Reclamation Law in Litigation: Acreage and Residency Limitations on Private Lands

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RECLAMATION LAW IN LITIGATION: ACREAGE AND RESIDENCY LIMITATIONS ON PRIVATE LANDS

*Provision of land and water for family farms was the fundamental policy underlying the acreage and residency limitations of the Reclamation Act of 1902. Three-quarters of a century later, the family farm is again a matter of great concern, and acreage and residency limitations are the subject of discussion, legislation and litigation. To illustrate the issues that can be expected in such litigation, this comment analyzes three cases arising from the Boulder Canyon Project.**

INTRODUCTION AND BACKGROUND

The Homestead Act of 1862[1] was the first major step in the federal government's promotion of widespread settlement of the West. When the last humid lands were claimed, Congress wanted to continue the settlement program; it was obvious, however, that land without water was worthless, and the press for irrigation began.[2] To protect against monopoly and speculation, restrictions on the number of acres a settler could claim and requirements that the settler be a resident had been placed in the Homestead Act[3] and other federal legislation of the nineteenth century.[4] When the federal government entered the field of reclamation, such limitations were included for private as well as public lands.[5]

The Reclamation Act of 1902[6] is the foundation of federal reclamation law. It provided for a reclamation fund, consisting of pro-

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* The author has consulted the following Ninth Circuit Court of Appeals briefs in preparing this comment: Brief for Appellant, United States v. Imperial Irrigation Dist., No. 71-2124; Brief for Appellee State of California, United States v. Imperial Irrigation Dist., No. 71-2124; Appellant's Reply Brief, United States v. Imperial Irrigation Dist., No. 71-2124; Brief for the Federal Appellants, Ben Yellen v. Hickel, Nos. 73-1333 and 73-1388; Brief for Appellee, Ben Yellen v. Hickel, Nos. 73-1333 and 73-1388; Landowner's Joint Consolidated Brief, United States v. Imperial Irrigation Dist. and Ben Yellen v. Hickel, Nos. 71-2124, 73-1333 and 73-1388; and Brief of Ben Yellen in Response to Landowner's Joint Consolidated Brief, United States v. Imperial Irrigation Dist. and Ben Yellen v. Hickel, Nos. 71-2124, 73-1333 and 73-1388.

1. Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified in scattered sections of 43 U.S.C.).

2. For an excellent general background on reclamation law, *see* J. Sax, *Federal Reclamation Law*, in 2 WATERS AND WATER RIGHTS 111-291 (Clark ed. 1967) [hereinafter cited as Sax]. *See also* Gates, *Reclamation of the Arid Lands*, in PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 635-98 (1968) [hereinafter cited as Gates].

3. Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified in scattered sections of 43 U.S.C.).

4. *E.g.*, The Desert Land Act of 1877, 43 U.S.C. §§ 321-23 (1970); Timber and Stone Act of 1878, 43 U.S.C. §§ 311-13 (repealed by Act of August 1, 1955, ch. 448, 69 Stat. 434).

5. There are many issues that arise concerning public lands, but this comment will focus on lands in private ownership.

6. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C.).

ceeds from the sale of public lands, which would be used for building, operating and maintaining irrigation works.[7] Both public and private landowners could receive water upon agreeing to pay charges for the cost of construction.[8] Acreage and residency provisions are found in section 5 which provides, in part, as follows:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.[9]

Section 8 relates the Act's effect on state water laws, and provides that water rights under the Act shall be appurtenant to the land and "beneficial use shall be the basis, the measure, and the limit of the right."[10]

The Warren Act of 1911[11] authorized the Secretary of the Interior to contract with parties outside the area initially intended to be served by the federal project. Such parties were allowed to use the excess capacities of the project facilities, provided that water would not be furnished "to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres."[12] The Act of August 9, 1912,[13] provided in section 3 that no water would be furnished to, or water right sold or recognized for, land held in excess of 160 acres.[14]

The Reclamation Extension Act of 1914[15] modified the payment schedule of the 1902 Act, and strengthened the excess land limitations. While the 1902 Act stated only that a water right would not be sold for lands over 160 acres, section 12 of the 1914 Act provided that in any new reclamation project, owners of private lands would be required to agree to dispose of the amount in excess of that sufficient for the support of a family before a contract was let or work begun on construction.[16]

The Omnibus Adjustment Act of 1926[17] provides, in section 46,[18] for contracts between the Secretary of the Interior and irriga-

7. 43 U.S.C. §§ 391, 491 (1970).
8. *Id.* §§ 419, 461.
9. *Id.* § 431.
10. *Id.* § 372.
11. *Id.* §§ 523-25.
12. *Id.* § 524.
13. *Id.* §§ 541-46.
14. *Id.* § 544.
15. Act of August 13, 1914, ch. 247, 38 Stat. 686 (codified in scattered sections of 43 U.S.C.).
16. 43 U.S.C. § 418 (1970). For further discussion of this Act, *see* Comment, *Acreage Limitation and the Applicability of the Reclamation Extension Act of 1914*, 21 S.D.L. REV. 737 (1976).
17. Act of May 25, 1926, 43 U.S.C. §§ 423-423g, 610 (1970).
18. 43 U.S.C. § 423e (1970) provides:
> No water shall be delivered upon the completion of any new

tion districts (as opposed to individuals). The contracts are to provide that lands in excess of 160 acres will be appraised by the Secretary of the Interior, and that no water will be delivered to excess lands if the owners refuse to execute recordable contracts for the sale of such lands at terms and conditions satisfactory to the Secretary.[19]

Throughout the 75 year history of federal reclamation law, provisions for acreage and residency limitations have often failed to eliminate the monopolistic and speculative evils at which they were directed,[20] and have not been uniformly enforced.[21] In the last five years there have been proposals both to eliminate the limitations[22] and to enforce them more strictly.[23] For the present,

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> project . . . until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district . . . providing for payment . . . of the cost of constructing, operating and maintaining the works during the time they are in control of the United States. . . . Such contract . . . hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary. . . .

19. *Id.*

20. In 1924, a group of special advisors (the "Fact Finders Committee") reported to the United States Senate as follows:

> Although the Reclamation Service attempted to compel the subdivision of these privately owned lands into the units fixed by law, yet the legal enforcement was found difficult; and what was still worse, in many cases the owners of the land capitalized the Government expenditures and the liberality of its terms of repayment by selling the land to the settlers at much higher prices than could otherwise have been obtained. The benefits of the reclamation act, therefore, went in such cases almost entirely to these speculative owners. . . .

FEDERAL RECLAMATION BY IRRIGATION, S. Doc. No. 92, 68th Cong., 1st Sess. 38-39 (1924).

On January 11, 1976, the lead article in The *San Francisco Examiner* was entitled "The $2 Billion Giveaway;" the first paragraph read, "Paper farmers, absentee landowners and several big corporations reap most benefits from a federal irrigation project that was supposed to redistribute huge landholdings into family farms . . ." San Francisco Examiner, Jan. 11, 1976, at 1, col. 1.

21. *See, e.g.*, Memorandum of the Chairman of the Subcommittee on Irrigation and Reclamation to Members of the Senate Committee on Interior and Insular Affairs, ACREAGE LIMITATION—RECLAMATION LAW, 85th Cong., 2d Sess. 36-39 (1958). Indeed, while the acreage limitation is sporadically enforced, the Department of the Interior has not demanded compliance with the residency requirement for nearly 50 years.

22. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE, THE REPORT OF THE NATIONAL WATER COMMISSION 149 (1973): Recommendation 5-7: Congress should abolish the 160-acre limitation in reclamation projects constructed in the future; provided, however, that direct project beneficiaries pay the full costs of the projects allocated to irrigation. *Compare* PUBLIC LAND LAW REVIEW COMMISSION, REPORT OF THE PUBLIC LAND LAW REVIEW COMMISSION: ONE THIRD OF THE NATION'S LAND 182 (1970):

however, the acreage and residency limitations are laws "on the books"—or are they? This is precisely the issue in several cases from the federal courts in California. Three of these cases, *United States v. Imperial Irrigation District*[24] (hereinafter *Imperial*) and the first and second *Ben Yellen v. Hickel*[25] (hereinafter *Ben Yellen I* and *Ben Yellen II*) are the primary focus of this comment.[26]

Imperial and *Ben Yellen I* and *II* arose in the Imperial Irrigation District in southern California. Imperial Irrigation District receives its water from a federal reclamation project under the terms of the Boulder Canyon Project Act.[27] Simply stated, the issue in *Imperial* is whether the 160-acre limitation of federal reclamation law applies to the lands in the Imperial Irrigation District; and the issue in *Ben Yellen I* and *II* is whether the residency requirement

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Recommendation 71: The allocation of public lands to agricultural use should not be burdened by artificial and obsolete restraints such as acreage limitations on individual holdings, farm residency requirements, and the exclusion of corporations as eligible applicants.

23. *E.g.*, H.R. 5236, 92d Cong., 1st Sess. (1971), which was a bill presented by Representative Kastenmeier of Wisconsin "[t]o provide for the creation of an authority . . . to carry out the congressional intent respecting the excess land provisions of the Federal Reclamation Act of June 17, 1902."

24. 322 F. Supp. 11 (S.D. Cal. 1971).

25. 355 F. Supp. 200 (S.D. Cal. 1971); 352 F. Supp. 1300 (S.D. Cal. 1972). The *Imperial* case and the *Ben Yellen* cases all arose in the Federal District Court for the Southern District of California, and are now on appeal to the Ninth Circuit Court of Appeals. Limitations were upheld by the trial court in the *Ben Yellen* cases but rejected in *Imperial*. To avoid confusion, it should be pointed out that two different judges presided —Judge Turrentine in *Imperial* and Judge Murray in the *Ben Yellen* cases. For a discussion of these cases, and reclamation law problems in the Imperial Irrigation District in general, *see* Taylor, *Water, Land and Environment, Imperial Valley: Law Caught in the Winds of Politics*, 13 NATURAL RESOURCES J. 1 (1973).

26. Two other cases, United States v. Tulare Lake Canal Co., 340 F. Supp. 1185 (E.D. Cal. 1972), and Bowker v. Morton, No. C-70-1274, 4 E.L.R. 20,255 (N.D. Cal. 1973) have also been appealed to the Ninth Circuit Court of Appeals. Issues from *Tulare Lake* and *Bowker* which are representative of questions arising in reclamation litigation generally will also be discussed. *See* note 156, and text accompanying notes 276-77, *infra*.

27. 43 U.S.C. §§ 617-617t (1970). When Congress financed the Boulder Canyon Project and built the All-American Canal in 1928, it was the most monumental reclamation and hydroelectric project ever undertaken in the United States, although larger projects have since been built. The product of ten years of Congressional hearings and debates, the Boulder Canyon Project Act enacted the fourth "Swing-Johnson Bill" sponsored by Senator Johnson and Congressman Swing of California. Although the Boulder Canyon Project would serve much of the lower basin of the Colorado River, special attention was given to the Imperial Valley of California, formerly a desert, but by 1928 a lush agricultural area. The Imperial Valley already had an irrigation district, Imperial Irrigation District, which distributed water to approximately 424,000 acres of privately-owned land, but the system was not reliable. First, much of the Imperial Valley had been flooded in 1905-1906, when the Colorado River broke through its west bank, and the danger of flooding was still present. Secondly, the Alamo Canal, through which the Imperial Irrigation District received its water from the Colorado River, ran a 50-mile course through Mexico, where much of the water was diverted. For a further discussion of the geological and historical background of the Boulder Canyon Project and the All-American Canal, *see* Arizona v. California, 373 U.S. 546, 552-61 (1963); Ben Yellen v. Hickel, 352 F. Supp. 1300, 1312-13 (S.D. Cal. 1972); United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 12-14 (S.D. Cal. 1971).

applies to such lands. The plaintiff in *Imperial* was the federal government, which sought to enforce the 160-acre limitation; defendants were the class of owners of more than 160 acres of land within the Imperial Irrigation District.[28] The plaintiffs in *Ben Yellen I* and *II* were residents of Imperial Irrigation District who sought a writ of mandamus to require Walter J. Hickel, the Secretary of the Interior, to enforce the residency requirement within the District.[29] Non-resident owners of land within the district were intervening defendants.

Many questions arose in *Imperial* and *Ben Yellen I* and *II* which had to be answered before determination of the ultimate issues, whether acreage limitations or residency requirements applied to the Imperial Irrigation District. First, were these cases properly before the court; or, in *Ben Yellen I* and *II*, should the plaintiffs have been barred either by lack of standing or because of the res judicata effect of an earlier case (*Hewes v. All Persons*[30])? Secondly, *could* the terms and legislative history of the Boulder Canyon Project Act[31] be construed to allow the enforcement of acreage and residency limitations in the Imperial Irrigation District; and, in the light of national policy, *should* the limitations be enforced? Thirdly, if limitations are applicable in the Imperial Irrigation District, to what extent do they apply? Finally, what effect should administrative practices of the Department of the Interior have on the application of acreage and residency limitations? These questions in *Imperial* and *Ben Yellen I* and *II* are typical of those that might arise in future reclamation litigation involving acreage and residency limitations, and their analysis follows. The implications of these cases beyond the Boulder Canyon Project are discussed in the conclusion.

