MOOT COURT BRIEF

The National Agricultural Advocacy Competitions: 1992 Best Brief

The LAW REVIEW *has agreed to publish the winning brief from the 1992 National Agricultural Advocacy Moot Court Competition. This competition is an annual event wherein teams from law schools nationwide submit legal briefs and argue before a panel of judges. The problem addressed in the brief is a pre-assigned agricultural law issue and is set forth immediately preceeding the brief. The brief is unedited by the* LAW REVIEW *but has undergone minor editing by the original drafters for publication.*

RECORD ON APPEAL

HISTORICAL BACKGROUND

In response to public demands for federal funding of reclamation projects in the Western states, Congress enacted the Reclamation Act of 1902, June 17, 1902, ch. 1093, 32 Stat. 388 (codified at 43 U.S.C. sections 391 *et seq.*). The Act created a federal program to construct and operate dams, reservoirs and canals for the irrigation and reclamation of arid lands in seventeen Western states. Under the Act, the Secretary of Interior was authorized to execute contracts with individual water users. The fees collected under these contracts helped to recover the costs of construction, operation and maintenance of the federal irrigation systems.

CASE BACKGROUND

In 1946, Congress passed the Western Basin Project Act (the "Project") subject to the Reclamation Project Act of 1939 (the "Act"). Construction of two dams, reservoirs and a canal delivery system was completed in 1957 at a cost of $600 million. The Project, wholly located within the State of San Joaquin, irrigates over 1 million acres of land

and is divided, geographically, into two districts, one in the north and one in the south.

Each irrigation district is responsible for operation and maintenance of the water distribution systems within its borders. On behalf of the federal government, and pursuant to Federal Reclamation Law, including sections 9(d) and (e) of the Act (43 U.S.C. sections 485(d) and (e)) each district is also required to contract with each of its water users. In order to recapture at least a portion of the costs of each project, Federal Reclamation Law directs that users of federally supplied irrigation water shall pay a fee. Water rates are charged on per-acre basis reflecting project costs of construction and surface water delivery, and the operation and maintenance costs (O & M costs) incurred by each irrigation district. Accordingly, each district assesses annual fees to each water user, a portion of which is remitted to the federal government. The balance pays the districts' O & M costs.

The Project supplies surface water to landowners within its boundaries by utilizing the tendency of subsurface soils to naturally distribute percolating water from north to south. It operates by collecting irrigation water for distribution over lands in the north. Then, by a natural process of percolation, the water flows underground to the south where it is recaptured and redistributed as surface irrigation.

The system begins in the north, at Northern Lakes Dam, where impounded water is pumped into Creed Lake, and from there conveyed through a network of canals and reservoirs for distribution to northern lands. This water then enters the ground and percolates south where it is recaptured by the Potholes Reservoir, created by the construction of Potholes Dam. This reservoir acts as a plug in the channel of Willow Creek to prevent collected waters from naturally flowing out of the system. As a result, the local water table is substantially raised and a shallow aquifer is formed, containing both naturally occurring public water and a larger amount of migrating ground water.

Appellants own lands in the central portion of the Project area. This region was not served by the delivery facilities of either of the Project's irrigation districts. At the time of Project construction, the U.S. Corps of Engineers considered Appellants' lands to be non-irrigable, due to the limitations of existing technology and the nature of the terrain and the soil.

In the late 1960's, however, surface outcroppings of new vegetation began to appear in this central region, nurtured by subsurface ground water migrating from north to south. With recent technological developments in sprinkler systems and well drilling, irrigation and farming of these arid lands suddenly became feasible. Landowners, including

Appellants who do not receive surface water from the Project, began to appropriate ground water by sinking wells and installing pumps at their own expense. The subsequent costs of drawing water, including maintenance and electric power, is borne solely by these landowners.

In the early 1970's, the State of San Joaquin created the Red Sands Water Subarea in the central region to preserve the continued availability of artificially stored ground water. It declared that no further public ground water was available for appropriation. San Joaquin's Department of Natural Resources, pursuant to state statute S.J.S. section 104, promulgated regulations for ground water use, and all parties claiming an interest in the artificially stored ground water were required to file a claim with the state.

In response to the state's action, the Bureau of Reclamation, on behalf of the United States, filed a claim of ownership to the artificially stored ground water, as did Appellants. San Joaquin acceded only to the government's claim, thereby forcing Appellants to obtain requisite state water use permits and execute license agreements with the United States pursuant to San Joaquin State Code sections 103(a) and 104.

Thus, two classes of water users were created. The first class, comprised of landowners who receive surface water directly from Project irrigation districts, is assessed operation and maintenance costs as well as construction repayment costs of $2.63 per acre. The second class, comprised of landowners who receive ground water indirectly from the Project by way of wells drilled on their own land at their own expense, are assessed according to a formula contained in the license agreement with the Bureau. The following license agreement provisions are in issue:

> CLAUSE 7 "PAYMENT"
> A. Operation and Management: Seventy-five percent (75%) of the estimated average Project-wide operation and management costs for the year, determined by including 56,000 acres (estimated to be subject to ground water licenses) in the Project acreage for calculating per-acre cost, plus,
> B. Construction Component: One dollar and seventy cents ($1.70) per acre for participation in Project construction repayment.[1]
>
> CLAUSE 8 "CONFORMITY WITH STATE PERMIT"
> It is understood and agreed that this license is subject to the terms and conditions of the state water permit, including regulatory orders of the State issued thereunder. The payment of water allotment hereunder may be adjusted, either on a temporary or a permanent basis as the situation

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[1] Neither the surface water users nor the ground water users are assessed a construction repayment fee that reimburses the government for the actual cost of construction. This is not atypical in Reclamation projects. The government calculates the full repayment cost would be $20.03 per acre per year for a 50 year term.

