Acreage and Residency Limitations in the Imperial Valley: A Case Study in National Reclamation Policy

by

Amy K. Kelley

Originally published in SOUTH DAKOTA LAW REVIEW
23 S. D. L. REV. 621 (1978)

ACREAGE AND RESIDENCY LIMITATIONS IN THE IMPERIAL VALLEY: A CASE STUDY IN NATIONAL RECLAMATION POLICY

By AMY K. KELLEY*

Since the turn of the century, the irrigation of lands in the arid western part of the United States has become a matter of increasing importance. Much of the irrigation is made possible by federal reclamation projects. An issue that arises regularly and is the subject of a great amount of controversy is who shall benefit from the water provided from these projects. Parties ranging from large corporate agricultural combines to the poorest of migrant farmworkers have become aware of the opportunities presented by this "liquid gold." The controversy is particularly strong in California, where the combination of a warm climate and project water has produced a lush setting for the profitable pursuit of agriculture. In the recent case of United States v. Imperial Irrigation District, *the Ninth Circuit Court of Appeals was called upon to decide whether restrictions should be placed upon water delivery in the prosperous Imperial Valley.*

RECLAMATION LAW BACKGROUND: POLICY AND PRACTICE

The federal reclamation law had its seventy-fifth birthday last year,[1] but the Department of the Interior, the Bureau of Reclamation, western landowners, lessees and farmworkers, Congress, the courts and various other parties concerned with the operation of that law had little time to stop and celebrate the diamond jubilee; they were too busy. Existing reclamation projects had to be supervised and operated, proposed projects were scrutinized. The announcement in February of 1977 that President Carter proposed that funds be cut or even totally deleted for many water projects, including a number of Bureau of Reclamation projects, caused an enormous uproar, which did not dissipate when funds actually were cut in some instances.

Even when one considers all the controversies that accompany implementation of the federal reclamation law, however, two provisions of that law stand out for the impressive amount of commentary, debate and downright petty bickering that they produce. The two provisions are the acreage limitation and the residency requirement, which operate to limit water delivery from federal reclamation projects.[2] A leading authority in the area of reclamation law stated in

* B.A., College of St. Catherine, 1973; J.D. University of South Dakota, 1977.

1. The foundation of federal reclamation law is the Act of June 17, 1902 ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C.).

2. There are two statutes of importance in this article. The first is 43 U.S.C. § 431 (1970), which provides that,

1967 that, "Acreage limitation is, in every respect, the most important part of reclamation law. The excess-land provisions are the most economically significant, the most controversial, the most frequently litigated—and the most frequently violated."[3] This statement is equally accurate a decade later, although today Professor Sax would probably amend his comment to include the residency requirement as well as the acreage limitation.

The controversy usually arises in the context of administrative enforcement, or nonenforcement, of the acreage and residency laws, and is essentially a policy debate.[4] There is little question that when originally passed, the Reclamation Act of 1902,[5] in addition to providing a means by which previously arid land could be made cultivable, was an extension of the homestead concept and was intended to

---

> 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.

This statute was part of section 5 of the 1902 Act, 32 Stat. 388, and contains both an acreage limitation and a residency requirement. The second statute, 43 U.S.C. § 423e (1970), provides that,

> No water shall be delivered upon the completion of any new 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 . . . if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against such lands have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior . . . .

This statute was section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. §§ 423-423g (1970), and contains a reference only to an acreage limitation, not a residency requirement. It must be emphasized that neither of these statutes limits land ownership. They merely provide limitations upon delivery of project water. This article deals with the issue of limitations upon water delivery from a *federal reclamation* project to *private* lands within the federal project area. No attempt is made to address the problems that arise upon public lands, or under federal flood control projects, *see* United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1156, *reh. denied*, 97 S. Ct. 1669 (1977), or in areas served by joint federal-state projects, *see* Bowker v. Morton, 541 F.2d 1347 (9th Cir. 1976).

3. J. Sax, *Federal Reclamation Law*, in 2 WATERS AND WATER RIGHTS § 120 at 209 (Clark ed. 1967) [hereinafter cited as Sax, *Federal Reclamation Law*]. This work is the best available source for a general introduction to federal reclamation law.

4. The premier authority on the issue of federal reclamation policy is Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1955).

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

promote the family farm and discourage land monopoly and speculation. The most frequently cited comment in the history of reclamation law is the following statement made by the sponsor of the original law, Congressman Francis G. Newlands:

> Lord Macauley said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That will be the test of the future, and the very purpose of this bill is to guard against land monopoly and to hold this land in small tracts for the people of the entire country . . . . Convey this land to private corporations and doubtless this work would be done, but we would have fastened upon this country all the evils of land monopoly which produced the great French revolution which caused the revolt against church monopoly in South America, and which in recent times has caused the outbreak of the Filipinos against Spanish authority.[6]

In 1958, the United States Supreme Court confirmed that the purpose of reclamation laws and reclamation projects was

> 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.[7]

Finally, as recently as last year, the policy of providing "the greatest good to the greatest number" was administratively endorsed by the Secretary of the Interior.[8]

---

6. 35 CONG. REC. 6734 (1902). *See also Id.* at 1386:

> It is argued by some that as wealth grows larger in a few hands the opportunities of the laboring classes to secure employment are multiplied . . . . [B]ut looking a little beyond immediate benefits, it appears that the tendency under such a condition is to dwarf self-reliance in the masses and to make the mere service of opulent employers by the great army of breadwinners the fulfillment of all human ambition. I think it is the duty of the legislator to pursue a policy under which the greatest possible number of our people may be provided with the means of independent employment, by which the aspirations of the individual may be encouraged and developed.

(Senator Hansbrough, Senate sponsor).

7. Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 297 (1958). For a further discussion of how federal reclamation projects serve as an enormous subsidy, *see* Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13 (1965) [hereinafter cited as Sax, *Selling Reclamation Water Rights*]. Professor Sax is particularly concerned with those within project areas who "cash in on the subsidy by selling their land for a large profit, a profit made possible by the increase in value of the land attributable to project water. [This] situation is no mere loophole in search of an opportunist, but is rather an existing problem of considerable proportions . . . ." *Id.* at 14.

8. *Testimony of Cecil D. Andrus, Secretary of the Interior, on S.J. Res. 93 and S.J. Res 96 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Testimony of Secretary Andrus*]:

The opponents of the acreage and residency limitations argue that whatever might have been the original purpose of the reclamation laws, the concept of the family farm is no longer viable, and thus the acreage and residency limitations should be abolished. A report of the Public Land Law Review Commission recommends that "The allocation of public lands to agricultural use should not be burdened by artifical and obsolete restraints such as acreage limitations on individual holdings, farm residency requirements, and the exclusion of corporations as eligible applicants."[9] Acreage and residency requirements are considered "obsolete" because the small family farms that they encourage allegedly do not produce the efficiency and "economies of scale" that are made possible by large farming operations. This argument has been countered by contentions that large scale farming actually may not be more efficient than the farming of small parcels of land.[10] In any case, an argument against acreage limitations and residency requirements based purely on an "economy of scale" standard largely bypasses the major policy issues. The opportunities that the reclamation law presents to individuals to enter upon the land, as well as the impact of that law upon the

---

> After many years of lax enforcement . . . the basic social purposes of the Reclamation Act have been obscured. I don't believe we should lose sight of those goals.
>
> Congress originally authorized the Reclamation Act, and has continued to recognize it, not simply as a program to irrigate arid lands in the West or for the general benefit of agriculture; rather, the basic goal of the Reclamation Act is to create family-sized farms in areas irrigated by Federal projects. As the first Commissioner of Reclamation, F. H. Newhall, observed seventy-five years ago:
>
> > The object of the Reclamation Act is not so much to irrigate land as to make homes . . . . It is not to irrigate the lands which now belong to big corporations or to small ones . . . But it is to bring about a condition whereby that land shall be put in the hands of the small owner, whereby a man with a family can get enough land to support that family.
>
> It is also a basic goal to secure the wide distribution of the substantial subsidies involved in reclamation projects and to limit private speculative gains resulting from these projects. The intent is to make lands available to as many family farmers as possible. The Congress enacted the acreage limitation provision and other measures to assure redistribution of small tracts of land at non-speculative prices, and that lands would be sold at prices excluding project benefits.
>
> The Administration supports these goals. I believe the vast majority of the American public and the Congress also support these goals. Given the substantial Federal subsidies involved in reclamation projects, it is not unreasonable to insure that the benefits are widely distributed.

See also note 17 *infra*.

9. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 182 (1970). The report addresses public lands, but it is a safe assumption that the commission would also consider that acreage and residency limitations were "obsolete" on private lands.

10. *See, e.g.*, McDonald, *The Family Farm is the Most Efficient Unit of Production*, in THE PEOPLE'S LAND 86 (Barnes ed. 1975); Greene, *Promised Land: A Contemporary Critique of Distribution of Public Land by the United States*, 5 ECOLOGY L.Q. 707, 744-45 (1976).

It has also been alleged that the 160 acre limit is obsolete even in terms of the family farm, since 160 acres of land is not sufficient to support a family. This argument ignores several factors. First, it has been the practice of the Department of the Interior to allow a husband and wife to irrigate 320 acres, rather than only 160 acres. Secondly, the limitation does not limit the number of acres a

quality of life in agricultural areas, should enter into the debate,[11] just as those subjects did when the reclamation law was first proposed.

While the controversy rages on, action on the acreage and residency limitations has been taken in some quarters. Under court order in *National Land for People, Inc. v. Bureau of Reclamation*,[12] the Department of the Interior issued proposed Reclamation Rules and Regulations in the summer of 1977.[13] Other than to note that the proposed regulations include a residency requirement[14] for the first time in over fifty years,[15] it serves little purpose to describe the provisions of the regulations in detail. The Department has been enjoined from further rule making proceedings in the area until it has filed an environmental impact statement,[16] and in any event, it is expected that the regulations will be substantially revised before they are issued in final form. The statement of objectives contained in the proposed regulations are, however, indicative of concern on the part of the current administration for the family farm.[17]

---

person may own, but only the number that may be irrigated. In crop intensive areas where several crops may be grown in a year, 160 irrigated acres may in themselves be sufficient to support a family. In many other areas, the irrigated acres may only be a supplement to other farm operations. Finally, much of the current criticism of the limitation based upon an efficiency argument can be met by expanding the limitation, not abolishing it. One way of doing this is to actually increase the acreage limit from 160 acres to, for example, 640 acres. Another method is to establish an "equivalency standard." Under this method land is classified according to various physical factors such as soil, topography, drainage, water quality and climate, and economic factors such as cost of production and the productive capacity of the land. Landowners with less productive land are then allowed delivery of water for a greater number of acres than landowners with "class 1" land.

11. *See* Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D.L. REV.. 475, 489-94 (1975). *See also Testimony of Secretary Andrus*, *supra* note 8:

> I continue to believe that family farms are essential to the strength of our Nation. I do not believe family farming is an obsolete economic enterprise. Indeed, studies show family farms yield greater long-term economic and social benefits than huge corporate farms or absentee-owned enterprises. This Administration strongly believes that the Federal subsidies now provided through the Reclamation programs should be available to legitimate family farmers, but not to large corporations, absentee owners and investors holding land purely for speculation.

12. 417 F. Supp. 449 (D.D.C. 1976).

13. 42 Fed. Reg. 43044 (1977).

14. *Id.* at 43046 §§ 426.4(j)(k)(1); 43048 § 426.10(a). The residency requirement in these proposed regulations only applies to excess lands. In supplemental information furnished by the Department, however, it was indicated that "regulations spelling out how the residency requirement will be reimplemented across-the-board will be prepared as soon as practicable." *Id.* at 43044.

15. *See* note 30 *infra*.

16. American Farm Bureau v. Andrus, #F-77-203-Civ. (E.D. Cal. 1977).

17. 42 Fed. Reg. 43044, 43045 (1977).

§ 426.1 Objectives.

> The Reclamation Act policies of limiting the area of land for which project water may be supplied and requiring the landowner to reside on or in the neighborhood of the land benefitted are designed:
>
> (a) To provide opportunity for a maximum number of farmers on the land.
>
> (b) To distribute widely the benefits from public-supported reclamation because interest-free money and low-priced water are involved.

Congress has also been concerned with the acreage and residency laws. The most comprehensive bill currently proposed is Senate Bill 1812.[18] Although they have been postponed several times, hearings on this bill should be held before the Senate Energy and Natural Resources Committee sometime during the spring of 1978. Congressional concern about the limitations was also evidenced by its order[19] directing the Secretary of the Interior to set up a task force to investigate the San Luis Unit of the Central Valley Project, a California reclamation project that has been notorious for numerous alleged reclamation law violations.[20] The report of the task force, issued after hundreds of hours of meetings and hearings, recommended, among other matters, that enforcement of the acreage and residency limitations be tightened and that reclamation law and programs be reevaluated.

Like the Department of the Interior and Congress, the federal courts have been required to focus their attention on the acreage and residency limitations of the reclamation law.[21] Indisputably, the award for longevity in reclamation litigation can be bestowed upon the consolidated cases of *United States v. Imperial Irrigation District* and *Yellen v. Andrus*,[22] wherein the Ninth Circuit Court of Appeals was called upon to determine the applicability of the acreage limitation and residency requirement in California's Imperial Irrigation District.[23] The scope of the litigation, however, en-

---

(c) To promote the family-sized owner-operated farm.
(d) To preclude the accrual of speculative gain in the disposition of excess land.

18. 95th Cong., 1st Sess. (1977). This bill is commonly known as The Reclamation Lands Family Farm Act, and contains both an acreage limitation, with a modified "equivalency" provision, *see* note 10 *supra*, and a residency requirement. The residency requirement is not mandated as such, but is effectively found in requirements that farms be operated by individuals that live on or near the land. This bill is only one of many bills concerning reclamation law that have been introduced in the 95th Congress, and it is expected that numerous bills will continue to be introduced throughout 1978.

