September 1975

California Water Project: Law and Politics

Paul S. Taylor

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation


Link to publisher version (DOI)

http://dx.doi.org/https://doi.org/10.15779/Z389Z4D

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
California Water Project: Law and Politics

Paul S. Taylor*

The California Water Project of 1960 represents a major effort on the part of large landowning interests within the State to circumvent national water policy. As expressed by the United States Supreme Court, that policy is to prevent private monopolization and speculation in the increased land values created by public reclamation projects. The tactic is to use a state, rather than a federal project, to avoid application of national reclamation law and policy. As administered by both state and federal agencies, circumvention has been successful so far.

Viewed historically and nationally, distribution of landownership was the essence of the issue until westward settlement reached the hundredth meridian. Thereafter it centered on the joining of water to arid land. The California Water Project is but a relatively recent phase of this century-old issue.

The pervasive influence upon society of the distribution or concentration of landownership was early understood. As Daniel Webster said on the 200th anniversary of the landing of the Pilgrims:

Our New England ancestors . . . were themselves, either from their original condition, or from the necessity of their common interest, nearly on a general level, in respect to property. Their situation demanded a parcelling out and division of the lands; and it may be said fairly, that this necessary act fixed the future frame and form of their Government . . . . The consequence . . . has been a great

* Professor of Economics Emeritus, University of California, Berkeley; consultant to the Office of the Secretary of the Interior and to the Bureau of Reclamation, successively, between 1943 and 1952. Martha M. Chase and Stefan Jovanovich assisted in the preparation of this paper. The Committee on Research and Institute of Business and Economic Research, University of California, Berkeley, gave support.
subdivision of the soil, and a great equality of condition; the true basis, most certainly of popular government.¹

I

MAN IN HIS ENVIRONMENT

Let's ask ourselves "what is the environment?" In short, it is everything—everything that was here before man—plus all the changes man has wrought, both directly and indirectly. In addition, and not to be overlooked, it must include man himself.

—Secretary of Interior Rogers C.B. Morton, 1971²

[N]o one would believe that shrewd, calculating business men would invest their money on the strength of land rising in value while unimproved, for even the farmer himself has to abandon it who endeavors to add to its value without water. At the same time, purchasers are not lacking who would add it to their already extensive dry domain and the people, in the next legislature, will find themselves confronted by an array of force and talent to secure to capital the ownership of the water as well as of the land, and the people will at last have it to pay for . . . .

—Visalia (California) Delta, 1877³

"Environment" and "ecology" are words used currently to reflect concern about undesired effects of economic development left to uncontrolled market forces. But the issue of socially acceptable development of natural resources is not new. Two generations ago this public concern bore the name "conservation."

A generation ago a government study in California's Central Valley compared two rural communities: one, Arvin, was surrounded by large-scale farms and the other, Dinuba, was surrounded by smaller family-size farms. Proportionately, Dinuba had twice as many business, professional, and white collar workers; three times as many farm operators; slightly more skilled, semi-skilled, and service laborers; and fewer than half as many agricultural laborers. Per dollar of agricultural production, the family-size farms of Dinuba supported a larger number of persons in the local community at a higher average living standard than did the large-scale farms of Arvin. Similar contrasts were found between

the two communities in the quality of civic life—Dinuba had more parks, schools, churches, recreational opportunities, local newspapers, etc.\(^4\)

More recently, in 1969, another study found that Imperial County, California, was a “two-class” polarized community consisting of 4.4 percent “upper class” farm persons and 87.3 percent “mass of laborers.”\(^5\) More than half of the farmed land was in holdings in excess of 160 acres, the ceiling on individual water deliveries set by federal reclamation law.\(^6\) By contrast, Livingston County, Illinois, was found to be an overwhelmingly “middle class” community, where only 1.3 percent of “farm personnel” was “upper class” and only 11.7 percent “lower class.”\(^7\)

Today, ownership of California agricultural land is heavily concentrated.\(^8\) This concentration is largely an inheritance from early eras of railroad land grants, Spanish and Mexican land grants, and speculative acquisition of large blocks of public lands.\(^9\) In the 1880's, British observer James Bryce recorded this description of the emerging environmental pattern in California's Central Valley:

Some of these speculators, by holding their lands for a rise, made it difficult for immigrants to acquire small freeholds, and in some cases checked the growth of farms. Others let their land on short leases to farmers, who thus came into a comparatively precarious and often necessitous condition; others established enormous farms, in which the soil is cultivated by hired labourers, many of whom are discharged after the harvest—a phenomenon rare in the United States, which is elsewhere a country of moderately sized farms, owned by persons who do most of their labour by their own and their children’s hands. Thus the land system of California presents features both peculiar and dangerous, a contrast between great properties, often appearing to conflict with the general weal, and the sometimes hard pressed

---

4. STAFF OF SENATE SPECIAL COMM. TO STUDY PROBLEMS OF AMERICAN SMALL BUSINESS, 79TH CONG., 2D SESS., SMALL BUSINESS AND THE COMMUNITY, A STUDY IN CENTRAL VALLEY OF CALIFORNIA ON EFFECTS OF SCALE OF FARM OPERATIONS, S. REP. NO. 13 (COMM. PRINT 1946). See also W. GOLDSCHMIDT, AS YOU SOW (1947).


7. T. Smith, supra note 5, at 508.


small farmer, together with a mass of unsettled labour, thrown without work into the towns at certain times of the year.\textsuperscript{10}

As it was emerging, this pattern of concentrated landownership was sharply contested. Debate came to a particularly sharp focus at the State's 1879 Constitutional Convention. Ultimately, it was decided that future grants of state lands should be limited to 320 acres per individual.\textsuperscript{11} In the same year, Major John Wesley Powell, explorer of the Colorado River, wrote that in the water-short West, "The question for legislators to solve is to devise some practical means by which water rights may be distributed among individual farmers and water monopolies prevented."\textsuperscript{12}

This issue was not confined within the boundaries of any one state. It spread steadily throughout the West and arrived eventually at the national Capitol. A popular movement sprang up in the 1890's seeking development of Western waters. The minutes of the nearly annual sessions of the National Irrigation Congress reflect two principal concerns: (1) to find a public source of financing Western water development and (2) to prevent the building of water monopoly upon the foundations of existing land monopoly.

Both these purposes were embodied in a bill introduced in Congress in 1902. Congressman Francis G. Newlands of Nevada, author of the bill, explained that President Theodore Roosevelt

was somewhat in doubt as to whether the bill was sufficiently guarded in the interest of homeseekers. It was a question simply of construction . . . . We all wanted to prevent monopoly and concentration of ownership, and the result was that certain changes were made absolutely satisfactory both to the Executive and to the Irrigation Committee . . . .13

Congressman Frank Mondell of Wyoming contributed his assurance that the bill would guard "against the possibility of speculative land

---

\textsuperscript{10} 2 J. Bryce, American Commonwealth 427 (1913).
\textsuperscript{12} J. Powell, Report on the Lands of the Arid Region of the United States 41 (2d ed. 1879). The enduring and pervasive nature of the problem is suggested in a generalization by Solomon Blum:

I find two forces at work in our economic life. They are antagonistic in principle. The first is private enterprise, in some of its aspects terribly wasteful, disorderly and reckless. Its valuations are simply the prices of the market. It is mechanistic. Individual and social responsibility can develop only when it is modified. For all this, possibly because of this, it is productive and it generates energy. Profits are the source of this energy. But individualistic competition has never had the field entirely to itself. It has always been too harsh to bear. Therefore society has always protected itself in some measure from the blind forces of the market. S. Blum, Labor Economics vii (1925).

\textsuperscript{13} 35 Cong. Rec. 6674 (1902).
holdings... on the public land, while it will also compel the division into small holdings of any large areas... in private ownership which may be irrigated under its provisions." The bill, which became the National Reclamation Act of 1902, stipulated that:

No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land...

Although the words "ecology" and "environment" were not used during Congressional debate on the Reclamation Bill, it is clear that the relevance of environmental considerations to the issue of concentrated versus dispersed landownership was understood. During debate, Congressman Newlands pointed out that:

Lord Macauley said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That will be the test of the future, and the very purpose of this bill is to guard against land monopoly and to hold this land in small tracts...

In 1907, President Theodore Roosevelt invited similar recognition of the importance of husbanding and of using natural resources generally for the public benefit when he convened the first Governors Conference and chose "conservation" as its theme. Assembled in 1908, the Governors resolved:

We declare our firm conviction that this conservation of our natural resources is a subject of transcendent importance, which should engage unremittingly the attention of the Nation, the States, and the People in earnest co-operation... We agree that the sources of national wealth exist for the benefit of the People, and that monopoly thereof should not be tolerated.

Thus the principles of the homestead tradition of giving actual settlers access to land, enacted six years earlier in the acreage and residency provisions of reclamation law, were recognized officially by the governors of the states as being vital to the nation's conservation of natural resources. A half century later, in the form of acreage limitation, this policy was challenged in the courts. The U.S. Supreme Court rejected the challenge in a unanimous decision declaring that reclamation projects were "designed to benefit people, not land," and to distrib-

14. Id. at 6677. See also statements by Sen. W.A. Clark of Wyoming, id. at 2222-24.
ute benefits "in accordance with the greatest good to the greatest number of individuals."  

II

PRIVATE INTEREST VS. PUBLIC POLICY

In California much of the best land . . . is in huge private holdings . . . . Already owners of more than seventy huge tracts of land have signified their willingness to subdivide their lands for the benefit of intending settlers. This shows which way the wind blows and may be taken as an indication that when the Government is ready to go ahead our patriotic landed proprietors will be willing and ready to cooperate.

John W. Ferris, 1905

The conclusion is inescapable: the DiGiorgio Fruit Corporation, like the Kern County Land Company, is not susceptible to the kind of land reform the Bureau [of Reclamation] seems interested in introducing via the back-door. Its 160-acre limitation clause is a wholly inadequate club with which to coerce the big landowners into dividing their baronies among the serfs.

Senator Sheridan Downey of California, 1947

Private landowners, the Federal Government, and the California State Government all showed early interest in irrigating the arid and semi-arid lands of the Central Valley. Privately-financed stream diversions for this purpose were begun immediately following the Gold Rush. Because of the cost, these efforts spread slowly, reaching their peak on the Kern River in the 1880's. In 1887 the California Legislature passed the Wright Irrigation Act, which authorized local financing of local water projects. With hardly an exception, little financing of construction followed.

In 1874 a federal commission reported to the President that irrigation of Central Valley was technically feasible, and that if undertaken the value of the land "could be increased many fold." It recommended that "[t]he rights of water which have given so much trouble in other

20. S. Downey, They Would Rule the Valley 180 (1947) [hereinafter cited as Downey].
countries . . . be established . . . on the principle of 'the greatest good for the greatest number.'"24 In this spirit, landowners in the Sacramento Valley voluntarily accepted a 40-acre limit on water deliveries to encourage construction of a federal reclamation project at Orland in 1907.25

In 1920 the Irrigation Association of California published a report urging development of Central Valley waters.26 Intensive studies followed, culminating in 1930 in a report to the State Legislature on a "State Water Plan" to be directed by Engineer Edward Hyatt.27

Three years later, in the depths of depression when unemployment was at its peak, the people of California authorized, by referendum vote, the issuance of $170 million in revenue bonds to construct a Central Valley project. The voters understood that federal aid of $43 million could be anticipated.28 The measure authorized construction by the State and permitted the State to seek federal construction in compliance with terms prescribed by federal law.29 The State Water Authority created by the referendum was expressly authorized and empowered, to accept cooperation from the United States of America, its instrumentalities and agencies in the construction, maintenance and operation . . . of said Central Valley Project, and . . . shall have full power to do any and all things

28. Cal. State Dept., Referendum Measure to be Submitted to the Electors of the State of California at the Special Election to be Held . . . December 19, 1933, at 3.
The measure carried by a vote of 439,712 YES; 426,109 NO.
necessary in order to avail itself of such aid, assistance and cooperation under Federal legislation now or hereafter enacted by Congress.\textsuperscript{80}

Thus, the measure extended to the authorized State Central Valley Project the authority previously given to state irrigation districts "[t]o cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto. . . ."\textsuperscript{81}

The State Water Authority was unable to sell the revenue bonds because of the depression, so it sought federal aid. At Congressional hearings in February, 1935, the Chairman of the House Flood Control Committee questioned Edward Hyatt concerning California views on the nature of possible federal-state cooperation:

\textbf{THE CHAIRMAN.} Is it your view that this project should be undertaken as a Federal project with State assistance or as a State project with assistance of the Federal Government?

\textbf{MR. HYATT.} That is a matter of secondary interest in California. California wants the project constructed, and if the Federal Government desires to take charge of it I am sure that the people of California will say well and good. They are desperate. Our view is that it should be done by the State, and we have filed this application with the Public Works Administration and are proceeding under the State water authority. . . . However, the great desire is to get the project constructed and to safeguard this country; and the Government's desires in that matter will come first.\textsuperscript{82}

The reaction of the Public Works Administration, under Secretary of the Interior Harold L. Ickes, was to take federal responsibility for Central Valley Project, allocating $20 million to begin construction. Two years later, Congress reauthorized the project under "the provisions of the reclamation law" in the 1937 Rivers and Harbors Act.\textsuperscript{83}


\textsuperscript{32} Hearings on H.R. 4122 & 4128 Before the House Comm. on Flood Control, 74th Cong., 1st Sess. 60 (1935).

