The Role of the Federal Government

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A Symposium on Federal, State and Local Cooperation in Conservation and Development of Water Resources

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The history of water resources development in the West is characterized by harmonious cooperation of federal, state, and local governmental units in developing and using water resources, and in applying the law. This harmonious accommodation of varied interests is a direct result of a national policy having its roots in the Constitutional Convention and in the Constitution which that convention submitted to the people of the states for ratification. The policy has respected the interests of state and local units of government and it has fostered an assumption of responsibility in their areas.

Among the factors which brought about the Constitutional Convention and required the termination of the headless government of thirteen confederated American states were lack of respect from abroad and the absence of a cohesive national government at home. This lack of cohesion and direction at home was particularly manifest in two related fields—interstate relations and interstate commerce. Indeed, one of the constitutional catalysts was an unresolved dispute between the sovereign States of Virginia and Maryland. The term "sovereign" in this instance was no mere figure of speech. National sovereignty, if it validly could be called that, was divided into thirteen parts. The domestic problems plaguing this Hydra-type monster were real and menaced its very existence. The balancing force of a national pride in a strong central government was virtually absent.

It should be noted, however, that in one field of administration of public lands, the confederated national sovereignty achieved two great successes—the cession by states of claims to the western lands, and the adoption of the Ordinance of 1787,¹ which charted the course of future western development. Without any further major direction, the magnificent development of the West which followed took form largely because of a readiness of people to assume locally the responsibilities of government set forth initially in that ordinance.

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Commerce under the confederation was chaotic. Thirteen separate sovereignties, joined together loosely in a confederated debating society, bickered and produced few tangible results after the Revolution, except for the Ordinance of 1787, unless it be said that they succeeded as a holding operation essential to the noteworthy constitutional achievement which was to evolve later.

I

THE HISTORICAL DEVELOPMENT OF FEDERAL-STATE-LOCAL COOPERATION

This history focuses attention on three areas of constitutional law vitaliy important to this subject. They are interstate compacts, interstate commerce, and public lands, as those subjects and the powers attendant thereto operate in, or influence generally, the highly important field of federal-state-local governmental relations, and particularly as they pertain to water rights and water resource development.

Compacts, under the Constitution of the United States, are available as solutions to many interstate problems. Although a discussion of that highly important subject is not included here, one observation may be pertinent. Although the Government of the United States is the acknowledged guardian of the rights of all the people of the United States, it is not a proper function of that Government to impede interstate arrangements merely for the purpose of fostering the imposition of federal controls on states in the name of that guardianship.

An acknowledgment of the desirability of, and need for, local responsibility and control was one of the keystones in the establishment of a national policy fostering harmonious federal-state relationships. That acknowledgment was manifest in one of the earliest acts of Congress, declaring that all pilots of ships should continue to be regulated in conformity with the laws of the states respectively wherein their ships might be. That law, which is still on the books, was challenged in the courts, in conjunction with the application of a state law, on the ground that while Congress could adopt the existing laws of the states, it could not provide for the application of laws adopted in the future by those states. Pennsylvania had enacted the challenged state law in 1803 and the Supreme Court held it was clearly a regulation of commerce. But the Court also held that this power validly continued in the states under the 1789 act in the absence of further direct regulation by Congress. This legislative device has since been applied

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*The subject of interstate compacts is treated in Stinson, Western Interstate Water Compacts, printed elsewhere in this issue.

1 Stat. 54 (1789).


in other instances by Congress to other problems in commerce, and local regulation pursuant to applicable state laws has been sustained generally by the Supreme Court.  

Let us pick up the thread of this 1789 congressional policy in the West more than three-quarters of a century later by referring to the federal acts of 1866, 1870, and 1877, the last being the Desert Land Act. Miners and farmers, pursuant to local customs and laws, were diverting and beneficially consuming waters from streams arising on federally-owned lands, and Congress stipulated that those local laws and customs should govern. The import of the local laws was stated in a landmark decision of the United States Supreme Court in California Oregon Power Co. v. Beaver Portland Cement Co.  

