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## A FEDERAL-STATE COMPACT FOR MISSOURI BASIN DEVELOPMENT

FRANK J. TRELEASE\*

There seems to be general agreement today that something should be done about the hodgepodge of federal bureaucracy presently engaged in the development of the Missouri River Valley. A large part of the criticism is directed at the federal agencies at the national level, but in a number of instances specific attention has been called to the situation in this basin, one-sixth of the nation's land area, where almost every type of land and water resource control problem is raised by the basin's wide variety of climate and topography. Two demands are voiced: for coordination of federal efforts, and for participation by local people and governments in the development program.

The federal agencies have been so often charged with waste and inefficiency, with having conflicting, duplicating and overlapping plans and efforts, with competing with each other and with colluding with each other, that citation is unnecessary. Proof of these charges, at least to the satisfaction of the accuser, is easily made through the selection and interpretation of facts from the great mass of data and history available. Yet even those who do not see these agencies as all bad are calling for a greater coordination than now exists in the planning and execution of programs and projects for the control and use of the basin's natural assets. At present the issue is not whether it shall be done, rather it is how the coordination might be best achieved. Many who make these demands raise the separate but related demand for a local voice in the future development of these resources. It is no answer to them that this development will take place primarily through the expenditure of federal funds; their reply is that it is their lands, their lives, that will be most directly affected.

Proposals for the solution of one or both of these problems have been numerous. A federal corporation similar to the Tennessee Valley Authority has been suggested, reorganization of the federal departments has been recommended, and various commissions to coordinate the existing agencies have been proposed. Local participation in the decision-making process has been proposed in conjunction with one or more of these in the forms of advisory committees of state representatives, public hearings, state nominated or appointed members of the commissions, and state representation on a joint federal-state agency created by compact between the United States and the states. Since the last of these, which we may call

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the "compact approach", seems to have gathered a great deal of support and seems to be in accord with current political trends, it will be the subject of the greater part of this discussion.

An appraisal of these proposals can be intelligently made only with some understanding of the present assignments of resource development activities to the bureaus and agencies of the federal government and of the procedures that underly the execution of these functions. Existing measures for coordination must be understood and their deficiencies determined before a substitute can be chosen. The part that the states today play in resource development should be examined, and the part that they should take should be determined. Brief outlines of these problems will be first offered,<sup>1</sup> then some of the legal implications of the compact approach will be examined.

#### THE EXISTING ORGANIZATION

*Federal Functions.* The principal water resource activities of the federal government consist of the reclamation of land, aid to navigation, flood control, the development of hydro-electric power, and soil conservation and watershed treatment. In the performance of these functions three agencies play the major part—the Department of the Interior, the Department of Agriculture, and the Corps of Engineers, United States Army—and the responsibility for each function is to some degree shared by at least by two of these agencies.<sup>2</sup> For instance, the reclamation of land by irrigation is primarily the responsibility of the Secretary of the Interior,<sup>3</sup> delegated to the Bureau of Reclamation, yet since dams constructed for flood control purposes have been located where use of the water might be made for irrigation, the Corps of Engineers may include that as one of the purposes of such dams.<sup>4</sup> Interior's Bureau of Indian Affairs has constructed many irrigation projects on Indian lands.<sup>5</sup> Also, the Secretary of Agriculture has been given some responsibility for irrigation development through the encouragement of the construction of water facilities<sup>6</sup> and through small projects built by Reclamation but managed by Agriculture.<sup>7</sup>

1. Some portions of this article resemble the report of the Missouri Basin Survey Commission to a marked degree, and where original authorship cannot be claimed, the author acknowledges his indebtedness for some of the factual material to members of the staff who worked with him, particularly Mr. Harry A. Steele of the Bureau of Agricultural Economics, Lincoln, Nebraska, Mr. Marvin Meade of the Bureau of Government Research of the University of Kansas, and Dr. W. Robert Parks of Iowa State College, without wishing to suggest in any way that the opinions expressed herein are to be attributed to them.
2. Summaries of the existing programs of the major agencies are set out in Missouri: Land and Water, The Report of the Missouri Basin Survey Commission (1953) pp. 69-81, substantive problems relating to these and related functions are found at pp. 113 to 185.
3. Section 2, Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C.A. 411.
4. Section 8, Flood Control Act of 1944, 58 Stat. 887, 890, 33 U.S.C.A. 709.
5. See generally, Water Resources Law, (1950) Vol. 3 of the Report of the President's Water Resources Policy Commission, 246-254.
6. Water Facilities Act of 1937, 50 Stat. 869, as amended, 16 U.S.C.A. 590r-590x.
7. Water Conservation and Utilization Act of 1939, 53 Stat. 1418, as amended, 16 U.S.C.A. 590y-590z-11.

Navigation has from the beginning been the sole responsibility of the Corps of Engineers, yet some waters may be impounded in Reclamation dams to maintain a navigable channel.<sup>8</sup> Flood control, when first adopted as a national policy in 1936 was, with respect to the improvement of rivers and waterways, given to the agency with a hundred years' experience in those matters, the Corps of Engineers, but watershed measures for runoff and waterflow retardation and soil erosion prevention were assigned to the department dealing most directly with the land itself, the Department of Agriculture,<sup>9</sup> and three years later the Bureau of Reclamation was authorized to include flood control as one of the multiple purposes of its dams.<sup>10</sup>

As it was realized that hydroelectric power from waters impounded by government dams presented a feasible means of repaying a part of the costs of the projects, responsibility for its development was divided among several agencies. Construction responsibilities were given to the builders of the dams,<sup>11</sup> but the necessity for generating facilities at Army projects is determined by the Federal Power Commission,<sup>12</sup> which as part of its regular duties makes broad surveys of power needs of the country. While the marketing of the power was given to the Secretary of the Interior,<sup>13</sup> the Federal Power Commission has some authority over the rates.<sup>14</sup>

Even in soil conservation, responsibility has been divided among three agencies within the Department of Agriculture, the Soil Conservation Service, the Forest Service, and the Production and Marketing Administration,<sup>15</sup> although recently the latter agency's functions in this regard have been curtailed.<sup>16</sup> Furthermore the Bureau of Land Management within the Department of the Interior carries on similar programs on lands under its jurisdiction.<sup>17</sup>

This review of the statutory delegation of major purposes to the departments of government does not by any means give a complete picture

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8. Section 9(b), Reclamation Project Act of 1939, 53 Stat. 1187, 43 U.S.C.A. 485h.
  9. Section 2, Flood Control Act of 1936, 49 Stat. 1570, 33 U.S.C.A. 701a-1.
  10. Reclamation Project Act of 1939, *supra* n. 8.
  11. Sec. 5, 34 Stat. 116, 117 (1906), 43 U.S.C.A. 522 (reclamation projects); Sec. 10, Flood Control Act of 1944, 58 Stat. 887.
  12. Sec. 10, Flood Control Act of 1944, *supra* n. 11.
  13. Sec. 2, Fort Peck Project Act, 52 Stat. 403 (1938), 16 U.S.C.A. 833a; Sec. 5, Flood Control Act of 1944, 58 Stat. 887, 16 U.S.C.A. 825s.
  14. Rates for power produced at Fort Peck Dam must be such as to amortize a capital investment based upon an allocation of costs by the F.P.C., and are subject to confirmation and approval by the F.P.C. (Secs. 5 and 6, Fort Peck Project Act, 52 Stat. 405, 16 U.S.C.A. 833d, 833e.) As to the other Corps of Engineers projects, Sec. 5 of the 1944 Flood Control Act provides that rate schedules are to become effective upon confirmation and approval by the F.P.C. (58 Stat. 887, 16 U.S.C.A. 825s) but Sec. 9(c) of that Act provides that as to projects authorized under the Pick-Sloan Plan, "the reclamation and power developments . . . shall be governed by the Federal Reclamation Laws," which do not require F.P.C. approval of rates. The Secretary of the Interior has taken the position that rates for power from the main stem dams on the Missouri need not have such approval, a position with which the F.P.C. disagrees. See Statement of Chairman Buchanan of the F.P.C., Hearings of the Subcommittee to Study Civil Works, 82nd Cong., 2nd Sess., No. 82-16 (1952) 399.
  15. See U. S. Government Organization Manual 1951-52, 239, 241, 247.
  16. Secretary of Agriculture, Memorandum No. 1325, April 1, 1953.
  17. See U. S. Government Organization Manual 1951-2, 194-195.

of all the functions which the United States performs in relation to the development of land and water resources. There remain a number of activities and programs which affect the major purpose projects or upon which those projects have an effect. These related activities deal with municipal and industrial water supply, control of pollution, fish and wildlife resources, public lands, national forests, national parks, mineral resources, rural electrification, research and investigation, education of the public, rehabilitation of Indians, and the collection of basic data upon which the planning of major projects must be founded. Forty-three federal agencies have been listed as having responsibilities connected with or bearing upon river basin development.<sup>18</sup>

*Project Procedures.* The procedures by which a project is carried into execution vary widely from agency to agency, having been evolved as separate processes for accomplishing their separate major purposes. Some are designed to give greater administrative efficiency than others; some to give greater legislative control by Congress; all provide essentially for project development rather than for a comprehensive unified program. Recent statutory provisions and administrative adjustments have resulted in cooperation and communication between agencies in relation to the coordination of projects, but there is no legal process for evaluating the individual projects against an overall program.

