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Proposed Rules for Administering the Acreage Limitation of Reclamation Law

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PROPOSED RULES FOR ADMINISTERING THE ACREAGE LIMITATION OF RECLAMATION LAW

RECLAMATION LAW—Recent litigation, resulting from a history of non-enforcement, has caused the Bureau of Reclamation to propose regulations relating primarily to the disposition of excess lands.

INTRODUCTION

In a recent Ninth Circuit opinion, the limitation on the amount of land an individual may own within an irrigation district receiving federal reclamation water was applied to California's Imperial Irrigation District.[1] The limitation had long been part of the reclamation law, but had not been enforced. The decision of the Ninth Circuit and other recent litigation have forced the Bureau of Reclamation to promulgate new rules for present-day administration of the reclamation laws. This note will examine the history of reclamation law, case law developments and the resulting proposed regulations.

BACKGROUND

The Reclamation Act of 1902[2] was passed in response to a need for federally funded irrigation works. Before the Act was passed, attempts at irrigation in the West had been inadequate because of the need for costly dams and works.[3] The Act provided for construction costs of such irrigation dams, advanced without interest. It also provided that public lands irrigated with reclamation water were to be distributed into small units and that private lands were to receive a limited supply of water.[4]

The policy behind the Act required that benefits from the reclamation program be available to the largest possible number of people. This was accomplished by limiting the quantity of land in a single ownership to which project waters were supplied.[5] Such an acreage limitation, or "excess land law," was clear evidence that the

1. United States v. Imperial Irrigation District, 559 F.2d 509 (9th Cir. 1977).
2. 43 U.S.C. §372 et seq. (1970).
3. Warne, *The Bureau of Reclamation,* Praeger Publishers (1973), p. 6.
4. Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477, 479 (1955).
5. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 292 (1958).

sponsors of the Act intended that it prevent a monopoly of water on reclaimed public land and break up existing monopolies on private lands.[6] Thus, "the restriction on the size of land ownerships that would be permitted to use water from federal irrigation facilities became the keystone of the federal policy."[7]

The Reclamation Act was amended in 1911 by the Warren Act[8] which expanded the provision on excess land to include water already in private ownership when stored or carried by federal works.[9] An additional amendment was passed in 1912[10] which has resulted in confusion over the enforcement of the excess land provisions.[11] It is unclear whether the wording in section 3 of that amendment was intended to mean that in no case shall a person own irrigable land in excess of 160 acres or if it was to mean that in no case shall a person own in excess of 160 acres of irrigable land before final payment of building charges for the excess.[12] The acceptance of the second interpretation led to the practice of permitting excess landowners to pay cash rather than dispose of excess lands.[13]

The current acreage limitation rule was adopted in the 1926 Omnibus Adjustment Act, Section 46.[14] It was passed primarily to correct the problem of land speculation.[15] Section 46 bars delivery of reclamation water to private lands in excess of 160 acres in one ownership unless the owner executes a recordable contract with the Secretary of the Interior and thus becomes obligated to sell the excess at a price excluding the incremental value resulting from the existence of the project. Section 46 also requires that water delivery contracts be entered into only with public irrigation districts organized under state law.[16] No contracts with individuals may be made.

HISTORY OF NON-ENFORCEMENT

Before the enactment of the reclamation law, national land policy was breaking down in the West, especially in the Central Valley of California. Land was acquired in huge tracts from which were created

6. Taylor, at 484.
7. Warne, at 8.
8. Act of Feb. 21, 1911, 36 Stat. 925, 43 U.S.C. §524 (1952).
9. Taylor, at 487.
10. 37 Stat. 266 (1912), 43 U.S.C. §543, 544 (1952).
11. Taylor, at 487.
12. *Id.*
13. *Id.* at 487-488.
14. Omnibus Adjustment Act of May 25, 1926, section 46 as amended, 43 U.S.C. §423e.
15. Warne, at 72-73.
16. United States v. Tulare Lake Canal Company, 535, F.2d 1093, 1094 (9th Cir. 1976).

large-scale agricultural and livestock operations.[17] Obviously, a national policy of water distribution that would bring about redistribution of land was not favored.

When acreage limitations were passed, Congressional exemptions were sought by landowners. As an alternative pressure was put on the administrator not to enforce the requirements,[18] and when non-enforcement was achieved, it was used as a precedent against any future enforcement.[19] In addition, a letter from the Solicitor of the Interior Cohen to the Commissioner of Reclamation in 1947 contained the opinion that the 1912 amendment meant that full and final payment of construction charges against excess lands would free the lands of the acreage provisions, and that where payment of charges was not available officials should press for reasonably prompt disposal of excess lands.[20] Cohen's opinion added to the confusion.

The restrictions on land have consequently not been uniformly or diligently enforced. Recent action in the courts, however, has forced the Bureau to change this practice.