> may require, to conform to any increase or decrease in the quantities of water available.
>
> CLAUSE 17 "RULES AND REGULATIONS"
>
> The United States, acting through the Bureau of Reclamation, may make rules and regulations, not inconsistent with the provisions of this license, for the purpose of carrying it out, and the Landowner shall observe the same.

Seventy-five percent (75%) of the ground water fees paid by Appellants are remitted to the irrigation districts. Initially, the O & M costs assessed to ground water users were $3.00 per acre. These costs escalated yearly, to a high of $18.57 in 1987. Appellants' attempts to negotiate with the irrigation districts over these rising costs were futile. The irrigation districts notified the Bureau of Reclamation that they had no interest in pursuing negotiations concerning the reasonableness of the O & M charges. As a result, Appellants withheld further payment. They brought an action on their behalf and on the behalf of all landowners similarly situated. The class was certified pursuant to Fed. R. Civ. P. sections 23(a) and 23(b)(2).

Appellants claim that the O & M costs are unreasonable and amount to a taking. They argue that there is no relationship between the payments extracted from ground water users and the benefits received by such users since they do not receive water directly from the Project's water delivery systems.

Prior Proceedings

Appellants, individual farmers, brought a class action suit in federal district court against the United States Bureau of Reclamation, Department of Interior, seeking declaratory and injunctive relief. Appellants alleged: 1) Under state law, all ground water in the state belongs to the public; 2) charges imposed by the Bureau against Appellants for ground water are unreasonable; 3) the contract between Appellants and the Bureau was unconscionable; 4) the rates imposed on Appellants for ground water through the license agreements were invalid because they amounted to a taking under the Fifth Amendment.

The Bureau counter-claimed for a restraining order on Appellants' use of federal water until payment of delinquent accounts was made, and for summary judgment on Appellants' claims.

The District Court granted the Bureau's motion for summary judgment. The Court ruled that 1) it lacked jurisdiction to review decisions committed to Agency discretion, 2) the contracts were not unconscionable as a matter of law, and 3) Appellants' constitutional claim was without merit.

On appeal, the Court of Appeals, affirmed. The United States Supreme Court granted certiorari to resolve the constitutional issues and the conflict of state and federal law. The Court will hear oral arguments on February 15, 1992. Briefs on this issue are due no later than January 15, 1992.

ISSUES

1. Whether the lower court erred in granting summary judgment?
2. Whether the lower court erred in holding that it lacked jurisdiction to review the Appellants' contracts and the rate charged for ground water because these matters were solely within the Secretary of Interior's discretion; therefore, there was no law to apply?
3. Whether the lower court erred in holding that the payment formula in the government contract, as applied, did not amount to an unconstitutional taking under the Fifth Amendment?
4. Whether the imposition of an unconscionable charge for water constitutes a breach of promise by the Bureau of Reclamation, Department of the Interior; therefore, the government should be estopped from enforcing the provision?

Case No. 91 - 877709

IN THE

Supreme Court of the United States

Winter Session, 1992

Gordon Barnett, et al.,

Appellants,

vs.

United States of America, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

Petitioners are individual farmers within the Red Sands Water Subarea in the State of San Joaquin as well as all landowners similarly situated pursuant to Federal Rules of Civil Procedure sections 23(a) and 23(b)(2). Petitioners brought a class action suit in federal district court against the United States Bureau of Reclamation, Department of the Interior, seeking a declaratory determination of Petitioners' rights and obligations under a license agreement with the Bureau. Petitioners additionally seek to enjoin the Bureau from enforcing the "Payment" clause of the license agreement (hereinafter referred to as "license").

Before the trial court, Petitioner farmers under suppression of the license, alleged pursuant to the laws of the State of San Joaquin that all ground water in the state belongs to the public for the beneficial use of the public. Petitioners similarly alleged that the improperly inflated "Operation and Maintenance" (O & M) costs assessed pursuant to the "Payment" clause of the license for such water, amount to an uncompensated taking in violation of the Fifth Amendment. Petitioner farmers contended before the lower court, and on appeal, that the license was unconscionable as a matter of law and thus was unenforceable. As such the Petitioners maintain that the Secretary of the Interior may not enforce the payment provision of the license, and seek to enjoin such enforcement by the government.

The Bureau of Reclamation counter-claimed pursuant to Federal Rule of Civil Procedure section 13(a) for a restraining order on the Petitioner farmers' use of their well-water until payment for delinquent amounts under the contested license agreement were remitted. Respondent also requested a summary judgment on the Petitioner farmers' claims.

The district court granted Respondent's motion for summary judgment ruling that the court 1) lacked jurisdiction to review decisions committed to the discretion of the Bureau of Reclamation, 2) the contracts were not unconscionable as a matter of law, and 3) that Petitioner farmers' constitutional claim was meritless. The decision of the federal district court was affirmed on appeal.

Petitioner farmers requested review before the Supreme Court of the United States on the grounds that the lower court erred in granting Respondent's summary judgment, that the constitutional rights of the Petitioners are in fact being violated through the license agreement with the United States, and that Petitioners' rights under state water law are at odds with contractual obligations under Federal Reclamation law as perceived by the Bureau.

STATEMENT OF FACTS

In 1902, Congress passed the Reclamation Act ("Act") to provide federal funding for water and irrigation projects in arid portions of the western United States. The Act established a fund from the sales proceeds of public lands to develop, construct and operate water delivery systems for the irrigation and reclamation of these arid lands. Under the Act, the Secretary of the Interior is authorized to develop irrigation projects and is assigned the duty of distributing water from such projects. In order to discharge this function, the Secretary is authorized under the Act to execute contracts with individual water users.

In 1946, Congress enacted the Western Basin Project Act ("Project") providing for the construction of a water delivery system in the State of San Joaquin consisting of a dam, reservoirs and a series of canal systems to implement the delivery of irrigation waters. The Project, completed in 1957 at a cost of $600 million, successfully provides irrigation water for over one million acres of now productive farmland within two geographically separate irrigation districts.