Once the flow of federal funds started, a move was made to remove from Central Valley Project the reclamation law's acreage limitation and residency protections against monopoly and speculation. The original draft of the 1937 bill contained such a removal proviso that the "transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law."\(^{34}\) The House report on the bill, however, recommended repayment "under the Reclamation Law."\(^{35}\) Without floor debate, the House agreed to the latter.\(^{36}\)

Interests opposed to acreage limitation did not press their case at the jeopardy of obstructing initiation of the flow of funds. Large landholding interests, however, were acutely aware of the implications of the current phase of a longstanding California issue known from its nineteenth century beginnings as "land monopoly." Roland Curran, a spokesman for their point of view, related in retrospect the concerns over acreage limitation law as water development became an issue in the 1930's:

> In 1937, I was serving as secretary of the Kern County Water Development Commission, an agency of the county of Kern. We were requested by responsible officials of the Bureau of Reclamation to take the lead in organizing . . . districts . . . able to contract for project water. The question was raised about the application of acreage limitations, at that time, as a considerable percentage of the lands to be brought into a district organization were in holdings exceeding 160 acres. We were assured by officials of the Bureau of Reclamation that, as there were no public lands in the area and that at least half of the project water would be used, of necessity, for recharging the ground-water table and as there was no legal or physical way in which any land owner could be prevented from pumping what waters underlay his surface lands, that we could count with certainty that before the project was completed, the acreage limitations would be removed.

> Until 1944, this was the general understanding. In February of 1944, the Commissioner of Reclamation advised that, if any correction was made in the law or remedial legislation asked for, it was up to the people of the project area to bring it about, or to use his exact words: "I am handcuffed on this matter."\(^{37}\)

In April of 1944, Russell Giffen, a large land operator on the west side of the San Joaquin Valley, similarly advised Congress of a change

---

34. 81 Cong. Rec. 6716-17 (1937).
in the attitude of Bureau of Reclamation officials. At first some officials forecast that the Central Valley Project would be exempted from acreage limitation, but later spokesmen affirmed that acreage limitation law was to be supported and enforced. Giffen testified:

Two members of our committee went to Denver and talked to Mr. Harper of the Bureau. It was indicated to them there that the 160-acre provision was not to be taken seriously. It was their suggestion. We went there with the plea that they put in a district on the west side. They came back and said that there would have to be surveys there. It was their suggestion that we put up half of the money, half of $50,000. We put up $25,000 and they put up $25,000 . . . . It seems to me that the Bureau was completely in bad faith in taking that $25,000, knowing that they were going to support as vigorously as they have the 160-acre limitation knowing that our district could not accept that.88

The alleged bad faith on the part of Bureau officials was, in fact, as Commissioner Bashore implied, a response to directions from their superior, Secretary of the Interior Harold L. Ickes, to support acreage limitation against the attack upon it just begun in the House.89 On March 22, 1944, a complete exemption had been passed by the House after brief floor debate and rejection of a compromise. This result was achieved in part by a tactic of surprise. The exemption was proposed as a committee amendment, without public hearings.40

The Senate, however, held public hearings and then killed the amendment. In conference committee, the exemption was restored. Supporters of acreage limitation, nevertheless, succeeded in holding up passage of the entire rivers and harbors bill, which would have authorized projects throughout the country.41 Early in the next session, without the exemption of Central Valley Project from acreage limitation, the bill passed easily.42


39. On May 4, 1944, for example, testimony from Secretary of Interior Ickes supported "traditional anti-land-monopoly and anti-speculation policies which the Congress has developed in the Federal reclamation laws for the protection of working farmers . . . ." Hearings on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce, 78th Cong., 2d Sess. 534 (1944) [hereinafter cited as Hearings on H.R. 3961].

40. About six weeks earlier, Commissioner of Reclamation Harry W. Bashore had testified, "I think that in the Central Valley of California there will have to be a modification of that [acreage limitation] requirement . . . because you have a developed economy in that region." Hearings on H.R. 4485 Before the House Comm. on Flood Control, 78th Cong., 2d Sess. 642 (1944).

41. Central Valley Project: Water and Land, supra note 23, at 243-44.

Three years later, a bill to exempt projects in California, Colorado, and Texas was the subject of hearings at which the Senate Public Lands Subcommittee received 1329 pages of testimony. That bill died in committee.48

The intensity of the battle was long remembered. A quarter of a century later, Senator Clinton P. Anderson, Chairman of the Subcommittee on Water and Power Resources, cautioned that further attempts at legislative exemption from acreage limitation "would engender great controversy. When such an attempt was made back in the middle '40's . . . it was rejected by the Congress but the turmoil that ensued plagued the reclamation program for many years."14

III

PLANNING TO CIRCUMVENT PUBLIC POLICY

If the big landowners in the valley lose out in this particular fight [for exemption of federal CVP from acreage limitation] they have several other proposals to accomplish their end. One of them is a House bill which would authorize the Army to add irrigation and power development to its present navigation and flood control powers. The legislation also would call for construction of a series of irrigation and power projects throughout the country, especially in Central Valley. This would circumvent the 160-acre rule, since the Army is not bound by that restriction.

Another proposal, said to have originated among the big landowners of Fresno County, is for the state of California to take over the Central Valley project, paying the entire bill. This, too, would sidestep the 160-acre limitation. Still other landowners are sinking wells around their holdings in order to be prepared to pump irrigation water from the raised water table, thus getting a free ride on the Central Valley project.

—Business Week, May 13, 194445

43. Hearings on S. 912, supra note 37.
45. Valley Divided, BUS. WEEK, May 13, 1944, at 24. The magnitude and concentration of economic incentives for large landowners in Central Valley to avoid acreage limitation is suggested by these data:

(1) Subsidy unrepaid by irrigators on CVP averaged $577 per acre ($92,320 on 160 acres and $577,000 on 1,000 acres). Letter from Congressmen Engle, Miller, Moss, Hagen, Sisk, and McFall to Gov. Edmund G. Brown, Feb. 4, 1957.
(2) Receivers of Class I water from Friant-Kern Canal (CVP) year after year pay one-fourth of what its price would be "... if subsidies and special benefits were eliminated." Hearings on S. 912, supra note 37, at 869.
(3) Measured by experience on reclamation projects begun prior to August 1913, the value of unimproved land rose by an average of 759 percent. Id. at 204.
(4) In 1947, thirty-four landowners "in probable, present, and future San Joaquin Valley service area," with 5,000 or more acres each, owned 748,490 acres, an average of 22,014 acres each. Id. at 864 (italics omitted).
Outright Congressional exemption was only one of the tactics employed by large landowners who sought to escape from national reclamation policy limiting water deliveries to the Central Valley Project. The tactic of substituting the Army Engineers for the Bureau of Reclamation as construction agent on Kings and Kern Rivers within the Central Valley was approved by Congress in 1944. Under Executive pressure, however, the bill was rewritten so that administration of irrigation use of water from Army projects was transferred from the Secretary of War to the Secretary of the Interior, and was placed under reclamation law.\textsuperscript{46}

Reliance upon pumping from groundwaters, as a tactic to avoid acreage limitation, also encountered obstacles. Central Valley groundwaters have been long overdrawn. As a result, greater and more costly pumping lifts have become necessary. Mineral content of the water has increased and crop productivity has declined. Early suggestions that use of groundwater might free large landowners from repayment obligations generally have not materialized. A result of overdrafted groundwaters on the west side of the San Joaquin Valley is "subsidence of the surface of the ground . . . at the rate of only slightly less than one foot per year throughout the some 80 miles of the San Luis Canal right-of-way."\textsuperscript{47}

Another tactic used by large landowners to avoid acreage limitation was to get the State to take over the Central Valley Project. While California several times had authorized its water districts to comply with federal reclamation law in return for federal assistance, and while the people, in a 1933 referendum, had conferred similar authority on the State Water Authority, the State had not attached equivalent controls over water distribution and speculation as conditions for receiving state financial assistance. This lack of controls opened the door to considering California, rather than the Federal Government, as the agency to construct and operate the Central Valley Project. At the Governor's Water Conference in December, 1945, State Engineer Edward Hyatt

\textsuperscript{46} 43 U.S.C. § 390 (1944); \textit{Excess Land Law on the Kern?}, supra note 21, at 169. \textit{Cf.} United States v. Tulare Lake Canal Co., 340 F. Supp. 1185 (E.D. Cal. 1972), which held that even though section 8 of the Flood Control Act of 1944 (58 Stat. 877) provides that reclamation laws apply to irrigation projects, the flood control project at Pine Flat Dam was not subject to the 160-acre limitation on water released for irrigation purposes. The case (No. 72-2322) is currently on appeal to the 9th Circuit Court of Appeals. It was argued Dec. 13, 1973, and awaits decision.

\textsuperscript{47} \textit{Hearings on H.R. 17787 Before a Subcomm. of the Senate Comm. on Appropriations}, 89th Cong., 2d Sess., pt. 3, at 841 (1967) (remarks by Ralph M. Brody, Manager-Chief Counsel, Westlands Water District).
discussed these related roles of financing and policy. Referring to federal plans for full development of Central Valley basin waters, he said:

This enlarged Federal activity, although advantageous to the State from a financial viewpoint, carries with it the threatened imposition of Federal laws and policies in the control and utilization of our water resources and the substitution of Federal control for State control of water and its development. This poses a whole series of new problems with regard to State rights matters. We have as an example the very serious problems facing potential users of Central Valley Project water brought into focus by the excess land provisions of the reclamation laws.

At the same conference, George Schlmeyer, Master of the California State Grange, stated the grounds for his opposition to the removal of acreage limitation:

A man came to my office in Sacramento saying, "You are opposing the 160-acre limitation being taken off." He said, "A farmer can farm 10,000 acres today as easily as he could 160 acres 20 years ago."

I replied in this way: "If you allow that large land operation, which is not farming"—don't call that 42,000 acre farm in Fresno County a farm; it is an industrial operation . . . .

If you want to see the effect of nonresident corporate farming, just . . . drive west of Stockton in the most fertile section of California, and you can drive miles and miles and you will never see a farm home. You will see plenty of barracks for labor.

And if we go to the point where we let land get into too large operations and the young men and young women . . . want to get married and we say to them, "You can't buy a home," then you destroy that community life that has built America, then you have pulled up one of the great anchors of our Democracy.

The California State Grange fought the Elliott Amendment to take the 160-acre limitation off . . . speculators are . . . buying that land—one tract sold for $27.50 an acre. That land when the Central Valley water gets there will be worth $150 an acre without any more improvements. And we think it is fundamentally wrong that young men returning from the service of the country should be compelled to pay that difference to speculators who don't live there.

48. USDI, BUR. RECLAMATION, CENTRAL VALLEY BASIN COMPREHENSIVE REPORT ON DEVELOPMENT OF WATER AND RELATED RESOURCES, S. DOC. NO. 113, 81st Cong., 1st Sess. (1949) (previously approved by Sec'y of Interior Ickes on Nov. 16, 1945, id. at 52).
49. PROCEEDINGS OF THE CALIFORNIA WATER CONFERENCE CALLED BY EARL WARREN, GOVERNOR 32 (Dec. 6 & 7, 1945).
50. Id. at 462-63.
In the preceding months, in light of the incipient agitation within California for return of Central Valley Project to the State, Secretary of Interior Ickes had expressed the federal view on the critical questions of finance and policy. Noting that the Federal Government had assumed responsibility for the Project when the State was unable to market its bonds, already had invested $157 million, and had plans to spend an additional $200 million, he asked Governor Earl Warren, "Do you think that the State is now prepared to assume full responsibility for the project?" Eight months later, commenting on recommendations by the State Chamber of Commerce that the functions of irrigation and power be returned to the State, the Secretary said:

... their principal objective is to avoid application to the Central Valley of California of the long-established reclamation policy of the Congress which provides for the distribution of the benefits of great irrigation projects among the many and which prevents speculation in lands by the few.

For the time being, the question of turning the Central Valley Project over to the State of California rested there, pending outcome of a second attempt to persuade the 80th Congress (Republican) to grant the exemption from acreage limitation that the 78th Congress (Democratic) had refused. The second attempt failed, as had the first.

32. Open letter from Sec'y Ickes to Frank Clarvoe, Editor, San Francisco News, October 31, 1945. The Secretary further commented:

I well know the State Chamber of Commerce's record on the Central Valley project. Originally it opposed the project outright in the early water and power act campaigns in California, but suddenly climbed on the band wagon after the people of California voted their approval of the project at the special election in December 1933. In the years that followed almost everyone in California, including even the State Chamber, paid vocal tribute to the Central Valley project when it was a matter of interesting the Federal Government in it and obtaining Federal money for its development. In recent year[s], however, with the Federal Government now committed to the program and the two main dams completed by the Bureau of Reclamation, the attitude of the State Chamber and some other special interests in California has changed from one of acclaim of the project's merits to claiming the project's benefits for their own exclusive profit. It is the age-old battle over who is to cash in on the unearned increment in land values created by a public investment.

Id.