The procedures of the three major construction agencies could be expected to differ because of the fundamental dissimilarities of the agencies and of their programs. The basic premise behind the procedures for the execution of typical river and harbor or flood control project by the Corps of Engineers is that the Corps is a consulting body to Congress in the preliminary stages and an executive agency for carrying out Congressional directives in the construction stages. Reclamation projects are also handled by a single agency, the Bureau of Reclamation, whose procedures follow normal executive channels through the Secretary of the Interior to the President and from him to Congress. On the other hand, watershed programs are the joint responsibility of two bureaus within the Department of Agriculture, and unlike projects of the Corps or the Bureau, which are typically for major works such as dams, are essentially accelerated programs of a number of related land treatment measures scattered over wide areas and the lands of many persons. In spite of these differences, and of variations in the basic statutes governing the agencies and their projects, substantially identical steps are undertaken by each and parallel treatment has been achieved by administrative action.<sup>19</sup>

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18. Water Resources Law, Vol. 3 of the Report of the President's Water Resources Policy Commission (1950) 430.

19. Detailed analyses of Corps of Engineers procedures may be found in several publications. Maas, *Muddy Waters* (1951) 21-36, emphasizes the actual processes; Water Resources Law, *supra* n. 18, 91-112, 134-148, collects the statutory requirements that have been laid down by Congress from time to time, and Hearings of the Sub-committee to Study Civil Works, 82nd Cong., 2nd Sess., No. 82-16 (1952) 74-77, contains a step by step presentation of a typical case. Reclamation procedures

The first step in a project is the preliminary examination or reconnaissance report. Preliminary examinations for Corps of Engineers projects are individually initiated by Congress, usually after local groups or officials interest their congressmen or senator in the stream improvement, and may also be initiated by resolutions of the Public Works Committee of the Senate or House calling for a review of a previous unfavorable report. On the other hand, the Secretary of Agriculture has been given general power to make preliminary examinations and surveys for runoff and waterflow retardation on the watersheds of all waterways that have been authorized for survey by the Army Engineers.<sup>20</sup> Still wider authority is granted the Secretary of the Interior; he has complete initiative in making investigations, examinations and surveys for the development of irrigation within the seventeen western states.<sup>21</sup>

The preliminary examinations proceed usually by means of field reconnaissance and examination of maps and other available data. Public hearings are held on Corps of Engineers projects and may be held by the Bureau of Reclamation or the Soil Conservation Service or Forest Service, who conduct examinations for the Department of Agriculture, but these latter agencies frequently use other methods of determining local opinion. If it appears that the project is practical and justified, it is administratively determined that a more detailed survey should be undertaken. Only in the case of Corps of Engineers projects is there a review of an unfavorable decision; interested parties may have a hearing before the Board of Engineers in Washington and since the report is final it is submitted to the states and other agencies before being transmitted to Congress.

The second step, a more complete survey or project investigation, is made as funds become available. Surveys of watershed and reclamation projects are reviewed during this stage by other agencies within the departments, who furnish consultation and advice to the responsible agency. After further review by states and other departments, as later noted, Congress is asked to take the next step, of authorizing the projects for construction.

Legislative authorization is required of all Corps of Engineers projects, but some reclamation projects are automatically authorized when the Secretary of the Interior finds that the project has engineering feasibility and that the repayable costs allocated to irrigation, power and municipal water, together with any allocations to flood control or navigation, equal the total estimated cost of construction.<sup>22</sup> If the project does not meet

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are discussed in Water Resources Law, *supra*, 186-198, Hearings, *supra*, 457-461. Department of Agriculture surveys are outlined in Hearings, *supra*, 194-195, and detailed in the Department's handbook, Preliminary Examinations and Surveys of Watersheds for Runoff and Waterflow Retardation and Soil Erosion Prevention, 1947.

20. Sec. 2, Flood Control Act of 1936, 49 Stat. 1570, 33 U.S.C.A. 701a-1.

21. Sec. 2, Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C.A. 411.

22. Reclamation Project Act of 1939, 53 Stat. 1187, 43 U.S.C.A. 485.

the above requirements, or if an affected state or the Secretary of the Army objects to the project, then a specific authorization by Congress is necessary. The basic legislation for Department of Agriculture watershed programs empowers the Secretary to prosecute the work in accordance with plans approved by him, seemingly making it unnecessary to report to Congress if he approves a plan,<sup>23</sup> but as a matter of policy it has been decided to submit such programs for authorization in the same manner as projects of the Army Engineers.

The authorization of a project for construction is an important step, involving hearings before the appropriate congressional committees and a determination that the project should go ahead. Under present procedures the separate agencies present their separate programs to different committees, and no all-agency multiple purpose plan is presented to guide Congress in making its selection of the projects best designed and most urgently needed for optimum use and control of the resources.

Even though a project is authorized, either automatically or by Congress, work may not proceed without an appropriation of funds. Appropriations are generally made to the departments for the construction of specific projects, except that some large lump sums are appropriated to the Corps. In the case of watershed programs Department of Agriculture appropriations are distributed by the Secretary administratively among the various agencies responsible for making the direct payments, technical assistance, extension of credit or expenditure by which these programs are carried out. Appropriations to the Bureau of Reclamation, originally made from the Reclamation Fund,<sup>24</sup> are now also made from general funds and are reimbursable to the treasury.

Appropriations for construction frequently are split into funds for making the final plans and blueprints and for the actual physical construction of the works. It is a common occurrence for the final constructed work to be somewhat different from the project described in the authorizing legislation. Wide discretion has of necessity been granted to the agencies for determining the modifications that may be made in translating the survey into blueprints, for return trips to Congress for re-authorization would greatly delay the prosecution of the project. This presents a serious problem, especially in view of the lapse of time between authorization and construction that occurs in many instances. For example, the Glendo Dam on the North Platte was authorized in 1944 as a silt control structure, but in the years that have elapsed hydrological studies have indicated a greater supply of water in the river, and final plans for Glendo call for two multipurpose units at the site of the first small dam. In a number of instances dam sites have been moved up or down stream when final plans showed the desirability of a changed location. Congressional

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23. Sec. 7, Flood Control Act of 1938, 52 Stat. 1215, 33 U.S.C.A. 701b-1.

24. See Water Resources Law, *supra* n. 18, 198-202.

control of such modifications is attained to some degree through the appropriation process, but a more adequate procedure would be for the modified plans to be matched against the ultimate program for development.

Since the construction of hydroelectric power dams by private industry may be an important part of basin development, the procedures by which private agencies obtain licenses from the Federal Power Commission deserve consideration. No non-federal agency may construct a power dam on navigable waters without a license from the Commission issued upon a finding that the project is desirable and justified in the public interest,<sup>25</sup> and if the project is on a stream which is non-navigable but affects navigation the Commission may require that a license be obtained.<sup>26</sup> There are some procedures for integrating projects into basin-wide plans and for correlation with federal projects; no license affecting the navigable capacity of any waters may be issued until the plans have been approved by the Chief of Engineers,<sup>27</sup> and hearings are held under procedures providing for notice to interested government authorities and for intervention in the proceedings and the filing of protests against the application. Licenses are issued for a period of not exceeding fifty years,<sup>28</sup> after which the United States may, on two years' notice, take over and maintain the project, paying the net investment of the licensee and reasonable damages.<sup>29</sup>

Conflicts have arisen between private and government agencies over which should construct dams at certain sites. The law gives a preference in the issuance of licenses to states and municipalities (which include any subdivision of a state capable of carrying on a power business), and whenever the Commission feels that the development of the water resources should be undertaken by the United States itself the law states that it shall not approve the application but shall submit a complete report to Congress with its recommendations concerning such development.<sup>30</sup> Recently several private power companies have applied for licenses for dams on the sites of proposed federal projects, and one of these cases has reached the Supreme Court of the United States.<sup>31</sup> The Court has held that the "approval" of a comprehensive plan for basin development by Congress does not prevent the Commission from issuing a license to a private concern to build one of the dams called for by the plan, that only an express withdrawal of the project from the jurisdiction of the Commission or the implied withdrawal by the authorization of construction would have that effect. This present state of the law leaves much to be desired. A private hydroelectric dam may affect the comprehensive plans for river development in many ways. It may be a most desirable and important link in a series of projects,

25. Secs. 4 (e), 23 (b), Federal Power Act, 16 U.S.C.A. 797 (e), 817.

26. Sec. 23 (b), Federal Power Act, 16 U.S.C.A. 817.

27. Sec. 4 (e), Federal Power Act, 16 U.S.C.A. 797 (e).

28. Sec. 6, Federal Power Act, 16 U.S.C.A. 799.

29. Sec. 14, Federal Power Act, 16 U.S.C.A. 807.

30. Sec. 7 (b) Federal Power Act, 16 U.S.C.A. 800 (b).

31. *U. S. ex rel. Chapman v. Federal Power Commission* (1953) 73 S. Ct. 609.



private and federal; on the other hand it may utilize or drown out dam sites suitable for a much larger project, or it may skim the cream off a proposed unified system of federal projects, eliminating the revenues of the particular dam from the pooled income of the public system, which may reduce the benefit-cost ratio so that the system becomes unfeasible and the remainder of the power is lost and irrigation features of the plan must be abandoned. Unified basin planning demands that the decision in such cases should not rest upon the accident of whether or not government planning has arrived at the authorization stage, and that prior to that stage, one agency with one concept of a comprehensive plan should not be permitted to block the plan of another by unilateral action.

