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Excess Land Law on the Kern?

A STUDY OF LAW AND ADMINISTRATION OF PUBLIC PRINCIPLE vs. PRIVATE INTEREST

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Property is vigilant, active, sleepless; if ever it seems to slumber, be sure that one eye is open.—William Ewart Gladstone, 1891.[1]

No principle commands more ready acceptance than that special interest should yield to the general good. Yet, to declare the principle of public good in a statute is one thing; to administer it effectively is quite another. Causes of failure to realize principle may be many. Among them are unskillful bill drafting, unsound administrative structure, and unbalanced pressures upon administrators. The pressure for relaxation from those placed under limitation by a statute is not matched in strength and persistence by the efforts of adherents to principle and those potentially benefiting from its enforcement. The public is short of memory and, except on rare occasions of great stress, its common interests appear to be weak and diffused. Ownership of property encourages memory and providence, and its concentration invites use of power to serve its interests.

These factors are present on the Kern River in California. Some of them produced concentration of landownership there long ago.[2] The question whether they will also produce failure of the excess land law, or 160-acre water limitation,[3] is still in the balance.

The excess land law is a provision of national reclamation law written as a declaration and instrument of public policy by Congress in 1902, at the instigation of President Theodore Roosevelt.[4] No individual private

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[1] 3 MORLEY, LIFE OF WILLIAM EWART GLADSTONE 469 (1903).

[2] This implies no reflection on present owners of large land holdings, nor is any intended.

[3] 32 STAT. 390 (1902), 43 U.S.C. § 372 (1952), 44 STAT. 649–50 (1926), 43 U.S.C. § 423(e) (1952).

[4] See remarks of Congressman Francis G. Newlands of Nevada, 35 CONG. REC. 6674 (1902).

landowner may receive more water from a federal reclamation project than an amount sufficient to irrigate 160 acres. This is not a restraint on ownership of land, for no one is required to subject himself to its provisions unless willing to do so to obtain publicly-developed water. The restraint lies upon the individual, who is limited to an equitable share of water in the interest of spreading opportunity to others. "The bill is drawn exclusively," said Congressman Eben W. Martin of South Dakota, "for the protection of the settler and actual home builder, and every possible safeguard is made against speculative ownership and the concentration of the lands or water privileges into large holdings . . . ."[5] "This provision," said Congressman Frank W. Mondell of Wyoming, in answer to eastern charges that federal reclamation of the west would hand over its waters to a few, "was drawn with a view of breaking up any large land holdings which might exist in the vicinity of the Government works and to insure occupancy by the owner of the land reclaimed."[6]

Congress applied reclamation law, including the excess land provision, to flood control projects including Kern River, in 1944.[7] However, the executive branch of the federal government has failed to insist on enforcement. It has permitted the Army Engineers—sympathetic to the views of excess landowners there and unsympathetic to those of other local persons who favor reclamation law—to delay, deny, and obstruct. This paper is a commentary on administration of land and water law on the Kern,[8] important as a case study of national significance—especially in the Missouri Valley and eastward to Florida.

I

LAND

[The] land department has been very largely conducted to the advantage of speculation and monopoly, private and corporate, rather than in the public interest . . . . It seems that the prevailing idea running through this office and those subordinate to it was that the government had no distinctive rights to be considered and no special interest to protect . . . . I am satisfied that thousands of claims without foundation in law or equity, involving millions of acres of public land, have been annually passed to patent

[5] *Id.* at 6758.

[6] *Id.* at 6678.

[7] 58 STAT. 891 (1944), as amended, 43 U.S.C. § 390 (1952).

[8] Kern River flows into Tulare Lake Basin, its flood waters merging there with those of the Tule, Kaweah, and Kings Rivers; these rivers and basin are in the southern part of the Sacramento-San Joaquin Basin, known also as the Great Central Valley of California. Water, geography, economics, law, and administration are so closely interrelated throughout the area that while the focus of this paper is on the Kern, the treatment must frequently draw upon data and situations that reach beyond the lands that strictly bear that river's name.

upon the single proposition that nobody but the government had any adverse *interest.*—Commissioner William A. J. Sparks, 1885.[9]

The administration of the law, both in Washington and in the field, was frequently in the hands of persons unsympathetic to its principle, and Western interests, though lauding the [Homestead] act, were ever ready to pervert it.—Paul Wallace Gates, 1936.[10]

Public faith in a causal connection between widespread ownership of land and water and the maintenance of popular government has animated the main stream of legislation for disposal of the American public domain. This faith has been expressed countless times,[11] and combined with the land hunger of a numerous landless population, it has been politically effective in enacting notable legislation to diffuse landownership and protect against land and water monopoly. Its driving power produced the Pre-emption Act of 1841.[12] In 1860 it helped carry to power the Republican Party, which wrote the Homestead Law in 1862[13] and, after forty more years, the National Reclamation Law of 1902.[14]

Congress made exceptions to this policy at times—for example, in granting great tracts of public land to encourage railroad building by private

[9] ANNUAL REP. COMM'R GEN. LAND OFFICE 3-4 (1885) (emphasis in original).

[10] Gates, *The Homestead Law in an Incongruous Land System,* 41 AM. HIST. REV. 652, 655-56 (1936).

[11] Never more succinctly than by Daniel Webster in 1820 when he said, at the bicentennial of the landing of the pilgrims: "Our New England ancestors . . . were themselves, either from their original condition, or from the necessity of their common interest, nearly on a general level, in respect to property. Their situation demanded a parcelling out and division of the lands; and it may be said fairly, that this necessary act *fixed the future frame and form of their Government.* The character of their political institutions was determined by the fundamental laws respecting property . . . . The right of primogeniture . . . was . . . abolished . . . . The entailment of estates, long trusts, . . . were . . . seldom made use of. On the contrary, alienation of the land was every way facilitated . . . . The consequence of all these causes has been a great subdivision of the soil, and a great equality of condition; the true basis most certainly of popular government." Webster, *Discourse, Delivered at Plymouth, December 22, 1820. In Commemoration of the First Settlement in New England* 53-54 (3d ed. 1825). (Emphasis in original.) In 1776 Thomas Jefferson had persuaded the Virginia Legislature to abolish entailed estates. He said: "In the earlier times of the colony, when lands were to be had for little or nothing, some provident individuals procured large grants . . . desirous of founding great families for themselves . . . . To annul this privilege, and instead of an aristocracy of wealth, more harm and danger, than benefit, to society, to make an opening for the aristocracy of virtue and talent, which nature has wisely provided for the direction of the interests of Society, and scattered with equal hand through all its conditions, was deemed essential to a well-ordered republic." Foley, The Jefferson Cyclopedia, 307 (1900) citing *Autobiography,* in I WRITINGS OF THOMAS JEFFERSON 36 (1821).

[12] Act of Sept. 4, 1841, c. 16, 5 STAT. 453 (codified in scattered sections of 43 U.S.C.).

[13] Act of May 20, 1862, c. 75, 12 STAT. 392 (codified in scattered sections of 43 U.S.C.).

[14] Act of June 17, 1902, c. 1093, 32 STAT. 388 (codified and amended in scattered sections of 43 U.S.C.); see also the Puerto Rican 500-acre limitation enacted by Congress in 1900, 31 STAT. 715 (1900), 48 U.S.C. § 752 (1952).

enterprise; but, in 1902, it reconsidered that method of disposing of land in large blocks and repudiated it as a deviation from principle not to be repeated, even to obtain construction of great irrigation works which could not otherwise be profitably constructed by private enterprise. The House Committee on Arid Lands recognized that disposition of large blocks of public lands to a single private interest would secure the construction of such irrigation works, but found this sacrifice of public policy too costly.[15]

Recent investigation has furnished fresh support for the view that the historic policy of wide distribution continues to foster sound community values. During the forties, when national policy was under attack in Congress, an intensive study was made comparing two communities based on large scale and family-size farm operations respectively. The results were impressive.[16] The former was highly stratified, the latter more balanced.[17] In the latter community local business, newspapers, and church, veteran, recreational and civic organizations were all more flourishing.[18] "The bearing on the American way of life, which is all-important to all of us who seek to see the virility of this Nation go on unimpaired, is at once apparent," wrote Senator James E. Murray in the foreword of the study.[19]

The excess land provision of reclamation law embodies this national policy by favoring more equally balanced rural communities. Its fate in a

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[15] House Committee on Irrigation of Arid Lands, *Report on Reclamation of Arid Lands*, H.R. REP. No. 1468, 57th Cong., 1st Sess. 3, ser. 4404 (1902): "If we were willing to abandon our time-honored policy of inviting and encouraging small individual landholdings, and were prepared to turn over all of the public lands under a large irrigation system to the control of a single individual or a corporation, we could undoubtedly secure the construction of extensive works which cannot be profitably constructed by private enterprise under present conditions, but no one contemplates paying so stupendous a price as this for irrigation development."

[16] Senate Special Committee to Study Problems of American Small Business, *Small Business and the Community, a Study in Central Valley of California on Effects of Scale of Farm Operations*, S. COMMITTEE PRINT No. 13, 79th Cong., 2d Sess. (1946); made pursuant to S. RES. 28, 79th Cong., 2d Sess. (1946).

[17] The family-size farm community had twice the proportion of business and professional and white collar workers, three times the proportion of farm operators, and less than half the proportion of agricultural laborers which, in the large-scale farm community, rose to two-thirds of the gainfully employed. Senate Special Committee to Study Problems of American Small Business, *Small Business and the Community, a Study in Central Valley of California on Effects of Scale of Farm Operations*, S. COMMITTEE PRINT No. 13, 79th Cong., 2d Sess. 43–45 (1946).

[18] "The small-farm community is a population of middle-class persons with a high degree of stability in income and tenure, and a strong economic and social interest in their community. Differences in wealth among them are not great, and the people generally associate together in those organizations which serve the community. Where farms are large, on the other hand, the population consists of relatively few persons with economic stability, and of large numbers whose only tie to the community is their uncertain and relatively low-income job. Differences in wealth are great among members of this community, and social contacts between them are rare." *Id.* at 6.

[19] Chairman of Senate Special Committee to study problems of small business. *Id.* at vili.

number of places, among them the Kern River, is currently in jeopardy from administrative quarters.[20]

The history of the administration of both land and water statutes disposing of public domain under pressure of large private interests furnishes disturbing omens of the outcome on the Kern River. In 1905 the Public Lands Commission advised Congress that:[21]

> [T]he land laws, decisions, and practices have become so complicated that the settler is at a marked disadvantage in comparison with the shrewd business man who aims to acquire large properties. Not infrequently their effect is to put a premium on perjury and dishonest methods in the acquisition of land.

