December 15, 1977

ENFORCEMENT OF AN ANACHRONISM: The 160 Acre Limitation

INTRODUCTION

At the turn of the century, the arid lands which comprise large sections of our western states remained sparsely settled. In many instances, the only factor making these sections unsuitable for human habitation was the lack of available supplies of water for farming. In an effort to encourage the development of these areas, Congress passed the Reclamation Act of 1902, which provided for the use of federal funds to finance projects aimed at bringing irrigation to arid western lands. In so doing, it was hoped that these lands would be settled by small farmers. In order to avoid the possibility of land speculators gaining monopoly control over lands increased in value by the advent of federal water, a provision was included in the 1902 law which limited the amount of federally irrigated land an individual could own to 160 acres.

At the time the Reclamation Act of 1902 was passed into law, the 160 acre limitation was not an unreasonable restraint. Techniques used in farming around the turn of the century were primitive by contemporary standards. Mechanization had not yet begun to take hold, and the primary source of motive power was still the horse. Given this level of technology, 160 acres was actually the maximum amount of land a family could be expected to farm successfully.

Today, farming methods and technology have changed radically. Farms make extensive use of machinery and often specialize in particular crops. Sophisticated fertilizers, herbicides, and soil conditioners have tremendously increased yield per acre. Colleges offer degrees in agronomy and in animal husbandry. The advent of technology has also drastically reduced the number of persons necessary to produce the food needed to feed the nation.

It has been estimated that during the early 19th century, as much as 90 percent of the population was engaged in raising food. Today, only 2 percent of the population accomplishes the same task for a much larger number of people and even produces surpluses so large that there is a substantial expenditure each year aimed at limiting production of certain crops. No other nation on Earth raises so much food using so few people. However, this dramatic increase in productivity has not been accomplished without major changes in farm economics. As the use of modern technology to improve agricultural efficiency has increased, so has the size of what could be considered an economically sound farming unit.

Modern farming techniques, with their emphasis on mechanization and crop specialization, have had a significant impact on the amount of start-up capital required to establish a farm. Many essential pieces of farm equipment such as tractors and harvesters cost tens of thousands of dollars, and some can even cost hundreds of thousands of dollars, although equipment costs are not the only factor contributing to the increased capital requirement. The costs of fertilizers, herbicides, and other chemicals basic to the implementation of modern farming techniques have increased markedly, in part due to the rapid rise of world oil prices.

According to the American Farm Bureau, the start-up costs of a farm could easily range between $300,000 and $500,000. Further, while there are some specialized types of farm operations such as orchards which can be economically sound with relatively limited acreage, the minimum size for an economically sound unit would generally be around a section. A section is 640 acres, fully four times larger than the acreage limitation contained in the 1902 statute.

Perhaps the heart of the controversy stems from the fact that the 1902 law applies not only to federal lands which are sold to the public, but also to private lands which receive federal water. It does not matter whether those lands were in production prior to the advent of federal water or whether they had existing water resources of their own. Also, no consideration is given to the fact that water is typically provided by irrigation districts and that, therefore, most lands which receive federal water have no other source available, even if there may have been other sources prior to the initiation of the federal project. These problems are highlighted in the most publicized controversy stemming from recent

decisions to strictly enforce the 1902 law. This case concerns California's Imperial Valley, reputed to be among the nation's richest crop-growing regions, and illustrates how the recent court decisions regarding the 1902 law threaten the very existence of American agriculture.

HISTORICAL BACKGROUND

As early as the middle of the 19th century, the agricultural potential of the Imperial Valley was recognized. Dr. Oliver M. Wozencraft, a San Francisco physician, originally conceived of diverting the Colorado River to irrigate this area and worked for almost 40 years to try to see his dream become a reality.

Around the time that Dr. Wozencraft was pursuing his goal of seeing the arid lands in California settled, similar interest was developing in Congress regarding all of the arid western lands. From the earliest days of our republic, efforts had been underway to transfer the vast land areas in the public domain to individuals. At first, these transfers were seen as a method of gaining revenue for the new nation. In 1796, various proposals were placed before the Congress to provide for the sale of certain parcels of public lands. The size of the parcels was debated, with the first reference to the 160 acre concept being made during this debate. Ultimately, the land was sold by sections (640 acres).

