigation water: (a) lands covered by water-right applications; (b) lands receiving water under joint liability contracts with public water districts; and (c) lands receiving water under the Warren Act.

Two aspects of Associate Solicitor Felix Cohen's answer were very familiar: King was cited as authority; the answer made no fresh examination of the legal soundness of the 1914 *Instructions*. He said simply: "As to part (a) of your question, pertinent references are to Section 3 of the Act of August 9, 1912 (37 Stat. 265, 266), and to instructions approved by the Department on July 22, 1914 (43 L.D. 339)."⁶⁴ He quoted the proviso in section 3 immediately, verbatim, and *in toto*, without attempt at construction of its language. Then without pause he summarized King's *Instructions* and proceeded to his own conclusion at once, without argument or suggestion of a doubt: "payment in full of the charges . . . removes the lands for which the water right is acquired from the operation of the acreage restrictions."⁶⁵ Once again King's *Instructions* was acknowledged as authoritative.

Cohen's answer to part (b) of the Commissioner's question was the same as his answer to part (a). Relying on the proviso, he held that whether the payment of construction charges was under a water right application or a joint-liability contract, the excess-land rule was the same.⁶⁶

interpretation as "apparent." See language of the proviso in text at note 41 *supra*. And Johnson and Keebaugh reached a contrary interpretation.

63. Memorandum of Commissioner of Reclamation, Sept. 19, 1947, quoted in Felix S. Cohen, Associate Solicitor, Memorandum to Commissioner, Bureau of Reclamation, No. M-35004, Oct. 22, 1947, p. 1, entitled, Program of the Bureau for Action Consistent with the Acreage Limitations of the Federal Reclamation Laws [hereinafter cited as Cohen Opinion].

64. Cohen Opinion, p. 1. It was not conducive to clear interpretation of a law imposing a limitation upon *individual shares of water*, that the Commissioner's question and the Associate Solicitor's answer spoke of the law as a limitation upon *lands*.

65. *Id.* at 1, 2.

66. *Id.* at 2-5.

Cohen's answer to the final part of the Commissioner's question produces such extraordinary consequences that one wonders how he avoided questioning the foundation of his position. The answer to part (c) of the question, he said, would depend in each case upon how the landowner's Warren Act contract provided for payment of construction charges, *i.e.*, whether by full payment in annual installments, or by inclusion of construction charges in a permanent "annual carriage charge." In the latter event the excess land provision could never be extinguished, said Cohen, because the contract provides no means for making "full payment."⁶⁷

The upshot of Cohen's reasoning is its implication that Congress intended that the duration of its limitation upon an individual's right to receive water stored or carried by a federal reclamation project should depend entirely on an administrative decision whether he was to pay for the service by a permanent annual charge or whether he should pay it off in installments. There is not the slightest evidence that in choosing one arrangement or the other either the Interior Department or water users ever had an inkling that freedom from the excess land provision was at stake. Nor was Cohen disturbed by a thought that he had created a *reductio ad absurdum* which brought into question the reliability of King's interpretation of the law.

Cohen's opinion is the latest authoritative legal statement of the Department's interpretation of reclamation law, but since, like all the other intervening statements, it represents no critical review of the validity of King's position, any fresh examination of Department policy must focus on the King opinion itself, and upon the statutes it construed. The validity of Cohen's opinion requires no separate inquiry, for it stands on King's *Instructions*.

In 1951 and 1954 King's interpretation received mention again. His *Instructions* was unargued, unexplained, un-cited, but his view was accepted and Cohen's opinion relied on by an excess landholder attempting to destroy the "9(e)" type of water contract which provides him with *lower rates* than would be possible under the older-type forty installment contract.⁶⁸ Under section 9(e) of the Reclamation Project Act of 1939,⁶⁹ Congress authorized a contract for the benefit of water users, small and large alike, similar to the arrangement for annual charges for water storage and carriage under the Warren Act. As Cohen pointed out, that type of contract fixed no date when construction charges would be fully paid, and consequently, under King's

67. *Id.* at 5. Cohen acknowledges that "there is no indication that Congress intended to distinguish" between Warren Act and other projects as to the effect of final payment of construction charges, and "neither is there any apparent basis for a distinction of this nature." *Ibid.*

68. See Answering Brief of People of California & Water Project Authority of California, *supra* note 61, at 8-9; Joint Reply Brief of Appellants, pp. 11-12, 16, *Ivanhoe Irrigation Dist. v. All Parties and Persons*, L.A. No. 23043, Cal. Sup. Ct., filed Aug. 2, 1954. Also see *California Water Policy Fundamentals*, 25 TRANSACTIONS OF THE COMMONWEALTH CLUB OF CALIFORNIA 141 (Nov. 28, 1949). Section 9(e) contracts provide lower annual rates by lengthening the period of repayment.

69. 53 STAT. 1196 (1939), as amended, 43 U.S.C. § 61 (1952).

Instructions, failed to provide excess landholders with a technique for terminating the excess land provision. The Attorney General of California, while defending the right of an irrigation district to make 9(e) contracts with the United States under federal reclamation law, relied on King's interpretation in 1951 and 1954. He was unconcerned with King's legal soundness; so long as Interior accepted King's *Instructions* it sufficed to explain the difference between the excess landholders' "ostensible" and "real" objections to 9(e) contracts.⁷⁰ Counsel for the landholders similarly accepted King's interpretation in 1954.⁷¹

Thus King's ruling of 1914 furnished motive in 1954 for litigation to invalidate a type of contract that Congress approved for the purpose of providing all landowners on reclamation projects with lower water rates. If successful in making their escape from the excess land law, excess landholders will raise the cost of water to smaller landowners. There is no evidence that Congress intended to create this anomaly; it is only King's *Instructions* that does this. Its validity can no longer go unchallenged without risking havoc in the nation's water policy.

KING, 1914

"Congress . . . has shown clearly that the excess-land provisions are the heart of the reclamation law."

—Fowler Harper⁷²

The chief counsel of the Reclamation Service, Will R. King, persuaded the First Assistant Secretary of the Interior in 1914 to reverse his original decision that the limitation on an individual's right to receive water from a federal reclamation project is not terminated by full and final payment of construction charges. Forty years later the present Secretary of the Interior not only accepts King, but offers to go even beyond him by declaring that prepayment nullifies the limitation *ab initio*. With no more exception than proves the rule, none of the officials who have relied upon or referred to the *Instructions* during the past forty years has ever recited or quoted the reasoning.⁷³

70. The excess landholder's principal ostensible objection to the 9(e) contract was that it failed to guarantee him a perpetual water right. Following Cohen, the Attorney-General argued that his real objection to a contract that gave him lower water rates was that the 9(e) contract provides excess landholders no way to terminate the excess land provision by payment of construction charges. See Joint Reply Brief of Appellants, *supra* note 68, at pp. 4, 7.

71. See Reply Brief of Respondent McCracken, p. 64, *Ivanhoe Irrigation Dist. v. All Parties & Persons*, L.A. No. 23043, Cal. Sup. Ct., filed June 1954.

72. Fowler Harper, Solicitor, Memorandum No. M-33902, May 31, 1945, p. 4, entitled, *Applicability of the Excess-Land Provisions of the Federal Reclamation Law to the Boulder Canyon Project Act*, printed in *Answering Brief of People of California & Water Project Authority of California*, *supra* note 61, at pp. 147-62.

73. Associate Solicitor Cohen did quote brief excerpts from King's *Instructions* holding that to limit appurtenant water rights after all charges had been paid would be radical departure from all the public land laws. Cohen Opinion, p. 5.