The bedrock upon which the policy foundations for western water law were thus constructed, as a result of federal cooperation, was recognition of water rights as property under state laws. It is true that these property rights are usufructuary in nature, but they are property nevertheless, and in most western states they are appurtenant to the land. Such rights, when perfected and vested under state law, can be taken for governmental purposes, as a general rule, only upon payment of just compensation.

After the Desert Land Act, Congress went even further in anticipating local needs in the future and in cooperating with states and local units by providing a basis in 1888 not only for a survey of reservoir sites but also for the reservation of lands for canals, ditches, and related irrigation works. To assure completely the future availability of rights-of-way for canals and ditches constructed by the authority of the United States, Congress required that proper reservations be made in all future grants of land patents on public lands. Since the federal government owned practically all of the western lands, this type of legislation was indispensable if local initiative was to make the desert bloom. This policy of cooperation was implemented still further by a series of acts which authorized grants of rights-of-way to state and local irrigation developers. Under the Carey Act states were permitted to acquire title to lands for irrigation development.

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For a recent example, see Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), upholding state regulation of insurance pursuant to federal law.

10 295 U.S. 142 (1935).
In 1902 came the crowning federal achievement in this policy field—the Reclamation Act. There again, Congress cooperated with state and local governmental programs by providing in section 8 for the application of state laws. Numerous similar provisions of law, such as the O'Mahoney-Millikin Amendment to the Flood Control Act of 1944, adhering to that policy, have since been enacted.

Complementary to these developments is an interesting story of the right-of-way laws which should be recounted briefly. Titles acquired by settlers under the Homestead Act of 1862, and the earlier Preemption Acts, had not reserved rights-of-way for canals and ditches. This had permitted ditch and canal companies in the West to control the distribution of water through the device of purchasing or acquiring key tracts of land. The difficult question arising under this situation was who owned the water rights—the companies or the farmers?

The Canal Act of 1890 probably stems from a proposal sponsored by Senator Stewart, of Nevada. It was intended to reserve reservoir and canal sites and to withdraw temporarily lands within potential irrigation projects until opened for disposition under the Homestead Act pursuant to a proclamation by the President. This law should be read in connection with the earlier provision of the 1888 law which sought temporarily to withdraw lands from entry and settlement pending the selection of sites for reservoirs, canals, and ditches. In fact, the two acts appear to have been part of a major shift in federal policy, culminating in the termination of the operation of the Timber Culture Act and the Preemption Acts.

The initial results of the reservation under the 1888 law appear to have been the location of many reservoir sites and a number of canal sites. However, the withdrawal of lands pending the completion of surveys seems to have created confusion and hardship for interested homesteaders and settlers already on the scene. The over-all results must not have been satisfac-

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Footnotes:

17 Act of May 20, 1862, c. 75, 12 Stat. 392 (codified in scattered sections of 43 U.S.C. from §161 through §211).
22 Act of June 14, 1875, c. 190, 20 Stat. 113, repealed by the act of March 3, 1891, c. 561, §1, 26 Stat. 1095.
23 See note 18 supra.
tory, for the 1890 act largely repealed provisions of the 1888 law, but reserved the surveyed reservoir sites and also validated entries and settlements attempted in good faith during the withdrawal period under the earlier act. But a proviso in the new law specifically required a reservation in all patents of "a right of way . . . for ditches or canals constructed by the authority of the United States."24 The reasons for this proviso can be stated as follows: (1) The reservoir sites necessarily were located first, before complete topographical surveys were made whereby the best locations for canals and ditches thereafter could be determined. Many of these locations otherwise could be easily made and privately acquired in the interim because they were so obvious. (2) A blanket reservation of rights-of-way in all patents would preclude speculative activities of canal and ditch companies in acquiring obviously needed rights-of-way. Thus, activities of intermediate companies could be controlled and the building of the project distribution works could be left to an organization of settlers and homesteaders.