*Procedures for Review by Other Agencies.* Statutory requirements for inter-agency consultation and review stem primarily from Section 1 of the Flood Control Act of 1944,<sup>32</sup> which requires that prior to transmission to Congress reports of the Corps of Engineers must be submitted to the Secretary of the Interior if they relate to waters arising west of the 97th meridian, and that Bureau of Reclamation reports must be submitted to the Secretary of the Army. During the course of investigations these agencies are to give each other information developed, an opportunity for consultation, and to the extent deemed practical, an opportunity to cooperate in the investigations. When irrigation is to be developed at Army dams and reservoirs the Secretary of the Interior makes an investigation as to the feasibility of incorporating irrigation features, and if the Secretary of the Army adopts his recommendations and the features are authorized by Congress, Interior has responsibility for the construction and operation of the added irrigation works. At reclamation projects the Secretary of the Interior, under the Reclamation Project Act of 1939, is required only to consult with the Secretary of the Army on the allocation of a part of the cost of the works to flood control and navigation,<sup>33</sup> but it has been the administrative practice for the Corps to make the studies and evaluations of flood damages and flood control benefits which are used by the Bureau of Reclamation in its reports. Each report of these agencies must under the 1944 Act be submitted to "affected" states, which include those in which the project is located and those west of the 98th meridian in the same basin.

While the 1944 Act by its terms does not apply to the Secretary of Agriculture he follows a similar procedure and refers survey reports to the governors of the states concerned and to interested Federal agencies for comment.

During investigation of any project which impounds or diverts water, consultations must be had with the Fish and Wildlife Service and with the head of the state agency concerned with wildlife resources, and the report

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32. 58 Stat. 887, 33 U.S.C.A. 701-1.

33. Sec. 9(b), 53 Stat. 1187, 43 U.S.C.A. 485h.

must contain their recommendations on possible damage to wildlife and on means for avoiding such damage.<sup>34</sup>

In 1943 the President required all public works agencies to submit to the Bureau of the Budget, with their budget estimates, advance programs and estimates of requirements for planning funds, and to clear all project reports through the Executive Office of the President in order to determine their relationship to this program of the President.<sup>35</sup> For various reasons this agency has not, however, functioned as an over-all planning agency.<sup>36</sup>

Although these procedures for inter-agency consultation, review, and cooperative investigation have enabled the parts of the present legal and administrative machinery to move forward in some order, they have not been entirely adequate for the task of coordinating agency activities. In the first place, the arrangements for inter-agency consultation fail to cover all the areas where inter-agency cooperation is required. But the main weakness in the present procedure for coordination is that the procedure is largely the negative one of reviewing and criticizing programs and plans that have already been developed. The agencies are brought together at too late a stage to achieve coordinated program development.

*State and Local Participation.* Basin development, or even the so-called federal program for the development of a basin, is of course not a wholly federal function, with all the planning, construction work and money being furnished by the United States. States, local districts, individuals, and groups of consumers and users will play a very large part in some aspects of the program and a lesser part in others.

In the field of construction of projects, the only state in the basin that has made any real strides is Montana, whose Water Conservation Board, created in 1934,<sup>37</sup> has constructed many smaller projects that now provide irrigation for 252,920 acres in that state and supplemental water for an additional 133,294 acres. It has also furnished engineering services for the construction of over 10,000 miles of rural electrification lines that serve over 12,000 customers, and has supervised the building of works for many irrigation districts and private companies. Much of this work was financed in part by such federal agencies as the WPA and PWA but a third of the funds, well over \$5,000,000, has been appropriated out of state moneys. North Dakota,<sup>38</sup> Iowa,<sup>39</sup> and Wyoming<sup>40</sup> have more recently established agencies with authority to construct or participate in the construction and maintenance of water development projects, but none has matched the

34. 60 Stat. 1080, 16 U.S.C.A. 661-663.

35. Ex. Order 9384, Oct. 4, 1943.

36. See Missouri: Land and Water (1953), 242.

37. Rev. Code Mont. 1935, Secs. 349.1 to 349.38.

38. Water Conservation Commission, N. Dak. Rev. Code (1947 Supp.) Secs. 61-0214 et seq.

39. Natural Resources Council, Iowa Code 1950, Secs. 455A.1 et seq.

40. Wyoming Natural Resource Board, Wyo. Comp. Stat. (1945) (1951 Cum. Supp.) Secs. 18-2101 to 18-2114.

record of the Montana board and their experience has been too short lived to predict their ultimate share in such work.

Local districts have played a greater part in construction and operations than the states themselves. In the upper basin irrigation and conservancy districts, largely formed to meet the requirements of a suitable entity which may contract with the United States for the operation, maintenance, and reimbursement of reclamation projects,<sup>41</sup> have constructed the distribution works by which the water is transported from the dams to the benefited lands. In the lower basin drainage and levee districts have served similar functions in providing land, operation, and maintenance for federal water control works.<sup>42</sup> In Nebraska, that state's unique public power and irrigation districts have built projects that serve large areas of land with irrigation water and have through the construction and purchase of generating facilities become the sole source of electric power in the state. These districts are not authorized to levy taxes as are irrigation and conservancy districts, and while some of their larger structures were built with federal aid during the depression the projects are financed principally by the issuance of revenue bonds.<sup>43</sup>

While the states and local districts play a relatively minor part in the direct construction of works, they and their people will be called upon to make very substantial contributions to the federal program. They will be directly responsible for many adjuncts of the federal reservoir projects, such as parks and recreation facilities, stocking of fish, and management of game habitats. The Missouri Basin Region Agricultural Research Committee, established by the state experiment stations, has launched detailed research projects on problems considered of first importance in the development program, which will be carried out through the cooperative efforts of the land grant colleges and the Department of Agriculture. When the states' programs for construction, resource use education, research and regulation are all considered it is estimated that state expenditures in the natural resource field will amount to more than \$400,000,000 within the next six years.<sup>44</sup>

But a still larger contribution that will be made by the people of the region is the reimbursement to the federal treasury by the water and power users of the basin of the costs assigned to the irrigation, municipal water, and hydroelectric power features of the federal program. In general local contributions will not be required with respect to navigation works and the contributions to Corps of Engineer's flood control works will be limited to maintenance of and the furnishing of land for local protection works. In the case of the large multiple purpose dams those elements of the cost that are allocated to flood control or navigation are non-reimbursable,<sup>45</sup>

41. Sec. 4, 53 Stat. 1187, 43 U.S.C.A. 485.

42. (1936) 49 Stat. 1571, 33 U.S.C.A. 701c.

43. (1938) 52 Stat. 1215, 33 U.S.C. A. 701e-1, (1939) 53 Stat. 1187, 443 U.S.C. 485h.

44. Missouri: Land and Water (1953) 84.

45. (1938) 52 Stat. 1215, 33 U.S.C. 701e-1, (1939) 53 Stat. 1187, 43 U.S.C.A. 485h.

but allocations to irrigation, power and municipal water supply are repayable, and water and power users are expected to repay costs allocated to those purposes.<sup>46</sup> In practice, however, the burden of repayment is not directly related to the costs allocated, since costs allocable to irrigation but beyond the water users' ability to repay are assigned for return from revenue from power or municipal water supply.<sup>47</sup> It has been argued by some that this method of collecting of reimbursement results in a heavy subsidy of irrigation farmers by the power users. However, if the irrigation features of the projects were eliminated and larger allocations made to power, the rates for power would increase to the point where its production would become infeasible, hence the combination may be necessary to make either purpose feasible. The assignment of power revenues to repay the allocated costs of irrigation features is therefore simply a bookkeeping entry insuring the return to the United States from all purposes of the total reimbursable costs of the project. Total returns from water and power uses in the Missouri Basin are expected to amount to \$3,347,483,000.<sup>48</sup>

Local contributions to watershed treatment programs take a more direct form. The Soil Conservation Service furnishes technical assistance, through local soil conservation districts, to aid participating farmers in analyzing their soil and crop needs and installing the measures and practices best calculated to conserve the soil and retard runoff. Expenses incurred are paid by the farmer, whose contribution may be in part labor and services, although his costs may be recouped in part through the receipt of incentive payments under the National Conservation Program. Of the \$8,487,623,000 which the Department of Agriculture's proposed "Missouri River Basin Agricultural Program"<sup>49</sup> is estimated to cost, the Department has assigned \$4,995,623,000 as the portion which will be borne by land-owners; state and local governments are expected to contribute \$428,267,000, leaving a net amount of \$3,063,137,000 to be borne by the federal government over a thirty year period.

