A REPORT ON POLICIES FOR REPAYMENT CONTRACT ADJUSTMENT, PROPOSED REPEAL OF THE 1890 ACT, AND PROPOSED LEGISLATION RELATING TO FEDERAL TAKING OF IRRIGABLE LAND FOR NONAGRICULTURAL USES

Statement By

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I appreciate this opportunity to appear before you, at the invitation of Mr. Robert Barkley, Chairman of the Water Users Committee, to discuss briefly three topics, namely: 1. the Bureau's authority, policies, and procedures for amending repayment contracts to treat with needed and justifiable adjustments in irrigable acreages and repayment obligations, (2) proposed repeal of the so-called Canal Act of 1890, under which the U. S. reserved a right of way for canals and ditches across all public lands which were entered after October 2, 1888, and (3) proposed legislation to provide authority for Federal and State agencies to make payments to irrigation districts when irrigable lands are taken for nonagricultural purposes.

I recognize these are only a few of the many problems and questions faced by water users and district organizations in the operation of Reclamation projects. Since moving to Washington where all major problems eventually are referred, which incidentally become mine, I am more conscious than ever of the frequency and complexity of your many problems. I am reminded of the letter a bricklayer once wrote to the contracting firm for which he worked. If you think you and I have troubles, just listen to the problems of this bricklayer.
"When I got to the job, I found that a storm had knocked some bricks off the top of the wall. So I rigged up a pair of blocks and hoisted up a couple of barrels of bricks.

"After I had finished repairing the damage, I found there was a lot of bricks left over, so I hoisted the barrel back up again and secured the line at the bottom. Then I went up and filled the barrel with the extra bricks, then I went down to the bottom and cast off the line."
"Unfortunately, the barrel of bricks was heavier than I was and before I knew what was happening, the barrel started down, jerking me off the ground. I decided to hang on, and halfway up I met the barrel coming down and received a severe blow on the shoulder.

"Then I continued to the top, banging my head against the beam and getting my fingers jammed in the pulley. When the barrel hit the ground it burst out its bottom, spilling out the bricks. I was now heavier than the barrel, and started down again at high speed.

"Halfway down, I met the barrel coming up and received severe injuries to my shins. When I hit the ground, I landed on the bricks, getting several painful cuts from the sharp edges.

"At this point I must have lost my presence of mind because I let go of the line. The barrel then came down giving me another heavy blow in the head which put me in the hospital.

"I respectfully request sick leave."

I am sure there are times when we become so inflected with irrigation problems that we would like to request "sick leave" and take off for a mountain trout stream or one of our many recreation areas for a week or two of convalescence. I shall discuss these in the order mentioned.

The philosophy of irrigation repayment, as established by the 1939 Reclamation Project Act, is based upon the principle of assessing annual charges to irrigators in accordance with their reasonable ability to pay.
The principle of payment capacity is fundamental to the planning, development, and repayment of Reclamation projects. Obviously, development of a repayment schedule that runs 40, 50, or more years into the future requires projections of yields, prices, and costs over an equally long period. If our crystal ball were more perfect, there would be very few repayment problems and little need for contract amendments. However, at best, it is impossible to foresee and initially allow for all economic and physical conditions that may develop into repayment problems throughout the lifetime of a project. To attempt to allow for every contingency would require ultra-conservatism and would result in bypassing many good projects. Therefore, through the years, a sounder approach has been developed whereby basic legislative authority, policies, and procedures provide latitude for amending repayment contracts to make adjustments in financial and other provisions when and where necessary and justified.

Three acts of Congress contain most of the general authorizations for adjustments in the acreages and payment obligations on Reclamation projects. These are the Fact Finders' Act of 1924, the Omnibus Adjustment Act of 1926, and Sections 7 and 8 of the Reclamation Project Act of 1939.

Most contract amendments since World War II have been made under the 1939 Act. Section 7(a) of that Act provides that:
"The Secretary is hereby authorized and directed to investigate the repayment problems of any existing project contract unit in connection with which, in his judgment, a contract under section 3 or 4 of this Act would not be practicable nor provide an economically sound adjustment, and to negotiate a contract which, in his judgment, both would provide fair and equitable treatment of the repayment problems involved and would be in keeping with the general purposes of this Act."

Section 7(c) of the 1939 Act requires that any contract negotiated under Section 7(a) may be executed by the Secretary only after approval thereof has been given by Act of Congress. Thus, to adhere to the procedures specifically established by the Congress under Section 7 involves reaching agreement with water users on contract terms and formal presentation of the contract to the Congress for approval.