19. Pub. L. No. 95-46, 91 Stat. 225.

20. The first criminal case brought for violation of the reclamation laws arose in this project. United States v. Bonadelle, F-25-294 (E.D. Cal. 1977). The case involved a complicated set of land transfers designed to avoid the acreage limitation. The defendant pleaded guilty to a charge of "conspiracy to defraud the United States of and concerning its governmental function in having its reclamation and irrigation programs administered in accordance with the provisions of the Reclamation Act."

21. *See, e.g.*, United Family Farmers, Inc. v. Kleppe, 552 F.2d 823 (8th Cir. 1977); Israel v. Morton, 549 F.2d 128 (9th Cir. 1977); Bowker v. Morton, 541 F.2d 1347 (9th Cir. 1976); United States v. Tulare Lake Canal Co., 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1156, *reh. denied*, 97 S. Ct. 1669 (1977); National Land for People, Inc. v. Bureau of Reclamation, 417 F. Supp. 449 (D.D.C. 1976).

22. 559 F.2d 509 (9th Cir. 1977). The *Imperial Irrigation District* case concerned the issue of acreage limitation, while the *Yellen* case addressed the residency requirement. Throughout this article, the consolidated cases in general will be referred to as United States v. Imperial Irrigation District. When it is necessary to distinguish between the acreage and the residency cases, they will be referred to as the *Imperial* case and the *Yellen* case, respectively.

23. The Imperial Irrigation District is located in the Imperial Valley. The District was already formed and in operation before the federal reclamation project was built, and there were in excess of 400,000 acres of privately-owned

tails construction of the Boulder Canyon Project Act,[24] which has an impact beyond the bounds of the single named irrigation district. In one sense, the court battle started in 1933.[25] The dispute over the applicability of restrictions on water delivery in the irrigation district then died to a low rumble for approximately thirty years, with only an occasional administrative reference to the problem.[26] The current litigation had its genesis in an opinion issued by the solicitor of the Interior in 1964, stating that the acreage limitation should be enforced in the Imperial Irrigation District.[27] The government spent a number of years unsuccessfully attempting to renegotiate the contract between the district and the United States to provide for an acreage limitation. Finally, in *United States v. Imperial Irrigation District*,[28] the government went to court, seeking a declaration that the acreage limitation applied to privately owned lands within the district. A number of landowners with excess acreages in the district and the State of California intervened as defendants. In the meantime, a group of residents of the district brought a mandamus action, *Yellen v. Hickel*,[29] against the Secretary of the Interior, seeking enforcement of the residency requirement in the district. This was an extremely significant case, for the Department of the Interior had not enforced the residency requirement anywhere since the late 1920's.[30] Several nonresidents who owned land and were receiving water deliveries in the Imperial Irrigation District intervened as defendants.

The government lost both cases in the lower courts:[31] the decision in the *Imperial* case denied applicability of the acreage limita-

---

irrigated lands. The irrigation system that existed before the federal project was not dependable, however. There was a flood danger, and much of the canal that delivered the water was in Mexican territory. This led to pressure for a federal dam and the building of an "All-American Canal." A brief historical background of the Imperial Valley is found in United States v. Imperial Irrigation Dist., 559 F.2d 509, 514-16 (9th Cir. 1977).

24. 43 U.S.C. §§ 617-617t (1970).

25. *See* text accompanying notes 131-35 *infra*.

26. *See* text accompanying notes 224-48 *infra*.

27. *Applicability of the Excess Land Laws, Imperial Irrigation District Lands*, 71 Interior Dec. 496 (1964) (Opinion of Solicitor Barry) [hereinafter cited as *Barry Opinion*].

28. 322 F. Supp. 11 (S.D. Cal. 1971).

29. 335 F. Supp. 200 (S.D. Cal. 1971); 352 F. Supp. 1300 (S.D. Cal. 1972) Annot., 27 A.L.R. FED. (1976). The first case was a decision on a partial summary judgment motion. That decision was reviewed and the remainder of the issues were addressed in the second case.

30. As noted previously, *see* note 14 and accompanying text *supra*, the Department of the Interior is considering reimplementing the residency requirement. It had been the Department's position for many years, however, that the passage in 1926 of section 46 of the Omnibus Adjustment Act, 43 U.S.C. § 423e (1970), indicated that the residency requirement of section 5 of the 1902 Reclamation Act, *Id.* § 431, was no longer part of the reclamation law. That position was based on the fact that section 46 includes references to an acreage limitation, *see* note 2 *supra*, but makes no provision for the enforcement of the residency requirement. This issue was hotly contested in the lower court, Yellen v. Hickel, 335 F. Supp. 200 (S.D. Cal. 1971); Yellen v. Hickel, 352 F. Supp. 1300 (S.D. Cal. 1972), but was never reached on appeal, because the plaintiffs were not granted standing. *See* note 35 *infra*.

31. For two discussions of the lower court decisions, *see* Taylor, *Water*,

tion, and the decisions in the *Yellen* cases upheld the residency requirement. The government determined to appeal the residency decisions, but decided to allow the acreage decision to stand. In short, the government adopted the position that there should be neither acreage nor residency limitations on water delivery in the Imperial Irrigation District. Plaintiffs (appellees) in the *Yellen* case determined that the failure of the government to prosecute an appeal in the acreage case would harm their position in their own residency appeal. For that reason, and also because their desire to purchase land in the Imperial Irrigation District would be affected by the *Imperial* decision, substantially the same parties who were plaintiffs in the *Yellen* case sought to intervene to take an appeal in the *Imperial* case. The lower court denied the intervention, but was reversed in 1973 by the Ninth Circuit Court of Appeals. At that time the acreage and residency cases were consolidated. After extensive briefing and arguments, the appellate opinion was issued in August of 1977. That opinion is the subject of this article. Since the excess and nonresident landowners made vigorous efforts to keep these cases out of court, it is necessary first to address the constitutional and procedural issues of standing, intervention and res judicata.

THE SWINGING DOOR TO THE COURTROOM

The Door Closes—Denial of Standing in Yellen

In the wake of the recent Supreme Court decisions in *Warth v. Seldin*,[32] and *Simon v. Eastern Kentucky Welfare Rights Organization*,[33] an alarmist might predict that it would be easier for a camel to pass through the eye of a needle than for a poor man to get into federal court,[34] unless the poor man can demonstrate that the governmental action he challenges affects him immediately and drastically and can be easily remedied. Absolute directness of effect and simplicity of relief is not always characteristic of governmental action, the

Land and Environment, Imperial Valley: Law Caught in the Winds of Politics, 13 NAT. RESOURCES J. 1 (1973); and Kelley, *Reclamation Law in Litigation: Acreage and Residency Limitations on Private Lands*, 21 S.D.L. REV. 695 (1976) [hereinafter cited as *Reclamation Law in Litigation*]. There is considerable overlap between the current article and the author's 1976 article (*Reclamation Law in Litigation*). This is inevitable since this article is essentially an update of the older one. Some issues, however, such as the standing issue, received more emphasis on the appellate level. Additionally, the appellate court's analysis of many issues varied from the approaches taken by the lower courts. An attempt has been made to restrict the actual repetition of material to those matters that are necessary for a clear understanding of the appellate decision. For that reason, there are many cross-references to the earlier article.

32. 422 U.S. 490 (1975) (low income individuals seeking housing, property taxpayers, a not-for-profit corporation concerned with the shortage of low and moderate income housing, and a home builders association denied standing to challenge an allegedly exclusionary zoning ordinance).

33. 426 U.S. 26 (1976) (indigents and organizations composed of indigents denied standing to challenge a Revenue Ruling that allegedly allowed favorable tax treatment to nonprofit hospital that restricted its treatment of indigents to emergency room service).

34. *Compare* Matt. XIX, 24.

impact of which may be quite dramatic, even if remote in origin, and be sufficiently complicated that "one-step" relief is not a realistic test. In adopting a standing test based on the *Warth* and *Simon* decisions, and denying standing to plaintiffs in the residence action, the Ninth Circuit Court of Appeals has made that alarmist prediction even more reasonable.[35]

"Injury in fact" is the touchstone in all standing cases.[36] It is also true that other matters, essentially policy considerations, play a large part in standing decisions.[37] The courts should recognize the particular policy factors that enter into the determination of a case, and state them. This would prevent a standing formula that is appropri-

35. United States v. Imperial Irrig. Dist., 559 F.2d 509, 517-19 (9th Cir. 1977). The denial of standing was in the consolidated case of Yellen v. Andrus. *Id.* The decision to deny standing in *Yellen* may ultimately prove to be the most important decision in the case. It is of importance within the case itself, for as the defendant district in the *Imperial* case notes in its petition for rehearing, the denial of standing in the residency case appears to be inconsistent with the granting, to substantially the same parties, of the right to appeal in the acreage case. Petition of Defendant Imperial Irrigation District for a Rehearing En Banc of the Decision of This Court Filed August 18, 1977, at 5, United States v. Imperial Irrig. Dist., 559 F.2d 509 (9th Cir. 1977). *See also* notes 109-131 *infra*.

The real potential of this decision, however, lies in the effect it may have nationally. First, it removes consideration of the residency issue from the case. *See* note 30 *supra*. Resolution of the issue whether the Department of the Interior's longstanding interpretation that the residency requirement was "repealed by implication" and no longer a part of reclamation law would have had an impact beyond the confines of the Boulder Canyon Project. *See Reclamation Law in Litigation, supra* note 31, at 724-30, 734-35. Secondly, the standing decisions, first in Bowker v. Morton, 541 F.2d 1347 (9th Cir. 1976) (standing denied to plaintiffs seeking application of the 160 acre and residency limitations in state irrigation project using joint federal-state facilities); and then in *Yellen*, are sobering answers to Mr. Justices Brennan and Marshall, who wondered where courts, armed with the "fatally speculative pleadings tool" would strike next. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 63 (1976) (Brennan, J., concurring in the judgment and dissenting). Even though the current administration may intend to attempt to enforce the residency requirement, the record of the Department of the Interior in enforcing the reclamation laws in general is remarkably bleak. *See* note 77 *infra*. Whether the decisions in *Bowker* and *Yellen* will merely make it necessary for future plaintiffs who might desire enforcement of the law to "prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts," Warth v. Seldin, 422 U.S. 490, 528 (1975) (Brennan, J., dissenting), or whether these decisions will serve as precedent for completely closing the courts to such plaintiffs, is unclear. Neither alternative is likely to contribute to the vitality of the reclamation laws as part of a national land policy.

36. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 22.02-1 at 487 (1976) [hereinafter cited as DAVIS]: "one vital proposition about the federal law of standing has no exception: One who is not injured in fact lacks standing to challenge governmental action."

37. Policies served included a desire for judicial economy, Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 670-83 (1973); to recognition of the peculiar characteristics of the criminal justice system, Linda R.S. v. Richard D., 410 U.S. 614, 617-19 (1973); to a desire not to resolve the case on its merits, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 66 (Brennan, J., concurring in the judgment and dissenting). One commentator argues that there is trend toward confusing standing with a determination whether the complaint states a cause of action. Albert, *Standing to Challenge Administrative Actions: An Inadequate Surrogate for Claim for*

ate in one case from being inappropriately applied in another case.[38] As Justice Douglas once stated, "Generalizations about standing to sue are largely worthless as such."[39]

That statement is especially true when generalizations are crystallized into a test, which is what has happened in the Ninth Circuit. The test enunciated in *Yellen* is that plaintiffs must allege "(a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought."[40] The test is taken from the case of *Bowker v. Morton*,[41] another reclamation law case, and in turn is that court's abstraction of holdings in the *Warth*[42] and *Simon*[43] cases. The test is an essentially accurate, if abbreviated, statement of the Supreme Court's requirements. The basic problems, however, are whether the Supreme Court decisions were as well considered, or at least enunciated,[44] as they should have been, and whether the standing test was appropriately applied in *Yellen*.

The primary point to remember in any discussion of standing is that it is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the *specific circumstances* of *individual situations* . . . ."[45] Admittedly, the court in *Yellen* did review specific facts concerning plaintiffs' position.[46] What the court did not do is consider policy factors, or facts concerning the nature of the action that differentiate *Yellen* from the cases upon which it relied as precedent.

The *Yellen* case was brought by 123 plaintiffs who were residents of the Imperial Irrigation District and sought to compel the Secretary of the Department of the Interior to enforce the residency requirement of the federal reclamation law.[47] Plaintiffs alleged that

---

Relief, 83 YALE L.J. 425 (1974). In a related vein, DAVIS, *supra* note 36, § 22.21 at 522, suggests that courts at times should use the laws of unreviewability and scope of review instead of the law of standing. "The way to protect against too much government by judges is to limit *what* the judges decide, not to limit *who* can raise a question for a court to decide."

38. Comment, *The Impact of Policy on Federal Standing*, 45 FORDHAM L. REV. 515 (1976) [hereinafter cited as *Impact of Policy*].

39. Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 151 (1970).

40. United States v. Imperial Irrig. Dist., 559 F.2d 509, 517 (9th Cir. 1977).

41. 541 F.2d 1347, 1349 (9th Cir. 1976) (standing denied).

42. Warth v. Seldin, 422 U.S. 490, 504-08 (1975).

43. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38-46 (1976).

44. I must dissent from the Court's reasoning on the standing issue, reasoning that is unjustifiable under any proper theory of standing and clearly contrary to the relevant precedents. The Court's further obfuscation of the law of standing is particularly unnecessary when there are obvious and reasonable alternative grounds upon which to decide this litigation.

Id. at 46 (Brennan, J., concurring in the judgment and dissenting).