State participation in the planning for resource development takes a number of forms. Most of the states have one or more agencies involved to some extent in either local planning or participating in the planning of

46. (1939) 43 U.S.C.A. 485h.

47. Missouri Basin Account:

	<i>Allocations</i>	<i>Scheduled Repayments</i>
Irrigation	\$2,577,113,000	\$ 905,367,400
Power	687,038,000	2,333,550,400
Municipal Water	19,695,000	49,235,200
Fish and Wildlife	660,000	-----
Recreation	3,647,000	-----
Reserve (Power System)	59,330,000	59,330,000
	\$3,347,483,000	\$3,347,483,000

Source: Page 43, Report of the Regional Director, Region 7, Lower Platte River Basin, Bureau of Reclamation, Denver, Colorado. Payout schedule as of Sept. 1951.

48. Ibid.

49. House Doc. 373, 81st Cong., 2nd Sess. (1949).

federal programs. These may take the form of over-all commissions such as Colorado's State Planning Commission, or construction agencies which also possess a planning function such as the Montana Water Conservation Board, or the principle water agency of the state, or Colorado's Water Conservation Board, or a special advisory committee to the governor such as exists in Kansas. In addition, departments of health, game and fish departments, highway commissions, park boards, state universities, and land grant colleges and departments of agriculture also play a part. In some states coordination between these state agencies is achieved by an informal arrangement such as Missouri's State Inter-Agency Committee, or by a statutory board chosen to represent various agencies such as Wyoming's Natural Resource Board.

The states also have a share in basin-wide planning. They have been accorded membership in the Missouri Basin Inter-Agency Committee<sup>50</sup> and they have formed the Missouri River States Committee which comprises all of the governors of the Basin states and meets at intervals to provide a forum for discussion of state problems and actions relative to basin development. The Missouri River States Committee was instrumental in bringing about the compromise that resulted in congressional authorization of the Pick-Sloan Plan, but its most notable contribution to date has been the sponsorship of the concept of a Missouri River Basin Compact.<sup>51</sup>

Turning from over-all state or basin planning to the question of state participation in individual project planning, the Flood Control Act of 1944<sup>52</sup> provides that investigations which form the basis of any plans, proposals or reports shall be conducted so as to give to the affected states information developed by the investigation and also opportunity for consultation regarding plans.

In practice, this usually involves conducting public hearings prior to initiation of preliminary surveys, at which time all persons having an interest in the project may appear and testify concerning the proposed project. A further opportunity for the expression of local views may be provided in the case of unfavorable agency reports on preliminary examinations or detailed surveys.

In addition, to the extent deemed practicable by the Chief of Engineers or Secretary of Interior, the states may be given an opportunity to cooperate in the investigation. Thus, by the language of the statute, the extent to which the states actually participate in investigations leading to formulation of project plans is left to the discretion of the head of the department responsible for conducting the investigation.

Upon completion of all investigations, and prior to submission of survey reports to Congress, the Chief of Engineers and the Secretary of

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50. See *infra* at notes 62-64.

51. See *infra* at note 76a.

52. Sec. 1, 58 Stat. 887, 33 U.S.C.A. 701-1.

Interior are directed to transmit a copy of their proposed reports to each affected state. The Department of Agriculture by administrative decision follows the same practice. Within ninety days after receipt of the proposed report, the written views and recommendations of each state may be submitted to the Chief of Engineers or Secretary of Interior, and these comments are attached to the project report which is submitted to Congress. In actual practice, the effect of this requirement is open to some question, for the federal agencies are not compelled to modify their plans in accordance with the states' expressed views and recommendation. They are required to take no action other than to append the states' comments to the project report submitted to Congress. In fact, however, it appears that some of the states have been comparatively successful in achieving a workable relationship with the federal agencies in individual project planning, and have been able to modify project plans to more nearly fit local needs and desires.

Apart from over all planning for the basin or for major projects in the basin program, the states are involved in the planning of the number of subsidiary or secondary features of the federal program such as recreation, fish and wildlife, and pollution control. Fish and wildlife regulation is primarily a state function, but the federal government provides some technical assistance and federal aid in certain cases. State conservation departments must be consulted concerning the effects of projects on fish and wildlife resources with a view to preventing loss on or damage to those resources.<sup>53</sup> The wildlife habitat development programs on federal water development projects are jointly planned by Interior's Fish and Wildlife Service and state departments, and generally result in the turning over of the completed developments to the state agencies. Similarly, since the basin development program presently being pursued will provide greatly increased possibilities for the establishment of state parks and recreation areas there has been close cooperation between federal and state agencies in this field. As for pollution control, the Water Pollution Control Act of 1948<sup>54</sup> recognized that the control of water pollution was the primary responsibility of the states, but the United States Public Health Service furnishes technical research and service, and cooperates with state health departments in gathering data on pollution problems and formulating of plans for their control.

Finally, mention should be made of one very important function of the states in the water resource program, that is, the control of water resources by state law and administrative officials. In the lower basin, the state law of riparian rights may have a major effect upon the handling of drainage and watershed management programs. In the upper basin, in all of the states where irrigation is practiced, the doctrine of prior appropriation is

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53. (1946) 60 Stat. 1080, 43 U.S.C.A. 485h.

54. (1948) 62 Stat. 1115, 33 U.S.C.A. 466.

the paramount water law and state law and administration will have a major effect upon the program.<sup>55</sup>

In eight of the states of the basin, (all but Iowa and Missouri), adjudication of the rights to use water are made by the state, either through courts or administrative officials. In Kansas, Minnesota, Nebraska, North Dakota, South Dakota, and Wyoming a permit must be obtained in advance before an appropriation of water to beneficial use can be made. Since the major dams of the Corps of Engineers are designed to serve primarily navigation and flood control functions, which are regarded as an exercise of the superior right of the United States to control navigability of streams, no state appropriations are taken out for these purposes,<sup>56</sup> but the Bureau of Reclamation must comply with state law in the prosecution of its projects.<sup>57</sup> Since the water officials of these states uniformly have the power to deny an application for an appropriation on the grounds that it conflicts with the public interest, they may have what amounts to a veto power over projects within their borders. An example of this is the action of the State Engineer of Wyoming, who withheld the permit for the construction of the Glendo Unit in the North Platte River until he was satisfied that the best interests of Wyoming would be served thereby.

Another important phase of water administration by the state is the distribution of water to the persons entitled thereto by priority. In Colorado, Nebraska, and Wyoming the water is distributed by water commissioners and water masters under a central administration,<sup>58</sup> North Dakota has given its Water Conservation Commission control over its streams,<sup>59</sup> in Kansas the State Engineer has the power to distribute water to adjudicated rights,<sup>60</sup> and in South Dakota the State Engineer may appoint a water commissioner when necessary in his judgment or in the judgment of the court that adjudicated the rights.<sup>61</sup> Montana has no centralized agency but adjudicated water rights may be controlled by a water commissioner appointed by the court that decreed the priorities.<sup>62</sup>

*Missouri Basin Inter-Agency Committee.* Shortly after the Flood Control Act of 1944, which set in motion the vast program known as the Pick-Sloan Program, the MBIAC was created as a step toward coordinating the resource development of the Basin. The committee consists of representatives of the Departments of Agriculture, Commerce, and the Interior, the Corps of Engineers, the Federal Power Commission, and the Public Health

55. A summary of state water law in the basin is found in Missouri: Land and Water (1953) 193-202.

56. *Gilman v. Philadelphia*, (1865) 3 Wall. (U.S.) 713; *Oklahoma v. Atkinson*, (1941) 313 U.S. 508, 61 S.Ct. 1050, 85 L. Ed. 1487.

57. Sec. 8, Reclamation Act of 1902, 32 Stat. 331, 43 U.S.C.A. 383.

58. 1935 Colo. Stat. Ann. c. 190, Secs. 201 et seq.; Nebr. Rev. Stat. 1943, Secs. 46-215 et seq.; Wyo. Comp. Stat. 1945, Secs. 71-101 et seq.

59. N. Dak. Rev. Code 1943, c. 61-02.

60. Kans. Gen. Stats. 1949, c. 82-a.

61. S. Dak. Code 1939, Sec. 61.0121.

62. Mont. Rev. Code 1947, Secs. 89-1001 et seq.

Service of the Federal Security Agency. Originally five governors of the basin states sat as members, but since March 1952, all ten governors have become members.