Each irrigation district is responsible for the operation and maintenance of their water distribution systems and is required to contract with individual water users within their respective districts. Federal Reclamation law mandates that all users of federally-supplied irrigation water shall pay a fee based upon a "per/acre basis reflecting project costs of construction and surface water delivery, and the operation and maintenance costs (O & M costs) incurred by each irrigation district." (RA 2: 7-10).

Petitioner's farmland lies in the central portion of the Project area (RA 3: 10-11). At the time, delivery of irrigation water to the districts was initiated under the Project. Petitioner's farmland was not served by either irrigation district (RA 3: 12-13). This was the result of the United States Corps of Engineers determination that Petitioner's land was non-irrigable due to adverse soil conditions existing on Petitioner's land and the limitations of present technology to provide water to the area (RA 3: 13-17).

In the late 1960's, the presence of ground water under the Petitioner's land made it feasible for the area to be developed into productive farmland. Petitioner farmers converted the arid wastelands not served by the irrigation districts through the costly process of drilling deep subterranean wells and the installation of pumping equipment to provide water for irrigation (RA 3: 18-26). The Petitioner farmers bore the staggering expense to develop suitable irrigation systems without aid from the irrigation districts or Bureau (RA 3: 28). The Petitioner

farmers must similarly shoulder the burden of paying for the skyrocketing costs of operating and maintaining those systems. This includes ever-increasing energy costs, necessarily paid by the Petitioner farmers to provide their own water, in addition to their license obligations to the government, creating a dual burden on Petitioners for the use of the same water (RA 4: 1-2).

Shortly after the Petitioner farmers began to develop the area into tillable farmland, the State of San Joaquin created the Red Sands Water Subarea to envelop the central region into the Western Basin Project area. The state declared that water within this subarea could no longer be appropriated requiring all parties claiming an interest in the ground water contained in the subarea to file a claim with the state. San Joaquin Statutes (hereinafter referred to as S.J.S.) section 104. The state acknowledged the claim filed by the Bureau on behalf of the United States, but summarily rejected that of the Petitioner farmers (RA 4: 18-19), forcing Petitioners to obtain state licenses for water. Unable to pay for both increasing energy costs and seemingly limitless O & M obligations to the government, Petitioners were forced to stop payment to the government, filing this action only after protracted negotiations with the Bureau failed to reach an accord (RA 6: 8-9).

Statement Of Issues

I. Did the lower court err in granting the Respondent's motion for summary judgment?

II. Did the lower court err by ruling that it lacked jurisdiction to review the Petitioners' contracts and the rate charged for ground water as matters solely within the discretion of the Secretary of the Interior?

III. Was the lower court in error by holding that the payment formula within the government licensing agreement, as applied, did not amount to an unconstitutional taking under the Fifth Amendment to the United States Constitution?

IV. Do the principles of equitable estoppel foreclose Respondent from seeking enforcement from an otherwise unconscionable contract against Petitioner farmers?

ARGUMENT

I. SUMMARY JUDGMENT IS NOT AVAILABLE WHERE THE MOVING PARTY HAS FAILED TO CARRY ITS BURDEN OF INTRODUCING EVIDENCE SHOWING THE ABSENCE OF FACTUAL ISSUES

A. Appellate review of summary judgment determinations is de novo.

The district court below granted the Bureau of Reclamation's motion for summary judgment (RA 7: 20-22). Appellate review of such determinations is de novo to determine whether there is any genuine issue of material fact. *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990); *T. W. Elec. Serv. v. Contractors Ass'n*, 809 F.2d 626 (9th Cir. 1987). A motion for summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *United States v. Diebold*, 368 U.S. 654 (1962); *Brennan v. Hendrigan*, 888 F.2d 189 (1st Cir. 1989).

B. Evidence offered to establish genuine issues of material facts must be examined in the light most favorable to the non-moving party.

In deciding a motion for summary judgment, the court must consider whether the evidence presents a "sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); see also, *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179 (1st Cir. 1989). However, any evidence offered by the moving party to establish or disprove a material fact and to resolve a genuine issue must be viewed with all inferences drawn in the light most favorable to the party opposing the motion. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The lower court was directed by law to view all the moving papers submitted by the parties, together with any statutes, case law and facts, drawing all inferences which might be drawn, in the light most favorable to the Petitioner farmers. Petitioner farmers had only to plead sufficient material facts to establish a genuine issue regarding the government's claim to the ground water which Petitioners have been pumping from their wells at their expense since the late 1960's (RA 3:

18-22). Absent a showing by Respondent that Petitioners failed to establish an element of any one of their claims, Petitioners meet their burden of establishing a prima facie case. *Celotex Corp. v. Catrett*, 477 U.S. at 325.

C. The burden of proof shifts from the moving to the non-moving party upon a proper evidentiary showing.

Once a non-moving party has established a prima facie case, the burden shifts to the moving party to show "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. at 325. Thereafter, the burden shifts to the non-movant to establish the existence of a genuine material issue. *Brennan v. Hendrigan*, 888 F.2d at 191. Once a party has established a prima facie case in their pleadings or responses, the moving party must tender evidence which, when viewed with all inferences drawn in the light most favorable to the non-moving party, resolve all questions as to material facts in the favor of the movant and determine all genuine issues as a matter of law. *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104 (9th Cir. 1988).

D. Absent evidence from which any other inference could be drawn, a genuine issue of fact exists as to Petitioner farmers' claim to the ground water.