Consequently, Commission inquiries revealed, "collusion or evasion" of the law was common practice in the acquisition of large estates, and speculators and corporations were acquiring a larger proportion of the public lands than actual settlers.[22]

This breakdown of public principle reported so regretfully and regularly to Congress probably was nowhere more conspicuous than in the Sacramento-San Joaquin Basin, including Kern River. Historian Paul Wallace Gates of Cornell University writes:[23]

> With great areas of land in the San Joaquin and Sacramento valleys open to cash purchase the opportunity for speculative profits was unparalleled elsewhere; nor was the opportunity neglected .... Greatest of all the speculators operating in California was William S. Chapman, whose political influence stretched from Sacramento to St. Paul, Minnesota, and Washington, D.C. Of him it was said, with apparent justice, that land officers, judges, local legislators, officials in the Department of the Interior, and even higher dignitaries, were ready and anxious to do him favors, frequently of no mean significance ....

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[20] Projects for Kings and Kern rivers were authorized under the Flood Control Act of 1944, and constructed by the Army Engineers. See Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1955) (present author's study of maladministration of reclamation law on Kings River).

[21] Public Lands Comm'n Second Partial Rep., *Message from the President*, S. Doc. No. 154, 58th Cong., 3d Sess. 13 (1905).

[22] "It is apparent, in consequence, that in very many localities, and perhaps in general, a larger proportion of the public land is passing into the hands of speculators and corporations than into those of actual settlers who are making homes .... Your Commission has had inquiries made as to how a number of estates, selected haphazard, have been acquired. Almost without exception collusion or evasion of the letter and spirit of the land law was involved. It is not necessarily to be inferred that the present owners of these estates were dishonest, but the fact remains that their holdings were acquired or consolidated by practices which can not be defended." *Id.* at 13–14.

[23] Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652, 668–69 (1936).

> . . . The total amount purchased from the Federal government by Chapman, Miller and Lux, Friedlander, E. H. Hiller, and Mitchell was one and a quarter million acres. Forty-three other large purchasers acquired 905,000 acres of land in the sixties in California. Buying in advance of settlement, these men were virtually thwarting the Homestead Law in California where, because of the enormous monopolization above outlined, homesteaders later were able to find little good land.

The early concentration of ownership on the Kern River was the subject of official inquiry by Secretary of the Interior Carl Schurz in 1877; he suspended all land entries at Visalia Land Office pending investigation. The first investigator he sent out was caustically critical of the methods used to obtain land. According to probably the only account of his findings extant:[24]

> Mr. Newcomb discovered that the Desert Land Act of Congress was simply a Ring job, and was made the medium for an organized colossal steal by the Ring, to the prejudice of thousands of honest, *bona fide* settlers, against whom it was so used as to prevent them enjoying the benefits of the letter and spirit of the Act. By arrangement and collusion, the thing was so managed as to furnish from Washington to the Ring here the instant information of the Executive approval of the Act, and in less time, by weeks, than it requires to officially communicate the necessary order to give proper operation to an Act of Congress on this coast, the Ring land-grabbers had been allowed by the officers of the Visalia Land Office to list and locate an immense area of the desert tracts . . . .

The entire matter was reviewed for Secretary Schurz on October 26, 1878, by J. A. Williamson, Commissioner of the General Land Office, who recommended removal of the suspension of land entries. The Commissioner found no violation of the statutory requirement that no one can take more

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[24] San Francisco Chronicle, Sept. 18, 1877, p. 2; see also *id.*, Sept. 17, 1877, p. 3; *id.*, Dec. 9, 1877, pp. 4, 8; *id.*, Dec. 11, 1877, p. 3; *id.*, Dec. 12, 1877, p. 1; *id.*, Dec. 13, 1877, pp. 2, 4; *id.*, Dec. 16, 1877, p. 8; *id.*, Dec. 17, 1877, pp. 1, 3; *id.*, Dec. 19, 1877, p. 6; *id.*, Dec. 22, 1877, p. 2; *id.*, Dec. 25, 1877, p. 3; *id.*, Dec. 26, 1877, p. 2; *id.*, Dec. 29, 1877, p. 1; *id.*, Dec. 31, 1877, p. 2; *id.*, Jan. 5, 1878, p. 4; *id.*, Jan. 6, 1878, p. 4; *id.*, Jan. 7, 1878, pp. 2, 4; *id.*, Jan. 8, 1878, p. 3; *id.*, Jan. 9, 1878, p. 4; *id.*, Jan. 10, 1878, pp. 2, 4; *id.*, Jan. 11, 1878, pp. 1, 2; *id.*, Jan. 12, 1878, p. 2; *id.*, Jan. 13, 1878, p. 3; *id.*, Jan. 15, 1878, p. 2; *id.*, Jan. 17, 1878, p. 2; *id.*, Jan. 21, 1878, pp. 2, 3; *id.*, Jan. 22, 1878, p. 2; *id.*, Jan. 23, 1878, p. 2; *id.*, Jan. 26, 1878, p. 1; *id.*, Jan. 29, 1878, pp. 2, 4; *id.*, Jan. 30, 1878, p. 2; *id.*, Jan. 31, 1878, pp. 2, 4; *id.*, Feb. 2, 1878, p. 2; *id.*, Feb. 3, 1878, pp. 2, 3, 5, 8; *id.*, Feb. 4, 1878, p. 4.

Archives of the Interior Department contain evidence that Newcomb was paid to go to California to investigate land scandals, and the Chronicle mentions a 300-page report by him, which it summarizes from a Washington dispatch; no copy of the report itself is to be found in National Archives. See also COOPER, LAND, WATER, AND SETTLEMENT IN KERN COUNTY, CALIFORNIA: 1850–1890, at 128–256 (unpublished master's thesis in Univ. of Calif. Library, Berkeley, 1953); UNITED STATES v. JAMES B. HAGGIN, TESTIMONY TAKEN BEFORE THE REGISTER AND RECEIVER OF THE UNITED STATES LAND OFFICE, AT VISALIA, CALIFORNIA (1878); Remarks of delegate Ganz of Illinois, PROCEEDINGS, NINTH ANNUAL SESSION OF NATIONAL IRRIGATION CONGRESS 54–57 (1900).

than one section, that the loan arrangements whereby the lender—a single individual—obtained liens on the lands of the other parties were possibly unenforceable but not illegal, and that the use of "combined enterprises" was a "reasonable and even necessary" means of developing irrigation on desert land.[25]

The Williamson report evidently closed the case. It did not, however, end the issue of wide vs. concentrated landownership. For the nature of the "combined enterprises" referred to by Williamson soon turned out to be a closely held partnership and before long a corporation, rather than an association of landowning neighbors enabled "to enjoy the benefit of the act" by engaging "in common with others" in bringing water to their lands.

Whatever the language of the statute and the facts surrounding acquisition of title to land, this was understood as a defeat of principle. The same year that Williamson made his report, Major J. W. Powell, recognizing

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25 "The testimony shows that no one man has nominally claimed to enter more than he is entitled to under the act but that many have entered claims of adjoining tracts, and are jointly irrigating the entire body of land entered.

"There is no evidence which proves that this is not in good faith, and for the real benefit of all.

"It seems that long canals are necessary, and many persons desiring to enter land are unable to build the ditch, and could not afford to do so except in common with others . . . . It seems reasonable and even necessary, if one man is to have only one section or less; and I think there is nothing in the statute, or the intention of its makers, to prohibit combined enterprises from making valuable a large district of desert land. The only restriction is, that no one can take more than one section.

"It seems that in this case, money has been loaned by one of the parties, Haggin, to others, and a contract made, which is set forth in the evidence, purporting to give him a lien therefor on the land.

"In case the certificates are not assignable, or the claims inalienable before a patent issues, then the contract for a lien on the land is simply void. I think that question is not properly before us in the case.

"The fact that one man encourages others by loans to make claims under the statute, so as to have aid in procuring water and right of way, does not make a case, in my judgment, of entering several tracts for his own use, and does not savor of fraud against the government, but simply enables others and himself to enjoy the benefit of the act, and accomplish what Congress seems to think desirable—the improvement of lands now nearly useless, which would not, and could not, be done by a single person." Letter from Comm'r. J. A. Williamson to Secretary of the Interior Carl Schurz 22–25, October 26, 1878. The San Francisco Chronicle called this "an outrageous decision" by one whose "whole official course" shows "he is always for the wealthy grabber and against the poor settler." (November 5, 1878.) The Visalia Delta was critical (November 1, 1878), and The Tulare Times was favorable, saying "all that is desired is that these barren plains should be made to blossom as the rose." (Quoted in the Visalia Delta, November 8, 1878.) To this the Visalia Delta replied sarcastically with political overtones: "And all that is necessary to make them bloom is to give them away in chunks, the size of whole states, to Carr & Haggin and let them sell them to actual settlers who have use for them. Rah for Tilden and Reform." *Ibid.* Newspaper quotations from COOPER, LAND, WATER, AND SETTLEMENT IN KERN COUNTY, CALIFORNIA: 1850–1890, at 250–52 (unpublished master's thesis in Univ. of Calif. Library, Berkeley, 1953).

widespread fears aroused by such occurrences, pointed out that land monopoly need not inevitably lead on to water monopoly, provided legislators would take measures to prevent it. "The question for legislators to solve," he wrote in his famous official report on the arid west, "is to devise some practical means by which water rights may be distributed among individual farmers and water monopolies prevented."[26] One year later the California Constitutional Convention, after protracted debate on land monopoly, prohibited grants of more than 320 acres of cultivable land to an individual.[27]

The prohibition was a genuine reflection of the public view on sound policy, but it came too late to be effective practically; a pattern of extraordinary concentration of landownership had already become established in California, especially in the southern and western San Joaquin Valley.[28] It survives to this day. In 1947 about twenty-five corporations owned nearly fifty-five per cent of the 192,000 acres in Tulare Lake Basin Water Storage District, and 102 individuals held about thirty-five per cent, all in holdings exceeding 160 acres.[29] In the same year the Bureau of Reclamation listed thirty-four individual and corporate owners of "5,000 or more acres in probable present and future San Joaquin Valley service areas of Central Valley Project," totalling 748,490 acres, and in an overlapping tabulation listed 717,257 acres in "large holdings" on the "upper west side of probable future development and Tulare Lake Basin" held by "land and development companies, banks, oil companies, partnerships and estates, individual and community property holdings of 1,000 acres or more, processors of farm products, railroads, corporation farms and other companies."[30] The chief engineer of Kern County Land Company informed Congress in 1940 that he was chief engineer of fourteen of the fifteen enterprises using water from Kern River, covering 300,000 acres, and that the other enterprise covered about 50,000 acres.[31]

Under these circumstances the opposition between the private interest of excess landowners and the principle of reclamation law dividing water

[26] POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 41 (2d ed. 1879). The excess land law is Congress' answer to Powell's question of 1879.

