ORIGINAL

In the

Supreme Court of the United States

JOHN M. BRYANT, ET AL., PETITIONERS,	)	
CALIFORNIA, ET AL., PETITIONER,	)	
IMPERIAL IRRIGATION DISTRICT, ET AL., PETITIONERS,	)	No. 79-421 No. 79-425 No. 79-435
V.	)	
BEN YELLEN, ET AL., RESPONDENT.	)	

Washington, D. C.
March 25, 1980

Pages 1 thru 69

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Petitioners, :
v. : No. 79-421
BEN YELLEN, ET AL., :
Respondents. :

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Respondent. :

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Washington, D. C.,

Tuesday, March 25, 1980.

The above-entitled matters came on for oral argument at 10:10 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NORTHCUTT ELY, ESQ., Watergate 600 Building, Washington, D. C. 20037; on behalf of the Petitioners

CHARLES W. BENDER, ESQ., O'Melveny & Myers, 611 West Sixth Street, Los Angeles, California 90017; on behalf of the Petitioners

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Respondents

ARTHUR BRUNWASSER, ESQ., 240 Stockton Street, San Francisco, California 94108; on behalf of the Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first this morning in three consolidated cases, Bryant v. Yellen, California v. Yellen, and Imperial Irrigation District v. Yellen.

Mr. Ely, you may proceed whenever you are ready.

ORAL ARGUMENT OF NORTHCUTT ELY, ESQ.,

ON BEHALF OF PETITIONERS

MR. ELY: Mr. Chief Justice, and may it please the Court:

I believe that a map has been distributed.

MR. CHIEF JUSTICE BURGER: It is being distributed now, Mr. Ely.

MR. ELY: The primary question before the Court, Mr. Chief Justice and may it please the Court, is whether the Boulder Canyon Project Act, this Court's opinion in Arizona v. California, and its two decrees in that case require the Secretary of the Interior to deliver water in satisfaction of present perfected rights in excess of 160 acres per owner.

If time permits, I would refer also to two other issues in the case, namely the finality that we feel attaches to the conduct of the Department of the Interior and the other judicial approaches to this matter over a period of some thirty-odd years and finally briefly the

standing of the respondents here. We have briefed all three issues, I may say.

The area involved in the Imperial Valley, the Court may recall, is below sea-level, it was irrigated starting in 1901 by a canal that took off in the United States and followed an ancient river channel through Mexico, the Alama --it is shown in yellow on this map -- and back into the United States. This was done without federal assistance. It continued, the area continued to be irrigated in that fashion for some forty years.

The area under irrigation grew gradually from about 100,000 to the precise figure of 424,145 acres as of the effective date of the Boulder Canyon Project which was June 25, 1929. This Court's decree of last January 1979 so determined. It adjudicated that the present perfected rights, that is rights to water for a specific area of land, 424,145 acres, had been established under state law by valid appropriations with the priority of 1901 and that the quantity diverted and used in the effective date of the project, 1929, was 2,600,000 acre-feet.

QUESTION: Where was that determination?

MR. ELY: That is in this Court's decree of January 1979, in Arizona v. California.

QUESTION: That is a supplemental decree that

got around to specifying the perfected rights?

MR. ELY: That is correct, Mr. Justice White. It determined the present perfected rights of some 17 defined tracks of land in Arizona and 59 in California.

Of the area in the Imperial Irrigation District, it is stipulated that 233,000 acres are in holdings in excess of 160 acres. There are 800 such holdings in the district. This came about because prior to the time when the Boulder County Project Act was enacted, the economy of the valley had established that pattern. Lands had originally been acquired under the Desert Land Act in tracts of 320 acres, not 160 acres, and over the years have been consolidated as the laws of California and indeed the United States permitted, with the result that as of 1929 and now the economy of the valley is reflected in holdings larger than 160 acres.

QUESTION: Mr. Ely, to whom did the perfected right run? That is relevant to this case.

MR. ELY: Yes. The 1979 decree decreed these rights to Imperial Irrigation District. I should add that under the laws of California, the district is a trustee for the landowners who are the equitable owners of the water rights. The district cannot sell them, it cannot mortgage them under California law. It is a trustee.

QUESTION: What standing does state law have under the reclamation laws?

MR. ELY: The Bounder Canyon Project Act -- this Court's 1964 decree, I should say, defined present perfected rights as rights acquired under state law and perfected by the application of a specific quantity of water to a defined area of land by the effective date of the project act. The Court in its definition adopted the state law as the key to the magnitude and priority of the present perfected right.

The problem here arises from primarily section 6 of the Boulder Canyon Project Act read in connection with section 14. Section 6 directed the Secretary of the Interior to so operate Hoover Dam and Lake Mead as to satisfy three functions: First flood control, navigational flood control; second, irrigation and domestic uses; and the satisfaction of present perfected rights pursuant to Article 8 of the Colorado River Compact.

Article 8 of the Colorado River Compact declared that present perfected rights are unimpaired by this compact. It did not define the term but the legislative history makes -- as reported to Congress during the Project Act debates, make it very clear that the present perfected rights being talked about are the very ones involved here. Imperial Irrigation District

representatives appeared before Mr. Hoover and the Commissioners and granted protection if there was going to be an interstate allocation of water.

Article 8 refers to the very lands involved here. The rights were perfected by the application of water to these same lands, the 233,000 acres of excess lands. This was well known to Congress and during the course of the debates on the Boulder Canyon Project Act, you may recall, there were Swing-Johnson bills, the question arose as to whether the land limitations of the reclamation law of 160 acres per owner should apply to these lands, and the decision was plainly that they should not.

There were no less than five efforts made in the two Houses to add a specific section to the Project Act which would have extended the 160-acre limitation to these lands, and each of these failed. A House committee included such language in one bill, the Senate when it passed its bill omitted it. Three times in the Senate Senators Phipps, Hayden, an Ashurst offered amendments to do this. Each of these was abandoned because it had no support. The law as enacted does not contain any specific acreage limitation on the present perfected rights.

It does contain in section 14 a direction that

this act shall be deemed a supplement to the reclamation law which will govern the construction, operation and maintenance of the project, except as otherwise provided in this act, and the question is whether this cross-reference to the reclamation law somehow overrode section 16's mandate to satisfy present perfected rights.

Now the consequence if it did is that the Secretary cannot deliver water to some 233,000 acres that this Court has adjudicated to be within the 424,000 adjoined present perfected rights.

QUESTION: Well, they could deliver it if the land was in 160 — all held by persons owning no more than 160 acres.

MR. ELY: If the equitable owner of the water right is compelled to sell, the effect, according to our opponents' brief it this: The land carries with it no present perfected right. It must be sold at desert land prices, $25 to $50 per acre and it will revert to desert.

Now, you may or may not agree with that consequence of the statute, but that is what our opponents say and that is the basis upon which the Ninth Circuit decided the case.

QUESTION: And under that approach it is a truism to say that the landowner could sell no water.

MR. ELY: That is correct. He is stripped of it and if there can be a greater impairment than reduction of the water right to zero, it is hard to imagine it. It is alleged and the argument is made that the land is worth $1,200 to $1,400 per acre irrigated. It has been irrigated for fifty years now or more but would have to be stripped of its water right if sold at desert land prices.

QUESTION: Mr. Ely, are you going to address the question of standing or is your colleague?

MR. ELY: Yes, I will touch on that no doubt, and Mr. Bender will, too. Would you like for me to turn to that?

QUESTION: It is your --

MR. ELY: Judge Turrentine in the District Court decided against the United States. This was an action brought by the government to require an injunction against the Imperial Irrigation District to require it to cease deliveries of water in excess of 160 acres. After a trial, Judge Turrentine decided against the United States in a well considered opinion in which he said it was repugnant to the mandate that water be delivered in satisfaction of present perfected rights to say that water should be withheld from 233,000 acres enjoying such rights.