45. United States ex rel. Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953) (emphasis added).

46. United States v. Imperial Irrig. Dist., 559 F.2d 509, 518-19 (9th Cir. 1977).

47. One of the plaintiffs was a doctor, and one agricultural labor contractor. Whether they desired to purchase lands themselves is unclear. A discussion of the principles of asserting the rights of third parties is not necessary however,

nonresidents owned much of the land in the district, but were receiving water delivery in violation of the law. Plaintiffs alleged that their desire to buy land in the district was blocked because the government's nonenforcement of the law permitted the nonresidents to retain the land, which would not be fertile without the water. Plaintiffs also alleged that not only would land be made available if the law were enforced, but that the prices would decline.[48]

The court denied plaintiffs standing for several reasons. One of the major reasons was that

> there is nothing in the record to indicate what price any plaintiff could afford to pay for any *particular* farm or that enforcement of the residency requirement . . . will lead to a decline in farm land prices sufficient to bring those prices into a range where plaintiffs could afford to purchase a *particular* farm.[49]

The court noted that land prices are determined by supply and demand and that the level prices would adjust to if residency were required "cannot be determined with any degree of precision and . . . may still be higher than plaintiffs can afford."[50] The lower court found that there would be a "substantial decline" in market value,[51] but this was not a sufficiently specific finding for the Circuit Court of Appeals. Further, other factors, such as tax laws, crop supports, availability of loans, income supports, or conversion of the land to industrial or residential uses could affect the availability of land and plaintiffs' ability to purchase it.[52] The court noted that the most it could order would be discontinuance of water delivery,[53] not the sale of nonresidents' lands. Nonresident owners might become residents[54] and continue to receive water. Finally, even if land did enter the market, parties other than plaintiffs might buy it.[55] In short, the court found that plaintiffs had not alleged injuries that were "particularized," that were "concretely and demonstrably" the result of defendants' actions, and that could be redressed.[56]

---

since at least the other 121 plaintiffs did personally wish to purchase land. In its treatment of the case, the court in *Yellen* makes no distinction between the status of the different plaintiffs.

The lower court dealt with the issue of standing in Yellen v. Hickel, 352 F. Supp. 1300, 1303-04, 1312 (S.D. Cal. 1972).

48. United States v. Imperial Irrig. Dist., 559 F.2d 509, 518 (9th Cir. 1977).

49. *Id.* (emphasis added).

50. *Id.*

51. Yellen v. Hickel, 352 F. Supp. 1300, 1317 (S.D. Cal. 1972). For an excerpt of testimony to that effect *see Reclamation Law in Litigation, supra* note 31, at 701 n.45.

52. United States v. Imperial Irrig. Dist., 559 F.2d 509, 517 (9th Cir. 1977).

53. This is technically incorrect. The court would order the Secretary of the Interior to enforce the law. It is assumed that discontinuance of water delivery would be one result. The mechanics of enforcement, however, would not be dictated by the court.

54. In the case of large nonresident corporate landowners, this is highly unlikely, if not totally impossible. The residency statute, 43 U.S.C. 431 (1970), requires residency *on the land.*

55. United States v. Imperial Irrig. Dist., 559 F.2d 509, 519 (9th Cir. 1977).

56. *Id.*

> [I]t is a mere speculative possibility that any relief which is appropriate under the statute will bring about the result sought by plaintiffs . . . [T]he solution to plaintiffs' problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by plaintiffs.[57]

The court in *Yellen* followed the decisions in *Warth* and *Simon* closely,[58] as well as the earlier Ninth Circuit decision in *Bowker v. Morton*,[59] where there also had been an attempt to compel the government to enforce federal reclamation laws. The court's application of precedent was too mechanical, however; it did not exercise its powers of analysis as rigorously as possible.

The actual language of Article III of the United States Constitution does not limit federal jurisdiction to suits brought by plaintiffs with standing, but to the hearing of "cases or controversies."[60] There is, of course, no chance that the vast accumulation of case law on the subject of standing will be disregarded by a court, but heightened awareness of the original constitutional requirement may prevent the dismissal of suits that *are* cases or controversies, even if judicially constructed standing "tests" are not met.[61] That the dispute over the applicability of the residency requirement is a controversy with adverse parties is indisputable. The only possible parties on either side of the question are present: The parties benefiting from violation of

---

57. *Id.*, *citing* Bowker v. Morton, 541 F.2d 1347, 1350 (9th Cir. 1976). This is not completely correct. Nonresident landowners had intervened in the action in the lower court and participated fully there and in the appeal.

58. For example, the requirement that the plaintiffs allege a particular price they could afford appears to be derived from Warth v. Seldin, 422 U.S. 490, 505 (1975) and Bowker v. Morton, 541 F.2d 1347, 1350 (9th Cir. 1976). The requirement that plaintiffs desire to purchase a *particular* farm is parallel to the requirement in *Warth*, 422 U.S. at 507, 516. *See also* Arlington Heights v. Metropolitan Hous. Corp. 429 U.S. 252 (1977). The concern about factors other than the Secretary's enforcement or non-enforcement of the law that could affect the causation of the injury reflects the concern expressed in *Warth*, 422 U.S. at 504-05 and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-43, that injuries must be traced to defendant's actions. Similarly, the concern regarding factors that could affect the effectiveness of a remedy parallels the requirements in *Warth*, 422 U.S. at 505-06, *Simon*, 426 U.S. at 43-45 and *Bowker*, 541 F.2d at 1350, that the remedy sought would relieve the injury.

59. 541 F.2d 1347 (9th Cir. 1976).

60. U.S. CONST. art. III, § 2, cl. 1.

61. *See* Note, *The Causal Nexus: What Must Be Shown for Standing to Sue in Federal Courts*, 29 U. FLA. L. REV. 250, 271 (1977):

> [T]he difficulty lies in the type of showing that the Court requires to meet [the] test. It is not enough that plaintiffs allege that the challenged action contributes to their injury. They must demonstrate that "but for" the challenged action they would not be so injured. While this is an appropriate test for identifying cause in fact on the merits, such a high standard seems unnecessary for standing purposes. It is questionable whether many federal plaintiffs would be able to account for the hundreds of contingencies that might occur between a decision on the merits and the eventual mitigation of their injury. The imposition of such a high standard may foreclose many plaintiffs from obtaining a forum to protect against injurious government action *despite the possibility that an adequate case or controversy actually exists*. (emphasis added).

the law;[62] the parties allowing the law to be violated; and the parties intended to be benefited by the law and the *only* parties who would be interested in the enforcement of the law. By its very nature the reclamation law was a law of opportunity;[63] its intended beneficiaries are persons in the future. They do not exist at present. Since they exist only in future and not in the present, they lack voices and are in a sense unrepresented."[64] All *any* plaintiffs could allege would be that they desire the chance to reap the benefits of the federal reclamation "subsidy"[65] but how can anyone ever *prove* a direct, concrete injury to a hope?[66] It is submitted, however, that the plaintiffs do suffer an "injury in fact": exclusion from the opportunity to participate in the benefits of a federal reclamation project. *Yellen* should be distinguished from *Bowker v. Morton*,[67] where plaintiffs did not allege a desire to buy project land.[68] Their interest could, therefore, correctly be called "generalized." Plaintiffs in *Yellen*, however, do have an interest in buying land—if it were possible to do so. In *Simon* the court stated that the inference that hospitals were denying services to plaintiffs due to favorable tax treatment, instead of making decisions without regard to tax implications, was "speculative at best."[69] Agriculture in the Imperial Irrigation District

---

The author suggests that instead of the strict "but for" test, courts could require that the plaintiff only "demonstrate that the challenged action has substantially contributed to his alleged injury." *Id.* at 256. *See also Impact of Policy, supra* note 38 at 548.

62. As pointed out at note 57 *supra*, non-resident landowners intervened in the action, and have participated fully. Indeed, the landowners' brief in the case is as, if not more, thorough than the government defendant's brief. *See* Landowner's Joint Consolidated Brief, United States v. Imperial Irrig. Dist. and Yellen v. Hickel, Nos. 71-2124, 73-1333 and 73-1388. The fact that landowners have been so intensively involved in the suit distinguishes *Yellen* from Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) and Bowker v. Morton, 541 F.2d 1347 (9th Cir. 1976), where the "third parties" intervening between the federal agency and plaintiffs were not before the court. It is true, however, that since plaintiffs seek relief in the form of mandamus, any order would not be directed toward the landowners.

63. *See* notes 6-8 *supra* and accompanying text. As is clear from the dissent in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 56 (1976) (Brennan, J., concurring in the judgment and dissenting), the Supreme Court has difficulty in grasping that there may be injury to an opportunity interest. *See also The Supreme Court 1974 Term*, 89 HARV. L. REV. 1, 191 (1975) where the authors point out that the nature of the injury necessary for standing has been altered "from loss of opportunity to actual denial of access . . ." In applying that rule to reclamation law, however, one swiftly realizes that a) non resident landowners are unlikely to offer any of their productive, illegally watered land for sale, and therefore plaintiffs will not have a chance for their bids to *be* denied and b) even if plaintiffs actually did attempt (and were denied the chance) to buy land, no landowner would admit that *the* reason the land is not for sale is because he is reaping the benefits of violating the law. The current Secretary of the Interior admits, however, that strict enforcement of the law in the past would have resulted in more opportunities for family farmers. *See* note 77 *infra*.

64. Sax, *Selling Reclamation Water Rights, supra* note 7, at 46 n.107 (citing 108 CONG. REC. 5711 (1962)).

65. *See* note 7 *supra* and accompanying text.

66. *See* note 63 *supra*.

67. 541 F.2d 1347 (9th Cir. 1976).

68. *Id.* at 1350.

69. 426 U.S. 26, 43 (1976).

produces enormous income.[70] That the income produced on land owned by nonresidents is directly attributable to water furnished because of the Interior Department's nonenforcement of the residency requirement of the reclamation law is not speculative, even "at worst." The Imperial Valley is a desert without water. It is perhaps technically "speculative" whether a cutoff of water, and the concomitant disappearance of income, on present nonresident holdings would lead to their sale. But it is suggested that a distinction should be drawn between speculation that is wild fantasy and speculation that is actually enlightened deduction. Considering that there are approximately 437,000 acres of irrigated land in the Imperial Irrigation District,[71] and that from forty-five to fifty percent of the farms are owned by nonresidents,[72] it seems improbable that enforcement of the residency requirement would *not* result in a sizeable amount of land reaching the market, and at reduced prices.[73]

Similar arguments can be directed toward the court's insistence that plaintiffs allege a particular price they could afford to pay for a particular piece of land. This requirement of strict particularization was criticized in the very case in which it was enunciated,[74] and the criticism is equally applicable here. The disregard of the residency requirement has been so complete that plaintiffs can not single out

70. *See* Yellen v. Hickel, 352 F. Supp. 1300, 1317 (S.D. Cal. 1972) (Finding of Fact XXXIII).

71. *Id.* (Finding of Fact XXXII).

72. *Id.* (Finding of Fact XXIX).

73. Although addressed to a different problem (that of large holdings reaching the market upon the expiration of a recordable contract), it is pointed out in Sax, *Federal Reclamation Law, supra* note 3, § 120.12 at 232, that distortion does occur when excess lands reach the market.

Even if the exact amount of land that would become available, the exact cost of that land, and the exact reasons why that land is not now available can not be demonstrated by plaintiffs in *Yellen*, it is difficult to believe that the extent and cause of plaintiffs' injuries, or the possibility of relief, are any more speculative or indirect than those involved in United States v. SCRAP, 412 U.S. 669 (1973). Allegations that in allowing water delivery to non resident's lands, the Department of the Interior fosters denial of plaintiff's opportunities to buy that land, are, if anything, more capable of demonstration than allegations that an ICC order with the possible effect of discouraging the shipment of recyclable materials might promote the use of raw materials, thereby perhaps causing an adverse effect on the environment, possibly even in Washington. *SCRAP* has not been reversed, indeed the Court even paid lip service to it in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 45 n.25 (1976). As the dissent points out, however, "the Court's attempted distinction of *SCRAP* will not 'wash.' " 426 U.S. at 62 (Brennan, J., concurring in the judgment and dissenting).

74. Warth v. Seldin, 422 U.S. 490, 522 (1975) (Brennan, J., dissenting): "the . . . plaintiffs' interest is *not* to live in a *particular* project but to live *somewhere* in the town in a dwelling they can afford." (emphasis added). Similarly, plaintiffs in *Yellen* don't want a *particular* farm in the Imperial Irrigation District, they want to live there somewhere. It is also unreasonable to expect the plaintiffs to allege the exact price they wish to pay. If they could not afford 160 acres, they might buy 40 and share equipment with neighbors. Successful small farms are possible in crop intensive areas. *See* NEWSWEEK, Sept. 5, 1977, at 67-68. Finally, plaintiffs should not be required to prove that they personally will get land, only that they would qualify. Certainly, the successful low-income minority plaintiff in Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) could not prove that she would get housing in a project, only that she would be one of many that would be eligible.

an *individual* parcel of land that is inacessible to them, they can merely assert that nearly half of the entire irrigation district's land is out of their reach! The Secretary of the Interior and the nonresident landowners have effectively argued that their practices, which have made it impossible for plaintiffs to buy any land at any price, should serve as the very reason why plaintiffs can not challenge those practices.[75] *United States v. Imperial Irrigation District*[76] may become a landmark reclamation law case. The current administration seems willing to promote the policies of the reclamation law.[77] Other administrations have not been, and may not be in the future. In an area of the law so vulnerable to collapse in the event of administrative inaction, or even abuse,[78] it is dangerous to set a precedent relieving the administrators from the tender attentions of a watchdog.[79]

The Door Opens—Intervention is Granted in Imperial

As noted previously, when the government determined not to appeal the adverse decision in the acreage case, substantially the same parties who were plaintiffs in the residency case intervened to

---

75. *Compare* Warth v. Seldin, 422 U.S. 490, 523 (1975) (Brennan, J., dissenting):

> [T]he Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low-income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.

76. 559 F.2d 509 (9th Cir. 1977).