[27] CAL. CONST., art. XVII, § 3 (1879).

[28] See testimony of Paul H. Johnstone, economist of the Bureau of Reclamation, *Hearings on S. 912 before Senate Public Lands Subcommittee,* 80th Cong., 1st Sess. 860 (1947); compare the critical views of Sheridan Downey, *id.* 1236; DOWNEY, THEY WOULD RULE THE VALLEY 163 (1947).

[29] Letter from Commissioner of Reclamation Michael W. Straus to Senator Paul H. Douglas, February 2, 1949, p. 2 (mimeo.).

[30] Testimony of Paul H. Johnstone, *Hearings, supra* note 28, at 864. It is impossible to predict precisely which or how much of these acreages actually need or will be supplied with project water, but the proportion may be high.

[31] Testimony of George L. Henderson, *Hearings on H.R. 9640 before House Flood Control Committee,* 76th Cong., 3d Sess. 578 (1940).

equitably among individuals attains magnitude, feelings become intense, and pressures to distribute water according to property instead of according to people become sustained and pervasive.

II

WATER

The Bureau of Reclamation . . . has consistently endeavored to bring about changes and to substitute social experiments which are distasteful to the citizens of this community, who have brought about a state of satisfaction through about 80 years of development . . . . We have no disposition to deal with the Bureau of Reclamation in any particular. I may even say that we have refused and will continue to refuse to participate in this project if it is assigned to them for construction and operation . . . . [W]e cannot consent to the invasion of our rights as citizens and of the control of our private properties and do not intend to do so.—George L. Henderson, Chief Engineer of Kern County Land Company, June 5, 1944.[32]

[Y]ou will need no supersleuth to discover that there are strong local interests from that area which seek to avoid application of the Federal reclamation laws to themselves . . . by having the works built by an agency other than the Bureau of Reclamation. Naturally large landed interests have been conspicuous in this slightly disguised effort to escape the provisions of the federal reclamation laws which seek to distribute widely the benefits of conserved water. Other local interests at the same time, among whom family-size farmers are conspicuous, have been equally insistent that the antimonopoly and antispeculation features of the Federal reclamation laws shall be maintained without alteration in principle. If my opinion is worth anything, the national interest clearly lies on the side of the family-size farm families.—Secretary of the Interior Harold L. Ickes, June 7, 1944.[33]

Although land in the arid regions is of little value for agricultural purposes without water, no close measurement of the incremental value of add-

[32] *Hearings on H.R. 4485 before Senate Commerce Subcommittee,* 78th Cong., 2d Sess. 318–19 (1944). Mr. Henderson qualified himself before congressional committees as "chief engineer of the Kern County Land Co., one of the largest landowners in that area," as "chief engineer of 14 of the 15 canal units, the irrigation units of the Kern River," and as representing "all the irrigation interests of the Kern River in San Joaquin Valley." *Id.* at 305, 317, 319; *Hearings on H.R. 4911 before House Flood Control Committee,* 77th Cong., 1st Sess. 114 (1941); *Hearings on H.R. 4485 before House Flood Control Committee,* 78th Cong., 2d Sess. 751 (1944); see also *id.* at 756.

[33] *Hearings on H.R. 4485 before Senate Commerce Subcommittee,* 78th Cong., 2d Sess. 460 (1944). In 1941 and 1944 spokesmen for Grange, organized labor, and other local interests in Kern County opposed efforts to escape the excess land provision, whether by authorizing the Army Engineers to construct Isabella Dam or otherwise. *Hearings on H.R. 4911 before House Flood Control Committee,* 77th Cong., 1st Sess. 140–51 (1941); *Hearings on S. Res. 295 before Subcommittee of Senate Irrigation and Reclamation Committee,* 78th Cong., 2d Sess. 459–75 (1944).

ing water to the lands held by large owners on the Kern River is presently available. Data that distinguish between the values added by bringing natural stream flow to the land and those added by providing a controlled flow through the regulation of stored waters, or that specify the increment to each owner from water deliveries made possible by operation of Isabella Dam are likewise deficient and disputed.[34] But these values per acre are substantial by any measure for any era from the beginnings of development to the present, and are large in the aggregate for a few owners in the Kern River Valley.

In 1947, a Bureau of Reclamation economist estimated this net increment, allowing around $60 expenditure for levelling land, at around $200 per acre.[35] Using his basis for arriving at net increment and the differential land prices actually prevailing in Tulare County in 1945, the net differential from irrigation appears close to $400 per acre.[36] In 1957, the financial editor of the San Francisco Examiner reported figures pointing to a net differential of $300 per acre, figured conservatively.[37] He also cited income figures suggesting a much higher estimate: "The average acreage leased by the company to its tenants is 267 acres and in a decent crop year the tenant can make a net profit of about $16,000 from it." The landlord's share, he said, "would be about $12,000, minus taxes and other expenses."[38]

In the aggregate, incremental values can be of great importance to owners of large landholdings. At $200 an acre the owner of 10,160 acres would stand to gain approximately $2 million from reclamation if freed of the excess land law which allows him to gain only $32,000. If the $300 or $400 per acre estimates were used, the calculations of aggregate increment would need to be increased by 50 and 100 per cent, respectively. If a landowner already has a partial water supply, the estimates should be reduced to arrive at the increment attributable to improvement from construction of a dam.

These rough estimates and calculations are to indicate that the interest of present large landowners in a firm water supply, provided to them free

[34] *Hearings, supra* note 28, at 831–58, 860–911, 939–65, 965–74; DOWNEY, THEY WOULD RULE THE VALLEY 163–70 (1947).

[35] Paul H. Johnstone, *Hearings, supra* note 28, at 904.

[36] *Id.* at 861.

[37] White, "Barony in Valley is 'Precision' Farmer," San Francisco Examiner, June 14, 1957, sec. II, p. 4. Another financial editor writes: ". . . at a cost of $250–350 an acre the company since 1941 has levelled about 110,000 acres of raw grazing land for irrigation. Its lands upgraded from $200 an acre value to $800 or so, and it's now growing high-yield row crops in precision farming." Allen, "Kern County Land Heeds Lady Luck," San Francisco Chronicle, June 13, 1957, p. 19. This estimate appears to include the cost of sinking wells. The water supply coming from wells in the Southern San Joaquin Valley lacks assured permanence; this makes big reservoir projects indispensable.

[38] White, "Barony in Valley is 'Precision' Farmer," San Francisco Examiner, June 14, 1957, sec. II, p. 4.

of excess land limitations, is one of magnitude; the estimates are not intended to imply that a wider distribution of the same incremental values is not of great consequence to farmers, businessmen, and the community at large. On the contrary, the excess land provision was drawn largely with the interests of the latter in mind. Present landowners, however, are on the ground and watchful of their private interests; others are usually dispersed and ill-informed of their less well-defined interests.

Those active in acquiring large blocks of land in Kern River Valley in the eighties were aware of the prospect of incremental gain. To establish ownership of a large block of arid land, therefore, was to create at once a strong and conscious economic interest in the union of water and land. The great landholders on Kern River moved quickly to obtain its waters. Hardly was title to land cleared when the two greatest among them carried their dispute to the California Supreme Court. It was a battle of giants for a division of the natural flow of the stream.[39] Apprehensively, the court in 1886 expressed fears of the imminence of "a monopoly of all the waters of the state by comparatively few individuals . . . controlling aggregated capital, who could either apply the water to purposes useful to themselves, or sell it to those *from whom they had taken it away,* as well as to others."[40]

The decision pointed out the danger but did not solve the issue of monopoly. On the contrary, by declaring the doctrine of riparian rights to be the law of California it gave victory to one of the greatest landowners in Kern Valley. A public controversy broke out, charging that the riparian rights doctrine created a monopoly of water.[41] A leading attorney in water law told of the settlement in retrospect:[42]

> Did Henry Miller rest satisfied with the decision which gave him and his associates all of the water of Kern River? Not at all. He immediately said, "There is more water than we can use, and it does not come at the right time of the year. It comes in a great flood early in the spring, and in the hot

[39] The contest for the *controlled* flow would come many decades later when help was sought from the federal government to build Isabella Dam to make storage and regulation of water possible, and is the subject of later portions of this paper.

[40] Lux v. Haggin, 69 Cal. 255, 309–10, 10 Pac. 674, 703 (1886). As protections against water monopoly the doctrines or riparianism and appropriation proved horns of a dilemma, neither of them a solution. This was clear to the United States Supreme Court sixty-four years later when it said: "The State Supreme Court said the law of appropriation would result in monopoly. Lux v. Haggin . . . . If the uneconomic consequences of unlimited riparianism were revealed by court decision [as in Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 Pac. 607 (1926); Ivanhoe v. McCracken, 47 Cal. 2d 597, 621–2, 306 P.2d 824, 837–8 (1957)], so the effects of unrestrained appropriation became apparent when the flow of rivers became completely appropriated, leaving no water for newcomers or new industry." United States v. Gerlach Live Stock Co., 339 U.S. 725, 750 (1950).

[41] See PROCEEDINGS, STATE IRRIGATION CONVENTION (San Francisco, May 20–22, 1886).

[42] TREADWELL, THE CATTLE KING 93 (1931).

> months of summer the river is dry." So he said to his late antagonists, "You builds me a reservoir, and I gives you two-thirds of the water," and the difficulty was solved.

In recognition of the importance of the political issue of monopoly in California in that era, he added the comment: "In this settlement Henry Miller showed that he was not only a great general, but also a great statesman at the peace table."[43] With one of its chief supporting interests eliminated from immediate controversy, the agitation subsided. Concentration of landownership on the Kern had been followed by concentration of control of natural stream flow. The question of rights to controlled flow remained for the future—our present.

Costs of developing water supplies in the arid regions quickly came to exceed what agriculture could afford. Therefore, toward the end of the nineteenth century western landowners and other citizens interested in promoting western development sought aid from the federal government. Their agitation, lasting more than a decade, produced the National Reclamation Act of 1902 as an instrument for providing generous financial aid for water development and incorporating the excess land provision and other safeguards against private monopoly of water.[44] Opponents of the bill charged that large landowners would reap huge incremental gains in land values, but its sponsors—citing the excess land provision in answer—denied emphatically and repeatedly that this would be its effect.[45] It is abundantly clear that the bill would never have passed Congress[46] without this pro-

[43] *Id.* at 94. Although the immediate controversy on the Kern ended, dissatisfaction with the riparian doctrine as a guide to public policy survived. However, it was not until 1928, after an unsuccessful attempt by the Legislature in 1913, Cal. Stat. 1913, p. 1012, was blocked by the California Supreme Court in 1926, Herminghaus v. California Edison Co., 200 Cal. 81, 252 Pac. 607 (1926), that the people of the state were able to curb its most extreme aspects by amending the constitution. CAL. CONST., art. XIV, § 3 (1928). See résumé of the effort to overcome this obstacle to water development in Ivanhoe v. McCracken, 47 Cal. 2d 597, 621–2, 306 P.2d 824, 837–8 (1957); United States v. Gerlach Live Stock Co., 339 U.S. 725, 751 (1950).