To support his conclusion that Congress could not have intended to prohibit purchase of paid-up water rights for more than 160 acres, King looked, not to the legislative history of reclamation law, but to the provision of previous land laws. He concluded that permanently limiting an individual to a 160-acre water right was too "radical" a change from past land policy without ever considering that in passing new *water* legislation Congress might have been eager to avoid the pitfalls of prior *land* legislation. Because, in seeking out congressional intent, King failed to see what Congress said it was doing, his conclusions convey an impression of dogmatism rather than conviction. His reasoning falls roughly into five arguments.

King's first argument is an inference. It is not explicitly articulated, but this appears to be a fair interpretation: since the proviso in section 3, added by the Act of 1912, contains an express prohibition against receiving water for excess lands *before* payment, the absence of an explicit prohibition *after* payment indicates that Congress did not intend the prohibition to apply *after* payment in full. King here relied on the specific words of prohibition "before final payment in full" appearing in the proviso. Yet he interpreted the 1902

It may be helpful to the discussion below to quote at length from King: "[If the clauses in the proviso, 'nor in any case in excess of 160 acres,' 'nor shall water be furnished under said acts nor water right sold or recognized for such excess,' are] construed as applying to the lands for which water right has been paid in full it has the effect of a provision by Congress limiting water rights for private land holdings, after full payment, to water rights for 160 acres Such a limitation is a *radical departure from all the public land laws*, as apparently *there never has been any intent by Congress* to limit the amount of land which a man may own after having complied in full with the provisions of the law in order to acquire the title, and *as the water right becomes on final payment an appurtenance to the land the same rule governs*."

"It would seem that a construction of a statute constituting *so wide a departure from the previous conditions regarding the rights of individuals* should not be adopted in the absence of a *plain intent expressed in the law*, as it would not only render the law subject to question on the ground of *constitutionality*, but would also introduce *an entirely new system of land ownership in reclamation projects* not applicable to any other public lands

"On the other hand, there is a *rational* interpretation of this language that is in full harmony *with prior legislation and the evident intent of the reclamation law*, namely, that a person who holds a farm unit shall not be permitted, before full payment has been made on the appurtenant water right, to acquire other lands with appurtenant water rights unless the water right charges on the latter have been fully paid; similarly that a person may hold private lands with appurtenant water rights up to the limit of single ownership fixed for the project in one or more parcels before full payment of the water right charge, but may not acquire other lands with appurtenant water rights unless the water right charges thereon have been paid in full. Furthermore, that the limit of area of the farm units and of single private land holdings to which water rights are appurtenant (and as to which water right has not been paid in full) shall in no case exceed 160 acres.

"[The proviso permits] the furnishing of water for land on which payment in full has been made of building and betterment charges even when more than 160 acres of such land is owned by one person" Instructions, 43 L.D. 340-41 (1914) (emphasis added).

Act the same way, even though it contained no such specific language as the proviso.

King's second argument was founded on two "facts," one of them statutory, the other historical. The statutory fact was that Congress, in section 8 of the Reclamation Act of 1902 had made the water right an appurtenance to the land upon final payment.⁷⁴ The historical fact was that Congress had never placed a limit in prior land laws on "the amount of land which a man may own after having complied in full with the provisions of the law in order to acquire the title . . ."⁷⁵ He concluded that "the same rule governs" water once it attaches to land, so that there was no limitation on appurtenant water to which a landowner had obtained title by compliance with the law.

Reclamation law does indeed make "the right to the use of water . . . appurtenant to the land irrigated,"⁷⁶ but it does not follow that all conditions attached to water ownership disappear once it becomes appurtenant. The very section that makes the right to the use of water appurtenant to land, plainly imposes a limitation which survives final payment: "beneficial use shall be the basis, the measure, and the limit of the right."⁷⁷ Appurtenance does not equate water ownership with land ownership, but even if it did, conditions limiting an owner's use of land to which he holds fee title are well known to the law, whether written in the deed or imposed by ordinance or statute.

Legislative history of the reclamation law shows that appurtenance was not intended to vest as an unconditional property right. Congressman Mondell said: "The settler or landowner who complies with all the conditions of the act secures a *perpetual right* to the use of a sufficient amount of water to irrigate his land, *but this right lapses* if he fails to put the water to beneficial use and only extends to the use of the water on and *for the tract* originally irrigated. These most important provisions of the law prevent all the evils which come from recognizing a property right in water with power to sell and dispose of the same elsewhere *and for other purposes* than originally intended . . ."⁷⁸ King, the interpreter, argued that the act of becoming appurtenant extinguished all conditions attached to the water including acreage limitation; Mondell, the legislator, argued that appurtenance itself was contingent.

King's historical fact that prior land legislation furnishes no precedent for a permanent water limitation is an historical error. On March 2, 1889, Congress amended the homestead law to permit entrymen who had complied with the law and made final proof for less than 160 acres, to make further entry, but only on so much land as would bring the total lands entered to 160 acres.⁷⁹

74. 32 STAT. 390 (1902), 43 U.S.C. § 372 (1952).

75. Instructions, 43 L.D. 339, 340 (1914).

76. 32 STAT. 390 (1902), 43 U.S.C. § 372 (1952).

77. *Ibid.*

78. 35 CONG. REC. 6679 (1902) (emphasis added). See also remarks of Congressmen Mondell, Tongue, and Ray in text at notes 85-88 *infra*.

79. 25 STAT. 854-55 (1889).

Thus, Congress had established a limitation on entrymen on public land, effective after compliance in full with the conditions prescribed to obtain title. And in the Warren Act of 1911 Congress imposed the excess land law on water to which private landowners already held full title.⁸⁰

King's third argument was that the Department's original construction was so "wide" and "radical"⁸¹ a departure "from the previous conditions regarding the rights of individuals" that Congress could not have intended it. In fact, Congress gave every indication that it intended a wide departure from prior legislation.⁸² Furthermore, it is hard to see how a law infringes upon individual rights when the individual "owners of private lands are not required to subject such lands to the operation of the reclamation law or to take water therefor."⁸³

King's fourth point was that imposing acreage limitation after payment was "subject to question on the ground of constitutionality." Perhaps by this he meant that Congress would not have risked raising a constitutional question in addition to the other obstacles he saw. Or possibly King meant to rest his case again on his erroneous belief that Congress had never limited the amount of land which a man may own after he had complied with the law—implying that such a limitation would be unconstitutional. But the excess land law does not "limit the amount of land which a man may own"; it limits only the amount of water an individual may receive from a federal reclamation project.⁸⁴

The issue of constitutionality was debated when the original reclamation bill was passed in 1902. The sponsors of reclamation were clear in their own minds that Congress had power to set up a permanently effective limitation. Congressman Mondell said that Congress had the right to grant public lands, "with or without stipulation as to their use and final disposition."⁸⁵ And Congressman Tongue of Oregon, relying on *Gibson v. Chouteau*,⁸⁶ advanced the unrestricted powers of the Government to attach permanent conditions to grants of the public domain, either in the individual patent or by general legislation.⁸⁷

80. See text at note 40 *supra*.

81. There is nothing to indicate that King, in 1914, meant "radical" in the modern sense of communistic. But the charge of "communism" did crop up temporarily in 1944 during the unsuccessful effort of Congressman Alfred J. Elliott to exempt Central Valley Project in California from the excess land provision. See San Francisco Call-Bulletin, June 1, 1944, p. 1; Superior California Register, June 11, 1944. In the Irrigation Congress the charge of "communistic" had been met by supporters of public reclamation. See OFFICIAL REPORT OF THE INTERNATIONAL IRRIGATION CONGRESS 81 (1893).

82. See text at notes 27-50 *supra*.

83. C.M. Kirkpatrick, 42 L.D. 547, 549 (1913).

84. Graham, *The Central Valley Project: Resource Development of a Natural Basin*, 38 CALIF. L. REV. 588, 603-04 (1950).

85. 35 CONG. REC. 6680 (1902) (emphasis added).

