Acreage Limitation and the Applicability of the Reclamation Extension Act of 1914

by

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ACREAGE LIMITATION AND THE APPLICABILITY OF THE RECLAMATION EXTENSION ACT OF 1914

This comment examines the application of acreage limitation provisions in reclamation law and analyzes the rules that guide the Bureau of Reclamation in its development of reclamation projects. A complementary construction of section 12 of the 1914 Reclamation Extension Act and section 46 of the 1926 Omnibus Adjustment Act in light of canons of statutory construction and historical analysis is offered. Finally, the comment examines various alternatives proposed to carry out the unfulfilled promise of reclamation law.

INTRODUCTION

The purpose of the Reclamation Act of 1902[1] was to involve the Federal Government in building works from proceeds of public land sales in the arid western states, in order to make water available to both private and public lands. One of the weak spots of the original Act, however, was its failure to anticipate the extent to which private lands would be involved. To receive water, the irrigator had to agree to repay current maintenance costs each year, and to return the cost of construction in full within ten years, without interest. It was contemplated that a revolving fund would be established to finance future projects and that the reclamation program would be self-supporting. These goals have never been realized, and the 10-year period for repayment of costs has been extended to 50 years.[2]

Anti-monopoly and anti-speculation provisions of the 1902 Act are embodied in section 5, which provides that no water will be sold for use on more than 160 acres owned by an individual landowner, and that the person receiving the water must be a resident or occupant upon the land.[3] Section 12 of the Reclamation Extension Act of 1914[4] requires that an excess landowner agree to divest himself of acreage in excess of 160 acres before contracts are let or construction of the project is begun. The Bureau of Reclamation does not enforce this requirement, however, contending that it has been repealed by section 46 of the Omnibus Adjustment Act of 1926,[5] which states that "no water shall be delivered" until a recordable contract covering excess acreage has been signed by the landowner.

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1. Act of June 17, 1902, 32 Stat. 388.
2. Sax, *Federal Reclamation Law*, in 2 WATERS AND WATER RIGHTS 122 (Clark ed. 1967) [hereinafter cited as Sax].
3. 43 U.S.C. § 431 (1970).
4. *Id.* § 418.
5. *Id.* § 423(e).

This comment will examine the application of the acreage limitation provisions, currently a subject of heated debate between the Bureau of Reclamation and critics of its policies, and will analyze the rules that guide the Bureau in its development of reclamation projects.[6] Special emphasis will be placed upon the recordable contract requirement of the 1926 Act and its effect upon the divestiture requirement of the 1914 Act. After an examination of policies underlying the acreage limitation provisions of reclamation law, section 12 of the 1914 Act and section 46 of the 1926 Act will be analyzed in light of canons of statutory construction and official documents concerning the two sections. Finally, the author will briefly examine the various proposals being offered to carry out the unfulfilled promise of reclamation law.

HISTORICAL BASIS FOR THE ANTI-SPECULATION PROVISIONS

Both the residency requirement and the 160-acre limitation in the 1902 Act can be traced to the Homestead Act of 1862,[7] which promised 160 acres of free land to those who would reside upon or farm it for five years.[8] The framers of reclamation law noted three major shortcomings of the Homestead Act: first, the law failed to assist homesteaders in the transition to farming; secondly, there was inadequate protection against monopolists and accumulation of the most desirable tracts by speculation; and, finally, 160 acres was inadequate for grazing, the only use to which arid lands could be put without prohibitively expensive irrigation.[9]

Other acts disposing of the public domain were even more grossly abused by monopolists and speculators, a fact which was noted by the framers of the 1902 Reclamation Act.[10] The Desert Lands Act of 1877[11] permitted a person, upon a small payment, to acquire 640 acres of arid land, provided he would irrigate it. Because irrigation was economically impossible, the Act was openly violated by large sheep and cattle interests. Professional witnesses testified for a fee that they had seen water upon the claim; this usually meant that a bucket of water had been emptied on the ground in their presence.[12] In one colorful case, a land baron had himself dragged across the land in a rowboat pulled by horses to establish his claim under the Swamp Act, which required the land to be navigable to be eligible.[13] Similarly, millions of acres of timber lands were placed in the hands of a few companies

6. The Oahe Irrigation Project in eastern South Dakota is an example of such a project.
7. 43 U.S.C. § 161 (1970).
8. Sax, *supra* note 2, at 114-15.
9. *Id.* at 115.
10. Act of June 17, 1902, 32 Stat. 388.
11. 43 U.S.C. §§ 321-39 (1970).
12. Sax, *supra* note 2, at 115.
13. Greene, *Promised Land: The Distribution of Public Land by the United States* 34 (unpublished paper 1973).

through fraudulent abuse of the Timber and Stone Act of 1878.[14] The situation deteriorated to the point where more land was sold to settlers by railroad companies than was conveyed under the Homestead Act, and tenancy on western farms grew steadily until 1900.[15]

Such fraudulent schemes by monopolists and speculators inspired a political movement that arose at the turn of the century, advocating a land policy oriented toward family farmers. Federal reclamation policy developed from this political movement, a product of experience gained from early experiments with land policy.