77. *Testimony of Secretary Andrus, supra* note 8:

> [W]e should not overlook the fact that the residency and acreage limitations provisions of the Reclamation Act have not been enforced vigorously. I'm not here to blame the Bureau of Reclamation or past Administrations. It is my view, however, that past enforcement has not been consistent with the original purposes of the Act as this Administration and many others see it.
>
> The Department's basic responsibility and objective is to enforce the law as written. I intend to fulfill that requirement. I should like to add that had the law been strictly enforced in the past, many more opportunities would have been afforded genuine family farmers throughout the West.

See also notes 8 and 17 *supra*.

78. There have been allegations that at least in some projects, Bureau of Reclamation officials have represented to landowners that "There are ways to get around the law." Family Farmers Comment on Proposed Interior Department Regulations for the Sale of Excess Land, *reprinted in* 123 CONG. REC. 19329 (1977).

79. *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531 at 180 (1975) [hereinafter cited as WRIGHT & MILLER].

> It is easy to understand the origin of a principle that allows a litigant standing to complain of official acts that would give rise to a private cause of action if the defendants had done the same acts in a private capacity . . . It is much more difficult to understand the persistence of a principle that *limits* standing to such situations, in light of the greatly increased capacity of official action to cause injury, and of the relatively helpless predicament of an individual affected by injurious government activity.

See also Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS L.J. 663, 676-78 (1976).

appeal the acreage decision.[80] Intervention was originally allowed primarily "to avoid . . . the confusion and uncertainty that would result if two conflicting final decisions on legal issues of public and private importance should both be in force . . ." in the Ninth Circuit.[81] On the appeal of the merits of the consolidated cases, however, it was determined that plaintiffs in the residency case lacked standing, and that case was remanded for dismissal.[82] The grounds for the original grant of intervention were thereby removed. Noting that it was not bound by the previous order allowing intervention,[83] the court determined that because of its decision in the residency case it was appropriate to re-examine the intervention issue.[84]

The court set forth the following test in reviewing the request for intervention: Parties seeking to intervene under Rule 24[85] "need not possess the standing necessary to initiate the lawsuit,"[86] but in order to intervene for the purposes of taking an appeal such parties must have an "appealable interest,"[87] and determination whether such an

80. *See* text following note 31 *supra*.

81. Order Allowing Intervention, United States v. Imperial Irrig. Dist., No. 71-2124 (August 6, 1973), *reprinted in* United States v. Imperial Irrig. Dist., 559 F.2d 509, 543 (9th Cir. 1977).

82. United States v. Imperial Irrig. Dist. 559 F.2d 509, 542 (9th Cir. 1977).

83. Intervenors had argued that the appellate court could not re-examine the order allowing intervention because of the "law of the case" doctrine. That rule, however, is only a self-imposed judicial restriction, designed to promote efficiency and prevent panel shopping. Zarzaur v. United States, 493 F.2d 447, 453-54 (5th Cir. 1974). The court in *Imperial* declined to apply the doctrine "woodenly" and stated that an appellate court should reconsider an issue when warranted by "considerations of substantial justice." 559 F.2d at 520, *citing* Lehrman v. Gulf Oil Corp., 500 F.2d 659, 662-63 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

84. 559 F.2d at 521.

85. FED. R. CIV. P. 24(a)(2) provides as follows:

> RULE 24.—INTERVENTION
> (a) Intervention of Right
> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Intervention by statutory right, Rule 24(a)(1) and permissive intervention, Rule 24(b) were not sought in this case.

86. 559 F.2d at 521, *citing* Trbovich v. United Mine Workers, 404 U.S. 528 (1972). The circuit court's use of *Trbovich* was somewhat of a misstatement since *Trbovich* did not actually address the question whether a party could intervene when he did not meet a constitutional standing test. Rather, that case determined whether, in light of a statute that excluded individuals from initiating a suit because the right to do so was reserved to the Secretary of Labor, such individuals could nevertheless intervene in an action once it had been commenced.

87. 559 F.2d at 521, *citing* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 753-54 (1968). An interest merely in establishing a precedent is insufficient. 559 F.2d at 521, *citing* Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944). In *Boston Tow Boat*, however, the interest of the parties seeking intervention was in a jurisdictional precedent that would not adversely affect them. It would seem, therefore, that *Boston Tow Boat* could be distinguished in a case where individuals had an interest in a precedent that would adversely affect them. *See* WRIGHT & MILLER,

interest exists turns on a standing analysis.[88] The court stated that the issue that it faced was whether the individuals seeking intervention had such an "appealable interest."[89]

The intervenors' interest was construed as one in purchasing farm lands that belonged to excess landowners and would be sold at prices to be set by the Secretary of the Interior if a judicial determination were made that section 46 of the Omnibus Adjustment Act of 1926[90] applied in the Imperial Irrigation District. The aggregate landholdings of the excess landholders were approximately 233,000 acres, and the court found that the "[s]ale of any of these holdings in excess of 160 acres in accord with Section 46 would make family-size farms available for purchase in the Imperial Valley at prices below current market prices."[91] Unlike the statement in the part of the appellate decision dealing with the residency issue indicating that the plaintiffs should have alleged a particular price that they could pay for a particular farm,[92] the finding in the acreage case was that the intervenors suffered an injury

> no matter which parcel of land is desired for purchase. The fact that it cannot be specifically measured in dollar amount at this time does not change the fact that . . . the sale price of parcels of irrigable farm land in the Imperial Valley will definitely be reduced if Section 46 were to be applied . . . .[93]

The court also found that nonenforcement of section 46 was the direct cause of the intervenors' injury and that an order determining that the section was applicable would redress the injury.[94] Thus, the intervenors met the three-pronged standing test of the Ninth Circuit.[95] Since their interest was also within the "zone of interests" intended to be protected by section 46,[96] the court affirmed the previous order granting intervention for the purpose of appeal.[97]

This decision on intervention suffers from two analytic ailments. The first is that although the court allowed intervention under Rule

---

supra note 79, § 1908 at 514-15 (1972) for the proposition that the "purpose of the 1966 amendment [to Rule 24] was to allow intervention by those who might be *practically* disadvantaged by the disposition of the action," (emphasis added) and that the stare decisis effect of a decision could suffice for the practical disadvantage, without requiring that the parties seeking intervention actually be bound by res judicata or collateral estoppel.

88. United States v. Imperial Irrig. Dist., 559 F.2d 509, 521 (9th Cir. 1977), *citing* Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1013-14 (3rd Cir. 1971).

89. 559 F.2d at 521.

90. 43 U.S.C. § 423e (1970), *see* note 2 *supra*. The court specifically notes that the government only relied on section 46 in bringing its suit for enforcement of the acreage limitation, and that it did not rely on section 5 of the 1902 Reclamation Act, 43 U.S.C. § 431 (1970). 559 F.2d at 516.

91. 559 F.2d at 522.

92. *See* text accompanying note 49 *supra*.

93. 559 F.2d at 522.

94. *Id.*

95. *See* text accompanying note 40 *supra*.

96. 559 F.2d at 522.

97. *Id.* at 523-24.

24(a)(2),[98] it did not discuss the requirements of that rule in its decision. It did address the issue of whether intervenors had an interest in the litigation and, without denoting that it did so, it effectively determined that as a practical matter, disposition of the action would impair or impede intervenors' abilities to protect that interest. The court did not, however, determine whether the petition to intervene was timely, or whether the intervenors' interest was adequately represented by the existing parties.

Intervention must always be timely, and timeliness is to be determined from all of the circumstances of the case.[99] As a rule, courts are reluctant to allow post-judgment intervention.[100] This is due to an assumption that, at that time, intervention would unduly prejudice the rights of existing parties, or would interfere with the orderly processes of the court.[101] The individuals attempting to intervene in *Imperial* had participated as *amici curiae* in the lower court, however, and the existing parties, therefore, would not be surprised by any novel legal theories. Further, appeal of a judgment within the length of time prescribed for such an appeal is not disruptive of orderly judicial processes. In circumstances where the existing parties are not prejudiced and there is no interference with orderly process, "the mere fact that judgment has already been entered should not by itself require an application for intervention to be denied."[102] One of the reasons courts have consented to post-judgment intervention has been to allow the prosecution of an appeal.[103] The "critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment."[104] The intervenors in *Imperial* acted as soon as it became apparent that the government might not appeal the lower court decision that the acreage limitation did not apply in the Imperial Irrigation District.

Even if the intervenors were timely in their application, however, intervention could have been denied if they were adequately represented by an existing party.[105] There is a strong presumption of adequate representation when the representative is a governmental entity, especially the United States.[106] Even when there has been adequate representation, however, failure to take an appeal "may introduce the element of inadequacy, entitling the interested person

98. *See* note 85 *supra*.
99. NAACP v. New York, 413 U.S. 345, 365-66 (1973).
100. WRIGHT & MILLER, *supra* note 79, § 1916 at 579 (1972).
101. United States v. United States Steel Corp., 548 F.2d 1232, 1235 (5th Cir. 1977) *citing* McDonald v. E.J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970).
102. WRIGHT & MILLER, *supra* note 79, § 1916 at 582 (1972).
103. *Id.* at 582-83 and cases cited.
104. United Airlines v. McDonald, 97 S. Ct. 2464, 2470-71 (1977).
105. FED. R. CIV. P. 24(a)(2).
106. *See* Commonwealth of Pa. v. Rizzo, 530 F.2d 501, 505 (3rd Cir. 1976), *cert. denied*, 96 S. Ct. 2628 (1976); WRIGHT & MILLER, *supra* note 79, § 1909 at 528 (1972).

to intervene after judgment to file an appeal."[107] Such was the case in *Imperial*.

Since the "timeliness" and "inadequacy of representation" requirements for intervention were probably met by the intervenors, the court's failure to make findings on those issues, while creating a gap in the analytical framework of the case, does not cause a serious problem. The court's other lapse in its analysis of the intervention issue, however, is of much greater moment. The intervention test adopted in *Imperial* was a standing test.[108] Therefore, it is inevitable that the decision to allow intervention in that case will be compared with that denying standing in *Yellen*. Unfortunately, such a comparison, while perhaps not revealing screaming inconsistencies, certainly discloses sufficient variances to cause a clamor for clarification.

That, in essence, is what has happened. Defendant, Imperial Irrigation District, has petitioned for rehearing, seeking a determination that the intervenors had no standing to appeal the acreage case.[109] Defendant argues that the appellate court's reliance on enforcement of section 46[110] to reduce land prices is misplaced. First, even though section 46 calls for the Secretary of the Interior to appraise lands at a price excluding values attributable to the construction of the reclamation project,[111] since the Imperial Irrigation District lands were already irrigated before the federal project was built, Defendant argues that it "is pure speculation on the part of the court to assume that land would be available at less than current prices if Section 46 is held to be applicable."[112] Secondly, by its terms, section 46 only requires the Secretary to approve sales prices of lands until one-half the construction charges against those lands have been fully paid.[113] Over one-half of the irrigation district's obligation was scheduled to be paid as of March 1, 1978. It is defendant's position that after that date "[a]pproval of the Secretary of the Interior will not be required and sale of such lands will carry the right to receive water. Under such circumstances, it is inconceivable that any land owner would sell any land at prices substantially below current market prices."[114]

---

107. Nuesse v. Camp, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967), *citing* Wolpe v. Poretsky, 144 F.2d 505 (D.C.C.A. 1944), *cert. denied* 329 U.S. 724 (1944). The statement in *Nuesse* is dicta, but *see*, in *accord*, Zuber v. Allen, 387 F.2d 862 (D.C. Cir. 1967); Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953).

108. *See* text accompanying notes 85-88 *supra*.

109. Petition of Defendant Imperial Irrigation District for a Rehearing En Banc of the Decision of This Court Filed August 18, 1977, United States v. Imperial Irrig. Dist., 559 F.2d 509 (9th Cir. 1977) [hereinafter cited as Petition for Rehearing]. This petition was filed in September of 1977.

110. 43 U.S.C. § 423e (1970). *See* text accompanying notes 93-94 *supra*. *See generally* United States v. Imperial Irrig. Dist., 559 F.2d 509, 522-23 (9th Cir. 1977).

111. *See* text of 43 U.S.C. § 423e at note 2 *supra*.

112. Petition for Rehearing, *supra* note 110, at 3-4.

113. *See* text of 43 U.S.C. § 423e at note 2 *supra*.

114. Petition for Rehearing, *supra* note 110, at 4. The Ninth Circuit Court of

These two defense arguments are definitely deserving of comment. It is true that any excess lands sold under section 46 would not be sold at dry land prices since the sales price "will include the whole of any value attributable to preexisting irrigation facilities . . . ."[115] That does not mean, however, that the land would be sold at current market prices. "[I]nterstate allocation of water from the Colorado River, control of flooding, regulation of water supplies on a predictable and useful basis, and the construction of a canal to the Imperial Valley that did not pass through Mexico . . ."[116] were problems that pre-project irrigation facilities were *not* able to control. The assurance of a dependable water supply from the Boulder Canyon Project, and the All American Canal in particular, undoubtedly contributes to the value of the lands within the Imperial Irrigation District.

The argument that the Secretary of the Interior will no longer have any control over sales prices after March of 1978 has more serious ramifications. The provision in section 46 that until construction charges are one-half paid the Secretary must approve the sales prices of excess lands, if the right to receive water on such land is desired, seems clear as regards duration. It has been suggested, however, that "the provision should be examined with the purpose of determining whether its literal terms adequately cover the problems with which Congress has . . . indicated it wants to deal."[117] The acreage limitation itself is an anti-monopoly provision. Providing the Secretary of the Interior with a method of controlling prices is an anti-speculation device. Since speculation is principally a problem in the early stages of a project,[118] Congress probably considered it sufficient to limit prices until one-half of the construction costs of the project had been repaid. It can not be fairly said that when Congress passed section 46 it was contemplating the situation of a project that would be planned, constructed and half paid for before there had been a final determination whether the excess land laws applied to the project. The Imperial Irrigation District and owners of excess lands therein have known since 1964 that there would be an attempt to enforce the acreage limitations.[119] In light of the fact that prevention of land monopoly and land speculation form such an integral part of federal reclamation policy,[120] it would seem an unconscionable flaunting of that policy to reward opponents of the acreage

---

Appeals, after several months of silence, has finally called for written responses to the Petition for Rehearing. The responses are due on April 1, 1978. The timing of this request makes it reasonable to suspect that the court may give serious consideration to this defense argument.

