

# SELLING RECLAMATION WATER RIGHTS: A CASE STUDY IN FEDERAL SUBSIDY POLICY

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*It is the age old battle over who is to cash in on the unearned increment in land values created by a public investment.—Harold L. Ickes<sup>1</sup>*

THE federal reclamation program was designed to provide working farmers with irrigation water at prices they could afford. The farmers got their water at low prices, but in the process they got something else even more important—the right to continue to receive that share of water year after year.<sup>2</sup> In the arid reclamation states, assurance of a continuing, dependable supply of irrigation water is an extremely valuable asset. A piece of dry land may be almost worthless, but that same tract with a reliable water supply will generally be worth a substantial amount of money. Since the worth of the water right is thus typically reflected in land values, one who sells a farm in a reclamation project may also receive payment for this valuable right.<sup>3</sup> Moreover, since the asset which is being thus marketed was created by the investment of public funds in the construction of the project,<sup>4</sup> the effect is that the seller converts the

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1. DE ROOS, *THE THIRSTY LAND* 167 (1948).

2. See *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958); *Ickes v. Fox*, 300 U.S. 82 (1937); 32 Stat. 390 (1902), 43 U.S.C. § 372 (1964).

3. See, e.g., a letter to the author from the manager of the Wellton-Mohawk Irrigation and Drainage District, Arizona, April 5, 1965, which reports that while "there is no 'water right' sold with the land . . . the value of a right to receive water from the District is of course reflected in the price of the land itself." Wellton-Mohawk is one of many districts which operate on the model of a public utility, retailing water to users on an annual contract basis. As the letter indicates, the opportunity to realize water right profits exists in such situations just as it does on projects where the user is viewed as having a more traditional sort of property interest in the water.

4. Misunderstanding sometimes arises out of the calculatedly ambiguous claim that "reclamation pays its way." This is true in the narrow sense that the construction costs allocated to irrigation are required to be repaid. However, an examination of the way in which these costs are repaid makes it indisputably clear that the reclamation investment is an enormous subsidy for the benefit of irrigation users. Under standard reclamation law, construction costs may be repaid over a forty-year period, with no interest whatever. 53 Stat. 1193 (1939), 43 U.S.C. § 485h(d) (1964). This period may be preceded by a ten-year development period in which no repayment at all need be made. *Ibid.* Moreover, during the repayment years, the obligation can be distributed so that most of the cost is not due until the later years. See, e.g., S. Doc. No. 92, 88th Cong., 2d Sess. 16-17 (1964). Under another option in the law, certain costs can be deferred indefinitely. 53 Stat. 1193 (1939), 43 U.S.C. § 485h(e) (1964). Finally and perhaps most importantly, about 65% of the costs allocated to irrigation are actually repaid by power revenues. LEGISLATIVE REFERENCE SERVICE FOR HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., 1ST SESS., *RECLAMATION—ACCOMPLISHMENTS AND CONTRIBUTIONS* 52 (Comm. Print No. 1). For an example of how the subsidy

reclamation subsidy into cash, which he realizes as a private capital profit at the expense of his successors on the project.

That this situation is no mere loophole in search of an opportunist, but is rather an existing problem of considerable proportions, can be illustrated by recent events on the well-known Colorado-Big Thompson Project. The project area includes both agricultural and municipal users, and because of significant urban growth the limited supply of project water is much in demand. The various users have an allotment which entitles them to receive a fixed fractional share of the project's supply. There is an obligation to repay construction costs to the United States, but, typically, the terms are such as to reduce repayment to only a small fraction of the original public investment. The water rights are thus provided as a public subsidy but are held and sold, under current practice, as a private asset. By latest report, municipalities within the project were required to pay one hundred dollars to get the right to receive an acre-foot unit of water out of the annual allotment.<sup>5</sup> When it is considered that this district processed transfers of more than eleven thousand acre feet of water during 1963-1964,<sup>6</sup> the magnitude of the potential profit becomes obvious.

What is happening on the Big Thompson Project is perhaps especially dramatic because water rights, as such, are openly bought and sold and because the market is a relatively active and affluent one. Nevertheless, precisely the same possibility of reaping a large capital profit from the public investment can occur on any project when a farm is sold at a gross price of which a significant portion represents the value of the project water right. For example, one irrigation district in Oregon recently reported that when project water became available in 1961, land values increased from about fifty dollars per acre to as high as two hundred fifty dollars per acre.<sup>7</sup>

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operates, see the Department of Interior's presentation in *Hearings on S. 912 Before a Subcommittee of the Senate Committee on Public Lands*, 80th Cong., 1st Sess. 220 (1947).

It is assumed in the following discussion that free market sales of a commodity provided by a subsidy will generally result in substantial profits to the seller. Where that is not the case, and sales involve the mere recovery of payments made to the United States, the proposal to be suggested here is self-adjusting, and such a seller would not be penalized. See note 88 *infra*.

5. Boulder Daily Camera, May 12, 1964, p. 1, col. 5. The price is even higher than it seems, since in below-average years a unit will provide substantially less than one acre foot of water.

6. [1963-1964] NORTHERN COLO. WATER CONSERVANCY DIST. ANN. REP. OF THE SECRETARY MANAGER 5.

7. Letter to author from Secretary-Treasurer of Klamath Basin Improvement District, Oregon, March 30, 1965.

This situation raises some interesting questions about federal reclamation policy and about subsidy policy in general. Why should a program designed to give a needed service at reasonable rates evolve into one where the original recipients, at the end of their time of need, are also rewarded by the gift of a large capital asset? Moreover, why should that reward be given at the expense of their successors on the project, who, one would think, are equally the concern of the reclamation program? These are the questions with which this article will be concerned.

### I. THE SOURCE OF THE PROBLEM

The problem of private profit-taking exists today because the federal government refrains from imposing price controls on the sale of reclamation water rights. It refuses to attempt to prevent the seller from realizing the so-called "incremental value"<sup>8</sup> which accrues when a farm acquired at dry-land prices is sold at a price which incorporates the market value of the federal investment in reclamation. That refusal is not based on the impossibility of such a restriction, for similar restrictions have been employed in the past. Indeed, one mystery with which we must deal is the ground upon which the Department of the Interior, the administrator of the reclamation laws, bases its refusal to act. Never fully articulated, the Department's reasoning appears to rest upon some combination of the following three reasons: First, and most important, Congress does not want (or has prohibited) control of sales of water rights; second, such restrictions are somehow inconsistent with the underlying purposes of reclamation policy and the private property system in which it operates; and third, even if such controls were permissible and desirable, they are administratively impracticable.

The discussion which follows will consider and ultimately reject each of these reasons. It will conclude that Congress has not prohibited such controls, that a rational reclamation policy demands them, and that they are practicable and should be implemented forthwith.<sup>9</sup> Of all these issues, ascertaining the congressional attitude

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8. As used here, "incremental value" means the market value of the right to receive project water. "In practice 'incremental value' has been defined as the amount realized from the sale of land in excess of [the sum of] (1) original appraisal, (2) appraised value of improvements, (3) construction charges paid and (4) twice the amount of any previous payments to the district." U.S. DEPT. OF INTERIOR, LANDOWNERSHIP SURVEY ON FEDERAL RECLAMATION PROJECTS 48 (1946) [hereinafter cited as LANDOWNERSHIP SURVEY].

9. The two statutory provisions which deal most closely with the rights of users are in no sense determinative of the question at issue here. See 32 Stat. 389, 390 (1902), 43 U.S.C. §§ 431, 372 (1964). Moreover, it should be clear that merely because a user may have a right to continue his use and not be cut off, 70 Stat. 483 (1956), 43

is perhaps the most complex. The applicable statute seems, on its face, to suggest that the reaping of incremental values is not to be forbidden except in one special situation: the sale of large estates—so-called excess lands.<sup>10</sup> However, this appearance conceals a legislative view which, although twisted and shifting, is far more sympathetic to the general prohibition of private profit-taking than current administration would suggest. Our first task, therefore, must be an analysis of the legislative history of control of incremental value sales.

## II. EARLY HISTORY OF RECLAMATION LEGISLATION

The provisions of the original reclamation act, which came fairly late in the history of the nation,<sup>11</sup> clearly reflect the influence of two important factors. First, the disposition of the public domain had been plagued by monopolization and speculation, which had continuously frustrated the underlying purpose of opening the federal domain to settlement—the creation of a class of self-reliant family farmers.<sup>12</sup> To ensure that the reclamation program would not be similarly frustrated, the framers of the 1902 act devised a series of anti-monopoly and anti-speculation provisions. Chief among them were the prohibition against the sale of reclamation water rights for use on more than 160 acres in single ownership, the requirement that users be bona fide residents upon the land, and the condition that reclamation water be appurtenant to the land.<sup>13</sup> It was thought that these three rules would prevent land monopolization and profiteering by large corporations to the detriment of the intended beneficiaries of the act.<sup>14</sup>

The second factor was a determination that reclamation should carry its own weight to the extent possible. Thus, the law required users to repay to the United States the capital investment in construction. Although repayment was to be without interest, the full costs of construction were to be returned in ten years' time.<sup>15</sup> To what extent repayment was a calculated new departure in the theory of government aid and to what extent it was a political expedient to

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U.S.C. § 485h-1(4) (1964), he does not necessarily also have the right to sell his use to another for a profit. See Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49, 64 (1964). It is only the latter alleged right with which we are concerned here.

10. See 44 Stat. 649 (1926), as amended, 70 Stat. 524 (1956), 43 U.S.C. § 423c (1964).

11. 32 Stat. 388 (1902) (now codified in scattered sections of 43 U.S.C.).

12. See LANDOWNERSHIP SURVEY 61-73, 91.

13. 32 Stat. 389, 390 (1902), 43 U.S.C. §§ 431, 372 (1964).

14. See Taylor, *The Excess Land Law—Execution of a Public Policy*, 64 YALE L.J. 476, 484-86 (1955).

15. 32 Stat. 389 (1902).

win the needed votes of midwestern congressmen is unclear and, from today's perspective, irrelevant. In any event, a *limited* subsidy concept in the form of a repayment obligation was built into the basic fabric of reclamation law.