RECENT LITIGATION

Recently, the trend in litigation has been aimed at enforcement of the provisions of the Omnibus Act. In *United States v. Tulare Lake Canal Co.*,[21] the United States brought an action to determine the application of reclamation law to private lands receiving irrigation benefits from the Pine Flat Dam on the Kings River. Opposition came from large landowners in the Tulare Lake Basin who argued that Pine Flats was exempt because of the Flood Control Act of 1944 and that they were released from the limitation by repayment of construction charges.[22] The court looked to Section 8 of the Flood Control Act and its legislative history, finding that the Pine Flat project was to be operated under reclamation law and particularly in conformity with the acreage provisions.[23]

The important issue in the case was whether by repaying construction charges, owners of excess lands may avoid the obligation of executing recordable contracts providing for the sale of excess lands at ex-project prices.[24] The court found the theory was not sup-

17. Taylor, at 501.
18. *Id.* at 502.
19. *Id.* at 503.
20. *Id.* at 505-506.
21. 535 F.2d 1093 (9th Cir. 1976).
22. *Supra*, note 16, at 1118.
23. *Id.* at 1119.
24. *Id.* at 1118.

ported by the language of Section 46, the purpose and legislative history of the section, or the administrative practice of the Department of the Interior.[25] There was nothing in the wording of the act to suggest the option of paying construction charges. Moreover, the goals of the reclamation laws were to create family-sized farms in areas irrigated by federal projects, to break up and redistribute large private land holdings, to have wide distribution of the subsidy involved and to limit speculative gains. Since users of project water for irrigation were only charged with the project costs attributable to irrigation and not to navigation, flood control and other uses, the benefits from the project often would exceed the costs landowners would have to pay. The court therefore rejected that interpretation of the 1912 Act. If landowners were allowed to pay off construction costs and keep the enhanced value of the land they would be defeating the purpose of the Act.[26]

Finally, the court found that the administrative practice for the most part had been inferentially or expressly contrary to the "pay-out" policy. The Cohen letter had at times been used to justify that policy, but the opinion in the letter was wrong and its authority limited. The court concluded that the general scheme of enforcement of the acreage limitation provided no basis for the construction charge exception.[27] The outcome was that landowners in the project must execute recordable contracts to sell excess land at ex-project prices in compliance with Section 46 in order to receive project water for excess lands, even if construction costs are repaid.[28]

United States v. Imperial Irrigation District, 559 F.2d 509 (9th Cir. 1977), concerned the application of the excess land provision of Section 46 to the Imperial Irrigation District.[29] The argument against enforcement was based on the past interpretation of a letter from the Secretary of the Interior Wilbur and on the lack of department enforcement. The landowners claimed it would be unfair to enforce the excess lands provision because of individual landowners' reliance on the letter and on the past non-enforcement of the 160 acre limit.[30] The letter in question was sent in 1933 from the Secretary of Interior to the Imperial Irrigation District.[31] It stated that

25. *Id.*
26. *Id.* at 1119-1135.
27. *Id.* at 1143.
28. *Id.* at 1143.
29. *See* Recent Development: *Reclamation Act of 1902: After 75 Years 160 Acre Limitation Held Valid,* 17 N.R.J. 673.
30. *Supra* note 1, at 536.
31. *Id.*

the limitation did not apply to lands "now cultivated and having a present water right,"[32] thus providing for recognition of vested water rights for areas larger than 160 acres and permitting delivery of water to satisfy vested water rights in ownerships of more than 160 acres.

In considering the circumstances surrounding the letter, the court concluded that it could not be given any weight.[33] The court also considered the fact that in practice the department did not enforce the 160 acre limit on land in the district, because of the Wilbur letter and because of previous non-enforcement. However, the court held that neither the letter nor the administrative inaction could be considered administrative determinations to which the court should defer.[34] The court added that although individual landowners might be entitled to compensation for any impairment to property caused by Section 46, such a possibility could not prevent enforcement.[35] Therefore, in the absence of any express Congressional exemption for the Imperial Irrigation District, the district's land fell under the excess land provisions of reclamation law.

In *National Land for People, Inc. v. Bureau of Reclamation,* 417 F. Supp. 449 (1976) (U.S.D.C.), a non-profit membership organization brought action against the Bureau of Reclamation to require the adoption of rules and regulations, in accordance with the Administrative Procedure Act, with respect to the approval of sales of private lands in federally subsidized water projects. The court found the group had demonstrated the likelihood of prevailing on the merits and issued a preliminary injunction restraining land sales pending the formal adoption of rules.

The organization included many small farmers who had been unsuccessful at finding land available in 160 acre tracts at a price that excluded the enhancement from federal subsidy. Other members had offered to buy excess land and had their offers rejected.[36] There had been no formal rulemaking with regard to the Bureau's criteria for approving private sales. Because the organization had shown harm to an interest protected by the Act due to the Bureau's failure, the injunction was granted.[37]

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32. *Id.* at 537.
33. *Id.*
34. *Id.* at 540.
35. *Id.* at 541.
36. National Land for People, Inc. v. Bureau of Reclamation, 417 F. Supp. 449, 452 (U.S.D.C. 1976).
37. *Id.* at 453.