86. 13 Wall. (80 U.S.) 92 (1871). Tongue also cited KINNEY, IRRIGATION § 147 (1894), and POMEROY, RIPARIAN RIGHTS § 32 (1893).

87. 35 CONG. REC. App. p. 646 (1902).

An opponent of the bill argued that the United States, as an owner of real estate can impose no "restrictions running with and connected with the enjoyment of such land that are not subject to the laws of the State in which the land is situated"88 With the issue of constitutionality placed squarely before it, Congress decided nevertheless to proceed with the bill, confident that the objections were without merit.

In raising questions of constitutionality, King's *Instructions* appears to have overlooked *Burley v. United States*,⁸⁹ decided four years earlier, in which the Ninth Circuit upheld the constitutionality of reclamation law. The court quoted the excess land provision in section 5 of the Act of 1902 in support of its reasoning.⁹⁰

King's fifth argument against construing the excess land law as surviving full and final payment "in the absence of a plain intent expressed in the law," was that it would "introduce an entirely new system of land ownership in reclamation projects not applicable to any other public lands or any other lands acquired from the United States." It is doubtful that Congress would have been affected by such an argument, especially with its 1889 amendment to the Homestead Act⁹¹ as precedent. It is an ironical commentary on the argument that Cohen, following the logic of King's interpretation, produced two systems of land ownership within the reclamation system itself, when he concluded that the effective duration of the excess land law under the Warren Act of 1911 depends (under King's *Instructions*) on whether the administrative arrangement for repayment of construction charges is made on the basis of installments or annual carrying charges.⁹²

Now let us turn to the language of reclamation law. Section 5 of the Act of 1902 provides that "No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner . . . and no such right shall permanently attach until all payments therefor are made."⁹³ The Warren Act of 1911 states in section 1 that water stored or carried in federal projects "shall not be used otherwise than as prescribed by law as to lands held in private ownership."⁹⁴ The law referred to is section 5 of the original Act of 1902. Section 1 of the Warren Act adds to the original limitation on the sale of water rights a prohibition against using water in violation

88. Statement of Congressman George Ray (N.Y.), 35 CONG. REC. 6696 (1902). Ray argued also that the irrigation of public lands for sale to private owners promoted neither the general welfare nor interstate or foreign commerce. *Id.* at 6686. The House minority report on the bill denied the power of Congress to make water rights appurtenant to land. King, in his *Instructions*, accepted the constitutionality of the federal power to irrigate land and make water an appurtenance.

89. 179 Fed. 1 (1910).

90. *Burley v. United States*, 179 Fed. 1, 7-8 (1910).

91. See text at note 79 *supra*.

92. Cohen Opinion, p. 5.

93. 32 STAT. 389 (1902), as amended, 43 U.S.C. § 419 (1952) (emphasis added).

94. 36 STAT. 925 (1911), 43 U.S.C. § 523 (1952) (emphasis added).

of the excess land law. Section 2 of the later Act provides that "water *shall not be furnished* from [any federal project] to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres."⁹⁵ This is an independent restatement of a limitation on the water an individual landowner may receive. It is unmistakably timeless and of general application.

The Act of August 9, 1912, broadens the incidence of the excess land prohibition to include not only seller and user of water rights but also the purchaser. The proviso in section 3 forbids anyone to "acquire, own, or hold irrigable land" under reclamation law in excess amounts and states that no water shall be "furnished," "nor a water right sold or *recognized* for such excess."⁹⁶

The crux of the language is the meaning of the phrase in the proviso, "nor in any case in excess of one hundred and sixty acres." King said it is not overriding, but is qualified by the earlier phrase "before final payment in full of all installments of building and betterment charges."⁹⁷ But the "nor in any case" phrase can be read at least as easily to be overriding, as the original Departmental interpretations in *Johnson* and *Keebaugh* testify. Nor need the matter rest there. The Act of 1902 restricts entry to "tracts of not . . . more than 160 acres,"⁹⁸ and limits water rights sold to private landowners to the same maximum.⁹⁹ Since the upper limit already was established in the 1902 law, the phrase "nor in any case in excess of one hundred and sixty acres" if interpreted as qualified by the phrase "before final payment in full of all installments," would be tautological. It is more reasonable to assume that Congress meant "nor in *any* case" to be taken at face value, as an overriding limitation on water before and after final payment. And under this interpretation, later clauses in the proviso became less strained. The drastic penalty of forfeiture of excess lands acquired in good faith but held longer than two years is unreasonably severe if it could be avoided by repayment of charges. Congress had required repayment of all charges within ten years. Thus recitation of the proviso in every patent and water right certificate is hardly necessary if the restrictions would terminate within ten years, but it is a more than reasonable precaution to assure actual notice of permanent restrictions to transferees.

Although *Keebaugh* found the law "susceptible of but one interpretation," King is not without ground in pointing to a lack of clarity. But the *Instructions* is wrong in insisting that only a "plain intent *expressed in the law*,"¹⁰⁰ can be used to resolve the ambiguity. King may have employed the proper English rule for construing statutes, but not the American, under which reliance is

95. 36 STAT. 926 (1911), 43 U.S.C. § 524 (1952) (emphasis added).

96. 37 STAT. 266 (1912), 43 U.S.C. §§ 543, 544 (1952) (emphasis added). See full text of the proviso in text at note 41 *supra*.

97. *Ibid.*

98. 32 STAT. 388 (1902), as amended, 43 U.S.C. § 391 (1952).

99. 32 STAT. 389 (1902), 43 U.S.C. § 419 (1952).

100. *Instructions*, 43 L.D. 339 (1914).

made on external aids.¹⁰¹ The original reclamation law set the maximum period for repayment at ten years.¹⁰² Sponsors of the bill estimated that construction charges might be as low as \$10 or even \$5 per acre,¹⁰³ and that farm-units would be far less than 160 acres, probably as low as 40 acres. The total charge they foresaw was an amount that might easily be paid off in less than ten years. It places a strain on credulity to reconcile a protection lasting at most for ten years with the fulsome promise of the sponsors of the reclamation bill that they were providing an enduring protection against monopoly.

It is difficult to find reasonable ground either in the law or its legislative history to explain why administrators have accepted King's *Instructions*, apparently without question. The explanation seems to lie elsewhere.

III

PRESSURE

"In future as in earlier irrigation enterprises, large holdings will give most vexation . . . In the future it will be even more necessary to insist that large holdings shall not receive water from government supplies, unless divided into farm units of proper size, and offered to intending purchasers at reasonable terms."

—John A. Widtsoe¹⁰⁴

Foundations of the drive to escape the excess land law were laid in the half century before its enactment while national land policy was breaking down in the West, notably in the Central Valley of California.¹⁰⁵ During this period farsighted men acquired huge tracts that they turned into large-scale agricultural or livestock enterprises operating on short water supplies,¹⁰⁶ great mineral deposits frequently underlie these same tracts.¹⁰⁷ Such landholders do not welcome a national policy of distributing water that invites redistribution of

101. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUMB. L. REV.* 540, 544 (1947).

102. 32 *STAT.* 389 (1902).

103. 35 *CONG. REC.* 1384, 6681, 6766 (1902); *id.*, app., p. 256. The fact that soon after passage of the law costs were discovered to be a good deal higher is irrelevant in seeking the sponsors' intent.

104. WIDTSOE, *SUCCESS ON IRRIGATION PROJECTS* 113 (1928).

105. See, e.g., Gates, *The Homestead Law in an Incongruous Land System*, 41 *AM. HIST. REV.* 655, 668 *et seq.* (1936); COOPER, *LAND, WATER AND SETTLEMENT IN: KERN COUNTY, CALIFORNIA: 1850-1890* (unpublished thesis in University of California library, 1953).