The inadequacy of the anti-speculation clauses and the unrealistic harshness of the repayment formula soon led to disaster. The provisions so carefully designed to prevent profiteering in water failed to take account of the fact that the economic value of the water could and would be reflected in land values. Since there were no adequate restrictions on land transactions, a fatal combination of events took place.<sup>16</sup> In the face of a rising market, landowners were induced to refrain from selling in the hope that time would drive real estate prices even higher. Since a good deal of the property was held by owners of large tracts who could afford to wait and speculate, much land was held off the market and not settled at all during the early years. This result was, of course, contrary to the congressional desire that the projects be settled and cultivated and that the owners of the maximum amount of land begin repaying the construction charges which had been expended. At the same time, however, those lands which were put upon the market brought enormous profits. The extent of the speculative excesses is indicated by the fact that the average price increase on project lands during the first decade of reclamation exceeded 750 per cent.<sup>17</sup> This increase was nearly seven times the general rise in farm land prices in reclamation states during the same period.<sup>18</sup>

The rate of economic failures created by the combination of land speculation and a rigid repayment schedule was tremendous, and the settlers naturally turned to Congress for relief. The precise question was whether the repayment obligation should be reduced in order to permit the settlers on the projects to survive financially, but at the same time to permit the selling landowners to reap their profits.

In the context in which the problem arose, the solution appeared easy. Those who had been profiting at the expense of the repayment fund were principally large landowners and speculators whom there was neither need nor desire to aid. They were merely parasites—

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16. This history is reviewed in DEPT. OF THE INTERIOR, STUDY PREPARED PURSUANT TO A RESOLUTION OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 2D SESS., ACREAGE LIMITATION POLICY 6 (Comm. Print 1964) [hereinafter cited as ACREAGE LIMITATION POLICY]. These early developments are also discussed in the *Landownership Survey* and in the report of the Special Advisors on Reclamation, *Federal Reclamation by Irrigation*, S. Doc. No. 92, 68th Cong., 1st Sess. 36-40 (1924).

17. 33 U.S. BUREAU OF RECLAMATION, THE RECLAMATION ERA 178-79 (1947).

18. *Ibid.*

real estate manipulators who, without ever settling on or improving the land themselves, reaped enormous profits from the enthusiasm and naïveté of the true settlers to whom they sold. The need appeared to be merely to get the land into the hands of genuine settlers with dispatch and at reasonable prices. Once that had been done and the speculators had been squeezed out, the basic structure of the reclamation plan could go forward as originally planned. The true settlers would prosper, and the investment of the United States would be once again secure.

### III. HISTORY OF INCREMENTAL VALUE CONTROLS

#### A. *Limited Attempt To Curb Speculative Excesses— Price Control of Excess Land*

It was with this background that Congress passed the Reclamation Extension Act of 1914.<sup>19</sup> Its principal purpose was to grant a permanent enlargement of the repayment period from ten to twenty years, but it also made the first significant attempt to deal with the problem of speculative excesses. As previously noted, the task as it then appeared was "to cope with the special problem of initially breaking up these excess holdings and preventing the owners from capitalizing on the benefits of Federal construction in the form of high prices charged to purchasers of their lands."<sup>20</sup> In pursuance of this goal, a number of provisions were enacted to induce sales by making it burdensome and expensive to hold land out of production. In addition, the requirement was added that, before construction began on any project, the Secretary must require project landowners "to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate . . ."<sup>21</sup> This section provided the basic structure upon which subsequent incremental value provisions were built; it is therefore important to be clear about its purpose. Notably, it did not represent a declaration that the original bona fide settlers should have the benefit of incremental values for themselves. It was, rather, a negative law; it merely provided that the speculators (owners of excess land) should not have any such profit. The question with which we are concerned—distribution of profits in subsequent sales—was not before the Congress in 1914. It was having enough trouble getting the first generation started to worry about what might happen thereafter.

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19. 38 Stat. 686 (1914).

20. ACREAGE LIMITATION POLICY 7.

21. 38 Stat. 689 (1914), 43 U.S.C. § 418 (1964).

B. *Early Proposal for Broader Control Over  
Incremental Profits*

The problem of subsequent sales was not long in being raised. For a variety of technical reasons, it soon became obvious that the measures taken in 1914 were not sufficient to alleviate the financial difficulties of the reclamation projects,<sup>22</sup> and in 1923 the President appointed a panel of distinguished citizens to make a comprehensive study of the program.

The report of this group,<sup>23</sup> the so-called Fact Finders Committee, is most interesting. It recognized for the first time that competition for the benefits of the federally provided incremental values existed not only between "speculators" and "settlers," but also among bona fide settlers themselves. As the Fact Finders noted, there would inevitably be some turnover of reclamation lands. Many of the settlers who had initially come on the project would eventually sell out to succeeding settlers for a variety of legitimate reasons such as death, ill health, or restlessness.<sup>24</sup> The first settlers may have obtained their lands at low dry-land prices, but after the implementation of reclamation measures the lands had a market value inflated by the presence of irrigation water. The selling settlers were reaping this increment as a capital profit. Although these sellers, unlike the "pure" speculators, were meant to be the beneficiaries of the federal investment, so were the buying settlers. To permit the selling settler to reap the value of the water right as a profit meant that he would do so at the expense of the buying settler, thus reducing the financial stability of those persons subsequently coming onto the project. The Report described the situation thus:

[T]he [transferring] farmer sold his equity in the farm unit and the water contract at a price over and above the money he had actually paid out. The purchaser was under the obligation of paying to the Government the usual annual installments, and in addition the premium paid to the former owner. After several such transfers have occurred, each one at a price above the cost to the previous owner, the ultimate purchaser often carries an obligation to the respective purchasers which overshadows in magnitude the obligations to the Government. When the pressure of this heavy obligation weighs upon him, he is likely to blame his condition on the Government reclamation plan, when, as a matter of fact, the project construction and the operation and maintenance charges are small compared with the other obligations that he has to meet. Such a

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22. LANDOWNERSHIP SURVEY 42.

23. S. Doc. No. 92, 68th Cong., 1st Sess. (1924).

24. *Id.* at 112-14.

pyramiding of costs is most unfortunate, for it is nearly always disastrous to the credit and to the peace of mind of the farmer.<sup>25</sup>

The Fact Finders thus saw clearly the basic dilemma with which we are principally concerned—the allocation of incremental land values among successive generations of settlers on the project. It is important to note, however, that the similarity between their concern and ours is only partial. They saw a conflict between the generations of settlers only to the extent that there was a threat to the survival of the buyer and the security of the repayment obligation. Implicit in this limited concern is the assumption that if the buyer's security could be assured, it would be perfectly proper to permit the seller to reap the incremental value. The soundness of that assumption is at the very center of our concern here. We ask the questions why, and under what financial circumstances, the selling (earlier) settler should be preferred over the buying (later) settler in the distribution of a publicly conferred benefit. This difference is critical because the assumption that financial security is the sole consideration in determining the role of incremental profits pervades all congressional action, as we shall see, and gives support to the claim made here that Congress never decided, and never really considered, the issue with which we are concerned.

In any event, the Fact Finders did come to grips with their discovery that speculation was not limited merely to the initial disposition of large landholdings. They drafted a bill regulating all sales of all irrigable lands, both excess and non-excess, until all construction charges had been paid. It provided that project lands were to be appraised at their value without reference to the proposed project (in essence their value as dry land) and that "upon any and every sale of the land or any interest therein" the seller must turn over to the United States half of the amount by which the sale price exceeded the appraisal price.<sup>26</sup> The Fact Finders' proposal itself did not become law, but twice in the next two years Congress affirmed the principle that broad control over incremental value sales should be exercised.

### C. *Legislation Extending Price Control to All Project Land*

Both the San Carlos Project Act of 1924<sup>27</sup> and the Interior Department Appropriation Act of 1925,<sup>28</sup> which authorized a number

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25. *Id.* at 113; see also *id.* at 37.

26. *Id.* at 204-06; H.R. 8836, 68th Cong., 1st Sess. (1924).

27. 43 Stat. 475 (1924).

28. 43 Stat. 1141 (1925).



of projects, contained a requirement that no expenditures should be made until a repayment contract had been executed containing

a provision for an appraisal, showing the present actual bona fide value of all such irrigable land [all lands under the project] fixed without reference to the proposed construction . . . and [a provision] that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall be valid unless and until the purchase price involved in such sale is approved by the Secretary of the Interior . . . .<sup>29</sup>

This approach incorporated two highly significant changes from that used in the 1914 Extension Act. First, the restriction was to be operative until half the construction charges were repaid. Second, it was worded to prohibit the taking of incremental profits not only in the original sale of excess land to a settler, but also in subsequent sales of project lands.<sup>30</sup> If the quoted requirement meant to accomplish what its language indicates, its enactment marked a milestone in reclamation policy. Up to this time, as we have noted, congressional concern with speculation was limited to that period when land was first being put into production. In contrast, however, the 1924 and 1925 acts contain no such limitation. Their language covers not only initial sales of excess lands, but also subsequent sales between settlers.

That this was the result intended seems corroborated by the element of the requirement which covered all sales until half the construction charges were paid off. These charges were enacted during the period in which Congress was enlarging the total repayment period to forty years;<sup>31</sup> indeed, at the time of the 1925 act the operative repayment provision was indefinite in duration, with annual payments being based upon a percentage of gross income.<sup>32</sup> In light of these developments, it would seem to have been antici-

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29. Authorization for the Yakima Project, Kittitas Division, 43 Stat. 1170 (1925). The other authorizations contained provisions similar in scope, but not identical in language. It should be noted that the San Carlos Project Act and the 1925 Appropriation Act differed from the Fact Finders' proposal in that a general power of control over the purchase price in the Secretary was substituted for the specific requirement that 50% of the increment be returned to the United States. The debate on the Fact Finders' proposal suggests that the reason for this was not an objection to broad incremental value control as such, but rather skepticism as to whether the precise formula urged by the Fact Finders (which failed, for example, to give credit to the seller for improvements he had made) was fair. See *Hearings on H.R. 8836 and H.R. 9611 Before the House Committee on Irrigation and Reclamation*, 68th Cong., 1st Sess. 38-45, 314-41 (1924).

30. For example, the provision ordinarily would control a sale by a bona fide settler who had worked the land for six or eight years and who had become ill or decided to retire.

31. 44 Stat. 648 (1926), 43 U.S.C. § 423d (1964).

32. Section 4, subsec. F, 43 Stat. 702 (1924), *repealed*, 44 Stat. 650 (1926).

pated that the sale-price restriction would be in effect for a very long time and would probably apply to several resales of the project lands.