[44] See Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 484–86 (1955).

[45] Congressman George W. Ray of New York, opposing the bill, said, "[T]he very moment that we, at the public expense, establish or construct these irrigation works and reservoir, you will find multiplied by 10, and in some instances by 20, the value of now worthless land owned by those railroad companies . . . ." 35 CONG. REC. 6685 (1902).

[46] Congress was thoroughly familiar with the concentration of landownership in the arid region, and determined to prevent a similar concentration in control of water, as the debates show. The House report on the bill, pointing out that private lands ought to be provided water from public projects, gave this reassurance: "The bill is carefully guarded against the accumulation of large holdings of irrigated lands in single ownership and would compel the breaking up of any large tracts now held for which water rights from Government works are to be obtained by limiting the area of lands the property of any one landowner for which a water right may be acquired to 160 acres." H.R. REP. No. 794, 57th Cong., 1st Sess., ser. 4402, pt. 1, at 7 (1902). See also the unequivocal statement by John E. Raker, California judge and congressman, in PROCEEDINGS, THIRTEENTH NATIONAL IRRIGATION CONGRESS 61 (1905) (Portland, Oregon).

vision to limit private benefit from public water development and to distribute opportunity to make homes on irrigated farms. Without it the law might not have passed the scrutiny of courts concerned with justifying public expenditures for private benefit.[47] In 1926, following the recommendation of the Fact-finders Report, Congress tightened the controls over private receipt of incremental values accruing from public construction of irrigation works.[48]

The great advantage of federal reclamation law to private landowners is that under it they can obtain water they could not otherwise afford. Along Friant-Kern canal, which reaches from the San Joaquin River to the Kern, landowners are currently asked to pay for water less than one-fourth of what its estimated cost would otherwise be.[49] The Chairman of the House Committee on Interior and Insular Affairs and his five Central Valley colleagues pointed out in 1957 that on the Central Valley project landowners repay only about $123 an acre, and are subsidized by the interest-free provision of the law and by contributions to repayment from hydroelectric power users to the extent of about $577 an acre.[50]

Passage of the National Reclamation Act was hailed by many representatives of important economic interests in California as the instrument for developing the waters of the State. A California Promotion Committee, whose prominent sponsors were occupationally classified from "advertising," "banks," "capitalists" to "woollens" and included a private utility, published a pamphlet proclaiming the advantages of reclamation law under the title *"For California"* in 1905. Pointing to the opportunity afforded by the willingness of the federal government to construct irrigation works "even where the land is in private ownership," one of the papers in the pamphlet said:[51]

> In California much of the best land . . . is in huge private holdings. It is believed that every great landowner in California will be willing to sign a contract to subdivide in order that the Government may proceed as rapidly as possible to construct irrigation works . . . . Already owners of more than seventy huge tracts of land have signified to the California Promotion

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[47] Burley v. United States, 179 Fed. 1 (1910).

[48] *Federal Reclamation by Irrigation,* S. Doc. No. 92, 68th Cong., 1st Sess. 116 (1924); 44 STAT. 649–50 (1926), 43 U.S.C. § 423e (1952).

[49] *Hearings, supra* note 28, at 869.

[50] Letter from Clair Engle, George P. Miller, John E. Moss, Harlan Hagen, B. F. Sisk, and J. J. McFall to California Attorney General Edmund G. (Pat) Brown, February 4, 1957, in Ivanhoe v. All Parties, petition for rehearing of the appellant the State of California, in the Supreme Court of the State of California, L.A. No. 23,043, February 4, 1957, appendix, p. ii.

[51] Ferris, *Reclamation of Swamp Lands,* FOR CALIFORNIA, Sept. 1905, p. 14; see also Senator Francis G. Newlands' address at Red Bluff, June, 1905, SACRAMENTO VALLEY DEVELOPMENT ASS'N, BULL. No. 23, p. 14–18 (1905).

> Committee their willingness to subdivide their lands for the benefit of intending settlers. This shows which way the wind blows and may be taken as an indication that when the Government is ready to go ahead our patriotic landed proprietors will be willing and ready to cooperate.

The hopes of the California Promotion Committee proved over-optimistic. On the very eve of its public invitation to cooperation between California large landowners and the federal government, excess landowners launched an attack on the provisions in the National Irrigation Congress in session at Portland, Oregon. The issue was debated thoroughly there and the attack rejected by voice vote "amid great applause."[52] However, the decision did not persuade the large landowners of California.

The only federal reclamation undertaken in California prior to the Central Valley project in the mid-thirties was a small project of 12,000 acres at Orland where private landowners accepted a 40-acre limitation to obtain federal aid. The great landowners on the Kern took no steps to include a dam on their river in the federal Central Valley project to bring water from the Sacramento to the San Joaquin. Instead, after it became clear that the Central Valley project would be constructed under reclamation law including the excess land provision, and after Congress made "flood control" costs non-reimbursable—that is, to be borne by the federal treasury rather than by the beneficiaries—in the Flood Control Act of 1936[53]—large landholding interests in the southern San Joaquin Valley turned their attention toward bringing the Army Engineers into reservoir construction on all rivers from the Kings south to the Kern, as a means of water control. As early as 1940, Congressman Bertrand W. Gearhart, from the Kings River area, introduced a bill at the instance of large landowners to authorize the Army Engineers to construct Pine Flat dam, although the Bureau of Reclamation already held full legal authorization and was "ready for its first or initial appropriation."[54] Flood control law, governing the Army Engineers, did not include reclamation law and its excess land provision *at that time*. Landowners probably expected financial advantages from their choice also,[55] although one spokesman denied it.[56]

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[52] PROCEEDINGS, THIRTEENTH NATIONAL IRRIGATION CONGRESS 28–30, 60–2 (1905) (Portland, Oregon). See also testimony of Secretary of the Interior, J. A. Krug, *Hearings, supra* note 28, at 991–92.

[53] 49 STAT. 1570 (1936), 33 U.S.C. § 701a (1952).

[54] *Hearings on H.R. 9640 before House Flood Control Committee,* 76th Cong., 3d Sess. 544 (1940); see also *id.* 554.

[55] ". . . these water conservation facilities will be obtained through this program . . . at far less cost than would be the case by any other means." Address of President Ray B. Wiser, California Farm Bureau Federation, PROCEEDINGS, CALIFORNIA WATER CONFERENCE 323 (1945).

[56] Testimony of Charles L. Kaupke, *Hearings on H.R. 3024 before Subcommitee of Senate Appropriations Committee,* 79th Cong., 1st Sess. 999 (1945).

It is not difficult to understand why large landowners usually desire water permanently for all their lands and feel entitled to press for it, including the public help necessary to get it. Their spokesmen are inclined to ignore the considerations that have led public policy to prefer numerous smaller holdings to fewer large ones, to overlook the heavy subsidization of water development by taxpayers and power users, and to equate payment of *reimbursable* costs with full discharge of their public responsibilities. As one said:[57]

> . . . these irrigators and their lands are not a part of, and being self-contained and self-sustaining, do not contemplate any connection whatsoever with the Central Valley project, unless it be the extension of favors to less fortunate neighbors who do contemplate use of Central Valley facilities and may be accommodated in the exchange of water. This is a service flowing from and not to these *privately owned projects* and should not by any stretch of the imagination be construed as reason to impose an outside control upon their private affairs . . . . [T]he water rights, distribution systems, and lands in these projects are privately owned and have been privately developed to a high degree of efficiency at a very great cost, and without any Federal aid. Their owners propose *to buy and to pay for* any reservoir capacity used, or nominal services rendered in connection with these flood-control developments. That being the case, they are *under no obligation* to anyone of a nature to call for their *giving up the control of their lands* or rights or subjecting themselves to the *protective custody* or the social and economic theories *imposed on debtors of some Federal* projects.

The effort to deny the Bureau of Reclamation the right to construct dams on four rivers from the Kings to the Kern, and to award it to the Army Engineers, succeeded, the authorization for these dams being contained in the Flood Control Act of 1944. However, Congress was engaged at the same time in a full scale debate on the excess land provision in the Rivers and Harbors bill, owing to the simultaneous effort of large landowning interests to obtain passage of the Elliott rider exempting the Central Valley project from it.[58] The decision of Congress to reject the rider[59]

[57] H. L. Haehl, *Hearing on H.R. 4485 before House Flood Control Committee,* 78th Cong., 2d Sess. 767 (1944) (emphasis added). On another occasion Mr. Haehl identified himself as consulting engineer for 25 or 26 years of the canal company that "distributes about 80 percent of the water of the Kern River for the Kern County Land Co." *Hearings on S. Res. 295 before Subcommittee of Senate Irrigation and Reclamation Committee,* 78th Cong., 2d Sess. 437 (1944).

[58] *Hearings on H.R. 3961 before Subcommittee of Senate Commerce Committee,* 78th Cong., 2d Sess., pt. 4 (1944).

[59] By allowing the entire Rivers and Harbors Bill, carrying the rider, to go down to defeat; this collapse of a bill known colloquially as the "gravy train" is a gauge of the intensity of opposition to lifting the excess land law. The author of the amendment, Congressman Alfred J. Elliott, represented Kern, Kings, and Tulare counties, and was the most active member of the House in the effort to prevent the Bureau of Reclamation from constructing Pine Flat and Isabella dams. Stripped of the Elliott rider, the Rivers and Harbors Bill passed promptly at the opening of the next session of Congress.

was matched by a parallel decision to make reclamation law a part of flood control law, thus applying the excess land provision to irrigation uses of water on projects of the Army Engineers; this is the thesis of the present paper.