106. See, e.g., testimony of S.T. Harding, in *Hearings before Subcommittee of the Senate Committee on Irrigation and Reclamation on S. Res. 295*, 78th Cong., 2d Sess. 360 (1944); DOWNEY, *THEY WOULD RULE THE VALLEY* 171-81 (1947); testimony of George L. Henderson, in *Hearings before House Flood Control Committee on H.R. 4485*, 78th Cong., 2d Sess. 751-63 (1944).

107. See, e.g., testimony of Senator Sheridan Downey, in *Hearings before Subcommittee of the Senate Commerce Committee on H.R. 3961*, 78th Cong., 2d Sess. 770 (1944); testimony of Paul H. Johnstone, in *Hearings before Subcommittee of the Senate Committee on Public Lands on S. 912*, 80th Cong., 1st Sess. 864 (1947).

land. At times a strong alliance develops between them and large organizations of other kinds, each opposed to reclamation law for its own reasons.¹⁰⁸ The history of this drive is a case study in the observation of William Ewart Gladstone that "Property is vigilant, active, sleepless; if ever it seems to slumber, be sure that one eye is open."¹⁰⁹

Opposition to the excess land law moves to two main directions, attack on the law itself and pressure on administrators to weaken enforcement. The former tactic is preferred, for congressional exemptions are final, if they can be won. The effort to obtain outright exemptions is likely, however, to arouse popular and effective resistance in Congress. But, of the alternative, a spokesman for large landholdings candidly explained that in some cases nonenforcement "would not be a safe solution . . . Landowners could not rely on continued future nonenforcement."¹¹⁰ The twin campaigns against the law and its administration have proceeded simultaneously with fluctuating intensity.

Both sponsors and opponents of the original reclamation bill in 1902 joined in arguing against monopoly, sponsors saying federal reclamation would prevent it, and opponents claiming reclamation would benefit it. This unity of purpose, however, did not go very deep. Attack on the excess land law began in the 1905 meeting of the National Irrigation Congress when large landholders sought to obtain a resolution against it from the fathers of reclamation. The attempt was defeated by voice vote "amid great applause,"¹¹¹ and open attack on the law was not resumed until 1938. Then three projects were exempted within space of a few years, on the claim that special circumstances took them out of the class to which the excess land law was intended to apply.¹¹²

The most recent efforts to eliminate the excess land law, made in 1944 and 1947, produced the greatest congressional debates on reclamation since 1902, and defeat for the attackers. The first was the Elliott rider to the Rivers and Harbors Bill, seeking exemption of Central Valley Project.¹¹³ The second effort followed in the 80th Congress, six senators sponsoring a bill to exempt

108. The provision of reclamation law which gives public agencies preference in disposing of electrical power from reclamation projects is a counterpart of the excess land law and evokes resistance from private power interests. Reclamation Project Act of Aug. 4, 1939, § 9(c), 53 STAT. 1195, as amended, 43 U.S.C. § 485 L(c) (1952).

109. MORLEY, 3 LIFE OF WILLIAM EWART GLADSTONE 469 (1903).

110. Testimony of S.T. Harding, in *Hearings on S. Res. 295*, *supra* note 106, at 363.

111. Testimony of Secretary of the Interior J.A. Krug, in *Hearings on S. 912*, *supra* note 107, at 991-92; OFFICIAL PROCEEDINGS OF 13TH NATIONAL IRRIGATION CONGRESS 60-63 (1905).

112. Wertheimer, *supra* note 59, at 38 *et seq.*; testimony of James G. Patton, in *Hearings on S. 912*, *supra* note 107, at 623-28; letter from Louis T. Robinson to Congressman Alfred J. Elliott, dated March 19, 1947, in *id.* at 1169-72. Another exemption of this type for Santa Maria project, California, passed in the 83d Congress. With previous House approval it went through the Senate after debate by 45-17. 100 Cong. Rec. 1101-07, A858-59, A863-66 (daily ed. Feb. 2, 1954); *id.* at 14286-88, 14290-304 (daily ed. Aug. 18, 1954).

113. Section 4, H.R. 3961, 78th Cong., 2d Sess. (1944).

projects in California, Colorado, and Texas. The hearings, marked by acrimonious passages between Senator Downey, chief protagonist of the bill, and officials of the Bureau of Reclamation, ran for nearly a month and are recorded in more than 1300 pages.¹¹⁴ The bill died in committee.

The benefits of administrative nonenforcement were realized by opponents of the excess land law on some older projects such as Salt River Valley, Arizona, and the Imperial Valley Division of the All-American Canal.¹¹⁵ Once nonenforcement had been achieved, they advertised it repeatedly as a sort of "precedent," arguing from it that there should be no law at all.¹¹⁶

Even the strong and sympathetic administrator is more or less vulnerable to the kind of pressure brought to bear by opponents of the anti-monopoly, anti-speculation features of reclamation law. Reclamation administrators need visible, substantial, and persistent support for their projects. Citizens whose primary interest is in widespread distribution of benefits and the general principles of water resource development seldom provide such support. They have exerted intense influence at times such as the campaign for reclamation law in 1902, and the defense of the excess land law in 1944 and 1947, but obstacles as simple as the cost of travel from western states to the national capital impede their consistent support. Such obstacles are far less deterring to those expecting substantial financial gains from projects. They provide steady, vigorous support for undertaking particular projects, but on these very projects they expend an equal effort to eliminate the excess land law or to weaken its enforcement.

Not only can excess landholders give or withhold valued support to reclamation administrators; they can also transfer it to a competing agency of water resource development. The principal competitor is the Army Engineers, to whose projects the excess land law did not apply until 1944. By the late 1930's, officials in the Bureau of Reclamation were uneasy that this difference in law might, under the influence of excess landholders in Central Valley, cause them to lose construction of important reservoirs there. Reclamation officials are reported to have intimated that the excess land law need not be taken seriously in the Central Valley.¹¹⁷ But when these hints failed to

114. *Hearings on S. 912, supra* note 107.

115. See PENDLETON, *HISTORY OF LABOR IN ARIZONA IRRIGATED AGRICULTURE*, 34 *et seq.* (unpublished thesis in University of California library, 1950); Taylor, *The 160-Acre Water Limitation and the Water Resources Commission*, 3 *WESTERN POL. Q.* 435 (1950).

116. See, *e.g.*, testimony of Northcutt Ely, in *Hearings on H.R. 3961, supra* note 107, at 631-32; Curran, *The 160-Acre Limitation Law: Application to Private Land Will Prove Futile*, *Western Construction News*, Aug. 1948, p. 107; Williams, *The Vanishing American*, ADDRESS BEFORE CONVENTION OF CALIF. IRRIGATION DISTRICTS ASS'N 22 (Nov. 12, 1953).

117. See Testimony of Roland Curran, in *Hearings on H.R. 3961, supra* note 107, at 665-66, and in *Hearings on S. 912, supra* note 107, at 1310; testimony of Edward Hyatt, California State Engineer, in *Hearings on S. Res. 295, supra* note 106, at 27; testimony of Russell Giffen, in *Hearings before Subcommittee of U.S. Senate Military*

materialize, and new reclamation officials said in 1943 that they would enforce the law, Kings and Kern River projects were transferred by Congress to the Army Engineers, partly under spur of Tulare Lake Basin Water Storage District where excess landholdings predominate.¹¹⁸ In acceding to pressure to assign Kings and Kern River projects to the Army Engineers, Congress did not yield entirely to large landholding interests. For the first time it inserted reclamation law, with its excess land provision, into flood control law. Thus, the Bureau was denied opportunity to construct and operate important reservoirs, and was given the troublesome responsibility of enforcing the excess land law against strong resistance.

