Promised Land: A Contemporary Critique of Distribution of Public Land by the United States

Sheldon L. Greene
Promised Land:
A Contemporary Critique of Distribution of Public Land by the United States

Sheldon L. Greene*

"That the abuses of the public land laws are largely due to inefficient administration, to the conduct of weak or corrupt officials, and to erratic and fanciful decisions, is undeniable; but that the laws themselves are defective in want of adequate safeguards is also true. . . ."1

I

INTRODUCTION

During its first one hundred years, the work of the United States was to take possession of its vast land. The colonization and territorial expansion of the United States were, simply put, a colossal land rush. In an agrarian society land is the basic unit of wealth, power, independence and productivity. Consider the post-Revolutionary War expansion beyond the Appalachians; the distribution of land to soldiers and to settlers burnt out in the French and Indian Wars; the Louisiana Purchase; the belligerent acquisition of the Southwest from Mexico. Consider also the farms cleared from the forest; the great cattle estates; the dispossession of the Indians; the conflicts over water, mineral and timber rights as well as gold mining claims. An analysis of land use in this society must begin with the description of landholdings and history. Such analysis inevitably leads to a study of laws which have defined the character of land development. The evolution of the possessory interest, the nature of the use, the extent of ownership, the manner of exploitation, were shaped as much by the laws as by the settlers or the nature of the land itself. Legislatures established the

* Member of the law firm of Greene, Kelley and Tobriner, San Francisco, California; General Counsel to the Northern California Land Trust; B.A. 1956, LL.B. 1958, Case Western Reserve University.

limits of inchoate rights. Courts and administrative agencies nullified or expanded them.

Distribution of public lands has been determined by a cyclical conflict between the ideal of an independent agrarian society of small holders as a means of settling empty territories, and the reality of speculators, freewheeling businessmen who manipulated the laws, accumulating vast blocks of the best farm, timber and mineral lands.\(^2\) Settlers and speculators both had their champions, although the latter usually had greater resources. The conflict between these two interests was fought primarily in the legislatures, the courts, and the corridors of the Department of Interior rather than on the land itself. The result has been the enactment of a series of reformist laws such as the Homestead Act,\(^3\) which then were progressively undermined. Ultimately, small landholders in county after county and state after state were disenfranchised as railroads, timber companies, land companies, and real estate syndicates came to control tens of millions of acres.\(^4\)

The victory of the large land owners in the West, particularly California, had secondary economic consequences, for the large estates required large numbers of seasonal workers. One consequence of the concentration of land ownership was the establishment of a stratum of disenfranchised subsistence migrant workers to satisfy the labor needs of the estates at a minimal cost to the owner.\(^5\) Grower demands for migrant laborers contrasted bitterly with incessant efforts to deprive the entry level worker of basic amenities such as public assistance for the underemployed, adequate education for their children, and even the right to vote.\(^6\)

While approximately one-third of the land area of the continental United States remains in public ownership today, the lands best suited for agricultural and industrial use have been given away.\(^7\) Much of that which remains—wild areas, deserts, and timber lands—has been mismanaged and leased out for a negligible return.\(^8\) Hillsides have been overgrazed, minerals exploited, steep slopes vigorously denuded

\(^2\) See generally P. Gates, History of Public Land Law Development 765-72 (1968) [hereinafter cited as Gates].

\(^3\) Act of May 20, 1862, ch. 75, 12 Stat. 392.

\(^4\) Gates, supra note 2, at 440 et seq.


\(^6\) Id.


of timber. There has been wholesale strip-mining with the benevolent acquiescence of the government. Damage to the environment, including erosion, pollution of rivers, depletion of the water table, and degradation of the air, stands as one of the worst consequences of inadequate federal management.

Congress's intention to open public lands to independent small farmers has in 100 years been transformed from a mirage to a nostalgic recollection. The burden of this failure to provide equitable land distribution has been felt and will continue to be felt by those landless indigents from rural areas who fled to cities, often to face more bitter poverty. To the extent that our society wishes to preserve competition and expand opportunities for a broader segment of the population, we should encourage a revival of the American tradition of the family farm. If the family farms concept is to be preserved, the government must act affirmatively and programatically or the next decade is likely to see many fields of agriculture dominated by vertically-integrated oligopolies. An effective program will require breaking up concentrated land ownership in areas with high agricultural productive capacity, utilizing a combination of tax disincentives, regional development banks, and land trusts.

This article will trace the progress of land reform in the management of public lands in the United States. Particular emphasis will be placed on the role of railroads and the subsidization of irrigation by the federal government. This article will conclude with suggestions for further land reform.

II

EARLY AMERICAN LAND POLICY

Land speculation was common during the early days of the Republic due to the fact that land was then the principal component of wealth. It should please many cynics to know that George Washington speculated extensively in western lands. Fortunately Thomas Jefferson, not George Washington, designed the first land distribution law. The Ordinance of 1785 set the pattern for much of the land distribution

12. GATES, supra note 2, at 70 n.28.
policy which developed during the next 100 years. Townships, six miles square, were to be established by government surveyors and subdivided into sections of 640 acres.\textsuperscript{14} Preference was given to veterans of the Revolutionary War, and the remaining land was allocated to the States to be sold at public auction for at least $1.00 per acre, plus the cost of survey.\textsuperscript{15} The first public sale of land conducted in 1787 grossed $117,108.22 for about 73,000 acres.\textsuperscript{16}

A pattern of land speculation, monopoly, and inside dealing soon developed with the sale of 1,000,000 acres for approximately ten cents an acre to a syndicate known as the Ohio Company of Associates.\textsuperscript{17} Alexander Hamilton, the first Secretary of the Treasury, expanded the sale of large tracts to speculators, discarding the more costly and complex survey system.\textsuperscript{18} Under Hamilton, land sold for 30 cents an acre with credit for volume purchases in excess of ten square miles.\textsuperscript{19}

In 1796 Congress restored the land survey procedure, authorizing the sale of lands in Ohio in 640 acre sections for $2.00 per acre.\textsuperscript{20} Displaying a pattern of inside dealing which would be repeated, the man selected to survey the new lands was none other than a principal in the Ohio Company of Associates.\textsuperscript{21} As might be expected, land auctions conducted in the Territories by federal land officers were in large part a gaming room for speculators.\textsuperscript{22} Even the land officers competed at public land sales with private purchasers.\textsuperscript{23} The interests of the inside dealers continually clashed with those of illegal settlers who staked claims to virgin tracts by virtue of improvement. Even the use of the Army to destroy settlers' homes did not deter illegal occupation.\textsuperscript{24} Pressure soon mounted for legislation authorizing squatters to purchase their improved land.\textsuperscript{25}

\begin{enumerate}
\item[14.] Id. at 564.
\item[15.] Id. at 565. Mineral rights were reserved by the United States as were four sections in each township. The system of land grant colleges and the allocation of public lands to facilitate community development were introduced by reserving section 16 of every township for the establishment of public schools. Id. at 565.
\item[16.] B. Hibbard, A History of the Public Land Policies 41 (1924), citing T. Donaldson, The Public Domain (1884) [hereinafter cited as Hibbard].
\item[17.] M. Rohrbough, The Land Office Business 11 (1968) [hereinafter cited as Rohrbough].
\item[18.] Id. at 13-14.
\item[19.] Hibbard, supra note 16, at 59-60. An early element of American land acquisition was the conflict between small-time settlers, squatters, and absentee landowners. Settlement by squatters of wilderness areas west of the Appalachians was extensive; the government even resorted to troops in an attempt to expel them. Gates, supra note 2, at 122-23.
\item[20.] Act of May 18, 1796, ch. 29, 1 Stat. 464.
\item[21.] Rohrbough, supra note 17, at 21.
\item[22.] Act of May 10, 1800, ch. 55, 2 Stat. 73; Rohrbough, supra note 17, at 46.
\item[23.] Rohrbough, supra note 17, at 197.
\item[24.] Id. at 200-01.
\item[25.] Id. at 200.
A. Pre-emption Laws

Congress responded to this mounting pressure by adopting the Pre-emption Act\textsuperscript{26} in 1830. This legislation authorized the purchase of up to 160 acres by settlers "now in possession" of the land.\textsuperscript{27} In 1830 and 1831, 800,000 acres were distributed to settlers under the Act.\textsuperscript{28} Acknowledging that the poor still had not benefitted extensively from the land use policy, Congress adopted a bill in 1832 which provided for the sale of land in 40 acre parcels "for cultivation."\textsuperscript{29} The pre-emption laws were tarnished by extensive manipulation by speculators, culminating in one of the most outrageous land swindles perpetrated by the federal government.\textsuperscript{30} The Creek and Chickasaw nations were deprived of the bulk of their homelands in Mississippi and Alabama by the device of the executive treaty. Under treaties entered into during the early 1830's, the tribes were induced to cede their lands in trust to the United States. Although individual tracts totalling 2,685,000 acres were reserved to the chiefs, the land quickly passed to settlers and speculators.\textsuperscript{31} The transfers to the government were not governed by statutes and neither white settlers nor the Indians were protected by the usual pre-emption laws. By the Civil War nearly seven million acres of Indian lands had been transferred in this fashion.\textsuperscript{32}

The sale of public lands east of the Mississippi did not satisfy the settlers’ demands for land. As early as 1826, Americans crossed the Great Plains to explore California and Oregon. By 1842, American settlers under the leadership of John Bidwell had already established land claims in California.\textsuperscript{33} A few years later President James Polk sought to fulfill "Manifest Destiny" through the annexation of Texas and California. On the eve of the 1846 war with Mexico, the flamboyant Captain John Fremont, allied with rebellious American settlers, forced the capitulation of the Mexican government of California. As Mexican authority declined, some of these adventurers managed to acquire title to many of the vast Spanish land grant estates. Claiming new grants from the outgoing Mexican government as well, the settlers established the land use pattern in California which still prevails.\textsuperscript{34}
1848, when California became a United States possession, valuable valley land was already held by 813 claimants, 87 of whom had obtained grants during the last six months of Mexican rule. These grants ranged from roughly 4,000 to 50,000 acres and encompassed a total of 14,000,000 acres. The establishment of Mexican land claims was well-calculated, for land unclaimed would become public and subject to pre-emption rights of settlers who possessed or cultivated public lands.

In 1841 Congress extended the principle of pre-emption to authorize prospective settlement on surveyed land. Settlers were limited to one pre-emption, were required to make a declaration within 30 days after settlement, and were allowed one year in which to pay the purchase price. The requirements of the law often were avoided. Speculators frequently filed multiple declarations; they would make no improvements on the land, but would execute mortgages to secure loans from persons who in effect became subsequent purchasers, since the latter would typically obtain the properties through foreclosure after default.

In 1850 Congress, perceiving a need to settle the extensive fertile areas west of the Rockies, passed the Donation Act. The Act increased grants to 320 acres and recognized women's rights by providing a wife might claim an additional 320 acres "to be held by her in her own right." Three years later Congress further liberalized the land acquisition laws by extending pre-emption to unsurveyed lands for a one year period. The law encouraged settlement in the Far West by providing that persons with one pre-emption could enter a second claim in California, even on unsurveyed lands.