The idea of a federal program for the construction of irrigation projects did not gain serious consideration until the 1880's. Three major stimuli of the move for federal irrigation projects were the rise of the National Irrigation Congress as a powerful pressure group, the depression of 1894 (which caused many private irrigation companies to fold), and several disastrous dam failures.[16] The Carey Act of 1894[17] was the first attempt by the Federal Government to assume an active role in the development of western irrigation. It placed one million acres at the disposal of each participating state that would agree to build large irrigation works and sell the land to settlers in 160-acre tracts. The Act, however, was substantially a failure.[18] By 1900, support of "adequate national legislation to reclaim the arid lands" was part of the Republican Party's national platform. When Teddy Roosevelt became President, the reclamation forces had the final factor needed to implement their ideas. On June 17, 1902, the first reclamation act was passed and reclamation law was born.[19]

THE RECLAMATION ACT OF 1902

The reason for placing acreage limitations in the 1902 Act,[20] as well as acts which followed, was to prevent speculation at public expense and to make land available to as many people as possible. Congressional history of the acreage limitation provision is so strong that arguably the primary purpose of reclamation law was to provide land and an economic base for people, with irrigation as merely a secondary goal.

Francis G. Newlands, the author of the 1902 Reclamation Act, described its purpose as follows:

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14. Act of June 3, 1878, 20 Stat. 89 (repealed by Act of August 1, 1955, ch. 448, 69 Stat. 434).
15. Sax, *supra* note 2, at 115-16.
16. *Id.* at 119.
17. 43 U.S.C. § 641 (1970).
18. Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464 (1960).
19. Sax, *supra* note 2, at 121.
20. Act of June 17, 1902, 32 Stat. 388.

> 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 the 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, to give to each man only the amount of land that will be necessary for the support of the family. . . .[21]

Representative Martin from South Dakota, one of the sponsors of the 1902 Act, described it as being "drawn exclusively for the protection of the settler and actual homebuilder, and every possible safeguard is made against speculative ownership and the concentration of the lands or water privileges into larger holdings."[22]

In 1958, the United States Supreme Court was faced with the question of whether the acreage limitation and residency requirement were to be construed as interfering with California state law in violation of section 8 of the 1902 Act,[23] which provided that the Act is not to be construed as interfering with state laws "relating to the control, appropriation, use or distribution of water used in irrigation. . . ."[24] The Court held that the acreage limitation provision was not an unconstitutional denial of due process and equal protection, and that Congress could condition use of federal funds, works, and projects on compliance with reasonable requirements. In discussing the congressional policy of acreage limitation, the Court stated:

> From the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. . . .
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> The project was designed to benefit people, not land. It is a reasonable classification to limit the amount of project water available to each individual. . . .[25]

Despite the efforts of the framers of the 1902 Act, the acreage limitation provision did not suffice to prevent speculation and monopoly at public expense for at least two reasons. First, owners of large tracts of land were holding much of their excess land out of production, speculating that its value would rise as land became scarce. This delayed the use of land for production, which in turn delayed repayment of construction costs. Secondly, land sales often

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21. 35 CONG. REC. 6734 (1902).
22. *Id.* at 6758.
23. 43 U.S.C. § 383 (1970).
24. *Id.*
25. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 292, 297 (1958).

resulted in huge profits because the market value included the prospective value of water on the land. In other words, the owners capitalized on a federal subsidy at the expense of incoming settlers, whom the law was primarily intended to benefit.[26]

Congress passed the Warren Act[27] in 1911, which gave the Secretary of Interior authority to contract for delivery of water from government projects to corporations, companies, or irrigation districts in order that they could in turn deliver water to tracts of land not exceeding 160 acres.[28] The Warren Act was intended to resolve the question whether the Secretary had authority to make such contracts; it was not an attempt to plug loopholes in the 1902 Act.

The 1914 Reclamation Extension Act

The Reclamation Extension Act of 1914[29] gave the Secretary of the Interior authority to require certain parcels of land to be cultivated within three or five years, under penalty of cancellation of water rights. It also authorized the Secretary to impose an annual 5 per cent increase in construction charges for land held out of cultivation. These provisions were aimed at the large landholder who kept excess land out of production for speculative purposes.

The Act of 1914 required that "before any contract is let or work begun for the construction of any reclamation project" the Secretary shall require excess landowners to "agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family."[30] The sale price of excess land was not to exceed the price designated by the Secretary, and the penalty for refusal to comply was exclusion of the owner's land from the project. The attempted solution to the profiteering problem, therefore, was to require a pre-construction agreement to dispose of excess land at a limited price.

The House Committee on Irrigation and Reclamation described the purpose of section 12 of the 1914 Act as follows:

> Before the Secretary of Interior shall hereafter undertake any new project he shall require the owner of private lands thereunder to dispose of all his lands in excess of the area deemed sufficient to support a family, upon such terms and at such price as the Secretary of the Interior may designate. If this provision shall be adopted speculation in lands under reclamation projects will be reduced to a minimum, and the burdens of the real farmer who undertakes to reclaim and cultivate the lands, and for

26. Sax, *supra* note 2, at 211.
27. 43 U.S.C. §§ 523-25 (1970).
28. *Id.*
29. Act of August 13, 1914, 38 Stat. 689.
30. *Id.* at § 12, 43 U.S.C. § 418 (1970).