In *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990), under similar but distinguishable facts, the Court of Appeals held summary judgment appropriate where it had the benefit of the introduction into evidence of a five-year Department of Ecology study which substantiated evidence that "between 1967 and 1972 approximately 2.73 million acre-feet of water had been added as inactive storage as a result of the percolation from the project." *Id.* at 473. This study resolved any questions as to the source of petitioner's water and whether it could properly be classified "artificially stored ground water" within the meaning of the applicable Washington Administrative Code. The establishment of at least some interest by the Bureau of Reclamation in the ground water placed the other issues, which were much more susceptible to summary adjudication, within the province of the court. From this factual showing the *Flint* court went on to summarily adjudicate the other issues, identical to those at bar. *Id.*

In the instant case, no study or other evidence was offered to substantiate the source of Respondent's claim that Petitioner farmers were in fact pumping artificially stored ground water as opposed to migrat-

ing natural water. The Respondent failed in essence to establish that the aquifer below Petitioner's land was recharged through the reclamation project at all, relying rather on broad unfounded assertions contained within the record on appeal before this Court (RA 3: 6-9). The court, as well as Respondent, mistakenly believed that such an assumption was warranted and could be the basis for summary judgment. The district court went on to summarily adjudicate the remaining issues in accordance with this erroneous assumption finding no grounds for jurisdiction based on the exercise of agency discretion. Similarly, the lower court found that the charges pursuant to the reclamation license agreement did not constitute a taking in violation of constitutional mandates (RA 7: 20-25).

The present facts more readily lend themselves to summary adjudication once a proprietary interest in the water is established by the Bureau of Reclamation. However, absent a study or other evidence such as that introduced in *Flint*, the inference most favorable to Petitioners which can and must be drawn is that the water appropriated was public ground water. Respondent has introduced no evidence showing at least some interest in the water, which would have given rise to the adjudication of the additional issues.

E. Respondent has failed to carry its burden of showing that no issue of triable fact remains in the case thus summary judgment is not available.

San Joaquin Statute section 101 states in pertinent part that "[a]ll waters of the State of San Joaquin belong to the public." S.J.S. section 102 similarly states "[s]ubject to existing rights, all ground waters of the State of San Joaquin are declared to be public ground waters." Viewing the evidence available to the lower court and all reasonable inferences which can be drawn from that evidence in the light most favorable to the Petitioners, Respondent's assertion that the water is public ground water remains a genuine issue to be decided only upon trial on the merits. Respondent has not carried its burden by failing to resolve all material facts in its favor and therefore summary judgment should not have been granted. *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d at 179.

II. Federal District Courts Have Jurisdiction To Review Administrative Decisions Of The Department Of Interior

A. Appellate review of jurisdictional determinations is de novo.

The district court below granted the Bureau of Reclamation's motion for summary judgment. The court ruled that it lacked jurisdiction to review the Petitioners' contracts and rate charges for ground water because the matter was within the administrative discretion of the Secretary of the Interior (RA 7: 20-23).

Issues on appeal relating to jurisdiction are reviewed de novo. *California Admin. Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984); *South Delta Water Agency v. United States Dep't of the Interior*, 767 F.2d 531 (9th Cir. 1985). Similarly, appellate review of federal court interpretation of federal reclamation statutes is de novo. *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284 (9th Cir. 1987).

The Constitution of the United States is the basis upon which the right and power to review administrative and executive agency actions are predicated. The courts, as the last expositor of the Constitution, maintain the integrity of our separationist system by application of a constitutional litmus to the exercise of governmental function. This wielding of judicial power works in accord with the precepts of our democratic system by affirming the Constitution as the supreme law of the land, by allowing access to judicial process and by guaranteeing equal protection under these laws as well as due process in their application. *Judicial Review of Interior Department Decisions Affecting Mining Claims*, 5 A.L.R. Fed. 566.

B. The Administrative Procedure Act vests jurisdiction over agency decisions with the federal courts.

In 1946, Congress enacted the Administrative Procedure Act ("APA"), June 11, 1946, ch. 324, sections 1-12, 60 Stat. 243 (codified at 5 U.S.C. section 1009), as a means of ensuring judicial review of agency determinations where there were no statutory preclusion of judicial review or where agency action was by law committed to agency discretion. Section (a) of the 1946 APA allowed judicial resolution to any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute. Such aggrieved persons would be entitled to judicial review.

Section (c) of the 1946 APA provided that every agency action made reviewable by statute and every final agency action for which there is

no adequate remedy in any court shall be subject to judicial review. Section (e) defined scope of review to include interpretations of constitutional provisions, and determinations of the meaning or applicability of terms of any agency action. *Id.* In 1966, the APA was redesignated without substantive modification under 5 U.S.C. sections 701 *et seq.* Section 702 of the 1966 APA statutorily granted the right of review to "[a]ny person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." PUB. L. NO. 89-554, 80 Stat. 392 (1966).

Petitioner farmers fall within the context of the APA as aggrieved parties suffering a legal wrong at the hands of the Secretary of the Interior. Petitioners own lands within the central portion of the Western Basin Reclamation Project (RA 3: 10-11). This area was considered non-irrigable by the U.S. Corps of Engineers based in part on the nature of the terrain and prevailing soil conditions in the area (RA 3: 13-16). Thus, the area was not served by the delivery facilities of any existing irrigation district (RA 3: 11-12).

In the late 1960's, landowners, such as the Petitioners, turned this sterile wasteland into a fertile agricultural region by expending substantial monies of their own into irrigation systems, wells and pumps to extract ground water from the area (RA 3: 18-26). Soon thereafter, the State of San Joaquin created the Red Sands Water Subarea which enveloped Petitioner farmers' lands into the Western Basin Project's irrigation districts and declared that no further ground water within the district was available for appropriation (RA 4: 4-7).

This action in essence forced the Petitioner farmers to submit to contracts with the irrigation districts on behalf of the Secretary of the Interior and to pay O & M costs as well as repay construction costs associated with the Western Basin Reclamation Project (RA 5: 3-8). Under the terms of the contract, Petitioners are assessed $1.70 per acre for participation in Project construction repayment, as well as seventy-five percent of the estimated average Project-wide operation and management costs for the year as determined by estimated acreage within the Project subject to ground water licenses, for calculating per-acre costs. (Refer to Clause 7, sections A and B of the license agreement).