However, this provision restricting sales until half the costs were repaid cuts the other way, too. It is a limitation, and thus suggests some congressional reservations about denying the selling settler incremental profits, even at the risk of losing some of the repayment contracted for.

The two-edged aspect of the restriction is just the visible sign of a tangled background of legislative indecisiveness of which we shall see even more in the history of subsequent statutes.<sup>33</sup> In any event, despite some inconsistency, the 1924 and 1925 acts seem clearly to represent a congressional willingness to impose broad and long-lasting restrictions on incremental value sales.

D. *Section 46 of the Omnibus Adjustment Act—A Tangled Piece of Legislative Draftmanship*

The next events of interest took place in 1926, when Congress passed two important laws. The first was the annual Interior Department appropriation law, which, like that of 1925, authorized some specific reclamation projects.<sup>34</sup> The second was the Omnibus Adjustment Act,<sup>35</sup> a reclamation law of general application which is still in force. The statutes were enacted within fifteen days of each other and contain identical anti-speculation provisions. The relevant language, now best known as section 46 of the Omnibus Adjustment Act, stated that henceforth contracts between the United States and the users' associations must provide that:

[A]ll irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised . . . and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value . . . without reference to the proposed construction . . . and that no such excess

33. It is noteworthy that the Bureau of Reclamation had no such reservations about what ought to be done. During the hearings on the appropriation bill, the Commissioner of Reclamation put into evidence the repayment contract he proposed to use. *Hearings on the Interior Department Appropriation Bill for 1926 Before a Subcommittee of the House Committee on Appropriations*, 68th Cong., 2d Sess. 533-36 (1924). It provided in detail that an appraisal, excluding speculative values, was to be made of "all district lands." *Id.* at 534. If any lands in the district were sold for an amount in excess of the appraisal price, 50% of that excess would be payable to the irrigation district to be credited on the construction obligation. The contract expressly provided that it was to apply not only to the first sale to an eligible settler where profits would be those of a mere land profiteer, but also to a "second sale, or third or additional sale." *Id.* at 535.

34. 44 Stat. 478 (1926). Included were some reauthorizations of projects which had been approved in the 1925 act.

35. 44 Stat. 636 (1926).

lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against such lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary . . . .<sup>36</sup>

This provision is the successor to the 1924 and 1925 acts and is still the principal anti-speculation provision in the reclamation laws. It is, therefore, necessary to examine it in some detail. On its face, section 46 seems to embody a dramatic change of policy from the 1924 and 1925 laws, and from the recommendations of the Fact Finders, for it seems to reject the principle of general price control and to limit such controls solely to sales of excess lands. If indeed this was what Congress desired, it would explain the current administrative refusal to take action against private profit-taking in the publicly created reclamation water values. Unfortunately, a mere perusal of the face of section 46 is not enough; behind the unexamined statutory wording lurks a grammatical and legal puzzle of some complexity.

To solve that puzzle, it is first necessary to recall that anti-speculation provisions in the reclamation laws were of two types. One was designed to accelerate the disposition of large landholdings; the other was to control prices when lands were sold. The excerpt quoted above from the 1925 law deals only with the second problem, price control.<sup>37</sup> It requires the execution of a repayment contract between the Secretary and the water district agreeing that land sales be subject to control by the Secretary. To the extent that the 1925 law concerned itself with the problem of breaking up excess landholdings, it employed a quite different procedure described separately in the statute.<sup>38</sup> That procedure required that an entirely different contract be executed between the particular state involved and the United States, in which the state undertook the "duty and responsibility" of breaking up excess landholdings and securing settlers to improve the land.<sup>39</sup>

The excerpt quoted above from the Omnibus Adjustment Act

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36. 44 Stat. 650 (1926), 43 U.S.C. § 423e (1964).

37. Text accompanying note 29 *supra*. The same is true of the parallel portion of the 1924 San Carlos Project Act. Section 4, 43 Stat. 476 (1924).

38. 43 Stat. 1169, 1170 (1925). The excess land provision is in the same long numbered section, but in a separate proviso.

39. The San Carlos Project Act dealt with excess landholdings by requiring that the excess be conveyed to the United States. Section 4, 43 Stat. 476 (1924).

of 1926,<sup>40</sup> however, includes provisions for breaking up excess land-holdings and for controlling prices juxtaposed in the same sentence. The reason is that Congress had decided by then to abandon the experiment with state responsibility for excess lands and to revert to the same device it used for price control—a contract between the Secretary and the water district. As a consequence, the drafters of the statute were able to consolidate and incorporate both anti-speculation provisions within a single sentence. Thus the sentence could be structured to read:

[Such contract or contracts with irrigation districts hereinbefore referred to shall further provide . . .]

that no such excess lands so held shall receive water . . . if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands . . .

and that until one-half the construction charges against such lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary.

Ordinarily the details of sentence structure and the order of phrasing would be an utterly trivial matter, unworthy even of notice. However, in this particular situation the consolidation may have had a major impact on the administration of reclamation policy.

If we now turn back to the exact language of the 1926 law, the relevance of the consolidation will become apparent. The words of the earlier acts relating to restrictions on the sale price of lands—"until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall . . ."—were retained without significant change. However, in the 1926 law the force-sale provision for excess lands was inserted ahead of the language relating to sale-price control. Physically this was a mere consolidation of two independent provisions, but grammatically a crucial change occurred. Although the language of the sale price provision remained the same, the referent of the pronouns changed completely. Thus, though the provision still said—as it had in 1924 and 1925—"said lands" and "such lands," the lands to which "said" and "such" refer seem to have changed. In the earlier laws the referent was as broad as it could be—all irrigable lands under the project. In contrast, however, with the insertion of the excess land clause in the 1926 laws, the referent, grammatically at least, was now merely "all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres."

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40. Text accompanying note 36 *supra*.

If the Congress meant, in fact, to accomplish what it thus grammatically accomplished, then the broad coverage of incremental value sales in the legislation of 1924 and 1925 was substantially narrowed, and only sales of excess lands would be regulated. Indeed, as previously noted, current administration imposes only this very limited restriction, at least in part because of the view that the 1926 provision plainly states that only control of excess land sales is intended.<sup>41</sup> However, as we have just seen, it is quite possible that the apparent restrictiveness of the 1926 provision is the result of nothing more than a bizarre grammatical fortuity,<sup>42</sup> and that section 46 in no sense represents a congressional repudiation of broad control of incremental value sales.

In any attempt to resolve the question of the true meaning of the 1926 provision, it should be determined whether Congress ever indicated that it was changing the 1924 and 1925 laws or whether the apparent grammatical certainty is simply the result of blind

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41. The importance of § 46 to the formulation of administrative policy is somewhat uncertain. No doubt present policy is significantly influenced by congressional acquiescence, in the late 1940's and early 1950's, in suggestions that incremental value contracts covering non-excess lands should be repudiated and by the repeal of certain statutory incremental value provisions. See note 52 *infra*. However, the repeals were based on varying grounds, and in none of them did Congress indicate a desire to repudiate the principle of § 46, which has always been viewed as embodying the fundamental law. See note 64 *infra*.

There has also been a suggestion that broad control of incremental value sales could be imposed without regard to the meaning of § 46 under the blanket authority given the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect." 32 Stat. 390 (1902), 43 U.S.C. § 373 (1964). See LANDOWNERSHIP SURVEY 48. However, reliance on this section seems misplaced. If Congress has spoken specifically on an issue and indicated that it does not want a certain thing done, the executive branch certainly ought not to be allowed to do that thing anyway on the basis of a general authorizing provision in the applicable statute. Those who administer the reclamation acts, of all people, should be sensitive to the relation between general language and specific language in the law. See *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291-92 (1958).

42. Whether the change was purposeful or inadvertent must remain a matter of speculation; the details of the change are most inconclusive. The origin of the language that became § 46 was an Interior Department draft made in 1925. *Hearings on the Interior Department 1927 Appropriation Bill Before a Subcommittee of the House Committee on Appropriations*, 69th Cong., 1st Sess. 739 (1925). Oddly, this draft omitted entirely the critical clause beginning "until one-half." That draft thus plainly applied only to excess lands, notwithstanding the fact that all previous versions had clearly applied to all irrigable lands and the Department itself had openly advocated the broader coverage in hearings the preceding year. See note 33 *supra*. Moreover, in presenting this 1925 draft, Commissioner Mead at no point indicated any change in departmental policy. *Hearings, supra*.

To add to the mystery, the omitted clause, "until one-half . . .," was apparently reinserted by the House Appropriations Committee. See 67 CONG. REC. 1507, 5782 (1926); H.R. REP. NO. 37, 69th Cong., 1st Sess. (1926). Whether they added this language to broaden coverage to non-excess lands or for some other reason is not clear. It is also unclear whether they inserted the phrase at the point they did because it had been there in the 1924 and 1925 acts (when the excess land provision did not precede it), or purposely to follow and be limited by the newly inserted excess land provision.

chance. If Congress intended to narrow the earlier provisions, there should be some evidence of that intent. In fact, however, an examination of the legislative history of the 1926 act shows it to be wholly barren of any indication that the law was being narrowed.<sup>43</sup>

The only affirmative evidence available is to be found in contemporary administrative interpretation. In the report of the Bureau of Reclamation for the period ended June 30, 1926,<sup>44</sup> which was published more than a month after the signing of the Omnibus Adjustment Act, Commissioner Mead discussed the Vale Project in Oregon. That project was first authorized under the broad language of the 1925 act and then reauthorized in 1926 under the seemingly more restrictive language there used.<sup>45</sup> The Commissioner noted that under the 1925 law the project was made subject to "appraisal of private lands to be benefited by the proposed works with agreements for sale thereof at the appraised prices."<sup>46</sup> Although the 1926 statute had just been passed, there is no indication that it was thought to have modified control of incremental value sales, thereby narrowing the scope of regulation to transfers of excess lands only. Moreover, it seems significant that the report speaks expansively of "private lands" and not merely of excess land. Since it was the Bureau of Reclamation which had recommended the broad repayment contract, covering "all transfers" of "all district lands," to Congress in the hearings on the 1925 bill,<sup>47</sup> it might be expected that its report would be careful to distinguish between a law which covered all the private lands to be benefited and one which covered only excess lands.