> whose benefit the reclamation law was enacted primarily, can be kept normal.[31]

As recently as 1961, a Department of Interior Solicitor's opinion reiterated that the pre-construction requirement of section 12 was "designed specifically to cope with the special problem of initially breaking up holdings and of preventing the owners from capitalizing on the benefits of Federal construction. . . ."[32]

The Public Land Law Review Commission found that "it never proved easy to outguess the speculator,"[33] which certainly proved true in the case of the Reclamation Extension Act.[34] The first loophole used by speculators to circumvent the intent of reclamation law was sale to a middleman at a price designated by reclamation officials. The middleman was then free to sell the land at the full speculative price, which included the prospect of water on the land.[35] A second loophole appeared in section 11 of the Reclamation Extension Act of 1914,[36] which authorized the Secretary, prior to the issuance of public notice on any project, to "furnish water to any entryman or private landowner there-under until such notice is given" on a rental basis. The effect was to permit indefinite postponement of the public notice provided for the Act.[37] Because the deeds and contracts for disposal of excess lands did not require sale of the land until after public notice was issued, the time for disposal was also postponed. Landowners were allowed to receive water on all their lands, excess and non-excess, on a rental basis before public notice was given. In the case of several projects, repayment contracts were negotiated with irrigation districts under subsequent legislation, and no public notice was ever issued.[38]

THE FACT FINDERS' COMMITTEE AND ACREAGE LIMITATION

A committee of special advisors known as the Fact Finders' Committee was appointed in 1923 by the Secretary of the Interior to study all aspects of federal reclamation. In a comprehensive report, the committee explained the effect of speculation on reclamation projects, and concluded that "[t]he benefits of the reclama-

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31. H.R. REP. No. 505, 63d Cong., 2d Sess. 2 (1914).
32. *Proposed Repayment Contracts—Kings and Kern River Projects*, M-36634 (1961), *reprinted in*, 68 Interior Dec. 371, 390 (1961) (Opinion of Solicitor Barry) [hereinafter cited as Opinion of Solicitor Barry].
33. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 672 (1968).
34. Act of August 13, 1914, 38 Stat. 689.
35. DEP'T OF INTERIOR, LANDOWNERSHIP SURVEY ON FEDERAL RECLAMATION PROJECTS 42 [hereinafter cited as LANDOWNERSHIP SURVEY]; *see also* Sax, *supra* note 2, at 212.
36. 43 U.S.C. § 419 (1970). The statute calls for public notice of "lands irrigable under such project, and limit of area per entry . . . also of the charges which shall be made per acre . . . and the number of annual installments. . . ." *See also* authorities cited in note 35, *supra*.
37. Note 35 *supra*, at 44.
38. *Id.*

tion act . . . went in such cases almost entirely to these speculative owners, and an obligation of paying interest on inflated land prices was imposed upon the settler, in addition to his other burdens."[39]

The Fact Finders' Report stated elsewhere that "making a homestead, a place able to support a family and desirable for family life, must remain the central thought of every activity connected with federal reclamation," and made the following recommendation concerning excess land:

> *Disposition of private lands in excess of farm unit.*— That *no reclamation project should hereafter be authorized until* all privately owned land in excess of a single homestead unit for each owner shall have been acquired by the United States or *by contract placed under control of the Bureau of Reclamation* for subdivision and sale to settlers at a price approved by the Secretary. *This price to be considered in determining* what land and water will cost settlers and hence *the feasibility of the project* under the payment conditions of the law.[40]

It was the obvious intent of the Fact Finders' Committee that pre-construction agreement to dispose of excess land be required in order to determine the feasibility of a particular reclamation project. In other words, the Bureau could discover, before construction began, how many landowners would be willing to comply with the 160-acre limitation in exchange for project water. As will be shown, the Bureau of Reclamation no longer considers this in determining a project's feasibility.

THE OMNIBUS ADJUSTMENT ACT OF 1926: ANOTHER ATTEMPT AT LOOPHOLE-PLUGGING

Some provisions of the Interior Department Appropriation Acts for 1926 and 1927[41] applied anti-speculation controls to several specified projects, but it was not until the enactment of the Omnibus Adjustment Act of 1926 that another acreage limitation provision of general application was included.[42] Section 46 was added to the Act by amendment; no significant comment appears in the Congressional Record regarding its intended meaning.[43] It pro-

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

40. *Id.* at 116.

41. 43 Stat. ch. 462, at 1167-70 (1925); 44 Stat. ch. 277, at 482 (1926).

42. *See* LANDOWNERSHIP SURVEY, *supra* note 35, at 45.