The United States did not appeal. Solicitor General Griswold in a memorandum for his files, which has just been made public, just been made available to us last February 20 by publication in the Congressional Record and which is annexed to our reply brief in full, gave his reasons for not doing so.

QUESTION: What was the folcrum by which that letter was published in the Congressional Record?

MR. ELY: It was placed in the Congressional Record by Senator Nelson and I don't know the circumstances under which he came in possession of it.

In any event, he referred (Mr. Griswold) to the fact that this question had been considered and decided by Secretary Wilbur of the Department of the Interior in 1933 and he had decided that under the reclamation law the standing practice of the law dating at least from 1910 and the legislative history of the Boulder Canyon Project Act, the excess land laws were not intended to apply here.

The Secretary -- I am digressing slightly from the standing issue but not much, Mr. Chief Justice, Secretary Ickes followed him and came to the same conclusion. There was pending a confirmation proceeding in the state court, as required by the federal law, 43 U.S.C. 511, and as requested by the contract, to

determine the validity of this contract, at coming to trial on March 9, Secretary Wilbur went out of office on March 4.

In February, in response to inquiries from the district as to whether he would inform the court of what his decision had been, he wrote a letter which was submitted to the court which said that early in the negotiations it had been -- the determination had been reached that I just described. This had been some 13 months earlier that this conclusion had been reached.

Mr. Griswold refers to all of this in his memorandum and to the fact that five succeeding secretaries adhere to this ruling as a good reason why it is not in the interest of good government for the United States to appeal.

QUESTION: Mr. Ely, do you regard this interpretation of the Secretary as the kind of interpretation described by Justice Jackson's opinion in Skidmore v. Swift Company, where the Secretary is not authorized specifically to make rules but is the one charged with administering the statute and follows an administrative practice?

MR. ELY: Well, I would think so, Mr. Justice Rehnquist. We have relied on the Norwegian fertilizer case which refers to the responsibility of the

administrative officer who is charged with the responsibility of putting a statute in motion and this is exactly what happened.

After the United States had decided not to appeal, a group headed by a Dr. Yellen, 123 individuals, acting in their own name and not as a class action, moved for leave to intervene to appeal. Judge Turrentine denied that motion. It was reversed by the Ninth Circuit. The appeal was entertained. The United States did not participate. And the Ninth Circuit decided this case against the district, against the landowners, holding that the present perfected rights were not a bar to the application of the 160-acre rule.

I may say that this case had been started in 1967 after this Court's opinion and first decree in Arizona v. California had come down. The Ninth Circuit didn't regard this as conclusive at all. It was relying primarily on an opinion of a Solicitor named Frank Barry issued in 1964. After the Court's opinion and decree had come down, and it never mentions either one of them, it held that all the Secretaries before Secretary Udall had been wrong -- these were Wilbur originally, followed -- the other secretaries didn't undertake to determine the merits but simply regarded this matter as settled -- these were Krug, Chapman, Seaton, and so on, and now we

know from Solicitor General Griswold's memorandum that Secretary Morton also agreed, so altogether there are seven secretaries in five presidential administrations who followed this rule that the economy existing in 1929 was not meant to be dismantled and destroyed by a statute that directed that these same protected rights be served and not taken.

QUESTION: When Hellen and his group sought to intervene, did they make a commitment to buy or tender any money that obligated them in any way to buy?

MR. ELY: No, Mr. Chief Justice.

QUESTION: They just said --

MR. ELY: They said that they couldn't buy at $1,400 an acre, they expected to be able to buy at the lower price that the Secretary would set. They said the value of the land of this desert is $25 to $50 an acre which means a windfall of perhaps $200,000 per 160-acre tract to the buyer. I must say that he can resell at once under the law. There is no limitation on him. He can resell at full market price, not the desert land price.

QUESTION: Well, would not the owner confronted with that situation be also free to sell to anyone of his own choice over --

MR. ELY: The former owner?

QUESTION: Well, the ones who had more than the 160 --

MR. ELY: He would be limited altogether to 160 acres.

QUESTION: Yes, but could he sell the excess to anyone he wanted but not to Yellen?

MR. ELY: Yes, he could, at desert land prices. There is no assurance at all that Dr. Yellen would be the lucky buyer. If the honey pot is this big and this good, I suppose there would be hundreds of thousands of bidders literally from all over the country.

QUESTION: Doesn't that have something to do with his standing to intervene in this case?

MR. ELY: Well, we think so, Mr. Chief Justice. The irony is intensified by the fact that the very same group have brought a suit in District Court to enforce the residency requirements of the reclamation law, and that had been decided in their favor and was appealed by the United States and that case was decided by the Ninth Circuit in the same opinion that decided this, held that the same group did not have standing to enforce a residency requirement because there is no assurance that they would be the lucky buyers, but turned right around and held that they did have standing in this matter.

Now, there is one added item on standing, Mr.

Chief Justice. The statute under which this action is brought, which is section 46 of the 1926 Omnibus Adjustment Act, provides that the Secretary's authority to fix the price on resale, that is on sale of the excess lands by the original owner, shall expire when half of the debt to the United States has been paid. Now, that happened while the case was on appeal. The Imperial Irrigation District succeeded in repaying more than one-half of the original debt to the government. So if the Yellen group ever had standing, it disappeared when the Secretary lost his authority to fix the price on the sale of the excess lands.

Now, this was brushed aside by the Ninth Circuit on rehearing, but we say they never had standing, if they did they lost it. And if the Yellen group didn't have standing to file an appeal from the judgment against the United States, that judgment remains res judicata against the United States in the District Court. The case should not have been in the Court of Appeals, it shouldn't be here. It hinges entirely on whether these private parites had competence to intervene, to overrule the decision of the Solicitor General that this case in the public interest should not be appealed.

If this is possible in this case, I don't know where to draw the line as to the right of power of an

individual to --

QUESTION: I suppose if we agreed with you on standing we would just vacate the judgment of the Ninth Circuit which would leave the District Court's judgment standing but a judgment that wouldn't bind anybody but -- it would bind the United States, but would it bind some other people who --

MR. ELY: Well, it would bind the United States but I think it would be very --

QUESTION: If somebody else could convince the court that he had standing to challenge this holding, why, I suppose the judgment wouldn't bind him.

MR. ELY: I suppose. We prefer that the Court would --

QUESTION: I suppose that somebody would look around for somebody like that since they would know what the attitude of the Ninth Circuit is.

MR. ELY: I think you are probably right. You are probably right. We would hope that the Court will decide in our favor on the merits. If it does not, then the course indicated by Mr. Justice White is the alternative, we feel.

QUESTION: Mr. Ely, one other question on standing. Did the government complaint ask for an order compelling any landowner to sell his property?

MR. ELY: No, Mr. Justice Stevens. It is conceded by the government that the Secretary cannot compel a landowner to sell.

QUESTION: So we have to assume that there will be voluntary sales at desert land prices in order to support standing?

MR. ELY: That is the assumption, yes, and this means that a man on the day before the Project Act took effect, June 24, 1929, who had a 480-acre farm would wake up two days later and discover that he had water rights for 160 acres. He hasn't had a water right at all for 320 acres for the last fifty years. Now, this in the face of determinations by seven successive Secretaries is to the contrary, it seems an extraordinary result.

QUESTION: Mr. Ely, do you concede that a different rule prevails in the other valley?

MR. ELY: Coachella, yes, sir. Coachella had never had any perfected rights, it had never diverted water from the Colorado River. It was like the two districts in Idaho who had no rights in the water at all and the United States was at liberty to condition its sale of water by --

QUESTION: They just came in and bought some water. They just came in and contracted for some water.

MR. ELY: Well, they --

QUESTION: They didn't come in and say we have rights to water, they just came in and bought some water.

