# **ARTICLE: EXCESS LAND LAW: SECRETARY'S DECISION? A STUDY IN ADMINISTRATION OF FEDERAL-STATE RELATIONS**

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**Text**

**[\*1]**I. FOCUS OF DECISION

For many years the two governments have peacefully and wholeheartedly cooperated in the planning and construction of this huge [Central Valley] project. In the very truest sense of the terms it is and has been a cooperative project. Certainly there is no conflict between the legislative branches of the two governments. . . . The federal Congress . . . has determined . . . that the 160-acre limitation is a basic part of federal policy. The state Legislature has adopted this concept as state policy by specifically authorizing irrigation districts to enter into contracts for project water that contain the 160-acre limitation. . . .

--California Supreme Court, 1960 [[1]](#footnote-2)1

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

--Opinion of Counsel, Report of Chas. T. Main, Inc., to California Department of Water Resources, 1960 [[2]](#footnote-3)2

Survival of a national policy--the distribution of water "in accordance with the greatest good to the greatest number of individuals" [[3]](#footnote-4)3--is at stake again, this time in administrative decisions affecting **[\*2]**reclaimed areas within the Central Valley of California on the Kings and ***Kern*** rivers, and at San Luis. The policy is embodied in the excess land, or 160-acre, provisions of federal reclamation law that limit distribution of water to each individual to an amount sufficient to irrigate 160 acres.

Agreement and harmony on this policy has prevailed at times among legislative, executive and judicial branches, and between state and federal governments. At other times, sharp conflict has pervaded the processes of legislation on California water development and thrown these branches and levels of government into curious and changing alignments with, or against each other. In 1959, the California Supreme Court was able to report (and itself to exemplify) complete agreement between legislative and judicial branches of state and federal governments in *favor* of applying national policy in Central Valley. Two years earlier, prior to reversal by the United States Supreme Court, the state court's position had been otherwise. [[4]](#footnote-5)4In 1960 legal counsel advised the State of California of the existence of complete agreement between executive agencies of state and federal governments but in *opposition* to application of national policy.

Meanwhile, the federal administration has changed; a California reclamation project has run the gauntlet of Congress; and an interlocking state water program has run the gauntlet of the California legislature. While Congress decided in favor of acreage limitation, the legislature decided against it and the Governor decided against it in his contract with the Metropolitan Water District in southern California. Today conflict over policy is sharp between Congress and the California legislature and executive. The decisions to be made next are in the hands of the executive branch of the federal government. They may determine the survival of an effective national policy in California and in the nation.

The heat of controversy had so obscured the true character of acreage limitation as the instrument of historic national land and water policy that it required the United States Supreme Court to restate the policy with simple clarity. The purpose of acreage limitation is to distribute the benefits of federal expenditures for reclamation widely among individuals. [[5]](#footnote-6)5The principle of widespread distribution of benefits is timeless. Congress offered to extend these benefits -- not only to settlers on public domain--but upon request, to those private landowners who would accept as their proper and generous share an **[\*3]**amount of water no greater than sufficient to irrigate 160 acres. [[6]](#footnote-7)6Congressman Frank W. Mondell, in charge of the Reclamation Bill in 1902, reassured the House that reclamation would not be used to support water monopoly:

It is a step in advance of any legislation we have ever had in guarding against the possibility of speculative landholdings and in providing for small farms and homes on the public land, while it will also compel the division into small holdings of any large areas . . . in private ownership which may be irrigated under its provisions. [[7]](#footnote-8)7

The acreage limitation provisions of the reclamation law do not compel or force any private landholder to do anything. They neither confiscate nor expropriate land. Any excess landowner, knowing the terms on which Congress offers to provide water, is free to accept or to decline; he is not free to enlarge his own share at the expense of others beyond a sufficiency for 160 acres, or to reach for uncontrolled windfalls from public expenditures.

Congress has provided that individual landowners -- including those who decline to ask for water for their *excess* lands -- receive enough subsidized water to irrigate up to 160 acres. Employing the subsidy estimate of $ 577 per acre, a man and wife owning 160 acres each can obtain water bearing a total subsidy of $ 184,640. [[8]](#footnote-9)8However, substantial inducement is offered landowners to ask for additional water for their excess lands. By accepting acreage limitation -- whether they own 10,000 acres, 59,000 acres, or any other acreage of irrigable land -- they can obtain the use of subsidized water for their entire holdings for 10 years before selling the excess above 160 acres at a fair price, appraised to exclude increments in value created by the project. A leading opponent of acreage limitation acknowledged the generosity of this privilege to Congress. Referring to a large landholder in Central Valley, the Chief Counsel of Imperial Irrigation District said: "I will give you my own opinion of Jack O'Neill's willingness to sign the 160 acre limitation. He thinks if he gets water for **[\*4]**10 years on there without having to sell it, he can make enough money out of it so he can afford to sell it at any old price." [[9]](#footnote-10)9

Some excess landholders, nevertheless, regard limitation of their opportunities under federal reclamation as too severely restricted. They have sought in various ways to escape acreage limitation while retaining the liberal financial benefits of federal reclamation law. Their methods have included demands for outright exemption, and use of the Army Engineers and the State of California in lieu of the Bureau of Reclamation. [[10]](#footnote-11)10As an alternative they have sougth congressional and administrative approval of money payments. In the Small Projects Reclamation Act they succeeded in obtaining the privilege, known as the Engle formula, of making interest payments in lieu of other compliance with acreage limitation. They have sought congressional and administrative acceptance of full payment of construction charges in lieu of other compliance with acreage limitation on Kings and ***Kern*** rivers and at San Luis, but so far have not obtained it.

Proposals of this kind for undermining acreage limitation are phrased in language that needs clarification. "Full payment of construction charges" by water users is not the same as "payment of full costs of construction" of the reclamation works that provide them with irrigation water. The discrepancy between them is often great. Water users' organizations on Kings River are being asked to repay less than one-third the actual cost of Pine Flat dam. Although 63 per cent of *reimbursable* costs of construction on Central Valley Project are allocated to irrigation, the irrigators -- *i.e.*, private landowners -- have been asked to repay only 17 per cent. [[11]](#footnote-12)11Others must repay what the benefited landowners do not. On Central Valley Project, power users and municipal and industrial water users pay the difference between 17 per cent and 63 per cent of reimbursable costs. Federal taxpayers pay non-reimbursable costs, principally for flood control and for provision of interest-free money for irrigation.

For administrative convenience, reclamation policy is applied and financial repayment is arranged through the same contract executed between water users' organizations and the United States. This arrangement of convenience has fostered a contention that policy depends upon repayment and ceases with the final installment. The foundation of public policy, however, is not money but principle. **[\*5]**Acreage limitation is the instrument of policy, not a form of collateral to assure repayment. [[12]](#footnote-13)12The demand of excess landholders that "full payment" be accepted as "full satisfaction" of acreage limitation, is a spurious claim that final payment of a fraction of the construction cost should extinguish a public policy that does not depend on cash. The current demand by excess landholders upon the Secretary of the Interior for approval of this claim is the occasion for this article.

On January 20, 1961, the day he entered the office of the Secretary of the Interior, Secretary Stewart L. Udall found himself facing at least two critical decisions affecting application of the excess land provisions. Only the day before, on his last day in office, Secretary-Fred A. Seaton had said that he had made one of these decisions. He had approved repayment contracts on Kings and ***Kern*** rivers recognizing that completion of full payment of construction charges by water users' organizations renders the excess land laws inoperative. But Secretary Seaton was careful not to make his approval final, for he withheld "execution [of the contracts] . . . until the Attorney General's views are received. . . ." [[13]](#footnote-14)13In other words, he had not made a final decision, but had left that to the incoming administration. A few days later the Attorney General for the new administration sent the contracts back to the desk of the new Secretary without opinion.

The crucial point at stake in this first decision -- whether payment of money can satisfy policy--is that the law requires agreement by landowners to dispose of their holdings above 160 acres per individual at a fair appraised price as prerequisite to obtaining federal project water for their *entire* holdings. If it should be finally decided that full payment of the financial obligations of water users renders these provisions inoperative, then it would be possible for water users' organizations to avoid national policy entirely by promptly paying up in full. Naturally many excess landholders desire this option. [[14]](#footnote-15)14Furthermore, if water agencies on Kings and ***Kern*** rivers are permitted to escape acreage limitation by pre-payment in full, they can do so in other areas of federal reclamation -- including the federal San Luis service area. In addition, the State of California can relieve excess landholders, in the state service area of the San Luis Project, from the limitation by paying the state's share of the **[\*6]**cost concurrently with construction. [[15]](#footnote-16)15This is the import of the decision Secretary Udall must now make.

If the Secretary of the Interior accepts the doctrine that full payment renders the excess land laws inoperative, further decisions on acreage limitation on the San Luis Project will have been stripped largely of substance. But if he rejects it he still faces a second decision, of importance substantively as well as in principle.

The San Luis Project Act of 1960 authorizes him to enter into a contract with the State of California covering designing and constructing joint-use facilities -- dam, reservoir, pumping plant, and canal -- and to permit their use for delivery of water to a so-called state service area. [[16]](#footnote-17)16In passing the bill, Congress refused to exempt those water deliveries and drainage facilities serving lands under contract with the state lying outside the federal San Luis unit service area from the application of federal reclamation law. [[17]](#footnote-18)17The Secretary is responsible, therefore, for including provisions in the contract that will determine the manner and extent of application of federal reclamation law to the state service area.

These two decisions involve vast economic interests. Probably the greatest concentrations of ownership of remaining irrigable land in the United States lie within the adjacent areas of the Kings, ***Kern***, and San Luis projects. Senator Douglas placed figures in the *Congressional Record* showing that in ***Kern*** County alone -- including possible areas of service south of the federal San Luis service area -- 64.2 per cent of 2,135,000 acres was owned in lots of over 1,000 each, and 31.7 percent was held by four landowners. [[18]](#footnote-19)18Their financial stake in avoiding disposal of their excess lands is great. Public subsidies alone amounted to $ 577 per acre on the Central Valley Project, and have been estimated at $ 591 an acre on the San Luis unit. [[19]](#footnote-20)19Increments in land values from availability of water are likely to range from $ 500 to $ 1500 an acre, depending on fertility of soil, suitability for high value crops, and other factors affecting the quality of the land. [[20]](#footnote-21)20Besides, additional incremental values may be in **[\*7]**prospect for those who can retain ownership during years of strong population and economic growth.

These concentrated economic interests are the chief source of conflict over the excess land law at every level and in every branch of government whenever and wherever a decision affecting it is to be made. [[21]](#footnote-22)21Naturally intensity of feeling surrounds the issue. It was exemplified recently on one side by a resolution of the Feather River Project Association that unless Congress would exempt the state service area from acreage limitation, the Association should oppose federal construction of the San Luis Reservoir. [[22]](#footnote-23)22It was exemplified on the other side by descriptions that Senators Douglas and Morse applied to exemption, calling the attempt, if successful, a "public catastrophe" and "great water steal." [[23]](#footnote-24)23

II. STATE PROJECT

I support the position that the Federal Government should respect the water laws of California. If elected governor I will do everything in my power to have the department of water resources and the water rights board sustain the State's position as upheld by the recent decision of the Supreme Court of California [rejecting the 160-acre limitation] in the Ivanhoe and related cases. . . . My opponent, the present attorney general [Edmund G. Brown] of California, has himself abandoned, and sought to get the irrigation districts to abandon, this position.

--Senator William F. Knowland, Candidate for Governor of California, 1958 [[24]](#footnote-25)24

Gov. Brown is determined that the state water program, his great achievement, shall not fall on a technical point of federal law. . . . Every voter in California shall have his say on this in November when a proposition to authorize $ 1.75 billion in bonds will be on the ballot. The water agencies hold the fate of the bond issue . . . they could influence voters in their districts for or against the bond issue; or by refusing to negotiate contracts for water, they could shake the financial structure of the program so that bonds could not be sold, even if they were authorized . . . they have hung back with their **[\*8]**contracts, and that is why Gov. Brown will wage his all-out fight for Section 7 [to exempt the state service area from the 160-acre limitation]. He must retain the active support of the water agencies to win the water ballot next November. These mighty water agencies and associated organizations have made the terms. They have picked the ground on which the governor must do battle. It is rough ground, and it is a measure of the governor's courage and sagacity in this matter that he is willing to fight on it.

-- *Gov. Brown's "All-out" Fight*, editorial, Los Angeles Times, 1960 [[25]](#footnote-26)25

The State of California carried on extensive water investigations beginning in the 1920's and in 1930 proposed a state water plan, of which Central Valley development was a major part. [[26]](#footnote-27)26In 1933 the legislature, and the voters by referendum as well, approved a state revenue bond issue of $ 170 million to construct the first unit of Central Valley Project. [[27]](#footnote-28)27Unable to market the bonds, the state--through its spokesmen including the State Engineer--appealed to the federal government to undertake construction of this initial unit, *viz.*, Shasta Reservoir, Delta cross-channel, Tracy pumps, Delta-Mendota canal, Friant Reservoir, Madera and Friant-***Kern*** canals. This the federal government proceeded to do in 1935, assigning Central Valley Project to the Bureau of Reclamation. [[28]](#footnote-29)28

In the Spring of 1944, when the first full-scale effort to persuade Congress to remove acreage limitation from Central Valley was in progress, led by Congressman Alfred J. Elliott and Senator Sheridan Downey of California, a national business journal described plans attributed to California's "big landowners" for a four-pronged attack upon the law. The methods for destroying or avoiding acreage limitation were: (1) specific congressional exemption; (2) use of the Army Engineers as the construction agency, since its basic legislation did not include the acreage limitation provisions of reclamation law; (3) use of the State of California as owner, or operator, of Central Valley Project to "side-step the 160-acre limitation;" and (4) use of **[\*9]**pumps to draw upon underground water supplies rather than the surface waters delivered by a federal project. [[29]](#footnote-30)29

Attacks upon the excess land law exhibiting each point in this varied pattern have been unfolding successively, or simultaneously, ever since. The results of each tactic so far can be summarized briefly as follows:

Tactic (1): Congress rejected attempts at specific exemption of Central Valley in 1944, 1947, 1959 and 1960. [[30]](#footnote-31)30

Tactic (2): In 1944 Congress extended the acreage limitation provisions of reclamation law to govern also the irrigation features of projects constructed by the Army Engineers. [[31]](#footnote-32)31The Army Engineers denied for years that Congress had done this, but the Attorney General confirmed it on December 15, 1958. [[32]](#footnote-33)32In the meantime, the position taken by the Army Engineers obstructed application of the law to reservoirs on the Kings and ***Kern*** rivers completed in 1954. Now the decision lies with Secretary Udall whether to accept or reject the Kings and ***Kern*** contracts as approved conditionally--but not finally -- by Secretary Seaton.