The two bills authorizing water development were moving through Congress at the same time, the fate of both of them in some doubt because of intense controversy. They were linked by common subject matter and divided by their governing policies and by the administrative agencies they made responsible for construction.[60] When it appeared that Congress, in spite of Administration support for the Bureau of Reclamation, might authorize construction of multipurpose dams in Central Valley and elsewhere by the Army Engineers, Secretary of the Interior Ickes asked it to apply reclamation law to the projects.[61] It would be superfluous to recite legislative history in detail but for the present denial by the Chief of Engineers that this law applies. The original House report on the Flood Control Bill had professed to take care of reclamation interests:[62]

> Sound public policy requires not only that flood-control storage be under the supervision of the Secretary of War and the Chief of Engineers but also that *storage for the reclamation of arid lands be under the supervision of the Secretary of the Interior* . . . .
>
> Accordingly, the bill provides that *whenever* in the opinion of the Secretary of War and the Chief of Engineers *any dam and reservoir project* operated under the direction of the Secretary of War *can be consistently used for reclamation* of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations* for the use of the storage available for such purposes, and the operation of any such project shall be in accordance with such regulation. Such amounts as the Secretary of the Interior may deem reasonable shall be charged for the use of such stored water . . . .

The language of the House bill and these professions of the report were unsatisfactory to the Secretary of the Interior. Carefully he insisted on substitution of language of his own to protect reclamation principles.[63] The Senate Commerce Committee responded by inserting in the bill which au-

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[60] A contest over public power preference for publicly-generated electricity paralleled that over the excess land provision. The public power issue is not a concern of this paper.

[61] *Hearings on H.R. 4485 before Senate Commerce Subcommittee*, 78th Cong., 2d Sess. 313, 457–58 (1944); see also epigraph at note 33 *supra*.

[62] H. REP. No. 1309, 78th Cong., 2d Sess., ser. 10845, p. 8 (1944) (emphasis added).

[63] "I believe that this section should be rephrased in a way that would eliminate possible future uncertainties with respect to its precise meaning and operation. Language that might appropriately be used for this purpose . . . is suggested in my written report." Testimony of Secretary Ickes, *Hearings on H.R. 4485 before Subcommittee of Senate Commerce Committee*, 78th Cong., 2d Sess. 458 (1944); see Letter from Secretary Ickes to Senator Josiah W. Bailey, June 2, 1944, *id.* 310–14.

thorized construction of these projects a new section 8, to replace section 6, using language "generally in accord with existing law and the expressed views of the Secretary of the Interior."[64] The managers for the House, reporting from the conference committee, said:[65]

> This amendment of the Senate replaces section 6 of the House approved bill with certain modified language *substantially as requested by the Secretary of the Interior* and constitutes section 8 of the Senate approved bill. The Senate language *will provide for more effective administration in relation to the various technical features of the Federal reclamation law. It establishes a procedure for the utilization of multiple-purpose projects for irrigation purposes* when the Secretary of War determines upon recommendations of the Secretary of the Interior that a project operated under the direction of the Secretary of War may be utilized for irrigation purposes.

The conference report was approved by Senate[66] and House[67] on the same day.

If further evidence of legislative intent to apply reclamation law to flood control projects were necessary, it is supplied by a colloquy between Acting Majority Leader Senator Lister Hill and Senator John H. Overton. Although the contest in the 78th Congress over application of reclamation law was focused on two separate bills, it involved the closest attention of the same congressional personnel. Congressman Alfred J. Elliott represented the large landowners' opposition both as author of the amendment to the Rivers and Harbors bill to exempt Central Valley and as a principal spokesman before committees of both Houses urging authorization of Kings and Kern River projects to the Army Engineers. Senator John H. Overton not only presided over the Senate Commerce subcommittee that killed the Elliott rider to the Rivers and Harbors bill after extensive hearings, but held personal responsibility for leading the Flood Control bill through the Senate as well. Neither man, nor Senator Hill as party leader, could have misunderstood the nature of the issue as it appeared in either of the bills.

Senator Overton said in response to specific questioning just prior to passage of the Flood Control bill by the Senate:[68]

> The President wrote me and the chairman of the subcommittee in this regard. *However, in view of the fact that the Senate amendment made not only the California projects but all such projects subject to irrigation laws,* and in view of the fact that the House concurred in this action by agreeing to section 8 of the Senate bill, I am sure that the President will feel that

[64] S. REP. No. 1030, 78th Cong., 2d Sess., ser. 10842, p. 4 (1944) (emphasis added).
[65] H. REP. No. 2051, 78th Cong., 2d Sess., ser. 10848, p. 7 (1944) (emphasis added).
[66] 90 CONG. REC. 9269 (1944).
[67] *Id.* 9287.
[68] *Id.* 9264 (emphasis added).

> we have met the problem that he raised. Section 8 of the bill clearly places reclamation uses of water from these projects *under the Secretary of the Interior and under the application reclamation laws. No project in this bill which may include irrigation features is exempted from the reclamation laws* . . . . As I stated a while ago, *section 8 of the bill clearly places reclamation uses of waters from all projects authorized in this bill under the Secretary of the Interior and under the applicable reclamation laws.*

Secretary Ickes observed later: "I am satisfied that the foregoing colloquy interprets the law in no uncertain terms. I am satisfied that section 8 . . . represented a sweeping victory for the traditional reclamation policy of the Congress."[69]

III

LAND AND WATER ON THE KERN

> *The Kern County Land Company was born to wealth and by its own efforts it has continued into its maturity, even before the present golden flow of oil royalties came into being . . . . "To those who have it shall be given them" is written in the Bible, and this certainly seems the proper formula to apply to the Tevis and Haggin heirs.*—P. J. Fitzgerald, 1939.[70]

> *The Bureau of Reclamation has not yet been able to make repayment arrangements with local interests under the Kings River procedure* [*for "making of repayment arrangements . . . with the Bureau . . . in accordance with reclamation law"*]. . . . *Local irrigators also oppose extension of the*

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[69] Letter from Secretary of the Interior Ickes to Lt. Gen. Raymond A. Wheeler, Chief of Engineers, War Department, January 22, 1946, H.R. Doc. No. 367, 81st Cong., 1st Sess., ser. 11325, p. 67 (1949).

Section 8 reads as follows: "Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. *Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation puposes only in conformity with the provisions of this section,* but the foregoing requirement shall not prejudice lawful uses now existing: *Provided,* That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes." 58 STAT. 891 (1944), as amended, 43 U.S.C. § 390 (1952) (emphasis added).

[70] FITZGERALD, KERN COUNTY LAND COMPANY, A STORY OF SCIENCE AND FINANCE 29 (2d ed. 1939).

Kings River procedure to other projects, because they are unwilling to make repayment contracts under reclamation law, although they have offered to repay a substantial part of the cost of the project. They feel that provisions of reclamation law regarding acreage limitation and transfer of water rights to the Federal Government are not applicable in an area where irrigation has been practiced locally for many years, where local water rights are established under State law, and where most of the irrigation water to be provided by a Federal project is of a supplemental nature. Consequently, local interests appear to desire that repayment arrangements be made by the Secretary of the Army under the provisions of the *Flood Control Act of 1944, which* do not embrace the requirements of reclamation law.—Lieutenant General R. A. Wheeler, Chief of Engineers, July 27, 1948.[71].

The pattern of extreme concentration of landownership prevalent on Kern River since the settlement of that area continues to provide a natural basis for strong pressures to acquire similarly concentrated rights to controlled deliveries of water. These pressures, visible clearly in the contest over natural stream flow in the eighties, came to the surface again with the prospect of federal reservoir construction on the Kern in the forties. A few holders of rights to most of the natural stream flow of the river asked for construction of a reservoir by the Army Engineers, hoping to obtain federal help in securing the benefits of water control without invoking the policy of equitable distribution. Farmer and labor organizations of Kern County, on the contrary, opposed construction of Isabella Dam by the Army Engineers and favored reclamation law.[72] The latter failed to obtain their first point, but, as will appear below, they succeeded in their second. Nevertheless the pressures founded upon concentrated landownership remain the most influential factor in the administration of law on that river today, and are reflected in a tendency to forget there are any "local interests" on Kern River except those of large landowners.[73]

As early as December 3, 1945, the Chief of Engineers made it plain that,

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[71] *Sacramento-San Joaquin Basin Streams, California,* H.R. Doc. No. 367, 81st Cong., 1st Sess., ser. 11325, p. 6 (1949) (emphasis added).

[72] *E.g.,* Ralph Abel, *Hearings on H.R. 4911 before House Flood Control Committee,* 77th Cong., 1st Sess. 140–51 (1941); various witnesses, *Hearings on S. Res. 295 before Subcommittee of Senate Irrigation and Reclamation Committee,* 78th Cong., 2d Sess. 459–75 (1944).

[73] *E.g.,* "Custom indicated that had the local interests opposed the authorization of these two [Kern and Kings River], Congress would have thrown them out of the Flood Control Bills, and they would not have been built. The *local interests* consented and asked for their construction, with the understanding that the 160-acre rule would not apply, and that the operation of the facility, subject to flood control, would be in the hands of the local interests." Letter from Eugene E. Marsh to Secretary of the Interior Douglas McKay, U.S. DEPT. INTERIOR, EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAWS AND THE PAYMENT OF CHARGES, pt. 1, p. 101:2 (May 1956) (prepared at request of Subcommittee on Public Works and Resonrces, House Committee on Government Operations).

so far as projects authorized in the Flood Control Act of 1944 were concerned, he intended to act as though section 8 of the Flood Control Act[74] did not exist. He said: "The actual agreements for such repayment [for conservation storage] will be between local interests and the War Department. It is not mandatory under the law that these agreements comply with the provisions of the Reclamation Acts."[75] If this analysis of the meaning of flood control law by the Chief of Engineers is given effect by administrators, the concentration of ownership of land long since achieved on the Kern River will be paralleled there—and everywhere in the United States that flood control projects are constructed and concentrated landownership exists—by a like concentration of ownership of rights to controlled flows of water, the very outcome that the excess land provision was designed to prevent.

The arguments the Army Engineers use to support their position have been stated and restated over the years.[76] They boil down to three: (1) Congress authorized Kern River as a *flood control, not a reclamation* project. (2) Congress adopted, by reference to the Chief of Engineers' report, his recommendation that *he* make arrangements for payment. (3) Section 8 of the Flood Control Act, which deals with reclamation law on flood control projects, applies only to *additional works* that might be authorized in the future, *not to works authorized in the act.* These arguments will be examined seriatim.

(1) In order to distinguish a *flood control* project from a *reclamation* project, the Chief of Engineers has argued:[77]

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[74] Flood Control Act of 1944, § 8, quoted in note 69 *supra.*

[75] Letter from Lieut. Gen. R. A. Wheeler to Governor Earl Warren, in PROCEEDINGS OF CALIFORNIA WATER CONFERENCE 72, 74 (1945).