In 1841, the Pre-emption Act formally provided for the sale of parcels of public lands of 160 acres, again as a revenue-raising device. In the Homestead Act of 1862, which was the first law for the disposal of lands in the public domain which was truly aimed at encouraging settlement, parcels of from 40 to 160 acres were sold. After payment of a filing fee and completion of a five-year residency, settlers were free to dispose of the lands as they wished.

Largely through the 1862 Act, almost all publicly held arable lands were settled by the latter part of the 19th century. It was at this time that the Congress turned its attention to the reclamation of the arid western lands. The first attempt to encourage settlement of these areas was contained in the 1894 Carey Act, which attempted to have the states institute reclamation projects by authorizing grants of federal lands in amounts of 1 million acres. The results of this law, however, were less than encouraging.

Around the time of the Carey Act, the private sector began to be interested in developing the same arid western lands. In 1892, Charles Robinson Rockwood, a civil engineer, began a number of surveys which were the impetus for the formation of the California Development Company. This company, which Rockwood headed, constructed the first irrigation canal to deliver water to the Imperial Valley. Rockwood's Alamo Canal ran primarily through Mexico. By

1904, it had brought 150,000 acres of the Imperial Valley under cultivation. The California Development Company, however, suffered a series of major financial setbacks culminating in bankruptcy in 1905. The specific incident which led to the bankruptcy was a series of floods which broke through a heading on the Colorado River. These floods continued for a period of 18 months. The break was finally closed through the efforts of the Southern Pacific Railroad, but not until millions of dollars of property damage had occurred. In fact, so much water was produced by the flooding that the nearly dry Salton Sea was filled. Because the California Development Company was now bankrupt, Southern Pacific assumed its remaining assets and continued its operation for a number of years.

Residents of the now fertile Imperial Valley, dependent on the Alamo Canal and, hence, the now bankrupt California Development Company for their water, organized the Imperial Irrigation District for the purpose of acquiring the rights to the canal. In 1916, they acquired the rights to both the parent company and its subsidiaries. In succeeding years, they also acquired a number of mutual water companies so that they could assume responsibility for water distribution. The Alamo Canal continued to furnish water for irrigation to this area until 1942, when it was replaced by the federally constructed All-American Canal.

During the planning of the Hoover Dam project, of which the construction of the All-American Canal was a part, concern grew among growers in the Imperial Valley that it would result in their becoming subject to the 160 acre limitation. In exchange for their support for the project, they obtained assurances from its advocates that this would not be the case. The rationale for excluding them was quite simple; they already had vested water rights and their land was already irrigated. In fact, only 15,000 additional acres came into production as a result of the new facility. To insure that they were correct in their assessment, they sought an advisory opinion from then Secretary of the Interior Ray Wilbur. In his opinion, Wilbur stated: "Upon careful consideration, the view was reached that this limitation does not apply to lands now cultivated and having a present right. These lands, having already a water right are entitled to have such a vested right without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use or delivery of water to be furnished to these areas."

Residents of the Imperial Valley were to receive assurances that they were exempt from the 1902 law in 1937, 1941, 1946, and 1952. In each of these cases, the Department of the Interior held that the acreage limitation did not apply due to the fact that there were vested water rights associated with the Imperial Valley prior to the advent of the federal irrigation. In 1964, this situation was dramatically changed.

In December, 1964, Solicitor Frank Barry of the Department of the Interior issued a ruling which voided all of the assurances the residents of the Imperial Valley had received in the past. He stated that the opinion issued by Secretary Wilbur in 1933 was "clearly wrong" and that the "privately owned lands" in the Imperial Valley which received federal water were in fact subject to the 160 acre limitation. His opinion stated that even those lands which had vested water rights as a result of the prior canal were subject to his ruling. In other words, virtually the entire valley would be affected. Over 430,000 acres were involved. Slightly over two years after this opinion was issued, the government filed suit to force residents of the Imperial Valley to comply with the 160 acre restriction.

In 1969, the issue began to become more complex. A physician named Ben Yellen filed suit to force the federal government to enforce a residency requirement contained in the 1902 law. In 1972, a U.S. District Court found for Yellen, who had also requested permission to intervene in the acreage limitation case which had gone before a federal judge the year before and had been decided in favor of the residents of the Imperial Valley. Both the request by Yellen and an appeal of the residency decision by the Imperial Resources Associates were heard by the Ninth Circuit Court of Appeals. They decided to combine the cases concerning acreage limitation and residency and reversed the earlier lower court decision, thereby allowing Yellen to intervene in the acreage limitation case as well.