According to Major J. W. Powell, Director of the Geological Survey, the new farmers did not need the intervention of land and water companies in constructing distribution works. It was said that these companies would bring in people and settle them along a potential canal right-of-way which the particular company intended to develop for the purpose of selling water. Under the 1866 and 1870 laws these water companies could get necessary and valuable rights-of-way.25

Another obvious objective of this legislative development was the desire of Congress to control the location of the lands to be developed by withholding certain land from entry. Such controlled development came later with the Reclamation Act of 1902. A reclamation fund, earmarked from various sources, including the sale of public lands, was created by the Reclamation Act.26 Congress thereafter specifically required in 1914 that responsibility for operation and maintenance charges be assumed locally.27 Indeed, it also provided that whenever two-thirds of the project should be "covered by water-right contracts" local interests should be required to take over the care, operation, and maintenance of the project works as a condition precedent to receiving reclamation benefits.28 This was truly a partnership of effort between the federal government and local interests.

The sixteenth amendment to the Constitution was proclaimed on Feb-

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25 S. REP. No. 1466, 51st Cong., 1st Sess. 66, 80 (1890).
uary 25, 1913. Aside from a brief Civil War period, income taxes were not levied prior to that time. The federal government relied primarily on excise taxes, sales of public lands, tariffs, and similar revenues for the funds essential to its fiscal needs. Its limited revenues required, accordingly, greater local assumption of financial responsibility. It is clear from the beginning that for the purpose of assisting local units to assume financial responsibility, Congress intended that power revenues go with the reclamation project. Even moneys derived from leases by the Secretary of any surplus power were to be covered into the Reclamation Fund and to be placed to the credit of the project.²⁹

So far, a policy of federal-state cooperation has been outlined. One of the primary objectives of the Constitutional Convention, as has been indicated, was to create a governmental system which would be accommodative of national and local interests. To accomplish that objective, certain powers were vested either specifically or impliedly in the Government of the United States. Those powers not delegated nor prohibited to the states by the Constitution were reserved to the states respectively or to the people of the United States. Sovereignty was thus apportioned, and it was intended by the founding fathers that there should be harmony in the application of those apportioned powers.

But, when harmony is difficult to obtain, Congress has available, for possible use, unique powers of persuasion. It can bring into play, for example, the general welfare clause, by making federal funds or grants available or by participating cooperatively in state or local undertakings. But Congress, in so doing, also can attach conditions to its cooperation and the Supreme Court has held that such regulatory stipulations do not offend due process of law under the fifth amendment.³⁰ Further, the tenth amendment does not forbid the exercise of that form of persuasion.³¹

The national policy to date has thus been one of cooperation with varied forms of persuasion available, where national interests are involved, if cooperative efforts fail. Its keystone is local assumption of responsibility and its objective is protection of water rights as property. This national policy and these principles are manifest in the Small Reclamation Projects Act of 1956.²²

II

THE SMALL RECLAMATION PROJECTS ACT OF 1956

In recent years large reclamation projects, such as Central Valley and Colorado Storage, have commanded the public attention. At the federal

level, however, the attention devoted to the large projects has not been pre-
culsive of the interests or the needs of small local reclamation units. Over
a period of years, the National Reclamation Association has recommended
federal legislation to promote the continued development of small projects
in the West. Irrigation, as Westerners well know, started on a small projects
basis, and there still remain opportunities for worthwhile small develop-
ments. This small projects program, according to the views expressed by
the National Reclamation Association, could better be planned and exe-
cuted at the local level than at the federal level. However, support by the
federal government, in the approximate form of the financial assistance
afforded reclamation projects, was deemed essential.

Among the features desired by the Association were: assurance of local
responsibility for planning, design, and operation of each small project;
federal interest-free loans conditioned on local contributions of up to 25
per cent of the reimbursable costs; federal payment of certain nonreim-
bursable features benefitting the public in general rather than the project in
particular; and the requirement of a fifty-year repayment contract in each
instance between the Secretary of the Interior and the local organization.

We can readily discern in these objectives of the Association some of
the basic principles of existing reclamation law. The fundamental concepts
and the philosophy behind these principles are, of course, ownership of the
water rights by the owners of the land, and the right to contract for the
construction of project works to serve those property rights. Owners of
such property rights are not required, and should not be required contrary
to these concepts, to divest themselves of that property and thereafter be
compelled to contract for needed water supplies through the device of a
utility-type contract, or pursuant to a federal trusteeship theory which in
the future gives no assurance of the integrity or soundness of a water right
as property.