Even more important, the contemporary interpretation by the

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43. Conceivably it could be argued that it is improper to place the burden on the history of § 46 to demonstrate that it was an intentional departure from the 1924 and 1925 laws. Such an argument would suggest that the coverage of § 46, a law of general application, should be compared with its predecessor general law, the 1914 Extension Act, and not with such special and limited laws as the San Carlos Act and the Appropriation Act of 1925, or with the Fact Finders' proposal, which never became law. It would be further argued that § 46 and the 1914 act are consistent, since both deal only with excess lands and since the 1924 and 1925 laws were merely experiments which were tried and abandoned. This is possible, but it seems unlikely that such important experiments—the result of years of open reconsideration of reclamation policy—would be abandoned before they were given any chance to show their worth and that there was utter silence about the rather important decision to abandon them and return to the 1914 approach. Nor was silence customary for Congress when abandoning such experiments. The decision to discontinue state participation in breaking up excess landholdings, accomplished in the very statutes we have been discussing, was accompanied by extensive debate. The stark difference invites skepticism at the least.

44. [1925-1926] COMM'R OF RECLAMATION ANN. REP. TO THE SEC'Y OF THE INTERIOR 27.

45. 43 Stat. 1168 (1925); 44 Stat. 479 (1926).

46. COMM'R OF RECLAMATION ANN. REP., *op. cit. supra* note 44, at 27.

47. See note 33 *supra*.

Secretary of the Interior clearly supports the view that regulation of incremental values was not meant to be limited merely to sales of excess lands. Only five months after the passage of the 1926 Appropriation Act and the Omnibus Adjustment Act, the Secretary entered into a repayment contract for the Owyhee Project.<sup>48</sup> That project was one of those expressly authorized in the 1926 Appropriation Act, which contained an anti-speculation provision with language identical to section 46 of the Omnibus Adjustment Act.<sup>49</sup> The Secretary included in the contract an anti-speculation provision requiring that when sales of project lands were made in excess of appraised valuation, half of that incremental value must be paid to the district as an advance on future construction, operation, and maintenance charges.<sup>50</sup> The significant fact is that this contractual provision was not limited in its coverage merely to excess lands, but expressly included non-excess lands.<sup>51</sup> While the Owyhee form of contract was used extensively only in the Pacific Northwest, it was by no means an eccentric or isolated instance.<sup>52</sup> At the least,

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48. Contract between the United States of America and the Owyhee Irrigation District, October 14, 1926.

49. 44 Stat. 479 (1926).

50. Article 41 of the contract, *supra* note 48, provided *inter alia*:

(B) The amount in dollars by which the price fixed in any future sale of District land exceeds the sum of (a) the appraised value of the land (as determined by the appraisal provided for in subdivision C of this article); (b) the appraised value of the improvements thereon, if any (determined as provided in subdivisions C and F of this article); (c) payments, if any, made to the United States on the construction charges upon such lands; and (d) twice the amount of the payments, if any, made to the District under this article upon any previous sale or sales of such land, shall for convenience of reference be termed the "incremented" value of said land.

(I) If any of the lands of the District are sold at an incremented value, as defined in subdivision B of this article, the vendor shall pay to the District, or the vendee shall pay to the District out of the money which would otherwise have been payable to the vendor, an amount equal to fifty per centum (50%) of such incremented value.

51. Article 41(A) provided: "It is understood that this article does not apply to any of the old lands of the project excepting the old excess lands, but does apply to all new lands and excess lands." Definitions of old and new lands were provided in Article 7:

Lands having rights in canals now receiving their water supply by means of pumping from Snake River, but which will secure their water supply from the Owyhee Project after the same is constructed, and participate in the use of the project canal system as well as the project reservoir, are herein referred to as the "old" lands of the project. Lands which have no rights in the canals now receiving water by means of pumping from Snake River and which will secure their entire water supply from the works of the Owyhee Project are herein referred to as the "new" lands of the project. . . .

52. The history of the Department's use of and attitude toward incremental value contracts covering non-excess lands is most interesting. A survey recently made of all repayment contracts for the period 1926-1954 shows the following: "Excluding contracts which require the provision by reasons of specific legislation (Columbia Basin, Tucumcari and WCU projects) [Act of October 14, 1940, 54 Stat. 1119, as amended, 16 U.S.C. §§ 590y-z (1964)], only 36 out of well over 1,000 contracts contain the provision . . . . Thirty-two out of the 36, moreover, involve Pacific North-

this indicates that the 1926 laws were not viewed as a bar to broad control of incremental value sales.<sup>53</sup>

The foregoing analysis is not designed to suggest that section 46 of the Omnibus Adjustment Act *requires* the use of incremental value provisions for non-excess lands. It is designed to show, however, that section 46 neither forbids the use of such provisions nor in any sense necessarily embodies a congressional desire that incremental value controls be imposed only on the disposition of excess lands. Probably the most that can be said is that Congress was groping—not unwilling to accept broad controls when they were included in legislative drafts and not sufficiently concerned to make sure that the broad coverage did not slip out of the laws. The conclusions intended at this point are merely: (1) that broad price control of non-excess land sales has been at least acceptable to Congress and to the officials entrusted with the administration of the reclamation laws; (2) that Congress did not, in 1926, reject the use of such controls; and (3) that therefore whether such controls ought to be employed is a question that turns on congressional intent since 1926, to the extent that it is relevant, and upon an inquiry into what incremental value policy would best advance the goals of the reclamation program. Before embarking upon an analysis of the policy question, we must pause briefly to examine the legislative history since 1926.

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west projects . . . ." Letter from Edward Weinberg, Deputy Solicitor, Dept. of the Interior to author, June 1965. By contrast, reports and testimony of Department officials usually give the impression that such contracts were quite widely used. See, e.g., H.R. REP. NO. 448, 81st Cong., 1st Sess. 18 (1949); *Hearings on S. 2172 Before the Senate Committee on Irrigation and Reclamation To Prevent Speculation in Lands in the Columbia Basin*, 75th Cong., 1st Sess. 30-31 (1937); Memorandum From the Commissioner of Reclamation to J. A. Krug, Secretary of the Interior (June 16, 1948) (copy in the author's possession). "In any event, from 1954, if not earlier, it has not been departmental policy to include in contracts sale price controls on non-excess lands." Letter from Edward Weinberg to author, March 29, 1965.

53. The validity of the Owyhee contract was challenged on the ground that the Secretary had no authority to control non-excess land sales. *Terra v. Pinney & Owyhee Irrigation Dist.*, No. 4829E, Cir. Ct., Malheur County, Ore., Jan. 27, 1937 (decision reprinted in 27 U.S. BUREAU OF RECLAMATION, *THE RECLAMATION ERA* 128 (1937)). The court sustained the validity of the contract, but the opinion is so unsatisfactory that neither the precise ground of the objection nor the basis for sustaining the Secretary's authority is clear. It has been suggested that the cases turned on the broad authority given to the Secretary in § 10 of the 1902 act (see note 41 *supra*; see also 3 PRESIDENT'S WATER RESOURCES POLICY COMM'N, *WATER RESOURCES LAW* 232 (1950)), but that conclusion is not at all clear from the Oregon court's opinion. Such an interpretation of the opinion would seem to be supported by the fact that the incremental value provision was to be in effect for the whole term of the repayment obligation (Contract, *supra* note 48, art. 41[L]) and not merely until half the costs were repaid.



*E. Legislative Developments After 1926*

Congress enacted no anti-speculation legislation for more than a decade after the passage of the 1926 laws. Then, in 1937, it passed a special law for the Columbia Basin Project.<sup>54</sup> While this statute was limited in its application solely to that project and has since been repealed,<sup>55</sup> its background is worth examining, for it is illustrative of congressional unawareness of the specific problem at issue here.

The 1937 Columbia Basin law was phrased more expansively than any anti-speculation law Congress had ever previously considered. It expressly required the restriction of incremental value sales on "all irrigable lands whether initially excess or non-excess,"<sup>56</sup> and it imposed that requirement until the repayment obligation had been entirely liquidated.<sup>57</sup> The purpose of this restriction, however, was not to grant the incremental value subsidy to the buying settler in preference to the selling settler. There was no recognition whatever of the issue with which we are concerned—choosing how the benefit should be distributed as between the competing interests of the settlers.

The sole purpose of the restriction, according to its draftsman, was to secure the government's repayment rights by preventing the possibility of a ruinous speculation "during the period that we still have a financial interest in this project."<sup>58</sup> Thus, here as in earlier times, the only issue that was seen to be raised by incremental value sales was that of jeopardizing the security of the repayment obligation. Again it was assumed that if repayment were secure, it would obviously be proper to remove all restrictions on incremental sales and to give the benefit of increased land values to the settler. There is no evidence that it was ever called to the attention of Congress that there are two competing classes of bona fide settlers—the selling settlers and the buying settlers—and that a legitimate issue existed as to which of them should be preferred in distributing the benefit of incremental values, regardless of the

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54. 50 Stat. 208 (1937).

55. The anti-speculation provision of the 1937 act was superseded by 57 Stat. 14 (1943), the relevant provisions of which were repealed by 76 Stat. 678 (1962). See also 52 Stat. 211 (1938), repealed 69 Stat. 556 (1955); 54 Stat. 1121 (1940), 16 U.S.C. § 590z-2(c)(5) (1964).

56. 50 Stat. 209 (1937).

57. The act did not expressly so provide, but that intent was made quite explicit by the bill's draftsman, the Solicitor for the Department of the Interior. *Hearings on S. 2172 Before the Senate Committee on Irrigation and Reclamation To Prevent Speculation in Lands in the Columbia Basin*, 75th Cong., 1st Sess. 29, 31 (1937).

58. *Hearings on S. 2172*, *supra* note 57, at 29.

status of repayment. All through the years, Congress automatically equated "settler" with "selling settler."

For this reason, it appears that when it was possible to persuade Congress that the people on the project would be able to meet their repayment obligations, Congress was ready to remove all restrictions on incremental value sales. That is precisely what has been done. Beginning in the 1940's, as repayment stabilized the Department of the Interior took the position that incremental value restrictions were no longer necessary. Perhaps the first step in this last phase of the history was the amendment of the Columbia Basin Act in 1943, reducing the period of restriction to only five years.<sup>59</sup> This was done on the theory that ruinous speculation occurred only during the first years of a project's existence; after that time, as true settlers got on the land and put it into profitable production, repayment was being made and the need for control was thought to be at an end.<sup>60</sup>

This theory was made explicit in 1949 when the Department of the Interior sought to limit the use of incremental value controls throughout reclamation administration to periods not exceeding five years.<sup>61</sup> Its position was that:

The intent of the incremental value provision was to extend speculation control to nonexcess holdings and thereby, during the settlement and development periods, to stabilize land prices and prevent the over-capitalization of the lands by a failure to recognize the burden of unpaid construction costs, thus protecting the investment of the settler and assuring the repayment of construction costs in accordance with the contract.