PROPOSED REGULATIONS

Pursuant to the court order in *National Land For People,* the Bureau has proposed rules for the enforcement of the 160 acre limitation and other conditions of the Reclamation Act.[38] The proposed rules re-state the purposes of the Act's limiting the area of land for which water is to be supplied and requiring landowners to reside on or in the neighborhood of the land. These purposes are (a) to provide for a maximum number of farmers, (b) to widely distribute the benefits, (c) to promote family-size owner-operated farms and (d) to preclude speculation.

The following changes in the administration of the limitation have been proposed. First, although these rules do not address the residency requirement, they define an eligible non-excess owner as being a person residing on or in the neighborhood of the land, so all sales of excess land will be to residents of the area.[39] In addition, excess lands will only be sold to multiple ownerships–joint tenancies, partnerships, corporations, trusts–when there exists a family relationship among all of the persons, and each person involved must qualify as an eligible non-excess owner.[40]

The most important change, at least for purposes of enabling a wider distribution of irrigated land, is the method of disposition of excess lands. Excess lands may only receive water if the owner executes a valid recordable contract for the sale of that land. The recordable contract must provide that the excess owner will dispose of the land within five years.[41] For the excess lands to be eligible to receive project water, they must be disposed of to an eligible non-excess owner at a price approved by the Secretary based on the value without reference to enhancement by the project.[42] The excess landowner is to divide the land under the recordable contract into parcels of no more than 160 acres, or the district or the Secretary will so divide it.

After the execution of a recordable contract, the Secretary will publish a notice of availability. Prospective eligible purchasers are then to file a formal expression of interest with the Regional Director. At the time of sale, the Bureau is to select by lottery or other impartial means a purchaser at the approved price.[43] This is a depar-

38. 42 Fed. Reg. 43044 (1977) (proposed; to be codified in 43 C.F.R. sec. 426). *See* Ellis & Dumars, *The Two Tiered Market in Western Water,* 57 Neb. L. Rev. 333 (1978).
39. 42 Fed. Reg. 43046 (1977) (proposed; to be codified in 43 C.F.R. §426.4(1)).
40. 42 Fed. Reg. 43047 (1977) (proposed; to be codified in 43 C.F.R. §426.7).
41. 42 Fed. Reg. 43046 (1977) (proposed; to be codified in 43 C.F.R. §426.10).
42. 42 Fed. Reg. 43048 (1977) (proposed; to be codified in 43 C.F.R. §426.10).
43. *Id.*

ture from the past practice of allowing an excess land seller to privately arrange sale. A person in a family relationship with the excess land seller will, however, still have a preference to buy the land offered.[44] In addition, the seller is not permitted to lease the land back from the purchaser.[45]

A further restriction which will promote small farm operations by the actual owners is that no person will be entitled to lease more than 160 acres of land served by federal water under reclamation law.[46] Each lease must be filed with the District which is to keep a file and report to the Department annually.

One other significant change is that the Secretary is authorized to monitor resales of land. Non-excess land acquired from excess status for an approved price must be sold at a price approved by the Secretary as not reflecting project benefits if resold within 10 years. The Secretary will also monitor resales after 10 years until one-half of the construction costs have been paid to prevent unreasonable profit from accruing to the seller.[47] This provision is intended to reverse the current practice of allowing an excess land purchaser to realize windfall profits by immediate resale.[48]

The proposed rules could have many positive effects. The goals of promoting family owner-occupied farms, and providing a maximum number of farms and widely distributed benefits would be furthered by the provisions in the rules for actual enforcement of the acreage limitation. Tightening of criteria for eligible purchasers, impartially selecting purchasers and restricting leasing all serve these goals. And the rule that sale prices and resale prices will be subject to approval should work to end speculative gain.

On the other hand, because of the widespread non-conformance with the limitations, enforcement will meet serious opposition and could disrupt agricultural operations. To cope with this problem, the rules provide that a period of adjustment will be given to allow those who do not live on or near their land time to bring themselves into compliance.[49] Additionally, owners of excess lands are given five years in which to dispose of them under recordable contracts. However, the rules do not provide any other means of easing the transition period. Such a change in land-use patterns may not be feasible for present farming methods. If the 160 acre dream is no longer

44. 42 Fed. Reg. 43044, and 42 Fed. Reg. 43048, *supra.*
45. 42 Fed. Reg. 43048, *supra.*
46. 42 Fed. Reg. 43047 (1977) (proposed; to be codified in 43 C.F.R. §426.8).
47. 42 Fed. Reg. 43047-43048 (1977) (proposed; to be codified in 43 C.F.R. §426.9).
48. 42 Fed. Reg. 43044 (1977).
49. *Id.*

possible, it is up to Congress to declare a new policy for reclamation law and new land use goals.

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