The MBIAC was not created by statute, but is a voluntary interdepartmental organization which provides a medium for the interchange of information and the discussion of common problems. It is not a planning agency, for although it annually compiles a "six-year program" of proposed land and water developments for the basin, which summarizes work programs, proposes a construction schedule, and estimates costs, this program is simply a compilation of the already crystallized estimates and plans of the individual agencies.

As a coordinating committee, the MBIAC is powerless except where disagreements may be ironed out by the interchanging of information and the reaching of unanimous agreements. There have been a number of controversies relating to jurisdictional disputes or to fundamental disagreements on the form that a particular project should take that have arisen between the agencies or between an agency and a state. The report of the Missouri Basin Survey Commission details a number of these, pointing out the legal inability of such a voluntary organization to handle such basic problems.<sup>63</sup> In fairness it must be pointed out that the report also lists a number of tangible accomplishments of MBIAC.<sup>64</sup>

*Existing Plans.* It should not be assumed, in speaking of the need for a planning agency for the Missouri Basin, that there are no plans at present for that area. On the contrary, the three major agencies have in the works a total program which, including projects under construction, authorized, and still in the preliminary planning stage, will amount to sixteen billion dollars worth of construction.<sup>65</sup> This figure is staggering, but should not be frightening. It is calculated without reference to whether the money comes from federal or local sources, it does not reflect ultimate reimbursement from water and power users, and it is estimated that for every dollar spent, benefits of about \$1.75 will be realized.<sup>66</sup> It might then be thought, that so much in the way of plans now in existence must represent total planning for the basin and that little remains to be done. But in fact, completed projects and those under construction account for only slightly more than two billion dollars of this total, and a like amount represents projects authorized by Congress and scheduled by the agencies, but still subject to final planning and the appropriation of funds before work can begin. The remainder, or twelve billions, is the estimated cost of projects and programs proposed as feasible or regarded as potential, all of which are subject to future study and final planning.

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63. Missouri: Land and Water (1953) 215-222.

64. *Ibid.*, 85-86, 248.

65. *Ibid.*, 94.

66. *Ibid.*, 94.



The programs of the Corps of Engineers and the Bureau of Reclamation are jointly known as the Pick-Sloan Plan and stem from the blanket authorization in the 1944 Flood Control Act of the combined Army and Bureau plans for the full development and control of the basin's water resources.<sup>67</sup> The Army's share of this plan include navigation channel improvements and flood control levees from Sioux City to St. Louis, the great dams that would transfer the "Big Muddy" into a series of clear lakes stretching across the Dakotas, and many reservoirs on tributaries and local protection works to guard the cities of the lower basin against the repetition of disastrous floods. The Bureau's plan envisages almost 100 dams that will, together with the irrigation and power features of the dams constructed by the Corps, eventually irrigate five million acres of new land, provide supplemental water for another one million and generate an annual average of over nine billion kilowatt hours of electric energy. As studies and plans have progressed since 1944, the Pick-Sloan Plan has assumed a flexible nature as improvements and modifications have suggested themselves, and many final decisions remain to be made before most of the units of the program have been constructed. 1973 is the earliest date on which it is estimated the plan could be completed if the work proceeded as fast as possible; the actual completion is undoubtedly many more years in the future.

The Department of Agriculture's program for the basin,<sup>68</sup> sometimes known as the "Young Plan," has as yet no Congressional approval. It calls for the extensive application of a number of measures—stabilization of small water courses, aids to irrigation, drainage, rural electrification and many conservation and improvement measures for grassland and cropland. These activities are presently being carried out in the basin under existing authorities and nation-wide federal programs, and the plan itself is to unify and accelerate these programs in this area in such a way as to complete them during a thirty-year period. The total expense involved was estimated at almost eight and one-half billion dollars, and the Department was requested to split the program up on a watershed basis. In 1952 the first supplement to the report was filed with Congress,<sup>69</sup> and proposed the treatment of five smaller areas regarded as critical, within ten and twenty year periods, at a total cost of 386 million dollars, one third of which would come from non-federal sources.

*Operation.* It must be recognized that the construction of projects is but the first phase of water and land development. The Missouri Basin is now primarily in that stage, but ultimately the manner in which the water supplies are controlled and used will be the truly significant factor in the actual development of the Basin.

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67. Sec. 9, 58 Stat. 887, 891.

68. House Doc. 373, 81st Cong. 1st Sess. (1949).

69. House Doc. 530, 82nd Cong. 2nd Sess. (1952).

One of the major fields of operations control will, of course, be river and reservoir regulation. It is obvious that all of the storage reservoirs will form integral parts of a machine that must be operated as a whole. Each will have its separate job to do, but each unit must be carefully tuned to the working of the whole machine. Many of the small reservoirs for consumptive uses may have but little effect upon the overall picture, but the large federal dams of the main stem and major tributaries must be under a single operation. The problem is who is to act as watermaster, who shall determine when water shall be impounded, when it should be released. Inevitably conflicts will arise. One of these has already been foreseen; the continued development of irrigation may result in enough consumption of water to interfere with a flowing navigation channel during drouths. Congress has already settled this problem in the O'Mahoney-Milliken amendment to the 1944 Flood Control Act which gives the priority to beneficial consumptive uses,<sup>70</sup> but in the future many other such conflicts may arise. Navigation may some day conflict with hydroelectric power, since navigation requires that water be stored in the winter and released in the summer, while power demands are higher during the winter months. The development of irrigation may eventually consume enough water to curtail the production of hydroelectric power. A single organization is needed to recommend to Congress those uses entitled to preference and to coordinate water releases in accordance with whatever priorities are set up. The unilateral decision by a single agency should not control.

Other phases of operations will require supervision in the future. Contracts for irrigation reimbursement, contracts for the sale of power, and the administration of the system as a whole will have a great effect on the actual accomplishment of the objectives of the projects. The integration of power systems may be required.

No agency presently existing within the federal government is equipped to determine the policies, make the decisions, and give the supervision which will be required as development progresses.

#### PROPOSALS FOR CHANGE

*Federal Reorganization.* Suggestions for the improvement of the federal organization have generally been of three types: (1) reorganization of the executive departments and a reassigning of functions; (2) a corporate authority modeled on T.V.A. that would to a large extent take over the functions of the departments; or (3) the establishment of a new commission that would coordinate the work of the present agencies. Several proposals have been made for each type, but the salient feature of such suggestions can be seen from a short examination of typical solutions offered.

In 1949 the Hoover Commission recommended that the Department of the Interior be reorganized along more functional and major purpose

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70. Sec. 1(b), 58 Stat. 887, 33 U.S.C.A. 701-1.

lines.<sup>71</sup> The features of the plan that are of primary interest here are the establishment of a Water Development and Use Service within the department that would include all present functions of the Bureau of Reclamation in relation to irrigation and power supply, and all functions of river and harbor improvement and flood control that are presently under the jurisdiction of the Corps of Engineers. There would be set up in the office of the President a Board of Impartial Analysis which would review and report to the President the public and economic value of projects proposed by the Department, and no irrigation or reclamation project would be undertaken without a report to the Board from the Department of Agriculture.

The most recent bill for a Missouri Valley Authority,<sup>72</sup> called for the establishment of a federal corporation controlled by a board of five directors, three with a five-year residence in the valley, appointed by the President with the advice and consent of the Senate. Local representation, other than by board membership, and coordination, other than by displacement, was provided for by an advisory committee consisting of representatives of each state in the valley, each federal agency interested in resource development and representatives of agriculture, industry, labor and recreational interests. Coordination or displacement would be at the option of the corporation. Having complete planning power, it might include presently authorized projects "insofar as practicable" and give "particular consideration" to the Pick-Sloan Plan. It was directed to incorporate into its plan the programs of existing agencies and insure such participation by them as it might deem consistent with maximum development.

A coordinating commission could of course take many forms. One of these, that might be called a "legalized Inter-Agency Committee," has been proposed by a unit of the Bureau of the Budget, after a request by President Truman to prepare legislation to carry into effect the recommendations of the President's Water Resources Policy Commission. Working in consultation with the interested agencies, the Bureau produced the draft "Water Resources Policy Act of 1953" which was never introduced into Congress but that was made available to Congress by President Truman as he left office.<sup>73</sup> The river basin commissions proposed would have a federal chairman, members of the Departments of the Army, Interior, Agriculture, and Commerce, the F.P.C., and the Federal Security Agency, and the governor of each state in the region would appoint a member. Each commission would prepare a regional program, review agency projects to determine their consistency with that program, recommend which agency should undertake a project in case of conflict, and make recommendations for the allocation of costs among the various purposes to be served by a

71. Report of the Commission on Organization of the Executive Branch of the Government, "Department of the Interior" (1949).

72. S. 1883, 82nd Cong. 1st Sess. (1951).

73. 99 Cong. Rec. 454, Jan. 19, 1953.

project. There might be twelve of such commissions, established as the president deemed necessary, and their work would be reviewed nationally, and national policy would be formed, by the President, who might use existing facilities in his office or appoint an advisory board consisting of private citizens of broad experience to advise him on water and related land use problems.