In operation, it has become apparent that after a project has been developed and settled and the District has levied and collected assessments to cover construction installments for a period of years a need for control of speculation in nonexcess lands is materially lessened.<sup>62</sup>

Thus, the legislative history subsequent to 1926, while relevant, is in no sense determinative of the problem with which this article is concerned.

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59. 57 Stat. 14 (1943).

60. 89 CONG. REC. 1252-53 (1943); *Hearings on H.R. 6522 (Part 2) and H.R. 7722 Before the House Committee on Irrigation and Reclamation To Amend the Columbia Basin Project Act*, 77th Cong., 2d Sess. 234 (1942).

61. H.R. REP. No. 448, 81st Cong., 1st Sess. 18 (1949); Memorandum from the Commissioner of Reclamation to the Secretary of the Interior, June 16, 1948, approved, June 29, 1948 (copy in the author's possession).

62. Memorandum, *supra* note 61, at 2.

## IV. SPECULATION CONTROL: A MISCONCEPTION OF THE PROBLEM

It should by now be clear that control of incremental value sales has always been viewed as a problem of control of speculation, and the existence of speculation has been measured by the ability of settlers to survive financially and to meet their repayment obligations. Thus, in a loose sort of way the policy seems to have been that when control of incremental value sales on non-excess lands was necessary to secure the repayment obligation, they were employed; and when such controls were not needed for that purpose, they were abandoned.

For this reason the issues upon which incremental value control policy has been determined through the years are quite unrelated to the question with which we are here concerned. That question—upon which group of bona fide settlers the value is to be conferred as a reclamation benefit—is a totally separate issue. The mere fact that the repayment debt is current does not suggest that the selling settler is to be preferred over the buying settler or over the irrigation district as a trustee for all those on the project. Indeed, as we shall see, every element of a rational reclamation policy suggests that of all the available alternatives, that which gives the profit to the seller is the one wholly unacceptable solution.

A. *The Source of the Confusion*

In the early days of reclamation, permitting incremental profits to be taken was disastrous to recoupment of the repayment obligation, and therefore such profits were generally forbidden. Later, for a variety of reasons, it became possible for the United States to permit the taking of incremental profits (that is, to grant that additional value as a subsidy) and also to recoup its contracted-for repayment.<sup>63</sup> The result was a repeal of the restrictions on incre-

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63. Though not essential to the analysis here, there is a revealing sidelight on congressional incremental value policy which deserves comment. As we have seen, all through the years the congressional attitude toward incremental value sales was guided by the status of repayment. It was the original policy that the full costs of construction would be repaid by water users in a relatively short time. Theoretically, at least, reclamation policy has retained the principle of full recoupment of costs. However, the repayment obligation has been in fact greatly diminished under modern reclamation law. See note 4 *supra*.

In this context, it is instructive to note that the movement to reduce, and then to eliminate, restrictions on incremental value sales began in the 1940's, shortly after the passage of the Reclamation Project Act of 1939, 53 Stat. 1187, 43 U.S.C. § 485 (1958). It was the Project Act which largely introduced the modern law of repayment with its greatly reduced obligations for irrigation users. Thus, while Interior Department officials and Congress urged the dropping of restrictions on incremental value sales on the ground that speculation was no longer a problem, what that view may really have meant was that speculation was no longer a problem because the repayment

mental profits. The trouble was that this repeal not only had the effect of allowing the incremental value—which was perfectly consistent with reclamation policy—but also had the unconscious effect of permitting the selling settler to reap the value rather than retaining it for successors on the project. This came about because Congress apparently never considered that in distributing the benefit of the incremental value, it would have to choose between competing classes of bona fide settlers. It is this problem which Congress has never faced,<sup>64</sup> and which, as proposed here, should now be confronted directly for the first time. The following pages are devoted to an examination of that problem of choice.

## B. Some Alternative Choices

### 1. The Pioneer Theory: An Anachronism

The first-generation settlers on any project have generally been able to acquire their land at pre-project values and then to

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obligation had been minimized so that it no longer created financial difficulties for the purchasers of project water rights at incremented values. The problem of the double obligation was defeated, perhaps, not by an end of speculation (selling at prices which included the market value of the water right), but by the reduction of repayment as a major economic obligation.

If this is what actually happened, then the removal of incremental value restrictions has helped to undermine, *sub silentio*, a key reclamation policy: the policy that substantial repayment of construction costs was to be assured before any incremental profits were to be allowed to any settler, whether seller or buyer. The policy has been undermined because the irrigators' repayment obligations have been greatly reduced on the ground that they are paying all they can afford, whereas we know they can afford to pay, and do pay, incremental values for project water rights. If congressional policy continues to hold that assuring substantial repayment is more important than permitting the reaping of incremental values, then the present system—whereby such profits are allowed, but repayment is subsidized by power revenues or the general public—seems inconsistent with that policy. Would it not be more consistent with this policy to recapture incremental profits and use them to reduce the subsidy provided by the other two sources?

64. A principal purpose of the preceding discussion has been to show that there is no binding statutory intent which must determine the administrative or judicial attitude toward incremental values. Certainly it should be clear that the Omnibus Adjustment Act does not prohibit recapture of incremental values in non-excess land sales. Moreover, each of the recent express efforts to eliminate control of incremental value sales has been placed on a different ground, none of which indicates how Congress would react to the inter-settler problem posed here and none of which prohibits a change of policy to meet that problem. Thus, the position taken by the Department of the Interior in the late 1940's turned on the assumption that ability to meet repayment obligations was the critical issue, see text accompanying note 62 *supra*; repeal of the Arch-Hurley law was largely guided by problems of practical administration, see text accompanying note 87 *infra*; suggested elimination of the Wellton-Mohawk provision was based on difficulties encountered by settlers in obtaining financing, see text accompanying note 69 *infra*; and the Columbia Basin provision repeal was sought on the ground that the project ought to be brought into conformity with other projects. *Hearings on S. 3162 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 5 (1962).

sell out at full market value. Is there any reason to let these earlier settlers reap this capital profit when they sell and carry it off the project to the detriment of successor settlers?

The first response of those who defend the practice might be to show that this is the tradition of such programs. When the United States disposed of the public domain, as under the Homestead or Desert Land Acts, it was the first taker who was in a position to reap the benefit by acquiring land for virtually nothing and selling it for full market value. Not only is this traditional, the argument goes, but the problem is an inevitable one; someone must take the benefit at some point. Thus, the question might be reversed: why prefer the second or third settler to the first? In fact, it may be urged, there is a quite good reason for preferring the first settler. He is the one who had the courage to go on unsettled and untried land and to bring it into cultivation. In that sense he is being used as an instrumentality for promoting a national policy of land settlement, and the incremental value is a reward for that service which only the first settler performs.<sup>65</sup>

The notion that the first settler should be rewarded for his efforts as a pioneer was undoubtedly a factor in disposing of the public domain, and it may have been consistent with early reclamation policy when land settlement was a principal goal and the original farmer really was a pioneer. However, it appears most ironically inappropriate today when reclamation policy and practice have taken an almost opposite direction. In order to get a typical reclamation project approved today, its proponents must demonstrate that the government investment will *not* open new lands to cultivation and thereby intensify existing agricultural surpluses.<sup>66</sup> The keynote of reclamation today is not land settlement, but land rescue. An advocate for a new project will argue that what is needed is a supplemental water supply to help existing farmers stabilize their existing operations.

Under these circumstances, the first beneficiary of the project appears in quite a different light. In the traditional case, benefit

65. This history is discussed, in HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* (1939). The land may also have been a reward for services rendered, or to be rendered, in the military service. *Id.* at 116-35.

66. It should be clear that modern reclamation policy is anything but a land settlement policy and that its beneficiaries are not the hardy pioneers of yore. See, e.g., 70 Stat. 1059 (1956), 43 U.S.C. § 615K (1964); S. REP. No. 83, 87th Cong., 1st Sess. 7-8 (1961); 108 CONG. REC. 15669 (1962); 106 *id.* 18762, 15427 (1960); 103 *id.* 4749 (1957); 102 *id.* 11940 (1956). Of course some new lands are brought into cultivation by new projects, but they are typically merely unused portions of well-settled areas. See, e.g., H.R. Doc. No. 444, 86th Cong., 2d Sess. 22 (1960) (Mann Creek Project, Idaho). The Columbia Basin Project was probably the last great undertaking that really represented a policy of settling new lands.

worked both ways. The government wanted the land settled, and the pioneer fulfilled that desire, for which he was duly rewarded. However, times have changed dramatically, and under today's circumstances it seems rather inappropriate to suggest that the original settler is entitled to the benefit of incremental land values on the ground that he was the one who put in "the thought, the hard work and the effort to make a going farm out of raw land."<sup>67</sup> Far from being an agent who implements government policy by going on the public land and civilizing it—and who deserves a reward for his courage and hard work—the typical modern "first settler" resembles much more closely the welfare recipient, for he is already in business, needs help to preserve the business, and seeks that help from the United States.

## 2. *The Indifference Theory: Another Fallacy*

A second argument that might be advanced in favor of permitting incremental profits is that if the United States is going to distribute the water-right value as part of its subsidy, the benefit is going to have to come to rest on some person at some point. That is, some settler is eventually going to reap the benefit, so it might as well be the first as the second or the fourth or the tenth. However, this way of putting the question wholly misstates the choice. It is not a question of whether settler number one or settler number two will take the capital profit. The real question is whether this value will be retained on the project for whoever happens to be the inhabitants at the time or whether it will be converted into cash and possibly be carried off the project to be used for purposes which are of no interest or advantage to the reclamation program.