The notion of pre-emption embodied in the pre-Civil War land laws represented an improvement over the earlier attempts to auction land, which had largely benefitted speculators. Nevertheless, the sys-

---

35. Id. at 115-16.
36. Id. Included among the estates were 389,000 acres which eventually came under the ownership of the Kern County Land Company, 272,000 acres of the Tejon Ranch, 79,000 acres in the southern San Joaquin Valley now owned by the Standard Oil Company of California, and 110,000 acres in Orange County comprising the Irvine Ranch. Id.
39. Id.
40. GATES, supra note 2, at 240.
41. Act of Sept. 27, 1850, ch. 76, 9 Stat. 496.
42. Id.
43. Act of Feb. 14, 1853, ch. 69, 10 Stat. 158.
44. Id. Similar language applied to the Oregon and Washington territories. Id.
DISTRIBUTION

tern was still open to fraud and speculation. For example, perfection of a claim was in theory conditional upon actual settlement. However, since improvements were not mandatory, any interest acquired during the initial year could be transferred. Despite these loopholes, the pre-emption laws did unquestionably stimulate westward movement.

B. The Homestead Act

John Fremont's 1856 presidential campaign slogan, "Free Speech, Free Soil, Free Men," expressed the public's expectations about opportunities for land ownership. This slogan became law in 1862 when Congress adopted the Homestead Act.5 Under this law a citizen or an intended citizen could file a pre-emption claim to any parcel of unappropriated public land up to 160 acres. Upon filing an affidavit that he intended to enter the land "for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person . . ." and upon paying ten dollars, a citizen was granted the right to occupy the land. After five years from the date of entry, he could obtain a patent to the tract.47 Section 4 of the Act prohibited the homesteader from mortgaging the land prior to issuance of the patent. In the event that the land was abandoned for a period of six months, the law provided for reversion to the government.48

The terms of the Act itself, combined with lax and corrupt administration, rendered it vulnerable to fraud and speculation. Under one provision, a "homesteader" could commute his homestead and elect to obtain the land under the previous Pre-emption Laws, agreeing to pay $1.25 per acre after only six months of residency instead of five years.49 Even the six month residency requirement could be avoided by the practice of "allowing credit for time before entry, legalizing traffic in relinquishments, and permitting ex parte affidavits to be taken as proofs before a multitude of officers not responsible to the United States . . ."50 A federal commission estimated that 40% of the five year homesteads were fraudulently obtained due to faulty administration, false residency, and superfluous improvement and cultivation acceded to by government officials.51

46. Id.
47. Id.
48. Id.
49. Id. See also Gates, supra note 2, at 410, 416.
51. Id. at 223.
The development of the railroads paralleled the settlement of new lands. Initially, the federal government's land subsidy to railroads was simply the grant of a right of way. The first such grant was to the Winchester and Potomac Railroad in 1834. By 1862, security concerns brought on by the Civil War, along with the pressures of settlement and intensive promotion by railroad companies, led Congress to authorize the construction of a transcontinental railroad. To finance the construction of the road, Congress initially granted five alternate sections of land per mile of railway to be located within ten miles of either side of the road bed. A bond subsidy was also provided to aid the financing.

The original Act was broadened two years later to provide twenty odd-numbered sections within 25 miles of the railroad for each completed mile of track from Omaha to the Pacific Ocean. The Act also authorized the issuance of 30-year, six percent government bonds in return for a second mortgage on the railroads to provide immediate financing. More grants were to follow. Conditions in subsequent railroad land grants clearly reflect the intention to limit the railroads' interest in the land. The conditions in the original grants were less specific with respect to the way in which the lands might be used. The initial Southern Pacific grant of 1862 provided simply that the land be used for construction of the railroad. The lands were subject to the pre-emption laws in the event of a conflict between railroad sites and prior rights of settlers. By contrast, a later grant to the Central Pacific specifically provided that all lands not sold or disposed of within three years after the completion of the railroad would be subject to the Homestead and Pre-emption Acts, to be sold to settlers at the prevailing public land rates. The Central Pacific grant provided more fully for the interests of settlers and Congress acknowledged that the rail-

53. Act of July 1, 1862, ch. 120, 12 Stat. 489. Control of the project ultimately passed to four Sacramento businessmen: Leland Stanford, Collis Huntington, Mark Hopkins, and Charles Crocker. They manipulated the initial grant into a transportation monopoly and a banking empire without parallel in the West. See generally I. Stone, Men to Match My Mountains 293-301 (1956).
54. Act of July 1, 1862, ch. 120, 12 Stat. 489.
55. S. Daggett, Chapters on the History of the Southern Pacific 54 (1922) [hereinafter cited as Daggett].
57. Act of July 1, 1862, ch. 120, § 5, 12 Stat. 492.
58. Id. at 489.
road's interests in the land terminated upon completion of the road.\textsuperscript{60}

In a subsequent grant to the Oregon and California Railroad, Congress imposed conditions of even greater specificity regarding the sale of granted lands.\textsuperscript{61} Such lands were to be sold to resident farmers in small parcels at low cost.\textsuperscript{62} In these later grants, Congress clearly indicated that construction of the transcontinental railroad network was to facilitate the attainment of a broad-based distribution of public lands to resident small farmers.

\textit{A. Railroads' Interests in Public Lands}

Despite restrictive conditions, the railroad land grants stand without equal in the resulting private exploitation of public lands. Land grants to the Pacific railroads were intended by Congress to provide venture capital for the monumental undertaking of constructing railroads across a vast and inhospitable terrain. Restrictions contained in land grants were designed to minimize speculation and to ensure that extensive settlement by resident farmers would in fact allow the construction of the railroad.\textsuperscript{63} Under the terms of the legislation, the railroad first could reserve and ultimately patent lands adjacent to each forty mile stretch of the road on completion.\textsuperscript{64} Failure to complete the railroad within a specified time limit would result in forfeiture of the land.\textsuperscript{65} Even after the company filed a patent to the specified land, title was conditional, more a power of sale than a fee.\textsuperscript{66} All railroad land grants were subject to pre-emption rights of settlers whose claims of occupancy antedated the railroad grant.\textsuperscript{67} Similarly, all lands granted, except those required to operate the railroad, were subject to purchase under the Homestead Laws.\textsuperscript{68}

As might be expected, problems in the administration of the railroad land grants soon multiplied. Initially the railroads found their claims in conflict with pre-existing Spanish land grants, as well as pre-emption rights of homesteaders and squatters.\textsuperscript{69} The conflicts between these interests resulted in many agonizing legal disputes.\textsuperscript{70} The railroads sought to reserve parcels of land to preclude further encroach-

\begin{itemize}
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Act of July 25, 1866, ch. 242, 14 Stat. 239.
  \item \textsuperscript{62} Id. at 240.
  \item \textsuperscript{63} See text accompanying notes 58-62 supra.
  \item \textsuperscript{64} See, e.g., Act of July 1, 1862, ch. 120, § 4, 12 Stat. 492.
  \item \textsuperscript{65} Act of July 1, 1862, ch. 120, § 14, 12 Stat. 496.
  \item \textsuperscript{66} Id. See Glidden v. Union Pacific RY., 30 F. 660 (C.C.D. Neb. 1887).
  \item \textsuperscript{67} Id.
  \item \textsuperscript{68} Platt v. Union Pacific R.R., 99 U.S. 48 (1878).
  \item \textsuperscript{69} C. McWILLIAMS, FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA 13-16 (1969) [hereinafter cited as McWILLIAMS].
  \item \textsuperscript{70} Id.
\end{itemize}
ment on their land by settlers who would naturally be lured to areas adjacent to a proposed right of way.  

Having laid claims to the land, the railroads went to great lengths to preserve and maintain their interests and to avoid forfeiture for breach of condition. Failure to complete the road within a specified time would result in forfeiture, as would failure by the railroad to sell or otherwise dispose of the land. One railroad, for example, obtained control over lands by mortgaging them through an affiliated corporation controlled by the railroad's principle. It was claimed that these lands were not subject to forfeiture since, while not sold, they had been "disposed of." The Supreme Court held that land which had been mortgaged to an affiliate of the railroad had been "disposed of," and that, consistent with the terminology of the land grant, it was not subject to forfeiture. Railroads also claimed lands in excess of the authorized acreage. By one estimate, 10 million acres were claimed in excess of the formula established under the land grants. Lands were sold in parcels exceeding 160 acres and for more than the $2.50 per acre authorized by the land grant.

As abuses of the land grant laws increased, railroadmen and land speculators clashed with legislative representatives of settlers and labor. In response, the Land Office imposed a moratorium on patents and ultimately sought to implement the forfeiture provisions of the land grants. The Supreme Court, however, restricted the discretion of the federal Land Office, holding that the public agency lacked the authority to refuse to patent land to the railroads since only Congress had the power to declare a forfeiture of lands granted.

The extent to which the land grant laws were being circumvented was well documented by the Commissioner of the General Land Office in his 1885 annual report. The Commissioner concluded as follows:

The vast machinery of the land department appears to have been devoted to the chief result of conveying the title of the United States to public lands upon fraudulent entries under strained constructions of imperfect public land laws and upon illegal claims under public and private grants.

71. Id.
74. Id.
75. GENERAL LAND OFFICE REPORT, supra note 1, at 184.
76. Id.
77. See, e.g., Oregon and California R.R. v. United States, 238 U.S. 393, 408 (1915).
78. GENERAL LAND OFFICE REPORT, supra note 1, at 196-98.
80. GENERAL LAND OFFICE REPORT, supra note 1, at 155-56.
The chief abuse chronicled by the Commissioner was the Land Department's policy of withdrawing lands from public appropriation by private settlers based upon the railroad's preliminary representations of the planned right-of-way. Such premature withdrawal of lands from the public domain permitted the railroads to appropriate water rights and engage in mining and lumbering operations on lands to which they had no rightful claim. The grant privilege of selecting alternate "indemnity" lands to replace those pre-empted by settlers was grossly abused. It was estimated that lands claimed by the railroads in excess of original grant terms reached 500 acres per mile of railroad construction. The rightful prior claims of settlers under the pre-emption laws frequently were defeated by railroad lawyers who successfully forced settlers to pay the railroad for land, rather than establish pre-emption claims with the Land Office.

According to the survey, in 1885 an estimated 100 million acres patented or claimed by the railroads were rightfully subject to the forfeiture provisions for breach of the grant conditions. Congress reacted by passing the Adjustment Act of March 3, 1887, which resulted in the return of some but not all such lands. Additionally, 15 special forfeiture acts were enacted to nullify claims of railroad companies which had clearly defaulted in grant conditions in failing to commence or complete railroads. Finally, Congress adopted a

81. Id. at 179. The most blatant fraud disclosed by the Commissioner was the case of the Williamette Valley and Cascade Mountain Railroad in which promoters received a patent for 440,000 acres of land based upon false declarations of completed construction. Similarly, patents were issued to the New Orleans & Pacific Railroad Company by outgoing Land Office officials although no construction had been completed. The New Orleans, Baton Rouge & Vicksburg Railroad Company received patents for lands even prior to commencement of construction. Id. at 189-90.

82. Id. at 181.

83. Both the breadth and the longevity of the abuse of indemnity lands provisions are exemplified by the ironic decision in Montana v. Northern Pacific Ry. Co., 152 F. Supp. 865 (D. Mont. 1957), affd, 260 F.2d 900 (9th Cir. 1958). In that case, would-be settlers were denied the right to purchase unsold and undisposed of railroad lands at $2.50 per acre, through a semantic perversion of the law. The court ruled that the settlement and pre-emption proviso of a Congressional Joint Resolution did not apply to the railroad's second indemnity strip. Such lands, said the court, were not "granted" lands. Moreover, because the railroad did not acquire present title to the lands, but merely a "future power of selection," the settlers could not compel sale. 152 F. Supp. at 866-67.