Tactic (3): Use of the state of a means of avoiding acreage limitation is now being put fully to the test. At the moment its prospect for success depends on the nature of the contract with the State of California which the Secretary of the Interior is willing to approve for joint-use of the San Luis Project.

Tactic (4): Reliance on pumps has provided water from underground for large areas for many years, without acreage limitation. However, in 1956, and again in 1958, the President of Westlands District was appealing for federal help due to the insufficiency and poor quality of the pumped water, and professed willingness to accept federal acreage limitation law to get it. [[33]](#footnote-34)33

The remainder of this paper is devoted to consideration of the attempt to employ tactic number (3), use of the state as a means of escape from acreage limitation.

The original state Central Valley Project Act, approved by the **[\*10]**legislature and people in 1933, carried with it approval of not only state construction, but also of federal construction under reclamation law, of which acreage limitation is an essential part. In fact, the California legislature had approved acreage limitation at least five times, and the voters once, between 1917 and 1943, by authorizing acceptance of federal aid for water development under reclamation law. [[34]](#footnote-35)34In 1944, however, the California State Engineer "speaking personally and not for the water project authority" began to voice opposition to acreage limitation. In that year he supported an effort to exempt Central Valley, saying that the limitation was "inapplicable and unworkable for much of the Central Valley Project," and needed to be "radically amended or eliminated." He told Congress, "The necessity of change or elimination of this feature of the law, applying to Central Valley, has been repeatedly brought to the attention of the United States Bureau of Reclamation for many years." [[35]](#footnote-36)35The State Engineer did not mention the state legislative record on acreage limitation, nor the fact that under these laws the federal government long before had taken responsibility for construction of the Orland Project in Central Valley, applying to it a forty-acre limitation, nor the more recent fact that the legislature had memorialized Congress to appropriate funds for the Central Valley Project "reimbursable in accordance with the reclamation law" during the years when the State Engineer and other spokesmen for the state were actively seeking federal aid for Central Valley. [[36]](#footnote-37)36The State Engineer's opposition to acreage limitation was shared by large land-owning interests and, from the thirties, apparently by some officials of the Bureau of Reclamation as well. [[37]](#footnote-38)37

**[\*11]**The first major effort to use the state itself as an instrument for avoiding acreage limitation assumed the form of a proposal that the state take over the Central Valley Project which was being constructed by the federal government. [[38]](#footnote-39)38The State Chamber of Commerce, the Farm Bureau Federation, and later the California Water Council composed of representatives from irrigation districts, chambers of commerce, municipal governments and other organizations interested in water problems, were conspicuous among its supporters. [[39]](#footnote-40)39In 1945 Secretary of the Interior Harold L. Ickes identified the reasons, in his opinion, for the proposal that the state operate the Central Valley Project:

It is the age-old battle over who is to cash in on the unearned increment in land values created by a public investment. . . . [T]heir principal objective is to avoid application to the Central Valley of California of the long-established reclamation policy of the Congress which provides for the distribution of the benefits of great irrigation projects among the many and which prevents speculation in lands by the few. [[40]](#footnote-41)40

This initial effort slowed to a walk after the terms on which the Department of the Interior would be willing to withdraw in favor of the state were fully realized. Secretary Ickes advised Governor Earl Warren:

If the state has arrived at a financial position where it is ready to reimburse the United States Treasury for expenditures already made in behalf of the people of California, and is further prepared to guarantee the additional financing necessary to complete the project within a reasonable number of years, the Department of the Interior is prepared to withdraw from the project. Before we hand back these responsibilities to the state, however, we feel that sufficient evidence should be presented to prove the willingness and ability of Californians to shoulder the burdens of this great enterprise. [[41]](#footnote-42)41

The Bureau of Reclamation made it clear that congressional approval, required to turn over the federal project to the state, would involve discussions over continuance, under state operation, of acreage limitation and other federal policies, as well. [[42]](#footnote-43)42

**[\*12]**A second (the present) phase of the attempt to use the state to avoid acreage limitation began in 1951 when the state legislature approved Feather River as a state project. [[43]](#footnote-44)43A few years earlier, in 1945, the Federal Bureau of Reclamation had included development of Feather River in its plan for the Central Valley Basin, and in 1949 President Harry S. Truman had transmitted the plan to Congress. [[44]](#footnote-45)44The prospect of federal construction on Feather River, therefore, was coming closer. Besides, the Bureau of Reclamation was receiving the approval of more and more California water users and voters for contracts incorporating acreage limitations. On December 17, 1947, the voters of the Coachella Valley County Water District approved a contract by 1133 to 19. Two water users' districts in the San Joaquin Valley had accepted Central Valley Project repayment contracts containing the limitation in 1948, one of them through its board of directors and the other by popular vote of 188 to 1. Three more districts signed similar contracts in 1949, and five more in 1950; voters approved overwhelmingly. [[45]](#footnote-46)45These events revealed a severely concentrated, rather than broadly popular, basis for resistance to acreage limitation.

Acreage limitation and other questions of policy were not a significant part of the public discussions surrounding state authorization of the Feather River Project. However, state authorization was one possible way to place the Feather River Project beyond reach of this apparent trend toward water users' acceptance of federal policy. Unless the legislature should close a possible legal gap in state policy [[46]](#footnote-47)46by specifically extending acreage limitation to the Feather River Project, voters in water districts receiving Feather River Project water might not even be asked to express themselves on acceptance of water under acreage limitation.

Engineering considerations and possible conflicts with the federal government over physical aspects of Feather River development were discussed, but these were not among the reasons for state authorization. On the contrary, Governor Earl Warren explained carefully to **[\*13]**Congress that there was no "conflict with any federal program." "That Feather River project is a tremendous project. It involves multiple-purpose dams exactly the same as our Central Valley project does, the development of power and water and many other features." [[47]](#footnote-48)47

There is a considerable difference in the means of financing federal and state projects. For example the availability of interest-free money under federal law amounts to an advantage in favor of federal over state construction of around a half-billion dollars on the Feather River Project. [[48]](#footnote-49)48Public discussions in California, at the time of state authorization of the Feather River Project and ever since, have been remarkably free of this particular financial aspect -- a deterrent rather than motive for a state project.

Of course financial aspects of the Feather River Project were mentioned. Governor Warren spoke to Congress in 1951 of California's readiness to carry a larger share of the costs of its own water development. "I just want you to know that we want to be as self-reliant as we can. We don't want to come to Congress when it isn't necessary." Describing the state Feather River Project as "in consonance with the reclamation program and the flood control program," and apparently aware that as a state project without acreage limitation, Feather River was ineligible for federal interest-free irrigation funds, he said, "We will do it without asking the federal government to appropriate any money except insofar as federal interest might direct it in regard to navigation, flood control or salinity control." [[49]](#footnote-50)49

Instead of discussing in California the additional costs Californians would be obliged to bear if it were constructed as a state project, more public emphasis has been laid there upon the alleged reluctance of Congress to finance more irrigation development in that state, and upon the possibility of persuading Congress to make contributions to a state project for flood control, far less in amount than **[\*14]**the interest-free money for irrigation for which a state project is ineligible. Both subsidies are available to a federal project.

Congressman Clair Engle, emphasizing reluctance of Congress to authorize a federal Feather River Project, attributed this to three causes: (1) unwillingness "to step in when the state has expressed an interest"; (2) unwillingness to increase already large appropriations for California water development; and (3) opposition from congressional supporters of the "Upper Colorado Project hanging on the edge of defeat due to the opposition from Southern California." [[50]](#footnote-51)50The first and third were responses to California's own actions.

Progress on the state Feather River Project has been hesitant and slow. A sense of urgency appears to be lacking. About five years after authorization, the state arranged for relocation of highway and railroad, works which are still uncompleted. In 1961 the state let contracts for two diversion tunnels. These works are also "preliminary to the actual construction of Oroville dam." [[51]](#footnote-52)51

Among the more important effects of the 1951 state authorization of the Feather River Project, apparently, has been that it deterred the Bureau of Reclamation from constructing that project. As Senator Kuchel said in 1956, "I venture the guess that if the state had not indicated its interest in Oroville, we would have had long before last year's flood a federal dam at Oroville." [[52]](#footnote-53)52

**[\*15]**III. FEDERAL PROJECT

For the first time in these long discussions with which many of you are most familiar, Californians come before you united, offering a single plan with unanimous support.

--Governor Edmund G. Brown, 1959 [[53]](#footnote-54)53

Mr. [Senator Thomas] Kuchel: Who, in God's name, speaks for the people of California? Does a Democratic Governor? Do the two Senators from California?

Mr. [Senator Paul] Douglas: No.

--Congressional Record, 1959 [[54]](#footnote-55)54

Senator Kuchel: How do we judge the acceptance of the people of California, Congressman Hagen? How do we do that?

Representative Hagen: Senator Kuchel, I think in this very room you have people who in the main must be satisfied and in agreement before any real progress can be made on the San Luis project. There is one segment of opinion represented by the State Grange, Mr. Sehlmeyer, who is a very admirable man, who does not endorse any type of State project because the State does not have an acreage limitation law. . . . However, I think agreement could be achieved without the agreement of Mr. Sehlmeyer, and I think it has to be achieved before any progress could be made regardless of whether this Congress passes an authorization bill or not, because in my judgment the State has so many locks on various aspects of progress that the State acceptance has to be present for any progress to be made.

--Senate Hearings before the Subcommittee on Irrigation and Reclamation, 1958 [[55]](#footnote-56)55

The moves made during the late fifties and early sixties toward a new state water plan have not rested on the assumption that the state should undertake construction of all parts of the plan. On the contrary, the Feather River Project is the only large construction within the plan for Central Valley that the state legislature has said the state itself will undertake. This particular responsibility was assumed, as noted above, in spite of the heavy financial burden it imposes on the state, and the substantial financial advantage it would be to its citizens to make Feather River a federal project. A special House subcommittee--taking note of this burden upon the state a few months after the legislature acted--said its members were "surprised to learn that the legislature of the State of California authorized **[\*16]**a project for the total estimated capital cost of $ 1,270,000,000 on which the State Engineer testified he did not know whether the project was economically or financially feasible." [[56]](#footnote-57)56

State authorization of the Feather River Project has not ended federal efforts elsewhere in Central Valley toward completion of its water development. These have continued, principally on Trinity River, and have been supported by spokesmen for the state. A bill in the 87th Congress, S. 103 by Senator Kuchel, proposed additional federal construction within the state plan at both Auburn Reservoir on the American River, and the Folsom South Canal. [[57]](#footnote-58)57

The state Feather River Project does not stand by itself, separate from San Luis, in any significant respect. It would be at least as accurate to say that at San Luis a single project is divided into two, as to say that at San Luis two projects meet. [[58]](#footnote-59)58The Feather River Project is dependent physically upon construction of San Luis Reservoir as a means of getting water southward into the southern San Joaquin Valley and beyond. As State Engineer Harvey O. Banks said, "San Luis Reservoir is as essential to the Feather River Project as Shasta Reservoir is to the Central Valley Project." [[59]](#footnote-60)59State authorization of the Feather River Project, in recognition thereof, included authorization of San Luis in 1951 as a part of a whole. [[60]](#footnote-61)60

In 1956, Governor Goodwin J. Knight asked Congress to construct the San Luis unit "in such a manner that it can be integrated **[\*17]**with the state's Feather River Project. . . ." [[61]](#footnote-62)61From the state standpoint, federal construction of the San Luis Project was one means of lightening the heavy financial burden that a totally state-constructed Feather River Project would impose. [[62]](#footnote-63)62But water policy as well as money was involved. Despite the financial advantages of federal construction to the state and its water users, in Washington several witnesses from his own state failed to support Governor Knight and were so effective that Congress was influenced to postpone action on the Governor's request. [[63]](#footnote-64)63

These California witnesses were fearful of federal aid sought by Governor Knight in the form of federal construction. A spokesman for the ***Kern*** County Farm Bureau, for example, told Congress the Bureau preferred state construction of San Luis because federal authorization of San Luis "will cause undue delay in the construction and earliest usefulness of the Feather River Project. . . ." [[64]](#footnote-65)64The source of the "undue delay" was unexplained, but it became clear that a primary objective of these witnesses was to obtain use of San Luis facilities "under state law," *i.e.*, without acreage limitation. Assemblyman Patrick Kelly, of ***Kern*** County, apparently with the same end in view, asked Congress for a loan to enable the state to undertake "immediate construction, operation, management and control . . . of its natural water resources" including the San Luis dam, reservoir, and aqueducts. [[65]](#footnote-66)65Assemblyman Kelly called his proposal "in accord" with the partnership recommendation of President Eisenhower's Advisory Committee on Water Resources Policy on "partnership" dated January 17, 1956.

In these ways "control" of the San Luis reservoir emerged as the **[\*18]**dividing issue. Federal and state financing and construction were considered in the light of resulting federal or state control and, application or avoidance of acreage limitation. The interests in ***Kern*** County, where concentrated ownership of land is conspicuous, demanded state control. Their proposals became known as the "***Kern*** County concept," by which "the state would build and operate the joint-use features and the United States would pay to the state its appropriate share of construction costs and be entitled to use a proportionate part of the jointly used project capacities." [[66]](#footnote-67)66Mayor Norris Poulson of Los Angeles supported state construction financed by a federal loan under the "partnership" plan, because, "the federal government must not upset our program and attempt to dictate how California will make use of its own water within its own boundaries." When Senator O'Mahoney remarked: "All the federal government should do is pay the money," Mayor Poulson replied, "Well, no comment." [[67]](#footnote-68)67

The Master of the California Grange, on the contrary, wanted federal construction of both the San Luis and Feather River projects in order to assure federal control and acreage limitation. Asked by Senator Arthur Watkins of Utah if he meant that "one of the reasons why the state is moving in is to get rid of the land limitation," Grange Master George Sehlmeyer replied this "was an important factor and . . . the other factor is power." [[68]](#footnote-69)68

Any possible doubt that acreage limitation was a principal issue was removed two years later when State Engineer Banks presented a San Luis bill to Congress that included for the first time, a section specifically exempting from federal acreage limitation those lands **[\*19]**"under contract with the state to receive a water supply." [[69]](#footnote-70)69This proposal for coupling federal construction with the explicit exemption of a state service area from acreage limitation was an alternative to the ***Kern*** County concept of avoiding acreage limitation through state construction. [[70]](#footnote-71)70It was a compromise on finance and on policy. Federal construction included liberal financial aid to the state and acreage limitation for one San Luis area on the one hand, while on the other hand guaranteeing exemption to huge landholdings including those in ***Kern*** County.