43. The Senate Committee on Reclamation and Irrigation changed the first sentence of section 46 from "[n]o part of any sum hereafter appropriated for any new project or new division of a project shall be expended for construction purposes" to its present wording. This is an indication that the legislature expressly ruled out a pre-construction requirement for the signing of repayment contracts, which the first sentence refers to, but is no proof that a pre-construction requirement for the signing of recordable contracts to dispose of the land was also expressly ruled out. It is important to keep in mind the distinction between the repayment contract and the recordable contract agreeing to dispose of excess lands when studying the history of these statutes, and in reading section 46 of the 1926 Act. *See* S. REP. No. 831, 69th Cong., 1st Sess. 3 (1926).

As this article was going to print, Federal District Judge Fred J. Nichol,

vides in relevant part that "[n]o water shall be delivered . . . until a contract or contracts . . . shall have been made with an irrigation district . . . organized under State law providing for payment by the district . . . of the cost of constructing, operating, and maintaining the works during the time they are in the control of the United States. . . ."[44] The portion of section 46 dealing with acreage limitation reads as follows:

> Such contract or contracts with irrigation districts 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 Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal *without reference to the proposed construction of the irrigation works*; and that no such excess lands so held shall receive water from any project or division *if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands* under terms and conditions satisfactory to the Secretary of Interior and at prices not to exceed those fixed by the Secretary of Interior; . . .[45]

Other provisions provide that until half the construction charges are paid, no sale of excess lands carries the right to receive water unless the Secretary approves the price. The Secretary is authorized to cancel water rights upon proof of fraudulent representation of the true consideration in a sale of excess lands.[46] Both measures are aimed at the tactic of conveyance to a middleman to avoid the acreage limitation.

The parties to a typical recordable contract are the excess land owner and the United States.[47] The agreement provides for an appraisal of the land, which will serve as the basis for its sale price. Appraisal is left to the Secretary, unless the landowner chooses the alternative of using three appraisers—one designated by the United States, one designated by the irrigation district in which the land lies, and one designated by both of them or by a local court. The land is appraised at its fair market value, excluding the value of existing or prospective availability of water from the project.[48] The landowner must agree that the land will be sold at its appraised value plus the value of crops and improvements.[49] The land may be reappraised at any time prior to sale. Cost of the first two

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in United Family Farmers, Inc. v. Kleppe, Civil No. 74-3016 (D.S.D., filed Apr. 22, 1974), granted a motion for summary judgment and held that section 46 of the Act of 1926 pre-empted the pre-construction requirement contained in the 1914 Act. Time and space preclude an examination of this opinion at any length.

44. 43 U.S.C. § 423(e) (1970).
45. *Id.* (emphasis added).
46. *Id.*
47. Sax, *supra* note 2, at 231.
48. *Id.*
49. *Id.*

appraisals is to be paid by the United States; the cost of further appraisals is borne by the party requesting them.[50] After the expiration of 10 years from the date of the recordable contract's execution, the Secretary of the Interior is given a power of attorney to sell the excess land at not less than the appraised value for cash or on other terms satisfactory to the landowner.[51]

Administrative Interpretation of the Act

The Bureau of Reclamation has interpreted section 46 as preempting prior statutes on acreage limitation. It is the Bureau's policy to require recordable contracts to dispose of excess lands before water is delivered, but not necessarily before construction of a project begins. In recent congressional hearings, Senator Nelson of Wisconsin asked an Interior Department spokesman, "[w]hy . . . not insist that the contracts be signed before we launch into a $150 million project?"[52] Assistant Commissioner of Reclamation G.G. Stamm replied, "[t]he law does not require it," but he also acknowledged that the law "does not prohibit it."[53] The Commissioner of Reclamation has told Congress that it is not his intention to require recordable contracts prior to construction.[54]

It is also Bureau policy to give the Secretary of the Interior discretion to declare land purchased subsequent to the execution of a recordable contract, but prior to the date of initial water delivery, to be eligible in the hands of purchasers for the execution of a recordable contract.[55] The effect of this policy is to allow a landowner to purchase more excess land after signing a recordable contract before water is actually delivered; water can be received for up to 10 years on such land before its disposal will be required.[56] Noted water law expert Joseph Sax commented on this policy as follows:

> This is certainly a dubious decision. Since the rule permitting excess land to receive project water at all is merely an accommodation to pre-existing ownership, giving the owners a reasonable time to dispose of land, and since the general purpose of the law is to serve nonexcess lands, it would seem most anomalous to promulgate a rule making it profitable to acquire excess lands between the date of signing the contract and the date of water delivery.[57]

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50. *Id.*
51. *Id.*; The Oahe Irrigation Project's recordable contracts require disposal within five years on a graduated scale.
52. Taylor, *Excess Land Law: Calculated Circumvention*, 52 CALIF. L. REV. 978, 999 (1964) [hereinafter cited as Taylor].
53. *Id.*
54. 110 CONG. REC. 18090 (1964).
55. *Westlands Water Dist. Contract Central Valley Project California—Excess Land Limitations*, M-36666 (1965), *reprinted in*, 72 Interior Dec. 245 (1965) (Opinion of Solicitor Weinberg).
56. *Id.*
57. Sax, *supra* note 2, at 230.