84. GENERAL LAND OFFICE REPORT, supra note 1, at 184.

85. Id. at 188. See, e.g., Rice v. Sioux City and St. Paul Railroad Co., 110 U.S. 695 (1884).

86. GENERAL LAND OFFICE REPORT, supra note 1, at 196.


General Forfeiture Act in 1890\textsuperscript{89} to apply to all other railroads which at the time were in breach of grant conditions. By 1890, the West had a surfeit of railroads and settlers sought to obtain arable land withdrawn from the public domain by the Land Office pending completion of the railroads.\textsuperscript{90} Neither the adjustment of the claims of some railroads, nor the absolute forfeiture of lands granted to others, resolved the uncertainty and controversy which ensnarled the railroad lands. Even the General Forfeiture Act specifically exempted over three million acres of lands granted to the Northern Pacific Railroad.\textsuperscript{91}

**B. The Oregon and California Railroad Case**

A definitive chapter in the history of the railroads' exploitation of public lands was subsequently written by the Supreme Court in *Oregon and California Railroad Company v. United States.*\textsuperscript{92} At stake were 2.3 million acres of land granted to the Oregon and California Railroad Company, a subsidiary of the Southern Pacific Company. The railroad had sought to avert the implementation of a joint congressional resolution which directed the Attorney General to initiate court action to enforce the forfeiture provisions of the Oregon and Pacific Railroad land grants.\textsuperscript{93} Forfeiture was predicated upon the grantee's failure to sell "only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."\textsuperscript{94} The government sought to have the unsold lands forfeited and to have its own title in the lands quieted, or alternatively, the appointment of a receiver to sell the lands to actual settlers in conformity with the original terms of the grant.\textsuperscript{95} The district court ordered the forfeiture of unsold lands by the railroad in conformity with the grant conditions.\textsuperscript{96}

Under the original grant, the lands were to be "withdrawn from public sale" within the limits designated following the filing of a survey by the railroad of the lands adjacent to the right of way.\textsuperscript{97} On the completion of 20 or more consecutive miles of any portion of the railroad and on findings by presidentially-appointed commissioners that the

\textsuperscript{89}. Railroad Land Grant Forfeiture Act of 1890, 43 U.S.C. §§ 904-07 (Supp. IV, 1974).
\textsuperscript{90}. Id. See Wolsey v. Chapman, 101 U.S. 755 (1880). The Special Forfeiture Acts restored 28 million acres to the public domain; the enforcement of a timely general forfeiture act would have secured two times that much. GATES, supra note 2, at 457-58.
\textsuperscript{91}. Act of Sept. 29, 1890, ch. 1040, § 5, 26 Stat. 497.
\textsuperscript{92}. 238 U.S. 393 (1915).
\textsuperscript{93}. Id. at 395; Res. 18, 35 Stat. 571 (1908).
\textsuperscript{94}. 238 U.S. at 396.
\textsuperscript{95}. Id. at 397.
\textsuperscript{96}. Id. at 394-95.
\textsuperscript{97}. Id. at 400.
portion was ready for service, patents to the lands granted were to be issued.\textsuperscript{98} Section 8 of the Act provided that for failure to complete the road as required, the act should be null and void, "and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of such failure, shall revert to the United States."\textsuperscript{99}

The railroad had, however, sold some of the granted lands to persons who were not actually settlers in quantities and at prices exceeding the minimum designated in the provisions.\textsuperscript{100} Of the 2.3 million acres of land which remained unsold, nearly 2.1 million acres already had been patented to the railroad.\textsuperscript{101} The critical issue, therefore, was the character of the railroad's title to patented lands held in default of the land grant obligation to sell to small holders.

Seeking enforcement of the resale conditions, the government argued that restrictions upon the disposition of the granted lands became more dominant in purpose than the building of the roads.\textsuperscript{102} In response to that contention, the Court commented:

\ldots a change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also a purpose to restrict the sale of the granted lands to actual settlers.\textsuperscript{103}

Rejecting the argument that the sale obligation was a condition subsequent, the Court concluded, "they are covenants, and enforceable,"\textsuperscript{104} reasoning that "[t]he grants must be taken as they were given. Assent to them was required and made. \ldots [T]he acts are laws as well as grants and must be given the exactness of laws."\textsuperscript{105} Significantly, the Court held that no equitable defense such as acquiescence, estoppel, or simple lapse of time would bar the enforcement of the grant obligations:

\ldots the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel and even to the defenses of laches and the statute of limitations.\textsuperscript{106}

\textsuperscript{98} Id. at 400-01; Act of July 25, 1866, ch. 242, § 4, 14 Stat. 240.
\textsuperscript{99} 238 U.S. at 402; Act of July 25, 1866, ch. 242, § 8, 14 Stat. 241.
\textsuperscript{100} 238 U.S. at 408. On several occasions, lands were sold to individual purchasers in quantities ranging from 1,000 to 20,000 acres, and at prices ranging from $5 to $10) per acre. On one occasion, 45,000 acres were sold to a single purchaser at $7 per acre. \textit{Id.}
\textsuperscript{101} Id. at 409.
\textsuperscript{102} Id. at 416.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 423 (emphasis added).
\textsuperscript{105} Id. at 422 (emphasis added).
\textsuperscript{106} Id. at 427.
Notwithstanding the railroad's obligation, the Court held that the railroad "might choose the time for selling or its use of the grants as a means of credit," provided that "the power to mortgage the lands" did not carry "a right to sell on foreclosure" of the mortgage free from the limitations of the land grants.\textsuperscript{107}

Declaring that Congress, rather than the courts, had the power to declare a forfeiture, the Court enjoined the railroad from sales in violation of the covenants and from removal of timber from the land pending Congressional action.\textsuperscript{108} Congress subsequently adopted a provision which declared that title to lands not sold by the railroad prior to July 1, 1913, re vested in the United States to be sold under the Homestead Laws.\textsuperscript{109} The railroad was to receive part of the proceeds from the sale of the lands and profits were to be divided between the State of Oregon, the county in which the lands were situated, and the federal government.\textsuperscript{110}

Following an appeal from the lower court's decision on remand, the case again was heard by the Supreme Court. The railroad tenaciously maintained that its title was absolute, but the Court again disagreed. Reviewing in detail the previous opinion, the Court reiterated that the railroad's interest was limited by Congress in the original grants. "It is to be borne in mind that they carried with them covenants to be performed and necessarily an obligation to perform them, with remedies for breaches of performance. . . . \textit{[T]he interest that the granting acts conferred upon the railroad company was $2.50 an acre.}"\textsuperscript{111} As the Court reasoned, the railroads were no more than a vehicle to convey the land from the public domain to settlers. Congress could, if it chose, change the conditions of sale since the railroad had breached its original responsibilities.\textsuperscript{112}

The Court then dealt with the rights of mortgagees and lien holders of the railroad who had asserted that they were not bound by the original grant limitations. This argument was rejected: "So far as the rights of the trust company coincide with those of the railroad company we have considered them, and they cannot be greater than those of that company."\textsuperscript{113} The Court emphatically rejected ". . . the contention that an implication of the power to mortgage the lands carried a right to sell" the land on a contrived foreclosure free from the land

\textsuperscript{107} Id. at 434-35.
\textsuperscript{108} Id. at 438-39.
\textsuperscript{110} Oregon and California R.R. v. United States, 243 U.S. 549 (1917).
\textsuperscript{111} Id. at 559 (emphasis added).
\textsuperscript{112} Id. at 560.
\textsuperscript{113} Id.
grant restrictions. To yield to the argument that the railroads' rights were vested or inviolable "would be in effect to declare that covenants violated are the same as covenants performed—wrongs done the same as rights exercised—and, by confounding these essential distinctions give to the transgression of the law what its observances alone are entitled to." The Oregon and California Railroad case, therefore, defines precisely the interest conveyed by the land grants to the railroads. In regard to millions of acres of land currently controlled by the railroads, it should be noted that the Court limited the railroads' interest in the land grants to $2.50 an acre. Fifty years have elapsed since the Court's resolution of this issue. The railroads today might claim that the lapse of time combined with governmental inaction have demonstrated the atrophy of public interest and the ripening of a more substantial private interest in the granted lands. But, the Court has held that laches and estoppel are no defenses against the operation of a statute, and that the duties and conditions imposed by the statutes are covenants binding in perpetuity unless dissolved by Congress.

The Oregon and California Railroad case was not the only instance in which the railroads' claims were challenged. On more than one occasion, government attorneys and bureaucrats were successful in securing withdrawals of land for incomplete railroads and even in rescinding actual patents issued to railroads based upon mistake or fraudulent representation as to the character of the patented lands. A notable example is the case of United States v. Southern Pacific Railroad. In that case patents to lands known to be rich in oil were rescinded by the Court on the ground that the railroad had concealed the mineral value of the land. Railroad grants had consistently excluded mineral land. The Supreme Court found that the patents had been fraudulently obtained through false affidavits which disclaimed mineral value and characterized lands as agricultural. A similar conclusion was reached by the court in United States v. Central Pacific Railroad Company. In that case, even the interests of subsequent purchasers of the patented lands were nullified. Because the court charged such purchasers with constructive notice of the invalidity of the patents issued to the railroad and of the conditions of the grant which

114. Id.
115. Id. at 561-62.
116. 238 U.S. at 427. Further undermining the railroads' patents is the General Forfeiture Act, which declared that lands granted to railroads which had violated conditions in the land grants reverted to the United States. Act of Sept. 29, 1890, ch. 40, 26 Stat. 496.
117. 251 U.S. 1 (1919).
118. 84 F. 218 (C.C.N.D. Cal. 1898).
prohibited large sales to speculators, land sales to speculators and subsequent purchasers were invalidated.\textsuperscript{119}

C. The 20th Century: Continued Exploitation

The Interior Department's major efforts to police the railroads' compliance with land grant conditions terminated in the 1920's. By that time most granted lands had been sold, though the railroads still retained between 10 and 20 million acres of patented and unpatented potential agricultural land, much of it rich in minerals and timber.\textsuperscript{120} At the end of the following decade, the United States faced an increasing probability that it would be drawn into conflict with the Axis powers. In an attempt to restore the economic health of the nation's railroads, Congress passed the Transportation Act of 1940.\textsuperscript{121} Through this legislation, the government relinquished its right to reduced railroad rates for the transportation of federal government materials, including the mail, which had been applicable to land grant railroads. The right to gratuitously use the railroad to transport military goods and personnel remained unaltered, however.\textsuperscript{122} In return for the federal government's agreement to pay full commercial rates to railroads, the carriers relinquished their claims against the United States to lands or interests in lands "which had been granted, claimed to have been granted, or which it was claimed should have been granted to . . ." the carriers under any grant from the United States.\textsuperscript{123}

The terms of the Transportation Act ostensibly required the return to the government of outstanding railroad land grants excluding lands

\textsuperscript{119} Id. at 221. See also Southern Oregon Co. v. United States, 241 F. 16 (9th Cir. 1917).

\textsuperscript{120} Hearings on S. 1915, S. 1990, & S. 2294 Before a Subcomm. of the Senate Comm. on Interstate Commerce, 76th Cong., 1st Sess. 58 (1939). A chart presented during the hearings showed that the railroads owned 12.3 million acres of patented lands alone.

\textsuperscript{121} 49 U.S.C. § 65 (Supp. IV, 1974).

\textsuperscript{122} Act of Sept. 18, 1940, ch. 722, § 321, 54 Stat. 954.