The Senate debated and authorized the federal San Luis Project on these terms on August 15, 1958. Senator Watkins of Utah, overlooking the financial pressures that had led the state to ask for federal construction of San Luis as a means of helping the state Feather River Project, praised the state Feather River Project and state water plan and offered congratulations to California's Senators on the fact that their state "will build this project, and a still larger project which will cost in the neighborhood of $ 11 billion, and do it on its own . . . without calling upon the federal government." [[71]](#footnote-72)71

The exemption was challenged. Senators Kuchel, Knowland and Clinton P. Anderson each justified it, using generally similar language, *viz.*, "land which may be served by state operations only, under the state's water plan, upon which, of course, state law should apply"; [[72]](#footnote-73)72"an attempt to impose federal legislation upon a state in the case of purely intrastate waters"; [[73]](#footnote-74)73"in the areas where the state puts up the money, without cooperation by the federal government, the state naturally has its own rights under its own laws." [[74]](#footnote-75)74Senators Douglas and Morse demanded removal of the exemption, without success.

Nine months later the Senate, after four days of debate, would reverse itself by refusing the same exemption it had accepted the year before. [[75]](#footnote-76)75

IV. 86TH CONGRESS

[T]he amendment which we propose would apply the 160-acre limitation not merely to the initial 440,000 acres *to* be brought into cultivation, but **[\*20]**with respect to any additional land brought into cultivation which will use Federal facilities as a part of the system of distributing water, even though there may be State improvement superimposed upon the Federal system.

--Senator Paul Douglas, May 7, 1959 [[76]](#footnote-77)76

[T]here is merit in the position . . . that some persons could argue in a judicial proceeding that if at this late date section 6(a) [exempting the state service area from federal law] were stricken from the bill it would constitute an intention on the part of the Senate to make Federal law apply.

--Senator Thomas Kuchel, May 11, 1959 [[77]](#footnote-78)77

Has any explanation been given by the proponents of the bill why they feel that the 160-acre limitation should not apply, and why they feel that the holders of great acreages of land ought to have the benefit of irrigation under a policy different from that stipulated in the Federal law?

--Senator Frank Lausche, May 7, 1959 [[78]](#footnote-79)78

Senator Paul Douglas, of Illinois, co-sponsor of an amendment to eliminate exemption of the state service area from the 1959 San Luis bill, together with Senators Wayne Morse and Richard Neuberger of Oregon, stated repeatedly that the effect of their amendment would be to apply the federal 160-acre limitation to the state service area. [[79]](#footnote-80)79Senator Kuchel was apprehensive that this might be so and placed in the *Congressional Record* a telegram from a California attorney opposed to application of federal law, stating that, "Logically, the only valid argument for deletion of section 6(a) is that federal law should control water service by the state." [[80]](#footnote-81)80Senator Engle denied the claim of Senator Douglas (and fear of Senator Kuchel), saying that "it makes no difference whether section 6(a) is in the bill or out of the bill, because the federal law will not apply to the state-serviced areas anyway." [[81]](#footnote-82)81He said, "[T]he section is surplusage. It is merely **[\*21]**a statement of what the law is." Senator Douglas responded, "If it is surplusage, then eliminate it." [[82]](#footnote-83)82

Senator Kuchel implied that approval or rejection of specific exemption would be a "policy decision" by Congress. [[83]](#footnote-84)83Senator Engle cited a telegram from Governor Brown in support of his own position that no policy decision was involved and debate over section 6(a) was therefore useless:

Upon the basis of my own legal analysis and that of all my legal advisors I am convinced that . . . with or without the language contained in section 6(a) under S. 44, the federal reclamation laws do not . . . apply to the state facilities and state service areas of the project. [[84]](#footnote-85)84

Apparently the interests opposed to elimination of section 6(a) did not share the Governor's and Senator Engle's view that federal law would not apply to the state service area without specific congressional exemption. An editorial in the *Los Angeles Times* on February 28, 1960, stated:

Gov. Brown's water lawyers assure him that an acreage limitation would not apply to the state parts of Feather River Project, but the water agencies have vigorously expressed their doubts. . . . The results of Mr. Brown's all-out fight for Section 7 [House equivalent of section 6(a) in the Senate version] will be felt for the rest of this century. [[85]](#footnote-86)85

The compelling reason why neither Senator Engle nor Senator Kuchel would voluntarily eliminate section 6(a) apparently was the insistence of excess landholding interests on its retention. As noted before, inclusion of a specific exemption was essential to induce supporters of the ***Kern*** County concept to accept federal rather than state construction of the San Luis Project. [[86]](#footnote-87)86

Senators Engle and Kuchel were evasive, however, when questioned as to the identity of those seeking the "assurance" that congressional exemption would provide. When Senator Douglas asked the former, "Who are they? What people?," the latter interjected, "I will tell the Senator what people they are. They are the people of **[\*22]**southern California." Asked if he meant "the big landowners of Central Valley . . . the ***Kern*** County Land Company? The big land interests?," Senator Kuchel replied, "I do not mean them. I mean the city government of the city of Los Angeles." Senator Douglas responded, "How would the people of Los Angeles be hurt by omitting section 6(a), which would in effect provide a 160-acre limitation in the Central Valley?" Senator Kuchel then changed the subject by asking if state, rather than federal law ought not to apply. [[87]](#footnote-88)87When Senator Douglas asked Senator Engle again, additional assurance "to what people?," the latter's reply was, "To the people of southern California." Senator Douglas responded, "Was it to the people of southern California, or to the large landowners in the Central Valley and the railways and the ***oil*** companies, who have dominated politics in California for 70 years?" Senator Engle's answer was to reiterate that, "They wanted us to restate the law," but he himself "never believe[d] in restating the law." [[88]](#footnote-89)88

The reluctance of the California senators does not obscure the ample evidence in the public record and elsewhere that excess landholding interests wanted the additional assurance of congressional exemption. Indeed, no interests other than excess landholding interests are directly affected by the law and have a stake in its removal. [[89]](#footnote-90)89Senator Morse ascribed the purpose of section 6(a) to "the intention of the large landowners of California . . . to scuttle the 160-acre **[\*23]**limitation." [[90]](#footnote-91)90The compromise agreement referred to by Congressman Hagen -- made immediately preceding introduction of the San Luis bill in the 86th Congress with section 7 an essential part -- represented a "binding agreement of a representative of California's Governor, the two California Senators, Congressman Sisk, and myself, and representatives of San Luis, ***Kern*** County, and Los Angeles water interests, arrived at in a March 13 meeting attended by representatives of the Bureau of Reclamation." [[91]](#footnote-92)91

The Feather River Project Association, insistent throughout that section 6(a) was not surplusage and that congressional exemption was essential, has three directors at large with two of them spokesmen before congressional or state legislative committees for large landowning corporations. [[92]](#footnote-93)92Senator Douglas filled pages of the *Record* with names and statistics, including a table showing that these two corporations together owned close to 400,000 acres in ***Kern*** County "including possible areas of service by irrigation from San Luis Reservoir south of [the] Federal service area." [[93]](#footnote-94)93

The Senate eliminated section 6(a). [[94]](#footnote-95)94Nevertheless, the identical proposal to exempt the state service area from acreage limitation reappeared in the House San Luis bill as section 7 of H.R. 7155. The House Committee, by a divided report from which six members dissented, recommended adoption of section 7. Its report included a lengthy statement supporting a conclusion that section 7 was "surplusage," that it "in nowise changes established principles of reclamation law," and that its inclusion "is not to be interpreted as indicative of a belief on the Committee's part that without it the excess land provisions of the federal reclamation laws would be applicable to the state-served lands." [[95]](#footnote-96)95

The chief reliance of the Committee in expressing this view was upon the opinion given by Associate Solicitor of the Department of Interior Felix S. Cohen, on October 22, 1947, offering the prospect that, "[U]pon full payment of construction obligation under a joint-liability repayment contract, the lands receiving water . . . are . . . relieved of the statutory excess-land restrictions." [[96]](#footnote-97)96The San Luis bill **[\*24]**afforded a ready means of taking advantage of Cohen's and the Committee's view -- if accepted -- by providing that, "The State will. . . have paid its entire share of the cost of constructing the joint facilities prior to its utilization of them for storage and delivery of water." [[97]](#footnote-98)97

The House Committee protected against both routes of escape from acreage limitation, the surplusage theory and specific exemption. As the authors of S. 44 had done, it deferred to the difficulties of "bringing together as many diverse interests and points of view . . . as the San Luis project involves . . .," saying:

The Committee recognizes that the inclusions of surplusage is usually undesirable in a bill, but it also recognizes that the author of a bill . . . should be given considerable latitude in the way he expresses the position that is arrived at, more latitude than the Committee might give itself if it were to start drafting a bill ab inito. [[98]](#footnote-99)98

The difference was not incidental but crucial.

The House rejected the Committee's recommendation on a roll call vote after two days of debate and thus joined the Senate in eliminating the specific exemption. [[99]](#footnote-100)99During debate a good deal was said by Congressmen Aspinall, Hosmer, Hagen, Lipscomb, Moss and Sisk to indicate that in their opinion, section 7 was "surplusage" and it made no difference in reclamation law whether it was left in or stricken out. [[100]](#footnote-101)100However, the vigorous and intensive debate in both houses; the rejection of exemption despite its acceptance by the committees of both houses; and the record of the roll call vote in the House, leave little ground -- *if any* -- for relying on the legislative history of the 86th Congress for support of the view that in denying **[\*25]**exemption, Congress intended to permit exemption of the state service area. [[101]](#footnote-102)101

V. LEGISLATURE, 1957-1961

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

--Governor Edmund G. Brown, May 7, 1959 [[102]](#footnote-103)102

While there has been a big improvement in California in the selection of more Democratic, liberal, and progressive State legislators, in view of the past record we are not justified in depending on the frail reed of State action. What is likely to happen is that there will be no defense, and the big landowners will now take over.

--Senator Paul Douglas, May 11, 1959 [[103]](#footnote-104)103

When the California legislature grappled with proposals in 1933 to construct the first big unit of Central Valley development, it decided issues of policy and finance simultaneously. As part of the same law it approved not only the issuance of revenue bonds to finance the project, but also a state public power preference, a federal power preference and acreage limitation as well. [[104]](#footnote-105)104It referred its decision on both policy and finance to the people of the state who voted their approval. During recent consideration of proposals for state water development, however, the legislature has followed a different procedure and with a different result. Instead of coupling decisions on policy with those on finance as in 1933, the legislature has kept them separate. In 1960 the legislature referred only its decision on finance to the voters. Between 1957 and 1961, it defeated all proposals to adopt acreage limitation and gave the people no opportunity to say whether they approved or disapproved.

This striking contrast between the current defeat of policy and its previous approval in 1933 cannot be explained by rising popular objections **[\*26]**to acreage limitation. On the contrary, popular acceptance is clear and it is not diminishing. Previous to 1957, the legislature had approved acreage limitation seven times, memorialized against it only once, and allowed two bills to die in 1947 that proposed to prohibit irrigation districts from accepting contracts containing acreage limitation. The California Democratic Party platform supported acreage limitation in 1958, as it had since 1944, and Democratic candidates were generally victorious that year. The Governor won by approximately 3 to 2 over his Republican opponent who specifically opposed acreage limitation. In addition, fifteen popular votes in irrigation districts, recorded to 1951, total majorities of better than seven to one in favor of accepting Central Valley contracts with acreage limitation. [[105]](#footnote-106)105In 1952 five more districts approved contracts by a total vote of 744 to 125, and one rejected a supplementary contract by 33 to 45. [[106]](#footnote-107)106As recently as June, 1957, Senator Kuchel said that, when it found its legal capacity to contract with the United States impaired by a state supreme court decision against acreage limitation, Coming District in Sacramento Valley was willing to accept acreage limitation voluntarily to obtain federal project water. [[107]](#footnote-108)107

It was, and remains, decidedly to the financial advantage of California's water users to accept water under federal reclamation contracts. [[108]](#footnote-109)108Nothing in the record suggests that a change since 1933 in popular opinion toward acreage limitation accounts for the current defeat of policy. Instead this defeat is owing to the skillful tactical manipulation by its opponents in relying *exclusively* on the legislature, where they had strength, and in avoiding popular decision.

Attempts were made in the legislatures of 1957 and 1959 to approve application of acreage limitation to the state water project. But these failed. The arguments against adoption were procedural rather than substantive; they avoided open opposition to the principle of acreage limitation, as Senators Kuchel and Engle avoided it in debates on the San Luis bill by asking that the state be allowed to decide. It was urged in the legislature, for example, that policy arguments for acreage limitation should be deferred so as to permit the **[\*27]**legislature to concentrate on "appropriation"; that water bond legislation was "neither the time nor the legislation" for consideration of policy; and that "at times we have to rise above principle." [[109]](#footnote-110)109Although urged to place water on the agenda of the 1960 session of the legislature, Governor Brown declined, thus foreclosing debate on acreage limitation for that session. [[110]](#footnote-111)110As a result, the $ 1.75 billion state water bond issue that received popular approval by a small margin in November of 1960 was minus policy.