Indirect water users, such as Petitioners, who have expended considerable sums of their own monies in order to obtain water for the beneficial use of the land, in 1987 paid $18.57 per acre annually as operation and maintenance costs for the privilege of supplying their own water to themselves (RA 6: 8-9). This figure represents an increase in O & M costs of over 600% to Petitioners since the formation of the

subarea (RA 6: 7). This disparate cost to those shouldering the burden for their own irrigation water truly represents suffering a legal wrong as well as adversely affects Petitioners' ability to keep the land in production, as a result of the licensing agreement with the Secretary of the Interior and within the scope and policy of APA section 702.

C. Disparity in O & M costs to Petitioners is an arbitrary and capricious abuse of the Secretary of the Interior's discretion under Federal Reclamation Law which mandates judicial review.

Although section 701(a)(2) of the 1966 APA exempts from judicial review agency actions committed to agency discretion by law, the exercise of agency discretion itself does not negate judicial review of that decision in itself. *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958). Section 706 of the 1966 APA provides that the reviewing court shall decide all relevant questions of law, interpret all constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. Section 706(2)(A) also provides that the reviewing court shall hold unlawful and set aside findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The trial court summarily ruled that it did not have jurisdiction to hear the case as the contract provisions were within the discretionary authority of the Secretary of the Interior. Respondent will undoubtedly find prophylactic comfort in the Ninth Circuit's ruling in *Flint v. United States*, 906 F.2d 471. The *Flint* court determined that 43 U.S.C. section 485h(e) which provides in relevant part that "the Secretary, in his discretion, may enter into. . .contracts to furnish water for irrigation purposes. Each such contract shall be for such period. . . and at such rates as in the Secretary's judgment shall cover an appropriate share of the annual operation and maintenance costs. . . as the Secretary deems proper. . . ." *Id.* at 474.

The *Flint* court applied section 485h(e) in determining that the explicit language contained therein barred appellate review of the O & M costs and contractual provisions under APA section 701(a)(2) based primarily on plaintiffs' mistaken contention that 485h(e) did not apply to private individuals nor to existing projects. *Id.* at 475. No similar contention is made before this court. Petitioner farmers in the instant case premise jurisdiction rather on the explicit terms of APA section 706(2)(A) acknowledging that discretion is vested in the Secretary of the Interior to contract for irrigation waters and determine appropriate share costs to each user within the text of 43 U.S.C. section 485h(e).

Applicable case law supports the contention that even discretionary agency decisions are reviewable for determinations which are arbitrary, capricious, abuses of discretion and contrary to law. See *Cotton Petroleum Corp. v. United States Dep't of Interior, Bureau of Indian Affairs*, 870 F.2d 1515 (10th Cir. 1989) (finding that a decision of the Secretary of Interior reversing approval of communication agreement submitted by lessees of oil and gas rights in restricted Indian allotment land was reviewable under 5 U.S.C. section 706(2)(A); *Adams*, 271 F.2d 29, (federal court had jurisdiction to review denials of applications for mining patents by the Secretary of the Interior); *Work v. United States*, 262 U.S. 200 (1923) (finding that the Secretary of Interior's determination of a contract price for the appraisal and sale of coal deposits subject to existing leases was reviewable). For a discussion of general application of judicial review of actions by the Department of the Interior, see *Homovich v. Chapman*, 191 F.2d 761 (D.C. Cir. 1951).

The essence of Petitioner farmers' assertion in the instant case is that the Secretary's exercise of discretion concerning setting and assessing O & M costs pursuant to 43 U.S.C. section 485h(e) results in the arbitrary and capricious exercise of that discretion contrary to both state and federal law.

Section 485h(e) requires that annual O & M costs incurred by each district be assessed as annual fees to each water user, a portion of which is remitted to the federal government (RA 2: 8-13). This fee is reflected by a per-acre cost to the user reflecting such assessments (RA 2: 6-7). Clause 7 of the Petitioner's license agreement with the Bureau states that O & M costs are estimated on the average Project-wide costs each year by including some 56,000 acres of land subject to ground water licensing within the Project wide per-acre cost (Refer to Clause 7, section A of license). The total acreage within the Project, however, exceeds one million acres (RA 1: 22). The total acreage of ground water licenses constitutes only five percent of the total irrigable land served by the Project. Given that the Project had been completed in 1957 (RA 1: 20) and had been delivering water to direct users for at least fifteen years prior to Petitioner farmers' assessments for O & M costs (RA 4: 4-8); it escapes calculation and adequate explanation how indirect water users such as Petitioners, who comprise only five percent of the land subject to the Project and who incur all the expense for pumping their own irrigation water, have expended greater aggregate funds than those individuals who get their irrigation water directly from the Project. These direct users incur a fraction of the expense for irrigation water that ground water licensees under the agreement incur.

This is wholly arbitrary, and creates a distinct disadvantage to Petitioners at the exercise of the Secretary of the Interior's discretion.

D. Rates assessed under the licensing agreement are contrary to the law of the State of San Joaquin.

San Joaquin Statutes section 103(b) states that the Department of Natural Resources, having authority to manage and regulate all ground waters within the state pursuant to section 103(a), may enter "into licensing agreements and issue a permit for beneficial use of said waters and establish *reasonable rates.*" (Emphasis added). Similarly, section 104 of the San Joaquin Statutes requires that the agreement entered into between parties shall relate "to reasonable charges for withdraw of artificially stored ground waters."

43 U.S.C. section 383 sets the framework for deference to state law providing "nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state. . .relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." 1902 Act section 8, PUB. L. NO. 57-161, 32 Stat. 390 (1902) as cited in *Long v. Salt River Valley Water Users, Ass'n*, 820 F.2d 284.