Seven years later, Secretary of the Interior Oscar Chapman repeated Secretary Ickes' analysis when the prospect of State acquisition of Central Valley Project resurfaced:

the Department of the Interior would look with favor on acquisition of the Central Valley Project by the State of California, subject to consideration by the Congress, under terms and conditions ... that will assure the same widespread availability of project benefits under State operation as is provided under existing Federal Reclamation laws.

53. Cf. text accompanying note 37 supra.
The political alignment of groups supporting and opposing the federal law during these two attempts is revealing:\(^5\)

### Supporters of Excess Land Provisions

<table>
<thead>
<tr>
<th>Farm Organizations</th>
<th>Labor Organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Grange</td>
<td>American Federation of Labor</td>
</tr>
<tr>
<td>Farmers' Union</td>
<td>Congress of Industrial Organizations</td>
</tr>
<tr>
<td>Western Cooperative Dairymen's Union</td>
<td>Religious Groups</td>
</tr>
<tr>
<td>California Farm Research and Legislative Committee</td>
<td>Federal Council of Churches</td>
</tr>
<tr>
<td>Some local irrigation districts</td>
<td>Catholic Rural Life Service</td>
</tr>
<tr>
<td>Veterans' Organizations</td>
<td>Council for Social Action of the Congregational-Christian Churches</td>
</tr>
<tr>
<td>Veterans of Foreign Wars</td>
<td>Protestant Home Missions Council</td>
</tr>
<tr>
<td>American Veterans' Committee</td>
<td>National Catholic Rural Life Conference</td>
</tr>
<tr>
<td>American Legion</td>
<td>Other</td>
</tr>
<tr>
<td>Disabled American Veterans</td>
<td>League of Women Voters</td>
</tr>
</tbody>
</table>

### Opponents of Excess Land Provisions

<table>
<thead>
<tr>
<th>Farm Organizations</th>
<th>Business Organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td>California Farm Bureau Federation and a number of local Farm Bureaus</td>
<td>California State Chambers of Commerce</td>
</tr>
<tr>
<td>Irrigation Districts Association and a number of local irrigation and similar districts</td>
<td>Many (but not all) local Chambers of Commerce</td>
</tr>
<tr>
<td>California Central Valleys Flood Control Association</td>
<td>Kern County Land Company</td>
</tr>
<tr>
<td>Agricultural Council for California</td>
<td>Miller and Lux, Inc.</td>
</tr>
<tr>
<td>Central Valley Project Association</td>
<td>DiGiorgio Fruit Corporation</td>
</tr>
<tr>
<td>San Joaquin Valley Water Protective Association</td>
<td>California State Agencies</td>
</tr>
<tr>
<td></td>
<td>Water Project Authority</td>
</tr>
<tr>
<td></td>
<td>Agricultural Extension Service, University of California</td>
</tr>
</tbody>
</table>

### IV

#### INSTRUMENT FOR CIRCUMVENTION: THE STATE.

For some time we have had proposals . . . to transfer ownership of the project from the United States to the State of California. I have vigorously opposed these suggestions . . . on the ground that we need Federal assistance . . . such an action would not add a single drop of water or one kilowatt of additional power . . . . It seems to me that the State Engineer . . . and representatives approving this proposal should step forward and tell the people who it is that wants California's limited funds used in this manner and why they support California ownership of a great project that has been made possible by money from the taxpayers of the other 47 states.

—Congressman Clair Engle, 1954\(^5\)\(^6\)

The excess land provisions are not now a part of state law, and have been opposed by the leading organizations seeking state purchase of the CVP and by the California Water Project Authority.

Calif. Assembly Interim Comm. Report, 1955\(^5\)\(^6\)
The second failure in three years to obtain Congressional exemption of acreage limitation for the Central Valley Project brought a shift in the tactics of those seeking escape from acreage limitation. Without public hearings, the Legislature took the preliminary steps toward state acquisition of the project,\textsuperscript{57} as was forecast by \textit{Business Week} in 1944.\textsuperscript{58} In 1951, the California Senate adopted a concurrent resolution instructing the State Water Authority to report "on the legal and financial feasibility of the State assuming ownership and operation of the Central Valley Project. . . ."\textsuperscript{59}

This action was followed in 1952 by a $10 million appropriation to the Authority "for use in connection with acquisition by the State of the Central Valley Project . . . and to pay the initial installments . . . for such purchase . . . ."\textsuperscript{60}

However, state purchase of the existing federal project faced opposition on financial grounds as well as in defense of the acreage limitation principle. Federal construction had involved minimal state contributions and no bond issues. State purchase would cost huge sums of money in order to repay the federal investment. Alternately, it was possible to consider a compromise tactic that would cost the State less but still would offer a prospect of avoiding acreage limitation on vast holdings. Known as the Feather River Project, it envisioned construction by the state of a reservoir near Oroville on this tributary of the Sacramento, moving the water southward, partly for use in the San Joaquin Valley and partly to be hoisted over the Tehachapi Mountains and into southern California. The prospect that the state might some day build the Feather River Project was a powerful influence, thereby impeding federal construction to make use of those waters under reclamation law. In 1956, the year after disastrous Feather River floods caused immense property damage and loss of 36 lives, Senator Thomas H. Kuchel commented, "I would venture the guess that if the State had not indicated its interest in Oroville, we would have had long before last year's flood a Federal dam at Oroville."\textsuperscript{61}

\textsuperscript{57} Public hearings had exposed the deep divisions in public opinion within the State when a Senate Subcommittee came to California in 1944. \textit{Hearings on S.R. No. 295 Before the Subcomm. on the Central Valley Project, California, of the Senate Comm. on Irrigation and Reclamation, 78th Cong., 2d Sess. 29 (1944). See also \textit{Special House Subcomm. Report, Irrigation and Reclamation on Central Valley Project, California, H.R. Doc. No. 416, 84th Cong., 2d Sess., pt. 1, at 673 (1952).}

\textsuperscript{58} See epigraph accompanying note 45 supra.

\textsuperscript{59} Ch. 135 \[1951\] Cal. Stat. 4563. \textit{See also Ch. 1441, § 2, [1951] Cal. Stat. 3401.}


\textsuperscript{61} \textit{Hearings on S. 178 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 84th Cong., 2d Sess. 179 (1956) [hereinafter cited as \textit{Hearings on S. 178}].}
At this 1956 Congressional hearing on a bill proposing federal construction of the San Luis Unit as an addition to Central Valley Project to serve the San Joaquin Valley's westside, divergent interests among potential water-receiving groups surfaced, stopping all federal action for the time. Although the bill left the door open to possible federal-state cooperative use of project facilities, California large land and water interests did not agree upon it.

Speaking in support, Governor Goodwin J. Knight urged "immediate construction," adding, "I sincerely believe that Federal construction of the San Luis unit in such a way that it can be integrated with the State's plan, is an example of the highest type of Federal and State cooperation in solving California's water problem." Reliance on pumped westside groundwaters was turning out to be undependable for agricultural production as an alternative to surface deliveries of irrigation water. Pressure from westside interests for construction, despite the prospect of federal acreage limitation, was a result.

This was not the priority of southern California interests which wanted to assure water for their lands free of reclamation law. Mayor Norris Poulson of Los Angeles told the same Congressional committee:

The San Luis Dam is a basic element of the Feather River Project [which] ... would ... eliminate the water shortage in the San Joaquin Valley [and] ... also meet the needs of the southern portion of the State. We thus oppose violently ... the contents of the legislation in S.178, which would authorize development of the San Luis Dam as a Federal project of limited value.

Confronted with those conflicting interest groups, the Committee took no action.

By the time the 85th Congress was again ready to consider authorization of the San Luis unit of Central Valley Project, differences among California interests had not disappeared, but they had moderated sufficiently to reach agreement on federal construction of the San Luis unit, with protections against acreage limitation on lands served by the prospective, integrating state project.

Harvey O. Banks, Director of the California Department of Water Resources, testified in favor of the bill authorizing federal construction with financial cooperation from the State, but without wholly rejecting an alternative "Kern County concept" calling for state construction with federal financial cooperation. He explained that:

62. Id. at 4.
63. Id. at 16.
64. "The water situation is so confused in California that no Federal action is indicated until local agreement is reached." Memorandum of Congressman Hagen, Chairman of the Subcomm. on Irrigation and Reclamation of the Senate Interior and Insular Affairs Comm., 85th Cong., 2d Sess. 4 (1958).
The primary difference between the Kern County concept and the approach in S.1887 is in the responsibility for the construction and operation of the project. Under S.1887 the Secretary of the Interior would construct all of the joint-use features and the State would pay to the United States its appropriate share of the construction costs, and, in exchange, would be entitled to proportionate right to the use of the joint-use facilities . . . . On the other hand, under the Kern County concept, the State would build and operate the joint-use facilities and the United States would pay to the State its appropriate share of construction costs and be entitled to use a proportionate part of the jointly used project capacities . . . . My position on the Kern County concept is, in short, that it would be acceptable to the State if it is found acceptable by the Department of the Interior, by the affected water users in California, and by the Congress . . . . It is obvious that expenditures of this magnitude cannot be made solely by any one entity, and that the combined efforts of State, Federal, and local interests will be essential if California's water resources are to be developed in a proper and timely manner . . . the saving to the United States under an integrated plan of development at San Luis would be in excess of $30 million.65

As a condition of support of S.1887 by the State Water Resources Department, Director Banks stipulated that the bill be amended specifically to exempt the state service area of an integrated federal-state project from "provisions of the Federal reclamation laws," including, of course, their acreage limitation and residency requirements.66

Allen Bottorff of the Kern County Farm Bureau spoke for the "Kern County concept" and asked for an amendment exempting the state service area. "If these amendments are accepted as proposed," he said, "the bills would be substantially in line with the California Farm Bureau Federation policy and should be supported." If not, they "should be opposed."67 As requested by the State Director and the Farm Bureau spokesman, S.1887 was amended to exempt the state service area.

Had the proposed state and federal projects been physically separated instead of dependent upon joint-use facilities, specific exemption would not have been necessary to avoid acreage limitation. However, the

65. *Hearings on S. 1887 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 85th Cong., 2d Sess., 56 & 57 (1958) [hereinafter cited as *Hearings on S. 1887*]. *See also* testimony of Allen Bottorff, Kern County Farm Bureau, *id.* at 103. William S. Peterson, General Manager and Chief Engineer of the Los Angeles Department of Water and Power, expressed belief that the "use of common facilities"—dam, reservoir and canal—would save not only $30 million to the Federal Government, but also "an equal amount to the State or thereabouts . . . ."

66. *Id.* at 53 & 54.

67. *Id.* at 103 & 104.
Warren Act of 1911 applies acreage limitation law to water stored or carried in any reservoir, canal, or ditch of a federal reclamation project constructed or used, as San Luis was to be, under contract with "individuals, corporations, associations, and irrigation districts . . . ." The location of the lands to be served was irrelevant. In the judgment of spokesmen for large landowning interests, a specific Congressional declaration to that effect clearly was necessary if excess lands above 160 acres per individual owner were to be exempted from federal policy.

Faced with the problem of winning Congressional approval of the exemption, the tactic employed was to stress that the state and federal projects would water differently located lands. As Senator Kuchel explained, the requested exemption "applies to land which may be served by State operations only, under the State's water plan, upon which, of course, State law should apply." Federal law would apply within the federal unit.

---

68. 43 U.S.C. §§ 523, 524 (1911). The situations the Warren Act and the California Water Project were designed to meet are closely parallel. In 1911, Congressman William H. Reeder of Kansas, in charge of the Warren bill, told Congress:

In many of the irrigation projects there is a large amount of land which can be irrigated. There is generally but one right good place to impound the waters. . . . Then the Government, having the reservoir, when others furnish the money, may increase the size of the reservoir and increase the carrying capacity of the ditches and permit those who furnish the necessary funds to use the surplus water on their own land.

46 Cong. Rec. 2109, 2781 (1911). In 1958 Senator Thomas H. Kuchel of California told Congress:

One reservoir to serve 2 systems, 1 Federal and 1 State, is in the interests of efficiency and economy. Indeed, it may be that Mother Nature has precluded the possibility of 2 reservoirs, and thus herself has commanded that the governments of the Nation and the State should labor together, and at San Luis cooperate in the cost and in the use of a dam . . . .

104 Cong. Rec. 17726 (1958). There the parallel ends. Senator Kuchel continued: "Federal law, by the bill, would govern the waters impounded at San Luis for the [federal] Central Valleys project, and State law [i.e., no 160-acre limitation] would govern the waters impounded there for use . . . as a part of the State water plan." Id. The Warren Act, on the contrary, preserves the 160-acre national policy.

In the legislative history of the Warren Act, the Idaho State Land Board alludes to "cooperation between state and government projects," while the law authorizes cooperation with "irrigation districts"—creatures of states, but without mentioning "states." 45 Cong. Rec. 4323 (1910). Speaking to this point, Federal District Judge Oliver Carter stated in 1973 that

[It] would appear unreasonable to believe that the State can escape application of the reclamation laws simply because it, rather than the individual irrigation districts, does the direct contracting, for under such conditions the State would in reality be acting as a 'super' irrigation district rather than as a participating sovereign.


Additionally, note that payment of money to obtain cooperation from the federal reclamation service does not relieve the payers of the obligation to comply with national 160-acre limitation policy. See also P. Taylor, Excess Land Law: Execution of a Public Policy, 64 Yale L. J. 477, 512 (1955).