MR. ELY: That's correct. The Court's opinion in Arizona v. California draws a bright line between two classes of water rights. Present perfected rights the United States never owned, had nothing to sell, and contracts rights acquired by contract with the United States, and these the Court held could be allocated by the Secretary. He could choose the taker, he could make an interstate allocation, he can make intrastate allocation, but not so as to present perfected rights.

In some ten references to the present perfected rights which we have collected in the appendix to our reply brief, the Court said the Secretary is fettered with respect to these, that they are one of the most important limitations in the act, are of vast importance to those who have water in their possession.

So the three points that I had hoped to --

QUESTION: Mr. Ely, again the United States isn't suggesting that the water -- if the irrigation district just refused to deliver water to anybody who owns more than 160 acres but then sales took place, the irrigation district would have the water to delivery to anybody who owns 160 acres?

MR. ELY: Yes. The contention is that if the

landowners decide not to sell for $25 or $50 an acre but to wait for a better day, that the district can redistribute that water to others. You can't, for two reasons, one the legal one I mentioned -- it is only a trustee, it can't redistribute water pertinent to the land -- and second, there is no place to put it. All of the irrigable land in Imperial Irrigation District, private land is now being irrigated.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Bender.

ORAL ARGUMENT OF CHARLES W. BENDER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BENDER: Mr. Chief Justice, and may it please the Court:

The central issue in this case, as Mr. Ely has made clear, is what Congress intended in 1928 when it passed the Boulder Canyon Project Act. There is somewhat of an unreal quality about that question because we know that its answer is one that in the true historical sense we can't define today.

No one today has the capacity to look back fifty years and say with certitude what Congress intended in 1928. The legislative history which has been itemized in the briefs seems to indicate almost overwhelmingly that there was no intention to impose a brief limitation. But

even with that evidence we can't be certain we are engaging in some reasoned conjecture when we as counsel assert what is clear and what is not clear.

But there is in this case a core of fact that we don't have to conjecture about, we don't have to speculate about and it is really the essence of this case and it is the human experience of what happened after 1928, beginning with Secretary Wilbur's ruling, the judicial proceedings in Hewes and the lives that the people in Imperial Valley built on that foundation.

That human experience is the essence of this case, not a bunch of postulating about what Congress may or may not have intended. That human experience is what should be controlling in this case, I suggest, not syllogisms about statutory syntax.

The fundamental practical fact of the matter is that the contemporaneous construction of this act which was begun in 1931 when the government negotiated the contract with the valley, is the bedrock upon which this valley's economy and legal order has been based for almost fifty years. That bedrock started when the contract was negotiated, it was perpetuated when the electors of the district approved the contract, it was solidified when Secretary Wilbur ruled that acreage limitation did not apply, it was farther solidified when the contract was

placed in judicial proceedings, the matter was put in issue, and it was adjudged that acreage limitation does not apply.

Now, those events aren't conjectural. Those are the bedrock events in this valley's life. And we are not dealing with a situation where we have an administrative construction that you can overrule prospectively with only minimal impact on people's lives.

QUESTION: Counsel, there is the general rule that if the administrative construction is totally wrong, the government is not estopped in the way an ordinary party is by a long -- even a fairly long history of wrong construction if the courts determine that it was just flatly wrong.

MR. BENDER: That's correct, Mr. Justice Rehnquist, but the premise of that rule, it seems to me, is that the court will uphold the status quo unless the matter is free from doubt, unless there can be no reasoned argument in support of the status quo.

QUESTION: So you say that in effect Secretary Wilbur's letter is a permissible construction of the statute even though perhaps not the only one?

MR. BENDER: That is right, and it is permissible because of the language of the statute, because of what transpired in Congress when Reclamation Commissioner Mead

said acreage limitation would not apply, because of what happened in Congress when Congressman Swing said acreage limitation would not apply. There is a whole host of grounds upon which one can base Secretary Wilbur's construction, including the governmental practice which was embodied in regulations at that time, dating back to 1906, respecting vested rights.

The administrative practice in this case has given rise to reliance that is widespread and not conjectural, and the reliance of private individuals in this case is awesome in its dimensions.

Since the 1930's virtually every transfer of land in this valley has assumed the validity of what Secretary Wilbur said and what the Hewes Court said. Virtually every family that has farms in the valley today has at one time or another committed the bulk of its resources to acquiring farmland at market prices, reflecting the land's assumed entitledment to a perpetual supply of water.

Farmers have made enormous investments in subsurface drainage tile, concrete-lined ditches, leveling their lands, purchasing equipment, all premised on what has to be one of the most fundamental expectations human beings can have in an agricultural community, the assumed security of the water rights appertinent to the land.

And you have literally hundreds of human arrangements that have been built on this bedrock, testamentary trusts, inter vivos trusts, mortgage financings, estate plannings, all of which would be unwound if today we denied the legitimacy of the status quo.

I would like to refer to one example to give you a feel for the concrete facts in this case, and that is the situation of petitioner Charles Nilson. He appeared at the trial and testified. Mr. Nilson was born in this valley. He lived on a 130-acre farm his father homesteaded in 1907. When he graduated from high school in the valley, he went into the service in World War II. He came out, he and his two brothers joined in partnership to begin farming.

Over the years they put together a 970-acre tract in which Mr. Nilson owns a one-third interest and that is his excess acreage. Throughout the 1940's and the fifties they acquired this tract in little bits and pieces. It was land which during the depression had gone out of production because it was salt poisoned, virtually worthless. They acquired it as best they could afford it at $10 and $15 an acreage prices.

It took them on an average five years per 160 acres to bring that land into production. They had to deep plow it to a depth of four feet. They had to do

that twice. They had to install tile drainage. That land today is what it is because of that man's life. Its value is because of what he put in it, not because of governmental beneficence, and that illustrates another fact in this case, and that is that those who would like to acquire Mr. Nilson's land at $25 an acre don't really have any fundamental equities in support of the opportunity they seek.

They haven't declamentally relied on the past. They haven't declamentally relied on an expectation that the past will be rewritten. They haven't relied on Mr. Nilson. They just want an opportunity.

So what is really at stake here is not an abstract proposition but a very practical realistic thing as to who is going to own this land, who is going to farm it, those that have reclaimed it and farmed it or someone new.

QUESTION: Is Mr. Nilson typical of the owners?

MR. BENDER: Yes, Your Honor. We brought before the court nine owners. Two have since deceased. The seven remaining live in the valley, farm in the valley, have lived there all of their lives, with two exceptions of gentlemen who came to the valley after college or after high school to establish their careers there.

QUESTION: Well, are the nine typical of the owners who would be benefited if you prevail here?

MR. BENDER: Yes, Your Honor, they represent a class and there are approximately, according to the record, a stipulated fact, 800 such ownerships. Now, the 800 ownerships are, of course, combined into a smaller number of farms, as in Mr. Nilson's situation, where you have really three ownerships which he and his brothers each own one-third interest so they have three ownerships but they run their farm together as Nilson Brothers Farm, farming their land and their father's 130 acres.

A final and I think most practical consideration in this case is the contemporaneous vantage point from which those who construed the act originally made their decisions. We can't recreate that vantage point today. We cannot duplicate their perspective of what contemporary policy was or what happened in the Swing-Johnson proceedings.

Now, these people weren't ignorant officials. Porter Dent, who wrote Secretary Wilbur's ruling, was the Chief Counsel of the Bureau of Reclamation, a career government attorney who had been Chief Counsel of the Bureau of Reclamation since 1924. His career as the bureau's chief officer spanned the last four years of the debates on the Swing-Johnson bills. He was the

foremost legal authority in his day on reclamation law. He directed the compilation of the textbook on reclamation law. His immediate was Dr. Elwood Mead. Dr. Mead was one of the founders of the project. He served on the All-American Canal Board in 1919 which first recommended this. He was the government's principal witness in the Swing-Johnson hearings and he was intimately familiar with acreage limitation policy.

QUESTION: Is Lake Mead named after him?