Governor Brown made his decision against acreage limitation public at the opening of the 1960 session. [[111]](#footnote-112)111On January 20th he announced his "plan of attack" in a television broadcast to the people of the state. The attack commenced with abandonment of acreage limitation and substitution of a two-price differential with higher charges against landownerships in excess of 160 acres. He likened his proposal to "the principle of differential water rates for large and small farmers . . . already in effect in federal law in the small projects act sponsored by California's Senator Clair Engle." [[112]](#footnote-113)112

**[\*28]**When the Engle formula had first been proposed, its ineffectiveness for controlling enrichment and spreading ownership was immediately pointed out. Congressman William A. Dawson of Utah, a member of Congressman Engle's committee, described it, not as a means of controlling concentration of benefits, but as an "encouragement to take on more acreage because the other benefits are so great. . . ." [[113]](#footnote-114)113Nevertheless, the Governor incorporated his water price differential in a contract with the Metropolitan Water District of Southern California -- concluded four days before the November election at which the voters approved the state water bond issue. [[114]](#footnote-115)114Apparently the water charge differential incorporated in the contract is not only ineffective for accomplishing its professed purpose, but may also lack legal force. The opinion of counsel in the *Main Report*--submitted to the Governor just before the water bond election--states: "The law of California fails to authorize a contractual provision requiring or permitting the Department, an irrigation district or other water agency to impose a price differential based on the size of landholdings." [[115]](#footnote-116)115

In the 1961 session of the legislature that opened a few weeks after passage of the $ 1.75 billion water bond issue, bills to provide acreage limitation were introduced and several hearings were held in the Assembly. The bills either were killed or died in committee. [[116]](#footnote-117)116

The Feather River Project of the State of California has no acreage limitation, and the contract between the state and the Metropolitan Water District contains clauses that, if honored, will prevent effective compliance with federal acreage limitation law. If a contract **[\*29]**between the United States and the State of California should accept these conditions, acreage limitation would not apply to the state service area. As the President of the Feather River Project Association said, in effect, when Congress rejected exemption of that area,

[T]he federal Bureau of Reclamation may be able, under the new legislative history established during the recent House and Senate debate, to enter into a contract which will include the basic principle fought for by those in the State project area--namely the *single application of state law to water deliveries in that area by the state*. [[117]](#footnote-118)117

VI. ADMINISTRATIVE DECISION

[I]n view of the action which deleted Section 7 before its passage, whatever rights the state will have in future joint federal-state facilities and with respect to water deliveries in the state Feather River Project service area, *must then depend entirely upon the language of the contract* which may be executed between the state and federal government.

--Allen Bottorff, President, Feather River Project Association, I960 [[118]](#footnote-119)118

Mr. Senator [Paul] Douglas: I have seen enough of the operations in the Department of the Interior in Pine Flats, and so forth, to know it is one thing to get it in the law, and it is another thing to get it carried out as you face a mighty combination of landowners.

. . . .

Mr. Senator [Clair] Engle: There will be a Democratic administration soon, and the law will be enforced.

Mr. Douglas: It will be enforced a little better, but nor necessarily well, because sometimes Democratic Secretaries of the Interior go sour, too. . . .

. . . .

Mr. Douglas: . . . [I] wish to pay tribute to those . . . people who have been boycotted and blacklisted in the valley and throughout California because of opinions which they have held. . . . Without them the victory which was won this afternoon would not have been possible.

--Congressional Record, 1959 [[119]](#footnote-120)119

If the present Secretary of the Interior should wish not to apply acreage limitation to the state service area, legal opinions are on record approving such a decision and counselling him how to accomplish that end. They come from sources both within and outside the Department of the Interior. They hold that full payment of the construction charge obligation renders the excess land provisions of reclamation law inoperative. Applied to the Kings and ***Kern*** river contracts now on the Secretary's desk, these opinions would support contracts permitting water users' organizations -- at their option -- to relieve excess landholders of the obligation to agree, as a condition of receiving project water, to dispose of their excess lands at a fair **[\*30]**appraised price. Making full payment would provide this relief. Applied to the San Luis contract to be negotiated between the State of California and the United States, these opinions would relieve excess landholders in the state service area under a provision of the San Luis Project Act that "conditions the integration of the [federal] facilities with the state's Feather River and related projects upon the state providing funds to pay an equitable share of the cost of the San Luis Project joint facilities at the time they are built or enlarged." [[120]](#footnote-121)120The prospect of rendering acreage limitation law inoperative through payments made concurrently with construction underlay claims by the House Committee report on the San Luis bill, and by some senators and congressmen during debate, that exempting the state service area was "surplusage."

Secretary Seaton, in approving the form of repayment contracts with thirty-two water user entities on Kings and ***Kern*** rivers providing that full payment renders acreage limitation inoperative, said on January 19, 1961, that he was relying on the consistent views of all the chief legal advisors of the Department for nearly a half century. [[121]](#footnote-122)121The support these opinions afforded, however, is far less than appears, as Secretary Seaton himself recognized. In the same statement announcing his approval of the contract forms he said he was withholding "execution on behalf of the government until the Attorney General's views are received," because he was "aware . . . of conflicting views strongly held by some. . . ."

Senators Douglas and Morse have attacked the opinions of King, Cohen and Bennett cited by Secretary Seaton. Senator Douglas supported his own views in a notable exchange of correspondence with the Secretary that apparently closed with the latter's unfulfilled promise on December 24, 1957, that Solicitor Elmer F. Bennett would continue it. [[122]](#footnote-123)122Senator Morse described the King opinion as "merely an administrative opinion shared by a few administrative employees . . . never . . . seriously defended in the Congress," [[123]](#footnote-124)123and noted that Cohen had accepted King's instructions "without inquiry." Quoting **[\*31]**from a statement by Secretary Seaton approving the "lump sum theory" -- that prepayment in full renders the acreage limitation law inoperative -- Senator Morse told the Senate: "I am sure that the Secretary of the Interior under this administration, given the wide range of authority to negotiate agreement as set forth in this legislation, will find some way to subvert reclamation laws in regard to the San Luis area." [[124]](#footnote-125)124After Secretary Douglas McKay enunciated it, the present writer, examining elsewhere the doctrine that full payment renders acreage limitation inoperative, concluded it utterly lacks legal foundation and is tantamount to "complete subversion of the law." [[125]](#footnote-126)125

Although some Secretaries of the Interior have said they accept the doctrine, none has yet been willing to put his name to documents making it a finally and legally binding Department policy. Secretary Oscar Chapman refused to accept "lump-sum or accelerated payment . . . as a means of avoiding . . . acreage limitation" on Kings River. [[126]](#footnote-127)126Secretaries McKay and Seaton, although endorsing the doctrine and saying they would accept it in Kings and ***Kern*** river contracts, nevertheless withheld signatures that would have given final approval.

Excess landholding interests to whom approval of the King-Cohen-Bennett doctrine would be of advantage apparently have long shared with the Secretaries this lack of confidence in its legal soundness. The congressional representative of ***Kern*** and adjacent counties, where landownership is concentrated, introduced bills in 1950 and 1951 seeking from Congress the legal authority the King-Cohen doctrine said they already had, *viz.*, to accept full payment in satisfaction of acreage limitation on Kings and ***Kern*** rivers. [[127]](#footnote-128)127Similar unwillingness of some California interests in 1959 and 1960 to accept a San Luis bill without "additional assurance" of specific congressional **[\*32]**exemption suggests continued lack of confidence in the doctrine among directly-affected interests. [[128]](#footnote-129)128

The doctrine has been given support recently by legal opinion outside the Interior Department. Counsel in the *Main Report* states that the excess land provisions "do not apply to waters to be delivered from the San Luis Project to state service areas." Counsel conceded, however, that "deletion of sections 7 and 6a of the [San Luis] bills somewhat clouds the foregoing conclusion." [[129]](#footnote-130)129

The *Main Report* examines two principal lines of argument supporting its opinion. One of these, not involving the King-Cohen-Bennett doctrine, holds that cooperation between California and the federal government is outside the Warren Act, which prescribes for cooperation under reclamation law between the federal government, irrigation districts and other entities. "[It] could well be argued," says the opinion of the *Main Report*, "that section 542 limits its cocoperative provisions to irrigation districts, water users' associations, corporations, entrymen or water users' and that the State of California is not properly included within any of those classifications." The opinion, however, balanced against this the contrary argument that "the state comes within the general classification of 'water user' and the act applies to a project such as San Luis because of use of such a broad term as 'water user.'" The opinion then reinforces this contrary argument by observing that the United States also "may have agreements for the use of San Luis Reservoir with 'irrigation districts' or 'water users' associations,' apart from any agreement with the state." Since these agreements would be explicitly within the Warren Act, a theory of avoidance subject to simple administrative choice to employ another arrangement to escape it and founded on the shadowy distinction between a state and other water-using entities, has virtually no support at all. [[130]](#footnote-131)130

Examining the other line of argument, the *Main* opinion attaches weight to the King-Cohen-Bennett doctrine and quotes a passage from the House Committee report on the San Luis bill referring to an "administrative practice . . . now so well fortified by history that it can probably be successfully attacked by no one except Congress," and to the absence of legislation introduced to "overrule the departmental interpretation." [[131]](#footnote-132)131But departmental construction of a statute does not acquire legal force if it is "obviously or clearly wrong." [[132]](#footnote-133)132When Secretary **[\*33]**Seaton made substantially the same argument in 1957, Senator Douglas responded saying: "You speak of your 'reluctance to overturn' an administrative interpretation 'by administrative order.' My concern is with the use of an administrative order to overturn an act of Congress." [[133]](#footnote-134)133Hence, it would seem that the opinion of counsel in the *Main Report* adds nothing of consequence to the insufficient foundations of the King-Cohen-Bennett doctrine.

The *Main Report* observes that, "[N]either the Bureau of Reclamation nor the state administration [its client] desires to apply the federal excess land provisions to the state service area . . ." and that, "[A]n agreement is now being negotiated which, as we understand, on one ground or another will permit state law to apply." Immediately following its quotation of passages reiterating the King-Cohen-Bennett doctrine in the House report, and undeterred by concession that the legality of its conclusion is "somewhat clouded," it recommends bold procedure:

At any rate, it would seem apparent that the state should strive to obtain as part of its agreement with the federal government a provision that none of the waters supplied from the San Luis Reservoir, or from any of the aqueducts constituting a part of that project, to state service areas should be subject to the excess land provisions. It is true that if in fact the Bureau of Reclamation did not have the authority to enter into such a contract, the agreement might be open to challenge. However, as a practical matter, such a challenge in the courts need not be anticipated in the normal course of events. [[134]](#footnote-135)134

The opinion of counsel in the *Main Report*, it appears, merits more serious attention as advice to a client on how to attain a desired end than as impartial analysis to determine the law.

It is germane to the question -- whether claims are well founded that the state service area, or any part of it, is legally entitled to exemption from federal acreage limitation -- to inquire if there really is any state project separate and apart from the federal Central Valley Project of which San Luis is an integral part. Senators Kuchel and Engle were at pains to claim a clear separation of state from federal projects, notwithstanding their admitted physical union at San Luis. They supported their claim on three grounds citing separation of *lands, finances*, and *physical facilities*, respectively.

As to *lands*, Senator Engle argued:

I am speaking of the lands on which the water is delivered. They are completely severable. That is why we have said to the state, 'Put up your money if you so desire, and build a second story on the dam, increase its size, and spread the water out on lands in the state projects. [[135]](#footnote-136)135

**[\*34]**However, the separateness of land areas receiving water is irrelevant to reclamation law. The vital concern of reclamation law and its acreage limitation provisions is with water and the individuals who receive it; land area is simply a convenient measure of the maximum amount of water an individual is permitted to receive. [[136]](#footnote-137)136

As to *finance*, Senator Engle argued that separation of state and federal projects was complete. He assured the Senate that:

[T]here will not be a plugged nickel of federal money in the state project, and everything the state does in order to put a bucketful of water on a square foot of land will be paid for with state money. That is the reason why we have a provision in the bill that the reclamation law shall not apply to a wholly divisible, completely separate program that is paid for, lock, stock, and barrel -- powerhouse and all -- by the state taxpayers. . . . The state government will pay every nickel of its share. Not a penny of it will be charged to the federal taxpayers. . . . All the federal government has done has been to build the first story of the structure. The second story goes on at no cost to the federal government. [[137]](#footnote-138)137

Senator Douglas obtained immediate acknowledgement from Senator Engle that it was not "possible to have a second story without the federal expenditures on the foundation and the first story." [[138]](#footnote-139)138Later he pressed his argument home:

Previously, they have been saying this would be a 100 percent state project. But it turns out to be nothing of the sort. A large part of the basic [flood control] cost of the Oroville project is to be charged to the federal government. . . [T]here is a possible further federal subsidy in the case of the Oroville Dam -- namely, through interest-free payments to the so-called state irrigation project. That is a subsidy from the federal government. This shows what an illusion it is to call this **[\*35]**a separate state project, from which federal land policy should be excluded, as section 6(a) seeks to do. [[139]](#footnote-140)139

Then Senator Douglas placed in the *Record* material inserted previously by Senator Engle as a Congressman, proposing federal "interest-free loans for irrigation" for the state project as well as "outright grants for flood control, which is a traditional responsibility of the federal government." [[140]](#footnote-141)140The claim of financial separation falls to the ground when examined in light of these realities.