Tactics of personal harrassment of administrators began to be employed publicly. Congressman Elliott, author of the exemption rider of 1944, referred to employees of the Interior Department as "some 'dillywhackers' down here who have done everything they could do to keep the Corps of Army Engineers from doing any work."¹¹⁹ The rising pitch of bitterness against administrators defending the excess land law in 1947 appears from the following examination by Senator Downey of Economist Paul H. Johnstone of the Bureau: "Are you not here, Mr. Johnstone, rather as a propogandist of the most extreme kind, rather than an economist?"¹²⁰

In August 1947, after the Senate Public Lands Committee failed to report his bill, Senator Downey asked the Civil Service Commission to examine the professional qualifications of Richard L. Boke, Regional Director of Reclamation in the Central Valley area, who had been making strong defense of the

Affairs Committee, San Francisco, California, April 7, 1944, p. 93 (Mimeo.). An occasional note of pique was entered in the record against administrators who had held out prospects that turned out to be false. Giffen, a large landholder, said: "It seems to me that the Bureau was completely in bad faith in taking that \$25,000 [contribution toward cost of a water survey], knowing that they were going to support as vigorously as they have the 160-acre limitation . . ."

118. See, e.g., resolution of Tulare Lake Basin Water Storage District, March 14, 1940, in *Hearings before House Flood Control Committee on H.R. 9640*, 76th Cong., 3d Sess. 552-54 (1940); testimony of Charles L. Kaupke, in *Hearings before House Flood Control Committee on H.R. 4911*, 77th Cong., 1st Sess. 181 (1941). Kaupke testified, "[We] prefer the project as reported by the Corps of Engineers . . . [R]ather than accept the provisions of the Bureau project, we would forego a project on Kings River." Physical aspects of the two proposed projects were almost identical. On May 7, 1945, the president of Tulare Lake Basin Water Storage District wrote: "Over the several past years we have been required to incur much expense in order to assist preventing this project from being undertaken by the Bureau of Reclamation." Letter from Louis T. Robinson to Senator Carl Hayden, in *Hearings before Subcommittee of Senate Appropriations Committee on H.R. 3024*, 79th Cong., 1st Sess. 991 (1945).

119. *Hearings before Subcommittee of the Senate Commerce Committee on H.R. 4485*, 78th Cong., 2d Sess. 284 (1944).

120. *Hearings before Subcommittee of the Senate Committee on Public Lands on S. 912*, 80th Cong., 1st Sess. 904 (1947); see *id.* at 104. Senator Watkins inquired of Commissioner Straus whether he considered opposing a change in the law part of his duty. *Id.* at 123-24. Senator Downey stated that "a large part of the time of several hundred men in the Bureau" had been spent lobbying and propogandizing. *Id.* at 124-25.

excess land law. Boke was then beginning a difficult campaign against resistance, ultimately successful, to obtain water contracts containing the excess land provision as required by law. By mid-September the Commissioner of Reclamation, Michael W. Straus, also came under attack. The San Francisco News reported that "Within the last two weeks two efforts have been made to organize an appeal to President Truman to remove top officials of the Bureau of Reclamation. Foes of public transmission lines and acreage limitation have apparently jointed forces in a new drive . . . aimed at officials who enforce existing law on these two matters."¹²¹

The pressure on these officials culminated in a rider attached to the Interior Appropriations Bill for 1949 requiring that holders of top posts must be engineers, or go unpaid.¹²² Neither Straus nor Boke met this qualification. President Truman, who signed the bill on June 29, 1948, expressed regret that he could not single out these "arbitrary qualifications" for veto: "This rider is designed to effect the removal of two men . . . who have supported the public power policy of the Government and the 160-acre law which assures that the Western lands reclaimed at public expense shall be used for the development of family size farms. [Its result will be] . . . to serve the purposes of special interests desirous of monopolizing the rich farm lands of the West and intent upon stopping the construction of transmission lines for the delivery of power from Federal dams. These same interests tried first to get the law changed but failed, and having failed then sought to get the management changed."¹²³ Straus and Boke remained in office for five months without pay, which only a new Congress elected in 1948 restored.

During this period of extreme pressure on both the law and its administrators the props supporting enforcement were weakened. Without arguing that these moves were made step by step in direct response to pressure, it nevertheless seems relevant to chronicle some of them. As early as December 1946, during the lull between the congressional battles of 1944 and 1947, Commissioner of Reclamation Straus officially called attention of his Regional Directors to the necessity for bringing about compliance with the excess land law.¹²⁴ On September 19, 1947, while the opening guns were being fired in the fight to remove top Bureau officials, the Commissioner formally asked the Solicitor of the Interior Department if full and final payment of construction charges against excess lands frees such lands of the acreage limitations. Cohen answered in late October, and on December 16, 1947, the Commissioner informed his regional directors that payment of charges does free excess lands,

121. Ruth Finney, *San Francisco News*, Sept. 25, 1947, p. 18, cols. 6, 7.

122. 62 STAT. 1126 (1948).

123. Text of the President's statement appears in mimeo. release. 94 CONG. REC. 9368 (1948).

124. Michael Straus, Commissioner of Reclamation, to Regional and Branch Directors, Administrative Letter No. 303, Dec. 16, 1947, p. 1, entitled, Program of the Bureau for Action Consistent with the Acreage Limitations of the Federal Reclamation Law [hereinafter cited as *Admin. Letter 303*].

and that where payment of charges is not "an available solution" officials should press for reasonably prompt arrangements with water users for disposal of excess landholdings.¹²⁵ Not a line in the excess land statute had been changed, but the king-pin of its enforcement was quietly removed.

IV ACTION

"So off went the Emperor in procession under his splendid canopy. Everyone in the streets and the windows said, 'Oh how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!' Nobody would confess that he couldn't see anything, for that would prove him either unfit for his position, or a fool. No costume the Emperor had worn before was ever such a complete success.

" 'But he hasn't got anything on,' a little child said.

" 'Did you ever hear such innocent prattle?' said its father. And one person whispered to another what the child had said, 'He hasn't anything on. A child says he hasn't anything on.'

" 'But he hasn't got anything on!' the whole town cried out at last.

"The Emperor shivered, for he suspected they were right. But he thought, 'This procession has got to go on.' So he walked more proudly than ever, as his noblemen held high the train that wasn't there at all."

—Hans Christian Andersen¹²⁶

King's *Instructions* of 1914 lay dormant for decades, occasionally receiving an uncritical reference or a rare and brief official recitation.¹²⁷ A good indication that the *Instructions* was not used as basis for action in the first thirty-three years after its approval by the Department is the fact that the Commissioner of Reclamation found it necessary to ask the Department Solicitor in 1947 if payment of construction charges "frees" excess lands of the excess land law. This was the very question to which King had given an emphatic yes in 1914. On December 16, 1947, the Commissioner of Reclamation issued Administrative Letter 303 on the subject of a program "for action consistent with the acreage limitations." Referring to his letter of a year earlier on the "necessity of bringing about compliance with the acreage limitations," he informed his regional directors of Cohen's conclusion that payment does "free" excess lands and spoke of payment of charges as "an available solution to the excess land problem . . ." The old solutions, the actual disposal of excess lands as a condition precedent to receiving water from a federal reclamation project, or the signing of a recordable contract to make such disposal, were still acceptable. Water users' organizations expressing a genuine "desire fully to cooperate with the Bureau to bring about full compliance" with acreage limitation were to choose from among these three alternatives.¹²⁸ Less than a year later Supple-

125. *Admin. Letter 303*, p. 1.