MR. BENDER: Yes, Your Honor. He served on the fact-finders board in 1924 which made the recommendations on acreage limitation policy that were ultimately embodied in section 46 of the 1926 act. He was the government's principal witness in the hearings preceding that enactment.

If anybody knew what acreage limitation policy was it was Dr. Elwood Mead. And clearly if Dr. Elwood Mead had thought that non-application of acreage limitation was an affront to national policy or reclamation law he would have said so in Congress, but he stood in Congress with Congressman Swing and said this act will not apply to acreage limitation. And clearly if he thought that what he was saying was an affront to national policy, he would hardly have arranged for the bureau's counsel to assist the district in defending against the

allegations made in the Hewes proceeding about the 160-acre limitation question.

When that question arose in litigation in 1933, Dr. Mead arranged for the government to send counsel to help on that issue. Clearly if anyone had thought, if there had been any serious thought by these men who knew what acreage limitation policy was, that the Wilbur ruling was wrong, these events couldn't have happened. And that is pure plain fact which we can't escape from today.

We can stand here today as latter day historians and speculate about what administrative practice was in the thirties or the twenties or about what Congress intended, but Mead and Dent didn't have to speculate, they took part in the events of the day. They knew what the events of the day were, and their interpretation as a real practical matter is far more likely to reflect the reality of what Congress intended in 1928 than any hypothesis constructed by counsel today, whether it is counsel for petitioners or respondents.

Now, in circumstances like these where there is every practical reason to respect the past, we come to the pragmatic test which Mr. Justice Rehnquist referred to. It is a test which this Court has always applied. It says that every reasonable doubt should be given to the status quo, if there is any basis and reason

for argument in support of the status quo it should be followed.

As this Court said in United States v. Midwest Oil, that is a wise and quieting rule. It is a necessary rule if government is to remain a practical affair intended for practical men, and I would submit that that same thought was what Solicitor General Griswold expressed in 1971 when he made his decision not to authorize an appeal of the case. As he said, the essence of this case is essentially a question of good administration of the government.

QUESTION: What was the occasion, do you know, for the reexamination of the question in the Department of the Interior in 1964?

MR. BENDER: The occasion arose in 1964 hearings, in April, from Associate Solicitor Weinberg and the Secretary were before Congress, a Senate committee on Irrigation, considering a plan which called for use of 1.3 million acre-feet of Colorado river water in Arizona and the bringing of water from the northwest into California to replace that, and Senator Kuchel asked what law would apply to that new water brought in from the northwest. Solicitor Weinberg said the Boulder Canyon Project Act. Senator Kuchel said would the acreage limitation apply, and Mr. Weinberg said I don't know.

Senator Anderson said, well, clearly it wouldn't, it hasn't applied in California. Mr. Weinberg said, well, it may have to be litigated, I don't know the answer to it.

Now, I would suggest to Your Honors that that is a very revealing incident. If this law were so clear that it couldn't be said -- if it was as clear as Solicitor Barry contended, if there were no reasonable arguments any place for the historic construction, I can't understand why Mr. Weinberg stood before Congress and said he didn't know the answer.

QUESTION: Well, I suppose that this Court has already twice heard opinions from the Solicitor General about this matter, hasn't it?

MR. BENDER: Yes, you heard about it in the footnote from Solicitor General Rankin's brief, you've heard about it from Solicitor General Griswold, and will hear about it from Solicitor General McCree. It is a matter about which at best there is dispute, doubt and debate. It isn't clear one way or the other. All that is clear --

QUESTION: Solicitor General Rankin thought it was clear, didn't he? Or did he?

MR. BENDER: I'm not sure he asserted it, Your Honor.

QUESTION: On one occasion he did, didn't he?

MR. BENDER: One occasion is all that I am aware of, Your Honor. I might be wrong though.

I will reserve the rest of my time for rebuttal remarks. Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. McCREE: Mr. Chief Justice, and may it please the Court:

The government views this case as essentially one of statutory construction requiring the Court to decide whether the Congress intended to exempt the Boulder Canyon Project from the excess acreage limitation that has been an important part of reclamation law since the enactment of the Reclamation Act of 1902.

Central to legislation to dispose of the public lands has been a commitment to attempt to establish an independent yeomanry of small family farms. This was first evidenced as early as 1862 in the Homestead Act which provided an acreage limitation of 160 for a single holding. But it soon became evident that this acreage limitation would not apply in the arid lands as the Plain States were occupied because 160 acres was too small a holding for grazing and the average homesteader lacked the capital resources to permit irrigation.

There was a short lived Desert Land Act of 1897, with an expanded maximum acreage allowance of 640 acres, but this was abused when speculators began to amass large tracts by what has been characterized by one writer as fraudulent evidence of water having been brought onto the land. Someone would bring a pail of water and spill it and that affidavit would follow and the land would be given to the speculator.

With this prelude and against the backdrop of the drought decade of 1886, the Reclamation Act of 1902 was enacted with a limitation of 160 acres as the maximum amount of private land in single ownership that is eligible to receive water from a reclamation project.

The Reclamation Act was amended and strengthened in a series of successive statutes that culminated in the Omnibus Adjustment Act of 1926, Section 46 of which provided in part that no water should be delivered upon the completion of a new project until a contract shall have been entered into between the Secretary of the Interior and an irrigation district providing for repayment of the project cost and providing for recordable contracts to be entered into by the holders of excess acreage, that is to say, acreage in excess of 160 acres for an appraisal of the excess by the Secretary and an agreement by the owner of the excess to dispose of this property under

terms fixed by the Secretary and at prices not to exceed the appraised value.

I think we would differ with my brother who has argued earlier and perhaps with the respondents who will follow us in this respect: We read section 46 to provide that the Secretary should not appraise it at the desert price, as was stated, but at a price that would not take cognizance of the improvement of the project, and in the case of the Imperial Valley where there was water previous to the Boulder Project, that that would be the value of the land, the land favored by that water, irrigated by that water which would be less, we submit, than the value of the land receiving the Boulder Dam water which was more regular, more dependable and not subject to the vagaries of our foreign affairs with our neighbor to the south.

QUESTION: And the water I take it that you say the land already had before the project is precisely the adjudicated protected right?

MR. McCREE: The adjudicated protected right, that's right, if the Court please.

QUESTION: And you say the value of that water would be attributed to the land that somebody would be required to sell?

MR. McCREE: That is our reading of this requirement --

QUESTION: And you say that --

MR. McCREE: -- which makes the windfall not as great.

QUESTION: Which also says that the landowner is entitled to the water.

MR. McCREE: Not exactly. It says the landowner can --

QUESTION: Well, he could sell it, he gets to sell it.

MR. McCREE: But the land will be appraised according to its value as irrigated by that water.

QUESTION: So the water follows the land and the owner gets the value of the water. He gets the value of the land as irrigated land.

MR. McCREE: As it was irrigated under the Alamo Canal Project.

QUESTION: Which is a presently perfected right that was adjudicated.

MR. McCREE: But the water that is received now is different from in many respects in the form and manner in which it is delivered from the water that was received earlier.

QUESTION: But the amount that you are talking about is the presently perfected right, that was adjudicated.

MR. McCREE: The presently perfected right is

water to which the irrigation district is entitled. There is no question about that.

QUESTION: And each owner is entitled to be paid for his share of it.

MR. McCREE: Each owner is entitled to have his land appraised for the purpose of section 46 of the Omnibus Act according to its value before the Boulder Project was completed.

QUESTION: The difference, General McCree, that you are referring to is basically efficiency and certainty of delivery of the water, rather than the creation of new water rights, isn't it?

MR. McCREE: That's correct, and I think it is significant here to consider what happened before the Boulder Project was enacted. Judge Warrenburg recounts this history in his opinion, the opinion which is before the Court now. And of course, the Colorado River as it flowed south roughly along the boundary of Arizona and California flowed into Mexico and through Mexico into the Gulf of California. Through the efforts of the predecessors of the Imperial Irrigation District, some of its water was diverted into a dry river bed, the Alamo River, which preceded west and then northerly into what is now the Imperial Valley where there was a decline of the land northward, and it irrigated that valley before

this project works of Boulder Dam, now the Hoover Dam, and Lake Mead and the other project works were established.