An additional prospect was that by federal authorization of the joint-use San Luis Unit, the national treasury stood to be relieved by the State of the burden of financing additional development of California waters. The magnitude of this relief, as represented to Congress, would have dwarfed the $30 million mentioned by Director Banks when he referred only to the San Luis Unit. Responding on the Senate floor, Senator Arthur V. Watkins of Utah said:

I wish to congratulate the State of California and California’s representatives in the Senate, Senator Knowland and Senator Kuchel, on the fact that the great State of California will build this project, and a still larger project which will cost in the neighborhood of $11 billion, and do it on its own.\(^{70}\)

Unconvinced, Senators Paul Douglas of Illinois and Wayne Morse of Oregon sought to strike the proposed exemption of the state service area. After considerable debate on the Senate floor on August 15, 1958, the motion was defeated.\(^{71}\) However, in the absence of House action, the entire San Luis authorization bill died with the expiration of the 85th Congress.

V

SENATE DENIES EXEMPTION

I grant you, you start kicking the 160-acre limitation and it is like inspecting the rear end of a mule: You want to do it from a safe distance because you might get kicked through the side of the barn. But it can be done with circumspection, and I hope we can exercise circumspection.

—Congressman Clair Engle of California, 1955\(^{72}\)

SENATOR ENGLE: [E]verything the State does in order to put a bucketful of water on a square foot of land will be paid for with State money. That is the reason why we have a provision in the bill that the reclamation law shall not apply . . . . All the Federal Government has done has been to build the first story of the structure . . . .

SENATOR DOUGLAS: It would be impossible to have a second story without the Federal expenditures on the foundation and the first story.

—Senator Clair Engle of California and Senator Paul Douglas of Illinois, 1959\(^{73}\)

\(^{70}\) 104 Cong. Rec. 17730-31 (1958). Minutes later, Senator Kuchel corroborated this estimate. See text accompanying note 104 infra.

\(^{71}\) Id. at 17735.


\(^{73}\) 105 Cong. Rec. 7490 (1959).
I have always supported the 160-acre limitation. For 4 years I was chairman of the [House] Subcommittee on Irrigation and Reclamation . . . . Never have I deviated from my support for the 160-acre limitation. I do not deviate now.

—Senator Clair Engle, 1962

Early in the 86th Congress, debate was resumed over application of federal acreage limitation on water deliveries to the state service area via San Luis joint-use reservoir, pumping, and canal facilities. Governor Edmund G. Brown of California told Congress that local interests within his state had met to “remove potential sources of conflict . . . .” and agreed upon the pending bill with “minor amendments.” He added, “I hope and expect that the State of California will commit itself to invest more than $11 billion in the next 25 years over and above the Federal programs . . . .” The Governor and California’s senators, together with the Senate Interior Committee and a majority of its House counterpart, approved the bill including provision for exemption.

When the bill reached the Senate floor, California’s senators began with presentation of the physical aspects of the need for water. On the west side of the San Joaquin Valley, about 500,000 acres were to be served as part of the Federal San Luis Unit under federal acreage limitation law. Senator Kuchel said, “Years of overdraft have caused the groundwater table to recede at an alarming rate . . . . The supplemental water from this project would halt the inevitable abandonment of land which otherwise is liable to revert to semidesert.” The projected State Unit would use “a portion of the winter run-off which each year flows into the Sacramento-San Joaquin Delta and is wasted into the Pacific Ocean.” After passing through the San Luis joint facilities the water would be used:

ultimately for either delivery to agricultural lands of the surrounding area . . . or for transportation through huge new aqueducts to the residential, industrial, metropolitan and other areas of Los Angeles,

75. Hearings on S. 44 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 86th Cong., 1st Sess., 11 & 12 (1959) [hereinafter cited as Hearings on S. 44]. “Let us resolve to prove that we are one State, one people, and that we can produce one good water program. Let us grow with the strength of unity, as we begin to fulfill our destiny of greatness.” Id. at 16.
76. Id. at 1.
77. 105 Cong. Rec. 7484 (1959). Apparently, Sheridan Downey was forecasting a state project not subject to the federal 160-acre limitation when he wrote in 1947: “There is plenty of water in the Central Valley for the DiGiorgio holdings as well as for all other project farms, excess and nonexcess alike.” DOWNEY, supra note 20, at 180.
78. Id.
The "estimated cost to California" of the State water plan would be "nearly $12 billion." Since the State had not yet authorized funds to commence construction of its part of the joint project, the cut-off date for a federal-state contract was to be extended until January 1, 1962. Failing agreement by that date, construction of the Federal San Luis Unit was to proceed.  

Senators Paul Douglas of Illinois and Wayne Morse and Richard Neuberger of Oregon responded by introducing an amendment to S.44 to eliminate the proposed exemption of the state service area of the joint project from application of federal reclamation law. Senator Douglas maximized the strength of their strategic position by explicitly conditioning support for authorization of the project upon passage of the amendment, stating:

I regard that section, which waives the 160-acre limitation of reclamation law on the so-called State service land, as the crucial part of the bill. If we were to strike out section 6(a) from the bill, I personally would vote for the bill. . . . [T]he section is not eliminated from the bill, I shall be compelled to vote against the bill. I regard the debate on section 6(a) as of equal importance with debate on the bill itself.

California's senators insisted that Congress declare the exemption of the state service area from federal reclamation law. Their dilemma was twofold: (1) that water, whether serving state or federal service area lands, could be stored and pass through but a single site (the site upon which S.44 prescribed that the Federal Government should construct the facilities) and (2) that the Warren Act applies federal law to waters passing through federal facilities no matter where they are delivered ultimately.

Accordingly, Senator Kuchel argued that S.44 "should unequivocally provide that in one area served by the Federal project, Federal reclamation law will apply, while in the other area, served by the Feather River project, California law will apply."

79. Id.
80. Id.
81. 105 CONG. REC. 7488 (1959); see also id. at 7491, 7496. Senator Morse declared himself in favor of the bill "subject to the protection of some historic criteria." Id. at 7488. Senator Neuberger favored the project, but pointed out "the necessity for improving the bill to assure continuity of national water policy." Id. at 7493. He said, "[I]f the 160-acre limitation is breached in California, such action will set a precedent . . . by means of which all the other Western States would be able to request a similar prerogative." Id. at 7494.
82. Id. at 7484. He asked Senator Douglas whether the latter believed "that the people of California should have the right, by State law, to determine how water is to
Senator Engle argued, in justification of exemption, that investment of state money should free lands in the state service area from federal policy:

The State government will pay every nickel of its share. Not a penny of it will be charged to the Federal taxpayers. That is the reason for this [exemption] provision in the bill. The projects are completely severable. They do not overlap or intermix. 83

As debate progressed, Senator Engle assumed a new position, viz., that it made no difference whether the amendment to eliminate the proposed exemption of the state service area was passed by Congress or not; federal law would not apply to state service lands either way:

MR. ENGLE. Does the Senator believe that if section 6(a) is stricken from the bill the reclamation law will apply to the State projects service area?

MR. DOUGLAS. Yes, I do, and I want to make a record to show clearly that it would.

MR. ENGLE. I want to make a record which is very plain indeed that . . . the section is surplusage. It is merely a statement of what the law is.

MR. DOUGLAS. If it is surplusage, then eliminate it.

MR. ENGLE. The people affected want this additional assurance.

MR. DOUGLAS. Who are they? What people? 84

As Senator Engle declined to stand on his legal opinion to the extent of abandoning his support of section 6(a), Senator Kuchel intervened in the dialogue:

MR. KUCHEL. I will tell the Senator what people they are. They are the people of southern California.

MR. DOUGLAS. Does the Senator mean the big landowners of the Central Valley?

MR. KUCHEL. I do not mean the big landowners of the Central Valley . . . . I mean the city government of the city of Los Angeles. . . . They are interested in getting supplemental water, so that when the housewife turns on the water tap she can get water.

MR. DOUGLAS . . . . Surely the Senator does not oppose the application of the 160-acre limitation if he is just considering water distributed in the city of Los Angeles. It is in the Central Valley that this issue arises. 85

be used in California under the State system?" Senator Douglas responded: "I do not believe that large landowners should be able to come to Congress and obtain an exemption from the Federal law." Id. at 7497.

83. Id. at 7490.
84. Id. at 7496.
85. Id. at 7496-97. Before Senate debate concluded, Senator Engle produced a telegram from Governor Brown concurring in the position that section 6(a) was surplusage. Id. at 7857. Water for irrigation as well as for domestic use was included in plans for the state service area in both southern California and Central Val-
Senator Kuchel was not content to rely upon Senator Engle's contention that section 6(a) was "surplusage" and, consequently, that it made no difference whether or not Congress specifically exempted the state service area from federal reclamation law. On the contrary, on the last day of the four-day debate on the issue, he read a telegram from a Sacramento attorney reinforcing his own contention that section 6(a) must be retained to prevent application of federal law. That telegram stated:

I strongly urge that section 6(a) remain in S.44. Its inclusion was agreed to by all interests in the State of California, including the State itself and the congressional representatives from the affected areas. The reasons were (1) that Federal law should not control water deliveries by the State from the joint Federal-State project, and (2) that this should be made so clear by the Congress that a contrary argument could not later be made . . . . If section 6(a) is deleted now as a result of the insistence of those who state flatly that they want Federal law to apply to water deliveries by the State, this legislative history might be almost conclusive as to the intent of the Congress that Federal law is to apply to such deliveries. Logically, the only valid argument for deletion of section 6(a) is that Federal law should control water service by the State. To prevent that result it is now plainly imperative that section 6(a) remain in the bill.86

The issue was clear. Those leading the move to delete section 6(a) wanted federal law to apply to the state service area. California's senators, sponsoring 6(a), wanted specific exemption from acreage limitation. The latter was true notwithstanding Senator Engle's assertion that federal law would not apply regardless of what Congress might decide about deletion of 6(a). After four days of prolonged debate, the Senate voted to delete section 6(a).87

VI

HOUSE DENIES EXEMPTION

The section [7] was included in the bill at the request of the State of California as a means of bringing into unanimous agreement the many diverse interests and points of view in the State.

—Congressman Wayne Aspinall of Colorado, Chairman, House Committee on Interior and Insular Affairs, 196088

86. 105 CONG. Rec. 7987-88 (1959) (emphasis added).
87. Id. at 7995.
88. 106 CONG. Rec. 10450 (1960).
Fourteen or fifteen years ago this was a hot issue. It defeated a Democratic Senator for reelection from our State . . . . You can tell me all you want to that there is not something to be gained by keeping section 7 in the bill. I do not believe it. The ones who are trying to retain it are the prototype of those who have been against the 160-acre limitation clause for the past 30 years.

—Congressman George P. Miller of California, 1960

... of the 1.4 million acres in the San Luis Valley, including the proposed Federal service area and surrounding areas, over 64 percent of the land is held by owners with more than 1,000 acres each . . . . A similar pattern is to be found in Kern County including possible areas of irrigation service south of the Federal service area. Here, of 1.1 million acres of land, we again find that 64 percent is accounted for by owners of more than 1,000 acres each. The largest owner, the Kern County Land Co., accounts for 16 percent of the total and the various oil companies with large holdings account for another 15 percent.

Congressman Al Ullman of Oregon, 1960

Within two weeks of the Senate action striking the exemption of the state service area from federal reclamation law, the House Interior and Insular Affairs Committee issued a report on the San Luis project authorization bills before it. The majority report, with six members dissenting, took essentially the same position as Senator Engle and Governor Brown; that is, deletion of specific exemption of the state service area from federal reclamation law would not affect the application of state law there, but the exemption nevertheless should be retained in the bill authorizing the project. The majority explained at length:

The worst that can be said about section 7 [exempting the State service area] then, is that it is surplusage. Its rejection from the bill would have no substantive effect on the law applicable to the San Luis undertaking. Only an amendment affirmatively requiring adherence to the Federal acreage limitations notwithstanding the State’s full payment of its share of the construction cost of the project would

89. *Id.* at 10556. Responding to Congressman Miller, Congressman Charles S. Gubser of California chose another way of stating the issue between them: "I am wholeheartedly in favor of the 160-acre limitation. But my opposition to the amendment . . . is not based upon the philosophy of the 160-acre limitation . . . . It is based purely upon the philosophy of States rights." *Id.* at 10559. Congressman Miller’s reference was to Democratic Senator Sheridan Downey who, in 1950, decided not to run in the primary for reelection. He was opposed by Congresswoman Helen Gahagan Douglas, supporter of the 160-acre law.

90. *Id.* at 10455.
accomplish that which those who seek to delete section 7 mistakenly believe would be the effect of doing so.

The committee recognizes that the inclusions of surplusage is usually undesirable in a bill, but it also recognizes that the author of a bill, particularly when he is dealing with a subject that has involved bringing together as many diverse interests and points of view in his State and district as the San Luis project involves, should be given considerable latitude in the way he expresses the position that is arrived at, more latitude than the committee might give itself if it were to start drafting a bill ab initio.91

Overlooking the Warren Act's application of acreage limitation to any lands served by federal facilities, the Committee continued:

The committee concludes that section 7 of the bill in nowise changes established principles of reclamation law. It can well understand the possibility, however, that there might be difficulties in securing both statewide agreement and financing for the State project if there were doubt in anyone's mind concerning the relationship and the applicable laws under which each project would be constructed and operated. The committee therefore concludes that inclusion of section 7 in the bill will contribute to clarity and advance construction of the projects. The inclusion of this section, to put the matter otherwise, . . . is not to be interpreted as indicative of a belief on the committee's part that without it the excess land provisions of the Federal reclamation laws would be applicable to the State-served lands.