126. ANDERSON, *THE COMPLETE ANDERSON* 83 (Hersholt ed. 1949).

127. See text at notes 58-71 *supra*.

128. *Admin. Letter 303*, pp. 1, 2.

ment No. 1 to Administrative Letter 303 advised regional directors that under Cohen's opinion individual landowners as well as water users' organizations could "free the land of the acreage limitation" by paying charges in full.¹²⁹

While this program for "compliance" on the basis of Cohen's opinion was taking shape, eight Democratic California Congressmen wrote President Truman of their apprehension that Administrative Letter 303 might open the way to the evasion of the excess land law and frustrate the intention of Congress.¹³⁰ Secretary of the Interior Oscar L. Chapman expressed his gratitude for their "vigorous endorsement" of the law "as an important means of encouraging family size farms."¹³¹ He assured them that "in the entire State of California no situation exists on a Federal Reclamation project where Administrative Letter 303 has been applied or is being considered."¹³²

Secretary Chapman indicated that the purpose of Administrative Letter 303 was to secure compliance on projects begun prior to the Act of May 25, 1926 on which "significant non-compliance" existed. That act had inaugurated the procedure of permitting excess landholders to enter recordable contracts to dispose of excess holdings, instead of requiring actual disposal prior to receiving water. The Bureau's Landownership Survey in 1946 had revealed "a high degree of landowner compliance" on projects begun since 1926 where "individual recordable contracts" were used. The Secretary said that Administrative Letter 303 had been applied on at least three pre-1926 projects, and that these three had "eliminated non-compliance through either the execution of recordable contracts, disposal of excess lands to qualified owners, or through the payment in full of the construction obligation in strict accord with the Reclamation laws as determined by the Associate Solicitor . . ."¹³³ This evidently dates initial administrative action in reliance on the doctrine King announced in 1914, as occurring in 1950 or early 1951.¹³⁴

More than a year after the Secretary's letter to the eight Democratic California Congressmen, he reassured a citizen of California that Administrative Letter 303 had not been applied in California and was not "considered for

129. Kenneth Markwell, Acting Commissioner, to Regional and Branch Directors, *Admin. Letter 303*, Supp. No. 1, Sept. 24, 1948, with attachment #1, a letter from Clifford Fix, Chief Counsel, to Commissioner, Sept. 3, 1948, entitled Excess Land Enforcement Program—Salt River and Yuma Projects. The letter indicated ways of identifying an individual excess landholder's proportionate share of charges against his district.

130. Letter from John F. Shelley, Frank R. Havenner, Clinton D. McKinnon, Clyde Doyle, Harry R. Sheppard, Cecil R. King, Chet Holifield, and George P. Miller to President Harry S. Truman, dated Feb. 19, 1951.

131. Letter from Secretary of the Interior Oscar L. Chapman to Congressman John F. Shelley, dated March 29, 1951.

132. *Ibid.*

133. *Ibid.* The degree to which one alternative or another was used was not stated.

134. See Congressman Jackson's 1949 attack on Central Arizona Project, quoting from the Los Angeles Mirror for July 9: "Some 55 percent of these 260,000 acres are owned by only 420 men. So what their scheme amounts to is simply subsidizing 420 wealthy landowners to the tune of more than \$500,000 apiece." 95 CONG. REC. A4668 (1949).

application."¹³⁵ Kings River and Tulare Lake Project had been the subject of public protest by the Veterans of Foreign Wars after news reports that lump-sum payment on Pine Flat would void the 160-acre rule.¹³⁶ Chapman stated: "Negotiations will proceed only on the basis of compliance with the provisions of the reclamation laws prescribing limitations on the acreage of land"¹³⁷

Yet four months later, and only two weeks prior to the national election that shifted control of the executive and legislative branches of the Government from one party to the other, the local district manager of reclamation in the Kings River and Tulare Lake Project area informed the Kings River Conservation District in the course of negotiations for a repayment contract that, although the landowners could not "wish" excess land law "off the books," the lump-sum payment contract furnished by the Bureau "would remove the excess land restrictions."¹³⁸ Negotiations between the Bureau of Reclamation and Kings River water users were ended for the time, however, until resumed by the new national administration.

Meanwhile in the weeks remaining to him, the outgoing Secretary responded to fresh protests made to President Truman against Administrative Letter 303. He informed the President that at no time had he "concurred in a general policy that lump-sum or accelerated payments would be an acceptable alternative to the application of the excess lands limitation."¹³⁹ And he described Bureau policy as "to do no more than deal with some situations of long standing," without explaining why "situations of long standing" were an exception to "general policy." Early in 1952 the Commissioner of Reclamation had told Chapman that approval of Cohen's opinion in 1947 by the then Secretary had "formalized" Department policy on the "lump-sum settlement" procedure.¹⁴⁰ About the same time he wrote the President, the Secretary informed the Commissioner that Cohen's opinion carried no Departmental approval because it contained no "policy pronouncement" and had not been submitted for approval.¹⁴¹

135. Letter from Secretary Oscar Chapman to Correll M. Julian, dated June 23, 1952 [hereinafter cited as Chapman-Julian Letter]. See also correspondence, and statement by Senator Paul H. Douglas, 98 CONG. REC. 9178-82 (1952).

136. Statement by M.C. Hermann, Quartermaster-adjutant, Department of California, Veterans of Foreign Wars of the United States, 97 CONG. REC. A6351 (1951).

137. Chapman-Julian Letter.

138. Letter from Jack W. Rodner to Kings River Conservation District, dated Oct. 21, 1952, pp. 1-2.

139. Oscar L. Chapman, Secretary of the Interior, Memorandum to the President, Dec. 24, 1952, entitled, Letter from James G. Patton on Acreage Limitation in Federal Reclamation Policy.

140. Michael W. Straus, Commissioner, Memorandum to the Secretary of the Interior, Jan. 18, 1952, entitled, Kings River Contract Negotiations.

141. Oscar L. Chapman, Secretary of the Interior, Memorandum to the Commissioner of Reclamation, undated (*circa* Dec. 24, 1952). On more than one occasion Chapman had written approvingly of the application of Cohen's interpretation to certain

Pursuant to his "policy statements," Secretary Chapman instructed the Commissioner in late 1952 to refuse to accept any lump-sum or accelerated payment of construction charges which would, under Cohen's opinion and Administrative Letter 303, free the land from acreage limitation, and to refrain from negotiating new contracts which would permit lump-sum or accelerated payment. He specifically forbade negotiation of a King's River contract that would permit repayment of construction charges "in less than a pay-out period computed by the methods regularly used by the Bureau of Reclamation."¹⁴² Thus Secretary Chapman left office denying departmental approval to Cohen's opinion, and laying down a departmental policy against its use on Kings River and most if not all projects in the future.

The excess land law never has been an open issue between political parties, for no platform ever contained a plank against it. But as early as the national campaign of 1948 close observers believed that division was evident beneath the surface. In a list of five "tangible gains" powerful men in the Republican party would "expect a Republican Administration to deliver," Marquis Childs included repeal of acreage limitation in Central Valley, which then "could be taken as a precedent for breaking down" the provision elsewhere.¹⁴³ Candidate Thomas E. Dewey did not mention the issue publicly, but there is more than a hint of his attitude in his Seattle speech: "It will not be necessary for the Congress to force your next administration to appoint able and qualified men to the Bureau of Reclamation . . ." ¹⁴⁴ To those with knowledge of the attack on Straus and Boke, the opposing stands of candidates Dewey and Truman had been made clear, but the voters in general received no elucidation that enforcement of the excess land law was at stake. The national campaign of 1952 did no more than the campaign of 1948 to bring the excess land issue to the surface. However, less than a year after entering office, on November 9, 1953, Secretary of the Interior McKay authorized negotiation of a repayment contract on Kings River and Tulare Lake Project to include lump-sum prepayment at the option of water users, the payment to render the excess land law inoperative.¹⁴⁵

It is appropriate to review the legal supports that McKay mobilizes for his action. He relies primarily on precedent, beginning with the Cohen opinion: "This ruling was rested on a provision that goes back a long way in reclamation law and is found in Section 3 of the Act of August 9, 1912 . . ." ¹⁴⁶ He quotes a large portion of the proviso in section 3, but makes no mention of King's *Instructions* of 1914, the only reported legal opinion in the history of the Department that offers reasoning in support of the interpretation of the proviso which he now accepts

situations of long standing. The Cohen Opinion was rendered while Secretary J.A. Krug was in office; it bears no signature indicating Departmental approval.