As to *physical separation* of state and federal projects, it was impossible to deny their union at "the one [San Luis] site the Creator has made available." [[141]](#footnote-142)141The physical bonds between state and federal projects are even more numerous and extensive. The state report, for example, says that "large foothill reservoirs" in the American River Basin, "including Folsom are considered to be features of the California Aqueduct System. . . ." [[142]](#footnote-143)142Folsom Reservoir is an existing part of the federal Central Valley Project. The state report says that "from the siphon . . . water would be conveyed by canal and tunnel into the head of the existing Sly Park Reservoir. . . ." [[143]](#footnote-144)143Sly Park Reservoir, too, is part of the Central Valley Project. In addition, the state report says that "water for export would be conserved largely in Auburn Reservoir immediately above the head of the North Fork arm of Folsom Reservoir." [[144]](#footnote-145)144Senator Kuchel requested the 87th Congress to authorize Auburn Reservoir as a federal project. [[145]](#footnote-146)145As noted above, San Luis itself -- authorized as a federal project in 1960 -- was authorized originally as a state project in 1951. [[146]](#footnote-147)146

It is difficult at the present time to ascertain the specific items included within the state water plan that might touch or use a federal **[\*36]**unit directly, or might even become a federal unit as San Luis has become. The state plan is not clear as to the specific units within it; as Senator Engle intimated, its own present judgments are not final. [[147]](#footnote-148)147It is not in the nature of plans to be "final," and especially when the plan is motivated so largely by a desire both to take full advantage of the financial generosity of federal reclamation law, and to avoid its acreage limitation provisions. This lack of finality is illustrated by exchanges between Senators Douglas and Engle. The former asserted that state project water would flow through the federal Delta Mendota Canal. [[148]](#footnote-149)148Senator Engle denied this, saying this was "not the present plan." He said that the state would "build their own canal." [[149]](#footnote-150)149Senator Douglas cited a federal report assigning priority to enlargement of the federal Delta Mendota Canal over construction of a separate canal. Senator Engle then shifted his argument to one of *financial* separation, saying, "Of course it makes no difference whether a separate ditch is built or the present canal is enlarged. In either event the state will pay the cost." [[150]](#footnote-151)150

Senator Douglas named other points of probable physical union between federal and state projects, saying:

[T]he Delta Cross Channel is to be used . . . (and water elevated) with power developed from the dams and falls of water up north. . . . [The] additional state outlay, if it should be made would not get to first base if there were not a prior huge federal investment. To claim that this action is entirely distinct from the federal outlay is, to my mind, "moonshine." In addition to that, the previous outlays on Shasta, Keswick, Nimbus, Folsom, and Trinity, which is still under construction, will make water and power available to what is alleged to be a purely State system but which will not be in fact purely a state system but will be a joint system. [[151]](#footnote-152)151

Neither Senator Kuchel nor Senator Engle gave an immediate, direct response, but the latter denied at one point in debate that water would be elevated with the Tracy pumps using Central Valley power. [[152]](#footnote-153)152State Engineer Harvey O. Banks had told Congress in 1956 that the state desired to "contract for the use by the state of Central Valley project power facilities." [[153]](#footnote-154)153

Statements of Senators Engle and Kuchel in presenting the San Luis bill to Congress indicate how inextricable from one another the **[\*37]**state and federal projects are and how intrinsically desirable it is, if not inevitable, that each should take full advantage of the other. "[Federal] Central Valley project is part and parcel of the overall state water plan. . . ," said Senator Engle. [[154]](#footnote-155)154The San Luis bill, said Senator Kuchel, seeks "to pave the way for the integration of the San Luis unit with the Central Valley project of the California state water plan." [[155]](#footnote-156)155

Physical and financial separation, clearly, are not facts but rather fictions asserted to support argument for removing federal acreage limitation law from a so-called state service area. Senator Douglas summarized the situation by saying: "[T]his is not the injection of a federal provision in a purely state project, but the assertion of federal protections in a largely federal project." [[156]](#footnote-157)156Senator Morse told the Senate:

[T]he state development cannot take place without the federal development, so we have inseparabilities. . . . The fact is that this project was born of the federal government. . . . [[157]](#footnote-158)157I would only add that this almost becomes one of the 'now you see it, now you don't' affairs when a discussion is had of a federal interest in a state project. [[158]](#footnote-159)158

"This alleged state project we are dealing with, therefore," he said on another occasion, "is merely a vision created in the hope that it can somehow transform everybody's water to water reserved only for a few people . . . [they] think they have discovered a way around the law." [[159]](#footnote-160)159

The present Secretary faces the latest phase in a long-drawn out series of efforts to enable excess landholders to obtain water from public projects without agreeing to dispose of their excess lands as required by federal law. A spokesman for excess landholders once remarked to a friend of the present author, "You have to win every time; we have to win only once." This view of strategy affords an explanation of the variety and persistence of attacks in Congress, upon and through administrators, through the courts, through the state and through its agencies. But the responsibility of an administrator is to accomplish the objectives of law and policy laid down by Congress.

The Secretary of the Interior can advance the application of law on Kings and ***Kern*** rivers by presenting the thirty-two districts there with contracts like those approved so overwhelmingly by district directors **[\*38]**and voters along the Friant-***Kern*** and Madera canals a decade ago. [[160]](#footnote-161)160That will provide them opportunity to decide whether they wish firm water rights under reclamation law. If they accept the contracts, excess landholders within them are free individually to choose whether they wish to comply with reclamation law in order to obtain project water beyond an amount sufficient for 160 acres; usually it is financially very advantageous for them to do so. However, if either districts or individuals decline water on these terms, the Bureau of Reclamation will be free to dispose of it to others who accept it under the law.

This procedure should end a nearly half-century old contention that full payment renders acreage limitation inoperative, a contention no Secretary has been willing firmly to approve, but nevertheless one which has supported long delays in application of the law. Courts are open to challenge of the Secretary's decision by either side, but the abilities of excess landholding and small landholding interests actually to carry a challenge through the courts are markedly different. Apparently the *Main Report* had in mind the difficulties of small landholders when forecasting that if a decision adverse to acreage limitation should be written into the San Luis contract, appeal to the courts would be unlikely. Reclamation law, however, is intended to be administered for the *benefit* of small landowners, not to place them at a disadvantage.

The San Luis contract, like the Kings and ***Kern*** contracts, should apply acreage limitation without qualification to the entire state service area. The State of California would have opportunity under reclamation law of choosing whether to participate in the San Luis Project or not. If the State of California should decline to participate in the San Luis Project, the San Luis Act permits the Secretary of the Interior to report to Congress that he intends to proceed with the federal project after ninety days. [[161]](#footnote-162)161As an alternative, the Secretary could recommend delay until a modified, perhaps enlarged, program of federal construction could be placed before Congress. In any case, firm insistence on compliance with law is more likely to advance than to retard water development in the West, which is the purpose of reclamation law.

The prospect of avoiding acreage limitation has encouraged obstruction and delay rather than development. However, growing awareness of water needs and the high costs of meeting them, in **[\*39]**California as elsewhere in the West, may impel communities there to seek broader planning, financial and engineering bases than single states can well afford. It is possible as well--given time and a clear statement of choices -- that pressures within California favoring construction under reclamation law, as revealed in public hearings and debates, may assert themselves in the same direction, and that together these forces may prove sufficient to change the state's position. Straws are visible in the wind. A broad strategy of federal development, recently rejected, may become acceptable. California is contesting the adverse decision of a Supreme Court referee in its dispute over division of Colorado River water with Arizona, but cannot be sure of the outcome. The Mountain Counties Water Resources Association is attacking the state Feather River Project, and proposing that California lead other western states in requesting federal aid to develop the waters of the Columbia River for the needs of California. [[162]](#footnote-163)162This proposal from "counties of origin" of northern California waters amounts to a request for resumption of the Western Water Exchange report plans of the Bureau of Reclamation, shelved in 1951, apparently in response to California influence. [[163]](#footnote-164)163That year California was girding for the contest with Arizona. That same year saw district after district within the state accept water under acreage limitation, and decision by the legislature to authorize a state project unprotected by acreage limitation.

The record of the past decade reveals the state project as a hugger muggery, portrayed publicly as a great and generous state gesture to meet an imperative need, but the decade has seen no actual construction on the dam itself. In the meantime, though appeals for more and more federal aid, the size of the state's announced undertaking has been whittled down step by step. Its concealed purposes have remained a source of delay both actual and threatened and have led the state into an impasse, provided the Secretary of the Interior enforces reclamation law. The character of the project has obliged those who spoke for it to proclaim to Congress a fictitious separation of **[\*40]**state from federal projects in order to have recourse to an appeal to states' rights as means of parrying direct attacks upon the concealed purposes of the San Luis bill. It has obliged officials to abandon party platform and state policy, leaving statute book and contract between the state and its water agency, alike, stripped of all protections against concentration of private enrichment and of ownership of resources developed at public expense. The law places no responsibility upon a Secretary of the Interior for salvaging a state project of that particular kind in his endeavors to promote reclamation.