JUSTICIABILITY AND JURISDICTION: STANDING AND RES JUDICATA

Standing

The plaintiff in *Imperial* was the federal government, and the landowner defendants did not raise the standing issue. In *Ben Yellen I* and *II*, the plaintiffs were a doctor, an agricultural labor contractor, and 121 agricultural laborers who desired to purchase farm land in the Imperial Irrigation District.[32] Both the govern-

28. California intervened as an additional defendant.
29. The United States was in the anomolous position of plaintiff in *Imperial* and defendant in *Ben Yellen I* and *II* because the Department of the Interior still enforces the 160-acre limitation in certain circumstances, but takes the position that residency is no longer a requirement of the reclamation law in any project.
30. Civil No. 15460 (Super. Ct., Imperial County, Cal. 1933).
31. 43 U.S.C. §§ 617-617t (1970).
32. 352 F. Supp. 1300, 1312 (S.D. Cal. 1972).

ment and the intervening defendants—non-resident landowners whose lands were among those desired by the plaintiffs—challenged the plaintiffs' standing.[33] The trial court held plaintiffs had standing because they were clearly within the zone of interest protected by section 5 of the Reclamation Act of 1902,[34] which they sought to require the Secretary of the Interior to enforce.[35] The court stated as follows:

> If the plaintiffs are not granted standing to bring this suit, the Department of Interior will in effect be given a license to disregard the law, as well as an immunity from challenges by the intended beneficiaries of the legislation in question.[36]

In view of the recent Supreme Court decision in *Schlesinger v. Reservists Committee to Stop the War*,[37] where it was held that standing need not be predicated upon the assumption that no one has standing if plaintiff does not,[38] the reason cited by the *Ben Yellen* court for granting standing may be insufficient. It is necessary to discover whether there are other grounds upon which standing might be granted under current tests.

The defendant in *Ben Yellen I* and *II* is the Secretary of one of the agencies of the United States government, the Department of the Interior. The Secretary was sued for non-enforcement of the residency requirement of section 5 of the Reclamation Act of 1902.[39] The Administrative Procedure Act provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[40] The person "adversely affected or aggrieved" must have a "personal stake" in the outcome of the suit, and his injury must be concrete; that is, more than a "generalized grievance" must be shown.[41] This is the "injury in fact" test which demands that the plaintiff be among the injured and not merely one seeking to protect the public's interest.[42]

33. After the cases were consolidated for appeal, the government and the landowners dropped the standing issue. It arises fairly frequently in reclamation litigation, however, and deserves mention. *See, e.g.*, Bowker v. Morton, No. C-70-1274, 4 E.L.R. 20,255, 20,256-57 (N.D. Cal. 1973); Turner v. Kings River Conservation Dist., 360 F.2d 184, 198 (9th Cir. 1966).

34. 43 U.S.C. § 431 (1970). *See* text accompanying note 9 *supra*.

35. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1303 (S.D. Cal. 1972).

36. *Id.* at 1303-04. This statement was cited with approval in Bowker v. Morton, No. C-70-1274, 4 E.L.R. 20,255, 20,257 (N.D. Cal. 1973).

37. 418 U.S. 208 (1974).

38. *Id.* at 227.

39. 43 U.S.C. § 431 (1970).

40. 5 U.S.C. § 702 (1970).

41. United States v. Richardson, 418 U.S. 166, 173-74 (1974). Standing, however, is not to be denied simply because many people may suffer the same injury. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973).

42. Sierra Club v. Morton, 405 U.S. 727 (1972). Once a plaintiff has been granted standing, however, he may argue public policy on the merits.

> [T]he fact of economic injury is what gives a person standing to

The plaintiffs in *Ben Yellen I* and *II* desired to purchase land in the Imperial Irrigation District, but were unable to do so under current market prices and ownership.[43] If the non-resident landowners, who owned nearly one-half of the land in the Imperial Valley,[44] were forced either to comply with the residency requirement or to sell their lands, the plaintiffs' chances of fulfilling their desires would be enhanced.[45] The plaintiffs were not merely seeking to protect the public interest. Their interest is a concrete, economic interest which gives them a "personal stake" in the outcome of the litigation, rather than a mere "generalized grievance."[46] It appears, then, that under current tests, standing should be granted under the Administrative Procedure Act.[47]

> seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.

Id. at 737. This view has been affirmed in the latest Supreme Court decision on standing, Warth v. Seldin, 422 U.S. 35 (1975).

43. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1312 (S.D. Cal. 1972).

44. *Id.* at 1317.

45. This would be so because the land's market value would decrease, making it easier for plaintiffs to purchase.

> Q. . . . The question is: If residency was declared to be a prerequisite to the receipt of Project water and all non-resident owned lands were declared to be ineligible for further deliveries of Project water, what, in your opinion would happen to the market price of the lands now owned by nonresidents?
> A. . . . It would drop in value.
> Q. . . . Do you have an opinion as to how far the drop would go?
> A. . . . Well, the magnitude of the drop would depend upon the conditions under which the constraints on residency were enforced. It would be a function of time.
> Q. . . . If the residency requirement were enforced tomorrow, what would happen to the price of land?
> A. . . . You'd have a very substantial decrease in the market price because of lack of options on the part of those owners.

Testimony of William W. Wood, Agricultural Economist, in the Record, vol. 3, at 256-57, Ben Yellen v. Hickel, 352 F. Supp. 1300 (S.D. Cal. 1972).

46. This is at least true of the plaintiffs who are agricultural laborers and cannot afford to purchase any land at the present time. Dr. Ben Yellen's interest is obviously more generalized, but he is only one of 123 plaintiffs. In any case, the Supreme Court indicated in Warth v. Seldin, 422 U.S. 35, —, 95 S. Ct. 2197, 2206 (1975), that "[i]n some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties."

47. 5 U.S.C. § 702 (1970). Standing to sue the Secretary of the Interior for failure to require the execution of recordable contracts for the disposition of lands in excess of 160 acres was denied, however, in Turner v. Kings River Conservation Dist., 360 F.2d 184 (9th Cir. 1966). The court stated as follows:

> [T]he statutes imposed a duty upon the Secretary of Interior in the interest of the public at large, and there is nothing in the statutes to indicate that Congress intended to confer a litigable right upon private persons claiming injury from the Secretary's failure to discharge his duty to the public.

Id. at 198. The opinion is of questionable precedential value because it predates the recent Supreme Court cases which established new standing tests. *See* text accompanying notes 41-42 *supra.* In addition, the plaintiffs' injuries in *Turner* were not caused by a violation of the acreage limitation or residency requirement, whereas plaintiffs in *Ben Yellen I* and *II* allege that their injury is so caused.

Res Judicata

In addition to challenging plaintiffs' standing, the landowner defendants have raised the issue of res judicata,[48] alleging that the decision in a 1933 California case[49] bars any reconsideration of the applicability of acreage or residency limitations in the Imperial Irrigation District. The issue of res judicata arose in *Imperial* only after final judgment in the lower court,[50] while the plaintiffs in *Ben Yellen I* and *II* sought to intervene in order to appeal.[51] Because the Ninth Circuit has decided the question of intervention, res judicata may no longer be an issue in *Imperial*,[52] but it is still an issue in *Ben Yellen I* and *II*.

The decision which the landowners and the Department of the Interior allege is res judicata as to the plaintiffs' claim in the *Ben Yellen* cases is *Hewes v. All Persons*,[53] which was an in rem proceeding for confirmation of a contract between the United States and the Imperial Irrigation District for construction of the All-American Canal.[54] Charles Malan, an excess landowner, brought a

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48. The exact circumstances involved in these cases will never be duplicated, so the same res judicata issue will not arise. The portions of this section dealing with exceptions to the doctrine of res judicata may be relevant in other litigation under the reclamation law, however, because similar questions of public policy and changes in law may arise.

49. Hewes v. All Persons, Civil No. 15460 (Super. Ct., Imperial County, Cal. 1933).

50. Res judicata could not be raised at the trial court in *Imperial* because the United States had not been named or served with notice in the prior proceeding on which the claim of res judicata was based. Under the doctrine of sovereign immunity, the United States must consent to a suit. United States v. Sherwood, 312 U.S. 584 (1941), and unless it so consents, it is not bound by the judgment. *Applicability of the Excess Land Laws, Imperial Irrigation District Lands*, 71 Interior Dec. 496, 518 (1964) (Opinion of Solicitor Barry).

51. On January 5, 1971, the trial court in *Imperial* held that the land limitation provisions of reclamation law did not apply to private lands in the Imperial Irrigation District. 322 F. Supp. at 27. The government, as the losing party, made no move to appeal. On March 18, 1971, prior to the expiration of the time for filing an appeal, Dr. Ben Yellen and the other plaintiffs in *Ben Yellen I* and *II* moved to intervene in *Imperial* for purposes of appeal. Their motion was denied by the trial court on March 29, 1971. On April 5, they appealed from the order denying intervention. On August 6, 1973, the Ninth Circuit Court of Appeals granted leave to intervene, and *Imperial* and *Ben Yellen I* and *II* were consolidated for review.

Motions to intervene are a common occurrence in reclamation litigation and are generally granted. *See, e.g.*, Bowker v. Morton, No. C-70-1274, 4 E.L.R. 20,255, 20,259 (N.D. Cal. 1973); Ben Yellen v. Hickel, 352 F. Supp. 1300, 1312 (S.D. Cal. 1972); United States v. Tulare Lake Canal Co., 340 F. Supp. 1185, 1186 (E.D. Cal. 1972). The intervention issue was more hotly contested in *Imperial* than in most cases, probably due to the timing of the motion to intervene.

52. Even if res judicata were not foreclosed as an issue in *Imperial* upon the granting of leave to intervene, the doctrine arguably should not apply to the intervenors; they are merely appealing issues initially raised by the federal government, against whom the defense is unavailable. *See* note 50 *supra*.

53. Civil No. 15460 (Super. Ct., Imperial County, Cal. 1933).

54. Article 31 of the contract provides as follows:

> The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation

collateral proceeding in which he questioned the status of the 160-acre limitation. That proceeding was consolidated with the confirmation proceeding for trial. The trial court made the following finding:

> No. 35. That under said contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.[55]

This finding depended in part on the holding in *Hewes* that section 5 of the Reclamation Act of 1902[56] did not apply to the Boulder Canyon Project Act. The court in *Ben Yellen I* and *II* held that the findings in *Hewes* were not res judicata for three reasons: first, the California state court in *Hewes* did not have jurisdiction in a confirmation proceeding to construe federal reclamation statutes; secondly, a subsequent Supreme Court decision[57] was contrary to the state court's determination; and, finally, federal courts are not bound by state court precedent on federal questions.[58] Each of these three reasons deserves further explanation.

Regarding the determination that *Hewes* was not res judicata because the court lacked jurisdiction to construe the reclamation statutes, it is essential to note that a court must have jurisdiction over the person and the subject-matter before it can render a binding judgment.[59] When a court exercises special powers under prescribed conditions, no presumption of proper jurisdiction attends the judgment of the court.[60] The scope of such limited jurisdiction depends not upon the rank of the court, but rather upon the terms under which jurisdiction is granted.[61] The contract between the United States and the Imperial Irrigation District required judicial confirmation to become binding.[62] The contract did not in itself confer jurisdiction on any court, however; the Imperial County Court in *Hewes* had to derive its jurisdiction from either state or

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> of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid.
> . . .

55. Hewes v. All Persons, Civil No. 15460 (Super. Ct., Imperial County, Cal. 1933).
56. 43 U.S.C. § 431 (1970). *See* text accompanying note 9 *supra.*
57. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).
58. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1304 (S.D. Cal. 1972).
59. Earle v. McVeigh, 91 U.S. 503, 507 (1876). "[T]he want of jurisdiction makes it utterly void and unavailable for any purpose."
60. Galpin v. Page, 85 U.S. (18 Wall.) 350, 371 (1873).
61. *Id.* at 372.
62. *See* note 54 *supra.*

federal law, or both. Federal statutes authorizing confirmation proceedings in 1933 were section 1 of the Act of May 15, 1922,[63] and section 46 of the Omnibus Adjustment Act of 1926.[64] Applicable state laws were section 3 of the California Irrigation District Act of 1917[65] and section 68 of the California Irrigation District Act of 1897.[66] Whatever statute is applied, the jurisdiction of the confirming court seems to have been restricted to questions of validity of execution and authority to contract.[67] Determining the absence of an acreage limitation in the Boulder Canyon Project Act may well have been outside the court's limited jurisdiction because the United States Supreme Court has declared that "As to the rights and duties of the United States under the contracts, these are matters of federal law on which this Court has final word."[68]

Even if the California court did not, in fact, have jurisdiction, it has been held that a finding of jurisdiction would itself be res judicata. "The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action."[69] There are exceptions to this rule, however, such as federal pre-emption, sovereign immunity,[70] and cases where the issue was not actually litigated.[71] Furthermore, as previously noted, the usual presumptions granted to courts of general jurisdiction are not as strong when a court has limited jurisdiction,[72] as in *Hewes*.

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63. 43 U.S.C. § 511 (1970) (emphasis added):
> [N]o contract with an irrigation district under this section . . . shall be binding on the United States until the proceedings on the part of the district for the *authorization of the execution* of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction . . . .

64. *Id.* § 423(e) (emphasis added):
> No water shall be delivered . . . until a contract . . . shall have been made with an irrigation district . . . and the *execution* of said contract . . . shall have been confirmed by a decree of a court of competent jurisdiction.