This year, a three-judge panel of the Ninth Circuit Court handed down its ruling in the two cases. They found that the 160 acre limitation did in fact apply to the Imperial Valley farmers, but Dr. Yellen's appeal regarding the granting of permission to intervene was denied on the basis of lack of standing. The case regarding the acreage limitation is currently undergoing further appeals.

With the issuance of a decision by the Ninth Circuit, the Department of the Interior took action to begin to enforce the acreage limitation. Specifically, Secretary of the Interior Cecil Andrus has issued proposed regulations which would reinterpret existing regulations on the sale of excess lands under the reclamation acts to include a residency requirement. Area residents assert that the proposed regulations go beyond the scope of the Ninth Circuit Court's decision and that Andrus is usurping the legislative process with his proposals. According to figures from the Imperial Irrigation District, some 458,386 acres will be affected if the new regulations stand.

CONTENT OF THE NEW REGULATIONS

There are a number of specific provisions in the proposed regulations which are of concern to farmers, not only in the

Imperial Valley, but also in other areas where the 1902 Reclamation Act might be interpreted to apply. These provisions are as follows:

1. The new laws will impose a residency requirement. This requirement, stemming from the 1902 law, although not contained in subsequent amendments to it, would mandate that owners of the lands receiving federally furnished water must reside in the "neighborhood of that land." Neighborhood is a rather nebulous term which the Department of the Interior has chosen to define as residing within a maximum radius of 50 miles of the property in question. The 50 mile radius requirement, however, is at the discretion of the Secretary of the Interior who may, if he so desires, make the limitation more stringent. It is anticipated that he will exercise this discretion in most instances to limit the allowable distance an owner may live from the property to 15 miles.

2. A reinterpretation of the acreage provision of the 1902 statute prohibits the ownership of more than 160 acres of federally irrigated land by an individual. This differs from previous interpretations of this section of the 1902 Act in that, in the past, the limitation was applied in each conservation district. Therefore, an individual could own more than 160 acres of federally irrigated land in total, but could not own more than 160 acres in a given irrigation district. This may create problems for farmers who own small parcels in adjoining districts. It would be extremely hard to dispose of such pieces of property.

3. The amount of time a farmer who is found to possess land in excess of the maximum allowable limit will have to rid himself of the excess is going to be severely curtailed under the new rulings. In the past, an owner who had to divest himself of excess lands was given ten years within which to comply. This figure has been reduced to five years, but the problem is that the five year period begins from the date the land began to receive federal water. This means that areas such as the Imperial Valley which first received their water in 1942 would be subject to immediate divestiture requirements. This would amount to the land's being dumped on the market all at once. Obviously, if this were to occur, the selling price of the land would be substantially reduced due to the glut of property suddenly appearing on the market.

4. Interestingly, while the alleged purpose of the new regulations is to encourage the establishment of family farms, there are restrictions on multiple ownership which will limit the abilities of families to establish them. This is because of the manner in which family relationships are defined. Specifically, according to the Interior Department, a "family relationship" must be a lineal one. By this it is meant that such a relationship only exists between father and son, or grandfather, etc. This obviously excludes such relations as brothers, sisters, uncles and nephews. For example, if two brothers wanted to enter into a partnership to farm, they could not. If an uncle and a nephew wanted to go into a mutual trust, they could not. Only a direct descendent could do so. This same provision also limits farm trusts (a common method of operating a farm) to land. Since farm trusts normally include machinery and operating capital, which are obviously vital to the operation of a farm, it seems unrealistic for such a provision to be included.

5. One proposed rule would provide for the disposal of excess lands through a lottery. Specifically the rule provides that in instances where more than one person is bidding on a parcel of land, the one allowed to purchase it will be chosen through a lottery or other impartial means. There is an exception in the law which allows preference to be given to a "direct lineal descendent;" in any other instance the lottery would be used. Several questions have been raised as to the viability of this method of selecting a buyer. The most frequently raised is the questionable constitutionality of the requirement, which would appear to be a serious breach of the constitutional right to enter freely into contract. It also strikes at the heart of the right to own and dispose of one's own property. Finally, it does not take into consideration the financial ability of the various bidders to live up to their purchase agreement.