During the past 20 years, the Department has negotiated more than 40 amendatory repayment contracts under Section 7 of the 1939 Act for districts in financial difficulty. Legislative approval was obtained in each case. It is our general opinion that the policies, procedures, and standards as developed and supported by the Bureau and the Department, and repeatedly approved by the Congress, are realistic, fair, and equitable both to the Government and to the irrigation districts involved.

There may be some inequity between districts, however, because of the lack of uniformity in the length of payout periods. These range generally from 75 to 125 years.
The basic principles and procedures followed in the past 15 years are these:

1. Make a detailed analysis of the physical and economic factors influencing the ability of the project water users to make annual payments for water.

2. Negotiate an amendatory schedule of annual water charges in accordance with the ability to pay principal, without regard to the term of years required to return the contract obligation, except where power revenues are available to pay irrigation costs in excess of the irrigators' ability to pay over a 50-year period.

3. Recommend no write-off of reimbursable construction costs except where a reclassification of project lands results in a reduction of the irrigable area and in unused or excess capacities in project works.

4. Provide for a variable repayment formula which would operate to adjust the scheduled annual construction installments upward or downward in correlation with fluctuating annual ability to pay.

Among other matters considered are the need for a rehabilitation and betterment program and the desirability of establishing a reserve fund by the District to be available for unusual and unanticipated emergency-maintenance problems.
The amendatory repayment contract program of the Bureau of Reclamation has proceeded consistently on the basis of fixing annual payments of the water users in accordance with payment capacity, leaving length of repayment period to be worked out in terms of the actual costs required to be repaid. Recommendations for partial write-off of construction obligations have been limited to situations in which constructed works have become excess to the project's needs by reason of a reduction in irrigable lands.

Members of the Congress and others have suggested from time to time that repayment periods should not be extended beyond a reasonable maximum period, say 50 or 60 years. It has been further suggested that amounts which farmers cannot reasonably pay within such a period should be assigned to power revenues for payment, if available, or otherwise be declared nonreimbursable and nonreturnable.

The so-called Northwest account first proposed several years ago would have accomplished this for all projects in Oregon, Washington, Idaho, and western Montana had it been enacted into law. At times a west-wide account has been suggested which would accomplish this for all projects. Until and unless general legislation is enacted to provide otherwise, we shall continue the policy outlined herein.

On two recent occasions the Department has recommended enactment of legislation which would provide for the chargeoff of construction costs assignable to lands reclassified from irrigable to nonirrigable. One was on the Big Flat unit of the Missoula Valley Project in Montana and the other was the Riverton Project in Wyoming.
Project works of the Big Flat Unit consist only of a riverside diversion and one canal to serve less than a thousand acres. The reclassification of 164 acres as nonirrigable does not permit abandonment of a segment of the works, but excess capacity does result in the system by virtue of the reduced acreage.

Riverton is a special case not covered by Sec. 7 of the 1939 Act; however, it would involve a chargeoff of over $9 million, justified by a substantial abandonment of works resulting from a reduction in irrigable acreage. The proposed legislation provides that if new lands are added, or formerly unproductive lands are restored to the irrigable area of the district, the construction charge obligation shall be increased accordingly.

The policies and procedures which I have outlined were followed in amending over 40 contracts with irrigation districts since passage of the 1939 Reclamation Project Act, and continue today. Repayment periods have been extended and most fall within a range of 70 to 125 years.

There would seem to be considerable merit and justification for general legislative authority to limit the length of repayment periods for all project water users to a reasonable maximum, and assign irrigation costs in excess of amounts that water users can be expected to pay in such a period to a west-wide repayment account. Surplus revenues from an account would be derived from power revenues and municipal and industrial water service. However, in the absence of
general legislation, we can continue to carry problems of specific water-user organizations to the Congress under authority of Section 7 of the 1939 Reclamation Project Act. We think that adjustments under that authority have been fair and equitable to the water users and have contributed significantly to the sound administration of the Federal Reclamation Program.

Part 2 of this report deals with the so-called Canal Act of 1890.

The National Reclamation Association has passed resolutions favoring repeal of the Act of August 30, 1890.