The Small Reclamation Projects Act of 1956 has embodied many desir-
able features of federal reclamation policy. While some modifications,
currently under consideration by Congress, are necessary, they partially
involve problems in constitutional law and administration that are some-
what extraneous to this discussion of federal-state-local cooperation. Under
this act a small project may take either of two forms. It may be an irriga-
tion project or it may be a rehabilitation and betterment program for an
existing irrigation development. In either instance the cost must not exceed
ten million dollars. In the first instance, the irrigation project may be a
complete irrigation undertaking or it may be a distinct unit of a complete
undertaking the total cost of which does not exceed ten million dollars.
And it must be similar to what might be constructed on a larger scale by
the Bureau of Reclamation under the federal reclamation laws.
Organizations which may obtain loans are limited to the following: a state, or a department, agency, or political subdivision of a state; an irrigation district, or water users' association; an agency created by an inter-state compact, or similar organizations. No matter what the nature of the organization, however, it must have authority or capacity, pursuant to state law, to contract with the United States under federal reclamation laws. Consequently, an individual or an unorganized group cannot obtain a loan or grant under the Small Reclamation Projects Act. This precludes irrigation companies or similar organizations from obtaining loans unless they have the requisite status under state law which permits them to qualify and to contract with the United States.

The small projects for which loans or grants are sought, as we have stated, must be irrigation projects, although they also may serve other purposes if those other purposes are merely incidental to a complete irrigation development. Thus, projects may include incidental power and domestic, industrial, or municipal water supply features as well as certain nonreimbursable functions. Among the incidental functions for which direct grants may be made by the federal government are flood control, fish and wildlife programs, navigation, and sediment retention, provided the grants for such functions are of general public benefit.

Because irrigation must be the principal purpose of the project, loans cannot be made to cities or similar organizations for municipal water projects even if most of the water will be consumed by the irrigation of lawns and gardens within the municipality. However, some municipal or perhaps suburban-type organizations may be able to qualify for loans if the primary purpose of the proposed project is the irrigation of small farms or small plots used primarily for agriculture, and the municipal uses are clearly secondary. It is not intended by this law to put the Bureau of Reclamation in the municipal water business except as this is incidental to irrigation.

An application to the Bureau of Reclamation by a qualified organization for a loan must be accompanied by a check for $1,000 to pay part of the cost of reviewing and processing it. No refund will be made in the event of rejection of the application. If the Bureau is requested by an applicant to make special studies for its use in connection with an application, additional funds must be advanced to the Bureau for that purpose. All other costs of considering the application, as well as the cost of the Bureau's reviews and inspections of the final plans, drawings, works, accounts and so forth, must be assumed and repaid by the applying organization along with the money loaned under the terms of the contract.

In line with the requirements of the federal flood control laws and in consonance with the federal policy of cooperation, proposals must be submitted for review by local organizations to the state or states, as the case
may be, in which the project is located. The Governor or a duly authorized state agency must find that the project is feasible before it will be considered further by the Bureau. In some instances, it may be necessary to submit proposals, other than those for rehabilitation and betterment, to all the states of a particular river basin for review.

Pursuant to the policy of local assumption of responsibility, the applying organization is to be responsible for planning, building, operating and maintaining the system. The Bureau of Reclamation, of course, will examine the plans to determine whether the project will accomplish its purpose and, if it does, may contract for the repayment of the loan. It thereafter will inspect the project not only during construction but also throughout the period of the loan to make certain that the project is built and managed according to the terms of the contract.

The applying organization should assume the responsibility of making its own arrangement for obtaining necessary consulting engineering services and other specialized assistance. Upon request, however, the Bureau may advise and assist an applicant to the extent required or to the extent possible, but it will not undertake the planning, design, construction, or operation of the project. When specialized services cannot be obtained elsewhere by the project organization, the Bureau may provide such services, if it is practical to do so, provided the applicant pays for those services. Similar arrangements with other federal agencies probably can be made if necessary.

The limit of the federal funds that may be provided for a project is five million dollars, minus the amount of the local contribution that must be financed by means other than the federal loan and grant. This limit applies to any combination of a loan and a nonreimbursable grant or to either separately. An organization is limited to one loan for a single project. It cannot obtain several separate loans. Nor will it be possible to have several organizations obtain loans for that same project. A large project still must be authorized through regular Reclamation procedures. It may not be divided and financed as a series of small projects in order merely to take advantage of the Small Reclamation Projects Act.