Although the Bureau of the Budget was attacking the problem on a national scale, President Truman also appointed the 11-man, bipartisan Missouri Basin Survey Commission to make a special study of that region, and the report of that body was submitted to President Eisenhower on February 20, 1953. The Survey Commission recommended still another type of coordinating body, that would more closely resemble the board of directors of a river valley authority than it would an inter-agency committee, since it would be composed of five presidentially appointed residents of the Basin not having any connection with the existing agencies. The Survey Commission was explicit in its description of the powers and functions that such a coordinating commission should have in order to effectively operate,<sup>74</sup> and in stating its reasons for the recommendations. A summary of those powers is set out here. A coordinating agency could of course be strong or weak, depending upon the powers and functions that were assigned to it. The Survey Commission recommended a strong body that would be able to remedy most if not all of the defects that exist in present procedures, by making consistent decisions at all stages of program execution.

The absolute essential is the authority to prepare a master plan—a comprehensive program for the ultimate and optimum development of the basin's resources that would take into consideration all of the many purposes to be served. The present agencies are proceeding today for the most part on a project to project basis, and whatever plans exist that may be called ultimate or complete are the plans of single agency that will serve that agency's purpose and function, and planning for the same areas and streams is done by different agencies with different functions and with varying standards for evaluating projects. Up to now, such piecemeal planning has perhaps been permissible because ultimate development is so far in the future that it may be assumed that the particular project will fit into any eventual master plan, but as development proceeds, competition between different projects is bound to increase. The Survey Commission therefore recommended that the coordinating agency incorporate the plans and programs of the existing agencies to the extent that they are com-

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74. Missouri: Land and Water (1950) 265, 266. Curiously, the Survey Commission seriously weakened its coordinating agency by recommending that it should not "function" in a state that declined to consent to its establishment. It is not explained how a commission might coordinate the activities of the Bureau of Reclamation, Corps of Engineers, etc., in one state and not another, when the agencies are operating throughout the basin and the functions of the commission are stated in terms of a comprehensive, basin wide, balanced, program. See pp. 62-64, see dissent, pp. 13-14.

patible with the full development of the basin's resources, that future investigations and surveys be directed and supervised by the coordinating body, which might, in the solution of jurisdictional conflicts, direct joint surveys. Requests for authorization would be analyzed and reviewed with respect to the engineering and economic feasibility of the project and its relation to the basin program, and transmitted to Congress with a report on these matters, so that Congress could see the project in perspective rather than as an isolated case. The Federal Power Commission would not have the power to issue licenses or permits for private developments without a certification that the project was consistent with the basin program. The basin program would of course, be a flexible framework, not a blueprint, and would be kept current and modified from time to time on the basis of experience, new knowledge, and changing needs.

The coordinating agency would also have important budget functions. Instead of the present agency budget requests to Congress, competing with each other for available funds, a consolidated basin resource budget would be prepared by the central organization in consultation with the operating agencies, showing three levels of expenditure and the features to be added or dropped as the level changed. An informed recommendation might thus be made as to the proper priority schedule needed to carry out the plan.

The Survey Commission also recommended that the coordinating agency control the operation of the completed projects so as to insure that the ultimate employment of the resources, as well as the construction of works, would carry out the basin plan. Central control of river operations, directing the operation of other resource facilities, and preparing coordinated plans for emergency operation of flood control structures would be the duties of the coordinating body. Power distribution and control of rates, would also be a function of the new agency.

*Proposals for Federal-State Compacts.* The exact history of an idea is difficult to trace, and the originator of the first proposal for the solution of river basin problems by compact between the various states of the basin and the United States as an active party is unknown to this author. In 1947 a Comment in the *Yale Law Journal*<sup>75</sup> proposed the complete fusion of state and federal powers over resource development by the creation of a corporation modeled on TVA, which would possess all federal powers and to which would be delegated, by a federal-state compact, all important state powers over water and related resources. Mr. C. Petrus Peterson, of Lincoln, Nebraska, 1951 president of the National Reclamation Association, proposed in a speech given November 30, 1949 to the Missouri River States Committee that "area home rule" be given to a basin organization set up by a compact to which both levels of government would be parties. Ray-

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75. *Governmental Techniques for the Conservation and Utilization of Water Resources* (1947) 56 *Yale L. J.* 276.

mond Moley, in a 1950 monograph entitled "Valley Authorities"<sup>76</sup> concluded that a corporation created by interstate compact which the federal government would join would have significant advantages over the TVA type of authority. *The Interstate Compact since 1925*, authored in 1951 by Zimmermann and Wendell under the sponsorship of the Council of State Governments, suggests the usefulness of the device as a basic legal medium of cooperation between the different levels of government, and devotes considerable space to arguing the legality of such a plan.

A quite concrete proposal for such a compact has been drawn up. The Missouri River States Committee commissioned the late Clifford H. Stone of the Colorado Water Conservation Board, James M. Landis of New York, and Governor Phil M. Donnelly of Missouri to prepare a tentative draft of a compact to serve as the basis of discussions. In December, 1952, the draft, with some revisions, was approved by the Committee and published<sup>76a</sup> in order that further study and consideration might be given to the use of the compact approach in the basin's development.

The draft declares that the purpose of the compact is to facilitate the agricultural and industrial development of the Missouri Basin through a unified intergovernmental program for the management, conservation, storage, utilization and development of the land and water resources of the basin. The compact would establish a Missouri River Basin Commission of the United States Government and the participating states to integrate the programs and operations of state and federal agencies and to eliminate the causes of present and future controversies by securing effective Federal-state and interstate coordination.

The Missouri River Basin Commission would be an administrative and planning agency of the participating governments and of each of them. It would be composed of one member from each party state designated or appointed in accordance with the law of his state, and of not less than three nor more than five commissioners of the United States appointed by the President. Each party state would have one vote, and the United States would have a vote equal to the number of state votes present at any meeting, the vote of the United States being cast as a unit unless Congress prescribes otherwise. A quorum would consist of representatives of the United States and of five of the principal states and a majority of all participating governments, and a three-fourths vote would be required for effective action.

The commission would have the power to make comprehensive plans and adopt policies and procedures to effectuate integrated operation in the release, storage, or diversion of the waters of the Missouri Basin. If it found that the operational plan of a governmental agency or private development having a substantial effect on interstate relations in the use of the waters

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76. No. 438 "National Economic Problems" (1950).

76a. Council of State Governments (1953).

of the Missouri River would conflict with its plan of integrated operation it might make such recommendations as necessary to the appropriate government or governments for action. The commission would promote and aid the coordination of the activities of Federal and state water or other related natural resource planning or conservation agencies, and cooperate with such agencies in the development and management of the resources. It would make integrated plans for the conservation, development and utilization of the water and related resources, and submit the same to the member governments. It would review all plans for any project for flood control, irrigation or other water use which might have a substantial effect on interstate relations in the use of the water and submit its findings to the member governments. All governments and their agencies would submit plans for all such projects to the commission in sufficient time for appraisal and findings prior to authorization or approval. Projects at any state of construction might be reviewed if a specific request were made by any member government. The commission might conduct such public hearings and adopt such rules and regulations as in its judgment might be appropriate. It would make an annual report to the President and Congress and to the Governors and legislatures of the participating states on the activities of the commission, embodying its plans, recommendations and findings.

The facilities of the commission would be available to any two or more participating governments who might enter into supplementary agreements for the regulation and abatement of pollution, for the development and management of joint forests, parks, or recreational areas, or for the development, use and management of water and related natural resources.

It can be seen that as a coordinator of the federal agencies, the proposed commission would be considerably weaker than the body recommended by the Survey Commission, lacking the functions of directions of surveys, budget control, and actual operation of the completed projects. But a commission created by compact need not necessarily be a weak organization. Three members of the Survey Commission, Senator Milton R. Young of North Dakota, Congressman Clifford R. Hope of Kansas, and Dean H. T. Person of Wyoming, dissented from the organizational recommendations of the Survey Commission's report and urged a coordinating agency established by a compact to which the basin states and the federal government are parties. But the minority of the survey commission cannot be said to have simply approved the draft compact of the Missouri River States Committee. While they made no specific recommendations for the powers that might be given to a commission set up by compact, they concurred in the recommendations for very broad powers for any such agency, and stated that the precise definition of its duties and powers could best be worked out by agreement.<sup>76b</sup>

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76b. Missouri: Land and Water (1953) 12-14.