Weaknesses of the 1926 Act, As Applied by the Bureau of Reclamation

One of the major drawbacks of the current application of the 1926 Act is that the trade-off for the landowners' agreement to rid themselves of the excess land at some later date is delivery of water to the excess until the land must be sold, usually 10 years later. In other words, the "leverage" used to force sale of excess lands is delivery of project water to the excess—the very evil that reclamation law is aimed at preventing![58] Examination of this result in light of the strong history of congressional intent behind reclamation law highlights the absurdity of this situation. Another problem is the lack of any absolute requirement that excess land be sold; the owners merely must agree to sell if they want to receive water. This allows them to refrain from using water until one-half of the construction costs are repaid—at which time the price controls no longer apply, according to current interpretation.[59] The landowner who has retained excess lands without receiving water can then sell at full market value, including the value of water on the land, and make a large profit. Finally, a reclamation project often replenishes the water table in the area, and allows those excess landowners who did not take water directly from the project to pump water onto their excess lands. The Bureau does not treat this practice as receipt of project water.[60]

Another weakness of present policy on acreage limitation is that it encourages laxity in enforcement. By allowing the project to be substantially built before requiring contracts to dispose of excess lands, the Bureau makes it less likely that water will be terminated to excess landholders, because to do so would cut off the source of revenue needed to pay for the project. In addition, ascertainment of pre-project costs is made much more difficult. First, many years may elapse between undertaking construction of a project and the time when the recordable contract for sale of excess lands must be executed. The result may be as many as 15 to 20 years in which speculation is not restricted.[61] Even after the recordable contract is entered into, there can be another 10-year period before the excess land must be sold.[62] The result is that as much as a quarter of a century may pass between the time a project is begun and the time when excess land must be sold. This is, in effect, a huge subsidy of large landholders by federal taxpayers at the expense of the landless people who were the intended beneficiaries of reclamation law.

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58. *Id.* at 213.
59. *Id.* at 214.
60. *Id.* at 233.
61. It is estimated that the Oahe Irrigation Project will take twenty years to complete.
62. *See* note 51 *supra.*

AVOIDANCE OF THE ACREAGE LIMITATION

The Westlands Project—A Current Example

The Westlands Irrigation Project in the San Joaquin Valley in California is an example of how far reclamation policy has been detoured from its founding principles. Westlands, a 572,072-acre irrigation district formed in 1952, is the largest in the nation, with the costliest contract to provide water in the history of the country.[63] Although more than 100,000 acres have been sold in the first decade of the project's existence, only two owner-operated farms of 160 acres or less have resulted.[64] Title to one large tract of land passed through a dozen hands and a friendly foreclosure, all with the consent of the Bureau of Reclamation, before returning to the original excess landowner.[65] Local land appraisers have stated that without the reclamation project the land would be worth no more than 100 to 200 dollars per acre, whereas the actual present value, including water, is approximately 1500 dollars per acre. The Bureau allows it to be sold for 500 to 600 dollars per acre, in direct contravention of the express requirement that excess lands be sold at "dry land" value.[66]

Scores of would-be farmers, weary of the pressures of city living and hard economic times, have petitioned without success for farm properties supposedly made available by the acreage limitations.[67] No formal rules have been promulgated to assist potential buyers. The executive director of an organization formed to assist poor people has spent three unsuccessful years trying to find farmland in the Westlands District for low-income families, despite available financial assistance for such families.[68]

Avoidance Techniques and Some Proposed Solutions

Acreage limitation has been under attack virtually since its inception, when large landowners tried to persuade the 1905 National Irrigation Congress that the policy was a mistake. One avoidance technique was to exempt particular reclamation projects, one by one. This was accomplished on the Colorado Big Thompson project, and an attempt was made on the Central Valley project, but the effort was abandoned after public attention was called to the attempt.[69] The abortive attempt to exempt the Central Valley project from acreage limitation was followed by the tactic of turning the project over to the State of California, but this proved

63. San Francisco Examiner & Chronicle, Jan. 11, 1976, at 1, col. 1.
64. *Id.* at 1, col. 2, 22, col. 1.
65. *Id.* at 22, col. 4.
66. *Id.*
67. *Id.* at 23, cols. 3-4.
68. *Id.*
69. Taylor, *The Battle for Acreage Limitation*, in P. BARNES, THE PEOPLE'S LAND: A READER ON LAND REFORM IN THE UNITED STATES 114 (1975).

extremely costly and also ran into the disapproval of Secretary of Interior Ickes.[70]

More successful avoidance techniques have included piece-meal exemption of smaller reclamation projects, such as the Owl Creek and the San Luis projects,[71] and removal of the acreage limitation on all projects financed with less than $5 million of federal money.[72] Also, a 1956 amendment to section 46 of the 1926 Act allows land acquired by mortgage, foreclosure, inheritance or devise to receive water for five years.