It was in the light of such considerations as these that have just been set forth that the committee rejected, by rolcall votes, amendments which would, in one case, have deleted section 7 from the bill and, in the other, replaced it with language requiring the State to agree not to serve lands which would be ineligible to receive water if they were being served by the Bureau of Reclamation.92

92. Id. at 16. Congressman John P. Saylor of Pennsylvania sponsored the amendment in committee to oblige the State to observe federal 160-acre law, explaining later to the House that "I would have liked to see my amendment in the bill or I would not have offered it." 106 CONG. REC. 19464 (1960). However, when the House voted on the amendment to strike section 7, aimed likewise to assure state observance of the same law, he voted "nay." Id. at 10564. Ten years later, Congressmen Saylor and Aspinall and Senator Anderson signed the Public Land Law Review Commission report recommending elimination from public lands the requirements of "acreage limitation . . . residency . . . and exclusion of corporations as eligible applicants", as "artificial and obsolete restraints." PUB. LAND LAW REV. COMM’n, ONE-THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT iii & 181-4 (1970). The Interior Department had advised the House Interior Committee that

this Department has never contended that the proposed delivery of water by the State to its service areas from and through the joint-use works would be subject to the provisions of the federal reclamation laws, on the assumption, of course, that the State's share of the costs of construction would be met concurrently with the construction period.

H.R. REP. NO. 399, supra note 91, at 23.
Thus, the committee majority assumed the posture that federal acreage limitation was inapplicable to the state service area and that deletion of the exempting section 7, should that occur, would not provide evidence of Congressional intent to apply it. Furthermore, the majority, in order to satisfy unidentified California “diverse interests,” allowed inclusion of section 7, although redundant and meaningless in its view. The committee minority of six stated a contrary position that deletion of section 7 was necessary to “protect Federal interests and the basic concept of Federal reclamation law . . .” from the “real possibility of enhancement of huge private interests through interest-free Federal investment.”

After nearly a year, the San Luis bill reached the House floor for two days of extended debate. As in the Senate, deletion of the proposed exemption from federal law was the crucial issue. During the debate, the identity of the “diverse interests” that had insisted on inclusion of section 7 emerged. Congressman Al Ullman of Oregon, opposing section 7, and Congressman Craig Hosmer, supporting it, engaged in this illuminating colloquy:

**Mr. Ullman:** The gentleman said it was surplusage . . . If it is surplusage it would be little to give in return for getting a bill through this House and through the other body and making sure that you have a project.

**Mr. Hosmer:** It is surplusage insofar as this bill is concerned, but it is not surplusage insofar as its actual, practical effect upon my part of the country is concerned and in the financing, the operation and the speed with which we can carry out our State project.

Congressman Jeffrey Cohelan of California threw additional light on the “diverse interests” unwilling to accept the view that section 7 was surplusage and, on the contrary, insisted upon its inclusion:

On this question of whether it does or does not make any difference . . . I am wondering if the gentleman is aware that the Feather River Association on February 12 of this year passed a resolution demanding that if the Congress declined to delete section 7, the State of California should be asked to build San Luis in order to avoid the 160-acre limitation. Somebody obviously feels that this is important.

As debate progressed, it became more wide-ranging and the reasons for insisting upon inclusion became clearer. Congressman Hosmer explained:

---

94. *Id.* at 25.
96. *Id.* at 10456.
I fully agree with the report of this committee, which says that section 7 is surplusage, that without it you could take a case to court and get a decision that says, "Of course, Federal reclamation law does not apply to the State project." The 160-acre limitation cannot apply to this project by any type of legal gymnastics even without section 7.

Then why am I up here saying that I want to keep section 7 in? For this reason: the State project is going to require better than a billion dollars for just this San Luis phase including distribution systems. The entire State-wide water plan is going to require $5 billion out of the taxpayers of the State of California before it is through. What section 7 does and why it is necessary is ... It assures the matter stay out of litigation which could last for 20 years ... While the cases are in court you cannot go out and get a bonding house to float bonds ... In California we cannot wait 20 years for the water while this thing is in court. Section 7 makes sure to begin with it never goes to court and allows us to proceed with our vitally needed State water project.97

Finally, section 7 came to a vote. On a division the amendment to delete was defeated 84 to 81. Ullman then demanded tellers to record each vote and the amendment passed, 139 to 122. Congressman Hosmer demanded a roll call vote and the amendment passed again, 215 to 179.98

As a matter of practical politics, neither side was willing to treat section 7 as surplusage. Opposed to each other in purpose, both sides—in the House as in the Senate—treated the extent of coverage of the federal 160-acre law as a vital issue. Both Houses voted to delete the requested exemption of the state service area from federal law.

Apparently unnoticed during debate was a portentious provision, in the House version of the bill that became law, for review of any federal-state agreement effectuating joint use of San Luis facilities. As described in the House report, it offered "another opportunity to review project . . . ," specifying that "no funds shall be appropriated to commence construction . . . prior to 90 days after it has been submitted to the Congress and then only if neither the House nor the Senate Interior and Insular Affairs Committee disapproves it."99 The result, in about three years time, would be a complete reversal of power between committee and body of the whole.100

97. Id. at 10458.
98. Id. at 10560, 10563, 10564.
100. See text accompanying notes 151-161 infra.
Certainly there is no conflict between the legislative branches of the two governments . . . The federal Congress . . . has determined . . . that the 160-acre limitation is a basic part of federal policy. The state Legislature has adopted this concept as state policy by specifically authorizing irrigation districts to enter into contracts for project water that contain the 160-acre limitation.

—California Supreme Court, 1960

As we understand, neither the Bureau of Reclamation nor the State Administration desires to apply the Federal excess land provisions to the State service area. We are informed that an agreement is now being negotiated which, as we understand, on one ground or another, will permit State law to apply.

—Opinion of Counsel, Chas. T. Main, Inc. Report to California Department of Water Resources, 1960

With authorization of the federal San Luis Unit achieved, including approval of cooperation with a prospective state water project, the next step was to make the latter a reality. This step was accomplished in about six months when California voters, by a very narrow margin, approved a $1.75 billion general obligation bond issue to finance it. No mention was made of acreage limitation in the Secretary of State’s election pamphlet, furnished to all voters. Likewise, the magnitude of the proposed financial obligation that the State would assume was minimized.

California’s spokesmen before Congress had emphasized the burdens that California was prepared to assume, thus suggesting relief of the national treasury by appeals for equivalent help. “The State project,” said Senator Thomas H. Kuchel, “. . . will cost the people of California $11 billion when completed . . .”

The financial aspect of the State’s contribution was presented to its

3. CAL. STATE DEPT PROPOSED AMENDMENTS TO THE CONSTITUTION, GENERAL ELECTION, . . . NOV. 8, 1960 [hereinafter cited as PROPOSED AMENDMENTS TO THE CONSTITUTION].
voters in a very different light. The argument for the $1.75 billion bond issue in the election pamphlet assured voters that:

The program will not be a burden on the taxpayer; no new state taxes are involved; the bonds are repaid through the sale of water and power. In other words, it will pay for itself.105

105. PROPOSED AMENDMENTS TO THE CONSTITUTION 3 (emphasis in original).

It has turned out since that one of the ways in which the project "pay[s] for itself" is by levying assessments against taxpayers of the Metropolitan Water District of Southern California regardless of whether they receive water. K. Roberts, The Public Role of Engineering: The California State Water Project, 99 ENGINEERING ISSUES, Jan. 1973, at 19, 24. The project consumes more power to pump water than it produces. Another source of revenue for the project has been royalties received from the State's tidelands oil leases. As ex-Governor Edmund G. Brown has observed:

When I was governor, we earmarked the tidelands funds for education. The Reagan Administration, under pressure from the water interests of Southern California, repealed this statute and gave the funds to the water project. This . . . resulted in diminished education for the people of this state.


In May, 1959, Governor Brown, supporting exemption of the State service area, informed Senator Enge:

I am, and I believe that the California Legislature also is, opposed to any unjust enrichment or monopolization of benefits by owners of large land holdings as a result of either Federal or State operation. I intend . . . to take this matter up with the California Legislature in order to preclude . . . undesirable results . . .

105 CONG. REC. 7857 (1959). In June, the California Senate rejected an acreage limitation bill.

At one stage in the bitter debate, Assemblyman Jesse M. Unruh (Dem-Los Angeles) declared, 'At times we have to rise above principle.' He had been twitted by Assemblyman Lloyd W. Lowry (Dem-Rumsey) for opposing the latter's water acreage amendment which is part of both the State and national Democratic platforms.

E. Behrens, Legislature Passes Giant Water Bill, San Francisco Chronicle, June 18, 1959, at 1, 15, col. 1.

The California Department of Water Resources originally planned a surcharge on water delivered to excess lands, which it estimated would total 404,747 acres by 1973, or 78 percent of the total 521,088 acres to be served. SURCHARGE AND SURCHARGE CREDIT PROVISIONS. (Calif. Dept Water Resources, Water Service Contractors Council Memo No. 556, March 25, 1970) [hereinafter cited as SURCHARGE AND SURCHARGE CREDIT PROVISIONS]. Legal Counsel in the Main Report had said in 1960:

Apparently the Department's plan is a modification of a plan announced by Governor Edmund G. Brown in a television broadcast from Los Angeles . . . on January 20, 1960. This plan would have charged the owners of so-called excess lands the market value of the power used to transport water, while all other landowners would have paid only the actual cost of such power, less an amount equivalent to the benefit derived from the sale of System power outside the System. The present plan exacts a surcharge on water delivered to excess lands in an amount equivalent to the power credit that is derived from the operation of the System. . . .

MAIN REPORT, supra note 102, at 32-33, 34.

In 1972 the California Department of Water Resources abandoned the surcharge, explaining that it was too deficient in substance to justify its "administrative costs." SURCHARGE AND SURCHARGE CREDIT PROVISIONS, supra; Letter from W.R. Gianelli, DWR Director, to Donald Currin, October 24, 1972. In retrospect, Governor Brown said,
By 1973 the estimate of final construction cost of the State Water Project was nearly $3 billion. However, construction cost is only a portion of the total cost. Current reports of the Department of Water Resources reveal that the total "application of revenues . . . thru project repayment period . . ." is expected to exceed $11 billion. This is the same figure California's spokesmen gave to Congress, but not to the State's voters. Governor Brown, who had led the successful effort to win the voters' approval of the $1.75 billion bond issue, conceded that it would have been much cheaper . . . if the Federal Government had built the project . . . [and] that large landowners would benefit from [construction by the State] but I saw no way of building the project if we had to fight the 160-acre Federal limitation.

The role of the State as an instrument to avoid acreage limitation law received little publicity among California voters. The election guide furnished by the State failed to mention the issue in arguments on either side of the bond issue. However, ways to avoid the limitation received careful attention from state water officials right up to the 1960 water bond election time. In the month before the election, the State Department of Water Resources received from its hired consultants a report evaluating the California program. Included was an appendix prepared by legal counsel, addressing the question of whether the acreage limitation provisions of federal reclamation law would apply to the state service area under the proposed state Act and the already-adopted federal San Luis Act. Counsel concluded that the Warren Act, although applying reclamation law to water "... impounded, stored, or carried . . ." to private lands "... in excess of the requirements of the lands to be irrigated under any project . . .," was applicable to waters of the State Water Project given joint use of San Luis federal facilities:

To hold that the Warren Act of 1911, which dealt with a wholly different factual situation, requires their application seems to us far-fetched. The deletion of Sections 7 and 6(a) of the bills somewhat

As a matter of fact, there are far more benefits to more people in a large corporation that distributes its earnings rather than the acreage limitation which benefits relatively few people. One hundred and sixty acres is not a small farm because these farms are worth on an average . . . about $160,000. This is not the small farmer of the reclamation days of 1902. . . . It is a long story and I don't think you have it all.

Hearings Before Subcomm. on Migratory Labor, supra.