## OBJECTIONS TO THE COMPACT APPROACH

*Legal Objections.* The majority of the Survey Commission stated seven reasons for rejecting the federal-state compact as a solution to the problem. In the first of these they expressed the belief that such a compact would raise unsolved constitutional questions which would require prolonged litigation for final determination: "Historically, compacts have been concerned largely with problems of interstate relationships. We are of the opinion that a compact among a selected group of States and the Federal Government embarks upon a field largely unexplored in the courts."<sup>77</sup> It is true that the Constitution makes no mention of such an arrangement between the different levels of government. But we are not completely without precedents.<sup>78</sup>

In several instances, states with a common problem have established planning and coordinating agencies by interstate compact. The principal agencies so organized are the Port of New York Authority, and the Bi-State Agency. These are quite similar, and represent interstate solutions to the problems that arise when a great metropolitan area covers parts of different states. The Port of New York Authority, established in 1921 by New York and New Jersey,<sup>79</sup> is a corporation that plans, constructs, and operates terminals and transportation facilities and deals primarily with transportation problems and facilities in New York City and Newark, N. J. The Bi-State Agency, set up by Missouri and Illinois in 1949,<sup>80</sup> is a similar agency for the greater St. Louis area with much the same powers with regard to transportation as the Authority, but in addition, it has general planning powers over problems dealing with sewage, drainage, coordination of streets, highways, water supply, sewage disposal, recreation and conservation facilities, and land use pattern in a six-county area.

Many of the compacts by which the waters of interstate streams are divided are self-executing in that they require only adequate basic data on stream flow for the state water officials to apportion among state water users the shares of the signatory states. In other cases, because of the amounts of water involved, the presence of numerous tributaries, varying proportions allotted under different conditions of stream flow, or the necessity for storage of water to meet downstream commitments, the states have formed commissions for the control of the rivers. In each of these instances the states, recognizing the interests of the federal government in the river and in the problems with which the compact is concerned, have provided for federal representation on the commission.

In 1939 Colorado, New Mexico and Texas established the Rio Grande

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77. Missouri: Land and Water (1953) 10.

78. Zimmermann and Wendell, *The Interstate Compact Since 1925*, is largely devoted to discussion of the constitutionality of such a compact, and some of the arguments there set forth are reproduced here.

79. (1921) 42 Stat. 174.

80. P.L. 743 81st Cong. 2d Sess. (1949).



Compact Commission, whose chairman is a non-voting federal member designated by the President of the United States.<sup>81</sup> The compact apportions the waters of the Rio Grande and gives the Commission, by virtue of its powers of collecting data and making recommendations, control of the flow and division of the waters of the river. The eight states forming the major part of the Ohio River basin have similarly established an organization consisting of three commissioners from each state and three appointed by the President, which has wide recommendatory and some enforcement powers relating to stream pollution.<sup>82</sup> The Upper Colorado River Commission is an administrative agency set up to administer the Upper Colorado River Basin Compact,<sup>83</sup> which apportions the water of the river among the five states of that region. On this Commission a representative of the United States is the presiding officer of the Commission and entitled to the same powers and rights as the Commissioner of any state. The Commission is an operating body in full control of the flow and use of the river by virtue of powers delegated to it in the compact. While not specifically designated as a planning agency, it serves some planning functions and makes recommendations to the agencies developing the river and to Congress.

The federal government is a participant, in a sense, in all compacts since they require congressional consent. The federal government participated in the negotiations leading up to all of the western water compacts. In each case involving these the President has designated a representative of the United States to participate in the negotiations between the states and this representative is usually named as chairman of the negotiating commission. In several instances Congress has specifically required federal participation in the negotiation of a compact as a condition precedent to congressional approval of the completed agreement.<sup>84</sup>

The United States has not signed as a party to any of these compacts. While the Constitution does not expressly mention agreements between the United States and a state, the federal government has made such agreements in the past and their validity has received judicial recognition when a function or power of the United States was furthered.

In the case of *Searight v. Stokes*,<sup>85</sup> decided in 1845, the Supreme Court had before it such an agreement, in the form of a proposal by state legislation and an acceptance by congressional act. The federal government had constructed the Cumberland Road, but found the maintenance and upkeep difficult and expensive. The states through which the road ran proposed, by state legislation, to take under their care the road, maintaining it by tolls, and Congress passed a law declaring the assent of the United

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81. (1939) 53 Stat. 785.

82. (1940) 54 Stat. 752.

83. (1949) 63 Stat. 31.

84. (1942) 56 Stat. 736, P.L. 572, 82nd Cong. (1952).

85. 3 How. (U.S.) 149 (1845).

States to these statutes and ceding the road to the states. A dispute arose over the construction of one of these statutes and, while the validity of the agreement was not challenged, the Court, by Mr. Chief Justice Taney, stated that it saw no ground for questioning the power of the United States to enter into such an arrangement (which was designated a "compact") and the agreement was held a proper method of fulfilling the constitutional power to establish post offices and post roads.

Two extremely important precedents in federal participation in an interstate compact occurred in the final Republican River Compact<sup>86</sup> and in the Belle Fourche Compact.<sup>87</sup> These each state that the compact shall become operative only when consented to by Congress by legislation which provides that any beneficial consumptive use by the United States shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the basin is of paramount importance to the development of the basin, and that the United States shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the basin is of paramount importance to the development of the basin, and that the United States will recognize any valid established use for domestic and irrigation purposes which might be impaired by the exercise of federal jurisdiction over the waters of the river. In the consent legislation Congress embodied these provisions verbatim, thus in effect making the United States a party to the agreements.

The second stated objection is that state officers serving on the compact commission would exercise supervision over agencies and officers appointed by and responsible to the Federal government.<sup>88</sup> Phrased differently, the argument is that members of the compact commission would, by virtue of their powers, become federal officers within the meaning of the Constitution<sup>89</sup> and their appointment by means other than those specified in the Constitution would be illegal. This, however, is not an objection, unless a specific compact with this feature is postulated, it is simply a guidepost to the draftsmen of the compact. In the deliberations of the Survey Commission, Commissioner Holum of South Dakota pointed out that since two quite different demands are made—coordination of the federal bureaucracy, and creation of a local voice in the program—different methods might be used to accomplish the two objectives. And the dissenting members of the Survey Commission recognized that they had this key, although they were not explicit as to its use. They state: "Also we can foresee that Congress, in the legislation authorizing compact negotiations, may wish to except certain matters relating to purely Federal functions and responsibilities from the jurisdiction of the State-appointed members

86. (1943) 57 Stat. 86.

87. (1944) 58 Stat. 94.

88. Missouri: Land and Water (1953) 10.

89. Art. II, Sec. 2.

(of the Compact commission). In any event, there will be opportunity in the negotiations to invest the proposed body with the necessary delegations of authority from both Federal and State sources to do its work properly."<sup>90</sup> In other words, this constitutional hazard may be avoided either by proper delegation of authority to state officers or by eliminating state control of certain features of the organization. It is not necessary, if the states are given a strong voice in the management of the commission, that all powers of the commission be watered down to the extent that appears in the draft compact prepared for the Missouri River States Committee. On the other hand, it is not necessary to adopt the opposite extreme, and if the coordinating commission is given strong powers, to relegate the states to a merely advisory capacity.

Let us examine the powers that the Survey Commission believed such a coordinating agency would have to have to see which of them may be properly handled by agents of the states. As noted above, many of the functions of such a commission would amount to no more than making recommendations to Congress. The general planning and programing functions are of this nature, as are the studies that would be made, and the advice that would be given in relation to the proper budgeting of resource control activities. Any citizen, supposedly, may make a recommendation to Congress and the legislative precedent for review of federal projects by the states is found in Section 1 (a) of the Flood Control Act of 1944.<sup>91</sup> Insofar as budget procedures and authorization procedures would be changed, the mere routing of a federal agency's request through such an organization as an added step prior to submission to the Bureau of the Budget seems to raise no constitutional problems.

In regard to the operation of the completed projects by such a commission, it certainly seems that here the states, in control of the distribution of water in accordance with state created priorities, and affected materially by operations for power, flood control, and navigation, have sufficient interests to justify a joint voice in the matter of water releases. Similar composites of federal and state interests have never been questioned. Examples are the joint boards established in motor carrier cases by the ICC<sup>92</sup> and in certain types of power hearings by the FPC.<sup>93</sup>

It was also recommended that a coordinating commission should have general authority and responsibility for cost sharing policies. Insofar as this amounts to the establishment of policies relating to sharing the costs of projects and to equitable bases for payments in lieu of taxes, these powers also seem purely recommendatory since no action could be taken without Congressional changes in the substantive law. The negotiation of cost sharing agreements and contracts with states, districts, groups, and

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90. Missouri: Land and Water (1953) 13.

91. *Supra* n. 52.

92. 49 U.S.C.A. 305.

93. 16 U.S.C.A. 824h.

enterprises would again seem to be a matter of joint interest justifying joint participation, and to a large extent the Commission would simply be a forum for negotiations.

One recommendation was for the actual making of cost allocations among the various purposes of a project. Since the portion of the total cost of a federal project that is allocated to navigation or flood control is nonreimbursable, and since the division of remaining costs between power and irrigation features will have a material effect upon the amount of reimbursement and the rates for these services, it can be said with some justice that the amount of federal money that is reimbursable and the rates at which it will be reimbursed are matters of federal concern alone. One or two other powers may also be claimed as purely federal activities. It is contemplated that such a commission would have actual direction and supervision of future investigations and surveys, would set up procedures for the uniform evaluation of costs and benefits, and would have authority to make some allocations of planning funds among the various agencies.