142. *Ibid.*

143. Childs, San Francisco News, Sept. 9, 1948, p. 21, cols. 1-3.

144. San Francisco Chronicle, Sept. 28, 1948, p. 16, cols. 4-5.

145. The text of McKay's authorization appears in text at note 9 *supra*.

146. McKay-Haggerty Letter, *supra* note 9.

The Secretary also stated that in view of the action taken "directly or indirectly in reliance" on Cohen's opinion of 1947, "the Department is constrained to follow the precedents already set . . ." The elapsed period on which the Secretary is depending is six years at the outside. How much action intervened is not wholly clear. Administrative Letter 303 and its supplements were applied apparently for the first time around 1950 or 1951. Secretary McKay stated only that "a number" of contracts had been executed by his predecessors providing that payment of construction charges relieved lands of acreage limitations, and that such contracts with the Pathfinder Irrigation District, the Gering and Fort Laramie Irrigation District, and the Goshen Irrigation District had obtained the approval of Congress.¹⁴⁷

McKay did add a note of proper caution against construing congressional approval as constituting ratification of Department policy under Cohen's opinion and Administrative Letter 303: "It should be noted, however, that the principal reason for the submission of these contracts to the Congress was the *solution of the repayment problem*."¹⁴⁸ When the three contracts named by the Secretary were under consideration in Senate and House committee hearings, a fourth contract was also considered involving the Northport Irrigation District. None of the three contracts named by the Secretary as precedent was printed with the hearings. The text of the Northport contract, which contains no clause that payment of charges relieves lands of the excess land provision, was the only one reproduced. The excess land issue was not discussed before the committees, in House or Senate committee reports, or on the floor of either House.¹⁴⁹

The Secretary relied also on the uniqueness of the Kings River and Tulare Lake Project:

"The Kings River area is serviced by an irrigation system which was privately developed and financed, and operated long before the Kings River Project, and there will be no Federal investment in works below Pine Flat Dam. The benefit which the water users will derive from

147. McKay-Haggerty Letter. The contracts were approved by the Act of July 17, 1952, 66 STAT. 754 (1952), pursuant to § 7(a) of the Reclamation Project Act of 1939, 53 STAT. 1192, as amended, 43 U.S.C. § 485f (1952). Assistant Secretary of the Interior Fred G. Aandahl wrote: "on December 12, 1952 . . . the then Under Secretary of the Interior executed 31 contracts with water users' organizations in the Minidoka and Palisades Projects, in Idaho. All of these contracts contain provisions [for] employment of the lump-sum approach to repayment, with the consequent inapplicability of the acreage limitation . . ." Letter from Fred G. Aandahl to C.J. Haggerty, dated Aug. 6, 1954. Apparently these contracts were not submitted to Congress. The Assistant Secretary did not say whether they offered excess landholders the option of prepayment.

148. McKay-Haggerty Letter (emphasis added).

149. *Hearing before the Senate Committee on Interior and Insular Affairs on S. 2720*, 82d Cong., 2d Sess. (1952); *Hearings before Subcommittee of House Committee on Interior and Insular Affairs on H.R. 6723*, 82d Cong., 2d Sess. (1952); H.R. REP. No. 2150, 82d Cong., 2d Sess. (1952); S. REP. No. 1809, 82d Cong., 2d Sess. (1952); 98 CONG. REC. 8917, 8930-31, 9066-67 (1952). Northport contract was not approved by Congress because the district opposed it.

the operation of the project, which is one principally for flood control, will be the storage of certain waters behind Pine Flat Dam and their release into the river as may permit their most effective use in the completed system."¹⁵⁰

This statement boils down to four points. The first is that the irrigation system was privately developed, financed, and operated long before there was a federal project. This is irrelevant, and the Secretary does not dispute that reclamation law applies to Kings River and Tulare Lake Project the same as to any other. Congress was fully informed of that Project's uniqueness when it applied reclamation law to it. The sponsor of the Flood Control Bill covering Kings and Kern River Projects stated: "No project in this bill which may include irrigation features is exempted from the reclamation laws."¹⁵¹

The Secretary's second point is that "there will be no Federal investment in works below Pine Flat Dam." The Secretary is obviously in no position to give such assurance for the future. Tulare Lake interests have had plans for more flood control works ever since 1917,¹⁵² and they might be as successful in the future as they have been in the past. In addition McKay overlooks investment by the Army Engineers in flood control measures of great, if not exclusive value to irrigators of Tulare Lake bed. The total expended by the Army Engineers from 1933 to 1949 was close to two million dollars.¹⁵³ All these expenditures were borne by the federal government and were not reimbursable by the beneficiaries.

The Secretary's third point is that the project is "principally for flood control." It is hard to know what he means by this, or what relevance the argument has. It is true that the project was authorized by Congress in the Flood Control Act of 1944, but reclamation law was specifically applied to the project by section 8 of that act.¹⁵⁴ The project was included in the flood control bill in part upon representations by the Army Engineers that the ratio of benefits of flood control to irrigation was 1.19 to 1. In 1948 the Engineers, having won authorization over the Bureau, and with construction of the project "well under way," recalculated and produced a revised estimate favoring irrigation over flood control by 1.59 to 1.¹⁵⁵

150. McKay-Haggerty Letter.

151. 90 CONG. REC. 9264 (1944).

152. CALIF. DEP'T PUB. WORKS, DIV. WATER RES., SAN JOAQUIN RIVER BASIN, 1931, BULL. No. 29, p. 483 (1934).

153. From 1933 to 1939, \$357,000 was expended by Army Engineers on minor flood-control measures. H.R. Doc. No. 630, 76th Cong., 3d Sess. 6 (1940). In 1943, \$250,000 was spent on permanent control works for diverting flood waters. Between June 30, 1943, and late 1948, \$1,480,551 was expended by the Army Engineers on Tulare Lake and the streams flowing into it, and an additional \$52,000 was spent during the fiscal year 1949. Letter from Lt. Colonel Ellsworth I. Davis, for Sacramento District Engineer, to Paul S. Taylor, dated Oct. 15, 1948.

154. 58 STAT. 891 (1944), as amended, 43 U.S.C. § 390 (1952).

155. THE KINGS RIVER PROJECT IN THE BASIN OF THE GREAT CENTRAL VALLEY—A CASE STUDY, TASK FORCE REPORT ON NATURAL RESOURCES (Appendix L), Jan. 1949, pp. 178-79.

The Secretary's fourth point is that the water users' only benefit "will be the storage of certain waters behind Pine Flat Dam and their release . . . as may permit their most effective use." The Warren Act of 1911 appears to have had such a project especially in mind when it applied reclamation law to the service of waters "impounded" or "stored" for appropriate release later.¹⁵⁶ On few projects, it would seem from the record, was Congress so determined that reclamation law ought to be applied.¹⁵⁷

One point remains, unmentioned by the Secretary. Congress gave special authorization that repayment on Kings River and Tulare Lake Project might be "either in lump sum or annual installments, for conservation storage when used."¹⁵⁸ Thus, it is within the Secretary's power to accept lump sum prepayment. However, it would place an unbearable strain on credulity to believe that in 1944, after King's *Instructions* had lain all but dormant for thirty years, Congress was cognizant of the interpretation that Associate Solicitor Cohen declared three years later. Still less could Congress have foreseen the application of Cohen's opinion to prepayment, as proposed by Secretary McKay.