115. *See* United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1113 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1156, *reh. denied*, 97 St. Ct. 1669 (1977).

116. United States v. Imperial Irrig. Dist., 559 F.2d 509, 515 (9th Cir. 1977).

117. Sax, *Federal Reclamation Law*, *supra* note 3, § 120.10 at 228.

118. *Id.*

119. *See* text accompanying notes 27-28 *supra*.

120. *See* note 8 and text accompanying note 7 *supra*.

limitation merely because they had been able to successfully dodge the limitation for an extraordinary length of time.[121]

In addition to its arguments based on section 46, defendant points out that the intervention decision is inconsistent with *Bowker v. Morton*[122] and "internally inconsistent" with the standing decision in the residency case. There are many discrepancies between the acreage and residency standing decisions, considering that the parties seeking standing were essentially identical. In *Yellen*, plaintiffs were expected to allege specific prices they could pay for particular farms, and apparently the adjustment of market levels upon enforcement of the law was supposed to be capable of determination with a "degree of precision."[123] In *Imperial*, however, it did not matter which parcel of land was desired, nor was it necessary to determine specific dollar amounts.[124] The court in *Yellen* found there were too many government actions affecting both the land market and plaintiffs' income to attribute causation of injury to nonenforcement of the reclamation laws.[125] In *Imperial*, the impact of such matters as tax regulations, crop supports or agricultural loans was of so little interest that it was not even mentioned; the intervenors' injury stemmed "directly from the lack of recordable contracts required by Section 46."[126] In *Yellen*, there was no possibility of affording relief: nonresidents could not be forced to sell their lands; some lands could be converted to residential or industrial uses; individuals other than plaintiffs might purchase land if it were sold. In any case, the solution to plaintiffs' problems depended upon third parties.[127] On the other hand, in *Imperial*, while landowners could still not be forced to sell their lands, "it would be highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use . . . ."[128] Conversion to residential or industrial use, apparently a distinct possibility in the residency case, became "highly improbable" in the acreage case. It also seems that the possibility of other parties buying excess lands suddenly became less important. The intervenors did not have to "show with certainty that they will be able to purchase the excess lands should they prevail on the merits of this appeal."[129] Finally, the mysterious third parties who stood in the

121. Even assuming that the acreage limitations *had* been applied, at least one commentator has concluded that the Secretary continues to have the power to exercise price controls after the construction costs of a project have been more than one-half repaid. Sax, *Federal Reclamation Law*, *supra* note 3, § 120.10 at 228.

122. 541 F.2d 1347 (9th Cir. 1976). It should be remembered that the standing test adopted in *Yellen* was derived from *Bowker*. *See* text accompanying notes 40-41 *supra*.

123. United States v. Imperial Irrig. Dist., 559 F.2d 509, 518 (9th Cir. 1977). *See* text accompanying note 49 *supra*.

124. *Id.* at 522. *See* text accompanying note 93 *supra*.

125. *Id.* at 518-19.

126. *Id.* at 522.

127. *Id.* at 519.

128. *Id.* at 522.

129. *Id.* at 523.

way of relief in *Yellen* withered to the level of innocuousness in *Imperial*: redress did not depend on the landowners or the market.[130]

To be completely fair, it must be stated that the divergence in the court's treatment of the acreage and residency cases is often attributable to a shift in emphasis, not a total change of principle. Nevertheless, as it stands, *United States v. Imperial Irrigation District* is a precedent in the field of standing that any attorney with a preference for lucid decisions will approach with extreme trepidation. If the Petition for Rehearing is granted, perhaps the decision will be brought into conformity. There is no guarantee, however, in which direction the court would resolve the inconsistencies within the decision. It might reaffirm its current decision, although hopefully with better explanations. It might deny intervention in *Imperial*, but it might also reconsider its decision to deny standing in *Yellen*. In its attack, defendant has chosen a double edged weapon.

The Door Remains Open—Consideration of the Acreage Limitation is Not Barred By Res Judicata

Within a few years after the passage of the Boulder Canyon Project Act,[131] a contract was negotiated between the United States and the Imperial Irrigation District. An in rem proceeding was commenced in the California judicial system to confirm the contract.[132] Another suit was commenced at the same time by an excess landowner. Among other objections, the landowner alleged invalidity of the contract because, even though it contained no express excess land provisions, application of the reclamation laws would result in the taking of his excess water rights without compensation. The excess landowner's suit was consolidated with the confirmation proceeding. The eventual decision, *Hewes v. All Persons*,[133] confirmed the contract. The court also found that section 5 of the Reclamation Act of 1902[134] did not apply in the Imperial Valley and that "water service to lands regardless of the size of ownership will not be in any manner affected by said contract . . . ."[135]

Even though the *Hewes* proceeding was an in rem action, the United States had not consented to being a party, and res judicata was not raised in the lower court. Res judicata became an issue only

130. *Id.*

131. 43 U.S.C. §§ 617-617t (1970).

132. This proceeding was required by the contract, although not by the Project Act itself. There were provisions under both federal and California law for bringing such a confirmation proceeding. *See* 43 U.S.C. §§ 423e, 511 (1970); 1897 Cal. Stat. ch. 189, p. 276; 1917 Cal. Stat. ch. 160, p. 243. The court declined to decide the source of authority that actually was used. United States v. Imperial Irrig. Dist., 559 F.2d 509, 524 n.26 (9th Cir. 1977).

133. Civ. No. 15460 (Super. Ct., Imperial County, Cal. 1933).

134. 43 U.S.C. § 431 (1970). *See* note 2 *supra*.

135. Hewes v. All Persons, Civil No. 15460 (Super. Ct., Imperial County, Cal. 1933) (Finding No. 35).

in the acreage case when the intervenors became involved. The Ninth Circuit Court in *Imperial* rejected the intervenors' argument that res judicata was inapplicable to them because they were only appealing claims originally urged by the United States.[136]

The court did, however, find independent grounds to hold that res judicata was inapplicable. First, the court noted that judgments in confirmation proceedings are only binding on "matters to which the judgment properly relates."[137] The court then stated that confirmation proceedings are "'limited to a determination of the validity of the contract.'"[138] Next, the court determined that the "portion of the *Hewes* decision dealing with the acreage limitations of the reclamation law . . . [was] not essential to a determination that the contract was valid."[139] This was true because under the decision in *Ivanhoe Irrigation District v. McCracken*,[140] the contract would not be invalid if it *did* incorporate acreage limitations. If acreage limitations were *not* incorporated, the contract would still not be invalid. Since any decision on acreage limitations could not, therefore, affect the validity of the contract, such a decision was "irrelevant" and "pure dicta."[141] It was "an interpretation of the terms of the contract that the court was not entitled to make in a confirmation proceeding."[142] Therefore, even though a litigated issue, the decision on the acreage limitation in *Hewes* did not foreclose a new determination in the present case.[143]

This reasoning appears to be straight-forward, but there is one flaw in the court's analysis. This is found in the court's determination that any decision whether or not the acreage limitation was incorporated in the contract was irrelevant to the validity of the contract in 1933 when *Hewes* was decided. Such a decision would be irrelevant to contractual validity today because in 1958 the United States Supreme Court determined that enforcement of acreage limitations was not unconstitutional.[144] Without the value of that precedent, however, a court twenty-five years earlier might have determined that the contract was constitutionally inadequate if acreage limitations applied. The issue was, therefore, not irrelevant at the time, and the conclusion made on that basis in *Imperial* is faulty.

The court in *Imperial* was, however, quite correct in its realiza-

136. 559 F.2d 509, 525 (1977).

137. *Id.*, *citing* Ivanhoe Irrig. Dist. v. All Parties & Persons, 47 Cal. 2d 597, 606, 306 P.2d 824, 829 (1957), ***rev'd on other grounds sub. nom.*** Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1958).

138. *Id.*

139. 559 F.2d at 525.

140. 357 U.S. 275 (1958).

141. 559 F.2d at 526, *citing* Stanson v. Mott, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

142. 559 F.2d at 526.

143. *Id.*, *citing* Memorex Corp. v. International Business Mach. Corp., 555 F.2d 1379 (9th Cir. 1977).

144. United States v. Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1958).

tion that the decision in *Ivanhoe Irrigation District v. McCracken*[145] is important in deciding whether res judicata bars reconsideration of the acreage issue. The court in *Imperial* abjured determining "whether important policy considerations mandate the inapplicability of *res judicata* . . . ."[146] That is, however, essentially what the court did in recognizing the impact of *Ivanhoe*. That case and two opinions by Solicitors of the Department of the Interior[147] have altered the legal atmosphere with regard to acreage limitations in the Imperial Valley. As the author has previously noted:

> There is an exception to the application of res judicata "where between the time of the first judgement and the second there has been an intervening decision or change in the law creating an altered situation." 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 . . . ."
>
> Because of the decision in *Ivanhoe Irrigation District v. McCracken* and the two solicitor's opinions, 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 . . . . The "desirability of finality" should be balanced against "the public interest in reaching what, ultimately, appears to be the right result."[148] (Footnotes omitted).

There are, in addition, other possible grounds for holding res judicata inapplicable in *Imperial*. The court itself noted, without deciding whether the reasoning might apply in *Imperial*, that parties may not be bound by determination of an issue when the litigants did not have adverse interests.[149] Additionally, it is possible that the court in *Hewes* had limited jurisdiction and that its decision may have gone beyond the bounds of that jurisdiction.[150] Finally, questions have been raised regarding the binding nature of state court determinations of federal questions.[151] In any case, there are ample grounds for supporting the court's decision on res judicata in *Imperial*, although perhaps not its reasoning.

---

145. *Id.*

146. United States v. Imperial Irrig. Dist., 559 F.2d 509, 526 n.31 (9th Cir. 1977).

147. *Barry Opinion, supra* note 27; *Applicability of the Excess Land Provisions of the Federal Reclamation Law to The Boulder Canyon Project Act*, M-33902 (1975) *reprinted in* 71 Interior Dec. 496, App. H, at 533 (1964) [hereinafter cited as *Harper Opinion*].

148. *Reclamation Law in Litigation, supra* note 31, at 705, *citing, e.g.*, Civil Aeronautics Bd. v. Delta Air Lines, 367 U.S. 316 (1961); Commissioner v. Sunnen, 333 U.S. 591 (1948); State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154 (1945); City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 537 P.2d 1250, 123 Cal. Rptr. 1 (1975); Greenfield v. Mather, 32 Cal. 2d 23, 194 P.2d 1 (1948). *See also* Moch v. East Baton Rouge Parish School Bd., 548 F.2d 594 (5th Cir. 1977), and cases cited therein.

149. United States v. Imperial Irrig. Dist., 559 F.2d 509, 526 n.31 (1977).

150. *See Reclamation Law in Litigation, supra* note 31 at 703-04.

151. *Id.* at 706; Yellen v. Hickel, 352 F. Supp. 1300, 1304-05 (S.D. Cal. 1972).

INTERPRETING THE BOULDER CANYON PROJECT ACT

Construing the Statutory Language: The Preeminence of Policy

After a brief review of the general historical background[152] of the Boulder Canyon Project Act,[153] the court in *Imperial* commenced its scrutiny of that Act, stating that

> By the operation of Sections 12 and 14, the Project Act was incorporated into the framework of the reclamation laws, including Section 46, that had recently been considered by Congress and that had also been the subject of national concern for some time.[154]

Having given this tantalizing indication that it realized that the Act could not be considered except in relation to current events and the atmosphere of the national reclamation policy,[155] the court turned to specific statutory language. The court first noted section 1 of the Project Act.[156] That section provides that expenditures for the main canal and appurtenant structures are "reimburseable, as provided in the reclamation law." Section 4(b)[157] provides that the Secretary of the Interior shall make provision, "by contract or otherwise" to cover the "expenses of construction, operation and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law." Section 14[158] also refers to reclamation law as applying to the project. Stating that at the time the Project Act was approved section 46 of the Omnibus Adjustment Act[159] governed contracts for payment of casts on new reclamation projects, the court concluded that

> By direct scrutiny of the statutory language, it is apparent that the acreage limitations of Section 46 apply to private

152. United States v. Imperial Irrig. Dist., 559 F.2d 509, 526 (9th Cir. 1977).

153. 43 U.S.C. §§ 617-617t (1970).

154. 559 F.2d at 527. Section 12, 43 U.S.C. § 617k (1970) defines "reclamation law" as the Act of June 17, 1902 and "acts amendatory thereof and supplemental thereto." Section 14, *Id.* § 617m, provides that "This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." The pertinent text of Section 46 of the Omnibus Adjustment Act of 1926, *Id.* § 423e is found at note 2 *supra*. The Project Act was passed on December 21, 1928, the Omnibus Adjustment Act on May 25, 1926.

155. *See, e.g.*, Roe v. Norton, 522 F.2d 928, 935 (2d Cir. 1975): "A statute must be construed with reference to the circumstances existing at the time of its passage and in the light of conditions under which Congress acted at the time." (citations omitted).

The court in *Imperial* appears to have eschewed the principle of statutory construction that the language of the statute is to be consulted first, and *then* external aids may be consulted. Or, as one court noted, "There is no better technique than the 'threefold imperative' prescribed by Justice Frankfurter: '(1) Read the statute; (2) read the statute; (3) read the statute!' HENRY J. FRIENDLY, BENCHMARKS 202 (1967)." Dobbs v. Costle, 559 F.2d 946, 948, n.5 (5th Cir. 1977). As the Project Act is not a model of clarity, however, resort to matters outside the statutory terms themselves is eventually unavoidable.