If we say that the value belongs always to the persons coming on the project and stays with them only so long as they are project inhabitants, passing to the next generation and the next, then the benefit never comes to rest on any given person; it stays with the project as a project value. This approach is hardly a novel one, however foreign it may be to current reclamation administration. It merely embodies the principle that a government grant ought to be dispensed solely to achieve the purpose for which the money was appropriated and not to provide some unrelated windfall. For example, a public welfare program is designed to aid needy people while they are needy, and no longer; when one ceases to need welfare, he cannot sell the right to receive monthly payments to an-

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67. *Hearings on H.R. 6522 the Columbia Basin Project Act Before the House Committee on Irrigation and Reclamation*, 77th Cong., 2d Sess. 145 (1942).

other. It is the status of an individual, and not his personal identity, that determines the entitlement. Free textbooks are given to students *qua* students; when they leave school, they must leave the books for their successors. The White House belongs to the current occupant of the Presidency. The application of this principle to reclamation should be obvious. The money Congress appropriates for reclamation is meant to be used to promote that program. The choice we are faced with is this: should that money, in the form of the water-right value, be retained in the project for present reclamation project inhabitants, or should we permit it to be converted into cash which the seller, who is withdrawing from the project, may use for purposes wholly unrelated to the goals of the reclamation program? Is it not clear that the seller should relinquish his subsidy when he relinquishes his status on the project?<sup>68</sup>

3. *Use of Incremental Values as Loan Collateral:  
A Meritorious Argument and an Alternative Solution*

The only creditable argument which may be offered in support of current practice is based on the claim that a settler must "own" the capital value of the water right to obtain necessary bank loans. The point has been made that banks are reluctant to loan money on lands encumbered with incremental value contracts.<sup>69</sup> From this it has been concluded that if settlers are to be enabled to make the necessary borrowings, they must be free from incremental value restrictions, although this would, of course, also leave them free to sell the water right to a successor. This problem need in no way

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68. Undoubtedly this theory has implications beyond the reclamation laws. Wherever public funds are being spent, or public property being utilized, there is a question whether the expenditure is being used to advance the purpose for which it was made. See, e.g., Comment, *Public Land Laws—Need for Revision*, 39 N.Y.U.L. REV. 473, 496-97 (1964) (treatment of Taylor Grazing Act permits by the permittees as salable private property). Perhaps it is fair to characterize this article as an aspect of the broader struggle between the limited-grant concept and the windfall concept in the management of public resources. The dominance of the former approach today is illustrated by the changes which have taken place in federal mining law, where the old fee simple patent approach has in part yielded to leasing and multiple development concepts. Compare REV. STAT. § 2325 (1875), 30 U.S.C. § 29 (1964), with 41 Stat. 437 (1920), 30 U.S.C. § 181 (1964), and 68 Stat. 708 (1954), 30 U.S.C. §§ 521-26 (1964). Another aspect of this general problem is discussed in Mandelker, *Controlling Land Values in Areas of Rapid Urban Expansion*, 12 U.C.L.A.L. REV. 734 (1965).

69. Congress was told that this problem had created a serious impediment to settlers who were subject to incremental value contracts on the Wellton-Mohawk Division of the Gila Project in Arizona. In consequence, the Senate and House Appropriations Committees both recommended that the Secretary "carefully review those contracts in which such a provision exists, to eliminate it, and, if necessary, substitute some reasonable measure for controlling speculation." H.R. REP. NO. 1460, 83d Cong., 2d Sess. 12 (1954); S. REP. NO. 1506, 83d Cong., 2d Sess. 16 (1954); *Hearings on H.R. 8680 Before the Senate Committee on Appropriations*, 83d Cong., 2d Sess. 1239-43 (1954).

impair the position being advanced here. What is desired is that project settlers have the use of the value of the water right as collateral for improvement loans. This is a most admirable and sensible objective; as presently implemented, however, it fails to take account of the fact that there will be turnover on the projects. Once we introduce the fact of mobility into this problem, we see that the grant of the water right as collateral inures largely to the benefit of the first settler. When he sells out at full market price, he takes that economic value with him off the project, and the reclamation purpose which was served in giving him the value—the ability to borrow to improve project property—goes with him. Thus, we are back to the problem: why should the benefit be given only to the first generation settler?

To be consistent with a rational reclamation policy, we would want to distribute the benefit of increased ability to borrow equally to every settler. In order properly to implement such a subsidy, the benefit should be available only while one is a settler and only for project purposes. There is, it seems, a simple and well-known way of achieving this purpose. The United States can guarantee loans made to project settlers for project purposes; the guarantee can provide the desired collateral without producing the improper side effects which now exist.

### *C. The Most Equitable Solution: Retention of the Incremental Values in the Project*

The view suggested here—that attention should be focused on the project rather than on any individual settler—is corroborated by some other elements in the reclamation laws. For example, the old 1914 anti-speculation law<sup>70</sup> was expressly designed to prevent profiteers from taking money out of the project to the detriment of the remaining settlers. Similarly, the law permitting outside sales of project water expressly requires that no such sales may be made unless in-project needs have first been met.<sup>71</sup> From this perspective, the selling settler (assuming, as we have indicated, that he is entitled to no reward as a pioneer for past services rendered) is essentially in the same situation as the pure speculator; he embodies the threat that the federal subsidy will be drained out of the project for uses which may not serve federal reclamation policy at all.

This same conclusion can be drawn from another perspective. The idea that project settlers are entitled to reap incremental land

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70. 38 Stat. 686 (1914).

71. 41 Stat. 451 (1920), 43 U.S.C. § 521 (1964); 36 Stat. 925 (1911), 43 U.S.C. § 523 (1964).



values as profits is attributable, at least in some degree, to the notion that under the repayment system the United States is selling, and the settlers are buying, the irrigation system.<sup>72</sup> A buyer is, of course, entitled to the value of what he has bought. Nevertheless, even assuming that the characterization of the transaction as a sale is more or less accurate,<sup>73</sup> the real question is: who is the buyer? Under current practice, we are proceeding as if the individual water user is the buyer of that share of project water which he has used on his land. This is a most inaccurate assumption, however. Today the actual "buyer" is the irrigation or conservancy district, the agency which in fact has assumed the repayment obligation.<sup>74</sup>

The district differs from the individual water users in several important ways. Although the individual water users as a group comprise the district and are thus coextensive with it, the extent of each user's right to share in district assets is not properly measured by the proportion of project water he uses, but rather by the proportion of the repayment obligation which he bears. These two factors are frequently not the same. For example, a user of one per cent of the project water may very well not be paying one per cent of the repayment contract, but under current administration he will reap one per cent of the incremental profits. The reasons for the disparity between the share of water used and the share of repayment obligation borne are manifold. On many projects the construction cost obligation is calculated on the basis of acreage, not water use. Thus, those who grow thirsty crops and use much more water will pay as little as others with similar acreage, but much less water use.<sup>75</sup> Also, some projects charge construction costs to lands which are not in irrigation and are using no water.<sup>76</sup> Another principal reason for the diversity in costs arises from the classification of water uses

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72. One of the most recent examples of the attempt to characterize the relationship as a standard commercial transaction is found in *Ivanhoe Irrigation Dist. v. California*, 47 Cal. 2d 597, 628-29, 306 P.2d 824, 843-44 (1957), *rev'd sub nom.* *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 289, 299 (1958).

73. As previously indicated, note 4 *supra*, and as the Supreme Court has made eminently clear, the extent of the subsidy involved makes the comparison of the transaction to a sale accurate only in the most attenuated and superficial sense. See *Ivanhoe Irrigation Dist. v. McCracken*, *supra* note 72, at 299.

74. Even the California court took the position in *Ivanhoe* that at the end of the repayment period it is the District which will "become the owner in trust for the water users within the District." 47 Cal. 2d at 630, 306 P.2d at 843. Although the California court was talking about ownership of the distribution works, it should be clear that as an economic matter the value of the works is reflected in the market price of the right to receive project water.

75. *E.g.*, Carlsbad Irrigation District, New Mexico; Hayden Lake Irrigation District, Idaho; Salt River Project, Arizona (letters to the author from district managers, Feb. 1965).

76. Roza Irrigation District, Washington (letter to author from district manager, Feb. 8, 1965).

based on land productivity.<sup>77</sup> Similarly, municipal and industrial users may pay a much higher rate than agricultural users.<sup>78</sup> In one district, agricultural users consume 85 per cent of the water but bear only 40.5 per cent of repayment burden.<sup>79</sup> Another district charges each user a fixed dollar fee toward meeting the annual repayment obligation, regardless of the amount of water used.<sup>80</sup> In addition, the district may earn income from such activity as the selling of town sites or the leasing of grazing and farm lands. Under the reclamation law, profits from such sources are to be credited to repayment of project construction charges.<sup>81</sup> Finally, to the extent that the actual repayment costs are underwritten by power revenues,<sup>82</sup> there is a great disparity between the amount of water used and the share of construction costs borne.<sup>83</sup> All of these instances are cited merely to show that it may make a considerable difference whether incremental values are turned over to the district as an entity or to the individual user.

Moreover, giving the values to the district would have another effect even more important than that of changing the distributive profile. Giving the values to the district does not merely mean that they will be received by the constituents thereof, because the district undoubtedly will not, at least prior to the time repayment is completed, make a cash distribution to the persons on the project.<sup>84</sup> The district holds the money it receives in trust for the fulfillment of its primary obligations—operation of the project and repayment to the United States. If it received the incremental values, it might do one of several things. It could apply those values on the debt to the United States in order to reduce the taxes of the project's constituents,<sup>85</sup> or it could expend the money on project improvements.

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77. *E.g.*, Kittitas Reclamation District, Washington; Owl Creek Irrigation District, Wyoming; Gering-Fort Laramie Irrigation District, Nebraska (letters to author from district managers, Feb. 1965).

78. *E.g.*, Ventura River Municipal Water District, California; Solano Irrigation District, California; Wellton-Mohawk Irrigation and Drainage District, Arizona (letters to author from district managers, Feb. and April 1965).

79. Eastern Municipal Water District, California (letter to author from district manager, March 2, 1965).

80. Lewiston Orchards Irrigation District, Idaho (letter to author from district manager, Feb. 8, 1965).

81. 43 Stat. 703 (1924), 43 U.S.C. § 501 (1964).

82. See note 4 *supra*.

83. Letter to author from general manager of the Imperial Irrigation District, California, Feb. 15, 1965.

84. The congressional attitude toward such distributions seems to be indicated in 43 Stat. 703 (1924), 43 U.S.C. § 501 (1964).