6. Under the proposed rules, the Secretary of the Interior will set the price at which the land is to be sold. The original reason for the requirement was to prevent speculators from gaining undeserved profits when irrigation first was introduced into an area. The point is made by opponents of the changes in the regulations that most of the affected farms have been in operation for many years and that the owners do not really want to sell, but rather are going to be forced to sell. Therefore, such a provision is grossly unfair. Further, indications are that the land may be sold at considerably below its true value exclusive of the allowance for

the added value from irrigation. A third point is that the rule does not require the purchaser to buy the equipment along with the property. Just as with forced divestiture, this could seriously depress the price a present owner could get for his equipment because large amounts of it are likely to come on the market simultaneously, thereby creating even greater financial loss to the farmer.

7. One rule which will make it virtually impossible to have an economically viable farm unit concerns the leasing of land. Specifically, no person or entity (i.e., corporation or farm trust) may lease in excess of 160 acres of land receiving federal water. Also, the seller of a parcel of land is prohibited from leasing it back. The effect of this will be to limit even the new farms to an absolute maximum of 320 acres. This means that under no circumstances would any of the new farms approach more than half the size thought to be economically viable by most agricultural experts. The only alternative will be for the purchasers to convert their properties to specialized farm operations such as orchards which can operate with less land. This, of course, would last only as long as there was not a surplus of orchards. As more lands were affected and more of the new farmers turned to such crops in order to remain economically sound, an eventual glut of specialized crops would develop, thereby undermining the ability of even these units to survive.

ECONOMICS OF SMALL FARMS IN THE IMPERIAL VALLEY

One of the gravest concerns regarding the imposition of the 160 acre rule in the Imperial Valley is that the economics of 160 acre farm units are such that the purchasers of excess lands will be doomed to failure before they start. As has been stated, a 160 acre unit is simply uneconomic, and much evidence exists to support this viewpoint. Two studies of the viability of various sized farming units in the Imperial Valley have been conducted. The first was conducted in 1971 by the University of California; and the second, based largely on data from the University, was conducted by the California Growers Association. Both serve to illustrate the costs associated with modern farming techniques.

In the University of California study, it was determined that in the Imperial Valley, the greatest economies of scale were experienced with units which ranged from roughly two and one half sections (approximately 1,500 acres) to four sections (approximately 2,500 acres). With units this size, production costs per dollar of output were usually around 71 cents. In terms of dollars per acre, it was noted that within the range

of 1,000 acres to 3,178 acres, there was relatively little difference. For farms within that size range, return per acre was between $70 and $74.36. It should be noted that these figures assume the use of both crop rotation and a relatively high level of mechanization normally associated with modern farming techniques.

These returns, however, are gross returns; they do not take into consideration a number of additional costs which farmers must pay. Among the most important are the costs of property taxes, the costs of depreciation and maintenance of drainage systems, and charges for water. Property taxes average around $25.50 per acre. This reduces the net revenue to the producer from a high of $74.36 to $48.86. The cost of depreciation and maintenance of drainage systems runs roughly $22 per acre; this further reduces the farmer's net revenue to $26.86 per acre. When water charges of $1.42 per acre are subtracted, the farmer's net revenue per acre is reduced to $25.44. If the land being farmed had originally been purchased for $500 per acre, as opposed to the current $1,400 per acre selling price, the net return on investment would be 5 percent, which is less than the going rate of interest paid on savings accounts.

It should also be noted that should the farmer have outstanding loans on his property, the interest payments he would make would also have to be subtracted from the $25.44 net revenue per acre. If he had purchased the farm after the Second World War, for example, on a low interest government loan at 3 percent, this would add a $15 per acre interest charge, lowering his net revenue to $10.44 per acre. These same interest payments would make it impossible for a 160 acre unit to survive. This is especially true since the return on 160 acre units is only $53.05 per acre.

The California Growers Association has provided some examples of how the 160 acre limitation would affect the purchaser. For example, if one were to purchase 160 acres at $900 per acre with a federally subsidized loan bearing a 3 percent interest rate, and with a 20 percent down payment, there would be an annual net loss of roughly $1,676. The 160 acres would produce a gross revenue of $8,488 ($53.05 x 160). Property taxes and water assessments would amount to slightly more than $20.17 per acre, a total of $3,288. Maintenance and depreciation of the drainage system would run $22 per acre, a total of $3,520. Interest on the loan made to purchase the land would run $3,456. This places total expenses at $10,204 and total revenues at $8,488, with an annual loss of $1,676.