156. 43 U.S.C. § 617 (1970).

157. *Id.* § 617c(b).

158. *Id.* § 617m. *See* note 154 *supra*.

159. 43 U.S.C. § 423e (1970).

> lands in the Imperial Irrigation District that receive irrigation water from the All-American Canal.[160]

The court bolsters its conclusion by referring to the statement in *Ivanhoe Irrigation District v. McCracken*,[161] that when projects have been exempted from acreage limitations "Congress has always made such exemption by express enactment."[162] The court in *Imperial* found no language in the Project Act comparable to a specific exemption.[163] Having put the landowners on notice that their arguments would be given short shrift, the court proceeded to analyze problems raised by specific statutory sections.

One argument advanced by the landowners was that sections 1 and 4(b)[164] make the Project Act incompatible with section 46 of the Omnibus Adjustment Act.[165] The latter statute requires repayment for *all* project works, makes contracts the only method of repayment, and sets the completion of the project as the time for making payment provisions. Under the Project Act, however, payment was only required for the "main canal and appurtenant structures" and there were no charges for water or the "use, storage, or delivery" thereof.[166] Repayment for the Boulder Canyon Project could have been arranged by means other than a contract.[167] Finally, under the Project Act, provisions for payment were required to be made before any construction money was appropriated,[168] rather than upon completion of the project. The court found that these discrepancies were insufficient to remove the Project Act from section 46's acreage limitation. The modification of the timing for making payment arrangements "does not mean that all other substantive provisions of Section 46 are incompatible . . ., the partial relaxation of . . . reimbursement of the capital costs of all project works does not make the other provisions of Section 46 inapplicable . . . ." and, finally, even if the Secretary could have made other repayment arrangements, "the method chosen in the case of the Imperial Valley was a contract."[169]

The court, unfortunately, makes little attempt, except with reference to the fact that the repayment provisions were made by contract,[170] to explain the legal basis for its determination that the

160. United States v. Imperial Irrig. Dist., 559 F.2d 509, 527 (9th Cir. 1977).
161. 357 U.S. 275 (1958).
162. *Id.* at 292.
163. 559 F.2d at 527.
164. 43 U.S.C. §§ 617, 617c(b) (1970). At various times, the landowners alleged that sections 1, 4a, 4b, 5, 6, 8, 9 and 14 of the Project Act, *Id.* §§ 617, 617c(a), 617c(b), 617d, 617e, 617g, 617h and 617m operate in some way, though not explicitly, to exempt the project from operation of the excess land laws.
165. *Id.* § 423e.
166. *Id.* § 617.
167. *Id.* § 617c(b).
168. *Id.*
169. United States v. Imperial Irrig. Dist., 559 F.2d 509, 530 (9th Cir. 1977).
170. The court notes that even if arrangements for repayment were made "otherwise" than by contract, they would have to be "in the manner provided in the reclamation law," as required by section 4(b), 43 U.S.C. § 617c(b) (1970), and

admitted differences in the laws did not create an irreconcilable incompatibility. The answer apparently must be looked for in the court's earlier emphasis on the fact that the Project Act and section 46 were essentially contemporaneous legislation within the same area of the law.[171] Section 46 was drafted to apply to "any new project."[172] Although not stated explicitly, the court may have acted on the assumption that section 46 would not have been so soon discarded by the legislative body that adopted it.[173]

The landowners also argued that section 5 of the Project Act[174] operates to relieve the project from operation of the excess land laws. Section 5 applies to contracts for storage and delivery of water. It requires that such contracts conform to section 4(a).[175] Neither section 5 nor section 4(a) refer to general reclamation law, whereas certain other sections of the Project Act do so refer.[176] Since sections 5 and 4(a) are the sections specifically governing water delivery, the landowners asserted that failure to place a reference to the general reclamation laws in either of those sections meant that there were to be no conditions placed upon water delivery.[177]

As the court noted in its rejection of this theory, the argument overlooks several things.[178] The requirement in section 5 that contracts shall conform to section 4(a) may simply be a directive that any delicate adjustments of interstate water allocations that have been worked out under section 4(a)[179] shall not be violated by the Secretary in arranging water delivery. The fact that the Secretary's authority is thus limited, however, does not mean that it is not limited by other sections of the Project Act, including section 14, which requires that reclamation law shall govern, except as otherwise provided.[180]

---

that "at the time the contract was made there was no means authorized by the reclamation law, other than the type of contract involved here . . ." 559 F.2d at 530 n.42. *See* J. HELLAR, CATCH—22 (1961).

171. *See generally* 559 F.2d at 526-27. *See also* text accompanying note 154 *supra*.

172. 43 U.S.C. § 423e (1970).

173. The problems raised by sections 1 and 4(b) of the Project Act, 43 U.S.C. §§ 617, 617c(b) are more complicated than the decision in *Imperial* implies, but there are also explanations for many of the complications. *See Reclamation Law in Litigation, supra* note 31, at 710-11.

174. 43 U.S.C. § 617d (1970).

175. *Id.* § 617c(a).

176. *Id.* §§ 617, 617c(b), 617k, 617m.

177. United States v. Imperial Irrig. Dist., 559 F.2d 509, 530 (9th Cir. 1977). This argument was very successful in the lower court. United States v. Imperial Irrig. Dist., 322 F. Supp. 11, 17 (S.D. Cal. 1971).

178. 559 F.2d at 530-31.

179. 43 U.S.C. § 617c(a) (1970) is specifically addressed to interstate water allocation, which has been a perennial problem in the states served by the Colorado River. *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963).

180. 43 U.S.C. § 617m (1970). *See* note 154 *supra*. Another extremely important limitation on the Secretary's authority is found in the directive of section 6, 43 U.S.C. § 617e (1970) that "present perfected rights" shall be satisfied. *See* text accompanying notes 191-204 *infra*.

The landowners' next argument was based upon section 14 itself. That section provides that "reclamation law shall govern the construction, operation, and management" of the project works.[181] The section does not specifically state that water *delivery* is subject to reclamation law. Additionally, the landowners asserted that language in other sections of the Project Act distinguishes between "construction, operation and maintenance" and "delivery."[182] The court points out, however, that even section 46 of the 1926 Act,[183] the reclamation statute containing the acreage limitation, only refers to contracts for repayment of construction, operation and maintenance costs, and not to delivery contracts.[184] Further, since under the Project Act there were to be no charges for the construction of the main dam (only for the main canal), or for water delivery or use,

> It was natural . . . to have separate provisions dealing with the delivery of water, where no reimbursement was required, and with the construction of the Canal where reimbursement was required . . . . In this context, any differentiation in Project Act provisions for delivery of water and construction of the Canal is nothing more than a reflection of the fact that the Imperial Valley did not have to fully repay the United States for the benefit received under the Act but that repayment contracts for the benefits that did have to be reimbursed still had to be in accord with the reclamation law and Section 46.[185]

Another argument advanced by the landowners was that because section 9 of the Project Act[186] specifically includes an acreage limitation in reference to entry upon public lands, lack of such a specific limitation on private lands indicates that the excess land laws do not apply to private lands.[187] In dismissing this argument, the court noted that the 160-acre limit in section 9 refers to tract size, not to water delivery,[188] and that part of the specificity of section 9 is required by a preference given to veterans, a preference with "no

181. 43 U.S.C. § 617m (1970).

182. As the court notes, however, United States v. Imperial Irrig. Dist., 559 F.2d 509, 531 n.43 (9th Cir. 1970), "Section 8(b) 43 U.S.C. § 617g(b), appears to include delivery and use of water within the activities of construction, operation and management."

183. 43 U.S.C. § 423e (1970).

184. 559 F.2d at 531.

185. *Id. See also* Yellen v. Hickel, 352 F. Supp. 1300, 1308 (S.D. Cal. 1972) where the court notes that in *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958), the Supreme Court "found that . . . water delivery provisions . . . were included within the ambit of 'construction, operation and management' as used in the Central Valley Project Act." Use of *Ivanhoe* as precedent on this particular question presents some problems, however. *See Reclamation Law in Litigation supra* note 31, at 707-08 n.98.

186. 43 U.S.C. § 617h (1970).

187. United States v. Imperial Irrig. Dist., 559 F.2d 509, 531-32 (9th Cir. 1970).

188. A distinction between acreage limitations on public lands and private lands has always been an essential part of reclamation law. The limitation on public lands is on the amount of land that is subject to entry. The limitation on private lands is on the amount of water that may be delivered, regardless of the total size of the private tract of land. Of course, there is also water delivery to the entrymen on the public lands.

counterpart in the general homestead laws, as incorporated into the reclamation law . . . ."[189] Finally, the court noted that to use

> Section 9 to create an exemption for private lands from the excess land laws in face of the strong national policy of generally enforcing those laws, the specific incorporation of reclamation law in Section 14 of the Act, and the lack of any specific exemption from the operation of the excess land laws in the Project Act puts a far too strained reading on Section 9 which cannot be accepted.[190]

The statutory construction argument advanced with the most fervor by the landowners, and given the most attention by the court, was based on section 6 of the Project Act.[191] Among other things, that section provides that the dam and reservoir of the project "shall be used . . . for . . . satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact . . ."[192] The United States Supreme Court has held that this section *requires* the Secretary of the Interior to satisfy such rights.[193] The landowners alleged that they had such "present perfected rights," and that the mandate in section 6 that such rights be satisfied operates to remove water delivery to the holders of such rights from the restrictions of the reclamation laws. In short, the argument was that section 6 comes under the "except as otherwise herein provided" clause of section 14.[194]

The court first rejected the contention that the landowners held "present perfected rights." Citing several California cases,[195] the court stated that the Imperial Irrigation District, not individual

---

189. 559 F.2d at 532.

190. *Id.* Once again, the court makes a reference to the "strong national policy" behind enforcing the excess land laws. Throughout the court's treatment of various statutory construction arguments raised by the landowners, which seem to have at least a surface logic, one can perceive a sensitivity to policy questions. Perhaps the court was heeding the warning of the Supreme Court that courts "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy . . . .'" Philbrook v. Glodgett, 421 U.S. 707, 713 (1975), *citing* United States v. Heirs of Boisdoré, 8 How. 113 (1849).

191. 43 U.S.C. § 617e (1970).

192. *Id.* Article VIII of the Colorado River Compact provides that "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." I UNITED STATES DEP'T OF THE INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANN. 445 (1972). Present perfected rights under the Boulder Canyon Project Act have been defined as rights, "acquired in accordance with state law" and "existing as of June 25, 1929" that 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).

193. Arizona v. California, 373 U.S. 546, 584 (1963).

194. United States v. Imperial Irrig. Dist., 559 F.2d 509 (9th Cir. 1977); 43 U.S.C. § 617m (1970). *See also* note 154 *supra*.

195. Ivanhoe Irrig. Dist. v. All Parties and Persons, 53 Cal. 2d 692, 350 P.2d 69, 3 Cal. Rptr. 317 (1960); Madera Irrig. Dist. v. All Persons, 47 Cal.2d 681, 306 P.2d 886 (1957), *rev'd on other grounds sub nom.*, Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Hall v. Superior Ct., 198 Cal. 373, 245 P. 814 (1926); Jenison v. Redfield, 149 Cal. 500, 87 P. 62 (1906); Merchants Nat'l Bank of San Diego v. Escondido Irrig. Dist., 144 Cal. 329, 77 P. 937 (1904).

landowners, held legal title to water rights, and that those rights are held in trust for the common benefit of all landowners within the district. Extrapolating from these statements of California law, the court found that landowners do not hold a specific "proportionate ownership in the water rights owned by the irrigation district," "nor do the lands irrigated . . . obtain any absolute right to the continued delivery of water."[196] The result is that "no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights."[197]

Since individual landowners have no rights to a specific quantity of water, the direction of the Supreme Court that the Secretary of the Interior satisfy present perfected rights[198] can be complied with simply by delivery of the necessary quantity of water to the Imperial Irrigation District. The district would then supply water to the individual landowners. If the district, in compliance with the acreage limitation, deprived excess lands of water delivery, present perfect rights would not have been violated, for the district itself would have received all the water to which it was entitled.[199] In short, "satisfaction of present perfected rights is not incompatible with the application of the excess lands provision of Section 46."[200]

The analysis of "present perfected rights" appears to be one of the most flawless in the court's opinion. It brings federal law and state law into harmony, following the statutory direction that the reclamation laws are not to interfere with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . . ."[201] The decision in *Imperial* allows delivery of water to the Imperial Irrigation District in quantities to meet its "present perfected rights" as of 1929, thereby silencing critics that allege that application of the acreage limitation would unfairly deprive the district of water that it had already been able to provide for itself before the Project Act was approved.[202] The decision avoids the strained construction of the term "present perfected rights" suggested by a lower court.[203] It avoids the anomalous situation of applying the acreage limitation in a sporadic fashion in the Imperial Irrigation District, for as the court notes,

196. United States v. Imperial Irrig. Dist., 559 F.2d 509, 529 (9th Cir. 1977).
197. *Id.*
198. Arizona v. California, 373 U.S. 546, 584 (1963).
199. 550 F.2d at 529.
200. *Id.* at 528.
201. 43 U.S.C. § 383 (1970). This statute has been the subject of an extraordinary amount of litigation and commentary. *See Reclamation Law in Litigation*, *supra* note 31, at 718-20 and citations therein.
202. It should also be pointed out that by forbidding any charges for water storage, delivery, or use for irrigation, *see* 43 U.S.C. § 617 (1970), a break was given to parties who were using an operative irrigation system. All they paid for was an improved delivery system, not even including the main dam and reservoir.
203. Yellen v. Hickel, 352 F. Supp. 1300, 1308-10 (S.D. Cal. 1972). *See also Reclamation Law in Litigation*, *supra* note 31, at 722-24.