85. The manner in which such monies might be applied in liquidation of the repayment obligation can vary considerably. Using the money to meet current obligations, and thereby reduce current taxes, would be most favorable to the settlers and least favorable to the United States. If the monies were used first to pay off the last

In either of these ways the values would be used in the manner discussed in the foregoing subsection; they would be retained in the project for the accomplishment of project aims and ends. Such a result would seem to be far more consistent with reclamation policy than is the present administration, which permits the use of a public subsidy to enrich individuals who are free to apply the money received to non-project purposes.

From the foregoing discussion, it seems fair to conclude that prohibiting incremental value sales is consistent with true congressional policy, not because settlers should be denied this benefit, but rather because such sales give the values to the wrong settlers. It is the failure to see the issue in this light that has made the legislative history seem such a tangled mess.

The legal conclusion to which we have now come is indeed a simple one. It is that the money for which a reclamation-project water right is sold or leased (whether by itself or along with the land irrigated) does not belong to the seller, but should be recovered by the irrigation or conservancy district—the repayment obligor—to be held in trust and used for the benefit of the present project community.<sup>86</sup>

It must be emphasized that the proposal made here is not merely an indirect scheme for arguing that reclamation water prices are set too low. This article accepts the fact that Congress desires to subsidize reclamation; it only suggests that the existing subsidy should be redistributed. It is of course true that if repayment obligations are adjusted upward, approaching market costs, the opportunity for

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dollar of debt due (*i.e.*, a dollar not due for fifty years, which dollar is on loan interest free) in advance, the scheme would be vastly more favorable to the United States. See note 63 *supra*; see also 52 Stat. 211 (1938); 50 Stat. 208 (1937). A third alternative would be to use recovered incremental values to pay off irrigation costs allocated to power revenues, thus reducing the subsidy which irrigators receive. This approach, of course, would not benefit the project settlers, but rather the power users or the general public. Any of these alternatives would be acceptable under the theory of this article, and each would be far more consistent with a rational reclamation policy than is the present system.

The district, under this proposal, should be entitled to receive incremental values permanently. The time limitation in the 1926 act, formulated for a different purpose, should not bar a new result based on newly discovered issues. Cf. 68 I.D. 372 (1961) (Op. Sol., Dept. Int. No. M-36634).

86. When incremental value sales have been restricted in the past, it has been customary for the district to recapture only some fraction of the incremental value, usually 50%, and to permit the seller to keep the balance for himself. *E.g.*, Arch-Hurley Project, 52 Stat. 211 (1938); Owyhee Contract, *supra* note 50, art. 41(I). Sometimes a more complex sliding scale has been employed, requiring the seller to repay between 50% and 99% of the incremented value. Columbia Basin Project, 50 Stat. 208 (1937). Such devices, obviously designed to promote alienability by giving the landowner some incentive to sell, are unobjectionable. *Hearings on S. 2172 Before the Senate Committee on Irrigation and Reclamation*, 75th Cong., 1st Sess. 31 (1937). Other adjustments that would have to be made are discussed in note 88 *infra*.

profit-taking would be destroyed and the problem at issue here would automatically be solved. It is also true that a problem of how to house condemned prisoners would be terminated by abolishing capital punishment, but one who proposes a solution to the housing problem should not be viewed as advocating, or even as implicitly passing judgment upon, the abolition of capital punishment. The two issues are quite separable. There seems little reason to believe that the subsidy will be withdrawn imminently; while it remains, the important, independent problem of distribution ought to be solved. It remains now only to suggest how the solution proposed can practicably be implemented.

## V. PRACTICAL ADMINISTRATION

The practical problems of administering the proposal suggested here are essentially of three kinds. First, to what extent are existing contracts and existing state laws a bar to modification of present practices? Second, to what extent does longstanding administrative practice bar a change in that practice, absent express congressional authorization? Third, can the redistribution of values be achieved without invoking some terribly complex and expensive administrative machinery to determine what monies are being misapplied? The third problem is the most troublesome, and it may be helpful to dispose of it first.

### A. *Complex Administrative Machinery Is Unnecessary*

Previous attempts to regulate incremental value sales have had little success in finding an easy means for determining that portion of a sale price which is to be designated as a windfall.<sup>87</sup> The difficulty arises in part because most transactions are sales of farms at a gross price which includes, without specific allocation, the value of the land, improvements, and water. The problem is, therefore, the isolation and recoupment of that amount which represents the actual value of the water right.<sup>88</sup>

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87. *E.g.*, S. REP. NO. 1156, 84th Cong., 1st Sess. (1955) (repealing the incremental value requirement in the Arch-Hurley Law).

88. The district would not recover the full market value of the water right. The seller would be given credit for any increment he had paid his vendor. He might also be given credit for amounts he had already contributed toward the repayment obligation. This has apparently been the practice in incremental value contracts. LAND-OWNERSHIP SURVEY 48. See also note 86 *supra*, suggesting another adjustment that might be necessary.

Theoretically, it would be simpler to prevent water rights from being sold at all and to hold instead that the rights pass automatically and without charge to successor landowners. However, there seems to be no practical way of assuring that water would not be sold anyway in the form of increased land prices.

The methods thus far utilized to isolate that value have been quite complex. The traditional approach required an appraisal of the land, the individual improvements on each farm, the construction charges paid, and "other items of value that are proper."<sup>89</sup> Since improvements were continuously being made, any attempt to be accurate in allocation of values involved frequent reappraisals.<sup>90</sup> When all these values were ascertained, their sum was viewed as representing the total value of the property without reference to the project. Any excess over this amount was considered an incremental value which the United States was entitled to recover.

In addition to complexity, this approach obviously involved another serious flaw. By treating the entire excess over appraised value as an increment attributable solely to the existence of the project, this method failed to recognize that other factors—such as general inflation or proximity to budding urban development—also affect land prices.<sup>91</sup> Disillusionment with such misleading rigidities and with the above complexities has undoubtedly enhanced congressional sympathy for requests to repeal existing incremental value laws.

The question here is whether any attempt to recover incremental values is necessarily doomed to similar administrative difficulties. Prior attempts have bogged down, in part, because they sought to deduce the value of the water right from a mass of other data in an elimination process. It might, however, be possible to approach the issue directly, that is, by finding the independent market value of the irrigation water. If we can discover this, then for any sale we need only find the amount of water involved in the transfer (which is easy and obvious, since it is the amount the project is delivering to the land or individual in question), multiply it by the market value per acre foot of water, and hold that that sum<sup>92</sup> is owed to the project by the vendor. The specific consideration is thus whether project water has an ascertainable market value.

Certainly in many irrigation areas it is not customary to think in terms of the value of water rights as such. If inquiry were to be made concerning the unit value of project water, a common answer might be that "it is the value of the land, and not the acre foot of water . . . that is the yardstick."<sup>93</sup> But the mere custom that water

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89. *E.g.*, 57 Stat. 14 (1943) (Columbia Basin Project).

90. *Ibid.*

91. S. REP. NO. 1156, *supra* note 87.

92. Properly adjusted, as explained in notes 86 and 88 *supra*.

93. Letter to the author from the general manager of the Salt River Project, Arizona, Feb. 24, 1965. Farmers frequently use irrigated land as the measure of value and do not attach any price to water rights alone. Letters to the author from Terra Bella Irrigation District, California, Feb. 15, 1965, and Vale-Oregon Irrigation District, Oregon, Feb. 1965.

right values, as such, are not generally used does not mean that they cannot be ascertained. The following comments are designed to suggest that such values may not be nearly so elusive as past experience seems to indicate.

On many projects, users are allowed to sell or lease their water rights for a valuable consideration. While permanent sales seem to be relatively uncommon at the present time,<sup>94</sup> temporary leasing of water on an annual basis appears to be quite widespread.<sup>95</sup> One of the truisms of the marketplace is that the capital value of property can easily be ascertained from its annual rental value. Thus, in any project where selling or leasing is at all common, calculation of the market value of water rights per acre foot should be rather easy.<sup>96</sup> This value can, of course, be applied to determine the value of the water right in the sale of a farm for an undifferentiated total price.

In addition, a good deal of market information is ordinarily

94. As previously noted, sales are permitted on the Colorado-Big Thompson Project. See note 5 *supra* and accompanying text. In addition, the following are a few examples of projects where permanent transfers of water rights are permitted: American Falls Reservoir District, Idaho (letter to author from manager, Feb. 1965); Carlsbad Irrigation District, New Mexico (letter to author from manager, Feb. 20, 1965); Collbran Conservancy District, Colorado (Rules and Regulations for Reallocation and Transfer of Water Allotments 9, Dec. 7, 1961); Fremont-Madison Irrigation District, Idaho (letter to author from manager, Feb. 1965); Provo River Water Users Association, Utah (letter to author from manager, Feb. 15, 1965); Strawberry Water Users Association, Utah (letter to author from manager, Feb. 11, 1965); Washoe County Water Conservation District, Nevada (letter to author from manager, Feb. 1965).

The Fremont-Madison District reported that it had only one permanent sale in 1964; the American Falls Reservoir District reported three; and the Strawberry District reported that transfers are "quite infrequent."

95. The Carlsbad Irrigation District, New Mexico, reports that "because we are chronically short of water to supply the water rights of the District we have many transfers. . . . We estimate that approximately 3,200 acre feet of water was transferred during 1965." Letter to author from manager, Feb. 20, 1965.

The Boise Project Board of Control, which operates five irrigation districts, reports that "at times the transfer of allotted water reaches fair proportions . . . . During the season of 1961, which was one of short supply, a good many of the summer's allotments changed hands for as much as \$8.00 an acre foot." Letter to author from manager, March 1, 1965.

In addition to those cited above and in note 94 *supra*, a number of districts reported that they permitted annual leasing, without indicating how frequent or widespread such leasing is. *E.g.*, Form Authorizing Transfer of Water From One Parcel of Land to Another Parcel of Land Under Different Ownerships, Lindmore Irrigation District, California (Rules and Regulations Adopted Jan. 8, 1963); letter to author from superintendent of the Mirage Flats Irrigation District, Nebraska, Feb. 26, 1965; letter to author from manager of Reeves County Water Improvement District No. 1, Texas, Feb. 23, 1965; letter to author from manager of the Stone Corral Irrigation District, California, March 15, 1965.