Here also the railroads have been energetic challengers to the meaning of the Transportation Act of 1940. For example, in Santa Fe Pacific Railroad Co. v. Ickes, 57 F. Supp. 984 (D.D.C. 1944), \textit{rev'd}, 153 F.2d 305 (D.C. Cir. 1946), \textit{rev'd sub nom.}, Krug v. Santa Fe Pacific Railroad Co., 329 U.S. 591 (1947), the Santa Fe alleged that the Act's relinquishment requirement did not apply to "lieu lands," claiming an exemption on the basis of a contractual exchange of lands. In an opinion by Mr. Justice Black, the Supreme Court decided that the Transportation Act of 1940 applied to lands "under any grant." 329 U.S. at 597. The Santa Fe was successful, however, in another similar action designed to save its claimed lands from the effects of the Transportation Act of 1940. In Chapman v. Santa Fe Pacific Railroad Co., 158 F.2d 317 (D.C. Cir. 1946), 198 F.2d 498 (D.C. Cir. 1951), \textit{cert. denied}, 343 U.S. 964 (1952), the court ruled in favor of the Santa Fe, allowing its claim to stand on contractual grounds.
already patented—which at that time still exceeded 12 million acres.\textsuperscript{124} As of 1941, an Interior Department report indicates that eight million acres of lands claimed by the railroads were returned to the public domain.\textsuperscript{125} After the war, the federal government made an additional concession to the railroads, relinquishing the right to free transportation for the military goods and personnel.\textsuperscript{126} No mention was made of the remaining patented lands in that amendment to the Transportation Act.

1. The Role of the Interior Department

Although its statutory responsibility to review railroad compliance with land grant conditions remains unchanged, the Interior Department appears to have lost interest in continued enforcement. Under the law the Secretary of the Interior must adjust railroad land grants to conform with Supreme Court decisions.\textsuperscript{127} The Supreme Court in the first Oregon and California Railroad decision affirmed the Interior Department's duty to report to Congress regarding all violations of grant conditions irrespective of lapse of time.\textsuperscript{128} Because the Interior Department's surveillance obligation was and is ongoing, patented lands still could be returned to the public domain for noncompliance with conditions. Similarly, the Secretary has the authority to cancel patents to land grants issued erroneously.\textsuperscript{129} While a six-year statute of limitations restricts claims against patented lands, the cases which required forfeiture of patented lands held that the statute itself was no bar to the recision of patents.\textsuperscript{130}

2. Case in Point: The Southern Pacific

In spite of its statutory responsibility, the Department of Interior appears indifferent to the conduct of the railroads. The railroads are actively exploiting the extensive lands remaining in their hands. The Southern Pacific, for example, which still holds the 3.8 million acres in patented lands attributed to it in 1939, earned 25 million dollars in revenue in 1975 from oil and gas leases, agricultural leases, grazing

\textsuperscript{124} Hearings on S. 1915, S. 1990, & S. 2294 Before a Subcomm. of the Senate Comm. on Interstate Commerce, 76th Cong., 1st Sess. 58 (1939). The Southern Pacific, for example, held 3,895,000 acres, according to Forest Service estimates.

\textsuperscript{125} Report of the Commissioner of the General Land Office 220 (1941).

\textsuperscript{126} Act of Dec. 12, 1945, ch. 573, § 1, 59 Stat. 606 (codified at 49 U.S.C. § 65 (Supp. IV, 1974)).


\textsuperscript{128} 238 U.S. 393, 424-27 (1915).

\textsuperscript{129} 43 U.S.C. § 895 (Supp. IV, 1974).

\textsuperscript{130} See, e.g., United States v. Whited and Wheless, 246 U.S. 552 (1918); United States v. Southern Pacific Railroad Co., 251 U.S. 1 (1919); United States v. Northern Pacific Railroad Co., 311 U.S. 317 (1940); Southern Oregon Co. v. United States, 241 F. 16 (9th Cir. 1917).
rights, and timber sales. Its holdings include rich timber resources in Northern California, priceless lands in the vicinity of Lake Tahoe and the Sierra National Forest, and more than one hundred thousand acres of productive agricultural land irrigated by both federal and state water projects in the Southern and Central San Joaquin Valley in California. Southern Pacific's ownership of many thousands of acres of recreationally valuable Sierra Nevada land is questionable. The original grant conditions provided:

... all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

While the railroads would claim that mortgaging the land to associates of the railroad was a "disposition" of the land exonerating them of the condition, it is submitted that this argument would not be persuasive today. This theory was definitely rejected by the Supreme Court in the second Oregon and California Railroad decision.

Moreover, the Southern Pacific's commercial exploitation of its lands appears to be inconsistent with the explicit language of the second Oregon and California Railroad decision in which the Supreme Court concluded that the railroad's interest did not extend to the commercial exploitation of granted lands. The fact that the railroad is actively and profitably engaged in timber operations and is exploiting oil resources is strong evidence of a breach of grant conditions justifying the return of the lands to the public domain. The Southern Pacific's earnings from land grants, twenty-five million dollars annually, are only 1.5% of the overall revenues of the railroad's operations. Yet this figure represents almost the entire principal of the original bond subsidy granted to the railroad by the federal government as an initial aid in

132. Id. at 11.

An interesting sidelight on the issue of forfeiture for breach of land grant conditions is that the Southern Pacific Railroad, as originally contemplated, was in fact never completed. The promoters had filed a route from San Jose south across the mountains into Fresno County, and to Yuma, Arizona. While the line was completed between Alcalde, California, and Needles, Arizona, an eighty-four mile gap now exists between Tres Pinos and Alcalde. Under the terms of the General Forfeiture Act, failure to complete any part of a railroad was to result in the forfeiture of the lands granted in their entirety. A map of the original route, filed with the Commissioner of the General Land Office on January 3, 1867, by the Southern Pacific Railroad promoters, as well as a brief discussion of this question, are found in DAGGETT, supra note 55, at 125.

133. Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492.
134. 243 U.S. 549 (1917).
135. Id. at 551.
The current control of the granted lands does not conform to the original purpose of the grant conditions. Any further federal assistance to the railroads should be tied to the return of all patented lands and compensation derived from uses inconsistent with the conditions of the grants.

The Department of the Interior has made no further public inquiry into the status of the railroad land grants, and railroads such as the Southern Pacific continue to treat the granted land as if it were held in fee. The lesson of the railroad land grants after more than one hundred years is that government has been incapable of dealing affirmatively and at arms length with powerful economic interests. This history of abuse calls to mind the words of the 19th century humorist, Peter Finley Dunne. "Steal five dollars," he said, "then you'll be arrested, prosecuted and jailed, but if you want to get off free, steal a bank."  

IV

RECLAMATION LAWS

Toward the end of the last century, Congress recognized the need to furnish controlled water resources to multiple small landowners in order to avoid monopolization of land and water rights, and to maximize agricultural use of the semi-arid fertile areas of the Southwest. In 1894 legislation was enacted to stimulate the joint development of water resources by a combination of state government and private capital.

Within ten years Congress was convinced that the western rivers would not be developed without federal assistance. The same Congress which was concerned with trust-busting devised a scheme for equitable distribution of limited water resources as yet another means to encourage the breakup of large tracts of land. The Reclamation Act of 1902 authorized the Interior Department to construct water retention and distribution facilities. The legislation also obligated water users to repay construction costs over a ten year period.

137. Daggett, supra note 55, at 54. Two of the principal promoters of the railroad, Charles Crocker and Mark Hopkins, left estates appraised at more than 24 million and 19 million dollars, respectively, much of which was derived from the land grant railroads. Id. at 138.

138. Attributed to Peter Finley Dunne.


142. Id.
with the anti-monopoly theory of the Act, the sale of water was limited to individual resident farmers who would irrigate a maximum of 160 acres.

An important aspect of the bill was the subordination of pre-existing water rights to the water rights of the federal project whenever reclamation projects were built to enhance existing irrigation facilities. The federal government’s power to appropriate water rights has since been recognized by the Supreme Court.\(^4\) The Court has further acknowledged that the United States has an explicit right to western waters sufficient to serve the needs of public lands in the region.\(^4\)

The populist foundations of the Reclamation Act were soon eroded by the delivery of federal reclamation water to lands in excess of 160 acres and to the lands of non-resident owners. Despite the clear purpose of the Act, the sale of water has not been limited to resident farmers on 160 acre parcels. The discussion which follows will focus on the weaknesses of the excess land provisions, with particular emphasis on three instances where attempts were made to exempt lands in California from the 160-acre limitation. A concluding section will examine the ongoing evasion of the Act’s residency requirement.

### A. Excess Lands Provision

As amended in 1926, the Reclamation Act requires an owner of more than 160 acres to enter into a recordable contract with the Secretary of the Interior in which he agrees to sell his excess lands within ten years for a price determined by the Secretary of the Interior based on the pre-irrigation land value.\(^5\) An obvious weakness of the provision is that a landowner has the right to receive water for his excess acreage for a full ten years. Alternatively, he can simply receive water for only 160 acres and rely on ground water to irrigate some or all of his excess land. The excess lands provisions of the original Reclamation Act have been further diluted by legislation and by administrative policy. In extremely unproductive agricultural areas, the acreage limitation has been extended or entirely eliminated from specific reclamation projects.\(^6\) In extremely productive areas, the provision has been omitted, presumably as a concession to the status quo described by patterns of large parcel ownership.\(^7\)

The original Act conditioned the permanent attachment of water rights to the land upon full payment of the government’s construction

---

costs.\textsuperscript{148} A subsequent amendment to the Act stated that a user gains "a permanent right to an allocated share of the water . . . upon completion of payment."\textsuperscript{149} A 1961 opinion of the Solicitor of the Department of Interior indicated that repayment of costs does not terminate the 160-acre limitation.\textsuperscript{150}

Apart from attempts to water down the impact of the restrictions, three efforts to exempt lands in California from the 160-acre limitation deserve more extensive analysis. They are: (1) the exclusion of the Imperial Valley based on an informal opinion of the Solicitor of the Interior Department;\textsuperscript{151} (2) the claim that the acreage limitations are inapplicable to the Pine Flat Project, constructed under the Federal Flood Control Act\textsuperscript{152} in the central San Joaquin Valley; (3) the inapplicability of the provisions to the California Water Project, which shares facilities constructed under the Reclamation Act and supplies water to the central and southern San Joaquin Valley,\textsuperscript{153} including the exemption of the so-called state service area of the San Luis Unit of the Central Valley Project. These controversies will be examined in detail since they illustrate the erosion of the land reform rationale of the 1902 Reclamation Act.