We noted earlier the power of the federal government to condition its grants and its participation in the construction of reclamation projects. In line with past policy, Congress has made loans available for small reclamation projects interest-free within certain limitations. That portion of the project cost properly assigned to the irrigation of lands not in excess of 160 acres in a single ownership is free of interest charges. Acreage in excess of this 160-acre land limitation provision must pay interest. Interest also must be paid on portions of the project costs chargeable to the production of commercial power or to the furnishing of water for domestic, industrial, or municipal use. The rate of interest to be paid will be based upon that paid
on the long-term obligations of the United States—about three per cent at present.

The repayment period for these loans, in accordance with generally accepted reclamation policies, is fifty years. The actual payout schedule for a particular project will be dictated by the conditions to be anticipated, and will be the subject of negotiation between the Bureau and the applicant.

In this Small Reclamation Projects Act of 1956 we thus find a consummation of policies having their roots in constitutional history and in constitutional principles. It is intended to effectuate cooperative undertakings requiring harmonious actions of federal, state, and local units. It requires, as well as fosters, local assumption of responsibility under proper contractual safeguards. And it permits states to protect the integrity of their water laws and individuals to protect their property in water rights.

III

FEDERAL-STATE-LOCAL COOPERATION IN THE PRESENT AND FUTURE

Thus far we have noted not only the apportionment of sovereign powers under the Constitution but also the intention that those powers be exercised harmoniously and cooperatively by the federal, state, and local governments. The federal government, as we have stated, has been alert, as a general rule, to the basic needs of the West; has moved to protect or reserve both property and rights-of-way essential to local developments; and has in many instances provided that state laws should control.

In emphasizing these federal efforts to cooperate with state and local governmental units and to foster state and local control, there is no intention to minimize the importance of certain federal functions, responsibilities, and interests. Those federal aspects may be nationally important whether the project is large or small. And Congress is not likely to abdicate its constitutional powers or abandon its legislative prerogatives in those matters. Such matters include protection of national parks and monuments; effectuation of international adjustments by treaty; protection of existing Indian water rights or reservations; and the fostering of commerce through flood control or other programs.

It would not be fruitful to expect Congress to abandon federal responsibilities. It has been and will be fruitful to seek federal cooperation. Past history shows many instances of harmonious accommodation of all interests—federal, state and local. But a pattern of continued cooperation must be sought rather than abdication of federal powers and functions.

In one of his State of the Union messages President Eisenhower stated his view of cooperation this way: 83

The best natural resources program for America will not result from exclusive dependence on Federal bureaucracy. It will involve a partnership of the States and local communities, private citizens, and the Federal Government, all working together. This combined effort will advance the development of the great river valleys of our Nation and the power that they can generate.

As indicated previously, the concept of partnership and cooperation is not new. Nevertheless, in recent years an effort has been made to create the impression that this policy is novel and is the product of some kind of favoritism by the administration toward private power. The genesis of this policy, as it applies to power, is to be found in the Federal Power Act, which set up a system of federal licensing of hydroelectric projects, whether built by publicly-owned or privately-owned utilities. That act was first passed during the administration of Woodrow Wilson and reenacted in 1935 while Franklin D. Roosevelt was President. Under it the Federal Power Commission, a bipartisan independent agency, was created to issue such licenses if the proposed projects are found to be "best adapted" to comprehensive development of the river resource affected. Preference to public bodies was accorded in the granting of power licenses, thus preserving to the people of the service areas their option to choose between public and private power.

Along with the growth of such huge and dramatic federal developments as the Tennessee Valley Authority and the Bonneville Power Administration, there developed a federal policy of discouraging non-federal participation in hydroelectric development. Under the Eisenhower administration the policy has become again one of encouragement of state and local, public and private participation.

We have had a recent illustration of this policy. Secretary Seaton, on February 12, recommended to the Congress that legislation be enacted to approve joint development of the Trinity River Division in California by the federal government and the Pacific Gas and Electric Company. A bill which would have authorized this project was not reported out by the House Committee on Interior and Insular Affairs. Briefly stated, the proposed legislation would have provided that the federal government would build all Trinity facilities except those useful only for the generation of power. The company would have built the facilities specifically needed only for the generation of power. The company would have built the facilities specifically needed only for the generation of power.