These lands received that water prior to this project, but not under the circumstances they receive it now. As a matter of fact, I'm sure the Court is familiar with the history of this project when in 1905 the Colorado River breached its banks and flowed north in such abundance that it almost washed out the Imperial Valley, went into the Saltan Sink and created the current Saltan Sea, 333,000 acres of water, and this still persists since 1905.

Then there were drought periods where there was no water available to the lands and the uncertainty of having the lands flooded as dramatically as they were when the Saltan Sea was created or dry because the river was not dependable during the summer months is the difference between what this project meant to the Imperial Valley and what was there previous to its enactment.

QUESTION: Mr. Solicitor General, suppose the irrigation district had title to all the land at the time that the Boulder Canyon Project Act was passed, at the time of the adjudication of the presently perfected rights, suppose all the land was in one ownership, you would not be taking the same position, I suppose?

MR. McCREE: I suppose we would take the same

position based on the statute.

QUESTION: So it really doesn't make any difference that the land is in a variety of ownerships and that the perfected right was adjudicated to the district?

MR. McCREE: That's correct, the right is the right of the district and not the individual owners.

QUESTION: Yes, but it doesn't make any difference which one it is because you would take the same position even if it was all in one ownership.

MR. McCREE: Yes, because section 46 of the Omnibus Adjustment Act provided that no water should be delivered from a reclamation project to any single ownership exceeding 160 acres.

QUESTION: And the district holds it as trustee for the various landowners, does it not?

MR. McCREE: This is our understanding of the law.

QUESTION: Mr. Solicitor General, suppose a man now had 640 acres and before this case is decided he sells three tracts of 160 each to three qualified eligible purchasers that leases back all of the land sold and continues his operation as before, would that be permissible?

MR. McCREE: Where there is -- Mr. Chief Justice, the statute provides -- this is section 46 of

the Omnibus Adjustment Act -- that upon proof of fraudulent representation the Secretary of the Interior is authorized to cancel water rights. So whether --

QUESTION: My hypothetical is that there is no fraud, he sells it to three different owners each of whom will have 160 and each of them leases back to him on a legitimate lease --

MR. McCREE: I want to think about that. The impact of the excess acreage requirement isn't as draconian as it sounds. For example, a husband and wife can each have 160 acres and work that land together and they would be entitled to receive water from the reclamation project. A family with adult children might be permitted to have 160 acres for each spouse and each child who was a resident and who worked the land. The Secretary of the Interior has also applied the 160-acre limitation to cover a trust where a trustee holds land for more than one beneficiary and each beneficiary can have land up to 160 acres.

QUESTION: But how do we know that some subsequent Secretary won't come along and say, just as Secretary Udall did, that this thirty-year construction of the act is wrong and we're now going to change it?

MR. McCREE: We have this assurance, that after the breakup of the excess acreage and after more than

one-half or at least one-half of the project works have been paid for, the price limitation does not apply to subsequent sales of the property and the statute so provides also in section 46 of the Omnibus Adjustment Act of 1926.

QUESTION: Well, my hypothetical, part of the assumption is that it is a legitimate transaction, all on top of the table, he could lease back, the one person could lease back three other 160-acre tracts from his vendee.

MR. McCREE: Well, I know of no prohibition against that. I can't direct you to a statute that would forbid that or --

QUESTION: Would that be a matter for the Secretary to --

MR. McCREE: That would be a matter for the Secretary to handle, as we understand.

QUESTION: Let me ask you, Mr. McCree, as to the government's understanding of the meaning of section 46, do I correctly understand that it is your view that the Secretary of the Interior did not have, by reason of this statute did not have the legal authority to enter into a contract with the Imperial District, the contract itself should not have been entered into at all?

MR. McCREE: No, it is not our position. He had authority to enter into a contract with the Imperial

District, there is no question about his having that authority. We contend that the contract should have provided for the excess acreage limitation.

QUESTION: But it didn't.

MR. McCREE: It did not.

QUESTION: Doesn't the statute, in your reading of it, flatly prohibit the contracts that he made that says no water shall be delivered, and so forth?

MR. McCREE: Well, it doesn't prohibit the making of the contract, but it would prohibit the delivery of the water pursuant to such a contract, that's correct.

QUESTION: So it isn't merely the Wilbur letter but it is the fact that they have been delivering water pursuant to an understanding of the statute with which you disagree for all these years?

MR. McCREE: Since the project began in the early 1930's.

QUESTION: And really the case would be precisely the same even if Mr. Wilbur had never written the letter, because you would still have the position taken by the government of the United States on which everybody acted because of their reading of the statute.

MR. McCREE: But an effort was subsequently made to have the contract amended to conform with the statute.

QUESTION: Now, when was that?

MR. McCREE: This was first about 1964, I believe, efforts were made to have the contract reformed to comply with the statute.

QUESTION: Yes, I understand that, but from --

MR. McCREE: But from about 1931 until 1964, we submit that the administration of the waters from this Boulder Project was contrary to congressional authorization and direction.

QUESTION: But the government wants to keep the money that was paid.

MR. McCREE: Pardon me?

QUESTION: Wasn't money paid pursuant to this contract?

MR. McCREE: The water was not paid for.

QUESTION: No, but I --

MR. McCREE: The irrigation district was required to pay for the construction of the All-American Canal, but the fact of the matter is the All-American Canal had several power drops along the way and the electricity that was generated in these power drops was attributed to its share of the cost of the project works. As a consequence, they paid nothing for this water which has created the most desirable farmland certainly in that part of the country, if not in the entire country. It

hasn't cost anything, and we say this for their assertion of reliance and their detrimental reliance and the dire consequences that would result.

QUESTION: Suppose the All-American Canal had been built before the Boulder Project and they had been using it and their water had been running through it --

MR. McCREE: It could have been expressly --

QUESTION: The fact is that the district was entitled to the water.

MR. McCREE: But it would have been expressly exempted. As this Court said in Ivanhoe Irrigation, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such an exemption by express enactment, and that would have been the thing to do because they are not going to build a project where one is not required, and one would not have been required --

QUESTION: But the government construction of the statute for thirty years was contrary to your present submission.

MR. McCREE: It was, there is no question about it, but we say it was wrong, it was contrary to the direction of the Congress.

QUESTION: General McCree, you cite in your brief Justice Jackson's opinion for the Court in Skidmore

Swift & Company about administrative construction, at page 140 of 323 U.S. in that case. The Court's opinion contains the statement, "Good administration of the act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." Don't you have to take the position that Secretary Wilbur's letter was almost irrational in order to maintain the position you are now maintaining?

MR. McCREE: I don't think we have to characterize it that far, but we do say that it is contrary to the congressional direction. Mr. Justice Frankfurter said once in Hensley v. Union Planters Bank that wisdom sometimes never comes, so we should not reject it just because it comes late.

QUESTION: Thirty years of congressional inaction after Wilbur's letter is quite significant, isn't it?

MR. McCREE: It is significant, but we still say that the remedy is in the Congress and not in the Court, and Judge Wallenberg, writing for the Ninth Circuit recognized that in the opinion below which we respectfully urge this Court to affirm.

QUESTION: Mr. Solicitor, let's just assume for the moment that you agree that the statute could be

construed, could reasonably be construed A or reasonably be construed B, and for thirty years it had been construed A but the government now preferred to construe it B, what would your position --

MR. McCREE: If I make that assumption, I would agree I think with the conclusion that you would draw, but I don't make that assumption --

QUESTION: Exactly. I understand you don't.

MR. McCREE: -- because the statute --

QUESTION: Do you think it is so clearly drawn that thirty years of error should be corrected?