1. Imperial Valley

Irrigation projects transformed the Imperial Valley from a bone-dry prehistoric ocean floor into one of the most economically productive agricultural regions of our country. In 1901 the California Development Company, a private corporation, attempted to divert water from the Colorado River to the Imperial Valley and contiguous farm land in Mexico using a dry water course.\textsuperscript{154} This effort and an alternative diversion by way of Mexico brought disaster in 1905 when the channel overflowed, filling a former inland seabed to a depth of nearly 120 feet, and threatening to inundate the entire Imperial Valley. The California Development Company was held liable for the ensuing damage.\textsuperscript{155} The present Imperial Irrigation District was organized in July of

\begin{itemize}
  \item \textsuperscript{148} Act of June 17, 1902, ch. 1093, \$ 5, 32 Stat. 389.
  \item \textsuperscript{149} Act of July 2, 1956, ch. 492, \$ 1, 70 Stat. 483.
  \item \textsuperscript{150} Op. Sol. 68 I.D. 374 (1961).
  \item \textsuperscript{152} 43 U.S.C. \$ 390 (Supp. IV, 1974).
  \item \textsuperscript{153} For a thorough and authoritative discussion of this question, see P. Taylor, \textit{California Water Project: Law and Politics}, 5 Ecology L.Q. 1 (1975) [hereinafter cited as Taylor].
  \item \textsuperscript{154} California Development Co. v. New Liverpool Salt Co., 172 F. 792, 810 (9th Cir. 1909), \textit{cert. denied}, 125 U.S. 603 (1909).
  \item \textsuperscript{155} Id.
\end{itemize}
1911. Its claim to water rights antedating the Reclamation Act stems from the acquisition of the corporate shell of the California Development Company in 1916. Over the next fifteen years, the Imperial Irrigation District developed an extensive water distribution system serving more than 400,000 acres. The need for both a steady flow of water during periods of drought and the reduction of the natural siltation of the irrigation canals led the Imperial Irrigation District to press for federal reclamation assistance in the construction of a major water storage facility on the Colorado River. The dual benefits deriving from water storage, i.e., improved irrigation and potential for hydroelectric power, led to Congressional passage of the Boulder Canyon Project Act in 1929.

a. Boulder Canyon Project Act

Landowners in the Imperial Valley who expected to benefit from the Boulder Canyon Project sought to be exempted from the 160 acre limitation. Since the adoption of the 1902 Reclamation Act, Congress had on more than one occasion reaffirmed the applicability of the excess land law. In its final form, the Boulder Canyon Project Act appeared to be subject to the provisions of the 1902 Reclamation Act, including the excess land provisions. It provided that

this subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works therein authorized, except as otherwise herein provided.

Standing alone, this language suggests that all Imperial Valley water users were subject to the 160-acre limitation.

Nevertheless, certain ambiguities do support the assertion that the acreage limitation was not to be applied to private lands in production at the time Congress adopted the Boulder Canyon Project Act.

---

157. Id.
158. Id. at 14.
162. 43 U.S.C. § 617m (Supp. IV, 1974). The reclamation law was defined as the 1902 Act as amended and supplemented. 43 U.S.C. § 617k (Supp. IV, 1974).
163. The Boulder Canyon Project Act makes it clear that the project's function was to deliver water to the Coachella and Imperial Valleys. 43 U.S.C. § 617 (Supp. IV, 1974).
Because a provision of the Reclamation Act expressly applies the excess lands limitation to public lands which will benefit from the project, an argument can be made that private lands are excluded by implication. Proponents of acreage limitations in Congress sought unsuccessfully to expressly incorporate the excess land provision in the Boulder Canyon Project Act. The exemption of water users in the Imperial and Coachella Valleys from water charges is further evidence that the private owners were not subject to the acreage limitation.

Taken out of the context of the Boulder Canyon Project Act itself, the case for exclusion from the acreage limitation seemingly is persuasive. However, read with other applicable provisions, it seems more reasonable to conclude that the exemption from water charges was Congress' only concession to existing Imperial Valley water users. Having already provided that the Reclamation Law applied in its entirety, Congress would have made a specific reservation had it intended to further exempt the landowners from the acreage limitations.

The defeat of the express incorporation of the excess land provision in the Boulder Canyon Project Act must be read in the context of the Omnibus Adjustment Act adopted by Congress in 1926. The Omnibus Adjustment Act subjected the beneficiaries of all new reclamation projects to a standard joint liability contract, the provisions of which obligated the water users to sell all lands in excess of 160 acres at pre-reclamation project land prices as determined by the Department of the Interior. Landowners failing to execute valid recordable contracts for excess lands would receive no water. This more recent Act, therefore, was incorporated by reference into the Boulder Canyon Project Act. The legislative history bears out the notion of the sponsors that further reiteration of the exclusion would be surplusage.

b. Administrative and judicial interpretation of the acreage limitation

Although Congress had not specifically exempted the Imperial Valley from the acreage limitation, the Interior Department took the

168. See text accompanying note 185 infra.
172. Responding to a question regarding the inclusion of the acreage limitation, Senator Douglas of Arizona stated, "That is in the bill . . ." 69 Cong. Rec. 9626 (1928).
position that the Valley was exempted and its 1932 contract with the Imperial Irrigation District omitted reference to the acreage limitation. The following year, Secretary of the Interior Wilbur advised the Imperial Irrigation District in a letter that the 160-acre limitation did not apply to private lands in the Imperial Valley. The Department of the Interior followed the Wilbur opinion except that in 1945 the Department determined that the acreage limitations did apply to the Coachella Valley, the second major beneficiary of the Boulder Canyon Project.

In 1964, the Interior Department repudiated the Wilbur letter and reversed its approach to the Imperial Valley by concluding that the 160-acre limitation did in fact apply to private landowners. Subsequently, the Department of Justice filed suit against the Imperial Irrigation District to enforce the acreage limitation provisions. In 1971, the trial court held that the acreage limitation was inapplicable to privately owned lands within the district.

Relying heavily on statutory construction, the court concluded that if Congress had intended to apply the acreage limitation to private lands in the Imperial Valley, it would have done so expressly, as was done with public lands. The court also found that "the pre-project water rights" were paramount and not subject to restrictions such as acreage limitations. The court then commented that the Colorado River project was more than just a Reclamation Act project, apparently reasoning that its function therefore transcended the rationale underlying the Reclamation Act and was not subject to Reclamation Act restrictions. Citing the consistency of administrative interpretation until the 1964 decision and congressional knowledge and approval thereof, the court implied estoppel against the government to raise the acreage limitation. The government, in effect reinstating the Wilbur decision, elected not to appeal the case. Thus, the only remaining challenge to this decision depends on the pending appeal by taxpayers and farmworkers residing in the Imperial Valley who were denied the right to intervene.

178. Id. at 18.
179. Id. at 18-19.
180. Id. at 23-27.
A cogent counter-argument to the court’s statutory construction may be predicated on the holding of *Ivanhoe Irrigation District v. McCracken.* Ivanhoe concerned, *inter alia*, subordination of federal projects to state water law. Section 8 of the 1902 Reclamation Act, which provided that state law controlled with respect to any vested water right acquired thereunder, conflicted with Section 5, the 160-acre limitation, since water rights acquired under the state laws were not subject to this restriction. The Ivanhoe opinion described the acreage limitation as “a specific and mandatory prerequisite laid down by the Congress binding in the operation of reclamation projects, providing that ‘[n]o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . . .’”

The Court continued:

> We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary to violate § 5, the provisions of which . . . have been national policy for over half a century.

As in *Imperial Irrigation District*, it was argued that the acreage limitation was inapplicable since it had not been expressly reiterated in the specific enabling act. The Court responded, “Significantly, where a particular project has been *exempted* because of its peculiar circumstances, *Congress has always made such exemption by express enactment.*” Given the facts of *Imperial Irrigation District*, it would appear that the holding in that case is in substantial conflict with *Ivanhoe*, which declares the applicability of the acreage limitation to beneficiaries of federal reclamation projects, except where Congress has explicitly carved out an exception.

2. *Flood Control Act: The Pine Flat Project*

A second area of difficulty regarding the acreage limitation has been its applicability to projects constructed under the Flood Control Act of 1944. Responsibility for flood control fell under the aegis of the Army Corps of Engineers rather than the civilian Bureau of Reclamation. Section 10 of the Act authorized the construction of two multi-purpose reservoirs to store the winter runoff which flows from the Sierra Nevada mountains into the Kern and Kings Rivers of Cali-

---

184. *Id.* at 292.
185. *Id.* (emphasis added). As an example, the court cited the Act of Sept. 3, 1954, ch. 1258, 68 Stat. 1190.
187. *Id.*
Two facts supported the argument that the federal project should not be subject to the limitations of the reclamation laws. First, the appropriation of water by large landowners from each river had occurred in the 19th century, well before the adoption of the 1902 Reclamation Act. Second, the new water storage facilities required no further construction of distribution channels in the San Joaquin Valley.

Some beneficiaries of irrigation provided by flood control projects sought to circumvent the authority of the Bureau of Reclamation and the restrictions which attached to reclamation projects. Nevertheless, section 8 of the Flood Control Act obligated the Corps of Engineers to delegate the regulation of any facility which "can be consistently used for reclamation of arid lands, . . . [to the Secretary of the Interior] . . . to prescribe regulations for the use of the storage available for such purpose," and the section further provided that "the operation of any such project shall be in accordance with such regulations." As with the Boulder Canyon Project Act, the language did not expressly subject flood control reclamation projects to the excess land restrictions of the reclamation laws. The section had been amended to add the words "under existing reclamation law" which, in the words of the sponsor of the amendment, were to ensure that "these regulations shall be under existing reclamation law." A second amendment exempted from the application of the section "any dam or reservoir heretofore constructed which supplements any existing locally operated irrigation district." It was the intention of the sponsor to exempt "districts with canals and distribution facilities that have already been paid for and constructed by local interests." Since neither the Pine Flat nor the Isabella Projects had been constructed, they would not be within the exclusion and would therefore limit the delivery of water.

The Senate debates underscored this conclusion. Rebutting an amendment to delete the two projects from the Flood Control Act, a supporter of the bill explained: "the method of irrigation and the operation of the irrigation works are under the control of the Department of the Interior." Later, the same Senator reiterated:

\[\ldots\] the irrigation and power amendments \ldots were subsequently incorporated in the pending bill. \ldots The Engineers stated that they were perfectly willing \ldots to turn over to the Bureau of Reclamation

---

189. 105 CONG. REC. 7862 (1959) (letter from Attorney General to Secretary of the Interior).
192. Id.
193. Id. (emphasis added).
194. 90 CONG. REC. 8625 (1944) (remarks of Senator Overton).
the distribution of all surplus water . . . the distribution of which would come under the reclamation law . . .\textsuperscript{195}

The Senate amendment did not only affect the California projects; rather, the reclamation laws applied to all Flood Control Act projects.

After a thorough analysis of the legislative history of the Flood Control Act of 1944, Attorney General William P. Rogers concluded:

section 8 makes the reclamation laws applicable to contracts for the disposition of irrigation benefits from dams and reservoirs constructed under the authority of section 10, even if no additional works are required to be constructed in order to make such irrigation benefits available.\textsuperscript{196}

This was the case in the Pine Flat Reservoir Project.\textsuperscript{197} Consistent with the statements in the legislative history, the Attorney General concluded that the project's reclamation value justified the allocation of costs between flood control and irrigation inasmuch as the capacity to store additional water to be made available to farmers "substantially improves the irrigation water supply."\textsuperscript{198}

In \textit{Turner v. Kings River Conservation District},\textsuperscript{199} the Court of Appeals for the Ninth Circuit held that the Reclamation Law applies to the Pine Flat Project. The court ruled on a related section of the Reclamation Act of 1902 rather than the excess land provision; but this does not detract from the relevance of the decision inasmuch as the court applied the Reclamation Act without qualification. In \textit{Turner} the water users had prepaid about $14,000,000 to the federal government, representing the cost of construction of the Pine Flat Dam allocable to irrigation and water storage benefits. Section 1 of the 1912 amendment to the Reclamation Act, standing alone, can be interpreted to mean that the excess land provisions no longer apply after the water user has paid his entire share of the construction cost of the reclamation project.\textsuperscript{200} A 1947 letter of the Solicitor of the Department of the Interior stated:

[U]pon full payment of construction obligation under a joint-liability contract, the lands receiving water under such contract are under the provisions contained in Section 3 of the Act of August 9, 1912, relieved of the statutory excess land restrictions.\textsuperscript{201}

\textsuperscript{195} 90 CONG. REC. 8626 (1944) (remarks of Senator Overton).
\textsuperscript{197} 105 CONG. REC. 7862 (1959).
\textsuperscript{199} 360 F.2d 184 (9th Cir. 1966).
\textsuperscript{200} 43 U.S.C. §§ 541 (Supp. IV, 1974).
\textsuperscript{201} Memorandum M-35004 from Felix S. Cohen, Associate Solicitor, Dept' of the Interior, to the Commissioner of Reclamation, Oct. 22, 1974, cited in United States v. Tulare Lake Canal Co., No. 72-2322, at 79 n.181 (9th Cir., filed April 5, 1976).
However, a reading of section 3 and the Rogers opinion indicates that the intent of Congress was to limit the purchase of additional water rights to an additional supply sufficient for no more than 160 acres even after discharge of the water user's contract obligation. Section 3 provides that no person shall acquire land

before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said Acts nor a water right sold or recognized for such excess. The language of section 3 is ambiguous, but it could be construed to impose a ceiling either on excess land acquisitions or on the purchase of additional water rights for excess lands, even after the obligation to the federal government has been fully repaid. But read in context with section 46 of the Omnibus Adjustment Act of 1926, it is clear that the landowner has an absolute duty to divest the excess land as a condition to obtaining the federal benefit. The premise that the excess limitation continues after the payment for the water right is supported by the requirement that land in excess of 160 acres acquired by descent or by lien foreclosure be divested within five years of its acquisition. This language is without qualification. If Congress had intended to terminate the excess land provision when the debt owing to the federal government was repaid, it is probable that a similar termination provision would have been attached to the excess land divestiture requirement as well.