65. 1917 Cal. Stat. 245. *See* CAL. WATER CODE § 23225 (prior to its amendment in 1961 Cal. Stat. 3771): "A district may submit any contract . . . to the superior court of the county . . . to determine the *validity* thereof, [and] the *authority* of the district to make the contract . . ." (emphasis added).

66. 1897 Cal. Stat. 276. *See* CAL. WATER CODE § 22670: "A district may . . . bring an action in the superior court of the . . . county to determine the *validity of the bonds or of the levy.*" (emphasis added).

67. *See* notes 63-66 *supra*. *See also* Ivanhoe Irrigation Dist. v. All Parties and Persons, 53 Cal. 2d 692, 350 P.2d 69, 3 Cal. Rptr. 317 (1960); Sax, *supra* note 2, at § 123.2(H): "Nor is the confirmation proceeding designed to interpret the contract; it is a proceeding in rem and the only issue involved is the validity of the contract insofar as it rests on the action taken by the district."

68. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 289 (1958). This statement, however, was made on an *appeal* from the judgments in question and res judicata was not really in issue.

69. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377 (1940). *See also* Davis v. Davis, 305 U.S. 32 (1938); Stoll v. Gottlieb, 305 U.S. 165 (1938).

70. *See* note 50 *supra*.

71. Durfee v. Duke, 375 U.S. 106, 114 n.12 (1963).

72. Galpin v. Page, 85 U.S. (18 Wall.) 350, 371 (1873). The RESTATEMENT OF JUDGMENTS § 10(2)(c) (1942) states that among the factors to

The second ground[73] for holding res judicata inapplicable in *Ben Yellen I* and *II* was the Supreme Court's decision in *Ivanhoe Irrigation District v. McCracken*,[74] affirming the acreage limitation in the Central Valley Project. In addition, there have been two opinions by Solicitors of the Department of the Interior in which it was determined that acreage limitations applied under the Boulder Canyon Project Act.[75] There is an exception to the application of res judicata "where between the time of the first judgment and the second there has been an intervening decision or change in the law creating an altered situation."[76] The reason for the exception is that "a subsequent modification of the significant facts or a change or development in the controlling legal principles may make [a] determination obsolete or erroneous."[77] The California Supreme Court recognizes this exception where the change in law is "relevant to the issue on which res judicata is to operate."[78]

Because of the decision in *Ivanhoe Irrigation District v. McCracken*[79] and the two solicitor's opinions,[80] the legal atmosphere has changed since the *Hewes* decision. Questions of potential importance to thousands of landowners and residents of Imperial Valley are involved in this litigation. Without deciding at this point whether the final result in these cases would necessarily contradict *Hewes*, the opportunity for a full hearing of the issues should not be barred.[81] The "desirability of finality" should be balanced against "the public interest in reaching what, ultimately, appears to be the right result."[82]

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be considered in determining whether a collateral attack should be permitted is that "the court was one of limited and not of general jurisdiction."

73. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1304 (S.D. Cal. 1972).

74. 357 U.S. 275 (1958).

75. *Applicability of the Excess Land Laws, Imperial Irrigation District Lands*, 71 Interior Dec. 496 (1964) (Opinion of Solicitor Barry); *Applicability of the Excess Land Provisions of the Federal Reclamation Law to the Boulder Canyon Project Act*, M-33902 (1945) (Opinion of Solicitor Harper), *reprinted in* 71 Interior Dec. 496, App. H, at 533 (1964).

76. State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 162 (1945). Granting such an exception is largely discretionary, and some courts have declined to do so. *See* Barzin v. Selective Serv. Local Bd. No. 14, 446 F.2d 1382 (3d Cir. 1971).

77. Commissioner v. Sunnen, 333 U.S. 591, 599 (1948). The "change of law" exception is common in tax cases; *see, e.g.*, McCall v. Commissioner, 312 F.2d 699 (4th Cir. 1963); Commissioner v. Arundel-Brooks Concrete Corp., 152 F.2d 225 (4th Cir. 1945). The issue in such cases is one of collateral estoppel, rather than res judicata, but the rationale for the exception would seem equally valid in either situation.

78. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 228, 537 P.2d 1250, 1272, 123 Cal. Rptr. 1, 23 (1975).

79. 357 U.S. 275 (1958).

80. *See* note 75 *supra*.

81. The "public interest attached to the resolution of a question of law may require that it be determined without restriction from the collateral estoppel effect of prior litigation." City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 230, 537 P.2d 1250, 1273, 123 Cal. Rptr. 1, 24 (1975). The rule has also been applied to res judicata, which "will not be applied so rigidly as to defeat the ends of justice or important considerations of policy." Greenfield v. Mather, 32 Cal. 2d 23, —, 194 P.2d 1, 8 (1948).

82. Civil Aeronautics Bd. v. Delta Air Lines, 367 U.S. 316, 321 (1961).

The third and final ground for the determination that *Hewes* was not res judicata was that federal courts are not bound by state court precedent on federal questions.[83] The doctrine of res judicata, however, is different from the doctrine of stare decisis; while a federal court may not be bound by state precedent on appeal,[84] a state court's judgment may still be res judicata in a collateral attack.[85] Either of the other grounds for avoiding res judicata seems adequate, however, to prevent the doctrine from barring the *Ben Yellen* actions.

THE BOULDER CANYON PROJECT ACT AND THE IMPERIAL IRRIGATION DISTRICT: INTERPRETATION OF THE STATUTES

Interpreting the Terms of the Boulder Canyon Project Act

Section 12 of the Boulder Canyon Project Act defines reclamation law as the Reclamation Act of 1902 and acts amendatory and supplemental thereto.[86] Section 14 provides: "This act shall be deemed a supplement to the reclamation law, which . . . shall govern the *construction*, *operation*, and *management* of the works herein authorized, except as otherwise herein provided."[87] There are no express acreage or residency limitations for private lands in the Boulder Canyon Project Act. Any such limitations must therefore exist, if at all, by incorporation through section 14, or one of the other sections which refer to reclamation law.[88] Before section 14 can be construed to incorporate acreage limitations or residency requirements, two questions must be answered. First, what do the terms "construction, operation, and management" entail; and, secondly, do any of the terms of the Boulder Canyon Project Act "otherwise provide" that such limitations are inapplicable?

Two rules of statutory construction apply; first, all the words in the statute are to be given their common meaning[89] and, sec-

83. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1304 (S.D. Cal. 1972).

84. Standard Oil Co. v. Johnson, 316 U.S. 481, 483 (1942). "It was upon a determination of a federal question . . . that the Supreme Court of California rested its conclusion. . . . Since this determination of a federal question was by a state court, we are not bound by it." *See also* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 289 (1958).

85. Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973). Cases cited to the contrary, such as Kalb v. Feuerstein, 308 U.S. 433 (1940), and United States Fidelity & Guar. Co. v. Hendry Corp., 391 F.2d 13 (5th Cir. 1968), usually involve instances where res judicata effect was not given to state court decisions because federal courts had exclusive jurisdiction.

86. 43 U.S.C. § 617k (1970). *See also* text accompanying notes 7-19 *supra*.

87. Boulder Canyon Project Act of 1928, 45 Stat. 1065 (emphasis added). When this section was codified as 43 U.S.C. § 617m (1970), the words "herein provided" were changed to "therein provided," an error of some consequence.

88. 43 U.S.C. §§ 617, 617c(b) (1970).

89. A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.28 (Sands 4th ed. 1973) [hereinafter cited as SUTHERLAND]. *See also* Caminetti v. United States, 242 U.S. 470 (1917).

ondly, the entire statute must be consulted in determining the meaning of parts of that statute.[90] Because the issue is whether the words "construction, operation and management" can include water delivery so that general reclamation law limitations will apply to that delivery, the common meaning rule is not very helpful. The words "operate" and "manage" could reasonably be interpreted either to include delivery, or not. The "whole statute" rule is only slightly more helpful. The words "construction, operation, and management" appear several times in the Act,[91] as does the word "delivery."[92] In *Imperial*, the court held that a distinction between the terms was drawn throughout the statute and, therefore, reclamation law did not control any aspect of water delivery.[93] One of the sections in the statute refers, however, to "constructing, managing, and operating" as "including the appropriation, delivery, and use of water for . . . irrigation."[94] Thus, the terms do include delivery in at least one instance, but as there is no other clue in the statute, the result is ambiguous.

When a statute is not clear and unambiguous, reference may be made to statutes *in pari materia*.[95] Words in a prior statute on the same subject-matter may be similarly construed in a second statute.[96] One such prior statute is section 46 of the Omnibus Adjustment Act of 1926,[97] which requires contracts for repayment of the cost of "constructing, operating and maintaining"[98] irrigation works. Such contracts are to include terms withholding delivery

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90. SUTHERLAND, *supra* note 89, § 46.05. "Each part or section should be construed in connection with every other . . . so as to produce a harmonious whole." *See also* Federal Power Comm'n v. Panhandle E. Pipeline, 337 U.S. 498 (1949).

91. 43 U.S.C. §§ 617, 617c(b), 617d, 617e, 617g, 617i, 617m (1970).

92. *Id.* §§ 617, 617d, 617g.

93. 322 F. Supp. 11, 17 (S.D. Cal. 1971).

94. 43 U.S.C. § 617g(b) (1970).

95. SUTHERLAND, *supra* note 89, § 51.01. *See also Applicability of Excess Land Provisions of the Federal Reclamation Law to the Boulder Canyon Project Act*, M-33902 (1945) (Opinion of Solicitor Harper), *reprinted in* 71 Interior Dec. 533, 534 (1964):

> The Federal reclamation law is contained in the Reclamation Act of June 17, 1902 . . . which, together with acts amendatory and supplementary thereto, forms a complete legislative pattern in the field. The Supreme Court describes this type of legislation succinctly in United States v. Barnes, 222 U.S. 513, 520 (1912):
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> > Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject . . . it is the settled rule . . . that where there is subsequent legislation upon such a subject it carries with it an implication that *the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.* . . .
>
> Congress has followed precisely this type of legislative policy in enacting the Federal reclamation law.

96. SUTHERLAND, *supra* note 89, § 51.02.

97. 43 U.S.C. § 423e (1970). *See* note 18 *supra*.

98. Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423c (1970), contains the word *maintaining*, whereas section 14 of the Boulder Canyon Project Act, 43 U.S.C. § 617m (1970), uses the word *management*. The word *maintain*, however, is used in conjunction with the words *construct* and *operate* in sections 1, 4b, 5 and 10 of the Boulder Canyon Project

of water if excess land requirements are not met. Delivery is not, therefore, necessarily divorced from construction, operation and management, but neither is its inclusion absolutely clear. Because greater clarity is impossible to attain, the other part of section 14 should be consulted to determine whether any section of the Boulder Canyon Project Act "otherwise provides" to render the acreage and residency limitations of general reclamation law inapplicable.

Citing the rule that "Where Congress has employed a term in one place and excluded it in another, it should not be implied in the section where it is excluded,"[99] the judge in *Imperial* emphasized that section 5 specifically deals with delivery, but does not include a reference to reclamation law.[100] Stating that "This is the section where such reference would be most logical if water delivery is to be conditioned on acreage limitations," the court reasoned that the absence of an express provision in section 5 means the Boulder Canyon Project Act has "otherwise provided" that limitations will not apply to delivery of water.[101] The reasoning is similar when the express acreage limitation on public lands in section 9[102] is asserted as the basis for the statement that "The absence of a similar provision for private lands indicates that Congress did not apply acreage limitation to private lands."[103] Both arguments (that is, regarding section 5 and section 9) reverse the terms of the exception in section 14, which provides that reclamation law shall be applicable *except* where otherwise provided, not that reclamation law shall *only* be applicable where *expressly* provided. Because one who claims the benefit of an exception has the burden of placing himself within it,[104] the landowners should have the

Act, 43 U.S.C. §§ 617, 617c(b), 617d, 617i (1970). The words seem interchangeable. One might also consider the following statement in Ben Yellen v. Hickel, 352 F. Supp. 1300, 1308 (S.D. Cal. 1972):

> In finding that the 160-acre limitation applied to Central Valley contracts, the Supreme Court in *Ivanhoe* found that the water delivery provisions of Section 5 were included within the ambit of "construction, operation and management" as used in the Central Valley Project Act. The same must hold true for the incorporation statute (Section 14) of the B.C.P.A. [Boulder Canyon Project Act].

Any reliance on the *Ivanhoe* decision regarding this particular point should be made with caution. The Central Valley Project was never enacted in toto, as was the Boulder Canyon Project, so terms might be expected to be less exact. In addition, section 2 of the Act of October 17, 1940, ch. 895, 54 Stat. 1198, amending the Central Valley Project Authorization, contained in close proximity the terms "construction," "distribution systems," and "delivered." For further discussion of the *Ivanhoe* decision in this respect, *see* 71 Interior Dec. 496, 503 (1964) (Opinion of Solicitor Barry).

99. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 17 (S.D. Cal. 1971), *citing* FTC v. Sun Oil Co., 371 U.S. 505 (1963). *See also* SUTHERLAND, *supra* note 89, § 47.23.

100. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 17 (S.D. Cal. 1971).

101. *Id.*

102. 43 U.S.C. § 617h (1970).

103. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 18 (S.D. Cal. 1971).