[76] Letter from Major General E. C. Itschner, Chief of Engineers, to Senator Paul H. Douglas, March 19, 1957; Major General Thomas M. Robins, "The 160-acre limitation . . . does not apply . . . . You do not think the Army Engineers are dumb enough to go against the law." Quoted in reference to Kings River project in Fresno Bee, August 17, 1945, p. 9; Letter from Lieut. Gen. R. A. Wheeler to the Secretary of War, December 2, 1946, H.R. Doc. No. 136, 80th Cong., 1st Sess. 44–47 (1947); H.R. Doc. No. 367, 81st Cong., 1st Sess. xi, xii, 5–7 (1949); Letter from Major General Lewis A. Pick, Chief of Engineers, to Senator Paul H. Douglas, August 31, 1950; Letter from Secretary of the Army Frank Pace, Jr., to Senator Douglas, March 21, 1952, 98 CONG. REC. 9179 (1952); Letter from Brig. Gen. C. H. Chorpening, Asst. Chief of Engineers, to Senator Douglas, May 15, 1952, *Id.* at 9180; Letter from Brig. Gen. J. L. Person, Asst. Chief of Engineers, to Senator Douglas, January 22, 1957. The points covered in these officials' statements correspond closely to a carefully prepared legal analysis arriving at the same conclusion furnished by attorneys (McCutchen, Thomas, Matthew, Griffiths & Greene, by Burnham Enersen) to the Kern County Land Company, May 29, 1954 (processed).

[77] H.R. Doc. No. 136, 80th Cong., 1st Sess. 46–47 (1947). This statement referred to Kings River, but both Kings and Kern projects were authorized by the same act, their waters mingle in Tulare Lake Basin, and there is only slight difference in argument as to the law governing the two projects.

> In the first place flood-control benefits of the project are more than sufficient to justify its entire cost. Other conditions include the facts that local water users have incurred expenditures of over $70,000,000 without Federal assistance in developing their irrigation systems; that they are now using by far the greater part of the flow of Kings River under established water rights; and that this project does not involve the development of new lands but is for improving water supply for existing holdings of lands already developed. Thus, in my opinion, land ownerships and farming operations in the area make inappropriate the acreage limitations involved in reclamation law.

These arguments have convinced the Chief of Engineers that the excess land provision is "inappropriate" on Kings or Kern Rivers, but they offer no support to a conclusion that Congress shared this opinion. The opposite is the fact. To answer the main question—whether Kings and Kern projects are covered by reclamation law—it is irrelevant to ask whether or not flood control benefits are more or less than sufficient to justify the project, whether or not the improvement in water supply is for the benefit of lands and irrigation systems already developed at great local cost, whether or not the lands are newly developed, or whether or not water rights have been established previously. Section 8 of the Flood Control Act is concerned explicitly with the irrigation benefits from a project, not with their relation to flood control benefits. Reclamation law never has been concerned with the question whether, when, or at what cost benefiting landowners developed their irrigation systems and lands, except to offer to help them to build reservoirs and irrigation systems. Reclamation law requires that established water rights be recognized,[78] but if landowners choose to ask irrigation water benefits under reclamation law, the law requires equal compliance from all beneficiaries.[79]

The first argument of the Chief of Engineers fails generally, then, because to argue that a flood control project cannot be covered by reclamation law is a non-sequitur; it fails specifically because the facts it states do not

[78] 32 STAT. 390 (1902), 43 U.S.C. § 383 (1952).

[79] Argument about water rights tends to obscure the essential question which is the conditions under which Congress has said that individuals can obtain federal help in getting water for their lands. The Warren Act of 1911 covers precisely such a situation as the Kern, authorizing Secretary of the Interior to contract for the *impounding, storage,* and carriage of *non-project water* with "individuals, corporations, associations and irrigation districts," *provided* "that water shall not be furnished from any such reservoir . . . to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres." 36 STAT. 925–26 (1911), 43 U.S.C. §§ 523–24 (1952). To do otherwise would be to give owners of *uncontrolled* water the power to require the federal government to give them the *benefits of control* while waiving national policy in their favor. The so-called established water right is not a right to *controlled* flow of water, but only to natural stream flow, a right with which reelamation law does not interfere. Under reclamation law improvement of irrigation by controlling flow is not imposed on anyone; it is provided only through congressional appropriations and request by water users.

distinguish the irrigation benefits on Kern River and similar "flood control" projects from those customarily recognized and covered by reclamation law.[80]

(2) The second argument of the Chief of Engineers is that *he* is responsible for repayment contracts since, in section 10 of the Flood Control Act,[81] Congress approved by reference the recommendation in his project report that "authority to construct should be understood to include authority . . . *to make arrangements for payment* by the State or other responsible agency to the United States *for the conservation storage when used.*"[82] The language of section 10 of the act authorized the Kern River project "substantially in accordance with the recommendations of the Chief of Engineers," and the House report on the bill said the recommendations "attain the force of law through adoption of the report in the bill."[83]

However, the same report also said "sound public policy requires" that "storage for the reclamation of arid lands be under the supervision of the Secretary of the Interior," and the "bill provides" that "it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage" and project "operation" and set the "amounts" to "be charged for the use of such stored water."[84] This appears to establish, in the opinion of the House Committee, the primary role of the Department of the Interior in controlling arrangements for irrigation storage. The case is stronger since this report preceded a strengthening of language of the bill at request of the Secretary of the Interior to assure coverage of flood control projects under reclamation law. Since reclamation law requires the Secretary of the Interior to make repayment contracts,[85] the overriding question is whether Congress applied reclamation law to the Isabella Dam project by including

[80] It may be inferred from statements by the Chief of Engineers that he is aware of the irrelevance, while adhering to his position; he avoids saying his conclusion *rests on the arguments* of large landowners that Kern River is a special kind of project. In the epigraph to section III, in text at note 68 *supra,* he recites facts supporting the "feelings" of landowners opposed to the law, but avoids giving these as supports for *his conclusion* that reclamation law does not apply. In the passage quoted in the text at note 77 *supra,* he recites the same facts as support for a mere "opinion" that reclamation law is "inappropriate" on flood control projects.

[81] 60 STAT. 643 (1946), 10 U.S.C. § 1026b-1, 33 U.S.C. §§ 701f, 701j, notes (1952).

[82] *Kern River,* H.R. DOC. No. 513, 78th Cong., 2d Sess. 6–7 (1944) (emphasis added). See also Letter from Secretary of War Robert P. Patterson to Secretary of the Interior, February 15, 1946, S. Doc. No. 113, 81st Cong., 1st Sess. 275, 276 (1949); Letter from Secretary of the Army Frank Pace, Jr., to Senator Paul H. Douglas, March 21, 1952, 98 CONG. REC. 9179 (1952).

[83] H.R. Doc. No. 1309 on H.R. 4485, 78th Cong., 2d Sess., ser. 10845, p. 41 (1944).

[84] *Id.* at 8. For assertion of this legal authority and responsibility of the Secretary of the Interior, see H.R. Doc. No. 367, 81st Cong., 1st Sess., ser. 11325, p. 66 (1949); U.S. DEP'T OF INTERIOR SOLICITOR'S OPINION M-36457, PROPOSED CONTRACT BETWEEN THE UNITED STATES AND THE KINGS RIVER CONSERVATION DISTRICT 2 (July 10, 1957).

[85] *E.g.,* 44 STAT. 649 (1926), 43 U.S.C. 423(e) (1952).

section 8 in the Flood Control Act. This is explored fully below,[86] in light of the Army Engineers' denial that Congress did so.

Actually, the Chief of Engineers has not maintained his position on principle. Under the direction of his superiors, the President of the United States and Secretary of War, he has already surrendered the sole responsibility to make arrangements for repayment on flood control projects in one notable instance. On June 24, 1946, he joined with the Commissioner of Reclamation in a public statement that on Kings River, "under existing congressional authority, the Corps of Engineers will start construction . . . after required payments are insured *by contract, under the reclamation law, between the water users* who are beneficiaries of the development *and the Secretary of the Interior.*"[87]

The present basis for assumption of responsibility by the Army Engineers to conduct negotiations for repayment on Kern River is not *law,* but mutual agreement between the Departments of the Army and the Interior. The Department of the Army has been so flexible as to be prepared to accept the Department of the *Interior* as negotiating agency even on *Kern* River. On October 28, 1954, Secretary of the Army Robert T. Stevens wrote to the Secretary of the Interior that, in April 1954, the Department of the Army had executed an interim contract with local interests on Kern River *"after reaching an informal understanding with representatives of the Department of the Interior that your Department would be responsible for* negotiating and executing *the long term contract."*[88] Secretary Stevens then asked that responsibility be yielded back to the Army for reasons of which he specified only two: (1) the Army had been conducting negotiations with local interests for *interim* water service, and (2) *local interests preferred* to negotiate with *the Army* rather than with the Interior Department.[89]

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[86] Text following note 93 *infra.*

[87] H.R. Doc. No. 136, 80th Cong., 1st Sess. 49 (1947) (emphasis added).

[88] U.S. Dep't Interior, Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges, pt. 1, app. 70 (May 1956) (emphasis added). This "informal understanding" surrendering jurisdiction to the Department of the Interior followed earlier claims of legal authority for the Army by Secretaries Patterson and Pace. See note 82 *supra.* Secretary of the Interior McKay similarly was willing to recede from the claim of legal jurisdiction made by Secretary Ickes, H.R. Doc. No. 367, 81st Cong., 1st Sess., ser. 11325, p. 66 (1949), and supported by argument of regional counsel under Secretary Oscar Chapman. Letter from Leland O. Graham to Karl W. Shattuck, chairman of the negotiating committee, Kings River Water Association, July 24, 1950, U.S. Dep't Interior, Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges, pt. 2, app. 12:2 (May 1956). See text at note 95 *infra.*

[89] "Local interests . . . advocate most strongly that arrangement for handling the long term contract [for Isabella Dam] be accomplished by the Secretary of the Army and contend that existing law contemplated that such arrangements should be by *this* Department . . . . In view of the circumstances, including the *negotiations which have been conducted* to date by the

Neither consideration is a matter of *law,* nor did Secretary Stevens imply his own belief that it was, as he could easily have done by saying that he agreed with the large landowners' contention that he had responsibility under "existing law." His acceptance of the second consideration reflects again the willingness of the Army Engineers to side with certain local interests against others in effectuating a disputed interpretation—if not an outright violation—of law.