96. To be sure, former sales or leases are not a flawless indicator of current value. Prices paid may reflect, for example, a time of especially intense shortage or a transaction not at arms' length; furthermore, what one farmer paid another may not represent what a farmer could get from a city. Nevertheless, such market imperfections pervade every appraisal process.

available from related transactions in the general community. For example, the average differential between the cost of irrigated and non-irrigated land is a significant guide to the value of a water right.<sup>97</sup> Moreover, local sales of ditch company stock and ground water rights, condemnations, municipal water rates, and the like, all are important indicators of water right values.<sup>98</sup> To be sure, there are individual differences and market imperfections which make any such process of evaluation speculative and approximate. Nevertheless, there is considerable experience in the evaluation of water rights which suggests that no insuperable barriers need be anticipated. It is quite common, for example, to have to find the value of water rights in order to ascertain the base upon which water company rates are to be calculated.<sup>99</sup> Such an evaluation must also be made whenever a municipality condemns water rights to supply its residents.<sup>100</sup> Moreover, the courts are already familiar with the problem of determining the difference in land values with and without water rights.<sup>101</sup> Of course, determination of market values "is largely a matter of opinion,"<sup>102</sup> and this would be particularly true in areas where there is an inactive market in water rights. However, this difficulty has been met in water right appraisal proceedings in the same manner as it has in other areas.<sup>103</sup>

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97. The manager of the Klamath Basin Improvement District reported that when land gets a water right, its value jumps "from around \$50.00 per acre to between \$200.00 and \$250.00 per acre . . ." Letter to author from the secretary-treasurer, March 30, 1965. Similarly, a report from the Tulalake Irrigation District notes that "land with a water right is worth twice as much as land without a water right." Letter to author from the manager, Feb. 17, 1965.

98. Such data are available even in states with appurtenance rules which seem to prohibit any transactions in water rights alone. This is made clear by a leading authority in the field. Dean Trelease, in *Severance of Water Rights From Wyoming Lands 2* ((1960) WYOMING LEGISLATIVE RESEARCH COMM., REP. NO. 2), notes that there are ten kinds of transactions allowed in Wyoming which permit the transfer of water without appurtenant land. He concludes that "the exceptions already made have almost swallowed the rule." *Id.* at 36. He has also concluded, however, that despite the exceptions, the market for water rights alone in Wyoming is an exceedingly limited one. Letter to author, April 9, 1965.

99. *E.g.*, *McCardle v. Indianapolis Water Co.*, 272 U.S. 400 (1926); *San Joaquin & King's River Canal & Irrigation Co. v. County of Stanislaus*, 233 U.S. 454 (1914); *Reno Power, Light & Water Co. v. Public Serv. Comm'n*, 300 Fed. 645 (D. Nev. 1921); *Osborn Util. Corp. v. Public Util. Comm'n*, 52 Idaho 571, 17 P.2d 333 (1932).

100. *E.g.*, *Safranek v. Town of Limon*, 123 Colo. 330, 228 P.2d 975 (1951); *Village of Lapwai v. Alligier*, 69 Idaho 397, 207 P.2d 1025 (1949); *Moyle v. Salt Lake City*, 111 Utah 201, 176 P.2d 882 (1947); *Sigurd City v. State*, 105 Utah 278, 142 P.2d 154 (1943).

101. *E.g.*, *United States v. Twin City Power Co.*, 350 U.S. 222, 237 n.9 (1956) (condemnation); *Shurbet v. United States*, — F.2d — (5th Cir. 1965) (cost depletion of ground water).

102. *Montana Ry. v. Warren*, 137 U.S. 348, 353 (1890).

103. "It should be measured by the fair market value of a similar water right in the locality, or a similar locality, if such can be established by satisfactory evidence. If no market value can be established, then the opinion of competent witnesses as to the actual value may be considered. In this respect the case does not present any

To be sure, valuation of property is often quite unsatisfactory. Whether reclamation water rights can be satisfactorily evaluated is simply unknown at the present time. There is at least some reason to believe that market prices are reasonably ascertainable. Congress ought to be willing to try the experiment; much might be gained, and there is nothing more to lose.

#### B. *State Laws and Existing Contracts Present No Barriers*

There remain now only the questions whether state law, existing contracts, or longstanding practices are a bar to implementation of the interpretation proposed here. Objections based upon state law are easily disposed of. The suggestions embodied in this article are based upon an interpretation of federal reclamation law. To follow these suggestions is to implement congressional intent. To the extent that any state law is inconsistent therewith, it is superseded by virtue of the supremacy clause of the federal constitution.

The absence of implementing contractual provisions is more inconvenient, but not fatal. It would certainly be useful to have a contract provision spelling out the details for appraisal and the manner in which incremental profits are to be recovered and used.<sup>104</sup> However, the absence of such specifics does not impair the right of the United States and the district to demand of the seller that he turn over his incremental profits. The right to be asserted exists by virtue of federal law, not by virtue of contract. It can be vindicated in a judicial proceeding if voluntary compliance cannot be effected. Though cumbersome, the necessary machinery for appraisal

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exceptional features. The same rule is applied in the case of any property, real or personal." *Murray v. Public Util. Comm'n*, 27 Idaho 603, 150 Pac. 47, 51 (1915). Parallel sales are, of course, the best evidence of market value. 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 137, at 582 (2d ed. 1953). Where such sales are unavailable, the courts readily turn to the best evidence they can find. This may be more or less comparable sales, *Sac & Fox Tribe of Indians v. United States*, 340 F.2d 368, 370 (Ct. Cl. 1964), or it may be mere opinion evidence if no transactions are available to help arrive at a price. *United States v. 13255.53 Acres*, 158 F.2d 874, 876 (3d Cir. 1946). Moreover, where no comparable sales are available, the courts can always turn to such collateral evidence of value as the cost of obtaining an alternate supply. *Village of Lapwai v. Alligier*, 69 Idaho 397, 207 P.2d 1025 (1949).

104. It would also be useful to have had a statute expressly spelling out the policy conclusion which this article has reached by implication from fragments here and there. It is well known that the Department of Interior is "constantly experiencing protests" even when it acts "to implement specific congressional requirements." *Hearings on S. 3162 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 84 (1962) (Testimony of Associate Solicitor Weinberg). However, as is indicated in the concluding pages, this is an issue without a present constituency and therefore one which may need first to be advocated in a judicial forum.



and recovery can be worked out in the form of a judicial decree. Victory in a few such lawsuits might induce renegotiation of existing contracts in order to work out a practical procedure less complicated than litigation for all parties concerned.

### C. *Past Administrative Practices Are Not Binding*

Finally, there is the question of the effect of present administrative practice. While longstanding practice is suggestive of a proper interpretation of the law, the courts have made clear in recent years that it is only suggestive and not binding. Error does not become truth merely by virtue of antiquity.<sup>105</sup> The real question is whether the legislature can be viewed as having approved the policy which is being achieved by current administrative interpretation. Certainly the foregoing discussion ought to be persuasive that no such argument is properly available in this case. The legislative history of this problem only demonstrates that Congress has been led first one way and then another because false issues and erroneous choices have been put before it. Congress has never considered the interpretation proposed here.<sup>106</sup> Since the administrative agency, the Department of the Interior, has taken various positions at various times in accord with its evaluation of current needs, there is no reason why it cannot vary its position once again, leaving it to Congress to reject the choice if it desires to do so. The Department has in the past taken a broad view of its authority to deal with incremental values; it is time to exercise that broad authority again.

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105. Administrative interpretations, however longstanding, will not and should not stop a court from making its own determination of what Congress intended. *United States v. City & County of San Francisco*, 310 U.S. 16, 31-32 (1940). Moreover, the executive agency is entitled to change its mind about the proper interpretation of a statute and thus to initiate such a judicial determination. *FPC v. Union Elec. Co.*, 381 U.S. 90, 110 n.30, 113 (1965); *United States v. Dupont & Co.*, 353 U.S. 586, 590 (1957). See generally 71 I.D. 498, 516-17 (1964) (Op. Sol., Dept. Int., No. M-36675). This is not to deny that an agency's interpretation is "entitled to great respect" where the agency seeks to have a court confirm that interpretation. *Udall v. Tallman*, 380 U.S. 1, 18 (1965). The point made here is the quite different one that an agency which desires to change its view of a statute is not barred from doing so by its own previous interpretation to the contrary.

While it is surely true that economic expectations are based upon present interpretation and will be disappointed by a change, that fact is not conclusive against a change in interpretation. See generally Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962). It might, however, suggest the desirability of applying the change prospectively only. Such an interpretation would protect vendors in sales already consummated and also banks which have made loans with the water right as security. *Ibid.* See *Linkletter v. Walker*, 381 U.S. 618 (1965); *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring).

106. In any event, congressional inaction in the face of administrative practice, though relevant, is never conclusive evidence of approval of such practice. *Zemel v. Rusk*, 381 U.S. 1, 18 (1965).

## VI. CONCLUSION AND SUGGESTION

In the past, suggestions that incremental value contracts be used have taken the form of an argument that the United States should recapture for itself a benefit which it had formerly bestowed on its citizens. Such an approach is obviously always an unpopular one. The unique factor about the proposal made here is that it need involve no such unattractive suggestion. It does not require the recapture of aid previously given. Instead, it urges that the wrong people have been enriching themselves at the expense of their fellow citizens. Unfortunately, however, those fellow citizens who are being cheated are not likely to join forces and seek to vindicate their rights. The reason is that the victims are largely the future generation of people on the projects, and the victimizers are the present occupants. Thus, the victims are inadequately represented by the settlers now on the projects and by the district management, which, of course, is drawn from the present population.<sup>107</sup>

There is one partial exception to this problem, and it may suggest a good place to begin enforcement of the new interpretation. On at least some projects—the Colorado-Big Thompson is a good example—the future generation of buyers and users does have a present existence. The project area is urbanizing, and the future buyers are largely the municipalities in the project, which are acquiring water from agricultural users. It is to their benefit that incremental values be retained in the project, for project purposes, rather than being taken away by settlers who are selling their interests in the project lands. Moreover, since they buy water rights in gross, certain of the complex technical problems of valuation need not be encountered. This might be a very attractive opportunity to test the new theory.

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<sup>107</sup> As Senator Douglas has pointed out, the same sort of problem is presented by the excess land law, where the intended beneficiaries of the law "are persons in the future. They do not exist at present. Since they exist only in the future and not in the present, they lack voices and are in a sense unrepresented." 108 CONG. REC. 5711 (1962).