The history of the relationship between the federal government and the states in the reclamation of arid lands of the western states is both long and involved but through it runs the consistent thread of purposeful and continued deference to state water law by Congress. *California v. United States*, 438 U.S. 645 (1978). The federal court in *Flint*, relies heavily on its application of a Washington Administrative Code section which is virtually indistinguishable from San Joaquin Statute section 104. The Washington statute, however, adds that licensing provisions must "comply with federal law." *Flint*, 906 F.2d at 476. This variation, not found in the San Joaquin Statutes, acts to subject state law to that of the Federal Reclamation Law.

The analogous San Joaquin Statute has no such limiting language and as such, under the persuasive rule of *California v. United States*, the San Joaquin Statutes are afforded great deference and do in fact create a reasonableness standard under S.J.S. sections 103(b) and 104. A standard that is consistent with fundamental principles of equity and fairness. A standard which is woefully absent in the government's interpretation of Petitioner farmers' license obligations.

E. Respondent's cross-complaint vests jurisdiction with the district court.

28 U.S.C. section 1345(a) states in pertinent part that "the district court shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof." Normally, jurisdiction under this statute is limited to actions on behalf of the United States and the court's statutory jurisdiction may not be implied to include an extension to counter-claims seeking affirmative relief against the United States (see *United States v. Failla*, 120 F. Supp. 797 (D.N.J. 1954)). At least one federal court however has recognized that a cross action or counter-claim by the United States to foreclose a challenged federal lien would be an action commenced by the United States within the terms of 28 U.S.C. section 1345. *George v. United States*, 181 F. Supp. 522 (S.D. Tex. 1960).

The present case fits squarely within this rule of law. The government has counter-claimed for a restraining order against Petitioners until such time as Petitioners have tendered delinquent payment to the government (RA 7: 15-18). As such, 28 U.S.C. section 1345 confers subject matter jurisdiction independent of, and in addition to, jurisdiction conferred under the APA.

III. The Payment Formula Contained Within The License Agreement Amounts To An Unconstitutional Taking In Violation Of The Fifth Amendment

A. No private property may be taken for public use absent just compensation.

The "just compensation" clause of the Fifth Amendment to the U.S. Constitution states "nor shall private property be taken for public use without just compensation." The United States Supreme Court has stated that the just compensation clause was designed to prevent the government from forcing individuals to bear public burdens which, in all justice and fairness, should be borne by the public as a whole. Theuman, *Just Compensation-Taking Property*, 89 L. Ed. 2d 977.

The Supreme Court fails to recognize a precise definition of when a public action results in a compensable taking. The Court recognizes that just compensation within the Fifth Amendment is generally invoked where the character of the governmental action is such as to create an economic impact on the claimant, "particularly the extent in which it interferes with the claimant's reasonable investment-backed expectation." *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979).

Similarly, the Supreme Court in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), reiterated the concept that the "taking" analysis is essentially ad hoc and requires the use of logic and the principles of equity as much as standards of law. However, courts should pay particular attention to losses associated with reasonable investment-backed expectations.

The instant case on appeal falls logically within the broad concept of an investment-backed expectation. Petitioner farmers invested both time and capital in implementing adequate irrigation systems and bringing the land up to production standards. The capital outlay was in essence invested on a long-term return both as an increase in property value and as a viable business enterprise in agricultural commodity production (RA 3: 23-26, 4: 1-2).

B. The governmental restriction on Petitioners' use of the water serves no substantial public service.

Pursuant to section 8 of the license agreement, the license is subject to the terms and conditions of the state water permit, including the regulatory orders of the state issued thereunder. S.J.S. section 103(b) requires all persons claiming an interest in ground water to file a declaration with the state. Additionally, S.J.S. section 104 requires a ground water user to contract with the Bureau of Reclamation as a condition precedent to issuance of such permit.

A restriction on property may constitute a "taking" if the restriction is not reasonably necessary to effectuate a substantial public purpose or where it results in an unreasonably harsh impact upon the owner's use of the property. *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

A "taking" has occurred in the instant case. Petitioners' investment-backed interest in the property is substantially diminished in relation to the great cost in obtaining irrigation water. Furthermore, the permit requirement creates an unreasonably harsh result by requiring payment under the license prior to the right of drawing the water, thus creating an insurmountable financial burden on the Petitioner farmers. Broad policy concerns of supplying water for the beneficial use and development of otherwise arid lands is not effectuated by requiring Petitioners to pay twice for the water. It only decreases Petitioners' ability to maintain the land in its beneficial use, serving neither policy nor principles of equity.

C. State law governs determinations of proprietary water rights within Federal Reclamation Law.

Congress, through the legislative process, and the Supreme Court of the United States of America through interpretive rulings, both consistently leave the question of property rights in water "to be determined by and under local state law." *Rank v. Krug*, 90 F. Supp. 773 (S.D. Cal. 1950). The meaning of "property" as used within the context of the Fifth Amendment is a federal question, however it "normally obtains its content by reference to local law." *United States v. Cress*, 243 U.S. 316 (1917). The "character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial,. . .determines the question of whether it is a taking." *Id.*

The court in *Flint*, 906 F.2d 471, determined that no property right existed to be taken by the government in dismissing petitioners' claim. The *Flint* court based this assumption on application of Washington state water law and its subsequent interpretation in case law. See *Peterson v. United States Dep't of the Interior*, 899 F.2d 799 (9th Cir. 1990) (holding that the first step in a taking analysis is "to determine whether there is a property right that is protected by the Constitution"); see also, *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977) (finding that project water "is not there for the taking [by the landowner subject to state law], but for the giving by the United States").

The statutes concerning water rights under San Joaquin state law can be found initially in sections 101 and 102. S.J.S. section 101 states that "[a]ll waters of the State of San Joaquin belong to the public." S.J.S. section 102 adds that "[s]ubject to existing rights, all ground waters of the State of San Joaquin are declared to be public ground waters." The lower court record clearly establishes that the state of San Joaquin is a prior appropriation state for the purposes of water law (RA 10: 12).

D. Under applicable principles of prior appropriation Petitioners have a prior existing right to draw ground water for irrigation.