> [T]he Secretary may determine to allocate to the Imperial Irrigation District more water than the amount ultimately determined to be the District's present perfected rights. Water in excess of the District's present perfected rights would not be the subject of Section 6 of the Project Act and would not be protected by that Section from the operation of Section 46.[204]

Finally, it is a reasonable interpretation of a statute that shows consideration for both the rules of construction and the demands of policy, without applying the former too mechanically or deferring to the latter too liberally.

Legislative History: A Study in Congressional Inaction

The legislative history of the Boulder Canyon Project Act[205] has been discussed so exhaustively in so many places[206] that it serves little purpose to set it forth in detail once again. As the lower court in *Imperial* stated, "The language sought in the halls of Congress can usually be found in one place or another, . . ."[207] and that is true in the case of the Boulder Canyon Project Act, whether one is a proponent or opponent of the excess land laws. Considering the fact that various proposals were before the Congress over a ten year period, however, the total amount of information that can be gleaned regarding the acreage limitation law is "relatively meager."[208]

Without repeating every nuance of a murky topic, there are certain events that the court in *Imperial* appeared to emphasize, or in some cases, deemphasize. One event was the apparent confusion that attended the actual passage of the Project Act. The bill passed the House originally, with a specific acreage limitation intact.[209] When legislation was considered in the Senate, that body was told that the bill was substantially the same as the House bill, "with like purposes and designs."[210] The House bill[211] was substituted for the Senate bill,[212] but only the House bill's enacting clause was retained; the text was amended by substituting the Senate bill. By the time this remarkable hybrid passed the Senate,[213] the intent of that body regarding the presence or absence of one specific requirement, the acreage limitation, would be anyone's best guess.[214]

---

204. United States v. Imperial Irrig. Dist., 559 F.2d 509, 528 n.36 (9th Cir. 1977).
205. 43 U.S.C. 617-617t (1970).
206. *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963); United States v. Imperial Irrig. Dist., 322 F. Supp. 11, 20-22 (S.D. Cal. 1971); *Barry Opinion*, *supra* note 27, at 504-08, *Reclamation Law in Litigation*, *supra* note 31, at 712-16.
207. United States v. Imperial Irrig. Dist., 322 F. Supp. 11, 20 (S.D. Cal. 1971).
208. United States v. Imperial Irrig. Dist., 559 F.2d 509, 532 (9th Cir. 1977).
209. 69 CONG. REC. 9989-90 (1928).
210. 70 CONG. REC. 67 (1928) (Remarks of Mr. Johnson).
211. H.R. 5773, 70th Cong., 1st Sess. (1927).
212. S. 728, 70th Cong., 1st Sess. (1927).
213. 70 CONG. REC. 603 (1928).
214. After the bill passed the Senate, it was sent back to the House for

The landowners in *Imperial* placed heavy reliance on various actions and comments of Senators Ashurst and Hayden of Arizona, and Senator Phipps of Colorado, all of whom were opposed to the Boulder Canyon Project. Among them, they introduced amendments that would specifically incorporate acreage provisions, none of which were ever subject to a vote, or even discussion; a proposed bill that contained specific acreage limitations, which was never reported out of committee; minority reports complaining about the absence of an acreage limitation; and various statements pointing out that the acreage limitation; and various statements pointing out that the Senate bill failed to provide such a limitation.[215] The court noted that there were reasons other than the presence of an acreage limitation why the bill was probably not reported out of the committee,[216] and that, in general, it could not "rely on a few statements of opponents during the course of lengthy proceedings primarily concerned with other aspects of the proposed legislation as the correct version of the Project Act's legislative history."[217] The court also noted that when matters are not seriously debated or brought to a vote, it can "just as reasonably be inferred that [they] were not adopted because the legislation was considered to have already incorporated the proposed changes."[218]

This last statement is probably the best indication of the court's thought processes regarding legislative history. In keeping with the concern for national policy and reclamation law history that was voiced in its construction of the terms of the statute, the court emphasized the importance of section 46 of the Omnibus Adjustment Act of 1926[219] in interpreting the legislative history of the Project Act. First, the court indicated that the Project Act's history before May of 1926 should be viewed in light of the fact that section 46 was passed at that time.[220] Any previous statements, therefore, could not have been made with the impact of that statute in mind. Similarly, at least immediately after section 46 had been passed, "it could hardly have escaped the attention of the Senate that by that time the recla-

approval. No mention was made that the acreage limitation had been deleted. Therefore, if the Senate's intent in passing the bill is unclear, the House's intent (at the time of approval of the substituted bill, not at the time it originally passed the bill that contained a specific acreage limitation) is hopelessly beyond ascertainment. In this regard, *see* Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975) citing K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 3A.31 (1970 Supp.): " 'The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one.' "

215. *See, e.g.*, 69 CONG. REC. 7634-35, 9451, 10,471, 10,495 (1927); 70 CONG. REC. 67 (1928); S. REP. NO. 592, 70th Cong., 1st Sess. pt. 2, at 26 (1928).

216. United States v. Imperial Irrig. Dist., 559 F.2d 509, 534 (9th Cir. 1977). The bill lacked adequate provisions for the provisions of hydroelectric power.

217. *Id.* at 536. The court cites Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976), wherein the Supreme Court commented concerning opponents of legislation who "in their zeal to defeat a bill . . . understandably tend to overstate its reach" quoting NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964).

218. 559 F.2d at 535-36, *citing* United States v. Wise, 370 U.S. 405 (1962).

219. 43 U.S.C. § 423e (1970). *See* note 2 *supra*.

220. 559 F.2d at 533.

mation law also required significant acreage limitations in its provisions for contracts with irrigation districts."[221] The court rejected the landowner's argument that section 46 was only designed to apply to unimproved lands under federal reclamation projects, and not to lands already irrigated:

> Congress was well aware when it passed Section 46 that many federal reclamation projects were initiated to supplement or replace non-federal irrigation projects, as was done in the Imperial Valley. Section 46 was designed to strengthen both the anti-speculative and anti-monopoly policies of the reclamation laws, and there is no question that Congress intended it to apply to previously irrigated and productive lands such as those in the Imperial Valley . . . .
>
> > It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.[222]

In general, the court resolved all ambiguities in the legislative history in favor of the inclusion of an acreage limitation:

> [T]he legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created.[223]

Once again, policy reigned supreme.

THE IMPACT OF ADMINISTRATIVE PRACTICE

Past Practices Are Not a Basis for Interpretation of the Boulder Canyon Project Act

At the time that the construction contract between the Imperial Irrigation District and the United States was under consideration in the California courts in 1933,[224] the then Secretary of the Interior, Ray Lyman Wilbur, wrote a letter to the district expressing his opinion that there would not be an acreage limitation on water delivery in the district under the terms of federal reclamation law.[225] Primarily because of that letter, for many years no attempt was made to enforce such a limitation. The excess landowners rely heavily on that long period of nonenforcement in their argument that the Boul-

---

221. *Id.*

222. *Id.* at 536, *citing* and *quoting* United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1143 (9th Cir. 1976).

223. 559 F.2d at 535.

224. *See* text accompanying notes 131-135 *supra*.

225. Letter from Ray L. Wilbur, Secretary of the Interior, to Imperial Irrigation District, Feb. 24, 1933, *reprinted in* 71 Interior Dec. 496, App. E at 529 (1964) [hereinafter referred to as the Wilbur Letter].

der Canyon Project Act[226] should be construed to exempt the Imperial Irrigation District from the acreage limitation.

One of the platitudes of the law is that administrative construction of a law is to be given great deference by the courts.[227] Like many legal commonplaces, however, the rule is only useful when viewed in light of its qualifications. In general, the deference given to administrative practices in an area of the law is due to a recognition of administrative expertise in that area.[228] Where, however, the principal issue is a matter of statutory construction, it is considered that the courts, not the administrators, are "relatively more expert."[229] A question of statutory construction is precisely the issue in the *Imperial* case. Since, however, the Boulder Canyon Project Act does not explicitly include an acreage limitation and poses an extremely difficult problem of construction, the court still might have been tempted to accord great weight to the administrative interpretation urged by the landowners, if that interpretation had met certain standards.

One factor to be considered in deciding whether to defer to an administrative interpretation is whether it was thoroughly and validly reasoned.[230] An analysis of section 5 of the 1902 Reclamation Act[231] formed the basis of Secretary Wilbur's 1933 letter.[232] It has been suggested that even based on an interpretation of the 1902 law, the reasoning of the Wilbur letter was invalid.[233] The major problem with the letter, however, is that "whether legally correct or not, [it] is irrelevant to the present case. It concerns only the application of section 5 of the Reclamation Act of 1902. It does not purport in any way to consider section 46 of the Omnibus Adjustment Act of 1926."[234] The Wilbur letter did profess to excuse landowners in the Imperial Irrigation District from acreage limitations because of their present water rights.[235] That determination, too, was based on an analysis of administrative practices under the 1902 Act and did not take the 1926 Act into consideration. While granting that Wilbur's analysis was parallel to the present day excess landowner's argument

226. 43 U.S.C. §§ 617-617t (1970).

227. *See, e.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969); Humphreville v. Mathews, 560 F.2d 347 (8th Cir. 1977); Forester v. Consumer Product Safety Comm'n of the United States, 559 F.2d 774 (D.C. Cir. 1977); Puerto Rico Telephone Co. v. F.C.C., 553 F.2d 694 (1st Cir. 1977).

228. Wilderness Society v. Morton, 479 F.2d 842, 866 (D.C. Cir. 1973).

229. Barlow v. Collins, 397 U.S. 159, 166 (1970), *citing* Hardin v. Kentucky Utilities Co., 390 U.S. 1, 14 (1968) (Harlan, J., dissenting). *See also* Zuber v. Allen, 396 U.S. 168, 193 (1969), *cited in* United States v. Imperial Irrig. Dist., 559 F.2d 509, 539 (9th Cir. 1977): "The Court may not . . . abdicate its ultimate responsibility to construe the language employed by Congress."

230. *See, e.g.*, Case and Co. v. Board of Trade of Chicago, 523 F.2d 355 (7th Cir. 1975), *citing* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

231. 43 U.S.C. § 431 (1970). *See* note 2 *supra*.

232. Wilbur Letter, *supra* note 225.

233. *See generally*, *Barry Opinion*, *supra* note 27 at 508-13.

234. United States v. Imperial Irrig. Dist., 559 F.2d 509, 537 (9th Cir. 1977).

235. Wilbur Letter, *supra* note 225 at 530.

based upon "present perfected rights,"[236] the court notes that the letter "makes no mention" of any of the other arguments advanced by the landowners based upon "purported inconsistencies" between the Project Act and section 46. Regarding these other arguments, the Wilbur letter "can provide absolutely no support."[237]

The Wilbur letter, therefore, was obviously not an instance of a thorough or well-reasoned administrative interpretation. Indeed, it indicates "a lack of careful consideration."[238] Immediately upon receipt of the letter some forty-five years ago, landowners expressed concern that it had not addressed section 46. They were assured in a letter by the Assistant Commissioner of the Bureau of Reclamation that "the same principle discussed in the Secretary's letter of February 24, based upon section 5 of the Reclamation Act, involves precisely that contained in section 46 of the act of May 25, 1926."[239] The court in *Imperial*, however, states that there "is no claim that this letter should be considered as an administrative construct of the Project Act to which the courts should defer."[240]

This seems to be a correct analysis. The Supreme Court has stated that the rule of "administrative deference" is appropriately applied where the agency has rendered "binding" and "official" interpretation.[241] Both the letter of Secretary Wilbur and that of the Assistant Commissioner were issued in response to requests by the Imperial Irrigation District itself. No formal opinion was issued.[242] Further, when the district's attorney requested the ruling, he stipulated that he wanted one only if it stated that the 160-acre limitation did not apply.[243] The fact that an administrative interpretation was not made in an adversary context "detracts from its persuasive force."[244]

Even considering that the early departmental statements on the acreage limitation in the Imperial Irrigation District were not formal opinions, and were not thoroughly reasoned or made in an adversary context, the largest problem with the excess landowners' reliance on the Department of Interior's practice of nonenforcement is that the departmental practices have been inconsistent.[245] Consistency is one of the main requirements for according deference to an administra-

236. *See* text accompanying notes 191-200 *supra*.
237. United States v. Imperial Irrig. Dist., 559 F.2d 509, 537 (9th Cir. 1977).
238. *Id.* at 539.
239. Letter from Porter W. Dent to Richard J. Coffey, March 1, 1933, *reprinted in* 71 Interior Dec. 496, App. F at 531 (1964).
240. United States v. Imperial Irrig. Dist., 559 F.2d 509, 538 n.67 (9th Cir. 1977).
241. Piper v. Chris-Craft Indus., 97 S. Ct. 926, 949 n.27 (1977).
242. 559 F.2d at 538, 539.
243. Letter from Richard J. Coffey to Porter W. Dent, Feb. 4, 1933, *reprinted in* 71 Interior Dec. 496, App. B at 527 (1964).
244. Case & Co., Inc. v. Board of Trade of Chicago, 523 F.2d 355-361 (7th Cir. 1975); *See also* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 290 (1946). *But see* Skidmore v. Swift, 323 U.S. 134, 140 (1944).
245. *See generally* 559 F.2d at 537-39.

tive practice.[246] While the position expressed in the Wilbur letter was not expressly repudiated until 1964, as early as 1945 the Solicitor of the Interior decided that under the terms of the Project Act, limitations would be applied to another irrigation district in the Imperial Valley.[247] Furthermore, in 1948 and 1959 some doubt was expressed within the Department about the validity of the Wilbur letter itself, although it was decided to let the policy of nonenforcement stand.[248] From the time of the 1964 opinion of Solicitor Barry[249] until the government determined not to appeal the lower court decision in *Imperial* that acreage limitations did not apply under the Project Act, attempts were made by the Department of the Interior to enforce the excess lands law in the Imperial Irrigation District. The Department has now adopted a "hands off" policy, and is waiting upon a judicial determination of the status of limitations upon water delivery in the Imperial Valley.[250] Considering the inconsistency of the Interior Department's attitude toward this question and its present willingness to accede to the courts' interpretation of the law, it would seem incongruous for the court to bow to an administrative interpretation no longer espoused by the administration.