Two reclamation law authorities have stated that at least a partial solution to the ineffective present policy is to require recordable contracts to be executed earlier than is currently required. Joseph Sax stated that "[a] partial solution is for the Bureau of Reclamation to require the bulk of excess-land owners in a proposed project area to sign recordable contracts before the Bureau institutes construction."[73] Paul S. Taylor, who has been a consistent critic of current reclamation policy, stated that "[t]here can be little doubt that a prompt demand for contracts would remove the possibility that the Secretary will allow violations of the excess land law."[74] With this in mind, there follows an examination of canons of statutory construction and the suggestion that the pre-construction requirement of the 1914 Act can and should be read in a way which complements rather than contradicts section 46 of the 1926 Omnibus Adjustment Act.

A Complementary Reading of the Statutes in Light of the Canons of Construction

Principles of Statutory Construction

Because there is no explicit repeal of section 12 of the 1914 Act, the Bureau of Reclamation has based its failure to require a pre-construction agreement to dispose of excess lands on the doctrine of repeal by implication. The authorities are unanimous in declaring the presumption against repeal by implication, and in upholding the principle that, absent direct repeal, statutes must be construed together if at all possible.

The United States Supreme Court has held that "[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible."[75] The Court also described the rules regarding implied repeal as follows:

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70. *Id.* at 116.
71. *Id.* at 115.
72. *Id.*
73. Sax, *supra* note 2, at 234-35.
74. Taylor, *supra* note 52, at 998.
75. United States v. Borden Co., 308 U.S. 188, 198 (1939).

> First, that effect shall be given to all the words of the statute, where this is possible without a conflict; and Second, that, as regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted.[76]

Sutherland summarizes the doctrine as follows:

> The legislature is presumed to intend to achieve a consistent body of law. In accord with this principle subsequent legislation is not presumed to effectuate a repeal of the existing law in the absence of that expressed intent, and conversely, where a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication . . . is readily found in the terms of a later enactment. It is the necessary effect of the later enactment construed in the light of the existing law, regardless of whether such an effect is actually contemplated by the legislature or is wholly foreseen, that ultimately determines an implied repeal.[77]

A case recently decided in the Fourth Circuit has several issues in common with the subject of this comment. *Izaak Walton League v. Butz*[78] involved a challenge of Forest Service practices allowing clear-cutting of timber in Monongahela National Forest. The challengers argued that the Organic Act of 1897[79] forbade clear-cutting of national forests, and the Forest Service contended that the 1897 Act had been repealed by implication by a 1960 act. The court examined the legislative history of the 1897 Act and determined that the primary concern of Congress was the preservation of national forests. It also stated the general rule that repeals by implication are not favored, and quoted the United States Supreme Court for the proposition that, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."[80] The court of appeals held the Organic Act of 1897 to be in full force and effect, despite lack of enforcement for many years, and ruled the clear-cutting practice unlawful.

To analogize this case to reclamation law, it was clearly Congress' primary purpose in creating reclamation law that land be supplied to as many people as possible, and that speculation and monopolization of the land should be held to a minimum. The

76. Wilmot v. Mudge, 103 U.S. 217, 221 (1881).
77. 1A SUTHERLAND, STATUTORY CONSTRUCTION 223 (4th ed. 1972).
78. 522 F.2d 945 (4th Cir. 1975).
79. 16 U.S.C. §§ 475-82 (1970).
80. Morton v. Mancari, 417 U.S. 535, 550 (1974).

legislative history of the Reclamation Act of 1902[81] and the subsequent acts is at least as strong as that of the Organic Act of 1897.[82] The revival of old statutes which have not been enforced for many years, which was done in the Fourth Circuit, has precedent in the revival of the Civil Rights Act of 1866 in *Jones v. Mayer Co.*[83] and the revival of the 1899 Refuse Act (Rivers and Harbors Act)[84] in cases such as *Zabel v. Tabb*[85] and *United States v. Stoeco Homes.*[86]

A Complementary Construction of the Statutes in Light of these Principles

There is a reasonable, complementary construction of section 12 of the 1914 Act and section 46 of the 1926 Act which would fulfill the explicit original policy of reclamation law to prevent speculation and monopolization of the land. The enforcement technique provided for in section 46 of the 1926 Act prevents the irrigation district from ignoring the statutory requirements of the 1914 Act and adds more teeth to that Act, but was not intended to replace it. Before project construction is begun, all excess lands must be placed under recordable contract. The Bureau of Reclamation will then have an estimate of the number of excess landowners willing to take part in the project before construction is begun, in order to determine its feasibility. Determination of the "dry land" value of the excess land is also made much simpler by this process. When construction is completed, the project is turned over to the irrigation district for management and retirement of the debt, and the recordable contract is brought forward to the user districts. Section 46 of the 1926 Act then comes into play to keep the irrigation districts from delivering water to landowners who fail to comply with acreage limitation provisions. Strong support for this interpretation is supplied by the fact that the recordable contracts now in use by the Bureau are between the landowner and the United States, rather than between the landowner and the irrigation district, as would the case if section 46 of the 1926 Act was intended to be applied by itself, without the support of section 12 of the Reclamation Extension Act of 1914.[87]