Prior appropriation doctrine established a custom providing that he who first altered a course of a natural stream flowing through public lands and appropriated the diverted water for some useful purpose acquired a superior right to the continued use of such water. *Boquillas Land and Cattle Co. v. Curtis*, 213 U.S. 339 (1914).

Valid appropriation has encompassed water taken for irrigation purposes from wells and subterranean streams. 45 AM.JUR.2D *Irrigation* section 24 (1969). The rights acquired by prior appropriation are

usufructary only, the appropriator acquires no title to the water, but only a right to take his share for the beneficial use of irrigation. *United States v. Tilly*, 124 F.2d 850 (8th Cir. 1954).

The record on appeal establishes that although the state of San Joaquin recognized the rights of prior appropriators, in the early 1970's the state declared that no further ground water was available for appropriation (RA 4:7-8). The state did so pursuant to the authority of the state generally, and the Department of Natural Resources specifically, to regulate and manage all ground water within the state including those consisting of commingled, naturally occurring and artificially stored ground waters. S.J.S. section 103(a).

E. Respondent offers no fact establishing that Petitioners withdrew artificially stored ground water.

The *Flint* court determined that the petitioners had no property rights in the underground water. The court recognized a Washington Department of Ecology five-year study establishing that between 1952 and 1968, approximately 2.73 million acre-feet of water had been added to project storage as a result of percolation from project irrigation. This was evidence that the petitioners had in fact withdrawn "artificially stored water" as a result of the Federal Columbia Basin project. The only evidence Respondent offers below as to any benefit conferred to the Petitioner farmers in the Red Sands Subarea is that several years after the Western Basin Project was completed, surface outcroppings of new vegetation appeared in the area (RA 3: 18-21). Respondent offers the explanation for this as migrating subsurface ground water, failing to recognize that the U.S. Corps of Engineers had attributed the non-irrigable character of the area as due in part to terrain and soil conditions at the time (RA 3: 14-16).

Where Respondent has failed to establish that the Petitioners have been withdrawing "artificially stored ground water" pursuant to S.J.S. section 104, the Department of Interior may not preclude the use of such water based upon the issuance of a permit and non-payment of contractual obligations by the farmers. Farmers would then have a superior right to use of the water under prevailing state law in San Joaquin. A water right with no assurance of its peaceful enjoyment is worth little to a farmer whose very existence is dependent upon the predictability of his water supply. *State v. Rank*, 293 F.2d 340 (9th Cir. 1961).

Petitioners are being forced to comply with government licensing procedures. This results in Petitioners having to remit O & M pay-

ments under the forced license for irrigation water that they must pump and disperse themselves (RA 4: 19-23). This restriction on Petitioners creates extensive financial hardships as to both immediate operating expenses and long-term investment return due to conditions present in obtaining irrigation water. This governmental intrusion on Petitioners' right to use of the underlying water, as determined in accordance with state law, constitutes an uncompensated public taking of a private right to the beneficial use of appropriated irrigation water on Petitioners' lands, resulting in a violation of the just compensation clause of the Fifth Amendment to the Constitution.

IV. The Principles Of Equitable Estoppel Would Act To Prevent Respondent From Enforcing Its Unconscionable Contract With Petitioners

A. Equitable estoppel rests in law and equity to preclude claims where fairness and justice so demand.

The doctrine of equitable estoppel is neither a claim nor defense, "[i]t is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct." See generally 3 J. Pomeroy, Equity Jurisprudence section 804, at 189 (5th ed. 1941). Therefore, a plaintiff seeking the benefit of equitable estoppel must have some claim, sounding in equity or in law, that otherwise entitles it to prevail against the defendant. *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104. Equitable estoppel is applied to claims for enforcement, such as those of the Respondent, where its misconduct in acquiring unconscionable contract terms, would preclude enforcement as unfair or unjust.

The fundamental principle applied in the doctrine of equitable estoppel is that it "adjusts the relative rights of parties based upon consideration of justice and good conscience." *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970). "It is a rule of justice which, in its proper field, prevails over all other rules." *Id.* at 96. Estoppel acts to even-up positions of disparate bargaining power such as in the instant case, relieving parties such as Petitioners from performance under contracts that they did not negotiate and could not avoid (RA 4: 19-23).

B. The principles of equitable estoppel are applicable to agencies of the United States Government.

The circumstances under which the Respondent may be estopped from asserting a claim or a defense are not well-defined, but "it is well

settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Serv. of Crawford County*, 467 U.S. 51 (1984). It is the Supreme Court's position that it has never expressly applied the doctrine against the government. *Lyng v. Payne*, 476 U.S. 926 (1986). However, the Supreme Court applied the "rationale" of equitable estoppel against the government in *Moser v. United States*, 341 U.S. 41 (1951). See also, *United States v. Lazy F Ranch*, 481 F.2d 985 (9th Cir. 1973). The Ninth Circuit has said "[t]he fundamental principle of equitable estoppel applies to government agencies, as well as private parties." *ATC Petroleum*, 860 F.2d at 1104; see also, *Investors Research Corp. v. SEC*, 628 F.2d 168 (D.C. Cir. 1980).

Respondent, as an agency of the United States government, is held accountable to the principles of equity in its dealings with parties such as Petitioner farmers, even where the extent of that application is not yet certain.

C. More than the traditional elements must be shown to apply the doctrine of equitable estoppel against the government.

The traditional test for estoppel requires a showing that: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Jaa v. INS*, 779 F.2d 569 (9th Cir. 1986); *United States v. Georgia-Pacific Co.*, 421 F.2d at 96.

A party asserting estoppel against the government must do more than merely demonstrate that the four traditional elements exist. They must show two additional elements to invoke equitable estoppel against the government. *Heckler*, 467 U.S. 51.