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1. 1 Ivanhoe Irrigation District v. All Parties, 53 Cal.2d 692, 714-15, 3 Cal. Rptr. 317, 330 (1960). [↑](#footnote-ref-2)
2. 2 Chas. T. Main, Inc., Final Report, General Evaluation of the Proposed Program for Financing and Constructing the State Water Resources Development System of the State of California Department of Water Resources, 2229-1-2A, app. 29, October 1960 [hereinafter cited as Main Report]. State legislation has approved at least six times the acceptance of federal contracts containing acreage limitation by *water districts*. Legislation has not specifically given this approval to a *state* contract, as proposed at San Luis. See Personal testimony of Paul S. Taylor prepared for presentation before State Assembly Water Committee, Sacramento, California, April 11, 1961, at 8, 9. However, the federal government might contract with water districts for use of San Luis facilities already empowered to accept acreage limitation. See text accompanying notes 30, 46 *infra*. [↑](#footnote-ref-3)
3. 3 Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 297 (1958). [↑](#footnote-ref-4)
4. 4 Ivanhoe Irrigation Dist. v. All Parties, 47 Cal.2d 597, 306 P.2d 824 (1957). [↑](#footnote-ref-5)
5. 5 The words of the Supreme Court were: "[T]hat benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes." Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. at 297. [↑](#footnote-ref-6)
6. 6 Senator Francis G. Newlands, co-arthur of the Reclamation Act, said at Red Bluff, California, in 1905: "We realized . . . it would not be fair to apply it [reclamation] only to the public domain, for within reach of every Governmental project lie lands in private ownership . . . guarded against monopoly by preventing any proprietor from securing water rights for more than 160 acres . . . to destroy land monopoly; not only prevent the monopoly of public land, but to break up the existing land monopolies throughout the arid region." SACRAMENTO VALLEY DEVELOPMENT ASSOCIATION, BULL. NO. 23, 14-18. [↑](#footnote-ref-7)
7. 7 35 CONG. REC. 6677 (1902). [↑](#footnote-ref-8)
8. 8 This estimate excludes flood control subsidy. Letter from Congressmen Clair Engle, George P. Miller, John E. Moss, Harlan Hagen, B. F. Sisk, J. J. McFail to California Attorney General Edmund G. Brown, Feb. 4, 1957, in 44 CALIF. L. REV. 772 (1959). [↑](#footnote-ref-9)
9. 9 Statement by Harry W. Horton, *Hearings on S. 1425, 2541, 3448, Before Subcommittee on Irrigation and Reclamation of Senate Committee on Interior and Insular Affairs*, 85th Cong., 2d Sess. 87, 88 (1958). [Hereinafter referred to as *1958 Hearings on S. 1425*.] [↑](#footnote-ref-10)
10. 10 See text accompanying notes 29-33 *infra*. See also Taylor, *Excess Land Law: Legislative Erosion of Public Policy*, 30 ROCKY MT. L. REV. 480, n.163 (1958). [↑](#footnote-ref-11)
11. 11 See 38 CALIF. L. REV. 728, 730-732 (1950) (citing H. R. Doc. No. 146, 80th Cong., 1st Sess. 23 (1947)). [↑](#footnote-ref-12)
12. 12 Taylor, *Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 512-514 (1955). [↑](#footnote-ref-13)
13. 13 U.S. Dep't of Interior, Information Service, January 19, 1961. [↑](#footnote-ref-14)
14. 14 For example, the manager of the Land Department of the Southern Pacific Company, L. Frandsen, owning close to 150,000 acres in the San Luis Valley, testified that his company desired "the alternative of paying interest on the federal irrigation investment and thus be allowed to retain their land holdings and obtain water for them." *Hearings on S.44 Before Senate Subcommittee on Irrigation and Reclamation*, 86th Cong., 1st Sess. 101 (1959). See also Fresno Bee, Sept. 27, 1961. [↑](#footnote-ref-15)
15. 15 See text accompanying note 120 *infra*. [↑](#footnote-ref-16)
16. 16 74 Stat. 156 (1960). All waters from the state project reaching the southern San Joaquin Valley and southern California must flow through these facilities. [↑](#footnote-ref-17)
17. 17 S. 44, § 6(a); H.R. 7155, § 7, 86th Cong. (1959). [↑](#footnote-ref-18)
18. 18 105 CONG. REC. 7670 (1959). [↑](#footnote-ref-19)
19. 19 See also the statement of Harvey O. Banks, California State Engineer, to Senator James E. Murray, June 18, 1956, *Hearings on S. 178 Before Subcommittee on Irrigation and Reclamation of Senate Committee on Interior and Insular Affairs*, 84th Cong., 2d Sess. 37 (1956) [hereinafter cited as *1956 Hearings on S. 178*]. [↑](#footnote-ref-20)
20. 20 For estimates of the magnitude of economic interests at stake, see Taylor, *Destruction of Federal Reclamation Policy? The Ivanhoe Case*, 10 STAN. L. REV. 76, 92, (110); Personal testimony of Paul S. Taylor, *supra* note 2, at 2-4. [↑](#footnote-ref-21)
21. 21 See Taylor, *Excess Land Law: Pressure vs. Principle*, 47 CALIF. L. REV. 499 (1959). [↑](#footnote-ref-22)
22. 22 "[I]f federal legislation is adopted without such a provision as Section 7, then the state should proceed to construct the San Luis Reservoir and other joint-use facilities as part of the state project, with the right of the federal government as may be agreed upon, to provide the necessary storage capacity therein to serve its federal San Luis service area." *Feather River Project Association Resolution*, February 12, 1960, in 4 FEATHER RIVER PROJECT ASS'N NEWSLETTER NO. 2 (1960). Members of the Board of Directors included spokesmen in opposition to acreage limitation for some of the largest landowning corporations in Central Valley. [↑](#footnote-ref-23)
23. 23 105 CONG. REC. 7670 (1959). [↑](#footnote-ref-24)
24. 24 Address by Senator Knowland, Oakland, Calif., March 21, 1958, in 104 CONG. REC. A2705 (1958). In 1947 Senator Knowland co-sponsored S.912 with Senator Sheridan Downey to exempt Central Valley Project from acreage limitation. Attorney General Brown obtained unanimous reversal by the United States Supreme Court of the California Supreme Court's rejection of acreage limitation in the *Ivanhoe* case. He won the Governorship over Senator Knowland on a platform that declared: "We re-affirm our support of federal Reclamation Laws providing for 160-acre limitation to insure equitable distribution of water and avoid the evils of land speculation and monopoly, and to prevent undue profit at public expense." California Democratic Party Platform, 1958, p. 14. [↑](#footnote-ref-25)
25. 25 Feb. 28, 1960. "If Brown could ram through the water program that Knight failed to accomplish . . . (and) ring up a smashing victory on his new tax program, then the door of the White House might swing wide." Editorial, Calif. Farmer, April 25, 1959, p. 432, col. 2. For recent indications of the enduring and deep-seated political character of the acreage limitation issue see Earl C. Behrens, "The Federal 'Price' for Aiding San Luis Project?" San Francisco Chronicle, November 26, 1961, p. 9; Edward H. Dickson, "160 Acre Limitation Has Long Political History," Fresno Bee, November 12, 1961; Ruth Finney, "Trouble Looms for San Luis," San Francisco News-Call-Bulletin, November 10, 1961, p. 21; Fresno Bee, October 13, 1961. [↑](#footnote-ref-26)
26. 26 Division of Water Resources, Calif. Dep't of Public Works, Bull. No. 25, Report to Legislature of 1931 oh State Water Plan, in JOURNAL OP CALIF. SENATE & ASSEMBLY, 49th Sess. app. 3 (1931). [↑](#footnote-ref-27)
27. 27 Cal. Stat. 1933, chs. 918, 1042. [↑](#footnote-ref-28)
28. 28 MONTGOMERY & CLAWSON, HISTORY OF LEGISLATION AND POLICY FORMATION OF THE CENTRAL VALLEY PROJECT; Bureau of Agricultural Economics, U.S. Dep't of Agriculture, March 1946, 82-92. [↑](#footnote-ref-29)
29. 29 *Valley Divided*, Bus. Week, May 13, 1944, pp. 21, 24. The proposal that the state "take over the Central Valley project, paying the entire bill," was "said to have originated among the big landowners of Fresno County. . . ." [↑](#footnote-ref-30)
30. 30 H.R. 3961, 78th Cong., 2d Sess. (1944); S. 912, 80th Cong., 1st Sess. (1947); S. 44, H.R. 7155, 86th Cong., 2d Sess. (1960). [↑](#footnote-ref-31)
31. 31 Act of Dec. 22, 1944, ch. 665, § 8, 58 Stat. 891. [↑](#footnote-ref-32)
32. 32 105 CONG. REC. 7862-66. See also Taylor, *Excess Land Law on the* ***Kern****?*, 46 CALIF. L. REV. 153 (1958). [↑](#footnote-ref-33)
33. 33 "The near tragic situation I outlined before you 22 months ago has steadily worsened. Our water table has receded further and the use of deep well water of high mineral content is continuing to cause deterioration of our agricultural lands." Statement of J. E. O'Neill, *Hearings on S. 1887 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 85th Cong., 2d Sess. 89 (1958) [hereinafter cited as *1958 Hearings on S. 1887*]. [↑](#footnote-ref-34)
34. 34 Cal. Stat. 1917, ch. 160, §§ 1, 4; Cal. Stat. 1933, ch. 918, § 2; Cal. Stat. 1933, ch. 1042, § 15; Cal. Stat. 1935, ch. 615, §§ 2, 3; Cal. Stat. 1937, ch. 922, § 2; Cal. Stat. 1943, ch. 372. Section 15 of the 1933 Central Valley Act, approved separately at the polls by the people, empowered the state Water Project Authority to accept federal cooperation in "construction, maintenance and operation and in financing" of the Central Valley Project "under federal legislation now or hereafter enacted by Congress." Cal. Stat. 1933, ch. 1042 § 15. [↑](#footnote-ref-35)
35. 35 Statement by Edward Hyatt, State Engineer and Executive Officer, Water Project Authority of the State of California, *Hearings on H.R. 3961 Before a Subcommittee of the Senate Committee on Commerce*, 78th Cong., 2d Sess. 635 (1944). [↑](#footnote-ref-36)
36. 36 CALIF. SENATE JOUHN., Extraord. Sess. 1936, at 13, 14, 35, 36. [↑](#footnote-ref-37)
37. 37 Statement of Roland Curran, Secretary-Manager, Central Valley Project Association, *Hearings on S. 912 Before a Subcommittee of the Senate Public Lands Committee*, 80th Cong., 1st Sess. 1310 (1947). The State Engineer supported construction by the Army Engineers on Kings. River in preference to the Bureau of Reclamation at a time when the Army Engineers were resisting, and the Bureau of Reclamation supporting acreage limitation. "In 1944, the Bureau of Reclamation asked an appropriation to start work on the Pine Flat project. No state official showed concern or backed the request. . . . By 1946, state officials, who had been silent throughout efforts on the part of the Bureau of Reclamation to get funds for Pine Flats, began an active drive to get money appropriated to the Army Engineers for this project. In January, 1946, Northcutt Ely, the state's Washington lobbyist . . . read a telegram from [State Engineer] Hyatt saying 'the need is urgent, in order to prevent further flood damage.'" Statement of Finney, San Francisco News, October 16, 1948. [↑](#footnote-ref-38)
38. 38 MONTGOMERY & CLAWSON, *op. cit. supra* note 28, at 117-128. [↑](#footnote-ref-39)
39. 39 San Francisco News, December 18, 1946. The Water Council asked for, "State control . . . and exemption of CVP . . . from the 160 acre limitation law." [↑](#footnote-ref-40)
40. 40 Letter from Harold L. Ickes to Frank Clarvoe, editor, San Francisco News, October 31, 1945. [↑](#footnote-ref-41)
41. 41 Letter from Harold L. Ickes to Governor Earl Warren, March 7, 1945. [↑](#footnote-ref-42)
42. 42 U.S. Bureau of Reclamation, U.S. Dep't of Interior, Answers to Questions Submitted to that bureau by the Central Valley Project Committee 3, 4, in MONTGOMERY & CLAWSON, *pp. cit. supra* note 28, at 116-17. The move for state purchase came to a dead stop in 1953 when Secretary of the Interior Douglas McKay said he was "not optimistic," and remarked that Shasta Dam "is worth a lot more than the book value." Noting the opposition of "some people" to federal management and acreage limitation, the *Oroville Mercury Register* said, "From our viewpoint, purchase of the Central Valleys Project would mean an extension of the state's credit to a point where it would be unable to finance the big Oroville dam--the Feather River Project." Sacramento Bee, October 29, 1953, p. 36 col. 5. [↑](#footnote-ref-43)
43. 43 Cal. Stat. 1951, ch. 1441, § 2. [↑](#footnote-ref-44)
44. 44 Bureau of Reclamation, U.S. Department of Interior, Central Valley Basin--a Comprehensive Report on the Development of the Water and Related Resources of the Central Valley Basin for Irrigation, Power Production, and Other Beneficial Uses in California, and Comments by the State of California and Federal Agencies; see S. Doc. No. 113, 81st Cong., 1st Sess. 59 (1949). [↑](#footnote-ref-45)
45. 45 Taylor, *The Excess Land Law: Pressure vs. Principle*, 47 CALIF. L. REV. 499, 531 (1959). [↑](#footnote-ref-46)
46. 46 Epigraph accompanying note 1 *supra*. See also text accompanying note 2 *supra* and note 130 *infra*. [↑](#footnote-ref-47)
47. 47 Testimony given October 29, 1951, *Report of a Special House Subcommittee on Irrigation and Reclamation on Central Valley Project, California, as a result of hearings held October 29, 30, and 31, 1951*, at 29, 30. [Hereinafter cited as *1951 House Special Report*.] Eight years later, Senator Clair Engle was even more emphatic about the harmony between state and federal programs than the Governor had been. "The federal San Luis unit," he told the Senate, "is part and parcel of the overall state water plan. . . ." 105 CONG. REC. 7486 (1959). [↑](#footnote-ref-48)
48. 48 The basis for this estimate is the prospect that by 1990 water deliveries under the state project will be devoted about 40 percent to irrigation and 60 percent to urban uses. Federal investment for irrigation is interest-free under reclamation law. See Main Report, *supra* note 2, at 7, 8; Personal Testimony of Paul S. Taylor, *supra* note 2, at 14, 15. [↑](#footnote-ref-49)
49. 49 *1951 House Special Report, supra* note 47, at 27-30. Later, Congressman Engle advocated unlimited federal assistance to the state project, including interest-free money for irrigation costs as available presently only under reclamation law. 103 CONG. REC. A7668, A7669 (1957); 105 CONG. REC. 7855-57 (1959). [↑](#footnote-ref-50)
50. 50 "Engle Declares Federal FRP Is Empty Hope," Sacramento Bee, Feb. 3, 1956, p. 3, col. 1. *Time Magazine* indicated another possible reason for lack of enthusiasm among western Congressmen for aiding California water development. By its account, a federal report on Western Water Exchange, authorized by Congress to plan large-scale, united western water development, was pigeon-holed in 1951 "probably because California is afraid of the effect the report may have on its struggle with Arizona for the last dribbles of water in the lower Colorado River. . . ." Time Magazine, July 30, 1951, p. 50. [↑](#footnote-ref-51)
51. 51 N. Y. Times, August 20, 1961, p. 75. [↑](#footnote-ref-52)
52. 52 *1956 Hearings on S.178, supra* note 19, at 179. About two months earlier, Governor Knight had asked the state legislature for funds for relocation of railroad and highway, and surveys and construction plans. "He quoted Congressman Clair Engle . . . as telling him . . . California's chance of government help will be enhanced immensely if he can report affirmative appropriation action by the state legislature and not simply that state authorities still are studying the vast FRP undertaking. Governor Knight . . . emphasized an equally important factor . . . the crying need for Northern California flood protection and the fact that legislature originally approved the FRP five years ago and has taken no substantial action since. . . . 'I'm going to see that the people of this great valley get flood protection if I don't do anything else as governor,' Knight said. 'Floods don't, wait for the settlement of hair splitting technicalities.'" He "expressed hope" for grants of $ 300 million or more "in federal money ultimately" for flood control and San Luis Dam construction. Sacramento Bee, March 13, 1956, p. 1. Four years later, an editorial of the *San Francisco Chronicle*, entitled "Governor Brown Deplores Floods," stated: "The Governor of California, who was an early and vigorous critic of the water plan when it was broached under a previous administration--but who has now adopted it and plainly regards it as his own-- . . . has said that the present winter rains imply floods that could become catastrophic . . . and he has ominously added: . . . 'I ask some of the newspapers who have editorialized against it [the bond issue] to take note. The responsibility will be theirs.'" The editorial expressed "a disbelief that Providence has sent the winter rains to drum up votes for his bond issue--which contemplates spending precious little of its $ 1.75 billion for purposes of flood control." February 11, 1960, editorial page, cols. 1, 2. Construction of a dam on Feather River had not started in 1961. [↑](#footnote-ref-53)
53. 53 *Hearings on S. 44 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 86th Cong., 1st Sess. 11 (1959) [hereinafter cited as *1959 Hearings on S. 44*]. [↑](#footnote-ref-54)
54. 54 105 CONG. REC. 7851 (1959). [↑](#footnote-ref-55)
55. 55 *Hearings on S. 1887 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 85th Cong. 2nd Sess. 42 (1958) [hereinafter cited as *1958 Hearings on S. 1887*]. Congressman Hagen did not mention the California Labor Federation, long an active supporter of acreage limitation. Governor Brown said, "I have made no attempt to answer every conceivable question or satisfy all extremists." [↑](#footnote-ref-56)
56. 56 *1951 House Special Report, supra* note 47, at 9. A few months earlier the State Engineer's report had concluded that: "The Feather River Project and associated Santa Clara-Alameda and San Joaquin Valley-Southern California Diversion Projects are not financially feasible on the basis of revenue derived from water charges and the sale of electric power at the rates assumed in the report unless the Federal and State Governments contribute to the cost of the projects funds in substantial amounts in the interest of flood control and water development on the basis of state-wide concern." Report on Feasibility of Feather River Project and Sacramento-San Joaquin Delta Diversion Projects proposed as features of the California Water Plan 126, May 1951. [↑](#footnote-ref-57)
57. 57 13 WESTERN WATER NEWS NO. 5, 1, 4 (1961). [↑](#footnote-ref-58)
58. 58 Senator Kuchel told the Senate on May 5, 1959, "Thus two systems--one a federal [Central Valley] project in being; the other, a state project about to get under way--would both be served at San Luis, the point where they cross--by a single storage reservoir whose cost of construction and operation would be shared by both governments." 105 CONG. REC. 7483 (1959). A resolution presented to the Senate by the San Bernardino County Board of Supervisors, stated: "Whereas the San Luis dam is an essential part of said Feather River Project . . . the state [should] construct, operate, manage, and control the San Luis Dam and Reservoir as part of the Feather River Project." *1956 Hearings on S. 178, supra* note 19, at 14. [↑](#footnote-ref-59)
59. 59 Statement of Harvey O. Banks to Senator James E. Murray, June 18, 1956, *1956 Hearings on S. 178, supra* note 19, at 36. [↑](#footnote-ref-60)
60. 60 "It is an authorization under which the State could, if appropriations are made available, construct all of the works at San Luis to serve the entire service area in the westerly-southerly end of the San Joaquin Valley, including the San Luis service area and areas in ***Kern*** County and southern California." Statement of Harvey O. Banks, *1958 Hearings on S. 1887, supra* note 55, at 58. [↑](#footnote-ref-61)
61. 61 *1956 Hearings on S. 178, supra* note 19, at 7. [↑](#footnote-ref-62)
62. 62 *I.e.*, the same financial pressures that weighed heavily against state purchase of the federal Central Valley Project favored appeal to the federal government to build San Luis! "It was, of course, unrealistic to think at any time that the state would be able to buy the project--and at the same time do other big things to which the state is committed. . . . Government management is onerous, of course, and to some people the 160 acre limitation is practically confiscatory. These are the ones who are pushing the idea of a purchase." Editorial, Oroville Mercury Register, in Sacramento Bee, Oct. 29, 1953. [↑](#footnote-ref-63)
63. 63 *1956 Hearings on S. 178, supra* note 19, at 178, 263, 270, 274, 275, 294. [↑](#footnote-ref-64)
64. 64 Statement of Allen Bottorff, *1956 Hearings on S. 178, supra* note 19, at 216, 219. The position taken by the ***Kern*** County Farm Bureau and State Assemblyman from ***Kern*** County was consistent with testimony of President Dwight M. Cochran of the ***Kern*** County Land Company against acreage limitation before the California Assembly Interim Committee on Water, November 5, 1959: "[W]ith acreage limitation, the Feather River Project will never succeed. . . . Acreage limitation would prevent farmers from purchasing water for large acreages of their land. Under such circumstances, it is doubtful that the program could be self-liquidating. Not enough water could be sold." [↑](#footnote-ref-65)
65. 65 *1956 Hearings on S. 178, supra* note 19, at 252. "I did not say, or it is not stated here, 'interest-free loan.' It says 'loan agreement', which is entirely different . . . because some of that loan could possibly be on an interest basis." *Ibid.* [↑](#footnote-ref-66)
66. 66 *1956 Hearings on S. 178, supra* note 19, at 14-32. See also *1958 Hearings on S. 1887, supra* note 55, at 56, 57, 103. [↑](#footnote-ref-67)
67. 67 *1956 Hearings on S. 178, supra* note 19, at 20. *Cf.* the comment by Secretary of the Interior Harold L. Ickes on the early proposal that the state take over federal Central Valley Project: "I do not wish to dwell at length on all the false assumptions and unwarranted conclusions contained in the State Chamber's statement, but there are three or four additional claims that I can not ignore . . . it certainly is naive for the State Chamber to expect the Federal Government to hand over the State the two revenue-producing facilities--irrigation and power--while retaining responsibility for flood control, navigation, salinity control, and fish and wildlife development which the State Chamber says 'are not reimbursable costs and are, under any circumstances, gifts from the Federal Government.'" Letter from Harold L. Ickes to Frank Clarvoe, Oct. 31, 1945. [↑](#footnote-ref-68)
68. 68 *1956 Hearings on S. 178, supra* note 19, at 178. *Cf.* Secretary Ickes description in 1945 of the proposal that the State should take over the Central Valley Project from the Federal government, in which he linked the opponents of acreage limitation and public power preference as chief supporters of the effort. Letter from Harold L. Ickes to Frank Clarvoe, Oct. 31, 1945. See also Senator Wayne Morse's statement in 1959: "There has been . . . as much objection to the anti-monopoly preference clause in regard to federally generated power as to the antimonopoly land law. The same groups oppose both of these laws. The same groups have devised many devious interpretations; have written legislation which they have attempted to get the Congress to enact." 105 CONG. REC. 7686 (1959). [↑](#footnote-ref-69)
69. 69 *1958 Hearings on S. 1887, supra* note 55, at 54. [↑](#footnote-ref-70)
70. 70 *1956 Hearings on S. 178, supra* note 19, at 195; *1958 Hearings on S. 1887, supra* note 55, at 56, 57. [↑](#footnote-ref-71)
71. 71 104 CONG. REC. 17730 (1958). [↑](#footnote-ref-72)
72. 72 104 CONG. REC. 17727 (1958). [↑](#footnote-ref-73)
73. 73 104 CONG. REC. 17735 (1958). [↑](#footnote-ref-74)
74. 74 104 CONG. REC. 17731 (1958). In a California court the federal government has asserted its ownership of the right to use all unappropriated water within California. City of Fresno v. State Wateer Rights Bd., Fresno County Superior Court No. 105,245. See Harold W. Kennedy, *Federal Claims against California's Unappropriated Water*, as reported by the County Counsel of Los Angeles County, May 5, 1960 (mimeo). [↑](#footnote-ref-75)
75. 75 S. 1887 died with the 85th Congress for lack of action by the House. It reappeared in the 86th Congress as S. 44 and H.R. 7175. [↑](#footnote-ref-76)
76. 76 105 CONG. REC. 7668 (1959). [↑](#footnote-ref-77)
77. 77*Id.* at 7989. Senator Kuchel conceded on the floor of the Senate: "I telephoned persons who represent public agencies in California, trying to ascertain if there were a way in which we could do what it sometimes seemed to me, from statements in the *Record*, the Senator from Oregon wanted to do, and yet, at the same time, to avoid what the Senator from Illinois frankly says he desires to do.