In 1950, after the Regional Counsel of the Bureau of Reclamation responded to a challenge by large water users' representatives on Kings River by making a detailed argument that the law required the Department of the Interior to make the repayment contract,[90] Kings River representatives entered into negotiations with the Bureau of Reclamation. But when a change in administration had taken place, a new Undersecretary of the Interior receded implicitly from the earlier position taken under Secretaries Ickes, Krug, and Chapman, by yielding to Secretary Stevens' request that the Army be allowed to conduct negotiations on the Kern.[91] By 1955, in making arrangements between them for contract negotiations, neither Secretary of the Army Stevens nor Undersecretary of the Interior Davis showed any concern for what the law might prescribe, or any opinion that it prescribed at all. On October 20, 1955, Secretary of the Interior Douglas McKay likewise made no pretense of standing on *law* as his predecessor

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Department of the Army and the *desires of local interests,* it is considered *desirable* that this Department complete the contract in that case. I would appreciate your confirming that this is agreeable to you." U.S. DEP'T INTERIOR, EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAWS AND THE PAYMENT OF CHARGES, pt. 1, app. 70:1–2 (May 1956) (emphasis added). Secretary Stevens did not claim *legal* authority for the Army.

Simultaneously the Chief of Engineers was affirming his own opinion that the law conferred authority on him to negotiate the contract in one sentence, and announcing his surrender of it in another: "Existing flood control law under which these two projects [Kings and Kern] were authorized by Congress provided that the Secretary of the Army would make arrangements for repayment to the United States for conservation storage when used. The President, however, has issued instructions in the case of the Kings River or Pine Flat project that repayment arrangements for that project would be made by the Secretary of the Interior. Consequently, the Corps of Engineers is governed regarding the Pine Flat project by the President's decision and by the agreement for carrying it out which was reached between the Secretaries of Army and Interior on 1 February 1947." Letter from Major General Lewis A. Pick to Senator Paul H. Douglas, August 31, 1950.

[90] Letter from Lcland O. Graham to Karl W. Shattuck, July 24, 1950; see notes 88 *supra,* 95 *infra.*

[91] "As a result of our recent conferences with Assistant Secretary of the Army George H. Roderick and his staff, we now understand it to be acceptable to your Department, . . . that the Department of the Army negotiate and *execute a repayment contract* with local interests for conservation storage in the Isabella Reservoir, California." Letter from Clarence A. Davis to the Secretary of the Army, February 17, 1955, U.S. DEP'T INTERIOR, EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAWS AND THE PAYMENT OF CHARGES, pt. 2, app. 71:1 (May 1956) (emphasis added).

Secretary Ickes had done; administrative decision by the President followed by agreement between departments had tossed responsibility for negotiations on Kings River to the Department of the Interior; now agreement between departments without Presidential directive tossed responsibility on Kern River to the Army.[92] The contention of Secretary Ickes and of Regional Counsel Graham that responsibility for negotiation is a matter of law rather than agreement was rejected without public answer.

(3) The third and crucial argument of the Army Engineers is that section 8 of the Flood Control Act, which deals with reclamation law on flood control projects, applies only to *additional works* that might be authorized in the future, not to works authorized in the Act itself.[93]

Did Congress, as the Chief of Engineers contends, apply reclamation law only to future projects *not* authorized in the act and exempt all the projects that *were* authorized? This would be like saying that Congress, in passing section 8 of the Flood Control Act of 1944, was down in the cellar at midnight looking for a black cat that wasn't there. Such a construction is both unflattering to Congress and unable to bear inspection of the language of the statute.

Section 8 consists of three sentences.[94] The first two authorize construction of "additional works" under the reclamation laws and appropriate circumstances and procedures. The third sentence contains no reference at all to "additional works"; it reads: "Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section . . . ." Reclamation law, including a passage stating that "the Secretary of the

[92] Letter from Secretary of the Interior Douglas McKay to Eugene E. Marsh, October 20, 1955, *Id.*, pt. 1, app. 102. See also Letter from Eugene E. Marsh to Secretary McKay, July 28, 1955, *Id.*, pt. 1, app. 101:3, recommending, in light of the fact that the "larger landowners are strenuously opposed" to negotiating a contract with the Bureau of Reclamation that might apply the excess land provision, that the "simple way out is to have the Bureau withdraw, and permit the U.S. Army Engineers to negotiate the contract." To this, Secretary McKay replied: ". . . the fact that the Army early determined that they would offer *no different terms* than the Bureau of Reclamation would offer minimized many of the reasons which were urged upon the Department as a reason for the change." Letter from Secretary McKay to Eugene E. Marsh, Oct. 20, 1955, *id.*, pt. 1, app. 102:2 (emphasis added).

[93] The Chief of Engineers states: "Section 8 has been analyzed very carefully from the strictly legal viewpoint and it has been concluded that the authority provided therein pertains *only to dam and reservoir projects requiring additional Federal works* to make them useful for irrigation purposes. Such irrigation works may not be undertaken until after a report and findings thereon have been made by the Secretary of the Interior and after specific authorization of the Congress by an authorization Act. *No Federal supplemental irrigation works are involved* in the operation of the seasonal irrigation storage provided *in Isabella Reservoir,* and *hence* it is considered that *this general legislation is not applicable to this project.*" Letter from General E. C. Itschner to Senator Paul H. Douglas, March 19, 1957 (emphasis added).

[94] Section 8 is quoted in note 69 *supra.*

Interior is authorized to construct, operate and maintain, under the provisions of the Federal reclamation laws . . . ," is the only subject of the section. The reference in the third sentence to "Dams and reservoirs" is patently to *all* dams and reservoirs, of which Isabella Dam is the only one on Kern Rived named in the act. None of the congressional reports or debates on the Flood Control bill mentioned "additional works" or suggested departing from existing reclamation law in order to create a distinction between projects consisting only of "dams and reservoirs" and those consisting of "additional works" such as auxiliary dams, canals, or distribution systems. Unless intended to cover situations *other than* the "additional works" already covered in the first two sentences, the third sentence of section 8 would be unnecessary and without meaning.[95]

On the chance that his first line of defense might fall, the Chief of Engineers offers a second:[96]

> While we do not consider that Section 8 is applicable to the Isabella project we feel that we should point out that if this general authority were considered in direct conflict with Section 10 of the same Act, which authorizes the Isabella project, we would feel that the *specific* authority contained in Section 10 would govern . . . . It is considered that *specific* language would be necessary for each new project in order to make reclamation law applicable thereto unless *general* legislation covering the matter is enacted.

The statement is open to at least two objections. First, the *general* authority, section 8, prescribes the governing law of all flood control projects; the *specific* authority merely attaches authority to "make arrangements" for payment to the authority to construct. Since they do not refer to the same thing, the "general" and the "specific" in this instance are not comparable. Second, the "general" prescription of governing law is in the statute itself, while the "specific" authority to make arrangements for repayment depends upon the weaker ground of adoption by reference. The Army Engineers, in effect, claim power to oblige Congress to discover and

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[95] Regional Counsel for the Bureau of Reclamation summed up the point as follows: ". . . section 8 of the Flood Control Act of 1944 . . . intended that the section apply to all projects constructed by the Corps of Engineers to the extent that they should be utilized for irrigation purposes. Section 8 provides (1) for the construction of *additional works* pursuant to the Federal reclamation laws, to the extent that additional works are necessary, and it does this by the first two sentences of the section, and (2) for the utilization for irrigation purposes under the Federal reclamation laws of projects constructed by the Secretary of War where no additional works are necessary, and it does this by the third sentence. Only by a strained construction of the statute and an ignoring of the legislative history could it be argued that the Congress intended that where the *same type of benefit* is conferred a *distinction should be made* only on the basis of whether additional features are necessary." Letter from Leland O. Graham to Karl W. Shattuck, July 24, 1950, note 88 *supra*, pt. 2, app. 12:6 (emphasis added).

[96] Letter from General E. C. Itschner to Senator Paul H. Douglas, March 19, 1957.

specifically reject each and every recommendation affecting policy contained in an engineering construction report to which it might not wish to give approval, even to one—in the present instance—beginning in the middle of a paragraph on the last line on page 6 and including the first few lines at top of page 7 of a 42-page House report.[97] Confirmation of such power would offer administrators a field day for law-making, subject only to line-item veto by Congress.

If any doubt that the Flood Control Act of 1944 applies reclamation law to flood control projects survives the preceding analysis of its language, reference to the legislative history of the bill should suffice to resolve it.

The propriety of going to legislative history for clarification is denied by attorneys for large local interests; the Chief of Engineers ignores legislative history, although Secretary Ickes quoted it to him to support a charge that refusal to apply reclamation law to flood control projects "would be in direct violation of the intent of the Flood Control Act of 1944."[98] However, argument that examination of legislative history is unnecessary and inappropriate because the meaning of the statute is clear and unambiguous on its face is untenable. At least two Secretaries of the Interior have publicly asserted an opposite interpretation of the law to that of the Chief of Engineers.[99] One Chief of Engineers acquiesced over his own signature to a contract "under reclamation law" on Kings River, a project without "additional works" authorized under the same statute as Kern River project.[100] None of his successors have publicly repudiated this action, but on the contrary have accepted it by references as recently as 1957.[101]

The Chief of Engineers is left by his own actions and those of his superiors in no position to assert either that clarity of language in the flood control statute renders legislative history immaterial, for it clearly shows

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[97] H.R. Doc. No. 513, 78th Cong., 2d Sess. 6, 7 (1944). From a congressional viewpoint, Senator Douglas commented: "It is very difficult for me . . . to find any justification for your conclusion, in the absence of any expressed exemption, that the excess land provisions of the Reclamation Law do not apply to the Isabella project, *since the authorizing legislation for that particular project did not repeat the requirements of the Reclamation Law.* Do the Army Engineers seriously maintain that it is essential to repeat the provisions of existing general law in order to make it apply in connection with each new, specific project?" Letter from Senator Douglas to Lieut. Gen. S. D. Sturgis, Jr., Chief of Engineers, Feb. 15, 1957 (emphasis added). General Itschner's reply was in the affirmative. Letter from General E. C. Itschner to Senator Paul H. Douglas, March 19, 1957.

[98] H.R. Doc. No. 367, 81st Cong., 1st Sess. 66–67 (1949).

[99] Secretary Ickes, *ibid.*; Secretary J. A. Krug, S. Doc. No. 113, 81st Cong., 1st Sess. 16 (1949); the argument of Regional Counsel Graham was made under Secretary Oscar Chapman.

[100] H.R. Doc. No. 136, 80th Cong., 1st Sess. 49 (1947).

[101] Letter from Brig. Gen. J. L. Person, Assistant Chief of Engineers, to Senator Paul H. Douglas, January 22, 1957.

the intent of Congress to make reclamation law applicable,[102] or that a flood control project without "additional works" is not covered under reclamation law.