To restrict the anti-monopoly acreage limitation to the term required to repay the government would reduce the decentralizing purpose of the acreage limitation to the point of absurdity. It can be argued that just as ownership of the facility remains in the hands of the United States Government, so do the water rights and the acreage limitations remain conditions of use of public water for the entire term.

202. See also Opinion, Matter of Amaziah Johnson, 42 I.D. 542 (1913).
206. Indeed, the Cohen opinion, supra note 201, which postulated relief from the divestiture obligation on payment of the cost of the project, was repudiated after only a few years. In 1961 Solicitor Barry issued an opinion in which he determined that contracts including a payout provision were unlawful. Op. Sol. 68 I.D. 372, 404-05 (1961).
of use rather than for the shorter term of the indebtedness for construction.

Notwithstanding the clarity of the legislative history and the intensity of the controversy, the Corps of Engineers did not intend to require the local Water Users Association to comply with the 160-acre limitation as a condition to receiving water from the Pine Flat Dam.\textsuperscript{207} In December, 1963, having initiated the \textit{Ivanhoe Irrigation District v. McCracken}\textsuperscript{208} suit in the Imperial Valley, the Justice Department opened a second front by filing suit against the Tulare Lake Canal Company to enjoin the company from releasing water to landowners who held in excess of 160 acres until such time the owners complied with the reclamation laws.\textsuperscript{209} Some eight years later, a federal district court held that the water users "having vested rights in the water in the Kings River and having paid the United States its share of the cost of constructing Pine Flat Dam, . . . [are] not subject to the 160-acre limitation of the reclamation laws."\textsuperscript{210} The court stated: "Congress never intended that acreage limitations be applied to the water stored behind the Pine Flat Dam or it would have said so."\textsuperscript{211} Since the dam resulted neither in any new water development nor in any delivery facilities, Section 8 of the Act, requiring subservience of the project to the regulations of the Interior Department and the Reclamation Act, was held inapplicable.\textsuperscript{212} The government considered the adverse ruling for over four months, and finally noticed an appeal of the decision several days before expiration of the statutory period during which it could appeal.

On April 5, 1976, the Ninth Circuit Court of Appeals determined that the Reclamation Act acreage limitation applies to the Pine Flat project and that the payment of the costs by the landowners does not relieve them of the duty to reduce their holdings to 160 acres.\textsuperscript{213} The \textit{Tulare Lake} opinion includes a painstaking and authoritative review of the legislative history and administrative interpretation of the federal reclamation and flood control laws. The court appears to have based its decision on one overriding factor: the consistent adherence by Congress and administrative agencies to Congress' basic purpose in adopting

\textsuperscript{208} 357 U.S. 275 (1958).
\textsuperscript{210} \textit{Id.} at 1188.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.} at 1187.
\textsuperscript{213} United States v. Tulare Lake Canal Co., No. 72-2322 (9th Cir., filed April 5, 1976).
the reclamation laws, i.e., "to effect the breakup of large tracts of public lands on reclamation projects and assure the redistribution of such lands in small tracts at non-speculative prices." The opinion is restrained and legalistic in its style, but its frequent reiteration of legislative intent acknowledges the social and economic import of the reclamation laws. Characterizing the multiple legislative and bureaucratic battles involving the acreage limitation as the "unsuccessful struggle of owners of large tracts of land" to obtain the benefit of federal irrigation without accepting the acreage limitation, the court reaffirmed both the primacy of the legislative mandate and the continued significance of the acreage limitation as an instrument of legislative policy.215

To argue that water, which descends from the public skies and lies for the winter on public lands, inevitably draining through a public watershed into a public river and ultimately finding its way onto private land by way of a public flood control facility, then becomes the property of the landowners, would appear to be at best an anachronistic concept, more suitable to antiquarian doctrines of suzerain and seisin in wet England than to water-hungry western America. It must rather be concluded today that the water belongs to the public and that its use is subordinate to the interest of the public.216

3. Central Valley Project: The San Luis Unit

During Franklin D. Roosevelt's administration, public works projects such as the Tennessee Valley Authority and the Grand Cooley Dam provided the benefits of flood control and hydro-electric power along with a needed boost to the nation's economy. The Central Valley Project, designed to harness Northern and Central California's major rivers and to channel the runoff from the mountain snowpack to the farmlands of the fertile Central Valley, proved to be one of the most ambitious public works endeavors of the Roosevelt administration. Still not completed after 35 years, the plan originally called for the construction of three major dams with a combined hydroelectric capacity

214. Id. at 46.

215. Id. at 76. Still unresolved is the legality of a landowner's acquisition of excess acreage after divesting excess land and paying his share of the cost. Section 3 has since 1914 been construed to authorize consolidation. 43 I.D. 339 (1914), cited in id. at 62. The Tulare Lake opinion refers to the free alienability of homesteads after the patent has been acquired, but refrains from deciding the issue.

216. Notwithstanding the vesting of the right to the water, the residual public interest in the resource, the ongoing social value of the family farm, suggests that the acreage limitation is a burden that runs in perpetuity with the vested water right.
of more than one million kilowatts, and a virtual circulatory system of canals.\textsuperscript{217} When the plan was conceived, the projected federal investment exceeded one billion dollars.\textsuperscript{218}

The application of the Reclamation Act and the 160-acre limitation to this vast Central Valley Project\textsuperscript{219} was a bitter pill for the major California agricultural landowners to swallow. It is understandable that the large landowners urged the state of California to initiate its own state plan which would operate outside the federal project and without Reclamation Act limitations.\textsuperscript{220} The state plan involved a multi-billion dollar expenditure, to be financed largely by bonded indebtedness. It called for the construction of the Oroville Dam on the Feather River and the delivery of water through the Sacramento River Delta via a new California Aqueduct to the San Luis Reservoir.\textsuperscript{221} The latter reservoir and the succeeding stretch of the California Aqueduct were jointly financed and constructed by the federal government and the state of California.\textsuperscript{222}

\textbf{a. Landowners' resistance to the acreage limitation}

The application of the reclamation laws and the acreage limitation to the jointly constructed San Luis Reservoir was hotly contested in Congress. One object of the dispute was the exemption from the acreage limitation of 500,000 acres, owned largely by six landowners, including the Kern County Land Company, the Southern Pacific Railroad, the Los Angeles Times, and the Standard Oil Company of California.\textsuperscript{223} Opponents of the acreage limitation had introduced a measure specifically exempting part of the area served from the 160-acre limitation.\textsuperscript{224} The theory of the exemption was that since the state had paid for part of the project, a designated part of the acreage served by the reservoir should be exempt from federal restrictions. The proposed exemptions were specifically rejected when Congress expressly subjected the construction, maintenance, and operation of the San Luis Dam to federal reclamation laws.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{217} BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, CENTRAL VALLEY PROJECT CALIFORNIA (1966).
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Act of August 26, 1937, ch. 832, § 2, 50 Stat. 850.
\item \textsuperscript{220} Taylor, \textit{supra} note 153, at 12.
\item \textsuperscript{221} BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, SAN LUIS UNIT, CENTRAL VALLEY PROJECT (GPO-977-415).
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Taylor, \textit{supra} note 153, at 21 \textit{et seq.}
\item \textsuperscript{224} H.R. RES. 5687, 86th Cong., 1st Sess. (1959).
\item \textsuperscript{225} Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156.
\end{itemize}
Having failed in this attempt to have the so-called state service area exempted from the reclamation laws, the large landowners successfully elicited the cooperation of accommodating administrators. On December 26, 1961, the Solicitor's Office of the Department of the Interior ruled that the state service area was not a federal beneficiary and therefore was not subject to the Reclamation Act and the excess land restriction.\footnote{226} This opinion appears to contradict the view of the Supreme Court in \textit{Ivanhoe Irrigation District v. McCracken}.\footnote{227} Describing the Central Valley Project as a "complicated joint venture," the \textit{Ivanhoe} Court declared that when the federal government participates in a project with a state it has the power "to impose reasonable conditions on the use of federal funds."\footnote{228} Not only did the federal government jointly construct with the state the storage facility and the canal, but the Bureau of Reclamation operates the San Luis project.\footnote{229}

Opponents of the acreage limitation have argued that Congress actually ratified the Solicitor's opinion in failing to block the contracts which the Bureau of Reclamation proposed to enter into with the State of California.\footnote{230} Consistent with the Solicitor's opinion, these contracts contained no reference to the acreage limitation regarding the state service area of the San Luis Unit. Under the terms of the original legislation, the contracts would be valid unless the Interior Committees of the House and the Senate rejected them after presentation.\footnote{231} The only Congressional reaction was Senator Morse's resolution to reject the contracts because they omitted the acreage limitation. The Senate did not act on the resolution. The Interior Committee, known for its history of cooperation with the Bureau of Reclamation, took no action on the contract, and it ultimately was executed.\footnote{232} Was the legislative inaction an implied reversal of the longstanding legislative policy that federal participation carried with it federal standards in the absence of a specific exemption? Certainly not when the policy had consistently been applied since 1902, in repeated reclamation projects, and subse-


231. \textit{Id.}

232. \textit{Id.}
quently had been clarified to include instances of joint federal and state projects. The Tulare Lake opinion disposed of this question effectively. Referring to the similar routine approval of contracts lacking acreage limitations, the court explained:

Appellees can derive no additional support from congressional approval of these contracts. The contracts were submitted for the purpose of obtaining approval of provisions having nothing to do with acreage limitations.\(^2\)\(^3\)\(^4\)

The only justification offered for this legislative inaction was the judgment of the Chairman of the Interior Committee, who, in response to Senator Morse's resolution during the floor discussions, said, "We will leave the question to the courts; we decline to review this question legislatively."\(^2\)\(^3\)\(^4\)

b. Judicial review

Judicial review of the acreage limitation's applicability to landowners in the state service area was delayed for more than ten years, until the project was nearly completed and the acreage limitation was subject to enforcement. In 1970, a small farmer challenged the Interior Department's failure to apply the Reclamation Act to the California Water Project.\(^2\)\(^3\)\(^5\) More than two years passed before the federal district court decided the first motion to dismiss filed by the Department of Justice and the State of California. On the basis of the Solicitor's opinion, the court ruled that the state service area of the San Luis Unit was "ipso facto" not subject to the acreage limitation.\(^2\)\(^3\)\(^6\) However, the opinion left open the possibility that the state might be a super irrigation district and subject to the acreage limitation under the Warren Act.\(^2\)\(^3\)\(^7\) The Warren Act extended federal restrictions to projects involving federal assistance to irrigation districts and water users.\(^2\)\(^3\)\(^8\) Ruling on a second motion to dismiss, the court concluded that the Warren Act imposed no additional restriction on the state unless it could be shown by an evaluation of the operation of the San Luis Unit that the state was relying on federal water and resources disproportionate to its contribution to the cost of the project.\(^2\)\(^3\)\(^9\)

\(^{233}\) United States v. Tulare Lake Canal Co., No. 72-2322, at 86 n.201 (9th Cir., filed April 5, 1976).
\(^{234}\) 108 CONG. REC. 5691 (1962).
\(^{236}\) Id. at 13.
\(^{237}\) Id. at 13-14; Warren Act of 1911, 43 U.S.C. §§ 523-24 (Supp. IV, 1974).
\(^{239}\) Bowker v. Morton, No. C-70-1274, at 13-14 (N.D. Cal., filed Aug. 2, 1973). In a subsequent order dated October 16, 1974, the court said, "If there is a federal investment, then federal reclamation laws would seem to apply."
To base the question of federal subsidization on a determination of whether the state service area gets a disproportionate amount of water begs the central question of whether the so-called state service area could get any water without federal participation in the project and without pre-existing facilities constructed by the federally financed Central Valley Project. The whole concept of federal and state service areas is illusory, since the entire area irrigated by the Central Valley Project is California farm land. The distinction serves no purpose other than to support the exemption theory.