    "Here is an instance in which persons who are skilled lawyers in my State, and who represent public agencies, believe that the Senator from Illinois, in the position he takes, would have some vigorous supporters if the legislation got into the court, in contending that judicial adoption of the Douglas-Morse amendment would mean that the Federal reclamation law would cover all the waters coming out of the dam which is provided for by the bill." *Id.* at 7870. [↑](#footnote-ref-78)
78. 78 *Id.* at 7672. Although California's Senators were patently opening the door to escape from acreage limitation, neither was willing to accept characterization as an opponent of that law. Senator Engle said, "I support the 160-acre limitation." *Id.* at 7854. Senator Kuchel responded to a colloquy between Senators Lausche and Douglas: "The case should not be stated that way. . . . The question is as simple as this . . . we believe that the State of California, through its Governor and its legislature, ought to determine what the restrictions for use of water through a state system should be. It is exactly that simple. It is that easy to state." *Id.* at 7671. [↑](#footnote-ref-79)
79. 79 *Id.* at 7496, 7666, 7668, 7673. [↑](#footnote-ref-80)
80. 80 *Id.* at 7987, 7988 (Stanley W. Kronick to Senator Thomas Kuchel, May 9, 1959). [↑](#footnote-ref-81)
81. 81 *Id.* at 7673. [↑](#footnote-ref-82)
82. 82 *Id.* at 7496. See also 7857, 7858, 7994. [↑](#footnote-ref-83)
83. 83 *Id.* at 7993, 7989. [↑](#footnote-ref-84)
84. 84 *Id.* at 7994. [↑](#footnote-ref-85)
85. 85 § 2, p. 4, col. 1. After the Senate had eliminated section 6(a) it reappeared in the House San Luis bill as section 7 of H.R. 7155. The Feather River Project Association would accept nothing less than specific exemption; even when the Senate had eliminated exemption before approving the San Luis Project, the Association resolved that, failing to obtain congressional exemption, the state should construct the San Luis Project itself, allowing federal government to use the joint facilities. 4 Feather River Project Association Newsletter, No. 2, Feb. 29, 1960. [↑](#footnote-ref-86)
86. 86 See text accompanying note 70 *supra*. Faced with diverse California views in 1956 and 1958, Senator Clinton Anderson, Chairman of the Irrigation and Reclamation Subcommittee, had been unwilling to proceed toward authorization of a federal project, even when requested by a Governor. *1958 Hearings on S. 1887, supra* note 55, at 172. [↑](#footnote-ref-87)
87. 87 105 CONG. REC. 7496, 7497 (1959). At the hearings, Warren Butler, Vice Chairman of the Board of Directors of the Metropolitan Water District of Southern California had testified: "Let me say parenthetically, gentlemen, that our concern south of the Tehatchapie does not involve this 160-acre limitation as it does north of the Tehatchapie." *1959 Hearings on S. 44, supra* note 53, at 71, in 105 CONG. REC. 7987 (1959) (inserted by Senator Kuchel). The possibility that state project water might be delivered in Orange County to the 93,000 acre Irvine Ranch is not to be excluded. An engineering report of May 1961 was concerned with a "specific program" to transport Metropolitan Water District water to the Irvine Water District. It spoke of water from the Colorado River, but the Director of the State Division of Water Resources had said in 1959 that the insufficiency of Colorado River water for "satisfaction of Orange County's ever increasing water requirements" would necessitate "the early importation of water from northern California." The referee of the United States Supreme Court has recommended reduction of California's entitlement to Colorado River water, reducing the prospect of water for the Irvine Ranch area from that source; the Metropolitan Water District has contracted for northern California water for delivery in southern California, raising the already strong prospect that state project water will reach Orange County. STATE OP CALIFORNIA DEPARTMENT OF WATER RESOURCES, BULL. NO. 70, ORANGE COUNTY LAND AND WATER USE SURVEY, 1957; Santa Ana Div., Calif. Div. Water Resources, Boyle Engineering Report Upon Water Transportation Facilities Required for Supplemental Colorado River Water Supply to Irvine Ranch Water District, May 1961; *cf.* "Hot Words Over Irvine Ranch Plans," San Francisco Chronicle, Oct. 14, 1961, p. 2, col. 1. [↑](#footnote-ref-88)
88. 88 105 CONG. REC. 7673 (1959). [↑](#footnote-ref-89)
89. 89 Private power interests have a large stake in defeat of reclamation law and in curbing the Bureau of Reclamation, because reclamation law and projects carry antimonopoly power, as well as acreage limitation, provisions. See text accompanying note 68 *supra*. [↑](#footnote-ref-90)
90. 90 105 CONG. REC. 7871 (1959). [↑](#footnote-ref-91)
91. 91 Supplementary statement of Congressman Harlan Hagen, in *1959 Hearings on S. 44, supra* note 53, at 28, 29. [↑](#footnote-ref-92)
92. 92 George L. Henderson testified for ***Kern*** County Land Company. *Hearings on H.R. 4885 Before a Subcommittee of the Senate Committee on Commerce*, 78th Cong., 2d Sess., 317 (1944). J. P. Van Loben Sels testified before the California Assembly Committee on Water on Nov. 5, 1959, for the Southern Pacific which, with its subsidiary land company, owned about 150,000 acres, "mainly located in the southern San Joaquin Valley." [↑](#footnote-ref-93)
93. 93 105 CONG. REC. 7670 (1959). [↑](#footnote-ref-94)
94. 94 See Taylor, *Excess Land Law: Pressure vs. Principle*, 47 CALIF. L. REV. 499, 502-512 (1959). [↑](#footnote-ref-95)
95. 95 H.R. REP. No. 399, 86th Cong., 1st Sess. 11, 15, 16 (1959). [↑](#footnote-ref-96)
96. 96 *Id.* at 13, 14. The Committee drew support also from a telegram from Governor Brown stating similar views that Senator Engle had placed in the *Record* during Senate debate. 105 CONG. REC. 7857 (1959); 106 CONG. 10461 (1960). [↑](#footnote-ref-97)
97. 97 H.R. REP. NO. 399, *supra* note 95, at 11. The report cited "concurrence in this view of the law" by Secretary of the Interior Fred A. Seaton. However, Secretary Seaton left to Secretary Udall the final decision whether or not to act on this view of the law on Kings and ***Kern*** rivers, and at San Luis. [↑](#footnote-ref-98)
98. 98 *Id.* at 15, 16. [↑](#footnote-ref-99)
99. 99 106 CONG. REC. 10560, 10563, 10564 (1960). Three votes were taken on the Ullman amendment to eliminate section 7. The first showed 81 ayes, 84 noes. The second showed 139 ayes, 122 noes. The third roll call vote showed 215 ayes, 179 noes, 38 not voting. The Committee Chairman, Congressman Wayne Aspinall, voted "present." [↑](#footnote-ref-100)
100. 100 *E.g.*, by Congressman Aspinall, *id.* at 10450, Hosmer, *id.* at 10458, Hagen, *id.* at 10463, 10560, Lipscomb, *id.* at 10470, Moss, *id.* at 10471, Sisk, *id.* at 10560. Of these, Hosmer, Hagen and Lipscomb voted to retain section 7; Moss and Sisk voted to eliminate it; Aspinall voted "present." Congressman Saylor of Pennsylvania, had introduced a motion in committee to apply acreage limitation to the state service that failed, but he voted against elimination of the exemption. *Id.* at 10464. [↑](#footnote-ref-101)
101. 101 "We understand that recommendations are being made that the contract for joint utilization of the San Luis Dam and Reservoir be modified to require acreage limitations in areas to be served by the State of California. As you know, Congress rejected this provision at the time the joint partnership venture was authorized as part of the Central Valley Project." Letter from R. L. Minckler, Chairman, Statewide Water Resources Committee, California State Chamber of Commerce, to Secretary Stewart L. Udall, Sept. 12, 1961. [↑](#footnote-ref-102)
102. 102 105 CONG. REC. 7673 (1959). [↑](#footnote-ref-103)
103. 103 105 CONG. REC. 7861 (1959). [↑](#footnote-ref-104)
104. 104 CAL. STAT. 1933, ch. 1042. In 1933 the conspicuous antimonopoly policy, issue was public power generation with preference for public distribution; acreage limitation was inconspicuously included by adoption of federal law by reference in the state statute. Referendum measures to be submitted to the electors of the State of California at special election to be held Tuesday, December 19, 1933, as compiled by Fred B. Wood, Legislative Counsel, and distributed by Frank C. Jordon, Secretary of State, Sacramento, 1933. In recent debate over the Feather River and San Luis projects the balance in public concern has been the reverse--over acreage limitation more than public power preference. [↑](#footnote-ref-105)
105. 105 Statement of Edmund G. Brown, Attorney General of the State of California, in *1951 Report of the House Special Subcommittee on Irrigation and Reclamation* 110 (Sacramento). [↑](#footnote-ref-106)
106. 106 *California Elections on Reclamation Contracts* (April 1952), on file in Sacramento Regional Office, Bureau of Reclamation. [↑](#footnote-ref-107)
107. 107 Sacramento Bee, June 22, 1957, p. D-6, col. 1. [↑](#footnote-ref-108)
108. 108 In 1951 Attorney General Edmund G. Brown estimated the advantage along Friant-***Kern*** canal to be the difference between $ 3.50 and $ 8.75, or $ 5.25 per acre-foot. *Report of the House Special Subcommittee on Irrigation and Reclamation* 113 (Sacramento). "[U]nits are anxious to get permanent contracts because it has been estimated they will pay only a little more than half as much for [water under] their permanent agreements [as under interim agreements under reclamation law]." Fresno Bee, Sept. 27, 1961, p. 1, cols. 1, 2. [↑](#footnote-ref-109)
109. 109 Governor Brown said: "Some of the principles are sound, but they don't belong in bond legislation designed to provide financing, not to settle every water *argument* in the state." See Taylor, *Excess Land Law: Pressure vs. Principle*, 47 CALIF. L. REV. 499, 516 (1960). In a similar vein State Senator Richard Richards, participating in debate on acreage limitation and public power preference at the February 1960 Fresno convention of the California Democratic Council, referred to these as "glib policy issues." In December, immediately after the water bond election, he wrote: "We cannot afford any more wrangling on policy. . . ." Western Water News, Dec. 1960, p. 3, col. 4. [↑](#footnote-ref-110)
110. 110 "Highly dubious advice has gone to Governor Brown from the Director of Water Resources, Harvey O. Banks, in his recommendation that the 1960 Legislature should not be opened to discussion of and action upon water problems. . . . Banks' recommendation to the Governor happens to be in line with Brown's own preference. . . . Labor leaders have been insisting that before organized labor votes for water bonds the Federal 160-acre limitation must be imposed to prevent 'unjust enrichment' of big landholders in the San Joaquin Valley. The California State Chamber of Commerce just last week went on record opposing the 160-acre limitation. . . . The Governor should swallow his dislike of a brawl in a presidential year and call upon the legislature to go once again into the thick of the California water controversy." Editorial, San Francisco Chronicle, Dec. 8, 1959, p. 20, col. 1. [↑](#footnote-ref-111)
111. 111 Addressing the Feather River Project Association, he said: "I want to do everything I can to prevent such unjust enrichment, but I quite frankly am not at all sure that I know what the best method is. Simple acreage limitation doesn't really meet this problem head-on. As one of the acreage limitation's longtime defenders in litigation I know it has its faults as well as its virtues. In order to discover whether there isn't some much better approach, I want to announce to you here today that I am setting up a task force among the experts in State government to study this problem and come up with a recommendation as soon as possible. Ralph Brody, my special water counsel, is already working on a plan of attack." (Undated, apparently during second half of 1959.) The Governor spoke also of power preference policy: "My position in favor of power purchase preference for public agencies is well known. How and where it should apply in this project, however, is a matter requiring further detailed study." [↑](#footnote-ref-112)
112. 112 "I firmly believe that we have the responsibility to see that no one receives a disproportionate or lion's share of the benefits from a publicly-financed project. In addition, I think that the development of small farms should be encouraged. I believe we can attain those just and fair ends without trying to obligate or coerce anyone to sell or divide his land in order to get water. We are therefore establishing a fair price differential to take care of this situation. On land in excess of 160 acres, the price to be charged shall be the cost of delivering the water, including the market value of the power used to pump it to this land. For all others -- which shall include the overwhelming majority of customers in both the cities and farm areas -- the price shall be cost of delivering the water, including only the actual cost of the power to pump it rather than the market value of that power, less the amount of the benefit from any sale of power outside the project." Address by Governor Edmund G. Brown, California Water Program Bond Issue, NBC TV and Radio Network Broadcast, Jan. 20, 1960. [↑](#footnote-ref-113)