Due to the nature of the farming techniques necessary in the Imperial Valley, even units of as much as a section can prove uneconomic. Take, for example, a 640 acre farm purchased for $900 per acre with 20 percent down on a mortgage bearing 3 percent

interest. According to the University of California, such a unit would return $55.41 per acre, which is slightly higher than the 160 acre unit but considerably less than the larger units which can maximize economies of scale.

In this instance, annual revenue would amount to $35,465. Property taxes on this property would be slightly over $12,240. Depreciation and maintenance of the drainage system would run $14,080; and water assessments would be slightly over $900. This places the total expenses for the owner at $27,232 exclusive of interest. Interest payments at 3 percent would be $13,800. This would mean that the farm would experience an annual loss of $5,567. If the investor had taken his $115,000 downpayment and purchased certificates of deposit at a local savings and loan association, he would have realized at least $8,000 per year in interest income.

THE ABSENTEE OWNERSHIP QUESTION

One of the most frequently voiced justifications for the enforcement of the 160 acre and residency requirements of the 1902 Reclamation Act in the Imperial Valley is the contention that the bulk of the property is owned either by "agribusiness" or absentee landlords. If this were true, a case might be made for the enforcement of the provision based on the fact that the purpose of the 1902 Act was to encourage the settlement of the arid western lands. If this purpose were in fact being violated, perhaps it would be appropriate to take steps to insure compliance; but such is not the case. Further, the implication of this charge is that absentee owners hold large sections of the Imperial Valley, thereby gaining a government subsidy which was intended for individuals; but this, too, is a false assertion.

A total of 3,752 individuals and firms own land in the Imperial Valley. Of these, 2,870 are residents of the valley. In other words, roughly 27.7% of the land is held by absentee owners; also, for the most part, these owners hold relatively small parcels. In fact, among the larger farms (those containing 1,280 acres or more), there are 49 resident-owners and 19 non-resident owners. Of the non-resident owners holding relatively large tracts, there are only four who own more than 3,000 acres. Their total of 17,600 acres amounts to less than 3 percent of the land in the Imperial Irrigation District. Most of the non-resident ownership is accounted for by individuals who own less than a section of land. In fact, 824 out of 882 non-resident owners fall into this category. This amounts to approximately 93.4 percent of the total. In terms of acreage owned, these individuals account for almost 58 percent of the land held by persons outside the valley. When farms of between one and two sections are added to the total, fully 73 percent

of the non-resident ownership is accounted for, along with 96.5 percent of the non-resident owners. In most instances, these larger parcels represent farms which are owned by former valley residents who have retired and maintain their ownership as a source of retirement income.

The simple fact is that there is no justification for the allegation that the Imperial Valley is owned by giant agribusiness absentee landlords. Of the 154,000 acres represented by larger holdings of 1,280 acres or more, only 7.5 percent or 41,000 acres are held by non-residents. In fact, almost 72 percent of the land in the valley is held in parcels of less than two sections.

SUMMARY

The Imperial Valley controversy spotlights the potential danger to American agriculture inherent in a mindless enforcement of the acreage limitations and residency requirements contained in the 1902 Reclamation Act and its subsequent amendments. In fact, the valley was irrigated prior to the advent of federal water projects, and it was only after numerous assurances that the 1902 Act would not apply that the farmers in that region agreed to support the construction of the All-American Canal. To have the federal government abruptly change its position will work an undue hardship on the valley's farmers.

The purpose of the 1902 Act will actually be thwarted by enforcement of the acreage provisions. The Act was intended to encourage settlement of arid western lands, and this purpose has been accomplished. The farmers in the valley are not land speculators looking to make a quick profit. In fact, they do not even want to sell their land; they want to farm it. It is the federal government which is trying to force them to sell it. In many instances, they will suffer considerable losses as a result. Further, the individuals who purchase the excess lands will be unable to establish farms successfully on their tracts, as they will be too small to be economically viable. It may well be that in a relatively short time they will have to abandon them, thereby further destabilizing the valley.

If efforts to break up the farms in the Imperial Valley are successful, there are grave implications for the rest of American agriculture. Recent court decisions indicate that the acreage limitation will not only be applicable in instances where specific irrigation projects were constructed, but will also apply to flood control projects where irrigation was totally secondary. This could bring as much as 5 million acres of currently productive farm land under the aegis of this limitation. These lands, among

them many lying in our fertile midwestern regions, are among our most productive. In order to remain so, they must be subject to the advantages of the economies of scale which are essential to modern agriculture. In the end, it will be the consumer as well as the farmer who will suffer if they are not.

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