The Bowker plaintiffs filed an interlocutory appeal from the district court’s disposition of the legal issues. The defendants, now joined by intervening water districts, also supported the appeal. The matter is now under submission to the Ninth Circuit Court of Appeals.

The recent Tulare Lake decision affords ample authority for rulings favoring the acreage limitations in the Bowker and Imperial Irrigation District cases. The failure by large landowners in each case to persuade Congress to exempt the projects, as well as the overriding emphasis by the Tulare Lake court on legislative purpose, make the Tulare Lake case a strong precedent for reversal of the Imperial Valley and the San Luis Unit cases.

c. Westlands Water District

The ongoing problems of the San Luis Unit are exemplified by the current dispute over the terms of the pending contracts between the Bureau of Reclamation and the growers within the federal service area of the San Luis Unit. Westlands, an area the size of Rhode Island which largely is controlled by corporations such as the Standard Oil Company of California and the Southern Pacific Land Company, has become in the last decade one of the most productive agricultural regions in the world. As surface water was brought to the area through the federal system, owners contracting for the water agreed to divest all but 160 acres of their holdings within ten years for a price equal to the land’s value before the federal water became available. Critics of the Bureau of Reclamation claim that the divestiture provisions have been indirectly avoided by inside sales to relatives and employees of landowners and to syndicates of city investors seeking tax shelters and assets with speculation value. Virtually none of the land

240. United States v. Tulare Lake Canal Co., No. 72-2322 (9th Cir., filed April 5, 1976).
243. The regular use of farms as tax losses to offset nonagricultural profits has been
has been made available to resident family farmers.\(^{244}\) Indeed, the latest proposed contracts with irrigation districts even permit one owner of excess land to sell to another who then may sell at the market value of the land, \textit{i.e.}, the post-irrigation value.\(^{245}\) Although the large estates technically are being broken up, the principle of making the land available to family farming units of 320 acres or less has been ignored. Federal officials would do well to read the legislative history of the Reclamation Act of 1902, which was intended in part to “\[guard \ldots against the possibility of speculative land holdings and \[to provide\] for small farms and homes on the public land \ldots\].”\(^{246}\)

\textbf{B. Residency Requirement}

A final illustration of the extent to which the original purpose of the Reclamation Act has been evaded can be seen in the government's failure to enforce the residency requirement. The anti-monopoly provisions of the Reclamation Act prohibit the sale of water “to any landowner unless he be an actual bona fide resident on such land, or an occupant thereof residing in the neighborhood of such land. \ldots\)”\(^{247}\) The failure to implement this residency requirement has permitted management corporations to control major concentrations of land and allowed further circumvention of the excess land law by permitting the distribution of nominal ownership to members of investment syndicates or families.

Despite, or perhaps because of, its importance, the residency requirement was restricted by administrative interpretation many years ago. A 1916 opinion issued by the Department of the Interior indicated that residency was required only “at the time water-right application is made, \ldots\)”\(^{248}\) The Omnibus Adjustment Act of 1926,\(^{249}\) which updated the Reclamation Law, provided a more elaborate definition of the 160-acre limitation but made no mention of the residency requirement.\(^{250}\) Opponents of the residency requirement have argued that the documentation in studies made by the Internal Revenue Service. \textit{South Dakota State Legislative Research Council, Corporate Ownership of Agricultural Land and Farming} (Staff Memorandum, August 15, 1968).


\(^{248}\) This opinion is cited in Yellen \textit{v. Hickel,} 335 F. Supp. 200, 207 (S.D. Cal. 1971).


\(^{250}\) \textit{Id.}
failure to reiterate the residency requirement in 1926 indicates that Congress intended to repeal it by implication. The legislative history of the 1926 Act, however, does not support this view. The restriction of reclamation benefits to family farmers is found even in reclamation legislation adopted after World War II.

The substantial absentee ownership of irrigated land in the Imperial Valley demonstrates the consequences of non-enforcement of the residency requirement. In 1971, it was held in *Yellen v. Hickel* that the residency law did in fact apply even though the Department of Interior had failed to require it for over 55 years. "It is well-settled," the court stated, "that administrative practice cannot thwart the plain purpose of a valid law." Representatives of large landowners and the federal government had contended that the Boulder Canyon Project Act, which governs the delivery of water to the Imperial Valley, obligated the government to respect the prior rights of non-resident growers. Rejecting this contention, the court held that the Boulder Canyon Project Act was, according to its terms, "deemed a supplement to reclamation law which shall govern the construction, operation and management of the works authorized." Since the residency requirement was still in effect, the reclamation project was subject to its terms; therefore, water was to be provided only to bona fide residents of the neighborhood. In the court's view, limiting application of the residency requirement to the time of initial application for water rights would constitute an administrative repeal of an act of Congress. Moreover, since the Supreme Court had upheld the 160-acre limitation in *Ivanhoe Irrigation District v. McCracken*, failure to enforce the residency requirement would subvert the excess acreage limitation by permitting large parcels of land to be apportioned in 160-acre units to various corporations, trusts and co-tenancies.

The *Yellen* case offers a challenge to the reviewing court.

---

252. E.g., 43 U.S.C. § 419 (Supp. IV, 1974), authorizes the Secretary of the Interior to limit the area occupied by a farmer to that which is "reasonably required for the support of a family upon the lands in question."
254. Id. at 208.
255. Id.
257. 335 F. Supp. at 208.
258. Id.
259. Id.
261. 335 F. Supp. at 208.
262. The case has been under submission to the Court of Appeals for the last three years. See note 253, supra.
the one hand, there is an unambiguous requirement ignored by an administrative agency for many years; on the other hand, non-resident farmers have been receiving water in reliance upon the administrative agency's mis-interpretation. If the residency requirement no longer served any useful purpose, the court would have an easier time rationalizing implicit legislative repeal. However, since the residency requirement is just as effective a means now for creating opportunities for land ownership and self-sufficiency as it was when first enacted, the appellate court could and should sustain the lower court.268

V

RESTORING THE PUBLIC INTEREST; REVIVAL OF FAMILY FARMING

The conditions which prompted land reform in 1902, and which before 1902 spawned the Homestead Act, still persist in California. Concentrated ownership of rich irrigated farm land is common.264 There are high rates of unemployment among the youth and of underemployment among the unskilled and semi-skilled segments of the population, including farmworkers.265 The latter group experiences the lowest living standard and the least security of any working segment of the population.266 The primary costs of unemployment and underemployment are borne by the taxpayers in the form of public assistance and unemployment compensation. The secondary costs of poverty, including increased costs of law enforcement due to poverty-related crime and the loss of purchasing power attributable to joblessness, dwarf the primary costs.267

Family farming provides at least one significant opportunity for self-sufficiency not only for farm workers, but also for displaced urban workers. While examples of land transfers to underemployed workers are few, the recent success of several such projects indicates their

263. In this connection it should be noted that the Supreme Court has previously ruled that the failure of a government agency to enforce the statutes does not nullify the law. See Oregon and California Railroad Co. v. United States, supra note 77.


266. Id.

potential, given adequate government support. Increasing family farming opportunities will increase family and collective income, reduce the social costs of poverty, and generate additional jobs.

A. Economic Feasibility

From the consumer's standpoint, the desirability of breaking up large agricultural estates into small family farms depends on whether the purported inefficiency of the latter would mean higher prices at the market. The vaunted efficiency of agribusiness enterprises may, however, be mythical. First, agricultural economists have concluded that the family farm is consistently the most efficient economic unit of agricultural production. Similar studies show that farming efficiency, measured by parameters such as acreage under cultivation, peaks at a certain number of acres, then diminishes as farm acreage increases. Many big farms are actually less efficient than family farms. Finally, economies of scale derived, for example, from purchase discounts for quantity, of direct sales to the retailer, or ownership of the processing facilities, are all accessible to family farmers in the form of agricultural cooperatives.

The most efficient farm size varies. A good living for a farm family can be earned on under five acres in labor-intensive crops such as strawberries. Production of tree crops, such as peaches and nuts, attains high efficiency on fewer than 160 acres, while that of row crops, such as tomatoes, reaches high efficiency at about 500 acres. Crops such as cotton and wheat require even more land, but virtually all would reach high efficiency on 640 acres. In short, there is ample

269. A comparison of a community surrounded by large scale farms with one in a region of family farms showed that the latter community supports more businesses and people, pays more in taxes, and provides for a generally higher standard of living with better community amenities, than the community dominated by large corporate agriculture. 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 (Comm. Print No. 13 1946).
270. A. McDonald, The Family Farm is the Most Efficient Unit of Production, in The People's Land 86 (P. Barnes ed. 1975) [hereinafter cited as McDonald].
271. A California survey showed the impact of economies of scale on agriculture: decreased interest, reduced fertilizer and insecticide costs attributable to a discount for volume amounted to $1.27 per acre for a farm of 640 acres, but $6.60 per acre for a farm of 3,200 acres. E. LeVeen, Public Policy and the Future of the Family Farm: A Layman's Guide to the Economics of Agrarian Reform, April 27, 1973 (unpublished paper presented to the First Nat'l Conference on Land Reform).
272. See Kotz, supra note 268.
273. McDonald, supra note 270, at 86-87.
274. Id.
opportunity for efficient farming within the federal acreage limitation assuming institutionalized cooperation between contiguous farmers in purchasing supplies and equipment, processing, harvesting, and marketing. New farming methods, such as drip irrigation and the French Intensive cultivation method, will achieve greater productivity with lower dependence on chemical fertilizers, pesticides, and even water. Given increased labor intensiveness, the acreage necessary to produce a decent living for a farm family will actually decline. Such techniques will also reduce wear and tear on the environment.  