113. 113 *Hearings on H.R. 104, 384, and 3817 Before Subcommittee on Irrigation and Reclamation of House Committee on Interior and Insular Affairs*, 84th Cong., 1st Sess. 70 (1955). See also Taylor, *Excess Land Law: Legislative Erosion of Public Policy*, 30 ROCKY MT. L. REV. 1, 21 (1958). [↑](#footnote-ref-114)
114. 114 Apparently to reduce to very small dimensions any prospect that an administrator might ever find excess lands receiving project water to which to apply the surcharge, the contract creates a presumption that most or all non-project waters, not subject to acreage limitation, go presently to excess lands. Contract between the State of California Department of Water Resources and the Metropolitan Water District of Southern California for a water supply, executed Nov. 4, 1960, p. 30. [↑](#footnote-ref-115)
115. 115 Main Report, *supra* note 2, app. 34. AB 1829, introduced to authorize the differential price system based on size of landholding, died in the 1961 session. [↑](#footnote-ref-116)
116. 116 AB 1326, AB 2019, AB 2224. AB 1326 approximated federal acreage limitation law. Power preference bills also died in committee. [↑](#footnote-ref-117)
117. 117 4 Feather River Project Association Newsletter, May 31, 1960, p. 3. (Emphasis in original.) [↑](#footnote-ref-118)
118. 118 *Ibid.* (Emphasis in original.) [↑](#footnote-ref-119)
119. 119 105 CONG. REC. 7495, 8000, 8001 (1959). Referring to her defeat in the race for U. S. Senator against Richard M. Nixon, Senator Douglas said: "There are heroic public figures such as Helen Gahagan Douglas, who went down to political defeat in 1950 in part because she stood for this [160-acre] principle." *Id.* at 8000. Referring to Governor Edmund G. Brown, of California, he said: "Pat Brown, as attorney general, made a great fight to uphold the 160-acre limitation. I could not believe that as Governor he would do something contrary to his policy as attorney general. I hope the Democratic Party of California does not come out in defense of the large landowners." *Id.* at 7673. [↑](#footnote-ref-120)
120. 120 U.S.D.I. Information Service release, Jan. 19, 1960, 1, 2; see 74 Stat. 156 (1960). [↑](#footnote-ref-121)
121. 121 The most notable of the opinions supporting him were by: Chief Counsel Will R. King in 1914, Instructions, 43 Land Decisions 339 (1914); Associate Solicitor Felix S. Cohen in 1947, Memorandum to Commissioner, Bureau of Reclamation, No. M-35004, Oct. 22, 1947; and Solicitor Elmer F. Bennett in 1957, Memorandum to Commissioner, Bureau of Reclamation, No. M-36457, July 10, 1957; Memorandum from the Solicitor to the Secretary, undated, attached to letter, Secretary Seaton to Senator Paul H. Douglas, Oct. 21, 1957; see *Hearings on S. 1425, S. 2541, and S. 3448, Before Subcommittee on Irrigation and Reclamation of Senate Committee on Interior and Insular Affairs*, 85th Cong., 2d Sess., 21, 22 (1958). [Hereinafter cited as *1958 Hearings on S. 1425*.] [↑](#footnote-ref-122)
122. 122 *1958 Hearings on S. 1425, supra* note 121, at 20-25. [↑](#footnote-ref-123)
123. 123 105 CONG. REC. 7686 (1959). [↑](#footnote-ref-124)
124. 124 *Id.* at 7688. He said he was opposed to letting "big landowners buy their way out from under the 160-acre laws" to get "priceless water for any amount of land by an elaborate legalistic rationalization." *Id.* at 7689. Congressmen, spokesmen for organized labor and other groups, and individuals, also have protested the King-Cohen-Bennett doctrine of accepting money in satisfaction of policy. [↑](#footnote-ref-125)
125. 125 Taylor, *Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 481 (1955), Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 292 (1958); see Taylor, *Excess Land Law: Pressure vs. Principle*, 47 CALIF. L. REV. 499, 517-528, 535-540 (1959). The analysis is not repeated here. [↑](#footnote-ref-126)
126. 126 Taylor, *Excess Land Law: Pressure vs. Principle*, 47 CAL. L. REV. 499, 526 (1959). He permitted individual excess landowners on some old projects to bring "themselves into compliance with the acreage limitation provisions" by making full payment and Secretary McKay extended a similar offer broadly. Secretary Seaton condemned this, however, saying, "I cannot justify an aggravation of a prior practice in an effort to remedy an absence of legal authority. What I am concerned with is a whittling away at a principle until all that is left is a pile of shavings." Letter from Secretary Seaton to Philip A. Gordon, July 12, 1957. But he approved acceptance if payment was made by districts. See also Taylor, *Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 480 (1955). [↑](#footnote-ref-127)
127. 127 H.R. 7195, 81st Cong.; H.R. 413, 82nd Cong. Neither bill passed. [↑](#footnote-ref-128)
128. 128 See text accompanying notes 85-89, *supra*. [↑](#footnote-ref-129)
129. 129 Main Report, *supra* note 2, at 29. [↑](#footnote-ref-130)
130. 130 Senator Morse told the Senate: "I do not believe that this [state project] entity is any different from an irrigation district -- which is a state agency, with governmental powers." 105 CONG. REC. 7992 (1959). [↑](#footnote-ref-131)
131. 131 H.R. Rep. 399, 86th Cong., 2d Sess., 14 (1960); Main Report, *supra* note 2, at 29. See also text accompanying note 95, *supra*. [↑](#footnote-ref-132)
132. 132 United States v. Finnett, 185 U.S. 236, 244 (1902); *1958 Hearings on S. 1425, supra* note 121, at 24. [↑](#footnote-ref-133)
133. 133 *1958 Hearings on S. 1425, supra* note 121, at 23, 24. The present writer has concluded elsewhere that "administrative practice" accepting the King-Cohen-Bennett doctrine is clearly wrong. Taylor, *Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477, 512-514 (1955); Taylor, *Excess Land Law: Pressure vs. Principle*, 47 CALIF. L. REV. 499, 517-528 (1959). [↑](#footnote-ref-134)
134. 134 Main Report, *supra* note 2, at 29. This appears in accord with the views of the President of the Feather River Project Association, who testified as a member of the ***Kern*** County Farm Bureau and Water Commission before Congress in 1958 in favor of the ***Kern*** County concept. See text accompanying note 117 *supra; 1958 Hearings on S. 1887, supra* note 33, at 100. Apparently the *Main Report* did not misunderstand the attitude of the state administration; Governor Brown urged President Eisenhower to sign the San Luis bill in a telegram stating: "Immediately upon your signing of the bill, State representatives and the local office of the Department of Interior will commence negotiation of a contract which should lay to rest any fears arising as a result of amendments to the bill made immediately prior to its passage." Press release, Governor Edmund G. Brown, May 27, 1960. [↑](#footnote-ref-135)
135. 135 105 CONG. REC. 7490 (1959). For Senator Kuchel's, similar argument founded on difference in lands to be served, see *1959 Hearings on S. 44, supra* note 53, at 23, 25; 105 CONG. REC. 7484 (1959). [↑](#footnote-ref-136)
136. 136 "The project was designed to benefit people, not land." Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 297 (1958). [↑](#footnote-ref-137)
137. 137 105 CONG. REC. 7490 (1959). [↑](#footnote-ref-138)
138. 138 *Ibid.* Senator Engle responded by pointing out that San Luis proposed "a fine partnership" in which "The state government will pay every nickel of its share." *Ibid.* Senator Kuchel said, "The State of California is indebted for what the Congress of the United States has done with federal reclamation in the state. . . . Now, under the leadership of the incumbent Governor of California -- and, I may say, in the same fashion as under his two Republican predecessors -- the people of my state are about to embark on a $ 11 billion state water system. They are willing to bond themselves, and pay that money themselves, for a state system." 105 CONG. REC. 7672. [↑](#footnote-ref-139)
139. 139 *Id.* at 7855. [↑](#footnote-ref-140)
140. 140 Secretary of the Interior Harold L. Ickes commented on an earlier proposal that flood control and navigation were federal "responsibilities" on Central Valley Project, and that irrigation and power were state "functions": "The State Chamber's statement recommends restoration to the State of California of those Central Valley project facilities that are 'properly state functions,' which a footnote alleges to be irrigation and power. . . . It certainly is naive for the State Chamber to expect the federal government to hand over the state the two revenue-producing facilities -- irrigation and power -- while retaining responsibility for flood control, navigation, salinity control, and fish and wildlife development which the State Chamber says 'are not reimbursable costs and are, under any circumstances, gifts from the federal government.' " Letter from Harold L. Ickes to Frank Clarvoe, October 31, 1945. pp. 1-3. [↑](#footnote-ref-141)
141. 141 105 CONG. REC. 7485 (1959). Apparently more as a diversion of attention from this crucial fact than as a point of law, Senator Kuchel argued that joint construction would be "in the interests of the people of the United States and the people of California." *Ibid.* [↑](#footnote-ref-142)
142. 142 STATE OF CALIFORNIA, PUBLICATIONS OF STATE WATER RESOURCES BOARD, BULL. No. 3, REPORT ON THE CALIFORNIA WATER PLAN, VOLUME II, 9-239 (Prelim. Ed. 1956). [↑](#footnote-ref-143)
143. 143 *Id.* at 9-258. [↑](#footnote-ref-144)
144. 144 *Id.* at 9-240. [↑](#footnote-ref-145)
145. 145 Text accompanying note 57. [↑](#footnote-ref-146)
146. 146 Text accompanying note 60. [↑](#footnote-ref-147)
147. 147 Text accompanying note 149. [↑](#footnote-ref-148)
148. 148 105 CONG. REC. 7496 (1959). [↑](#footnote-ref-149)
149. 149 *Ibid.* Senator Douglas argued that "one cannot cut the dam in two any more than Solomon's child could be cut in two. . . . One cannot build a second story unless one has a first story." *Id.* at 7490. [↑](#footnote-ref-150)
150. 150 105 CONG. REC. 7672 (1959). [↑](#footnote-ref-151)
151. 151 *Id.* at 7671. Senator Douglas' characterization of the Feather River-San Luis development as a "joint system" left little ground under Senator Kuchel's suggestion that federal law might not apply north of San Luis Reservoir, even if section 6(a) were deleted. He did not press this point again. *Id.* at 7672, 7851. [↑](#footnote-ref-152)
152. 152 *Id.* at 7854. [↑](#footnote-ref-153)
153. 153 *1956 Hearings on S. 178, supra* note 19, at 44, 46. [↑](#footnote-ref-154)
154. 154 105 CONG. REC. 7486 (1959). [↑](#footnote-ref-155)
155. 155 *Id.* at 7484. [↑](#footnote-ref-156)
156. 156 *Id.* at 7497. [↑](#footnote-ref-157)
157. 157 *Id.* at 7492. [↑](#footnote-ref-158)
158. 158 *Id.* at 7495. [↑](#footnote-ref-159)
159. 159 *Id.* at 7992. [↑](#footnote-ref-160)
160. 160 Taylor, *Excess Land Law on the* ***Kern****?*, 46 CALIF. L. REV. 153, 183, 184 (1958); Taylor, *Excess Land Law: Pressure vs. Principle*, 47 CALIF. L. REV. 499, 528-37 (1959). The Secretary could virtually assure that, except by his own choice, no excess landowner on Kings River would be deprived of opportunity to obtain project water, by offering a single contract to the all-embracing Kings River Conservation District. [↑](#footnote-ref-161)
161. 161 74 Stat. 156, 157 (1960). [↑](#footnote-ref-162)
162. 162 Letter from Vernon Campbell to Joseph Jensen, President, Metropolitan Water District, July 26, 1961, p. 3. "To try to rob the people of Northern California of the water they must have for their own area development eventually will result in endless litigation more bitter and futile than that between California and Arizona. . . . California State Project water will be very expensive, not only because the project works will be costly but also because interest charges will at least double the cost of construction, making the water too expensive for agricultural use and very high in cost for domestic and industrial use. California must have more water than the state produces. The Columbia River has the water. California should lead the way in the promotion of the Columbia River Project and should without delay contact the other Colorado River States and secure their cooperation in presenting the proposal to the Congress." *Ibid.* See also BALLIS, CALIFORNIA WATER PLAN: AN EVALUATION 6 (1960), on file in Public Affairs Institute, Washington, D. C. [↑](#footnote-ref-163)
163. 163 Text accompanying note 50. [↑](#footnote-ref-164)