109. See text at note 103 supra.
110. Hearings Before Subcomm. on Migratory Labor, supra note 105.
111. PROPOSED AMENDMENTS TO THE CONSTITUTION, supra note 103, at 2, 3.
clouds the foregoing conclusion, but, on balance, is insufficient to change the result.\textsuperscript{112}

The report dismissed the view that Section 7 was “surplusage”: “It seems clear that if Section 7 had been left in the San Luis bill, the excess land provisions would not apply to the State service area. Doubts arise because of the deletion.”\textsuperscript{118}

Counsel examined an argument by the House committee majority that final payment of financial charges against beneficiaries of reclamation projects terminates applicability of acreage limitation. He noted that although this view had some support in administrative practice, it had been “severely challenged” by this present author.\textsuperscript{114} He concluded conditionally that California can “pay out” its share of the cost of the San Luis Reservoir before water is supplied from it to the State service area. Hence, if the pay-out provision applies, the operation of the Federal reclamation laws is academic. Even if they apply today, they will no longer apply when water is delivered.\textsuperscript{116}

As described earlier, the legislative history of the San Luis bill was marked by four days of heated floor debate in the Senate and two days in the House. Each House had voted to reject the recommendation of its own committee to exempt the state service area from federal acreage limitation law. Faced with this Congressional precedent favorable to applying acreage limitation, counsel recommended that administrators drafting the federal-state contract include the content of the exempting sections that Congress had denied:

At any rate, it would seem apparent that the State should strive to obtain as a part of its agreement with the Federal government a provision that none of the waters supplied from the San Luis Reservoir, or from any of the aqueducts constituting a part of that project, to State service areas should be subject to the excess land provisions.\textsuperscript{116}

The reasoning upon which this recommended tactic rested clearly was political was well as legal. Counsel continued:

It is true that if in fact the Bureau of Reclamation did not have the authority to enter into such a contract, the agreement might be open to challenge. However, as a practical matter, such a challenge in the courts need not be anticipated in the normal course of events.\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{112} \textit{Main Report}, supra note 102, at 29.
  \item \textsuperscript{113} \textit{Id.} at 28.
  \item \textsuperscript{115} \textit{Main Report}, supra note 102, at 28.
  \item \textsuperscript{116} \textit{Id.} at 29.
  \item \textsuperscript{117} \textit{Id.}
\end{itemize}
Counsel pointed out that the recommended agreement was not of itself sufficient to assure escape from acreage limitation on the state service area "even if the Department of Justice and other potential litigants concurred." There was yet another Congressional hurdle to take. The way had been prepared, however. During original consideration of the San Luis authorization bill, the House had substituted its own text for the Senate version, and the Senate had accepted it. The House version prescribed a 90-day period for review of the federal-state contract before it could take effect. The review was to be done by the respective Interior Committees in each House.

Apparently with the committee majorities' opposition to acreage limitation on the state service area in mind, counsel commented:

We do not attempt to forecast whether either committee might disapprove the agreement, but in the light of the past legislative history surrounding S. 44, this possibility may not be disregarded. In any event, the action of the committees on the actual agreement as drafted will likely be decisive. A prediction as to what will happen in Congress can scarcely be grounded solely on legal considerations. . . . The reaction of Congress and its relevant committees is more a political than a legal problem. If Congress in effect approves the agreement worked out between the Bureau of Reclamation and the State, it would seem likely that this will be the end of controversy as to this subject.

VIII

EXECUTIVE EXEMPTION

It is too bad that we cannot spread on the official record the history of the opinions—note that I use the plural—that were written . . . by lawyers in the executive department before the final official opinion was rendered.

I am satisfied that the original opinion was against the final decision that was made. . . . [T]he contract . . . should be considered as a total abdication of the national Government to the land and water monopolies which so completely dominate California.

—Senator Wayne Morse of Oregon, 1962

118. Id.
119. See text accompanying note 102 supra.
120. Main Report, supra note 87, at 29.
121. 108 Cong. Rec. 5688, 7812 (1962). Testimony confirming Senator Morse's 1962 statement contrasting the original with the final draft of the San Luis opinion was given in federal court in 1971. The Fresno Bee reported:

The federal government as late as November 1961, was going to apply the 160-acre limitation to the state service area of the San Luis Project . . . . Water Attorney Breckinridge Thomas testified . . . he read a draft opinion Nov. 2, 1961, prepared by Department of Interior officials, which held that the limita-
The course taken by the federal-state agreement deviated little from that recommended and predicted by counsel for the Main Report. The contract submitted to the Secretary of the Interior for his approval, however, did not follow the recommendation of the Main Report to repeat the language of sections 6(a) and 7 exempting the state service area from reclamation law in the federal-state contract. Instead, it omitted all reference to application of acreage limitation.

On December 26, 1961, Solicitor of Interior Frank J. Barry issued his opinion in support of the agreement as drafted, minus the acreage limitation. He began by closing immediately one potential loophole for escape from acreage limitations; namely, payment by the State of its assigned share of the cost of joint-use facilities concurrently with construction. He “concluded that accelerated repayment of the cost of construction cannot relieve excess landowners” of acreage limitation. Nevertheless, he relieved them of any obligation to comply with the limitation on other grounds.\footnote{122}

The Solicitor’s first argument for rejection of the obligation to comply was to deny that Congress, in rejecting proposals to exempt the state service area from acreage limitation, intended to apply that very law. First, he stated the general rule:

Normally, when an exemption is removed from a bill before enactment, the presumption is that the legislative body intended the law to apply in the situation described in the exemption. To apply the rule here would be to say that Congress expressed its intent that the excess-land laws should apply to State water deliveries.\footnote{123}

Then the Solicitor proceeded to hold it nevertheless inapplicable at San Luis. He rested his conclusion upon his own interpretation of the legislative history of debates over exemption, saying, “In my opinion the legislative history clearly indicates that Congress did not intend to require application of Federal acreage limitations by striking Sections 6(a) and 7.”\footnote{124}

Frank B. Horne, former regional solicitor of the Bureau of Reclamation testified similarly. “Horne also testified he understood ‘that Gov. (Edmund) Brown had said in the event of an unfavorable opinion on the state contract, the state would bring suit immediately.’” \textit{Pine Flat Case Bares San Luis Project Plan}, The Fresno Bee, May 12, 1971, at B1, col. 1.

122. Agreement with Calif. for Construction of San Luis Unit, Central Valley Project, 68 Interior Dec. 412, 413 (1961); see also 108 CONG. REC. 5712 (1962).

123. \textit{Id.} at 416.

124. \textit{Id.} at 417.
A senator who had led the original fight against exemption was quick to deny this interpretation of his successful battle. Senator Wayne Morse said:

Now, I regret to say, some lawyers in the executive branch have concluded that when we struck out that exemption clause our "intent" was that it should apply. The House of Representatives will probably be amazed to learn that their "intent" also was misinterpreted.\(^{125}\)

... It is a novel experience to find the executive branch undertaking to reinterpret quite erroneously the intent of the legislative branch which had already gone to some pains to spell out and positively act to establish its intent. If this sort of practice prevails, our time honored system of checks and balances with the legislative, judicial, and executive branches is in real jeopardy.\(^{126}\)

... Existing reclamation law is not changed by debate on the floor of the Senate.\(^{127}\)

Senator Thomas Kuchel of California, sponsor of the San Luis bill, also had thought it necessary in 1959 to retain the exemption in order to free the state service area from acreage limitation. He had said:

The Senator from Illinois . . . has stated several times that if his amendment shall be adopted, it will mean that Federal reclamation law shall apply to all waters which flow from the joint use reservoir, whether they go into the State system . . . or not. I deny that contention. . . . But I must say there is merit in the position . . . that if at this late date section 6(a) were stricken from the bill it would constitute an intention on the part of the Senate to make Federal law apply . . . .\(^{128}\)

Despite disagreement over the precise meaning of denial of exemption of the state service area from federal law, congressional leaders on both sides battled to the end. Congress denied exemption. The Solicitor's opinion, grasping at some differences in interpretation, stripped six days of congressional debate and decision of meaning. In effect, the Solicitor approved an exemption that Congress specifically had denied.

In support of his conclusion, the Solicitor found conflict between federal and state law over reclamation policy. He said:

In the consideration of the San Luis Act the Congress was scrupulous to avoid conflict with legitimate State authority . . . . we should not

\(^{125}\) 108 Cong. Rec. 5688 (1962).
\(^{126}\) Id. at 5698.
\(^{128}\) Id. at 7988-89.
precipitate a conflict with a State which Congress was careful to avoid . . . . \(^{129}\)

The Solicitor apparently overlooked a decision of the California Supreme Court, issued only the year before, denying the existence of conflict. The California Court had stated: “Certainly there is no conflict between the legislative branches of the two governments . . .” over the federal acreage limitation. \(^{180}\) Neither was there a conflict between California voters and federal law. As noted earlier, in 1933 they approved a referendum measure authorizing the State Water Authority to contract with the federal government under reclamation law. \(^{181}\) The California legislators and the voters, in 1959 and 1960, respectively, renewed this authorization by incorporating “the provisions of the [State] code governing the Central Valley Project.” \(^{182}\)

The real conflict was between large California landowning interests and federal acreage limitation law, not one between state and federal law. The former conflict illuminates the insistence of California’s spokesmen upon Congressional exemption of the state service area; there was no other conflict. \(^{183}\)

The Solicitor was faced with a difficult statutory problem. The federal Warren Act of 1911 specifically applies acreage limitation when a federal project cooperates with a non-federal entity, and makes no distinction as to where water is delivered, so long as the cooperation involves use of federal facilities. \(^{184}\)

---

129. Agreement with Calif. for Construction of San Luis Unit, Central Valley Project, supra note 122, at 426. The Solicitor supported his argument by citing Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1943). As the Solicitor said, seeking to establish a parallel between the Davies and San Luis situations, “There, as here, Congress had omitted to be specific . . . . Here as there ‘relevant authorities and considerations are numerous and equivocal, and different plausible definitions result from a mere shift of emphasis.’” Agreement with Calif. for Construction of San Luis Unit, Central Valley Project, supra note 122, at 425. However, Congress was specific in the original acreage limitation Act of 1902, and in the Warren Act of 1911, the latter applying acreage limitation specifically to federal cooperation with other entities. Davies and the state service area situation are not parallel. See also note 29 supra and text accompanying notes 134-138 infra.

130. Ivanhoe Irrig. Dist. v. All Parties, supra note 101. See also epigraph accompanying note 101 supra.


132. Ch. 1762, § 1, [1959] Cal. Stat. 4235 (now CAL. WATER CODE § 12931 (West 1971)).

133. In the House, California Congressmen were divided. California Congressman Jeffrey Cohelan and Oregon Congressman Al Ullman led the fight for exemption.

134. 43 U.S.C. § 524 (1911). Undersecretary of Agriculture True D. Morse stated: “. . . the Warren Act of 1911 . . . provided that water could not be delivered to landowners outside the reclamation project boundaries in excess of that amount needed to irrigate 160 acres.” Hearings on S. 1425, S. 2541, and S. 3448 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Af-
At first the Solicitor conceded the *prima facie* application of the Warren Act to the federal-state cooperation in the San Luis project. He said:

Section 2 of the Warren Act standing alone requires the application of acreage limitations where the United States cooperates with an entity in the construction of irrigation facilities even where no federal subsidy is extended to the lands served by the entity.\(^{135}\)

To counter this generalization the Solicitor offered two arguments. The first rested upon the legislative history of the San Luis Act. He said:

... the legislative history of the San Luis Act exhibits a recognition by the Senate and the House that acreage limitation should apply where Federal investment is made and because of the Federal investment.\(^{136}\)

In contrast to this view, in a second opinion barely three years later, the Solicitor rejected the sufficiency of legislative history as a method of altering established law and policy. He said then:

So firmly established are the excess land provisions of the reclamation law that Congress suspends their operation only where extraordinary circumstances dictate. Where Congress has seen fit to waive or modify the excess land laws in certain projects, it has always found it appropriate to enact positive legislation setting forth the exemption or other modification in unmistakable terms. Where Congress deems a departure from its established policy to be in order it so provides by express terms, and not by implication.\(^{137}\)

This latter opinion conforms to the reasoning in a unanimous United States Supreme Court decision:

Significantly, when a particular project has been exempted [from acreage limitation] because of its peculiar circumstances, the Congress has always made such exemption by express enactment.\(^{138}\)

Even if it were assumed that legislative history could modify the Warren Act to limit acreage limitation to federal investment, both the Governor of California and the Director of Water Resources testified

---

\(^{135}\) *Agreement with Calif. for Construction of San Luis Unit, Central Valley Project, supra* note 122, at 426.

\(^{136}\) *Id.* The Solicitor cited Senator Paul Douglas, *inter alia,* in support of this argument. He did not quote an explicit colloquy:

**Mr. Engle.** Does the Senator believe that if section 6(a) is stricken from the bill the reclamation law will apply to the State projects service area?

**Mr. Douglas.** Yes, I do; and I want to make a record to show clearly that it would.

105 CONG. REC. 7496 (1959).


to the State's dependence upon federal investment at San Luis.\textsuperscript{139} Thus, regardless of whether or not the fact of federal investment is necessary to require federal law, the Warren Act applies acreage limitation on the San Luis state service area.

The Solicitor's 1961 opinion offered a second ground for avoiding the application of acreage limitation as admittedly prescribed by the Warren Act when "standing alone."\textsuperscript{140} The opinion stated:

The Warren Act was enacted in 1911, before the maturity of national reclamation policy and long before anyone could get water for more than 160 acres by agreeing to sell his excess lands.\textsuperscript{141}

The significance of this reference to the 1926 Omnibus Adjustment Act\textsuperscript{142} requiring agreement to sell excess lands as precondition of watering them was unexplained. The 1926 Act repealed neither the Warren Act of 1911 nor the original Reclamation Act of 1902.