First, that the government's actions which resulted in an injustice were the result of affirmative misconduct. *Jaa v. INS*, 779 F.2d at 572; *Morgan v. Heckler*, 779 F.2d 544 (9th Cir. 1985); *International Org. of Masters, Mates & Pilots v. Brown*, 698 F.2d 537 (D.C. Cir. 1983).

Second, affirmative misconduct will not invoke estoppel against the government unless "the public's interest would not be unduly damaged by the imposition of estoppel." *Lazy F Ranch*, 481 F.2d at 985.

Respondent, in the instant case, approximately thirty years after creating the Western Basin Project (RA 1: 17-18) and some fifteen years after the actual construction of the dams and reservoirs (RA 1: 19-21), entered into mandatory license agreements and contracts with Petition-

ers (RA 4: 19-23). These agreements and contracts were forced upon Petitioner farmers knowing that Respondent's claim to the water was without the benefit of any Department of Ecology water survey. Such a survey would determine what, if any, effect the water project had on the ground water outside the initial project area. Respondent, as an agent of the government, is held to constructive knowledge of 43 U.S.C. section 485h(e), which in pertinent part states "[e]ach such contract shall be. . .at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance costs. . .as the Secretary deems proper. . . ." As such, Respondent not only enjoys the ability to force Petitioners into contracts for water which Petitioners may have a superior right to under S.J.S. sections 101 and 102, but also to adjust the rates charged with the only limitation being the minimum it could charge. Any banker, finance company or other installment sales merchant would cherish Respondent's position. Respondent not only admits to such knowledge in the record (RA 7: 15-19), but relied on it in its counter-claim, satisfying the first element of estoppel, knowledge.

The second element is that Respondent intended that Petitioners act upon the contract in the belief that Respondent possessed the only colorable claim to the ground water. The annual rate escalations imposed by Respondent (RA 6: 7-10), as well as the counter-claim in this action (RA 7: 15-19) establishes that the Respondent intended its conduct of imposing the open price term contracts be acted upon by payment of any amount demanded.

Petitioners' license agreements do not indicate the extent of discretion actually exercised in the setting of water delivery charges. In fact, the agreement is actually misleading in that it purports to allow "payment. . .may be adjusted. . .as the situation may require, to conform to any increase or decrease in the quantities of water available" (RA 5: 15-20). Such language, together with the minimal construction component (RA 5: 13-14) of $1.70, would lead a reasonable person to believe that absent substantial changes in the availability of ground water, (a fear not normally faced by Petitioner farmers who operate their own wells), the charges would stay reasonably stable at the rate existing when the contract was entered into. As such, Petitioners would have ***no knowledge*** of the true facts regarding the extent of Respondent's discretion in adjusting the price terms of the agreements.

In relying on Respondent's adhesive contracts, the Petitioner farmers have been paying increasing amounts annually for the right to draw water from wells that they installed at their own expense, which they maintain and in which they absorb the electrical costs in operating the

pumps. Respondent has done little more than expend administrative costs necessary to establish new boundaries without additional construction of canals or other structures. Thus, while the assessment base was expanded by the introduction of Petitioners into the project, the fees charged continued to escalate. As such, Petitioners' reliance on the acts of Respondent has resulted in the unjustified drainage of capital from their farming operations.

D. Petitioners' showing of the traditional elements of equitable estoppel establish unconscionability.

The Court of Claims described an unconscionable contract provision as "one which no man in his senses, not under a delusion, would make, on the one hand, and which no fair and honest man would accept on the other." *Hume v. United States*, 21 Ct. Cl. 328, 330 (1886), *aff'd*, 132 U.S. 406 (1889); *Fraass Surgical Mfg. Co. v. United States*, 571 F.2d 34 (Ct. Cl. 1978). Had Petitioner farmers known the true extent of the ability of the price term to be manipulated and abused or that judicial review was unavailable should a dispute arise, there is little doubt that they would have contested it then, instead of waiting until the abuse of agency discretion reached the point of forcing them out of business. Applying the quotation above, fairness and honesty would act to prevent the government from accepting such an unconscionable contract, let alone attempting to enforce such a contract after forcing a party into it. Therefore, the pursuit of such contracts by the government is itself an act of affirmative misconduct.

Lastly, non-enforcement of the contract through the implementation of equitable estoppel would have little if any adverse effect on any public interest. The income generated by the project would merely return to its pre-planned basis, depriving the government of only the windfall it stood to gain through its heavy-handed contract.

CONCLUSION

The Petitioners respectfully submit that the lower court erred in granting Respondent's motion for summary judgment. Before the lower court, the Petitioners sufficiently established a genuine issue of material fact as to the source of the underground water, and to the construction of the state statutes in relation to the Federal Reclamation Act. Summary judgment therefore was not warranted, in lieu of a trial on the merits.

The Petitioners also affirmatively pled and sufficiently established subject matter jurisdiction before the district court. The triable issues

presented before the trial court included interpretation of federal agency law in relation to state mandates, the exercise of agency discretion and the arbitrary and capricious nature of such decisions. It also included the constitutional claim against the United States for a violation of a private individual's right to use ground water under state law.

Petitioners have established that the governmental prohibition against unpermitted water use is tantamount to a taking of property, as defined within state law, so as to rise to the level of a "public use of private property without just compensation." Similarly, contractual obligations contrary to state mandates for reasonableness, subject the Petitioners to a taking of proprietary rights in the beneficial use of their water which similarly rise to the level of a taking within the meaning of the Fifth Amendment.

The principles in equitable estoppel of promoting justice and fair dealing by preventing the assertion of otherwise available legal or equitable claims is properly applied to Respondent, a government agency, since all traditional elements as well as the "affirmative misconduct causing injustice" and "non-harm of public interest" elements are identifiable. In the instant case, equitable estoppel should be applied to Respondent's claim for enforcement on its unconscionable contract, preventing its enforcement to promote fairness.

Petitioners respectfully request this court to reverse the trial court's summary judgment and enjoin action on Respondent's counter-claim pending final resolution of this matter.

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