104. SUTHERLAND, *supra* note 89, § 47.11. *See also* United States v. First City Nat'l Bank, 386 U.S. 361 (1967).

burden of showing the existence of an exception in the first place. The United States Supreme Court held in *Ivanhoe Irrigation District v. McCracken*[105] that "[W]here a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment."[106] The Court in *Ivanhoe*, however, was considering the Central Valley Project, authorized *after* the first project (the Colorado Big Thompson Project) was expressly exempted in 1938.[107] The Boulder Canyon Project Act[108] was passed ten years *before*, in 1928.

Section 1 of the Boulder Canyon Project Act[109] may also provide exceptions to the coverage of section 14. First, section 1 contains a proviso that "[N]o charge shall be made for water or the use, storage, or delivery of water for irrigation . . . in the Imperial or Coachella Valleys."[110] The landowner defendants in *Ben Yellen II* argued that this meant there could be no "sale" of water under the terms of section 5 of the Reclamation Act of 1902;[111] that is, that section 1 falls within the "otherwise provided" exception of section 14.[112] A broader construction of the term "sale" in section 5 of the 1902 Act seems reasonable.[113] But even if section 5

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105. 357 U.S. 275 (1958).

106. *Id.* at 292. For a partial list of the exempted projects *see* Sax, *supra* note 2, § 120.2. *See also* Taylor, *The Excess Land Law: Legislative Erosion of Public Policy*, 30 ROCKY MT. L. REV. 480 (1958); *Hearings on S. 912 Before the Subcomm. of the Comm. of Public Lands, Exemption of Certain Projects from Land-Limitation Provisions of Federal Reclamation Laws*, 80th Cong., 1st Sess. (1947).

107. 43 U.S.C. § 386 (1970).

108. *Id.* §§ 617-617t.

109. *Id.* § 617.

110. *Id.*

111. *Id.* § 431.

112. *Id.* § 617m.

113. "[S]ale" can only be understood in the context of sections 4 and 5 of the Act. A reading of the two sections together reveals that the sale is not merely a commercial transaction involving the transfer of a water right. It is the contract by which the government secures repayment and the water user obtains the range of benefits resulting from the construction of the federal project.

In section 4 the Secretary is directed to estimate and announce the per-acre charge and the number of annual installments. This is his estimate of the consideration to be paid by the water user for the sale referred to in section 5. When section 5 states "no right to the use of water for land in private ownership shall be *sold*" for more than 160 acres, it obviously means that the use of project facilities shall not be made available to a single owner for service to more than 160 acres. . . .

Sections 4 and 5 disclose a scheme by which all participants in a project share its cost. If a private landowner cannot be sold a water right because he already owns one, he cannot be charged for it either, and, since section 5 contains all the provisions of the Act for repayment, there is no way by which he can participate in the project.

Applicability of the Excess Land Laws, Imperial Irrigation District Lands, 71 Interior Dec. 496, 501-02 (1964) (Opinion of Solicitor Barry). Giving "sale" this expanded meaning is reasonable because, as noted in Ben Yellen v. Hickel, 352 F. Supp. 1300, 1305 (S.D. Cal. 1972), no "sale" of water rights was involved in Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958), which concerned a repayment contract between an irrigation company and the United States. Yet the Supreme Court applied section 5 in *Ivanhoe*.

is in fact inapplicable to the Boulder Canyon Project Act, the landowners would not be exempt from acreage limitations,[114] because other provisions of the reclamation statutes also contain acreage limitations.[115]

A second interpretative problem in section 1[116] also arises in section 4b;[117] both refer to reclamation law, unlike the sections just discussed. The Secretary of the Interior is authorized to construct the All-American Canal connecting the Imperial and Coachella Valleys with a diversion dam. Section 1 states that expenditures for the canal are to be reimbursable "as provided in the reclamation law."[118] Section 4b states that the Secretary shall make provision, "by contract or otherwise," to insure payment "in the manner provided in the reclamation law."[119] The apparent simplicity of these sections is deceptive; they give rise to three problems.

First, it was suggested in *Imperial* that the clause specifying reimbursement " 'as provided in the reclamation law' merely establishes the principle expressly added" to the clause that reimbursements should not be made by the sale of power.[120] A general rule of construction is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous. . . ."[121] The court in *Imperial* ignores that rule; and even if the court is correct about section 1, its reasoning would be inapplicable to section 4b, because the same combination of clauses does not occur.

A more complex problem arises in section 4b. The Secretary of the Interior is to make provision for revenues "by contract or *otherwise* . . . to insure payment . . . in the manner provided in the reclamation law."[122] "Or otherwise" is not defined either in the cases or in the statute. It seems, then, that the Secretary could have provided for repayment other than by contract, but he did not.

A contract between the United States and the Imperial Irrigation District was executed on December 1, 1932.[123] The existence

114. Since the residency requirement is only found in section 5 of the Reclamation Act of 1902, 43 U.S.C. § 431 (1970), lands in the Imperial Irrigation District would be exempt from it if section 5 were found to be inapplicable.

115. 43 U.S.C. §§ 418, 423e (1970). *See* text accompanying notes 14-19 *supra*.

116. 43 U.S.C. § 617 (1970).

117. *Id.* § 617c(b).

118. *Id.* § 617.

119. *Id.* § 617c(b).

120. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 17 (S.D. Cal. 1971).

121. SUTHERLAND, *supra* note 89, § 46.06.

122. 43 U.S.C. § 617c(b) (1970).

123. The terms of the contract are no more explicit than the terms of

of this contract poses a final problem: whether the contract was *"sui generis"* (that is, unique to the Boulder Canyon Project Act and "above" the law applicable to other irrigation district contracts), or whether it should have met the requirements of section 46 of the Omnibus Adjustment Act of 1926.[124] As pointed out in *Imperial*, there are several inconsistencies in section 46 and section 4b of the Boulder Canyon Project Act authorizing the contract.[125] Section 46 contracts are mandatory, whereas the Secretary could provide for repayment "by contract or otherwise" under section 4b.[126] Section 46 contracts were to be executed before delivery of water;[127] section 4b contracts before the appropriation of money.[128]

The court in *Imperial*[129] stated that even if the contract was executed pursuant to reclamation law, it could have been so executed under section 1 of the 1922 Reclamation Act[130] rather than under section 46.[131] If the contract was executed under any general reclamation law, however, it had to be executed under section 46 and not section 1 of the 1922 Reclamation Act. Section 1 of the 1922 Act authorized the Secretary of the Interior to enter into a contract with *"any* legally organized irrigation district,"[132] and did not distinguish between existing and new projects. Four years later, section 46 was enacted, and was to apply to all new projects.[133] The Boulder Canyon Project Act authorized a new project; therefore, if it was subject to any reclamation statute, it had to be subject to section 46.

The Boulder Canyon Project Act contains no express acreage or residency limitations, nor do any of its sections or terms expressly "provide otherwise."[134] Because the language of the Act

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the Boulder Canyon Project Act. Article 30 provides: "Except as provided by the Boulder Canyon project act, the reclamation law shall govern the construction, operation, and maintenance of the works to be constructed hereunder."

124. 43 U.S.C. § 423e (1970). Section 46 required owners of excess lands to sign recordable contracts for sale of such lands before water would be delivered. *See* note 18 *supra*.

125. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 17 (S.D. Cal. 1971).

126. 43 U.S.C. § 617c(b) (1970).

127. *Id.* § 423e.

128. *Id.* § 617c(b). This discrepancy can be explained by reference to the legislative history. Due to the large sum involved (a projected $125,000,000), the sponsors of the Boulder Canyon Bill feared that it would not pass without express assurances that Congress would appropriate no money until repayment was certain. 69 CONG. REC. 7245 (1928). Unfortunately, Senator Johnson's belief that "every penny contemplated to be expended under the bill" would be repaid has proved to be unfounded. *See also* S. REP. No. 592, 70th Cong., 1st Sess. 7 (1928).

129. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 18 (S.D. Cal. 1971).

130. 43 U.S.C. § 511 (1970).

131. *Id.* § 423e.

132. *Id.* § 511 (emphasis added).

133. *Id.* § 423e.

134. *Id.* § 617m. One term in the Boulder Canyon Project Act, "present perfected rights," *id.* § 617e, probably meets the "except as otherwise pro-

is ambiguous, extrinsic aids may be considered, including the legislative history of the Act.[135]

Legislative History of the Boulder Canyon Project Act

Investigation of the events occurring during the enactment of a law often reveal the intent and purpose of the law.

> Therefore, the history of events transpiring during the process of enacting it, from its introduction in the legislature to its final validation, has generally been the first extrinsic aid to which courts have turned in attempting to construe an ambiguous act.[136]

The Boulder Canyon Project Act was the product of the fourth "Swing-Johnson" Bill.[137] The House version[138] contained a specific acreage limitation; the Senate version[139] did not. Another Senate bill,[140] which did contain an acreage limitation, was introduced by Senator Phipps, but only Senator Johnson's bill was favorably reported out of committee. The court in *Imperial* notes that the Senate committee "refused to take action" on Senator Phipps'

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vided" requirement of section 14 of the Act, *id.* § 617m. Recognition of the exception would not make acreage and residency requirements totally inapplicable under the Act, because not every possible water user would have had a "present perfected right." The term is considered below, under the discussion of the extent of the applicability of the limitations. *See* text accompanying notes 197-232 *infra.*

135. SUTHERLAND, *supra* note 89, § 48.01. *See also* United States v. Donruss Co., 393 U.S. 297 (1969).

136. SUTHERLAND, *supra* note 89, § 48.04. *See also* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).

137. The first Swing-Johnson bill (H.R. 11449, S. 3511) was introduced in the second session of the 67th Congress in 1922, but was never reported out of committee. PROBLEMS OF IMPERIAL VALLEY AND VICINITY, S. DOC. NO. 142, 67th Cong., 2d Sess. 1-325 (1922) is an extremely informative background source.

The second Swing-Johnson bill (H.R. 2903, S. 727) was introduced in the first session of the 68th Congress of 1923-1924. Neither bill was reported out of committee. On the first session of the 69th Congress (1925-1926), Congressman Swing and Senator Johnson each introduced two bills, (H.R. 6251, H.R. 9826, S. 1868, S. 3331), called collectively the third Swing-Johnson bill. The bills were favorably reported out of committee, and were the subject of much debate in both Houses during the second session (1926-1927), but no action was taken. As noted in United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 20-21 (S.D. Cal. 1971), Congressman Swing indicated at the committee hearings on the House bills that he did not believe there was anything in the bills requiring the sale of excess lands. *Hearings on H.R. 6251 and H.R. 9826 Before the House Comm. on Irrigation and Reclamation*, 69th Cong., 1st Sess. 32-33 (1926). After the hearings, however, Congressman Leatherwood prevailed upon the committee to include an acreage limitation. H.R. REP. NO. 1657, 69th Cong., 2d Sess., pt. 1, at 29-30 (1926). The Senate Report contains the following: "In a great project such as this many details may properly be referable to a general law such as the reclamation act." S. REP. NO. 654, 69th Cong. 1st Sess., pt. 1, at 28 (1926). This statement indicates that a rather widespread incorporation of reclamation law may have been intended. The fourth Swing-Johnson bill (H.R. 5773, S. 728) was introduced in the first session of the 70th Congress (1927-1928), and was passed in December of 1928 during the second session.

138. H.R. 5773, 70th Cong., 1st Sess. (1927).

139. S. 728, 70th Cong., 1st Sess. (1927).

140. S. 1274, 70th Cong., 1st Sess. (1927).

bill,[141] but any inference of specific committee disapproval of the acreage limitation is tenuous. The reason for not reporting Senator Phipps' bill appears to have been its lack of provision for building power facilities.[142]

The report on the Senate bill contains more substantial clues to intent.[143] First, there is reference to the troublesome "repayment under the terms of the reclamation law" and "no charge" provisions of section 1 of the Boulder Canyon Project Act.[144]

> The amendment . . . making the expenditure for the all-American canal reimbursable under the provisions of the reclamation law, is for the purpose of avoiding conflict with well-established precedent. The latter part of the amendment to the effect that no charge shall be made for irrigation water through the all-American canal is to avoid duplication of charge on the lands. These lands already have a water right, and since they are to reimburse the Government under the reclamation law the act should be perfectly clear that the lands are not to pay additional charges for water service.[145]

This statement is illuminating; it indicates the Senate belief that the lands already had a water right,[146] and it also provides evidence that no departure from general reclamation law was intended. Indeed, a provision was added to avoid conflict with "well-established" precedent.