MR. McCREE: Should be corrected because there has been a --

QUESTION: Sort of like the income tax, a hundred years of error.

(Laughter)

MR. McCREE: I don't find anything in the Omnibus Adjustment Act that gives me any encouragement in that area.

QUESTION: Thank you.

MR. McCREE: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Brunwasser, you may proceed.

ORAL ARGUMENT OF ARTHUR BRUNWASSER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. BRUNWASSER: Mr. Chief Justice, and may it please the Court:

This case concerns the applicability of the anti-monopoly provisions of reclamation law to the Imperial Valley of California. The outcome will determine if the vast benefits of the reclamation program will enure forever to owners of hundreds and thousands of acres of land or if these benefits will be restricted to the persons who live and farm and work on family sized farms as intended by Congress in 1902 when the Reclamation Act was passed.

The subsidy involved in this case is far different from any other subsidy which probably has ever come before this Court and which has been considered by the government.

Aside from the dollar value of each year's supply of water deliveries, the subsidy here is continuous. It has been provided for the past forty years and will continue to be provided so long as the Colorado River flows.

QUESTION: Is there something in the nature of a subsidy lurking in the windfall that was referred to earlier by the Solicitor General and others for the purchasers who acquire the property at a modest price?

MR. BRUNWASSER: Mr. Chief Justice, Congress intended a subsidy and a windfall and Congress intended that that subsidy and that windfall go to small farmers because of a number of reasons which formed part of the fabric of legislation intended to protect small family farmers as developed in the amicus brief that has been filed in this Court. There is nothing wrong with subsidies per se, but Congress intended that subsidy be used for a specific purpose to create a class of small family farmers, not large farmers, small farmers.

QUESTION: Would you disagree then with at least the Solicitor General's tentative response to my hypothetical that one individual, a bachelor, no wife, no children, could dispose of all of his acreage in excess of 160 and lease it back. He wouldn't be a very small farmer any more, would he?

MR. BRUNWASSER: Well, the answer to that question, Mr. Chief Justice, is this, there are proposed regulations to cover this very point which are set out in the appendix to the district's brief, and the Secretary of the Interior has proposed that there be a limit to the amount of acreage which may be leased. There is a limit of 160 acres that may be leased. In addition, the landowner, as I understand it, may own 160 acres. The problem that Your Honor has put his finger on is a problem that

has plagued the reclamation program from the very beginning. Your Honor may know that at this very moment on Capitol Hill there is a bill, S. 14, which was approved by the Senate, it is now before the House, and one of the biggest battles over changing the reclamation program was over the question of leasing, how much land should a landowner be allowed to lease without violating the excess land laws.

The answer is that the Secretary has discretion under section 10 of the Reclamation Act to adopt rules and regulations to carry out the policies of the law. Clearly, the policy of the law as enunciated by Congress and as approved by this Court in Ivanhoe is that there be small family farms of 160 acres. Now, if the situation arises where there is an effort to lease more than 160 acres or 1,000 acres or more, then that is a matter under present law for the Secretary of the Interior to adjudicate at the first instance. If he acts unreasonably and beyond the scope of his authority, that matter would assumably come before the courts.

QUESTION: What is the thrust of the pending legislation that you referred to?

MR. BRUNWASSER: Number one, insofar as this case is concerned, it is to delete any applicability of the acreage limitation and the residency requirement of

reclamation law to the Imperial Valley of California. Number two, it is to enlarge the acreage limitation from anywhere -- I think the lowest figure is about 640 acres to 1,280 acres. Third, it is to delete the residency requirement completely.

In effect, the landowners of the Imperial Valley have asked Congress to do what their counsel has been asking the federal courts to do since this case began in 1967, and I might point out that a lot of the documentation and statistics which has been presented to this Court in the reply brief are self-serving statistics presented by representatives of the Imperial Valley to the Senate committee last year and the year before.

QUESTION: And that has passed the Senate, did you say?

MR. BRUNWASSER: It did, in December of 1979, S. 14 passed the Senate -- I'm sorry, on September 14, 1979, it passed the Senate. I believe in fact last week hearings were held before the appropriate subcommittee of the House Interior Committee on that very legislation.

QUESTION: If that passes, is that going to be the end of this problem?

MR. BRUNWASSER: That is the end of the ball game, Your Honor. In fact --

QUESTION: Suppose it passed tomorrow, would

the case just be moot?

MR. BRUNWASSER: I think so. I think so. The bill was introduced shortly after the Ninth Circuit made its decision. There has been an effort made to change the law because of this and a number of other cases and the specific exemption has been carried for the Imperial Valley.

I might point out that as far as I recall that is the only geographical area that has a specific exemption. The areas, their qualifications --

QUESTION: Where is the bill in the House, in the committee?

MR. BRUNWASSER: Yes. There were hearings held in Sacramento a few months ago and hearings were held this past --

QUESTION: Does the House have its own bill or was the hearing on the Senate bill?

MR. BRUNWASSER: It is my understanding that the hearing is on the Senate bill, S. 14.

I would like to point out that this litigation does not seek to take away any of this subsidy that has been provided to the landowners of the Imperial Valley in the past. No one is seeking to recoup the water or its value. The case concerns the right and entitlement to future water deliveries and we seek to have a determination

as to whom the water is to be delivered.

The continuing nature of the subsidy must be borne in mind when we consider the arguments on administrative practice and the non-legal issue which has been urged by the landowners, the non-legal issue of fairness. Well, I don't believe it is a proper legal issue, and I would like to address myself to it because, as my worthy opponent points out, it seems to be the core of this very case.

Fairness at most is a variation of the quitable estoppel argument. The landowners contend that they rely to their detriment upon the ruling by Secretary Wilbur.

QUESTION: Well, I hadn't understood that to be their precise contention, counsel. I had understood that they had thought that Secretary Wilbur's construction of the act was a permissible construction if not the only one, and that under Swift & Company and cases like that, after they had gone on for a period of time it represented a very significant canon of statutory construction, rather than simply a straight estoppel argument.

MR. BRUNWASSER: Well, I think the argument is two-fold. I think it covers both parts of Your Honor's hypothesis. In the first instance, from the time I became involved in this litigation, they have argued the reasonableness of Secretary Wilbur, there has been evidence

offered in either this case or the residency case -- and I forget which one -- of how some of the landowners heard Secretary Wilbur and they heard Congressman Swing and what have you, and they were promised --

QUESTION: Secretary Wilbur wrote an opinion letter of about six pages.

MR. BRUNWASSER: Two and a half pages, Your Honor, the Wilbur opinion.

QUESTION: Perhaps I was reading a different -- in one appendix or the other it comprises several pages.

MR. BRUNWASSER: If I may correct Your Honor, that is a collection of documents which are appended to the opinion of former Solicitor Barry, and the Wilbur letter is about two and a half pages.

QUESTION: Okay. Be that as it may.

MR. BRUNWASSER: But the short answer is, number one, if there is anything unfair or inequitable about enforcing congressional policy and seeing that the federal water subsidy is delivered to the people to whom it was intended is, as this Court indicated in Gerlach and Ivanhoe, the landowner should go to the Court of Claims.

QUESTION: Well, you first have to determine what congressional policy was here, whether the acreage limitation was intended to apply to the Imperial Valley.

MR. BRUNWASSER: Okay. I will move over to the

Imperial Valley situation which is the Boulder Canyon Act, and the argument is made that because of present perfected rights, Congress intended a shorthand reference to a specific exemption from the acreage limitation.

Let me start at this point: In Ivanhoe, this Court handed down and decided the rule of statutory construction that where there has been an exemption from the acreage limitation, Congress has always made that exception explicitly. This is set out at pages 90 and 91 of our brief.