Several interesting developments have occurred. Congressman Sisk of California introduced a bill in the House (H.R. 130) which would accomplish the objective of the National Reclamation Association. In addition, Congressman Martin of Nebraska introduced a bill which would make the 1890 Act inoperative as to the Ainsworth Unit of the Missouri River Basin Project. And further, the Department of the Interior has recommended general legislation which would in effect repeal the 1890 Act reservation of right of way. Before I outline the status of these proposals, let me discuss briefly the history and background of the Act of August 30, 1890, generally referred to as the Canal Act. It was enacted by the Congress on August 30, 1890, and it actually affects public lands west of the 100th meridian which were entered after October 2, 1888. This apparent discrepancy in dates comes about by the fact that all then pending entries for public lands were suspended by the Congress on that date, and when suspension was lifted by the passage of the Act of August 30, 1890, it was with
the proviso that the lands included in these suspended entries, as well as all other lands subsequently entered, would be subject to a right-of-way reservation for canals and ditches constructed under the authority of the United States.

The statute applies with but few exceptions to all public lands west of the 100th meridian which were entered after October 2, 1888. It does not apply to lands in the State of Texas. That State obtained title to its public domain when it was admitted to the Union. The old Spanish land grants, many of which are found in New Mexico and California, also are not subject to this reservation. Likewise it does not apply to the odd-numbered sections which were within the area of preliminary railroad grants. We find in certain areas to be crossed by a proposed canal that perhaps only one out of four or five ownerships is subject to the Act.

Although the legislative history of the Act is rather sketchy, our review leads us to believe that the Congress did not contemplate the construction of canals of the magnitude of those being built today on some of our current projects. Sixty years ago, when the reclamation program was getting under way, a right-of-way 75 or 100 feet in width was common; today for example on the San Luis Unit of the Central Valley Project the main canal right-of-way is about 650 feet in width, and on at least one section of the main canal on the proposed Garrison Diversion Unit of the Missouri River Basin Project in North Dakota about 1,400 feet of right-of-way width
will be required. Of course the canal itself will not occupy all of the right-of-way, but considerable areas will be needed for cuts and fills necessary to maintain the proper canal alignment. Furthermore, canals today frequently divert many miles upstream from the irrigable lands to be served and therefore pass through and cause severance damage to many lands that are not benefited in any way by the project.

The reservation of the Canal act is a floating-type easement, never located precisely until a canal is actually placed upon the land. Hence, a landowner never can be sure that the spot he selects for the location of his improvements might not be exactly in the route of a future canal. I do not wish to infer that we are arbitrary in the location of our canals. Quite to the contrary, we have gone to considerable effort to relocate proposed canals to avoid interference with existing improvements or to minimize severance damages. All in all, however, a canal is rather inflexible and only a minor degree of realignment is feasible since a canal location is dictated largely by topographic conditions. The first exercise of the Government's reserved right-of-way across a specific property does not terminate the operation of the statute. It is possible to exercise this again and again in the enlargement of canals or adding more canals by the location of two, three, or even more canals across the same piece of land, and even under this extreme situation the application of the Act would not be terminated.

The reserved easement remains a cloud on the title to a tract of land even though we may have no plans for the construction of a
canal across it in the foreseeable future. There is no authority in the Executive Branch to release the easement.

In legal interpretations ranging back over 40 years, it has been held that we can make no payment for the lands needed for canal rights-of-way where the Canal Act reservation is in effect, nor can be make payments for severance damages accruing to the remainder of an ownership. In our normal canal right-of-way acquisitions it is the practice to install bridges across the canals for the use of the farmers and ranchers in order to alleviate the severance problem. However, we are without authority to build such bridges across canals constructed on reserved rights-of-way as the construction of the bridges would constitute a form of severance damage compensation. We do have administrative authority, however, to make payments for improvements that are on the right-of-way, thus we can pay for such items as land leveling, established crops, fruit trees, terracing, alfalfa, or other similar permanent seed-beds, and for orchard and other trees including windbreaks, grapevines, and similar plantings. We can also make payment for houses, barns, and other building improvements, although we usually try to relocate buildings to an area adjacent to the canal right-of-way so that the landowner may continue to operate in the same area.
Earlier I referred to our right-of-way requirements for the San Luis Canal which is currently under construction as a part of the Central Valley Project. That canal will be approximately 102 miles in length and involves about 210 ownerships. Approximately 80 of these ownerships are subject to the reserved right-of-way. The Canal is crossing lands, many of which have extremely high productive potential for a wide variety of specialized agricultural crops. In such circumstances, current fair market value as determined by appraisal may result in payments as high as $2,000 per acre for non-Canal Act lands. However, when the reserved right-of-way of the Canal Act is effective and payment is limited to improvements only, the non-perennial nature of the current crop on otherwise similar lands may then result in payments as low as $100 to $200 per acre.