The main defects in the 1914 Act were allowing sale of excess lands to middlemen, and ineffective enforcement *after* delivery of water. Section 46 of the 1926 Act attempted to stop the device of middlemen by providing that until one-half the construction costs are paid, sale of the land does not carry with it the right to receive water until the purchase price is approved by the Secre-

81. Act of June 17, 1902, 32 Stat. 388.
82. 16 U.S.C. §§ 475-82 (1970).
83. 392 U.S. 409 (1968).
84. 33 U.S.C. §§ 401-13 (1970).
85. 430 F.2d 199 (5th Cir. 1970).
86. 498 F.2d 597 (3d Cir. 1974).
87. 43 U.S.C. § 418 (1970).

tary of the Interior. The problem of ineffective enforcement after water delivery was attacked by compelling the water user associations, through the requirement of a contract, to refuse delivery to lands not under recordable contract. A 1961 Solicitor's opinion described section 46 of the 1926 Act as having been "deliberately enacted by the Congress in further pursuance of its policy designed to secure the break-up of pre-existing excess holdings benefitting from the expenditure of federal funds and to prevent the owners of such holdings from reaping an unearned profit . . . ."[88] The opinion also observes, "that the genesis of Section 46 is to be found in section 12 of the 1914 Act."[89]

A 1946 report by the Department of the Interior indirectly lends support to the suggested interpretation of the statutes. The report assumes that section 12 of the 1914 Act is no longer in effect, and admits that a problem arises because of this fact.

> A further result of the abandonment of the system of direct dealing between the project officials and the individual water user was that the machinery for bringing to light violations of the excess-land restriction resulting from land transfers and the machinery for enforcing these restrictions were not fully effective.[90]

In other words, application of only the acreage limitation provision of the Omnibus Adjustment Act decreased the effectiveness of the enforcement machinery for acreage limitation.

The report also states that the Omnibus Adjustment Act of 1926 adopted the recommendations of the Fact Finders' Committee for all new projects.[91] As previously stated, the recommendation of the Fact Finders' Committee regarding excess land restriction was that "no reclamation project should hereafter be authorized until all . . . land in excess . . . shall have been acquired by the United States or by contract placed under control of the Bureau of Reclamation . . . ."[92] If the 1926 Act is applied in isolation, the recommendation of the Fact Finders' Committee is not carried out, whereas application of the 1914 Act and the 1926 Act together comes much closer to the intent of the Committee. If the Omnibus Adjustment Act of 1926 was intended to adopt the recommendations of the Fact Finders' Committee for all new projects, as the report states,[93] it would appear that the authors of that Act intended section 12 of the 1914 Act to remain in force.

The same reasoning applies to the recommendation of the Fact Finders that the price approved by the Secretary of the Interior

88. Opinion of Solicitor Barry, *supra* note 32, at 394.
89. *Id.*
90. *See* note 35 *supra.*
91. *Id.*
92. *See* note 39 *supra.*
93. *See* note 36 *supra.*

for the sale of excess lands shall "be considered in determining what land and water will cost settlers and hence the feasibility of the project under the payment conditions of the law."[94] The 1926 Act by itself does not allow consideration of the sale price in determining the feasibility of a particular project, because the recordable contract need not be signed until the project is already constructed and water ready to be delivered. By that time it will be too late.

Additional support is given for the continued validity of section 12 of the 1914 Act by the fact that the three-volume set of *Federal Reclamation and Related Laws Annotated*,[95] published by the Department of the Interior, contains 10 pages of annotations following section 46 of the 1926 Act, none of which contains an express statement that section 12 of the 1914 Act has been repealed. Two solicitors' opinions make the general statement that "[t]he provisions of reclamation law of general application dealing with land limitations include section 5 of the 1902 Act, sections 1 and 2 of the Warren Act, section 3 of the 1912 Act, section 12 of the 1914 Act, and section 46 of the 1926 Act."[96]

The United States Supreme Court made the following statement in 1912:

> Much of our national legislation is embodied in codes . . . each dealing in a comprehensive way with some general subject . . . and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.[97]

A 1945 Solicitor's opinion cited this statement and added that "Congress has followed precisely this type of legislative policy in enacting the Federal reclamation law."[98] The current administrative policy of the Bureau of Reclamation leaves an important chink in the armor of federal reclamation law which violates every express intent of its framers.

It would be foolish to believe that application of section 12 of the 1914 Act would end speculation and monopolization. The speculator has proved to be a tough character to eliminate from reclamation projects, and part of the problem lies not in the interpretation of statutes now in effect, but rather in the administration of those statutes. The construction just proposed will not improve adminis-

94. *See* note 39 *supra*.
95. DEP'T OF THE INTERIOR, FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED (R. Pelz ed. 1972).
96. Opinion of Solicitor Barry, *supra* note 32; *Applicability of the Excess Land Provisions of the Federal Reclamation Law to the Boulder Canyon Project Act*, M-33902 (May 31, 1945) (unpublished opinion of the Solicitor of the Dep't of the Interior).
97. United States v. Barnes, 222 U.S. 513, 520 (1912).
98. *See* note 96 *supra*.

tration, but will remove discretion from the administrators. With this in mind, there follows a brief look at some major proposals for reform of reclamation law.