Examples of an express exemption are far different than the hidden esoteric meanings that we find in the Boulder Canyon Act that are urged by the petitioners. In one statute, it says the excess land provisions of the federal reclamation laws shall not be applicable. That is clear and concise. In another statute, it says except as provided in section 3 of this act, the excess land provisions of the federal reclamation laws shall not apply.

In yet another statute, it says the excess land provisions of the federal reclamation laws shall not be applicable. There is no such language in the Boulder Canyon Project Act. As a matter of fact, in preparing for the argument today, I was rereading Arizona v. California and we come to the only specific reference that I have found as to the reason for the inclusion of

section 14. Section 14, as Your Honors know, is the section which incorporates reclamation law by reference, standard language which is found in every reclamation statute.

Mr. Justice Harlan in his dissent -- this is at 373 U.S., page 623, he points out that both Rep. Swing and Senator Johnson emphasized that this provision, section 14, was deliberately incorporated into the Project Act. Now, nobody in this case has yet come up with a reason for the inclusion of section 14. The petitioners have not pointed out any meaning to section 14. It is mere surplusage. They claim that everything is otherwise provided because there is a specific manner of contracting in section 4(b).

Well, obviously we are dealing with a multistate project here, the largest project of its day, but there is nothing in section 4(b) that says this shall be an exemption from the excess land laws of the reclamation law. So section 14 has no meaning at all according to the petitioners.

QUESTION: Mr. Brunwasser, but you have an express administrative construction that went on for thirty years.

MR. BRUNWASSER: An administrative construction which was wrong and --

QUESTION: You say it was wrong, but it has to be absolutely totally wrong, as I understand the law, and if one reads Solicitor Barry's opinion as opposed to Secretary Wilbur's opinion, it seems to me that in the reference to the various land division opinions one construed vested rights more narrowly than the other. It is not a case of black and white at all.

MR. BRUNWASSER: I respectfully disagree with Your Honor. I am not the only person who has asserted that the Wilbur letter was dead wrong, absolutely wrong as a matter of black letter law. The Ninth Circuit was charitable when it referred to the Wilbur letter as a rather simplistic analysis. There has never been one legal analysis or evaluation of the Wilbur letter from the time it was prepared for the Secretary's signature which has upheld its legal reason, not a one. On every --

QUESTION: Suppose the All-American Canal had been built before the Boulder Dam Project was even thought of and they had a big headgate on the Colorado and the Project Act comes along and they are going to preempt the headgate and so the Imperial Valley people say you must protect us in this, you must agree to deliver and they say we will, so they write in the Project Act that we will satisfy perfected rights and when the dam is built they contract to deliver to Imperial Valley the water that had

previously been taken out through the All-American Canal. Now, would you still be making this same argument?

MR. BRUNWASSER: I would have to have more details, Mr. Justice White. In the first place, if the people in the Imperial Valley were taking the water from the river and then along comes the government and blocks off their rights, then the landowner -- and nothing more -- the landowners would have a claim for condemnation and a taking under the Gerlach case. If the --

QUESTION: What they did is they went to the government and said you are going to be taking our water and the government says no, we're not going to take your water, we're going to give it back to you, we are going to give it back to you when the project is built, you are going to be taking your water out of the project.

MR. BRUNWASSER: Is Your Honor trying to summarize what has happened in this case --

QUESTION: That is a hypothetical, a plain and simple question.

MR. BRUNWASSER: If the government says that and the government allows the previously delivered appropriated water to go through the federally financed canal, the acreage limitation must apply. If the government says no, it won't apply, they are doing what Secretary Wilbur did.

QUESTION: But if the All-American Canal had been built before and it was not financed by the project at all, in my example --

MR. BRUNWASSER: Well, if there was no --

QUESTION: -- but nevertheless project water is delivered to the Imperial Valley through the All-American Canal.

MR. BRUNWASSER: Through the privately financed canal?

QUESTION: Yes.

MR. BRUNWASSER: Well, it is a matter of contract then. I think that is a matter of contract. I think the --

QUESTION: Well, suppose the only contract that was made is the contract that was in this case and then the provisions of the statutes are precisely the same. I would suppose you would be here making the same argument.

MR. BRUNWASSER: The distinction, Mr. Justice White, is that in the case at bar it is a federally constructed canal, the water --

QUESTION: I understand that, but now how about my question. Suppose it had been privately financed, would you be here making this argument?

MR. BRUNWASSER: I don't think I would if it was a privately financed irrigation project.

QUESTION: Although the provisions of the contract, provisions of the statute, provisions of the Reclamation Act would be precisely the same.

MR. BRUNWASSER: Well, there is a case that comes close to the hypothetical, it deals with the San Louis Project in the Central Valley of California, where there is a dam and a reservoir which was constructed jointly by the United States and the State of California and there is a Solicitor's opinion by Solicitor Barry that the acreage limitation would not apply to the service area served by the state financed canal, even though the water in the jointly constructed reservoir comes from both places. So that comes close to your situation.

QUESTION: So you wouldn't be here making the argument if the All-American Canal had been privately financed, even though the contract would be exactly the same contract as present here and the acts would say exactly the same thing.

MR. BRUNWASSER: Well, of course, there wouldn't be that kind of contract because the contract is not only to deliver water, the contract is to construct the canal. That is the contract provided in the Project Act. It isn't simply the Secretary saying I will deliver X acre-feet of water to this water district.

QUESTION: What about the land office decision

in the Wright case that Secretary Wilbur relied upon which Solicitor Barry simply said is inapplicable here? Do you think that is totally inapplicable?

MR. BRUNWASSER: I am not going to be able to respond in detail. I can just tell you that that was gone into at trial with Mr. Weinberg's testimony, the government expert witness --

QUESTION: Well, we are here deciding whether or not Secretary Wilbur's construction was a plausible or reasonable one. He relied on a couple of land office decisions which talked about vested rights and Solicitor Barry said no, he probably shouldn't have relied on them.

MR. BRUNWASSER: As I recall those cases --

QUESTION: That is part of the question we are answering here.

MR. BRUNWASSER: I understand those cases, the two lands cases discussed in the Wilbur letter. They referred to situations where the water had been delivered and there was no new delivery system that provided the water to Ana Wright and the other people who asked for an exemption. In the Imperial Valley, there was a new delivery system, so it has to be borne in mind that the water under the preexisting situation went into Mexico and then back into the United States, and there was no canal constructed by the government.

QUESTION: Well, I can understand that as a perfectly plausible reason if you are arguing a case to say no, the Wright opinion doesn't apply, but it doesn't seem to me that that means that the Wright opinion simply had no applicability whatever and that Secretary Wilbur was just almost out of his mind in citing it.

MR. BRUNWASSER: Well, according to Mr. Weinberg, Secretary Wilbur -- not to use that phraseology, but he was wrong because the practice had always been that when you bring in a federal project vested rights under state law do not exempt the landowners from the acreage limitation. That was the rule and that was a rule agreed to -- which was set out in one of Mr. Dent's memoranda in 1927 and a Solicitor's opinion in 1927, and it turns out that once in a while on a project you will have one or two people who are right there right next to the existing stream and the stream isn't changed, but the government will take water out of the stream and the stream is then appropriated and they allow these people to use the water. But that is a far different situation than the Imperial Valley, where everybody was using the water and they went to Congress, the water program was not satisfactory, they couldn't continue to use it, they had periodic droughts and floods in addition to the revolutionary conditions in Mexico, and they had to have this project. Any claim that

they relied upon this project and they would have approved it is really absurd. One only has to go to the dam site or to Boulder City and look at the movie that gives a history of the background of this project to see the devastation that existed in the Imperial Valley before this project was built.

I would like to return to present perfected rights for one moment.

QUESTION: Do you think, on the question of presently perfected rights, do you think the government could have charged the irrigation district, the Imperial Valley Irrigation District anything for the water?

MR. BRUNWASSER: Not under section 1. Section 1 specifically says they are not going to charge for the water and they haven't charged for the water. They charged for the construction of the canal.