Another important statement in the Senate committee report is found in the minority view of Senator Ashurst of Arizona:

> I offered an amendment before the committee that would subject the privately owned lands to the same conditions as lands in other irrigation projects privately owned, so that no water user might secure water for land in excess of 160 acres. This amendment is not included in the bill as it is reported to the Senate.[147]

Senator Ashurst and the other Senator from Arizona, both vehement opponents of the Boulder Canyon Project Act, offered amendments during debate and voiced their objections to the omission of acreage limitations.[148] Views on the lack of response by the Senate committee or by members of the Senate during debate are varied. In deciding in 1964 that the acreage limitations did apply

141. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 21 (S.D. Cal. 1971).
142. S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 31 (1928).
143. S. REP. No. 592, 70th Cong., 1st Sess. (1928). "Although not decisive, the intent of the legislature as revealed by the committee report is highly persuasive." SUTHERLAND, *supra* note 89, § 48.06; *see also* Zuber v. Allen, 396 U.S. 168, 186 (1969).
144. 43 U.S.C. § 617 (1970).
145. S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 4 (1928).
146. *See* discussion on "present perfected rights," in text accompanying notes 197-232 *infra*.
147. S. REP. No. 592, 70th Cong., 1st Sess., pt. 2, at 26 (1928).
148. *See, e.g.*, 69 CONG. REC. 7634-35, 9451, 10,471, 10,495 (1928).

in Imperial Valley, the Solicitor of the Department of the Interior stated as follows:

> The record is devoid of any inference that a majority of the committee members, in failing to adopt the Ashurst amendment, favored an acreage limitation exemption for private lands. Even if Senator Ashurst's comments could be interpreted as an expression of his view that without specific incorporation the excess land laws would not apply, the construction placed on a bill by an unsuccessful opponent is not a reliable indicator of its meaning.[149]

He also stated that "There is no indication that the failure of the Senate to act on the [Hayden] amendment evinced its rejection of the proposition that excess land provisions would be applicable. . . ."[150]

On the other hand, the court in *Imperial*[151] cited the Supreme Court for the proposition that while the "statements of opponents of a bill may not be authoritative . . . 'they are nevertheless relevant and useful.' "[152] Significantly, that statement was made in a case involving the legislative history of the Boulder Canyon Project Act.[153] The *Imperial* court's further statement, however, that the "statements of Senators Phipps, Hayden and Ashurst recur too frequently and are too pointed to be disregarded"[154] is to be questioned; a review of the legislative history reveals that the Senators were engaging in a filibuster and were making many pointed comments on many different subjects.[155] Literally dozens of amendments were offered; most of them, including the amendments on acreage limitation, were neither discussed nor came to a vote. "[C]aution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid."[156]

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149. 71 Interior Dec. 496, 505 (1964) (Opinion of Solicitor Barry).
150. *Id.*
151. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 22 (S.D. Cal. 1971).
152. *Id., citing* Arizona v. California, 373 U.S. 546, 583 n.85 (1963).
153. Arizona v. California, 373 U.S. 546 (1963). The Court noted comments of Senators Hayden and Ashurst. 373 U.S. at 572, 574, 576, 577, 582-83.
154. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 22 (S.D. Cal. 1971).
155. These comments included those on interstate apportionment of water cited by the Supreme Court in *Arizona v. California.* *See* note 153 *supra.* It should be pointed out that by far the majority of the comments of Senators Ashurst and Hayden were on that issue and *not* on acreage limitation.
156. SUTHERLAND, *supra* note 89, § 48.18. An example of the confusion that can be engendered in legislative debate is the history of the San Luis Unit, Central Valley Project Act of June 3, 1960, 74 Stat. 156. A provision in the bill that would specifically *exempt* lands that received water from the state service area of a joint federal-state unit from any acreage limitations was defeated on both the floor of the House and the Senate. Statements were made on the one extreme that defeat of the provision meant that the federal limitations would definitely apply to water deliveries, and on the other extreme that federal laws could not be applied even if the provisions were defeated. The Solicitor of the Interior decided that federal law did not apply. *Agreement with California for Construction of San Luis*

Even less comment on acreage limitations was made during the discussion of the House bill. Congressman Swing, the sponsor of the bill, made one statement affirming the existence of

> [a] limitation on the area that one person can hold after the canal is built, requiring that any large holding must be broken up, . . . if it is not broken up, it must be turned over to the Secretary of the Interior, who may sell it at an appraised price, so that no one will hold over a maximum of 160 acres.[157]

The bill passed the House with the limitation provision intact.[158] In the Senate, Senator Johnson moved to adopt H.R. 5773, retaining the House's enacting clause but substituting the text of S. 728, which did *not* have an acreage limitation. Senator Johnson assured the Senate that the two bills had "like purposes and like designs."[159] The substitution received unanimous consent. It was only later that Senator Ashurst noted the lack of an acreage limitation;[160] if anyone noted its absence earlier, there is no indication in the record.

As the court in *Imperial* noted, the "action is puzzling no matter how you read the completed statute."[161] What followed was also puzzling: after the substituted bill passed the Senate,[162] it was returned to the House for approval; Congressman Swing spent some time explaining what changes had been made before the substitution was accepted, but he did not mention that the acreage limitation had been deleted.[163]

The court in *Imperial* stated that "The language sought in the halls of Congress usually can be found in one place or another."[164] The problem with the legislative history of the acreage limitation in the Boulder Canyon Project Act is the scarcity of comments. In hundreds of pages of heated debates on interstate water appropriations and the advisability of constructing federal hydroelectric facilities, little attention was given to acreage limitations. There is not a single extended debate on the subject, and there is not even one

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Unit, Central Valley Project, 68 Interior Dec. 412 (1961) (Opinion of Solicitor Barry). The court in Bowker v. Morton, No. C-70-1274, 4 E.L.R. 20,255 (N.D. Cal. 1973), agreed. One authority in the field of reclamation law vehemently disagrees. *See* Taylor, *California Water Project: Law and Politics*, 5 ECOLOGY L.Q. 1 (1975). *See also* Sax, *supra* note 2, § 120.13.

157. 69 CONG. REC. 9626 (1928). Even though the statements of a sponsor of a bill may usually be considered to be more helpful than statements of parties less familiar with the bill, SUTHERLAND, *supra* note 89, § 48.15, Congressman Swing's statement here is of little ultimate consequence because the express acreage limitation was eventually deleted, inadvertently or otherwise.

158. 69 CONG. REC. 9989-90 (1928).

159. 70 CONG. REC. 67 (1928).

160. *Id.* at 289.

161. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 22 (S.D. Cal. 1971).

162. 70 CONG. REC. 603 (1928).

163. *Id.* at 831-33.

164. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 20 (S.D. Cal. 1971).

comment on residency requirements. "Legislative silence is a poor beacon to follow in discerning the proper statutory route."[165] Because the legislative history is as inconclusive as the terms of the statute, it is necessary to look beyond the confines of the Boulder Canyon Project Act itself.

National Policy and Public Grants

The United States Supreme Court has stated that "There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged."[166] Congress does not enact a law in a "vacuum,"[167] and "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."[168]

The Supreme Court described congressional policy in the federal reclamation program as

> one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as privately owned lands, which might receive project water.[169]

Evidence in support of this declaration of policy can be found in the statutory history of reclamation law preceding the Boulder Canyon Project Act.[170] Land speculation, monopoly, and ownership of water rights apart from the land were commonplace in the opening of the West.[171] Part of the purpose of the Reclamation Act of 1902[172] was to prevent these evils on public lands, and to preserve them "in small tracts for actual settlers and homebuilders."[173] The Act was also directed at private lands.

> Under nearly every project undertaken by the Government there will undoubtedly be some lands in private own-

165. Zuber v. Allen, 396 U.S. 168, 185 (1969).
166. United States v. C.I.O., 335 U.S. 106, 112 (1948).
167. Kokoszka v. Belford, 417 U.S. 642, 650 (1974).
168. United States v. Shirey, 359 U.S. 255, 260 (1959).
169. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 292 (1958). For the pre-eminent authority on the policy of federal reclamation law, *see* Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1954), cited in *Ivanhoe*, 357 U.S. at 292.
170. "The legal history of a statute, including prior statutes on the same subject, is an especially valuable guide for determining what object an act is supposed to achieve." SUTHERLAND, *supra* note 89, § 48.03.
171. Ben Yellen v. Hickel, 335 F. Supp. 200, 207-08 (S.D. Cal. 1971). *See also* Sax, *supra* note 2, § 110.1.
172. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C.).
173. 35 CONG. REC. 6674 (1902) (comment of Mr. Newlands, sponsor of the bill). Mr. Hansbraugh, the Senate sponsor, stated, "[s]o long as there is a quarter section of Government land I would make it possible for some one to build a home upon it." *Id.* at 1386.

> ership; and it would be manifestly unjust and inequitable not to provide water for these lands, providing their owners are willing to comply with the conditions of the act; and in order that no such lands may be held in large quantities or by nonresident owners it is provided that no water right for more than 160 acres shall be sold to any landowner, who must also be a resident or occupant of his land. This provision was drawn with a view of breaking up any large land holdings which might exist in the vicinity of the Government works and to insure occupancy by the owner of the land reclaimed.[174]

Whatever its purposes, the Reclamation Act had no provisions to force parties who would not comply with its provisions to dispose of their lands. As a result, the evils of speculation and concentrated ownership continued. The Reclamation Act of 1914[175] was designed in part to alleviate these problems. The House Committee Report stated:

> [A] very important provision of the bill preventing speculation may be found in section 12, which provides that before the Secretary of the Interior shall hereafter undertake any new project he shall require the owner of private lands thereunder to dispose of all his lands in excess of the area deemed sufficient to support a family, upon such terms and at such price as the Secretary of the Interior may designate. If this provision shall be adopted speculation in lands under reclamation projects will be reduced to a minimum, and the burdens of the real farmer who undertakes to reclaim and cultivate the lands, and for whose benefit the reclamation law was enacted primarily, can be kept normal.[176]

Such anti-monopoly and anti-speculation provisions form the background of the Boulder Canyon Project Act. Just two years before, in 1926, an act requiring recordable contracts for the disposition of excess lands had been passed.[177] Such a recent affirmation of acreage limitations certainly would not have been totally forgotten.

Substantial benefits from a public enterprise have been conferred on private landowners in the Boulder Canyon Project.[178] When a statute operates to relinquish a public interest, a strict construction will be given the grant so that nothing will pass into pri-

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174. 35 CONG. REC. 6678 (1902) (Mr. Mondell, from the Committee on Irrigation of Arid Lands).

175. Act of August 13, 1914, ch. 247, 38 Stat. 686 (codified in scattered sections of 43 U.S.C.).

176. H.R. REP. No. 505, 63d Cong., 2d Sess. 2 (1914).

177. Omnibus Adjustment Act § 46, 43 U.S.C. § 423e (1970).

178. The nation has also benefited, as noted by the court in United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 19 (S.D. Cal. 1971). The national interests cited as being advanced by the Project were irrigation of public and Indian lands, flood control, silt control and removal of the canal from Mexican to American territory. This does not detract, however, from the value to the private landowners of a steady and cheap water supply.

vate hands beyond what is given in clear terms.[179] Given the general policy of federal reclamation law at the time, Congress could have been expected to indicate a total rejection of that policy in clear terms. None of the provisions of the Act or legislative statements analyzed thus far has indicated that such acreage and residency limitations as may have existed in reclamation laws in 1928 were totally excluded from the Boulder Canyon Project Act. Acreage and residency limitations, therefore, could be applied to lands, including Imperial Valley lands, in the Boulder Canyon Project.[180] Several questions remain: To what extent will the limitations apply? What are the limitations? Finally, what effect should be given to a long history of administrative neglect?

THE EXTENT OF THE ACREAGE AND RESIDENCY LIMITATIONS: PRESENT PERFECTED RIGHTS, REPEAL BY IMPLICATION AND THE "THRESHHOLD" PROBLEM

Present Perfected Rights

Assuming that limitations on water delivery may be applicable in Imperial Valley, to whom are they to apply? Without more, the fact that much of the land in Imperial Valley had been irrigated prior to the Boulder Canyon Project Act would be insufficient to exempt landowners from restrictions imposed by federal reclamation law, even if they had acquired vested rights under state law. Section 8 of the Reclamation Act of 1902 seems to provide that such rights would be valid against federal regulations:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.[181]

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179. United States v. Grand River Dam Authority, 363 U.S. 229 (1960); United States v. Union Pac. R.R. Co., 353 U.S. 112 (1957); Slidell v. Grandjean, 111 U.S. 412 (1884).

180. The word *could* is used advisedly. The court in *Imperial* rejected the rule of construction that grants will be construed narrowly and stated that "Application of this rule of construction does not advance the search for acreage limitation in the Project Act." 322 F. Supp. at 19. Also, the court did not discuss national policy, other than to state that "important considerations of national policy" were involved in the litigation. *Id.* at 16. There were also several grounds for that court's determination that have not yet been discussed. It is proposed, however, that those grounds go more to the question whether the limitations *should* apply, or even *when* they should apply, and not whether the limitations *could* apply.

181. 43 U.S.C. § 383 (1970). For a discussion of the effect of section 8, *see* Attwater, *State Control over Federal Reclamation Projects*, 8 NATURAL RESOURCES LAW. 281 (1975). *See also* Comment, *Allocation of Water from Federal Reclamation Projects: Can the States Decide?* 4 ECOLOGY L.Q. 343 (1974).

An early Supreme Court opinion even interpreted section 8 as requiring federal compliance with state law;[182] and one of the reasons given by the Secretary of the Interior in 1933, when he approved exemption of the lands in the Imperial Irrigation District, was that such lands had vested rights.[183] In the last 30 years, however, the courts have refused to subordinate federal policies in reclamation programs to state laws.[184] In 1945, the Supreme Court stated in *Nebraska v. Wyoming*[185] that "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."[186]

In *Ivanhoe Irrigation District v. McCracken*[187] the precise issue was the effect of a conflict between federal regulations and claims of prior rights under state law. The Court "hasten[ed] to correct any impression that lands in the Central Valley had not been reclaimed and irrigated at the inception of the project."[188] Nonetheless, the Court held that section 8 only applied to cases where the United States found it necessary to *acquire* water rights,[189] and that

> acquisition of water rights must not be confused with the operation of federal projects . . . . Section 5 [of the 1902 Act] is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.[190]

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182. Nebraska v. Wyoming, 295 U.S. 40, 43 (1935). "[T]he Secretary . . . must obtain permits and priorities for the use of water . . . in the same manner as a private appropriator or an irrigation district formed under the state law."