The situation we are encountering on the Ainsworth Unit of the Missouri River Basin Project, Nebraska, is most unique. Here the storage reservoir and the main canal are located to the west of the 100th meridian while the areas which will receive the irrigation water are on the east side of the line. The lands crossed by the main canal will receive no benefit from the project, but those owners of which lands are subject to the Canal Act reservation will furnish
free right-of-way for the benefit of the water users on the other side of the meridian.

The main canal of the Ainsworth Unit traverses the Sandhill region of Nebraska which is almost wholly devoted to cattle ranches. Many of these ranches will be physically severed by the canal, but we will not be able to pay severance damages nor to install bridge crossings for the benefit of the ranchers.

On October 7 the Public Lands Subcommittee of the Interior and Insular Affairs Committee of the House of Representatives heard testimony pertaining to various bills and legislative proposals to amend or repeal the Act of August 30, 1890. H. R. 130, introduced by Congressman Siak was reported favorably by the Irrigation Subcommittee. Consideration by the full committee was scheduled for October 16, 1963, but was postponed because of failure to obtain a quorum. Thus it was set over until October 23 which is today. I have just been advised by telephone that no action was taken yesterday and it has now been scheduled for attention by the full committee on October 30.
Turning now to Part 3 of this report, which relates to proposed legislation to authorize Federal and State agencies to compensate irrigation districts for loss of irrigable acreage taken for nonagricultural purposes. A bill has been introduced in the Congress which, if enacted, will provide an equitable solution to financial problems which often arise when lands in an irrigation district, canal company, or other water agency are acquired for non-irrigation uses such as highways, defense installations, or airfields either by a Federal agency or by another public agency, such as a state, in connection with a Federal aid project. Under existing interpretations of rules applicable to such acquisitions, resulting costs to the water agency are regarded by some acquiring agencies as noncompensable. Such a stand is inequitable to the remaining lands in an irrigation district which must assume an increased debt per acre to compensate for the reduced paying acreage of the district. H.R. 5565, if enacted, would give the public agency acquiring irrigable land unequivocable authority to compensate the affected irrigation district or water agency for losses in its assessable base or for additional expenses incurred by reason of the land acquisition. The latter would include costs of relocation or modification of the project works.

The financial difficulties that confront water agencies fall into two categories: first, those associated with existing obligations to repay construction charges or to bear operation and
and maintenance costs; and second, those associated with additional costs which the land acquisition brings about. The latter category includes increased costs of operation and maintenance, and the expense of relocation or modification of project works.

For Federal reclamation projects the crux of the problem in the first category is found in the fact that the lands within a reclamation water agency are privately owned, while the project works—water storage and distribution system facilities and rights-of-way—are owned by the United States. When land within a reclamation water agency is acquired by a public body/\settlement on the value of the fee title to the land is a matter between the landowner and the acquiring agency; determination of such value is accomplished under generally established doctrines and procedures. On the other hand, irrigation district or the reclamation water agency as an entity, and not the landowners, has contracted to repay the United States the portion of the cost of constructing the project allocated to irrigation. Each acre of irrigable land within the water agency is assessable for its proportionate share of the repayment obligation.

Under the reclamation laws, the construction charge attributable to a specific piece of land does not constitute a lien upon that land except to the extent of matured and unpaid installments of the charge. Therefore, when land is acquired within a reclamation water agency, compensation for future installments of the construction charge
attributable to that land are not included with the payment to the landowner for the land itself. Nor, under present practice, is compensation ordinarily paid the water agency, which must still discharge its contractual obligation to pay the entire construction charge allocated to irrigation. The unpaid balance of the construction charge, including that attributable to the acquired lands, must be levied upon the remaining lands of the water agency. This places an undue burden upon the remaining lands. since, as a rule, there is no direct benefit to them from construction of a nonproject facility on the acquired lands.

The Department of the Interior has been asked to furnish its views on H.R. 5565 to the appropriate congressional committees. In general, we think that this is an excellent bill and we have recommended only minor modifications. The Department's proposed report to the Congress is now being prepared, and we expect it will be submitted to the Congress shortly. Hearings on the bill had not been scheduled at the time I left Washington, but we are hopeful that committee hearings will be held yet this fall.

We sincerely hope that prior to the 1964 Convention of the National Reclamation Association, we can report favorable action of the Congress on Parts 2 and 3 of this report. In the meantime we shall continue to work closely with the Water User Committee of the NRA.