In contrast to the vagueness of the Solicitor's 1961 reference to the timing of the Warren Act is the clarity of his 1964 opinion. In the latter he relied upon the United States Supreme Court for guidance in construing the general body of reclamation law. He said:

The rules in such cases were stated . . . as follows:

First, that effect shall be given to all the words of a statute, where this is possible without a conflict; and Second, that, as regards statutes in pari materia of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted.\textsuperscript{148}

In this same 1964 opinion the Solicitor indicated clearly his own belief that the 1926 Act did not destroy the 1911 Act. He said:

The provisions of reclamation law of general application dealing with land limitations include section 5 of the 1902 Act, Sections

\textsuperscript{139} Governor Edmund G. Brown testified: "We know that we cannot and should not depend entirely on the Federal Government . . . California recognizes . . . that it cannot do the job alone." \textit{Hearings on S. 44, supra} note 75, at 12. Director Harvey O. Banks testified: "It is clear that Federal assistance will be required, and the joint venture . . . would be of financial advantage to both the State and the United States . . . ." \textit{Hearings on S. 1887, supra} note 65.

\textsuperscript{140} See text accompanying note 135 supra.

\textsuperscript{141} Agreement with Calif. for Construction of San Luis Unit, Central Valley Project, \textit{supra} note 122, at 426.

\textsuperscript{142} 43 U.S.C. § 423e (1926).

\textsuperscript{143} Applicability of the Excess Land Laws, Imperial Irrig. Dist. Lands, \textit{supra} note 137, at 506.
1 and 2 of the Warren Act, ... and Section 46 of the 1926 Act ... .

Finally, the San Luis Act of 1960 had said that "the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902 ... and Acts amendatory thereof or supplementary thereto)." Nevertheless, the Solicitor determined that

... the San Luis unit does not include any lands "outside the Federal San Luis unit service area" and that it does not include the State service area.

Therefore, when the Act states that "in constructing, operating, and maintaining the San Luis unit, the Secretary shall be governed by the Federal reclamation laws," it directs the Secretary to apply reclamation law, not to the State service area but to the Federal service area, which is the only area included in the unit.

In support of this conclusion the Solicitor cited section 1 of the San Luis Act barring commencement of construction

... until the Secretary has ... secured, or has satisfactory assurance of his ability to secure, all rights to the use of water which are necessary to carry out the purposes of the unit ...

From this authority, the Solicitor argued that "If the Secretary cannot proceed until he has secured rights for the use of water for the State service area, it is plain that he cannot ever commence construction of the San Luis unit."

In arriving at his conclusion the Solicitor ignored the admonition of the United States Supreme Court, in its 1958 decision validating acreage limitation, that "the acquisition of water rights must not be confused with the operation of federal projects." The conclusion stands that the Warren Act's criterion of applicability of federal reclamation law is not the location of the lands served, but the use of federal facilities to serve them.

Thus the executive branch of government took its initial stand exempting the state service area. This position presumably was to be subject to review by higher executive authority, then by the legislative and judicial branches.

---

144. Id. at 501.
146. Agreement with Calif. for Construction of San Luis Unit, Central Valley Project, supra note 122, at 419.
148. Agreement with Calif. for Construction of San Luis Unit, Central Valley Project, supra note 122, at 417.
149. Ivanhoe Irrig. Dist. v. McCracken, supra note 18, at 291.
150. 43 U.S.C. § 324 (1911). See also text accompanying notes 134-144 supra.
IX

COMMITTEE EXEMPTION

... the Committee on Interior and Insular Affairs of the Senate should have brought to the Senate a recommendation either for or against [the Federal-State contract]. It should have submitted the question to the Senate, and should not have decided to have the committee take care of the matter.... I do not think the Senate would approve of this contract because, in my judgment, it circumvents the Congressional action of 1959.

—Senator Wayne Morse of Oregon, 1962

I thought, along with the Senator from Oregon, that we had won in 1959. With him, I have been deeply disappointed by the turn of events.

—Senator Paul Douglas of Illinois, 1962

Three days after Solicitor Barry issued his opinion holding acreage limitation inapplicable to the state service area, Attorney General Robert F. Kennedy gave it his qualified approval. The issue, he said, concerned a national policy "of long standing and one not lightly abandoned. . . .," one presenting "a most difficult problem." The intent of Congress, he continued, "is not free from doubt. Strong arguments can be made to the effect that they did not intend to abandon the policy even within the area to be serviced by the State." Having qualified his concurrence in the Solicitor's opinion, the Attorney General appealed to Congress to clarify its intent. Noting the provision in the San Luis Act for a 90-day review of the agreement by the House and Senate Interior Committees, he urged the Secretary of the Interior

... to seek a congressional reexamination of this question. I think that the Congress itself should make a clear determination whether or not the acreage limitations should apply to the State service area. Fortunately, under the provisions of the San Luis Act they will have the opportunity to do so, and I sincerely hope that they will take positive action in this respect.

The review procedure, upon which the Attorney General placed his hopes for Congressional action, did not result in broad reassessment by the House and Senate, but on the contrary impeded it. The procedure had been inserted in the law under the leadership of Congressman

---

152. Id. at 5711.
153. Id. at 5711-12.
154. Id.
155. Id.
Wayne Aspinall, Chairman of the House Interior Committee, after the House had followed the Senate in rejecting proposed exemption of the state service area from acreage limitation law. At his request, the House struck out all but the enacting clause of the Senate-passed bill and substituted the text of the House-passed bill containing the procedure for review of the federal-state contract if and when administratively agreed upon.

When this House version came to the Senate, Senator William Proxmire of Wisconsin interrogated Senator Clinton P. Anderson, Chairman of the Senate Interior Committee, as to its possible effect on the acreage limitation issue. The following colloquy took place:

MR. PROXMIRE. Can the Senator inform me whether this bill, as it comes from the House, makes any substantial changes in the bill as it passed the Senate . . .

MR. ANDERSON. No. I will say to the Senator from Wisconsin that there are no substantial changes. There are a few changes in wording, which I think probably improve the bill. Many of them were suggested by Representative Saylor, of Pennsylvania, who is a staunch friend of those who wish to keep reclamation within reasonable bounds . . .

MR. PROXMIRE. As I recall, there was a lengthy Senate debate on the floor . . . on the . . . 160-acre limitation . . . That has not been affected?

MR. ANDERSON. The bill has been strengthened, if anything . . . I am sure the bill has been strengthened rather than weakened.156

A very different analysis subsequently was given to the California Department of Water Resources by legal counsel for the Main Report. As noted earlier, counsel had forecast that

... in the light of the past legislative history ... the action of the committees on the actual agreement as drafted will likely be decisive . . . The reaction of Congress and its relevant committees is more a political than a legal problem.157

Between the Congressional debates of 1959-60 over application of acreage limitation to the state service area and review in 1962 of the draft federal-state agreement, two critical elements in the political-legal situation had altered. First, with passage of the San Luis Act, friends of acreage limitation on the state service area no longer held their original power to threaten denial of authorization to finance and construct the

---

156. 106 Cong. Rec. 10695-96 (1960). Presiding at initial House hearings to consider construction of the federal San Luis project, Senator Clinton Anderson asked a witness: "If this is coordinated or combined with some State project and the water comes down to Kern County, do you understand that the provisions of Federal reclamation law with respect to the 160 acres will apply?" Hearings on S. 178, supra note 61, at 132.

157. Main Report, supra note 102, at 29 (emphasis added).
project unless their demands were met. In 1959-60 this power had been essential to defeat of the attempted exemption. Second, substitution of the House version for the Senate bill in 1960 had conferred what was unrevealed in floor debate—virtually complete power of legislative review over administrative execution of Congressional intent upon the very committees whose recommendation against acreage limitation both Houses had rejected.

Omission of acreage limitation from the federal-state contract evoked extensive Senate floor debate on April 2, 1962, with substantial echoes on April 10 and May 4.\textsuperscript{158} Much of the debate consisted in restatement of views by leading opponents and proponents of the originally defeated state service area exemption from national policy. Senator Morse, whom Solicitor Barry had quoted as giving support for his decision against applying acreage limitation, was emphatic in restating his original position against exemption:

\begin{quote}
Our Nation as a whole has in the Central Valley Federal reclamation project an immense stake. Not only is there a vast Federal investment involved, but more important, there are human values upon which a price may not be placed. Important in that connection is the struggle to prevent land and water monopolies in the area by insisting upon compliance with the 160-acre limitation. . . . It was the failure of the Secretary of the Interior and his Solicitor to insist upon the applicability of those excess land provisions in . . . the State service area of the San Luis project which gave rise to my attack. . . . on the latter's opinion . . . .\textsuperscript{159}
\end{quote}

Senators Proxmire and Anderson exchanged views as to the substance of the policy issue:

\begin{quote}
\textbf{MR. PROXMIRe.} I ask . . . what our Latin American friends will think of us if we go to their countries preaching land reform and at the same time adopting legislation which would perpetuate agricultural feudalism in California? . . .

\textbf{MR. ANDERSON.} The Senator from Wisconsin referred to the project as feudalism. I do not see anything feudalistic in it, because the law provides that the people in the San Luis Valley shall not produce crops which are in surplus.\textsuperscript{160}
\end{quote}

The effectiveness of the attack on the contract, however, was blocked by the refusal of the Interior Committee to refer the matter to the Senate for decision by the Senate. As Senator Clinton P. Anderson, Chairman, explained:

The Interior Committee said . . . we would not review the contract since the Secretary of the Interior had made certain findings and de-

\textsuperscript{158} 108 CONG. REC. 5687-5725, 6237-40, 7809-14 (1962).
\textsuperscript{159} Id. at 7810.
\textsuperscript{160} Id. at 5690.
cisions, based on the concurrence of the Attorney General as to the law . . . . The committee considered the matter and voted not to disapprove the contract by resolution. I believe the committee’s action was compliance with the Attorney General’s recommendation. Committee consideration and decision is congressional action. It is complete, final congressional action so far as the Senate is concerned.161

The House committee raised no questions and the issue was not brought to the floor.

X

EXEMPTION: JUDICIAL REVIEW

. . . [W]e ought to leave to the courts the determination of these legal questions. . . . We believe that both sides in the controversy stand on an equal footing before the courts if we let the application of the bill go to the courts with section 6(a) eliminated. . . .

We are called upon to preserve a fundamental congressional prerogative the Senate has seen fit to defend on many previous occasions—that of assuring that the executive branch of Government shall carry out the intention of the Congress in administering Federal law. . . .

I am accustomed, in my public service, to seeing public officials yield to the kind of pressure to which the executive branch of the Government and the California officials have yielded. That is an old, old game in American politics, but that does not make it right. Why did . . . California not . . . test this provision in the courts? Why did they use the political route, after the decision in 1959?

—Senator Wayne Morse of Oregon, 1959, 1962162

If anyone wishes to take the case to court he may do so.

—Senator Clair Engle of California, 1962163

By late Spring of 1962, both executive and legislative branches of government (the latter for the second time) had gone on record on the issue of whether national reclamation policy controlling water monopoly and speculation should apply to the state service area. The Attorney General was uneasy over his own and the Secretary of Interior’s decision that the law did not apply.164 The legislative branch was divided internally. Senators who had won a 1959 vote denying exemption from

161. Id. at 5692-93.
164. See text accompanying notes 153-155 supra.
national policy were deeply disturbed when the Senate's own Interior Committee, siding with the executive, allowed a federal-state contract omitting national policy to stand and obstructed full Senate review of the executive decision. It remained to be seen who, if anyone, would take the issue to the courts and, if the contract was challenged, how the judicial branch would interpret the validity of omitting national policy.

During Senate debates, both those who favored and those who opposed application of national policy to the state service area had referred to the opportunity for court review. However, they were not in agreement as to who should find it necessary to go to court to protect his interests. This lack of agreement is implicit in an exchange between Senators Morse and Anderson:

Mr. Morse. I say most respectfully that I think the Department of the Interior should have followed a hands-off policy. It should have said . . . We are not going to approve this contract. We are merely going to say to the parties, "Go on to court." . . .

Mr. Anderson. The Senator has said that if we had wished, we could have adopted a hands-off policy. That is precisely what we did deliberately . . . The Interior Committee took a completely noncontroversial, hands-off position. We said that we would not review the contract since the Secretary of the Interior had made certain findings and decisions, based on the concurrence of the Attorney General as to the law. If these findings were wrong, they should be tested in a court of law. 166

Agreement between the two Senators on the meaning of keeping "hands-off" was more apparent than real. Senator Morse rebuked the executive branch for approving the contract lacking acreage limitation. Had the executive branch objected to the contract, the burden of taking the acreage limitation issue to court would have been left to the State of California or to large landowning interests. Responsibility for defense of its application then would have rested on the Government.

Senator Anderson responded that the Interior Committee had kept "hands-off" the contract; i.e., allowed it to stand without acreage limitation, as had the executive branch. The result was that landless or other private parties were left with the burden of taking to court the case for implementing national policy, with the Government defending its omission.

165. He added, "I would have liked to have the great lawyers of the Department of the Interior who rendered this final opinion do so without being assisted by those on the Hill." 108 Cong. Rec. 5692 (1962).