B. Compensated Redistribution

Assuming the usefulness of redistributing some of our rural land, how might this be accomplished? The fee simple is by no means absolute and the residual interest in land which reposes in the modern state may yet be subject to even greater expansion in the interest of the public well-being. Such residual interest can be seen in the right of appropriation of land for public purposes, restrictions on use, such as zoning, and the historic reversionary interest of the sovereign found in the concept of escheat. Redistribution of land to the public as a partial indemnification for losses sustained during the era of private acquisition of public lands could be undertaken by a legislature without shocking the conscience of the business community or shattering any sacrosanct privileges of private ownership. The federal government may acquire or re-acquire land to enforce breached covenants either by purchase or reversion. Additionally, the government can effect a partial indirect appropriation by reclaiming the unearned increment to land through taxation. Finally, the public interest can be given greater recognition by increasingly subordinating land use to the public welfare.

Land redistribution carried out within the framework of our system will be costly but the burden need not be borne by the bulk of the tax-

---


277. A bill to provide comprehensive land use planning to be implemented by the states and the federal government was introduced during the second session of the 92d Congress. The purpose of the National Land Policy, Planning, and Management Act of 1972 essentially was "to provide a system for the planning, administration and coordination of land use that will permit and encourage public involvement." H.R. 7211, 92d Cong., 2d Sess. § 102(d) (1972). The bill was introduced after the Public Land Law Review Commission published its recommendations with respect to national land use planning and policy. See PUBLIC LAND LAW REV. COMM’N, ONE THIRD OF THE NATION’S LAND (1970).
payers. Rather, the large landowners can pay for much of it through changes in the mode of taxation of land ownership.

C. A New Approach to Property Taxation

Our present public policy provides many incentives to extend rather than reduce the concentration of land ownership in the hands of conglomerates, timber, mineral and mining corporations, and tax-shelter real estate syndicates. Property taxes, for example, encourage the sale of virgin timber lands to lumber operators, since the tax rate increases with the value of the timber. Legislation intended to discourage the conversion of agricultural lands into urban subdivisions has provided a windfall tax break to large landowners and removed millions of dollars from limited rural property tax rolls. Income tax laws have fostered agricultural development of lands irrespective of the need for additional expansion. Syndicates composed of upper middle class professionals are induced to invest in these projects both to obtain a tax write-off for the developmental and agricultural losses and for the speculative increase in land valuations as a hedge against inflation. Similarly, conglomerates can offset gains in one industry against agricultural losses.

If the concentration of lands in the hands of non-residents is to be reversed, and our resources to be conserved reasonably for the future, new taxing concepts must be introduced.

1. Progressive Land Tax

Our present tax laws depend primarily on three sources to generate needed revenue; taxes are assessed on: (1) personal and corporate income; (2) the transfer of tangible property; and (3) the ownership of real property. The first two are based on an assessment of the value added to the public wealth through economic activity; the atavistic property tax is a recurrent assessment on market value. Over a given number of years the assessment could equal or exceed the property value.  

278. See, e.g., CAL. CONST. art. XIII, § 1; CAL. REV. & TAX. CODE § 201 (West Supp. 1976).


280. See, e.g., Annual Report, Oppenheimer Industries, Inc. (1972), and accompanying brochure, Cattle and Ranches: A Venture in Profits, Pride and Tax Shelter.


282. In 1970 property taxes in California generated $5.23 billion, representing 47 percent of all state and local tax revenues. 1 FINAL REPORT TO THE CAL. SENATE SELECT COMMITTEE ON SCHOOL DISTRICT FINANCE 13 (1972).
value. It clearly is not an assessment of the wealth which the property represents or of the gain derived from its sale. Rather, the property tax is an arbitrary services assessment. It is based on the assumption that local property owners must pay for the public service amenities which are available to them. The restructuring of the real property tax to make it serve socially desirable objectives regarding the ownership and use of land is reasonable and possible.

Changes in our real property tax structure could create disincentives to the concentration of land ownership, reduce the inflationary speculative component of land sales, and raise new revenues to be used to purchase land for redistribution. A progressive property tax could, for example, provide for a graduated rate of assessment commencing with aggregate ownership of more than 640 acres of land. The tax would be based on the fair market value of all rural lands held in excess of one section, 640 acres. Exempting 640 acres from the progressive tax would exempt family farms of efficient size and discourage acquisition or ownership of acreage in excess of 640 acres. The tax would be based upon aggregate value of all land with a progressive rate ranging from a low of .5% to a high of 4% of value. The singular advantage of the progressive property tax would be to reduce the long and short term advantage of ownership of real estate primarily to capitalize on the speculative increment that derives only from appreciation of values rather than from economic yield. The progressive tax could reduce the price of land and encourage the sale of large holdings. A graduated property tax would assure that a higher percentage of revenues would be paid by persons or corporations having a greater ability to pay because of accumulated capital and would provide a disincentive to land ownership concentration. The imposition of a surcharge on absentee ownership would also help encourage the sale of excess lands.

2. Unearned Increment Tax

A tax on unearned increment would be based on an annual assessment of a percentage of the appreciation of property value attributable solely to the rise in value due to nearby public expenditures such as highways. Unearned increment would be a percentage of the increase in assessed value and determined by county assessors and levied as a surcharge. Increases in value attributable to improvements would be exempt. The consequence of this tax would be at a much larger percentage of the unearned increment accruing to the landowners would return to the public.

The establishment of a progressive property tax, and a tax on unearned increment, would tax the passive wealth which land owner-
ship represents, discourage concentrated ownership, reduce land speculation and lower the price of land, and raise the revenues needed to purchase land and redistribute it. Let there be no misunderstanding, these would be “soak the rich” taxes. The private residence, the family farm, and proprietor-owned small businesses or factories on less than 640 acres would be exempt from these taxes.

D. Regional Land Banks

A system of regional land banks could serve as the vehicle to accomplish land redistribution. The regional land bank would use the tax revenues from the progressive property and unearned increment taxes to acquire large parcels of land suitable for division into family farms. The land bank would be a quasi-public corporation granted the power of appropriation of private land by state legislatures. It would be governed by a board of directors composed of family farmers, representatives of government and agricultural cooperatives, as well as specialists in financing, agricultural economics, and other relevant areas. In areas benefiting from federal water projects, an initial priority would be to acquire all lands owned in excess of the 160 acre limit. Land would be leased and ultimately sold minus the development rights to eligible veterans, farmworkers, displaced family farmers, and landless graduates of agricultural schools. A condition of sale would be participation in multi-purpose cooperative associations. A cooperative which could demonstrate maximum feasible participation by its members would be eligible to receive financial assistance in the form of grants and loans from the bank. Eligible farmers would receive limited grants not exceeding 10 percent of the purchase price of the land. Loans would be available for the construction of homes and buildings. Groups willing to engage in self-help construction projects and willing to construct cluster housing and farm facilities would be given priority in financial assistance. Interest subsidies would be available for the first five years. Technical assistance to farmers would be provided by the bank through independent contractors such as universities, private businesses, and cooperatives.

283. Under Swedish law small farms are purchased and consolidated to form economically viable farm units that can support and be operated by two families. Planning committees turn the farms over to suitable purchasers who intend to farm the land. Later transfers are licensed to assure that the land is not used for purposes of speculation. P. Raup, Satisfying the Economic Demands for Natural Resources: Some Recent Developments in European Land Policy, in Land Use Policy and Problems in the United States (Otteson ed. 1963).


285. See note 283 supra.
Development rights or residual ownership rights would be transferred by the bank to a regional land trust. In contrast to the bank, this entity could be set up as a non-profit tax exempt public trust. A board of directors would be composed of local family farmers and non-farming residents of the area where the land is situated. The trust would retain the development rights to the land indefinitely. It would monitor the agricultural use of the land to ensure environmentally sound practices and would act as a transfer agent when a farmer wanted to sell, ensuring that the purchase price would be limited to the reasonable value of the farming rights. The land trust would enforce restrictions in the leases, sales contracts, and deeds. In most cases, monetary penalties or threat of implementation of acceleration clauses, and provisions for terminating for breach of condition would be sufficient to prevent breach.

The bank would provide means for low-income rural residents to obtain an equity interest in land to be used for agricultural and commercial activities undertaken cooperatively by groups of farmers or under the aegis of corporations owned and controlled by community groups. The bank could take options on large tracts of private land and distribute smaller parcels among a broader base of the local population by means of long term leases with purchase option or through outright time purchase. It would also secure financing both from private banking and institutional sources and from government sources such as the Farmers Home Administration. The land banks would ultimately diminish extremes of wealth and poverty in rural areas by providing farmworkers and sharecroppers access to productive agricultural lands. Environmental interests would be served by obtaining forest and mineral lands and managing them so as to minimize the environmental degradation resulting from the exploitation of mineral and timber resources.

Activities funded would depend upon the uses to which the lands might best be put, the interests of the community, and the desires and abilities of the beneficiaries. Well-managed lumbering operations in Maine or Northern California, truck farming cooperatives in the South, hydroponically grown vegetables in Arizona, fruit processing plants, and mineral exploitation are possibilities.

A decade of land bank activity would result in a broader distribution of ownership of local enterprises within rural communities, a

286. The English National Land Trust offers a model for regional land trusts. Through outright ownership or restrictive covenants, the Trust now controls 450,000 acres of land and 250 historic buildings. Wall Street J., June 27, 1972, at 1.
parallel broadening of political responsibility and participation, a reduction of public dependency, and a dramatic increase in the percentage of the economic yield of the region which is retained in the community. A critical factor in rural poverty attributable to absentee ownership and management is the draining off of the economic yield of the region to managers, owners, stockholders, and affiliated enterprises. In contrast, local ownership would mean the retention of income and its use to broaden the local tax base, increase services and the quality of life, and increase the net spendable income available for goods and services provided by local business.

The regional land banks and land trusts afford a workable means of providing for redistribution of both land and attendant wealth consistent with our private enterprise system. This proposal would provide reasonable compensation to owners of excess land with minimal investment of public resources and maximal assurance that management of resources will be compatible with the regional public interest. For those who now reside in rural poverty, the land banks and land trusts offer an opportunity for realistic entry into the economic mainstream.

E. Land Acquisition

The obvious initial supply of land for redistribution is the undistributed railroad land grant acreage. A second category would be available through enforcement of the 160 acre limitation. Areas where ownership is concentrated in the hands of a few, and where the population is economically disadvantaged, would be selected as regional targets for land acquisition, distribution, and development.

Given adequate compensation to the landowners commensurate with their rights, the actual purchase program could be implemented with tolerable levels of political resistance.

CONCLUSION

The economic interests of large landowners and railroads have prevented a broad-based distribution of public lands without proper regard for the public interest. Although 70 years have passed since the bulk of our public lands were transferred to private ownership, the

287. The negative economic and social impact of corporate dominance over agricultural land was recognized in 1973 with the introduction of the Family Farm Antitrust Act of 1973. The bill sought to amend the Clayton Act to prohibit farm ownership by any entity with non-farming business assets in excess of three million dollars. The bill authorized the Secretary of Agriculture to purchase any land so held at fair market value. S. 950, 93d Cong., 1st Sess. (1973).

288. See note 269 supra.

289. See note 287 supra.
original distributive goal of the land laws remains unfulfilled. Yet, despite the lapse of time, it is still realistic to seek to attain this objective.

There are a number of approaches which can restore to the public much of the interest in lands lost to predatory economic interests in the 19th century. These include the return of the railroad lands to the public domain, the establishment of regional public land banks and trusts, the adoption of a tax policy which gives the public a greater share in the unearned increment in land value and discourages the speculative use of land, and the implementation of increased regional and national land use planning. As the American nation enters its third century, the recognition that the reallocation of some of our existing resources can provide a new initiative and impulse for growth, should assist the country in realizing its potential for all of its people. The bicentennial year is a good time to renew the Jeffersonian ideal.