QUESTION: Because it was a presently perfected right.

MR. BRUNWASSER: No, I don't agree that that is the reason because under Gerlach the government appropriated preexisting water, vested water rights under state law and there was a valid claim presented in the Court of Claims.

QUESTION: Of course, this is a statutory -- the Project Act provided for --

MR. BRUNWASSER: For the exemption.

QUESTION: -- for observing presently perfected rights.

MR. BRUNWASSER: Yes, but as this Court said in Arizona --

QUESTION: Would it have been inconsistent with that to charge for the water?

MR. BRUNWASSER: I don't think so.

QUESTION: Would it have been inconsistent with that section to charge for the water?

MR. BRUNWASSER: I don't believe so because it is one thing to deliver water, it is another thing to charge for it and this Court said very clearly in Arizona v. California that nothing in the compact purports to control any distribution of water within a state. And as I read this Court's opinion, it simply concluded that the present perfected rights of the users in the lower basin are to be satisfied out of the storage facilities in Lake Mead. In other words, in days where there may be a water shortage, the people in the upper basin can't withdraw sufficient water to prevent the present perfected rights from accumulating in Lake Mead, behind the dam. But there is nothing in the statute or in the compact which says word one about the acreage limitation.

I would like to move to one issue raised by Mr.

Chief Justice Burger, the question of standing. In this case, there is a unique statute, section 46. It is a unique statute which doesn't apply anywhere else in the law. There is an entire body of case law in the Ninth Circuit dealing with attempts to litigate, individual attempts to litigate Reclamation Act cases.

QUESTION: This is section 46 of the act?

MR. BRUNWASSER: Yes, Your Honor. There has been some allusion to these cases in the briefs, of Turner v. King's River Conservation District, Bowker v. Morton, and the two cases at bar. Significantly, Chief Judge Browning was on three of those panels. He was on all panels with the exception of Bowker v. Morton.

Under section 14 there will be an automatic drop in the price of land because one shouldn't be allowed to benefit from the federal water subsidy. There may be a dispute as to what level that price is going to drop, would it be in this case to 1942 when the district ceased using water from the Alamo Canal, or today when there is no longer water available from the Alamo Canal. But the fact remains that there definitely would be a drop in price and it would be to below market levels. The Secretary has proposed a series of regulations which are set out verbatim in the district's appendix to their major brief, which show how the Secretary intends to

carry out and to enforce the acreage limitation, and he quite clearly states that we're going to carry out the congressional purpose of creating small family farms, wide distribution of the benefits and the rest of it.

The respondents in this case have an opportunity to purchase some of the richest farm land in the world at below market prices. The Secretary has set up a list of priorities about how to qualify to be what he refers to as a non excess landowner. You have to live there, you have to promise to farm, you have to attempt to farm.

My clients qualify. Instead of there being 150 to 200 large landowners controlling essentially all of the excess land in the Imperial Valley, with an average holding of 715 ares of irrigated farms in California, and my clients for the past forty years have been essentially 1,600 fruit pickers, because instead of getting the water to engage in farming, they are out picking the crops.

Now, that isn't what Congress intended. We will get --

QUESTION: Do the qualifications of your clients to purchase depend at all on the price at which the land was offered?

MR. BRUNWASSER: It doesn't, Your Honor, because they --

QUESTION: They can pay whatever price is asked?

MR. BRUNWASSER: No -- well, the landowner does not have the right to set a price.

QUESTION: We don't know yet what the price will be.

MR. BRUNWASSER: But we know it is going to be below market prices and we could use our common sense to anticipate that that is going to be pretty cheap for this kind of farm land. Then there are federal programs available that we have made allusion to in our brief for borrowing funds if necessary, certainly --

QUESTION: What would motivate a seller to sell at less than market price?

MR. BRUNWASSER: Because the testimony in this record in answer to questions from their own counsel, the landowner said that there is no use for that land except farming, there is under two inches of rain a year, unless they wanted to raise rattlesnakes and rabbits.

QUESTION: Well, maybe they want to wait and see what the House of Representatives does with S. 14.

MR. BRUNWASSER: Well, that may be but, you know, life is full of imponderables like that. This Court --

QUESTION: Would you sell at about a fourth of market price if you owned the land?

MR. BRUNWASSER: If I owned 14,000 acres, like

Mr. Elmore, the typical Imperial Valley farmer that has been referred to by the petitioners and I had thousands of dollars worth of improvements in my land, as they claim they have, and I know that the law is determined by the Ninth Circuit and Tulare provides that the value of the improvements will be taken into consideration in setting the fair and reasonable X contract price, I would be very reluctant to sit back and let my 14,000 acres return to desert.

QUESTION: What roughly in your judgment is the spread between the fair market value of the land with water and the price at which it will be sold per acre? What is the range?

MR. BRUNWASSER: I don't know because we entered the case as intervenors and we didn't enter --

QUESTION: But your standing depends on some opinion at least as to the likelihood of making purchase.

MR. BRUNWASSER: But the record to date shows that the value of land without the water is $25 to $50 an acre.

QUESTION: Right.

MR. BRUNWASSER: And the value with the water is $1,200 to $1,400 an acre.

QUESTION: What light does that shed on the question, my first question as to likelihood of an owner

selling at the very reduced price when there is a statute or a bill pending in Congress which would restore the full value of the land?

MR. BRUNWASSER: Well, number one --

QUESTION: It has already passed one body of Congress.

MR. BRUNWASSER: Number one, if the bill passes Congress, that is the end of the case, but I don't know that the Court may decide the case based upon the possibility that Congress may change the law. So I think we have to assume that the law will continue as it is in determining the question on its merits, the case on its merits as well as the procedural questions.

It would seem to me that the spread is between $50 and $1,200; with respect to the improvements, I don't know, and the landowners and the district did not offer any conflicting affidavits in the trial court to show what the value of the improvements would have been. So the only record before this Court is that the --

QUESTION: What are these improvements? What are we talking about?

MR. BRUNWASSER: They build ditches, they line the ditches to keep the water from seeping down too far. I think the irrigation district simply brings the water to a certain place and the landowner has to take the water

somewhere else. There is machinery, of course.

QUESTION: Some of which, I suppose, would be retained on the 160-acre plots that they could retain.

MR. BRUNWASSER: Well, if you want to engage in farming, you would, although there are ways where --

QUESTION: I take it your standing argument does -- at least I am correct to shit extent -- does depend on an assumption that the owners would sell at the reduced price.

MR. BRUNWASSER: A substantial number of them would.

QUESTION: Or maybe just one might be enough for you.

MR. BRUNWASSER: Even one would be enough and I don't think it is necessary that we make the tender of $25 to $50 to Mr. Elmore, Mr. Chief Justice Burger, to ask him to refuse our offer for some of this rich farm-land. I don't think we should have to do a useless act.

MR. CHIEF JUSTICE BURGER: Your time has expired now.

MR. BRUNWASSER: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further?

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS--REBUTTAL

MR. McCREE: Mr. Chief Justice, and may it please the Court: I have only one brief remark in rebuttal.

The Solicitor General has referred to the passage of S. 14 in the Senate and has stated that if there is any unfairness here it should be the Congress to deal with it, and the Respondents have made the same argument.

I would like to advise this Court that when the landowners of Imperial Valley first went to Congress, they could not have known in advance that this Court would eventually grant certiorari. And when a bill was pending in Congress two years ago, they did take efforts to seek a provision dealing explicitly with them, but that does not render the case moot before this Court.

The present administration has taken the position consistently in Congress and all the proceedings on S. 14 that Congress should not act. Secretary Andrus has three times told Congress it should not act because it should be decided by this Court, and I quote from Secretary Andrus' testimony in 1978 to the Senate Committee on Energy and Natural Resources: "I would prefer to have this resolved in the Supreme Court of the United States because it is the highest court of the land."

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:43 o'clock a.m., the case in the above-entitled matters was submitted.)

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