183. Letter from Ray L. Wilbur, Secretary of the Interior, to the Imperial Irrigation District, Feb. 24, 1933, *reprinted in* 71 Interior Dec. 496, App. E, at 529-30 (1964):

> Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized. . . . Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.
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> . . . [I]t has been held that the provisions of section 5 of the Reclamation Act . . . will not prevent the recognition of a vested water right. . . .

184. *See* Sax, *supra* note 2, § 124. Sax theorizes that the reason for the shift to absolute federal priority is that at the inception of the reclamation program, Congress was willing to leave regulations to the states because there was no "substantial number" of federal policies at stake. As the reclamation program grew and the federal government had more at stake, it became less willing to subordinate itself to state law.

185. 325 U.S. 589 (1945).

186. *Id.* at 615. *See also* United States v. Willow River Power Co., 324 U.S. 499, 510 (1945), for the proposition that individual water rights might have to yield to superior government interests.

187. 357 U.S. 275 (1958).

188. *Id.* at 280.

189. *See* City of Fresno v. California, 372 U.S. 627 (1963).

190. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291-92 (1958), *cited with approval in* Arizona v. California, 373 U.S. 546, 586 (1963). *See*

The Court further found that the federal government was empowered to impose reasonable conditions on the use of a project it had developed, and that a state could not "compel use of federal property on terms other than those prescribed or authorized by Congress."[191] Finally, the Court stated:

> The project was designed to benefit people, not land. It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes. In short, the excess acreage provision acts as a ceiling, imposed equally upon all participants, on the federal subsidy that is being bestowed.[192]

The *Ivanhoe* decision was cited favorably in *Arizona v. California*,[193] where the Supreme Court held that the Secretary of the Interior was not "bound by state law in disposing of water under the Project Act."[194] In addition, the Court held that "[T]he Secretary in choosing between *users* within each State and in settling the terms of his contracts is not bound by these sections to follow state law."[195] It appears, therefore, that Imperial Irrigation District lands are subject to federal regulations, including limitations on water delivery, unless a particular exemption can be found. The Boulder Canyon Project Act[196] seems to contain such an exemption.

Sections 6, 8a, and 13 of the Boulder Canyon Project Act[197] provide a scheme of protection for "present perfected rights"[198]

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also Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49, 81 (1964):

> Where there is a "specific and mandatory" federal rule in the law, it must be observed even when in derogation of state law. But all the really difficult problems lie ahead, for . . . the reclamation laws are full of federal policies of varying specificity, of varying importance and of varying clarity.

191. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).
192. *Id.* at 297.
193. 373 U.S. 546 (1963).
194. *Id.* at 587.
195. *Id.* at 586 (emphasis added). *See also id.* at 580: "Congress intended the Secretary . . . to decide which users within each State would get water;" *and id.* at 587: "Where the Government, as here, has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws." The commentary on these statements has not been wholly favorable. *See, e.g.*, Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966) for the proposition that Congress did intend state law to govern intrastate allocation of water.
196. 43 U.S.C. §§ 617-617t (1970).
197. *Id.* at §§ 617e, 617g, 617l.
198. Present perfected rights are rights "existing as of June 25, 1929" which had been "exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works." Arizona v. California, 376 U.S. 340, 341 (1964).

which, if controlling, accomplishes two things. First, it qualifies under the "except as otherwise herein provided" language of section 14 of the Boulder Canyon Project Act[199] to except holders of present perfected rights from acreage and residence limitations. Secondly, it distinguishes *Imperial* and *Ben Yellen I* and *II*, to the extent present perfected rights are involved, from *Ivanhoe Irrigation District v. McCracken*,[200] thereby excepting holders of such rights from limitations which might be imposed by the rules enunciated in *Ivanhoe*.[201]

Section 8a[202] provides that the United States and all users of water shall be subject to the Colorado River Compact.[203] Section 13[204] states that the rights of the United States in or to waters of the Colorado River shall be subject to and controlled by the Compact. Article VIII of the Compact provides that "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."[205] Section 6 of the Boulder Canyon Project Act provides that the dam and reservoir will be used, among other things, for the "satisfaction of present perfected rights in pursuance of Article VIII. . . ."[206]

The term "perfected right" sounds very similar to the term "vested right" in section 8 of the Reclamation Act of 1902.[207] As has been shown, vested rights have not been exempted from reclamation law limitations.[208] The Supreme Court has, however, distinguished present perfected rights under the Boulder Canyon Project Act.

> In the construction, operation, and management of the works, the Secretary is subject to the provisions of the reclamation law, except as the act otherwise provides. § 14. One of the most significant limitations in the Act is that the Secretary is *required* to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6.[209]

The conjunction of these two sentences is significant. In the first, the Court states that the Secretary of the Interior is subject to the

199. 43 U.S.C. § 617m (1970).
200. 357 U.S. 275 (1958).
201. It is essential to keep in mind that exempting present perfected rights from the reclamation laws would not exempt all the landowners in Imperial Valley. Only those qualifying under the Supreme Court's definition of present perfected rights would be exempt. *See* note 198 *supra*. Any land first irrigated after June 25, 1929 would still be subject to the reclamation law.
202. 43 U.S.C. § 617g (1970).
203. I UNITED STATES DEP'T OF THE INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANN. 441 (1972) [hereinafter cited as FEDERAL RECLAMATION].
204. 43 U.S.C. § 617*l*(b) (1970).
205. FEDERAL RECLAMATION, *supra* note 203, at 445.
206. 43 U.S.C. § 617e (1970).
207. *Id.* § 383.
208. *See* text accompanying notes 181-95 *supra*.
209. Arizona v. California, 373 U.S. 546, 584 (1963) (emphasis added). *See also id.* at 566, 581, 582 n.83, 588, 594, 600.

provisions of the reclamation law; in the second that there is a limitation—he must satisfy present perfected rights. In other words, section 6, in its direction to satisfy "present perfected rights,"[210] meets the "otherwise provided" exception of section 14.[211] In addition, as the court in *Imperial* noted:

> This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights.[212]

Finding that the terms of the Boulder Canyon Project Act can be construed to exempt "present perfected rights" from the reclamation law, the court also distinguished *Imperial* from *Ivanhoe Irrigation District v. McCracken*,[213] on the ground that language guaranteeing perfected rights was "wholly lacking" in the latter case.[214]

The court in *Ben Yellen I* and *II*, on the other hand, was just as convinced that the term "present perfected rights" did not preclude the application of reclamation law limitations, citing the following reasons:

1) The status of the landowners as holders of present perfected rights was challenged. "There is no evidence that Congress, prior to the B.C.P.A., ever authorized the Imperial Valley landowners to use the navigable waters of the Colorado."[215] Also, "[I]t appears that . . . the landowners were still relying on Mexican water rights —not perfected American rights."[216] Regarding the first reason, the decree in *Arizona v. California*[217] requires that the perfected right have been acquired in accordance with state, rather than federal law.[218] As for the second, the history of the Boulder Canyon Project Act indicates that residents of the Imperial Valley were among those who were already considered to have acquired such rights.[219]

2) "The B.C.P.A. recognition given to 'present perfected rights' is a limited recognition. Holders of perfected rights . . . must, like everyone else, comply with the acreage and residence requirements.

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210. 43 U.S.C. § 617e (1970).
211. *Id.* § 617m.
212. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 18 (S.D. Cal. 1971).
213. 357 U.S. 275 (1958).
214. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 19 (S.D. Cal. 1971).
215. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1309 (S.D. Cal. 1972).
216. *Id.*
217. 376 U.S. 340 (1964).
218. *Id.* at 341.
219. S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 4 (1928): "These lands already have a water right. . . ."; 68 CONG. REC. 3087 (1927): ". . . a community like Imperial Valley that has already acquired a water right . . . ."

. . ."[220] The United States can impose "whatever conditions it wishes" on private rights under the project, and "whatever rights exist, exist by the grace of Congress." If the landowners wish to avoid the reclamation law, they are free to turn to "existing water supplies" outside the project.[221] In this second argument, the court in *Ben Yellen II* cited *Ivanhoe Irrigation District v. McCracken.*[222] As pointed out by the court in *Imperial*, however, *Ivanhoe* did not involve present perfected rights,[223] but rather the effect of state laws under section 8 of the Reclamation Act of 1902.[224] Here a specific congressional mandate appears in section 6 of the Boulder Canyon Project Act for "*satisfaction* of present perfected rights."[225] The condition imposed is on the Secretary of the Interior, not on the present perfected rights.[226] If owners of present perfected rights were forced to turn to other sources of water, the directive to "satisfy" those rights would be a nullity. If rights must "exist by the grace of Congress," these rights certainly qualify, for Congress expressly recognized them.

3) "The Supreme Court has pre-empted the question of perfected rights in the Colorado. The lower courts should not attempt a determination of this issue."[227] This reasoning is circular; if the Supreme Court has really pre-empted the question of present perfected rights, the lower courts are bound by its direction that such rights shall be satisfied. Not knowing at this juncture whether or not the landowners qualify as holders of present perfected rights, the court in *Ben Yellen I* and *II* would be unable to render *any* decision, but would have to wait for the Supreme Court to determine the issue.

4) The existence of present perfected rights is "irrelevant because it need only be shown that the Imperial Irrigation District is deriving a benefit from the use of a government facility for reclamation law to be applicable."[228] This is based on *Ivanhoe Irrigation District v. McCracken,*[229] but, as noted earlier, *Ivanhoe* can be distinguished.[230] The Court in *Arizona v. California,*[231] on

220. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1309 (S.D. Cal. 1972).
221. *Id.* at 1310. *See also* Taylor, *Excess Land Law on the Kern? A Study of Law and Administration of Public Principle vs. Private Interest*, 46 CALIF. L. REV. 153, 173 n.79 (1958): "The so-called established water right is not a right to *controlled* flow of water, but only to natural stream flow. . . ."
222. 357 U.S. 275 (1958).
223. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 19 (S.D. Cal. 1971).
224. 43 U.S.C. § 383 (1970).
225. *Id.* § 617e (emphasis added).
226. Arizona v. California, 373 U.S. 546 (1963). Congress has set standards for the Secretary to follow, including his obligation to respect "present perfected rights." *Id.* at 594. The Congress has fettered the Secretary's discretion in "clear and unequivocal terms . . . in recognizing 'present perfected rights' in § 6." *Id.* at 581.
227. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1310 (S.D. Cal. 1972).
228. *Id.*
229. 357 U.S. 275 (1958).
230. *See* text accompanying notes 223-24 *supra.*
231. 373 U.S. 546 (1963).

the other hand, spoke specifically in favor of present perfected rights.[232]

As has been demonstrated, the courts in *Imperial* and the *Ben Yellen* cases are in complete disagreement over the potential applicability of present perfected rights as an exception to limitations on water delivery in the Imperial Valley. If an appeal is taken from the Ninth Circuit, present perfected rights may be a central issue. In *Arizona v. California*,[233] allocations of water to *intra*state users were only important to the extent that they affected *inter*state allocations. After a thorough consideration of national reclamation policy, the Supreme Court could modify its stand. As the law stands, however, it seems that to the extent present perfected rights exist in the Imperial Irrigation District, they are exempt from reclamation law limitations.

Residency Requirements and Repeal by Implication

The second problem in determining the extent of the applicability of federal reclamation law limitations is to determine what those limitations are. The defendants in *Imperial* do not contend that the 160-acre limitation is not a valid requirement of the reclamation law; they argue only that the Imperial Valley is exempt. If there is no such exemption, acreage limitations are in effect. The residency requirement, however, which has not been enforced for 50 years,[234] is completely rejected both by the landowners and by the government. Therefore, even if it is determined that limitations apply in the Imperial Irrigation District, it must be determined whether a residency requirement exists at all.

It is argued that the residency requirement of section 5 of the Reclamation Act of 1902[235] is no longer operative because it has been supplanted by later reclamation laws which do not contain such a requirement.[236] In rejecting that argument and holding the residency requirement valid, the court in *Ben Yellen I* stated that "The policy behind reclamation law to aid and encourage owner-operated farms requires enforcement of the residency requirement. . . ."[237] In addition, the court found no "repugnancy"

232. *Id.* at 566-67, 581-84, 588.
233. 373 U.S. 546 (1963).
234. "[F]rom 1926 on no such requirement has been imposed upon water users within a federal reclamation district." Renda, *Owner Eligibility Restrictions—Acreage and Residency*, 8 NATURAL RESOURCES LAW. 265, 280 (1975).
235. 43 U.S.C. § 431 (1970), provides that no water right will be sold "to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood. . . ."
236. The specific laws are section 1 of the Act of August 9, 1912, 43 U.S.C. § 541 (1970); the Act of May 15, 1922, 43 U.S.C. §§ 511-13 (1970); and section 46 of the Omnibus Adjustment Act, 43 U.S.C. § 423e (1970).
237. 335 F. Supp. 200, 208 (S.D. Cal. 1971).

between section 5 of the 1902 Act and the later acts,[238] and declared that section 5 was "in full force and effect."[239]

The policy of the reclamation law has been discussed previously.[240] There is a historical basis for the statement in *Ben Yellen I* that residency requirements were part of that policy. Whether or not the residency requirement should be continued is in dispute; the requirement has both enemies[241] and proponents.[242] The court in the *Ben Yellen* cases did not have to decide what the national policy *should* be, but it did have to determine the current law. In so doing, the court had to analyze three statutes and decide whether section 5 was repealed by implication.[243]

Posadas v. National City Bank[244] sets forth the general rules of the doctrine of repeal by implication:

> The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act . . . .[245]

The most recent statement of the Supreme Court is found in *Morton v. Mancari*.[246]

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.[247]

With these rules in mind, the question is whether any of the three statutes relied upon by the landowners and by the government repeal the residency requirement of section 5.