IV

ADMINISTRATIVE STRANGULATION

> *. . . two large Federal agencies—the Army Corps of Engineers and the Department of Interior's Bureau of Reclamation—have conflicting jurisdiction in river development work. Operating under separate statutes and appropriations one is primarily concerned with local flood control, the other with irrigation. . . . There have been repeated instances where each competes with the other to begin construction on the same project. The result has been hasty planning, lack of sufficient basic data, duplicating cost of surveying and estimating, failure to consider the entire needs of the area, and the creation of strong and opposing local pressures each seeking special benefits. The end result has been needless delay, confusion, and gross waste of the taxpayers' money. The history of the operation of these agencies in the Columbia and Missouri Valleys and the Central Valley of California provides eloquent testimony to the disastrous consequences of the competition between these Federal agencies. . . . To remove the major areas of overlapping and duplication, we have recommended that the functions of flood control and river and harbor improvement work of the Army Corps of Engineers be consolidated with the Reclamation Service within the Department of the Interior.*[103] —Hoover Commission, 1949

The thesis of this paper is that reclamation law, applied to flood control projects by Congress in 1944, is being strangled by confused, irresponsible, and unsympathetic administration in the executive branch of government. The ultimate end of such a course, if permitted to continue, is outright violation of the law.

On October 2, 1957, four years after negotiations for repayment began on Kern River and ten years after negotiations for repayment began on Kings River, the Department of the Army advised the Comptroller General of the United States that it was proceeding, together with the Department of the Interior, to request the Attorney General of the United States to review and furnish his opinion on the question as to *which federal agency* is legally responsible for entering into the repayment contracts covering

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[102] The legislative history is explored in text from notes 58 to 69 *supra.*

[103] [HOOVER] U.S. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, CONCLUDING REPORT 27–29, 43 (May, 1949). See also MAASS, MUDDY WATERS: THE ARMY ENGINEERS AND THE NATION'S RIVERS (1951); Maass, *Kings River Project in the Basin of the Great Central Valley—a Case Study,* COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, CONCLUDING REPORT, APP. L, TASK FORCE REPORT ON NATURAL RESOURCES, January 1949, app. 7, pp. 149–82 (May, 1957); Maass, *Administering the CVP,* 38 CALIF. L. REV. 666–95 (1950).

irrigation benefits from Army projects and *under which laws.*[104] Two months later, the Comptroller repeated a previous recommendation of a "vigorous effort" to consummate contracts, and told Congress that "should these efforts fail, the matters [should] be referred to the appropriate congressional committee for instruction as to further actions."[105]

Proper administrative procedure in accordance with law is not difficult to discover. By inserting section 8 in the Flood Control Act, Congress covered *authorized* as well as "additional" works, and placed responsibility for concluding repayments on the Secretary of the Interior. President Truman, Secretary of War Patterson, three Secretaries of the Interior, at least one Chief of Engineers, and spokesmen for the interests of large landowners—the latter reluctantly[106]—have supported this view on Kings River. There is no sufficient difference between Kings and Kern projects in geography, economics, history, or statute to distinguish them as to governing law or the location of administrative responsibility for its enforcement. The Chief of Engineers—referring future decision to Congress—has even gone so far as to express his opinion that "the disposal of irrigation water is not properly a permanent function of the Department of the Army but should eventually be administered by the Bureau of Reclamation in accordance with the applicable provisions of reclamation law."[107] Yet the Army Engineers deny that reclamation law applies to Kern River project now, and are permitted by the Secretary of the Army, the Secretary of Interior, and the Chief Executive to reiterate the denial and to hold themselves out as possessing an administrative authority that Congress placed elsewhere.

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[104] Comptroller General of the United States, Audit Report to the Congress of the United States, Central Valley Basin, California, Water Resources Development Program, Bureau of Reclamation, Department of the Interior and Corps of Engineers (Civil Functions), Department of the Army for the Fiscal Year Ended June 30, 1956, December 11, 1957, p. 10, note 1.

[105] *Id.*, p. 10. For reasons given in this article the author disagrees with the unsupported statement of the Comptroller General that the Army Engineers bear responsibility for negotiating a repayment contract on Kern River, *Id.*, pp. 9, 34.

[106] It is not clear to what extent this reluctance was overcome by legal argument of the Regional Counsel of the Bureau of Reclamation under Secretary Chapman that the law made the Bureau of Reclamation responsible, as compared with the offer of Secretary McKay to permit excess landowners "to comply with the provisions of the Reclamation Law *without disposing of their excess land holdings.*" Letter from Secretary McKay to Eugene E. Marsh, Oct. 20, 1955, U.S. DEP'T INTERIOR, EXCESS LAND PROVISIONS OF THE FEDERAL RECLAMATION LAWS AND THE PAYMENT OF CHARGES, pt. 1, app. 102:1, 2 (May, 1956) (emphasis added). In Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1955), I argued that the McKay contract was a violation of reclamation law. McKay's successor, Secretary Fred A. Seaton, has rejected the contract, saying: "I cannot justify an aggravation of a prior practice in an effort to remedy an absence of legal authority. What I am concerned about is the process by which inferences are based on inferences and there is a whittling away at a principle until all that is left is a pile of shavings." New York Times, July 13, 1957, p. 10.

[107] Lieutenant General R. A. Wheeler, H. R. Doc. No. 367, 81st Cong., 1st Sess. 6 (1949).

Behind a facade of arguments in which law, the preferences of administrators, and the feelings of some—but not other—local interests are mingled almost indiscriminately, there is the spectacle of two agencies of the same government competing for authorizations to construct dams. Interests based on large landholdings, by giving or withholding their support, use this defective administrative structure and poorly drafted legislation to play one agency against the other for private advantage. Public principle and public interest are the victims of the pressures given elbow room by these defects. In an effort to correct this unsound organization of government the Hoover Commission recommended that the function of flood control and river and harbor improvement work of the Army Corps of Engineers be consolidated with the Reclamation Service within the Department of the Interior.[108]

Both the Army Engineers and the Bureau of Reclamation have recognized the difficulty of obtaining repayment contracts under reclamation law. The former have opposed delay in construction of flood control projects until contracts conforming to reclamation law were signed,[109] and their counsel was followed on Kings and Kern rivers. The consequences are no repayment for dams completed years ago and uncertainty whether reclamation law will be complied with at all. The Army Engineers would be satisfied with obtaining money for the treasury. The Department of the Interior has stood for both policy and money; Secretary Ickes characterized congressional reclamation policy as concerned primarily with policy —the creation of farm homes.[110]

Very recently the Solicitor of the Department of the Interior has given legal confirmation of the position taken by Regional Counsel of the Bureau of Reclamation in 1950,[111] and supported in this paper, *viz.*, that reclamation law applies to flood control projects and requires the Secretary of the Interior to enforce it. On July 10, 1957, the Solicitor said:[112]

> The statutory authority that you as Secretary exercise in connection with flood control projects providing irrigation benefits is derived from the Flood Control Act of 1944, particularly section 8. 43 U.S.C. 390. Dams and res-

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[108] See epigraph at note 103 *supra*.

[109] *E.g.*, H.R. Doc. No. 367, 81st Cong., 1st Sess. xii, xiii (1949).

[110] "The reclamation policy of the Congress is not concerned solely, nor indeed, primarily with repayment. It is concerned with the wide distribution of economic opportunities arising as a result of the construction of reclamation structures. It is concerned with the creation of farm homes. It strives against the monopolization of benefits by a privileged few." *Id.* 68; *cf.* Memorandum—Statement of Differences, prepared by the Army, *id.* xii, xiii.

[111] See note 95 *supra*.

[112] Elmer F. Bennett, U.S. DEP'T OF INTERIOR SOLICITOR'S OPINION M-36457, PROPOSED CONTRACT BETWEEN THE UNITED STATES AND THE KING'S RIVER CONSERVATION DISTRICT 2 (July 10, 1957).

> ervoirs operated for flood control purposes under the direction of the Secretary of the Army after December 22, 1944 may be utilized by you for purposes of irrigation under that Act only in conformity with the provisions of the Federal reclamation laws. Act of June 17, 1902, 32 Stat. 388 and Acts amendatory thereof or supplementary thereto. The specific provision with which you must comply under this mandate is found in section 46 of the Omnibus Adjustment Act of 1926 as amended. 43 U.S.C. 423e.

In drawing attention to large landowners who are opposed to reclamation law and administrators who are unsympathetic, it would be easy to overlook the contrasting attitude of most water users and of sympathetic administrators. The difference is crucial. When water contracts that included the excess land provision were presented to irrigation districts along Friant-Kern Canal in the southern San Joaquin Valley there were no rejections. On the contrary, the popular vote at the polls in 13 districts on 20 contracts was 5,753 to 551, a ratio of more than ten to one favoring acceptance of the contracts.[113]

Contrary to some predictions, acceptance of water under reclamation law has proceeded even farther. In the intensity of the effort to remove the excess land law from Central Valley in 1947, Senator Sheridan Downey said:[114]

> The conclusion is inescapable; the Di Giorgio Fruit Corporation, like the Kern County Land Company, is not susceptible to the kind of land reform the Bureau seems interested in introducing via the back-door. Its 160-acre limitation clause is a wholly inadequate club with which to coerce the big landowners into dividing their baronies among the serfs. It scares nobody; it irritates nearly everybody. It bids fair merely to trip up the doughty giantkillers so widely wielding it. One wonders, indeed, why they are so intent on laying about them with this particular shillelagh. There is plenty of water in the Central Valley for the DiGiorgio holdings as well as for all other project farms, excess and non-excess alike.

However, in 1952, the DiGiorgio Fruit Corporation signed a contract for water with Delano-Earlimart district agreeing to sale of its excess holdings

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[113] Senator Thomas H. Kuchel says that Corning district in the Sacramento Valley is prepared to accept the excess land provision voluntarily, despite the California Supreme Court decision against its validity. Sacramento Bee, June 22, 1957, p. D-6.

[114] DOWNEY, THEY WOULD RULE THE VALLEY 180 (1947). Senator Downey ignored the fact that Congress intended to spread the benefits of reclamation beyond local landowners to include persons anywhere in the nation seeking opportunity to farm on reclamation projects. However, citizens in other states who might like to farm on the project if they were informed of the opportunity are politically ineffective as compared with large landowners on the spot; they furnish no support to administrators trying to enforce the law. While Senator Downey directed political attack upon administrators sympathetic to the law, his logical target was Congress, which refused his proposal to change the law.

in compliance with reclamation law. The Corporation did so "under protest in order to get supplemental water for its crops, mostly grapes."[115]

Electors on the Kings and Kern rivers should be offered the opportunity that electors were given on Central Valley Project to vote on repayment contracts consistent with reclamation law, not denied it. The executive branch of the federal government, particularly the Secretary of the Interior, bears the responsibility his Solicitor confirmed on July 10, 1957, to see that this opportunity is provided.

[115] *The Bureau Coerces DiGiorgio,* CALIFORNIA FARMER, May 17, 1952, p. 533.