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35 By Title II of the Public Utility Act of 1935, c. 687, § 212, 49 Stat. 847, the original Federal Water Power Act of 1920, note 34 supra, was made Part I of the newly-designated "Federal Power Act," which, as amended, is now codified as 16 U.S.C. §§ 791a-825r (1952).
for power. It would have paid the United States each year that share of the joint costs, including operation and maintenance, allocated to commercial power. In addition, the company would have paid the United States an annual sum for the privilege of using the falling water, which would have depended on the amount of water available for its use.

As an integral part of the package proposal, the Company offered to extend its existing integration and wheeling contracts for fifty years, with certain modifications favorable to the United States. The present contracts will expire in 1961 and must be renegotiated. Under joint-development the Company would have agreed, at the election of the federal government, to firm up Central Valley federal generation for preference customers to 450,000 kilowatts over the fifty-year period. At the end of fifty years the United States could have acquired the Company's Trinity facilities upon payment of the Company's net investment at that time, as established through Federal Power Commission regulations, and upon payment of severance damages determined by the Secretary of the Interior.

After reviewing the proposal, Secretary Seaton found substantial advantages in a joint venture. Among these advantages are the following:

1. Joint development would decrease the capital investment in the Trinity Division by the United States by some $56 million, which is the estimated cost of the specific power facilities. In these days, when national defense and other necessary federal activities push the federal budget to an unprecedented peacetime high, it is evident that the federal government should assume no unnecessary financial burdens, and $56 million is a significant increase in any budget. It should be added, parenthetically, that this savings of $56 million assumes particular importance when it is realized that two Trinity contracts recently awarded by the Bureau of Reclamation for construction of certain features of the Trinity Division substantially exceeded the Bureau's engineering estimates.

2. Joint development would provide, during the fifty-year period, $165 million more surplus revenues to the Central Valley Project than would all-federal development, thereby increasing by that amount the funds available to assist further irrigation development in the Central Valley Project, as the Congress may determine. It should be remembered that the Central Valley Project, as ultimately planned, was estimated to cost $1.8 billion. There is much yet to be done in this expanding state.

3. Under joint development, the Company would pay, as a result of its participation, an estimated $135–145 million in taxes over the fifty-year period to the local, state, and federal governments.

4. Joint development would convert Trinity falling water into a substantial net asset of the Central Valley Project, whereas under all-federal development, Trinity power facilities would require substantial assistance
from other CVP revenues to meet repayment requirements. In fact, the federal Trinity Division, at present rates, requires subsidy from existing units, such as Folsom and Shasta, by more than $136 million.

5. In proposing the joint development of the Trinity Division, the Company offered to continue its present contract for Central Valley Project power for fifty years. The present contract expires in 1961, and we have no assurance today what terms and conditions can be negotiated then. As part of the joint proposal, the Company assumed generally the risks of inflation for fifty years. It also assumed the risk of obsolescence if nuclear power should become a reality as a lower-cost source of energy. In addition, the Company would, of course, have purchased falling water at an average cost of about $4,617,000 annually over the fifty-year period.

The Department of the Interior has been attacked for recommending joint development, on the ground that it does not afford preference in the sale of power to public bodies and cooperatives. The Secretary of the Interior is not opposed to the preference clause, but in this case he found that the national and regional benefits from joint development exceed any additional costs to preference customers, who represent only a small portion of the population in northern California. Actually, almost three-fourths of the assured dependable capacity of the Central Valley Project today is contracted to one community. Furthermore, every effort was made to interest the preference customers of California to construct the power features of the Trinity River Division, but none expressed a desire to participate.

CONCLUSION

While the history of federal-state-local cooperation in water resources development has at times been uneven, there is nevertheless evident a long-standing pattern of participation by all levels of government and private groups in this important area. The Small Reclamation Projects Act of 1956 is an example of the type of federal policy which will encourage local interests to develop their own water resources with financial support from the federal government. The future of this policy of cooperation should provide an expanded beneficial development of our country's water resources for all its people.