Even though the administration itself may no longer advance the argument urged by the landowners, they contend that Congress was aware of the many years of nonenforcement of the acreage limitation and, therefore, has ratified that practice. The court, in *Imperial*, rejected that contention, pointing out that any mention in Congress of the practice of exempting the Imperial Irrigation District from acreage limitations was made in connection with legislation that did not directly concern the Boulder Canyon Project Act or the district.[251] Under those circumstances, the court was unwilling to accept a theory of "congressional ratification by silence of the Wilbur interpretation."[252] When the Project Act was directly addressed, there was "no evidence that the acreage limitation question was

246. *See, e.g.*, Piper v. Chris-Craft Indus., 97 S. Ct. 926 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Morton v. Ruiz, 415 U.S. 199, 237 (1974).

247. *Harper Opinion, supra* note 147. *See* discussion in United States v. Imperial Irrig. Dist., 559 F.2d 509, 538 (9th Cir. 1977). The irrigation district that was the subject of the *Harper Opinion* has an acreage limitation in its contract with the United States. The Imperial Irrigation District does not. The court rejected the argument that this was significant. 559 F.2d at 542.

248. Letter from Secretary Krug to H.C. Herman, Apr. 27, 1948, *reprinted in* 71 Interior Dec. 496, App. I at 548 (1964); Letter from Solicitor Bennett to Solicitor General Rankin, Feb. 5, 1958, *reprinted in Id.*, App. J at 550. *See* discussion in 559 F.2d at 538-39. The decision by Secretary Krug and Solicitor Bennett to allow the nonenforcement policy to continue did not impress the court in *Imperial*: "Inactivity based on previous inactivity cannot be elevated into an administrative determination to which the courts should defer." *Id.* at 540.

249. *Barry Opinion, supra* note 27. This opinion was the most thorough analysis of the question of acreage limitations in the Imperial Irrigation District made prior to the present litigation.

250. Testimony of Secretary Andrus, *supra* note 8.

251. *See generally* 559 F.2d at 540-41.

brought to the attention of Congress."[253] Furthermore, Congress has taken no action since the 1964 determination of the Department of the Interior that acreage limitations should apply in the district, "so it could be argued, in terms of the landowners' frame of analysis, that Congress acquiesced in this new interpretation . . . ."[254] Finally, repeated congressional appropriations for construction of the All American Canal did not amount to ratification of the administrative nonenforcement of the law. For many of the years in which appropriations were made, there was no evidence of congressional knowledge of the practice. For many other years, Congress was aware of conflicting administrative interpretations. "As before, the record here [was] too sparse and ambiguous to justify a conclusion that Congress approved of the Wilbur construction of the Project Act and the reclamation laws."[255]

Potential Practices Are Not an Unfair Application of the Law

In resisting enforcement of the acreage limitation of section 46 of the Omnibus Adjustment Act of 1926,[256] the landowners' last argument is that such enforcement would be unfair to them because of their past reliance on the Wilbur letter and consequent departmental nonenforcement of the law. The court summarily dismissed this argument as not "germane" to the lawsuit.[257] First, many excess landholdings existed prior to 1933 and could not have been acquired in reliance on administrative practices.[258] Secondly, section 46 would not deprive landowners of the pre-existing value of their lands, "[i]t only excludes the increase in the value of their land attributable to the federal project."[259] Finally, even if the landowners could demonstrate that they suffered an injury, that was no reason not to apply the law, for "recourse for just compensation is open in the courts."[260]

---

252. *Id.*

253. *Id.* at 541. *See* Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721, 726 (9th Cir. 1975): "Knowledge of the precise course of action alleged to have been adquiesced in is an essential prerequisite to a finding of ratification."

254. 559 F.2d at 541.

255. *Id. See* Associated Elec. Coop., Inc. v. Morton, 507 F.2d 1167, 1174 (D.C. Cir. 1974): "While it is true that appropriations in some instances may constitute ratifications, it is also clear that ratification by appropriation will not be found unless prior knowledge of the specific disputed action can be clearly demonstrated . . . ."

In view of the court's numerous references to policy matters in *Imperial, see, e.g.*, text accompanying notes 190 and 223-23 *supra*, it is strange that it made no allusions to policy considerations in its discussion of administrative practices. *See* Zuber v. Allen, 396 U.S. 168, 192 (1969), where the Court stated that courts should resolve ambiguities in favor of administrative constructions "*if* such construction enhances the general purposes and policies underlying the legislation" (emphasis added). Contrast the silence of the court in *Imperial* on this subject with Yellen v. Hickel, 335 F. Supp. 200, 208 (S.D. Cal. 1971) (addressing administrative practices regarding the residency limitation).

256. 43 U.S.C. § 423e (1970). *See* note 2 *supra*.

257. United States v. Imperial Irrig. Dist., 559 F.2d 509, 541 (9th Cir. 1977).

258. *Id.*

259. *Id.*, *citing* United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1113 n.74, 1144 (9th Cir. 1976), *cert. denied*, — U.S. — (1977), 45 U.S.L.W. 3572 (1977).

260. 559 F.2d at 542, *citing* Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 291 (1958).

In addition to the court's stated reasons for rejecting this last argument of the landowners, there are others that support the rejection. As concluded in its discussion of "present perfected rights,"[261] individual landowners never had a vested right to particular amounts of water. Water rights were held by the Imperial Irrigation District in trust for all landholders, and implementation of the excess land laws would not impede the total amount of water delivered to the district. Further, if mere pre-existence of irrigation facilities was the test for whether or not acreage limitations should apply, almost no recent projects would have such a limitation—but they do—for almost all have been built in areas that are already developed.[262] Nevertheless, the reclamation projects still confer substantial benefits,[263] and acreage limitations are merely a ceiling on the federal subsidy.[264] This principle has been succinctly stated as follows:

> The point here is that under this system the irrigator pays only a small portion of the project cost to the government, and the United States may rightly decide that the project is worth while only if it receives other social benefits spread as widely as possible. There is little reason to build expensive projects for the benefit of corporations and individuals with large land holdings.[265]

CONCLUSION

At a time when both Congress and the Department of the Interior are contemplating the future of the federal reclamation laws, *United States v. Imperial Irrigation District* addresses issues that are currently of great national concern. It is unfortunate that the court used an inflexible standing test to avoid analysis of the extremely significant issue of the residency requirement. It is hoped that the current trends in the area of standing do not presage a return to the days when the primary test of an attorney's worth was his ability to draft interminable and ironclad pleadings. The court's treatment of the acreage limitation question, however, demonstrates a proper recognition of the vital policies that form the foundation of the reclamation laws. The acreage opinion, as well as being an example of thoughtful legal analysis, is an articulate affirmation of those policies.

---

261. *See* text accompanying notes 195-200 *supra*.

262. *See* text accompanying note 222 *supra*. *See also* United States v. Tulare Lake Canal Co., 535 F.2d 1093, (9th Cir. 1976), *cert. denied*, — U.S. — (1977), 45 U.S.L.W. 3572 (1977). Sax, *Selling Reclamation Water Rights*, *supra* note 7 at 33. Some projects, however, have been specifically exempted from application of the excess lands law. *See* Sax, *Federal Reclamation Law*, *supra* note 3, 120.2.

263. *See* note 116 and accompanying text *supra*.

264. Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 297 (1958).

265. Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 491 (1960). *See also* Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977): "The terms upon which [project water] can be put to use, and the manner in which rights to continue use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without compensations, such vesting can only occur on terms fixed by the United States."

ADDENDUM

On April 13, 1978, Secretary of the Interior Cecil D. Andrus testified before the Senate Committee on Energy and Natural Resources. Commenting on several bills concerning reclamation law that have been introduced in the Senate (S. 242, S. 1812, S. 2310, S. 2606 and S. 2818), Secretary Andrus affirmed the anti-monopoly and anti-speculation purposes of the law, stating that "the reclamation program should be a program directed to benefit many rather than a select few. Family farms contributing to the general welfare are the objective—not opportunities for speculation and profiteering at the expense of the taxpayer." The Secretary, however, also noted that past enforcement of the acreage and residency limitations has not been strict, that people have relied on this and that "No reform should fail to address this fact or fail to phase-in the changes that are so necessary now."

A balancing between these two positions—affirmation of the original purposes of the law contrasted with concern for those who have relied upon the lack of enforcement—is evident in the Secretary's statements on particular proposed reforms of the law. The statements also express, although not explicitly, a concern for the social and technological changes that have occurred in agriculture in the last three-quarters of a century.

In summary, the Secretary supports the following concepts:

1) Each individual (18 years or older) could *own* 320 acres for which he might obtain water delivery.

2) An additional 160 acres of *leased* land could be benefited by water delivery.

3) Two adults could own 640 acres and lease 320 acres for a maximum of 960 acres.

4) Multiple ownerships of more than two adults would be limited to that 960 acre figure. Further, in such multiple ownerships, all beneficial owners would have to have an immediate family relationship and no single owner could hold more than 480 acres (320 owned, 160 leased).

5) Current multiple ownerships corporate or otherwise, that did not meet these requirements would have a five year transition period in which to transfer lands to eligible holders.

6) Five years grace should be granted to allow compliance with the new leasing restrictions, and valid written leases, entered into by January 1, 1978, should be honored.

7) The residency requirement should be enforced. "Neighborhood" would be defined as a maximum distance of 50 miles from the farm, and the concept of residency should include substantial involvement in the farming operation.

8) Residency should be required of both lessors and lessees.

9) Enforcement of the residency requirement and new acreage limits should be "phased in" as follows:

a) New purchasers should have to declare an intent of residency and comply within three years.

b) Land currently owned by *individuals* would not be brought under the rule until after the first transfer of title.

c) Land currently owned by multiple ownerships that would meet the eligibility requirements described above (including family relationship) would first be subjected to the requirements upon transfer of title or upon the addition of new beneficial owners.

d) Lands currently owned by corporations or other multiple ownerships that do not satisfy the eligibility requirements should continue to receive water for up to five years. At that time, to continue receiving water, such owners must have become, or transferred their interest to, qualified resident individuals or family ownerships.

e) Exemptions from the residency requirements should be made for reasons of retirement or health.

10) In all cases, existing recordable contracts should be honored.

11) To insure that the reclamation water subsidy is distributed broadly and equitably, a lottery should be used for disposition of lands transferred from non-qualified owners. Assuming that the ineligible owners wish to transfer the land (rather than choosing to retain it without water delivery), however, they should first be given a fair opportunity to transfer it to immediate family relations, tenant farmers and farm employees of at least ten years duration or adjoining neighbors.

12) Acreage equivalency should be authorized in projects having a growing season of less than 180 days.

13) Repayment and recordable contracts containing provisions that acreage limitations would be terminated after payment of the cost allocable to irrigation should be legislatively ratified.

14) Informal letters or verbal statements to the same effect should *not* be endorsed.

15) Charitable or religious not-for-profit organizations receiving water as of January 1, 1978, should be exempt from acreage and residency limitations.

16) New contracts should contain provisions calling for recalculation and renegotiation of water votes every five years.

17) Repayment for delivery systems should commence with first delivery.

Analysis of the proposals reveals that the Secretary gives with one hand while he takes with the other. Restrictions on leasing and disposition of lands by lottery are rightfully emphasized as being critically important. Further, under the proposals, abuses by corporations and other multiple ownerships that are not family oriented would be ameliorated to a certain extent. Even the most blatant of such offenders, however, would continue to receive water for up to five years, or even longer if the irrigation district were one with executed recordable contracts. Apparently, individuals or family-related multiple ownerships that currently receive water would be under no compulsion at all to comply with the residency requirement, or the acreage limitation if they were not currently in

compliance, for the first transfer of title could be decades in the future. Even new purchasers could neglect to comply with the law for three years.

In short, most of the Secretary's stated concern for a widespread distribution of the benefits of the federal water subsidy is not concretely expressed in his proposals. Administrative approval of the continued wholesale frustration of a law, merely because the same administrative department has admittedly "distorted" the law in the past is not a valid legal or even moral stance. The argument fails legally, because as every first year law student knows, ignorance of the law is no excuse. Further, estoppel is not generally a successful argument when applied against the government—attempt to imagine a taxpayer prevailing on a complaint that he had detrimentally relied upon a tax loophole that was finally closed. Finally, as the history of the fourteenth amendment and the Civil Rights Acts of the 1870's demonstrate, longstanding nonenforcement of a law does not prevent eventual strict enforcement, regardless of the number of people discomfitted by the reversal.

Morally, the Secretary appears reluctant to displace people who have relied in good faith on what has essentially been nonfeasance by the Department of the Interior. The "good faith" of the reliance is questionable in many instances. The Imperial Irrigation District is a case in point. Not only was the original 1933 departmental stance on the excess lands law elicited in reply to a letter requiring that the position be announced only if it stated that the law did not apply, but also, any landowner that acquired land in the district since 1964 has known that the status of the limitation was disputed, and should not have relied on its non-application. Most importantly, the Secretary should temper his concern for parties currently receiving water with a realization that the law was designed to benefit a class of people that have been largely denied those benefits for decades. Those people will continue to have *their* justifiable expectations thwarted if the current landholders are allowed to retain their favored status. The parties receiving reclamation water without complying with the acreage or residency limitations have already profited mightily from the operation of the federal reclamation projects. It is hoped that in evaluating the Secretary's comments, Congress will determine to bestow the great federal water subsidy on those who have awaited its benefits for so long.