166. Id. In recommending the review procedure that became law, but was now waived, the original House Interior Committee majority report proposal said: "Congress would be given an opportunity to review the final provisions of any agreement for joint Federal-State development and use." H.R. REP. No. 399, supra note 91, at 16.
This prospect that private parties might challenge omission of national policy had been evaluated previously in 1960 by legal counsel for the Main Report to the California Department of Water Resources. Recommending the course that was actually taken, viz., omission of national policy from the contract, counsel forecast that "as a practical matter, such a challenge in the courts need not be anticipated in the normal course of events." 167

Commenting on the practical balance of political power in 1962, Senator Douglas told Congress:

I think we all know the practical difficulties in such a situation as this. The land is owned at present by a relatively small number of persons and corporations, each one of which owns an enormous amount of land; not merely thousands of acres, but in many cases tens of thousands of acres, and in some cases hundreds of thousands of acres. They are organized. They are powerful. They do not wish to have their holdings broken up by the application of the 160-acre limitation, and they can marshal tremendous resources in support of their position and against anyone who tries to stand against them.

On the other hand, those who might benefit from the acreage limitation, the small farmers who would come into being if the huge estates were broken up, 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. 168

Eight and one-half years elapsed before executive interpretation of the San Luis Act as exempting the state service area from federal reclamation law was challenged in court. Suit was brought, not by wholly landless persons seeking land, but by four family-size farmers on adjacent lands within the federal Central Valley project. 169

Three years later, Federal District Judge Oliver J. Carter ruled against the challengers. He recited the Supreme Court observation in Ivanhoe v. McCracken "that Congress, when exempting a particular project from acreage limitation because of its peculiar circumstances, had always done so by "express enactment." 170 Against that fact, however, he set "practical" considerations. Relying upon two earlier Supreme Court decisions, Judge Carter said:

Nevertheless, an administrative practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting the machinery in motion, of making the parts work efficiently and smoothly while they are yet

167. See text accompanying notes 116-118 supra.
170. Id. at 12, citing Ivanhoe Irrig. Dist. v. McCracken, supra note 18, at 292.
untried and new. *Norwegian Nitrogen Co. v. U.S.*, 288 U.S. 294, 315 (1933). [G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department —on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation. *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915).171

The Federal District Judge, like the Senate Interior Committee before him, declined to review the original executive decision at issue. The opinion continued:

The Court feels itself bound by those principles in the instant situation. Here the Department of the Interior, through its Solicitor, made a contemporaneous construction of the San Luis Act in order to determine whether it was exempt from the reclamation laws. In a thorough and well-reasoned analysis, the Solicitor's Opinion found that there was such an exemption. In reliance on that Opinion, the Department and the State, both charged with execution of the Act, proceeded to act through the intervening years. In light of the foregoing authorities, the Court sees no good reason to now question the validity of the Solicitor's Opinion.172

Examination of the two Supreme Court decisions cited by Judge Carter173 is illuminating for the substantive contrast with *Bowker v. Morton*. In *United States v. Midwest Oil Co.*, the Supreme Court upheld executive action, not at the expense of public policy, but to give Congress opportunity to enact a specific statute to preserve an exposed and specific public interest. The Court stated that

... when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned. And in making such orders, which were thus useful to the public, no private interest was injured .... The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the

171. *Id.* at 12-13. Following district court decisions adverse to plaintiffs, the Ninth Circuit granted leave to appeal. *Bowker v. Morton*, Civil No. 75-8126 (9th Cir., May 2, 1975).
172. *Id.*
173. See text accompanying note 171 *supra.*
withdrawal orders made. On the contrary it uniformly and repeatedly acquiesced in the practice and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though non-statutory purposes.174

Thus, the Midwest Oil case supported repeated executive action protective of public policy. By contrast, the District Court in Bowker v. Morton approved executive action destructive of Congressional opportunity to preserve public interest in wide distribution of public waters on a public project as prescribed in a national policy dating from 1902 and reaffirmed repeatedly. The executive action, founded on a Solicitor's opinion, was challenged in court within a decade.176

The issue in Norwegian Nitrogen Co. v. United States was the validity of administratively determined "contemporaneous construction" procedures to be followed in hearings and investigations to carry out the purposes of the 1922 Tariff Act.177 Applicability of the Act itself was not at issue. Before Judge Carter this was the central issue.

In Bowker v. Morton, the relations between the three branches of government were deeply involved. The District Court, in legalizing executive exemption of the state service area from federal law, attached little importance to (1) the vote by both Houses of Congress in 1959 and 1960 against exemption; (2) Congressional rejection of exemption in 1944 and 1947 of the Central Valley Project, of which the San Luis Unit is a part; and (3) the Supreme Court notice of a long-standing Congressional practice of exempting particular reclamation projects "because of ... peculiar circumstances ... [only] by express enactment."177 The lower court thus allowed to stand the Solicitor's rejection of the rule of law that "when an exemption is removed from a bill before enactment, the presumption is that the legislative body intended the law to apply..."178

176. Id.
177. Agreement with the State of Calif. for Constr. of San Luis Unit, Central Valley Project, 68 Interior Dec. 412, 417 (1961). Commenting to the Senate on the Solicitor's rejection, Senator Wayne Morse, previously Dean of the University of Oregon Law School, said:

Mr. President, that opinion was written by a lawyer; but he needs to go back to law school and refresh his memory and knowledge on how the courts determine legislative intent. If he would do so, he would find that that paragraph in his memorandum opinion is plain silly, because legislative intent is not legally determined by some lawyer's supposition as to what some Members of the Senate might have thought, and others to the contrary might have thought, when they voted on a bill. Most of this memorandum opinion is a conglomerate of silliness from the standpoint of legal analysis.

108 CONG. REC. 5688 (1962).
178. Id.
There exists and is spreading in the West a tenant or hired labor system which not only represents a relatively low industrial development, but whose further development carries with it a most serious threat. Politically, socially and economically the system is indefensible.

—Public Lands Commission, 1905

The central question in the [Imperial Valley, California] suit [over acreage limitation] was whether reclamation law applied to the 1928 Boulder Canyon Project Act . . . Imperial Resources Associates, a private group of landowners . . . raised a $600,000 defense fund . . . for the growers, including many corporate operations.

—Fresno Bee, September 16, 1973

We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man; and under present conditions, ashamed as we may be of it, this is not the fact.

—Ex-President William Howard Taft, 1915

As culmination to a decade of agitation by Western citizens and large landholding interests, Congress enacted the National Reclamation Act of 1902. This legislation created a Reclamation Service, now known as the Bureau of Reclamation, financed originally from sales of public lands and empowered to construct Western dams, reservoirs, and canals necessary to store and move water to arid and semi-arid lands. As a condition of extending this public assistance, Congress attached the requirement that no individual could receive water for more than 160 acres and that the receiver had to be an occupant of the land, resident upon it, or in the neighborhood. In 1944 Secretary of the Interior Harold

179. Quoted in Final Report of the U.S. Commission on Industrial Relations 15 (1915) [hereinafter cited as Final Rep.].


L. Ickes testified that in the intervening 42 years, Congress had endorsed this policy ten times.183

In 1917, the California Legislature authorized state-created water districts to contract for water with the Bureau of Reclamation in accordance with the terms of federal reclamation law. In 1959 and 1960 the legislature and people both reapproved the 1933 and earlier authorizations to accept federal acreage limitation policy. In the Fall of 1958, a unanimous U.S. Supreme Court reversed a divided California Supreme Court opinion to hold acreage limitation provisions constitutional. Accordingly, the California Supreme Court then declared unanimously in February, 1960, that, "For many years the two governments have peacefully and wholeheartedly cooperated . . . . The federal Congress . . . has determined . . . that the 160-acre limitation is a basic part of federal policy. The state Legislature has adopted this concept as state policy . . . ."184

In the months between the U.S. Supreme Court's validation of acreage limitation and the State Supreme Court's 1960 recognition of the unity of federal and state policy, California's governor and spokesmen in the United States Senate pleaded, concurrently with support from the Federal Bureau of Reclamation, for Congressional exemption of the planned state service area from acreage limitation. As Senator Kuchel told the Senate in 1959:

S.44 is authorized by my distinguished colleague from California [Mr. Engle] and by me. It is endorsed by the Bureau of Reclamation and the Secretary of the Interior. The Bureau of the Budget has interposed no objection. The bill is recommended by the government of California presided over by the Honorable Edmund G. Brown, a Democrat; and it was recommended by the government of California presided over by his predecessor, Hon. Goodwin Knight, a Republican. Thus, my colleague and I are in the happy position of being able to say that the bill comes to the Senate floor recommended by all those agencies, State and Federal, which have an official interest in the subject matter . . . . Accordingly, the bill should unequivocally provide that in one area served by the Federal project, Federal reclamation law will apply, while in the other area, served by the Feather River project, California law will apply.185

183. *Hearings on H.R. 3961, supra note 39, at 537.*
184. *Ivanhoe Irrig. Dist. v. All Parties, supra note 101.* This view apparently was not shared by all spokesmen for California. Notably, in May, 1959, Senator Kuchel, seeking Congressional exemption from acreage limitation, asked Senator Douglas of Illinois, "Does he believe that the people of California should have the right, by State law, to determine how water is to be used in California under the State system?" 105 CONG. REC. 7497 (1959).
185. *Id.* at 7483-84.
Senate and House Interior Committees endorsed the bill, including specifically the requested exemption of the state service area from federal acreage limitation law. Both Houses of Congress approved the project. After extended floor debate, however, both Houses voted to eliminate the proposed exemption. Nonetheless, elimination of the exemption by both Houses has not proved to be decisive that federal acreage limitation law will apply.

After Congressional authorization of the joint project, it became necessary for executive branches of state and federal governments to draft a contract defining their cooperation in detail. In anticipation, the House inserted in the project authorization bill a provision purporting to assure Congressional oversight of the contract terms before they could become effective. Before voting Senate acceptance of the House version, Senator Proxmire, an active supporter of acreage limitation, sought and received assurance that the changes would not impair the Senate's original decision denying exemption of the state service area. Senator Clinton Anderson, Chairman of the Interior Committee which originally had recommended exemption, responded that the House version "strengthened rather than weakened" the bill.186

The actual outcome of the provisions for review, however, has been to deny observance of acreage limitation, not to assure it. Congress conferred review authority upon the Senate and House Interior Committees, both of which were opposed to acreage limitation on the state service area from the beginning. Thus, drafters and reviewers of the contract alike shared the same view of the undesirability of acreage limitation.

Executives of the Interior Department and the California Department of Water Resources simply omitted acreage limitation from the contract drafted between them. Then the Congressional Interior Committees simply decided, in Senator Anderson's words, that they "would not review the contract . . . ."187 Thus, the review procedure was used to avoid review by the Senate and House as whole bodies.

Judicial review remained as a possibility. In the 1960 Charles T. Main Report to the State Department of Water Resources, legal counsel had predicted that, "If Congress in effect approves the agreement worked out between the Bureau of Reclamation and the State, it would seem likely that this will be the end of controversy as to this subject."188 His prophesy nearly came true. Review, if there was to be any, was left to the initiative of private citizens.

186. See text accompanying note 156 supra.
187. See text accompanying note 161 supra.
188. See text accompanying note 120 supra.
Within a decade after Congressional appropriation of funds for the project and the beginning of construction, four family-size farmers asked the federal district court to review the omission of acreage limitation by the executive. The court declined. It felt "bound" by "practical" considerations to which "officers, law-makers and citizens naturally adjust themselves" in time. The court saw "no good reason to now question the validity of the Solicitor's Opinion."

Judge Carter, in effect, declined to review the Solicitor's opinion of a decade earlier, as had the Attorney General and the Congressional Interior Committees before him. By so declining, he was condoning an executive action destructive of a national water policy of 68 years' duration, with roots in national land policy reaching back more than a century and a quarter.

Here is where three branches of federal and state governments, grappling with man's relation to his environment, rest for the time being.

The California Supreme Court holds that there is "no conflict between the legislative branches of the two governments." Each has given specific approval to the policy embodied in the 160-acre limitation. Yet this policy is absent from the vital contract executed by administrators of the two governments.

An administrative officer's challenged opinion that omission of policy is proper passes formally in review through three branches of the federal government, yet remains without review. An Attorney General avoids review, hoping he can leave that to Congress. The Senate Interior Committee not only avoids review, but obstructs review by the Congress as a whole. With the issue formally before him, a federal district judge concludes that reviewing is not for him.

In the meantime, the door of opportunity to reclaimed land in the West, opportunity that the law promised to open to the landless of the nation, remains closed. The tide of migration flows away from the land into the ghettos of the cities, a tide that national policy professes to curb. Monopolization of land by large interests and speculation in the windfall profits from public investment in reclamation go unchecked.

---

190. Id. at 13.
192. On May 2, 1975, the Ninth Circuit Court of Appeals granted leave to appeal the applicability of federal reclamation law to the state service area. Bowker v. Morton, Civil No. 75-8126 (9th Cir., May 2, 1975).
193. The Senate Small Business and Interior and Insular Affairs Committees have jointly opened inquiry into whether national reclamation policy is being observed even on the San Luis federal service area. They held Washington hearings on July 17 and 22, 1975, and forecast further hearings in California. 'Paper Farmer' Abuses Claimed, S.F. Chronicle, July 18, 1975, at 8, col. 1.
The burden of sustaining national policy falls on the shoulders of those in whose immediate interest it was adopted, yet those least able to bear it.

A polarized society is nourished while the wheels of review spin. An historic national policy favoring "actual settlers" and "people, not land,"\textsuperscript{194} lies dormant.