CURRENT PROPOSALS FOR REFORM OF RECLAMATION LAW

Elimination of the 160-acre Requirement

The National Water Commission has proposed the abolition of the 160-acre limitation in future reclamation projects, provided that direct project beneficiaries pay the full costs allocated to irrigation.[99] They have also recommended that, on existing projects, exemptions from acreage limitation be granted to irrigation districts and landowners who pay the balance due on their repayment obligations.[100] It is argued that acreage limitation has been so weakened by exemptions and loopholes that emphasis should be placed on making the projects self-supporting, which has never occurred. Other critics argue that acreage limitation is an outdated concept, and that modern "land reformers" believe in an Agrarian Myth which romanticizes the farmer sitting in his rocking chair on his front porch smoking a pipe.[101] The structure and effect of monopolized land ownership in the United States is outside the scope of this comment, but it can be argued that the various "land reform" groups have made a very strong case for reform; the Westlands Project is just one example of abuses of the present system.[102]

Proposals for Reform

Four proposals are currently under discussion for reforming reclamation law to achieve its framers' intent to favor the family farmer. First is a bill introduced by Representative Kastenmeier of Wisconsin, which would create a Reclamation Lands Authority to purchase excess lands at market prices prevailing before a Bureau of Reclamation project is initiated. The land would sell at post-project market prices, with profits applied to an "education, conservation and economic opportunity fund." The House of Representatives has not held hearings on the bill although it has been introduced in three sessions of Congress.

Second is the so-called "Californians Bill" sponsored by Senators Cranston and Tunney and Representatives Sisk and Krebs, all from California. The bill would establish a $50 million fund for the Interior Department to purchase and subdivide excess lands into "economic, agriculturally viable farms" on a family farm scale,

99. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 149 (1973).
100. *Id.*
101. Magida, *Agriculture Report/Role of Family Farmer Figures in Reclamation Debate*, NATIONAL JOURNAL, November 8, 1975, at 1549.
102. *See* note 69 *supra.*

and sell them to qualified farmers. Purchasers could borrow as much as $150,000 from the Department of Agriculture for up to 160 acres (or $300,000 for two members of the same family to buy 320 acres). The loan would be repaid over a 40-year period at five per cent interest, with payments on the loan deferred until the land is ready to produce crops.

A third proposal is embodied in the Family Farm Antitrust Act of 1975, sponsored by Senators Abourezk of South Dakota and Nelson of Wisconsin. This bill extends the provisions of the Clayton Antitrust Act[103] to agriculture. It is currently aimed at breaking up farmland monopoly and restoring competition to the agriculture market. It would be relatively easy to expand the bill to include an acreage limitation on land receiving federal reclamation water.[104]

A fourth possible method of reform is to petition for hearings to promulgate regulations for administration of reclamation statutes regarding acreage limitation, which has never been done by the Bureau of Reclamation despite requirements of the Administrative Procedure Act.[105] On November 17, 1975, National Land for People, a California-based, non-profit corporation, filed a petition for rulemaking with the Bureau of Reclamation, requesting that the Department of the Interior and the Bureau formulate rules and regulations establishing criteria and procedures for the approval of excess land sales under the Reclamation Act of 1902 and Acts supplementary thereto, and calling for public hearings on the matter. There has been no response from the Bureau of Reclamation to the petition, and the group contemplates a lawsuit.

CONCLUSION

Administrative practice and policy on acreage limitation has not achieved the high ideals of its originators and, as a result, the speculator and monopolizer have dominated reclamation projects throughout their 74-year history. Former Secretary of Interior Stewart Udall stated that "both Congress and the Executive Branch have on occasion exhibited a degree of concern for the excess-land owner which may be difficult to reconcile with the policies embraced by the excess land laws."[106] Perhaps this was inevitable, given the nature of large bureaucracies. Every bureaucracy needs a constituency to survive; the Bureau of Reclamation has found its constituency among private landowners on whose land reclamation projects were developed. To maintain the Bureau's growth

103. 15 U.S.C. §§ 12-27 (1970).
104. *See* Abourezk, *Agriculture, Antitrust and Agribusiness: A Proposal for Federal Action*, 20 S.D.L. REV. 499 (1975).
105. 5 U.S.C. § 552(a) (1970).
106. Letter from Secretary Stewart Udall to Sen. Henry Jackson, June 30, 1964, in Taylor, *supra* note 52, at 990.

and constituency, especially after passage of the 1926 Act, it became necessary to choose between tough enforcement of the acreage limitation and keeping its constituents happy.

The construction of section 12 of the 1914 Act and section 46 of the 1926 Act here suggested is reasonable in light of canons of statutory construction and the history of acreage limitation on reclamation projects. Although it is not a panacea for the maldistribution of land ownership in this country, the suggested construction is an improvement over present Bureau of Reclamation policy. It will at least allow the Bureau less discretion, which in turn will free it from some of the political pressure involved in the administration of reclamation law.

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