As to this last group then, these functions must either be excluded from the authority of the state members, or the state members, by some proper delegation of authority, be regarded as federal officers for these purposes.<sup>94</sup> Exclusion could be made by providing that state members could have the right to discuss and recommend on certain of these matters, but that the federal members would have the power to make the decision without reference to the position of the states.<sup>95</sup>

*Other Objections.* In addition to the above two legal objections, or rather questions, the Survey Commission made four criticisms of the compact approach on policy matters, and one that may be called a practical objection.<sup>96</sup> Both the third and fourth objections of the majority of the commission raise related policy questions. The third is based upon the premise that the development of the basin is so important to the federal

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94. An exhaustive list of situations in which state officials exercise authority for and on behalf of the federal government and the legal questions arising is found in Kauper, *Utilization of State Commissions in Administration of the Federal Motor Carrier Act (1935)* 34 Mich. L. R. 37, 46-49, 70-80. "The question has arisen in a number of cases, and in all of them the Court has either contented itself with the simple statement to the effect that the National Government might properly clothe state officers with federal authority, or it has unquestionably assumed that to be the case. It seems clear from these cases that the Supreme Court considers the question well settled in favor of the constitutionality of the practice. Undoubtedly the Court has been influenced by the fact that this practice dates back to the foundations of our government and in itself constitutes a practical interpretation of the Constitution not lacking in persuasive appeal." *Ibid.*, 72. See also *Governmental Techniques for the Conservation and Utilization of Water Resources (1947)* 56 Yale L. J. 276, 297-303.

95. Compare the bill prepared by the Bureau of the Budget, based in large part on the findings of the President's Water Policy Commission, made available to the 83rd Congress by President Truman. 99 Cong. Rec. 454 (1953), but never introduced. By that bill a state-federal coordinating commission would be established, but all of its powers would be vested in its chairman, a federal officer, who might act only after consideration and recommendation by the whole commission.

96. Missouri: *Land and Water (1953)* 10.

government that it cannot be shared. We are told that because of the national need for the agricultural resources of the basin, many of which are undeveloped, the federal interest cannot be delegated to state and local interests, that the integrity of the nation's responsibility must be maintained by the administration of federal programs by federal officers only, responsible to the President and to Congress. It seems strange to find residents of the basin thus arguing for a colonial policy under which the development of the area is regarded as secondary and incidental to the interests of the "mother country." The fourth views the outlay by the federal government of 70% of the funds needed for complete prosecution of the Pick-Sloan Plan as requiring that the states be denied an effective voice in the development, even though they more closely represent the people who will directly contribute within the next six years \$402,472,000,<sup>97</sup> and who will be eventually called upon to reimburse three and one-third billion dollars<sup>98</sup> to the federal government through power, municipal water, and irrigation revenues. This seems to be based upon some inarticulate theory that the federal government can be regarded as the majority stockholder in the enterprise, whose holdings require the exclusion of the minority shareholders from representation on the board of directors. This corporate theory might be made the basis of an argument in negotiations for a compact, that only minority representation and voting strength should be accorded to the states, although a working partnership, where a voice in the management is not necessarily tied directly to the proportionate investment of the partners, might be a better analogy.

The fifth reason given for rejecting a federal-state commission, while phrased in terms of "democratic processes," is self-contradictory and is a flat rejection of the principles of democracy as applied to basin development. It is found objectionable that state representatives on such a body would represent a limited and sectional interest, that "proper" decisions would be difficult, that the commission would be predisposed to the pressures of local interests. The implication is that such a state of affairs would be shocking, and should not be tolerated—yet it exists today in municipal and county governments, state legislatures, and in Congress. Similarly, the sixth objection is a rejection of the values of representative government: "The proponents of the compact device have made much of the popular demand for local participation in the development of the basin. They contend that this demand would be satisfied by a Governor's representative in the basin agency. We believe that the people, through their local districts, associations, and organizations, wish to speak for themselves. They have a better understanding of those issues and problems and should have the opportunity to take a more active part in the development program." In the first place, this makes an assumption that the state members on such a commission would be the representatives of the

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97. *Ibid.*, 84.

98. *Ibid.*, 107.

governors, although if precedents were followed, the compact would provide that such members would be designated in accordance with the laws of the states they represent, and the manner of their selection would be up to the several legislatures. Legislative confirmation might be required; the chief water official of the state or the head of the natural resources board might serve *ex officio*; conceivably provision could be made for the direct election of such a representative by the people. Secondly, this objection shows a distrust of the representative that seems hardly warranted. No reason is suggested as to why, in this field, local differences cannot be settled at the local level, or as to why the assumption is made that these representatives will not foster the interests of those they represent and will be uninformed, or why it should be assumed that the people will prefer the privilege of speaking (through district, association or organization *representatives*) at a public hearing in the hope of influencing a decision rather than the right to have their state representatives vote decisively on the issue.

Under their seventh heading, the Survey Commission group several "practical" objections: The difficulties and time consumed in reaching an agreement on the terms of the compact and in securing its ratification loomed large to them, negotiation would undoubtedly require years, ratification would take time if it could be accomplished at all. As if this were not enough, it is assumed that probably the resulting compact could not meet changing conditions and the whole dreary process would have to be repeated in renegotiations. Whether such fears are justified is of course a matter of opinion.

#### CONCLUSION

A strong argument can be made that in the light of the current political climate the compact approach not only has an excellent chance of speedy fruition, but that it is the only method that gives any promise of quick action. There can be little doubt that the failure of many of the other proposals to gain acceptance has been due to the resistance of the people of the basin and their congressional representatives. On the national level, President Eisenhower specifically endorsed this approach in his major campaign speech on resource development<sup>99</sup> and in his message to Congress on the state of the union.<sup>100</sup> The two Republican Congressional representatives on the Survey Commission voted for the compact approach. On the state level, the governors of the states in the basin have endorsed a preliminary draft of such a compact, and while the draft is entirely tentative, and the approval solely for as a basis of discussion, it does indicate the governors are sympathetic to such an approach or solution. At the grassroots, the Survey Commission was almost indefatigable in the holding of hearings up and down the basin, in every state, and from the record the conclusion seems inescapable that the people, and their

99. Seattle, Wash., Oct. 6, 1952, New York Times, Oct. 7, 1952, 22.

100. 99 Cong. Rec. 782, Feb. 2, 1953.

state organizations, will demand a real voice in the future development of their resources.<sup>101</sup>

The mechanics of the compact approach are simple. Congressional consent in advance to interstate compact negotiations is traditional. By it no irrevocable step is taken, since the draft produced in the negotiations is subject to final ratification. All that is needed to give the impetus that might produce truly comprehensive, optimum development of water and land resources through the joint efforts of the federal government and the states is the enactment of the following bill:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that:*

*"The consent of Congress is hereby given to the States of Colorado, Kansas, Iowa, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, and Wyoming, or any five or more of them, to negotiate and enter into a compact with each other and with the United States of America, providing for means for the attainment of the conservation and development of the land and water resources of the Missouri Basin, through a basin-wide, comprehensive program for the unified planning, development and operation of those resources, integrating the resource development programs and operations of agencies of the United States and of the States, and for securing effective coordination and cooperation between the States and between the United States and the States: *Provided*, that existing compacts between the States and decrees of the United States Supreme Court relating to any of the waters of the Missouri River or its tributaries shall be fully recognized: *Provided further*, that any compact negotiated pursuant to this act shall provide, that the use for navigation of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes.<sup>102</sup>*

*"Sec 2. The President is authorized to appoint a commissioner to represent the United States in such negotiations, who shall make report to the President and to Congress of the proceedings and of any compact entered into.*

*"Sec. 3. Any such compact shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been ratified by the Legislatures of each of the States whose assent is contemplated by the terms of the compact, and by Congress."*

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101. A cursory review of the extensive record shows that of the more than 300 witnesses who expressed an opinion on the need for greater coordination in resource development, about 200 were in favor of strong local representation on the coordinating body.
102. The second proviso states the substance of the O'Mahoney-Milliken amendment to the 1944 Flood Control Act, sec. 1(b), 58 Stat. 888, 33 U.S.C.A. 701-1. In the original bill for consent in advance legislation for a Columbia River interstate compact it was provided that the use for navigation and hydroelectric power should be subservient to consumptive uses, and that power generated should be allocated to meet the needs of each state. These were stricken at the suggestion of the Secretary of the Interior, Sen. Rep. 1841, 82nd Cong., as more properly the subject of negotiations. However, the O'Mahoney-Milliken principle is so firmly engrained in Missouri basin law, see 60 Stat. 641, 64 Stat. 163, that its mandatory inclusion in a compact seems justified.