Mr. Don Davis

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Excess Lands Agreement -- Bureau of Reclamation

Section 5 of the Reclamation Act of 1902 (32 Statutes at Large 389; 43 U.S.C., § 431) provides in part:

> "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred sixty acres to any one landowner, . . ."

Agricultural land ownerships in California and particularly in the arid regions of the San Joaquin and Imperial Valleys are rarely confined to 160 acres. In order to implement the 160-acre limitation, the Bureau of Reclamation is requiring owners holding acreage in excess of 160 acres to enter contracts whereby they agree to rid themselves of excess acreage within 10 years. You have requested our views as to the effect of such contracts on fair market value and, specifically, whether the contracts are enforceable restrictions within the meaning of section 402.1 of the Revenue and Taxation Code.

The history of the 160-acre limitation has been one of controversy and debate. Large California landowners have sought to overcome it both in Congress and in the courts. (See Taylor, Paul S., "Mexican Migration and the 160-acre Limitation" (1975) 63 Cal. Law Rev. 732; Taylor, Paul S., "California Water Project: Law and Politics" (1975) 5 Ecology Law Quart. 1.) At one point the California Supreme Court held section 5 of the Reclamation Act unconstitutional only to be reversed by the U.S. Supreme Court. (Ivanhoe Irrigation District v. McCracken (1958) 357 U.S. 275.) More recently, a federal district court declared that the Bureau of Reclamation was required to enforce the 160-acre limitation through its contract with an Imperial Valley water district in an action brought by residents of the district. (Yeller v. Hickel (1972; S.D. Cal.) 352 F.Supp. 1300.)

In spite of the results of this litigation, the bureau has not, in the face of political pressure brought to bear by the landed interests, been able to enforce the 160-acre limitation literally. Indeed, in the present contracts the bureau is selling water for use on parcels of greater than 160 acres in a single ownership. It has, however, obtained in the bargain contractual

rights pursuant to which these landowners promise to sell the excess acreage within a 10-year period. Moreover, the contract provides that the selling price will not reflect values attributable to water being made available to the property. (Bureau of Reclamation, Agreement Pertaining to the Sale of Water, paragraph 3.) The contract includes a power of attorney authorizing the bureau to sell the property at the restricted selling price if the landowner fails to do so within the 10 years. (Ibid, paragraph 11.) The contract is, thus, a compromise allowing the large landowners to make a killing for 10 years, but then requiring a breaking up of large land holdings in order to effectuate the purpose of section 5 of the Reclamation Act.

While the contract is recorded and binds subsequent purchasers, it is not a restriction on the use of land. Rather, it is a restriction on ownership of land. During the ten-year period the owner receives the water, and at the end of the ten years, a new owner will receive water. Throughout, the land will be held in its highest and best use: irrigable farm land. Nor is this a restriction on developing a higher and better use, such as subdivision development, should this become a possibility. Since section 402.1 of the Revenue and Taxation Code deals with a presumption concerning restrictions on the use of land, not restrictions on the ownership of land, these contracts do not come within its terms.

This is not to say, however, that the contract may not influence market values since these values are influenced by many factors other than restrictions on the use of land. In the first place the contract calls for the property to be sold at an artificially low price to a buyer not already receiving bureau water. If everything goes as planned, the supply of 160-acre farms in irrigable production should be increased. Furthermore, at the artificially depressed selling price there should be no shortage of purchasers. In fact, it will be interesting to see how the bureau manages to prevent sham sales and under-the-table payments from occurring.

One point to remember is that for purposes of ad valorem taxation, fair market value is the price "property would bring if exposed for sale in the open market" (Rev. & Tax. Code, § 110), not the artificially depressed price required by the bureau's contract. In appraising excess acreage, therefore, we are required to consider both buyer and seller's knowledge of the availability of water.

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