V

WATER POLICY OR COLLATERAL SECURITY?

"The effect of all system is apt to be petrification of the subject systematized. Legal science is not exempt from this tendency. Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules."

—Roscoe Pound¹⁵⁹

The roots of United States land policy reach into colonial times. The Legislature of Virginia abolished entail in 1776, curbing the right of individuals to hold landed estates intact by binding the next generation. This proposal, in the words of its sponsor Thomas Jefferson, "was deemed essential to a well-ordered republic." Its purpose was "to annul . . . privilege, and instead of an aristocracy of wealth, of more harm and danger, than benefit, to society, to make an opening for the aristocracy of virtue and talent, which nature has wisely provided for the direction of the interests of Society, and scattered with equal hand through all its conditions"¹⁶⁰ Jefferson's view became accepted national policy as statute after statute adopted, broadened, and inscribed it into provisions for disposing of the public domain. The fruit of this policy is better balanced communities and less class distinction.¹⁶¹

156. 36 STAT. 925 (1911), 43 U.S.C. § 523 (1952).

157. Few projects have been presented so fully to Congress as this one. There were hearings in the House on three House Bills and in the Senate on two House Bills and a Senate Resolution.

158. Section 10, 58 STAT. 901 (1944).

159. Pound, *Liberty of Contract*, 18 YALE L.J. 462 (1909).

160. FOLEY (ED.), *THE JEFFERSONIAN CYCLOPEDIA* 307, no. 2704 (1900).

161. The Senate Small Business Committee, seeking to ascertain the effect of great

The Virginia Legislature's action was a pure expression of social policy, but when this policy was applied to the disposition of the public domain, a financial transaction appeared. At first, in conferring title to cheap land, the financial aspect was slight, but this increased with development of the arid West when the Government expected settlers to repay costs of water development. Still anti-monopoly policy came first, and never was used as collateral to secure the financial obligation. Failure to achieve the policy goals was regarded as perversion of the statutes.

It is perfectly clear that Congress viewed reclamation law as a water policy measure. Congress knew that the problem of securing repayment could be lifted from Government shoulders by allowing monopoly of land and water, but rejected monopoly because "no one contemplates paying so stupendous a price as this for irrigation development."¹⁶² There is no evidence that Congress intended to offer water users an option to keep or dispose of excess landholdings.¹⁶³ On the contrary, when Congress spoke on the subject, it denied the option specifically; in 1902 it forbade "commutation" of the residence requirement by cash payment, and in 1939 it created section 9(e) contracts which no administrator interprets as affording an option.¹⁶⁴ Congress has shown repeatedly that finance is secondary by its willingness to make repayment easier for water users at financial sacrifice to the government.

The action of Secretary McKay authorizing his negotiators on Kings River and Tulare Lake Project to accept prepayment in lieu of requiring disposal of excess lands treats the excess land law as an expendable curb on water monopoly and speculation, a lash on the end of a whip to secure repayment from excess landholders. He is apparently untroubled that his interpretation makes the Government seem more concerned over securing repayment from one class of water users than another. He maintains that "the Department is constrained to follow the precedents already set, unless they should clearly be demonstrated to be wrong . . ."¹⁶⁵ Secretary McKay's immediate predecessor refused to approve what McKay suggests he is helpless to prevent. No Secre-

landholdings in twentieth century rural society, made a comparative study of two towns in the Central Valley of California. Indices such as distribution of occupation and income, volume and distribution of trade, richness of civic organizations, and community services demonstrate the striking differences between Arvin and Dinuba, surrounded by large and small farms, respectively. *SMALL BUSINESS AND THE COMMUNITY: A STUDY IN CENTRAL VALLEY OF CALIFORNIA ON EFFECTS OF SCALE OF FARM OPERATIONS, Senate Committee Print No. 13, 79th Cong., 2d Sess. (1946).*

162. H.R. REP. No. 794, 66th Cong., 2d Sess. 3 (1920). Because maximum repayment charges do not approach the expenditure of the Government, even the fiscal aspects of reclamation demand that benefiting land be divided into small portions, so that no individual receives more than an equitable share of the public bounty. See Note, *Acreage Limitation: Policy Considerations*, 38 CALIF. L. REV. 728, 731 (1950).

163. Sometimes it is intimated that the subsidy of interest-free money is the *raison d'être* for the excess land law. This is only another facet of the fallacy that the excess land law is essentially a collateral device to assure repayment by excess landholders.

164. 53 STAT. 1196 (1939), as amended, 43 U.S.C. §485h (1952).

165. McKay-Haggerty Letter.

tary is bound by precedents he finds shoddy. The Secretary of the Interior in 1913 reversed a ruling permitting corporations to obtain water rights because the intent of Congress was that reclaimed lands should be "the homes of families."¹⁶⁶ Even if the Secretary feels constrained to follow the Cohen-King opinion and Department practice under Administrative Letter 303 holding that full and final payment of charges terminates the excess land provision, no statute requires him to accept prepayment,¹⁶⁷ and no precedent dictates that landholders shall not first have disposed of their excess, or contracted to do so. The Secretary is expressing his own view of desirable national policy.

Secretary McKay's present action, still revocable, shatters the excess land law already weakened by the corrosion caused by external pressures upon administrators, by their own unsympathetic attitude toward the law and by their preoccupation with technicalities. If Secretary McKay's authorization of November 9, 1953, expresses the will of Congress and represents application of the excess land law, words have been emptied of their meaning.

Roscoe Pound regretted that in substituting technicalities for a concern with premises, the courts had "wrought an injury" to themselves and "to the public regard for law."¹⁶⁸ It is as necessary to maintain public confidence in the integrity of public administration as in that of the judicial process. Senator Paul H. Douglas has explained the especial importance of administering reclamation law properly on Kings River and Tulare Lake Project: "The great landowners of the Kings River and Tulare Lake area apparently have not hesitated to seek public appropriations for their own benefit while deferring and possibly defying compliance with a law they should be proud to support. The President, on the other hand, has wisely declared maintenance of the family farm to be our national policy at home and abroad. Land reform has become one of our main instruments for stopping the spread of international communism and maintaining our national security Whatever we do on Kings River, therefore, will be subjected to the most searching examination of all who realize that our policy must now meet the test in our own country, as well as in foreign lands."¹⁶⁹

It is hazardous to confuse collateral with policy, the pocketbook of a law with its heart, to forget to examine premises, to lose principle in a body of rules.

166. Instructions, 42 L.D. 250 (1913).

167. 58 STAT. 901 (1944).

168. Pound. *supra* note 159, at 487.

169. Letter to Secretary of the Interior Oscar Chapman, dated April 29, 1952, printed in 98 CONG. REC. 9181 (1952). A recent statement from India suggests a confidence in United States reclamation law reminiscent of that of the original American sponsors: "We are all glad that a number of irrigation projects are being undertaken by the present Government. But, are the same evils of land purchase speculation, rack-renting, money-lending, profiteering in trade to be repeated here too? Here is a chance for the present Government. Let them study the reclamation and irrigation laws of the U.S.A. in this respect." Sivaswamy, *The Demands of the Cultivating Tenant and Labourer*, in LEGISLATIVE PROTECTION FOR THE CULTIVATING TENANT AND LABOURER, PROCEEDINGS OF THE CONFERENCE OF AGRICULTURAL WORKERS' UNIONS 11-12 (1947).