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238. *See* note 236 *supra*.
239. Ben Yellen v. Hickel, 335 F. Supp. 200, 208 (S.D. Cal. 1971).
240. *See* text accompanying notes 169-76 *supra*.
241. *See* note 22 *supra* for the recommendation of the Public Land Law Review Commission to abolish the requirement.
242. "It is submitted that the problems of forms of ownership would be substantially diminished if the residency requirement—which is, after all, a federal law that has never been repealed—were enforced. . . ." Sax, *supra* note 2, § 120.7(d).
243. *See* note 236 *supra*.
244. 296 U.S. 497 (1936). *See also* Rosenberg v. United States, 346 U.S. 273 (1953); United States v. Borden Co., 308 U.S. 188 (1939); Wilmot v. Mudge, 103 U.S. 217 (1881).
245. Posadas v. National City Bank, 296 U.S. 497, 503 (1936).
246. 417 U.S. 535 (1974).
247. *Id.* at 551.

Section 1 of the Act of August 9, 1912[248] requires that "homestead entrymen submit proof of *residency*, reclamation and cultivation in order to obtain a patent while purchasers of water right certificates need only prove cultivation and reclamation of the land for a final [water right] certificate."[249] Omission of the word *residency* from the provision relating to private ownership seems strange, but several things must be considered before attributing too much importance to it. First, there is no "clear and manifest"[250] evidence in the statute that the residency requirement be repealed. Neither is there any such evidence in the legislative history. Secondly, the bill was not designed to regulate reclamation projects, but rather to make it easier for people to obtain credit on their lands.[251] Entrymen were allowed to obtain a patent, and private parties a final water right (which guaranteed that the land would be able to obtain water), before they paid the government in full. Such a patent or final certificate "was an asset which added to the mortgagable value of the land."[252] It is unlikely that Congress would have repealed the residency requirement in such a limited act. Thirdly, even if the Act did repeal section 5, it would do so only "to the extent of the conflict."[253] The 1912 Act deals only with obtaining a final water rights certificate. Section 5 of the 1902 Act would still govern initial water delivery.[254] Finally, in the Act of August 10, 1917,[255] Congress suspended the residency requirement for private lands during World War I. The court in *Ben Yellen I* noted that it "would be strange indeed" for Congress to suspend a requirement that it had already eliminated.[256]

The Act of May 15, 1922[257] allowed the Secretary of the Interior to dispense with the water right applications of individuals and enter into contracts with irrigation districts instead. Section 5 of the 1902 Act[258] speaks in terms of water "sales" to individual landowners. If the language is taken literally, any water "sale" occurring through a district would be exempt from the requirements of section 5. But because the Secretary had authority to continue to accept individual water right applications, there would be at most only a partial repeal. It is difficult even to support that thesis, for the Secretary was expressly directed to carry out

248. 43 U.S.C. § 541 (1970).
249. Ben Yellen v. Hickel, 335 F. Supp. 200, 204 (S.D. Cal. 1971) (emphasis added).
250. *See* text accompanying note 245 *supra*. *See also* West India Oil Co. v. Domenech, 311 U.S. 20 (1940).
251. H.R. REP. No. 867, 62d Cong., 2d Sess. 2, 4 (1912); S. REP. No. 608, 62d Cong., 2d Sess. 2 (1912).
252. Ben Yellen v. Hickel, 335 F. Supp. 200, 205 (S.D. Cal. 1971).
253. *See* text accompanying note 245 *supra*. *See also* Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945).
254. Ben Yellen v. Hickel, 335 F. Supp. 200, 205-06 (S.D. Cal. 1971).
255. Ch. 52, § 11, 40 Stat. 276.
256. Ben Yellen v. Hickel, 335 F. Supp. 200, 206 (S.D. Cal. 1971).
257. 43 U.S.C. §§ 511-13 (1970).
258. *Id.* § 431.

the purposes of the earlier Act.[259] Far from showing a "clear and manifest" intent to repeal the residency requirement, this demonstrates an intent to continue the policies of the 1902 Act.

Section 46 of the Omnibus Adjustment Act,[260] however, required that in new projects the Secretary of the Interior would *only* contract with irrigation districts. The practice of allowing individuals to file water right applications was no longer used in new projects.[261] In addition, section 46 contained a provision regarding the 160-acre limitation,[262] but no residency requirement. The first inconsistency in the terms of section 5 of the 1902 Act and section 46 of the 1926 Act is that the payment scheme in section 5 is cast in terms of the sale to an individual of the right to the use of water; the payment scheme of section 46, on the other hand, involves a contract with an irrigation district to repay costs of construction. As noted earlier,[263] the "sale of water" terminology can only be explained in terms of a unified scheme in sections 4 and 5 for charges for the cost of a project's construction. The individual-district problem is less explicable, but the court in *Ivanhoe Irrigation District v. McCracken*[264] did not seem bothered by the distinction, and held the acreage limitation of section 5 applicable to irrigation districts, stating that the limitation was a "specific and mandatory prerequisite" for the operation of a project.[265] This seems a justifiable result in that mere organization of an association ought not operate to shield landowners; "The formation of 'districts' is merely for administrative expediency. It is not meant to thwart the policy of Section 5."[266]

One question still remains. Why is there a specific reference to acreage limitations and none to residency requirements? Neither the statute nor the legislative history yields an explanation; as usual, there is nothing "clear and manifest" about the legislative intent,[267] but an answer can be found in logic.

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259. *Id.* § 511.
260. *Id.* § 423e.
261. 71 Interior Dec. 496, 502 (1964) (Opinion of Solicitor Barry).
262. *See* note 18 *supra.*
263. *See* note 113 *supra.*
264. 357 U.S. 275 (1958).
265. *Id.* at 291.
266. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1306 (S.D. Cal. 1971).
267. The Congress has dealt briefly with residency three times since 1926. In the Soldiers and Sailors Civil Relief Act of 1940, ch. 888, § 508, 54 Stat. 1178, the residency requirement for private lands was suspended for the Second World War. This is not conclusive because it may have applied to people from previous (pre-1926) projects who had not yet formed irrigation districts to contract with the Secretary. In section 2 of the Act of March 31, 1950, 43 U.S.C. § 375c (1970), is found the phrase "resident farm landowner or resident entryman." Section 2 of the Farm Unit Exchange Act of 1953, 43 U.S.C. § 451a(1970), refers to "any resident owner of private lands." The scarcity of references makes it just as logical to argue that an explicit reference to residency makes it a special requiremer in that Act as to argue that an explicit reference is a recognition of existi policy.

The recordable contract for the sale of lands was a new method of enforcing the excess land provisions. Merely limiting water delivery had proved an insufficient bar to speculation;[268] people discovered that even the excess lands increased in value from the delivery of water to non-excess lands. Requiring a contract for sale of excess lands to be signed before water delivery to any lands was a new way of alleviating the speculative evil. Merely reiterating the residency requirement, however, would serve no purpose. Section 46 "provides for sale of excess lands over 160 acres if the private owner wants reclamation project water. Section 5 requires that he be a resident to get water at all."[269] Viewed in that light, there is no irreconcilable conflict between section 46 and section 5. Section 46 is not clearly intended as a substitute for section 5. Therefore, remembering that repeals by implication are not favored, the later Act may be construed as a continuation of, not a substitute for, the earlier Act.[270] The residency requirement has not been enforced for half a century, but as the Supreme Court stated in *Jones v. Alfred H. Mayer Co.*,[271] in applying a statutory provision which had long been ignored, "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today."[272]

The "Threshhold" Problem

Once it has been determined which reclamation laws apply, and to whom, it must be decided how long the laws apply. The duration of the 160-acre limitation did not arise in the *Imperial* or *Ben Yellen* cases, but it remains a controversial issue in reclamation law. Known as the problem of "pay-out," the question is whether full payment of charges relieves a landowner (or, in most cases, an irrigation district) from the acreage limitation on delivery of water. The current position of the Department of the Interior is that in the case of "pay-out" by an individual under a water right certificate, excess water may be delivered if it does not defeat the anti-monopoly and anti-speculation purposes of reclamation law.[273] Under a section 46 contract,[274] however, the full payment of charges will not lift the acreage limitation, because of that provision's stricter requirements.[275] In *United States v. Tulare Lake Canal Co.*,[276] another reclamation case before the Ninth Circuit, the trial court held (contrary to the view of the Department), that

268. Gates, *supra* note 2, at 662.
269. Ben Yellen v. Hickel, 335 F. Supp. 200, 204 (S.D. Cal. 1971).
270. *See* text accompanying note 245 *supra*.
271. 392 U.S. 409 (1968).
272. *Id.* at 437.
273. 68 Interior Dec. 372, 383 (1961) (Opinion of Solicitor Barry). *See also* Sax, *supra* note 2, § 120.10.
274. 43 U.S.C. § 423e (1970).
275. 64 Interior Dec. 273, 275-76 (1957) (Opinion of Solicitor Bennett).
276. 340 F. Supp. 1185 (E.D. Cal. 1972).

pay-out does terminate the limitations. The court cited no reason for this decision.[277]

The duration of the residency requirement, assuming it exists, is an issue in *Ben Yellen I* and *II*. The court concluded:

> The residency requirement of Section 5 of the Reclamation Act is a continuing restriction upon the right to receive project water, not only until the completion of repayment of construction costs of the All-American Canal but continuing in perpetuity until Congress changes the reclamation law by appropriate statutory enactment.[278]

That conclusion can be expected to be vigorously contested.

A residency requirement could exist for three different time periods: 1) only until the application for water has been approved; this was the practice of the Department of the Interior when it last enforced the residency requirement,[279] and is called a "threshhold" requirement; 2) until complete payment for the cost of construction has been made; and 3) "in perpetuity."[280]

There is no specific durational requirement in the residency provision of section 5 of the Reclamation Act, but the first alternative seems untenable. First, it would largely negate the anti-speculative purpose of a residency requirement. Secondly, the United States would be required to confer the benefits of water delivery before it had received consideration. Finally, in another provision of the 1902 Act, homestead entrymen are prevented from avoiding actual residency by commutation payments,[281] although that practice is permitted on most public lands. In light of these factors, "It is most difficult to see the justification for so narrow a reading of the restrictions."[282]

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277. This was an alternate holding. The other holding was that the dam and reservoir at Pine Flat was not an irrigation project but a flood control project and that, therefore, the defendant company was not bound to observe the 160-acre limitation in its deliveries. Pine Flat was built pursuant to the Flood Control Act of Dec. 22, 1944, ch. 665, 58 Stat. 887 (codified in scattered sections of 33, 43 U.S.C.). The holding is in conflict with three Department of the Interior decisions—64 Interior Dec. 273 (1957) (Opinion of Solicitor Bennett), 65 Interior Dec. 525 (1957) (Opinion of Solicitor Bennett), and 68 Interior Dec. 372, 375 n.2 (1961) (Opinion of Solicitor Barry)—and one Attorney General's opinion, 41 OP. ATT'Y GEN. 377, 65 Interior Dec. 549 (1958) (Opinion of Attorney General Rogers).

278. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1319 (S.D. Cal. 1972).

279. The residence requirement of this section in reference to private lands is fully complied with if, at the time the water-right application is made, the applicant is a bona fide resident upon the land or within the neighborhood. After approval of the application further residence is not required of such applicant, and final proof may therefore be made under the Act of August 9, 1912, without the necessity of proving residence at the time proof is offered.

FEDERAL RECLAMATION, *supra* note 203, at 67 (1972) (Departmental Decision of Apr. 19, 1916). One commentator has described this practice as administrative emasculation. *See* Sax, *supra* note 2, § 121.

280. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1319 (S.D. Cal. 1972). *See* text accompanying note 278 *supra*.

281. 43 U.S.C. § 432 (1970).

282. *See* Sax, *supra* note 2, § 121.

The second alternative seems reasonable. If "sale" means "the contract by which the government secures repayment and the water user obtains benefits resulting from construction of the federal project,"[283] then relieving limitations upon repayment would be justified. Indeed, section 5 speaks in terms of a permanent attachment of a right to the use of water when all payments are made.[284] Final payment on the All-American Canal is not due until the year 2002; perhaps the beneficial effects of the limitations will have been felt by then.

The third choice, that of the court in *Ben Yellen II*, also has merit. It is in line with the Department of the Interior's position on pay-out,[285] and would insure long-term enforcement of federal policy. It would also eliminate the possibility of early repayment to avoid limitations.[286] In this writer's opinion, however, the pure application of this requirement would be too strict. It has been suggested that "There would be no objection to permitting . . . an adjustment period in which water continued to be supplied despite lack of compliance with the statutory requirement in case of acquisition by foreclosure, inheritance, and like processes."[287]

Administrative Practice and Congressional Ratification

The terms and history of the Boulder Canyon Project Act are ambiguous, and the status of the residency requirement is open to dispute. The history of federal reclamation law has been consulted, and it appears that, consistently with the policy of that law, acreage and residency limitations could be enforced in the Imperial Valley. Before it is determined whether such limitations should be enforced, however, one more ingredient—the effect of administrative practice—needs to be added to the interpretive formula.

The Interior Department's view of the applicability of the acreage limitation under the Boulder Canyon Project Act has been inconsistent. In February, 1933, the Secretary of the Interior wrote a letter to the Imperial Irrigation District in which he declared that acreage limitations would not be applied in the Imperial Valley under the Boulder Canyon Project Act.[288] Twelve years later, the

283. *See* 71 Interior Dec. 496, 501-02 (1964) (Opinion of Solicitor Barry), *quoted* note 113 *supra*.
284. 43 U.S.C. § 431 (1970).
285. *See* text accompanying note 275 *supra*.
286. *Cf.* 68 Interior Dec. 372, 383 (1961) (Opinion of Solicitor Barry): "[V]esting in a large landowner the right to compel delivery of water by the mere fact of immediate payout would place in such landowner the power to circumvent a fundamental policy of the law."
287. *See* Sax, *supra* note 2, § 121.
288. Letter from Ray L. Wilbur, Secretary of the Interior, to the Imperial Irrigation District, Feb. 24, 1933, in 71 Interior Dec. 496, App. E, at 529-30 (1964). *See* note 183 *supra*. It is interesting to note that the attorney for the Imperial Irrigation District requested a ruling from the Interior Department on the subject of acreage limitations in the Imperial Valley but he did not "want any formal ruling, of course, if the Solicitor were to hold that the limitation applies so far as Imperial Irrigation District is con-

Solicitor of the Interior decided that, under the same Act, acreage limitations would be applied to the neighboring Coachella Valley.[289] During the next 15 years, two Interior officials declined to review or correct the apparent inconsistency.[290] Finally, in 1964, a thorough review of the issue was conducted by Solicitor Barry, and the decision was reached that acreage limitations did apply to the Imperial Valley.[291] During the mottled career of the acreage limitation, however, the residency requirement received consistent treatment—total non-enforcement.

The question to be resolved is what weight should be given these administrative practices in the final determiniation of the effect of the Boulder Canyon Project Act on the Imperial Valley. The lower courts in *Imperial* and *Ben Yellen I* and *II* agreed on one point—that the rule of *Udall v. Tallman*,[292] that an administrative ruling need only be reasonable to be upheld, would not control their decisions.[293] At this juncture, the courts parted company. In the *Ben Yellen* cases it was held that administrative rulings "cannot thwart the plain purpose of a valid law,"[294] that the United States could not be estopped,[295] and that the court must look at the "law itself" rather than at the conflicting administrative interpretations of the law.[296] The court in *Imperial*, however, citing *United States v. Midwest Oil Co.*,[297] gave weight to the long-standing usage of the Interior Department from 1933-1964.[298] In addi-

cerned." Letter from Richard J. Coffey to P.W. Dent, Feb. 4, 1933, in 71 Interior Dec. 496, App. B, at 527 (1964).

289. *Applicability of the Excess Land Provisions of the Federal Reclamation Law to the Boulder Canyon Project Act*, M-33902 (1945) (Opinion of Solicitor Harper), *reprinted in* 71 Interior Dec. 496, App. H, at 533 (1964).

290. "[I]t being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to rely . . . they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling . . . ." Letter from Secretary Krug to H.C. Herman, Apr. 27, 1948, in 71 Interior Dec. 496, App. I, at 548-49 (1964). "I have not had occasion to undertake a legal analysis of the respective views heretofore expressed by Secretary Wilbur and former Solicitor Harper. Whatever the conclusion might be, to my mind the time has long since passed when it is realistic and practicable to do so." Letter from Solicitor Bennett to Solicitor General Rankin, Feb. 5, 1958, in 71 Interior Dec. 496, App. J, at 550 (1964).

291. 71 Interior Dec. 496 (1964) (Opinion of Solicitor Barry). This decision provides a thorough, if partisan, consideration of the question of acreage limitations in the Imperial Valley, along with an extremely helpful appendix. *See also* United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 23-26 (S.D. Cal. 1971), for a review of events in the administrative history.

292. 380 U.S. 1, 16-17 (1965).

293. The reasons given for the rejection of the rule in *Imperial* were that *Udall* involved a regulation and *Imperial* a statute; that private interests were involved in *Udall*, while important considerations of national policy were involved in *Imperial*; and that the administrative practice in *Udall* was consistent which was not the case in *Imperial*. 322 F. Supp. at 16. *Udall* was rejected in *Ben Yellen II* for essentially the same reasons. 352 F. Supp. at 1311.

294. Ben Yellen v. Hickel, 335 F. Supp. 200, 208 (S.D. Cal. 1971).

295. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1311 (S.D. Cal. 1972).

296. *Id.*

297. 236 U.S. 459 (1915).

298. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 26 (S.D. Cal. 1971).

tion, while noting that attributing significance to the inaction of Congress was a "shaky business," the court considered Congress' 40 year silence in concluding that acreage limitations did not apply in Imperial Valley.[299]

The conclusions in the *Imperial* and the *Ben Yellen* cases are all open to criticism. In its rejection of *Udall v. Tallman*,[300] the court in *Imperial* properly took note of the inconsistency of departmental opinions, but later chose to give credence to one of those opinions (Secretary Wilbur's 1933 letter exempting the Imperial Irrigation District from acreage limitations) because of its long standing usage.[301] Even while it was in force, the Wilbur letter did not remain unquestioned; it was challenged by the Solicitor of the Interior in 1945,[302] and though the letter was upheld for two decades thereafter, its acceptance was expressly not due to its legal merit, but rather to potential landowner reliance.[303] The Wilbur letter was completely rejected in 1964.[304] The weight given to an administrative interpretation may depend, *inter alia*, on "its consistency with earlier and later pronouncements."[305] Because of its inconsistency with later department practices, and because it was not even a formal department ruling, the Wilbur letter was perhaps not due the deference accorded it in *Imperial*.

The court in *Imperial* also noted that "Congress for more than 30 years was fully aware of the 1933 ruling . . ." and that it "would hardly have ignored the Department's failure to enforce an important provision of reclamation law."[306] How "fully aware" Congress was is debatable. One of the primary examples of congressional awareness cited by the court was a statement by an Interior official at a Senate Committee hearing.[307] That hearing, however,

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299. *Id.* at 27.
300. 380 U.S. 1 (1965).
301. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 26 (S.D. Cal. 1971).
302. *Applicability of the Excess Land Provisions of the Federal Reclamation Law to the Boulder Canyon Project Act*, M-33902 (1945) (Opinion of Solicitor Harper), in 71 Interior Dec. 496, App. H, at 533 (1964).
303. *See* note 290 *supra*.
304. 71 Interior Dec. 496 (1964) (Opinion of Solicitor Barry).
305. Morton v. Ruiz, 415 U.S. 199, 237 (1974); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
306. United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 27 (S.D. Cal. 1971).
307. *Hearings on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 1st Sess., pt. 4, at 599 (1944):

> Representative ELLIOTT: Why was the limitation lifted in the Southern part of California down in the Imperial Valley? Why was the 160-acre limitation lifted? That applied there, just the same as it did elsewhere.
>
> MR. WARNE: No, there was never a 160-acre limitation applied to the Imperial Valley.
>
> Representative ELLIOTT: It came under the same Act, the Act of 1902.
>
> MR. WARNE: No, I am sorry, I think you will find that the Boulder Canyon Act authorized the All-American Canal, and that the provision did not apply there except as to public lands. . . .

did not concern any legislation directly affecting the Imperial Irrigation District or the Boulder Canyon Project, so its relevance is questionable.[308] In addition, if congressional silence is construed as ratification of the Interior Department's 1933 interpretation exempting the Imperial Valley from acreage limitations, the same could be said of congressional silence on the contrary interpretations of the Interior Department regarding the Imperial Valley since 1964 and the Coachella Valley since 1945.[309]

In contrast to the court in *Imperial*, the court in *Ben Yellen II* emphasized the inconsistency of departmental interpretations, noting that "the interpretations of Section 5 have been very much in conflict."[310] But the conflicts concerned only the acreage limitations; the administrative attitude toward residency has been quite uniform. "[W]here contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as of great importance in arriving at the proper construction of a statute."[311] Because of the consistency of the Department of the Interior's practice of non-enforcement of the residency requirement, the facts of the *Ben Yellen* cases present a more favorable setting for upholding the administrative interpretation than the facts of *Imperial*. Strangely, the opposite result was reached.

The basis of the *Ben Yellen* court's rejection of the administrative interpretation was that court's emphasis on national policy considerations. Failure of the Department of the Interior to enforce the residency requirement was held to be "destructive of the clear purpose and intent of national reclamation policy."[312] But the purpose and intent of the Boulder Canyon Project Act, which was the reclamation law directly in issue, is anything but clear, as has been evident. It is suggested that at least some deference should have been given to administrative practices regarding residency. A "contemporaneous construction . . . is only one input in the interpretational equation,"[313] however, and the court in *Ben Yellen* may well have reached the same conclusion even after considering the departmental interpretation. Likewise, the court in *Imperial* probably would have held as it did even if it had given less weight

308. Zuber v. Allen, 396 U.S. 168, 186 n.21 (1969): "Where . . . there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence. . . ."

309. As pointed out in United States v. Imperial Irrigation Dist., 322 F. Supp. 11, 25 (S.D. Cal. 1971), one possible explanation for the discrepancy in administrative practice between the Imperial and Coachella Valleys may be that Coachella Valley, unlike Imperial Valley, had no lands with perfected rights when the Boulder Canyon Project Act was passed in 1928. This would not explain the discrepancy regarding lands in the Imperial Valley which did not have perfected rights, however, nor would it solve the problem of the complete reversal of departmental policy in 1964.

310. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1311 (S.D. Cal. 1972).

311. SUTHERLAND, *supra* note 89, § 49.07.

312. Ben Yellen v. Hickel, 352 F. Supp. 1300, 1318 (S.D. Cal. 1972).

313. Zuber v. Allen, 396 U.S. 168, 192 (1969).

to administrative practices. So many issues were involved in these cases that references to administrative interpretation seem almost an afterthought.

CONCLUSION

In its decision in the *Imperial* and *Ben Yellen* cases, there are several possible conclusions which the Ninth Circuit may reach: It may hold that both acreage and residency restrictions apply in the Imperial Irrigation District, that neither applies, or that only the acreage provision applies. In addition, the court must decide whether all or only some of the lands in the district are subject to whatever limitations are deemed applicable. Beyond the immediate consequences in the Imperial Valley, the result in these cases may profoundly affect practices in other federal reclamation projects. The importance of the decision to such projects will vary according to the reasons cited by the court for its conclusions.

If both acreage limitations and residency requirements are held inapplicable in the Imperial Valley on the ground that the terms and history of the Boulder Canyon Project Act indicate that it was never intended to be governed by previous provisions of reclamation law, the decision will have an impact in the other states served by the Boulder Canyon Project. Federal projects in other areas may be less drastically affected, because the applicability of limitations in those projects will depend on the terms of their own governing statutes. Similarly, recognition of "present perfected rights" would not affect other projects, because protection of such rights is peculiar to the Boulder Canyon Project Act.

If the limitations are upheld, the potential impact is much more profound. Even enforcement of the acreage limitation alone would be an affirmation of the policy enunciated in *Ivanhoe Irrigation District v. McCracken.*[314] Each time the 160-acre limitation is upheld in court, the pressures on the Department of the Interior mount. It will become progressively more difficult to ignore the repeated violations of the excess land laws that occur in many projects.[315]

The most critical decision, however, concerns the residency requirement. If it is held valid and enforceable in the Imperial Irrigation District, it will apply in every other district contracting with the United States for participation in federal projects. Because of the long history of nonenforcement, and the upheaval which would result upon an affirmance of the residency requirement, the court may be tempted to acquiesce in the administrative interpretation of the law. But Congress has never expressly repealed the residency requirement. If the policy objectives enunciated in *Ivanhoe*

314. 357 U.S. 275 (1958). *See* text accompanying notes 169 and 192 *supra.*

315. *See* note 21 *supra.*

Irrigation District v. McCracken[316] retain their validity, enforcement of the residency requirement would serve to fulfill them, for the 160-acre limitation alone is easily circumvented under present practices.[317]

Validation of the residency requirement could have a salutary effect on the entire body of federal reclamation law. It has been demonstrated that ambiguity is one of the most conspicuous features of reclamation law. Whether from ignorance, inertia or political expediency, Congress has allowed vital policy questions to go unanswered for years, and this silence has created unwarranted difficulties for administrators, courts and the parties affected by the law. Because the present system is clearly inadequate to cope with the enforcement problems that would be created if the residency requirement were affirmed, such affirmation could compel a congressional re-evaluation of the entire reclamation policy. Such a policy evaluation, and more importantly a clear statement of that policy, is needed.

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316. 357 U.S. 275 (1958). *See* text accompanying notes 169 and 192 *supra*.

317. *See generally* Sax, *supra* note 2, § 120.7.