GOVERNMENTAL TECHNIQUES FOR THE CONSERVATION AND UTILIZATION OF WATER RESOURCES: AN ANALYSIS AND PROPOSAL

"The physical problem of controlling the flow of a river involves the entire drainage basin. Our greatest and most unruly river drains thirty-one states and over forty per cent of the country." 1 Effective regulation and development of a basin area which does not lie within the confines of a single state presupposes the integration of appropriate governmental powers and the implementation of comprehensive regional water and land programs.2 Na-


2. For a lucid and detailed exposition of the necessity for regional planning and development as applied to the particular problems of New England, see The Directive Committee on Regional Planning (Yale University), The Case for Regional Planning with Special Reference to New England (1946). Myres S. McDougal and Maurice H. Rotival are co-chairmen of the Committee which includes Everett V. Meeks, Ashbel G. Gulliver, Roscoe Suttie, Charles Walker, and George Dudley. This study forms the back-
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national Departments, Independent Commissions, and a Regional Valley Authority have been utilized to execute a national water policy, but their operations have been impeded by jurisdictional strife and by the absence of adequate powers. Since paramount responsibility for major resource development rests with the federal government, the programs effectuated through interstate commissions and compacts are necessarily limited in scope. The Courts have endeavored to resolve individual interstate disputes but have been unable to supply the specialized, technical treatment and the continuous supervision demanded by drainage basin problems.

A rough functional outline and legal rationale is therefore offered in support of a new executive agency to be vested with complete federal and state authority bearing upon the conservation and utilization of water resources. The suggested program envisages the creation of a federal corporation, the formulation of a joint Federal-State regional policy, and the delegation to the corporation by interstate compact of important functions presently exercised by the state governments.

Judicial Settlement of Interstate Disputes

The Supreme Court has become a frequent arbiter of interstate water disputes by virtue of a constitutional grant of original jurisdiction and an assertion that interstate water apportionment presents a federal question.\(^3\)

In the face of two sharply divergent systems of sectional water law,\(^4\) the Court, notwithstanding *Erie Railroad v. Tompkins*, has moved hesitantly towards the enunciation of a single common law of interstate waters,\(^5\) and has decreed physical allocations among contestants in conformity with this formula.\(^6\)


5. On the very day that the decision in *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938) was announced, Justice Brandeis declared: “Whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.” Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). See also *Kansas v. Colorado*, 206 U.S. 46, 98 (1907).

6. In early cases, the Supreme Court refused to concede absolute appropriation rights...
However, the substantive doctrines formulated by the Court have not proved adequate even for the limited purposes of defining individual rights or forestalling subsequent litigation. Thus, a controversy over diversions from Lake Michigan necessitated six suits involving the same parties, and a dispute between Wyoming and Colorado evoked five Supreme Court opinions. The reluctance of the Court to grant injunctive relief may result in the completion of the allegedly harmful appropriation long before judgment has been rendered. Moreover, the reconciliation of conflicting water uses with the demands of a comprehensive national policy is a complex administrative function defying efficient exercise by an agency which lacks technical engineering skills. The Court has recognized the need for specialized treatment of water problems by the appointment of qualified masters to conduct preliminary investigations, but it has reserved the right to reject or modify the master's report and to substitute its own theories of allocation. It has attempted to furnish continuity of administration by providing for subsequent modification of its original decree, but it thereby invites further time-consuming and expensive litigation. The Court appears to be aware of its
to upper basin states or total natural flow rights to lower basin jurisdictions. Wyoming v. Colorado, 259 U. S. 419 (1922); Kansas v. Colorado, 206 U. S. 46 (1907). In suits between two riparian states, the Court ordered an "equitable apportionment" rather than a division in conformity with the common law doctrine; and this same principle was applied to disputes in which the states had conflicting systems of water law. Connecticut v. Massachusetts, 282 U. S. 660 (1931); New Jersey v. New York, 283 U. S. 336, 342 (1931); Kansas v. Colorado, 206 U. S. 46 (1907). Where both states had adopted the prior appropriation system, the Court originally attempted to allocate water on the basis of strict priority but it now in effect applies the "equitable apportionment" formula to this situation. Compare Wyoming v. Colorado, 259 U. S. 419 (1922), with Nebraska v. Wyoming, 325 U. S. 589, 618 (1945).

7. Wisconsin v. Illinois, 278 U. S. 367 (1929); 281 U. S. 179 (1930); 289 U. S. 395 (1933); 309 U. S. 569 (1940); 311 U. S. 107 (1940); 313 U. S. 547 (1940). Wyoming v. Colorado, 259 U. S. 419 (1922); 260 U. S. 1 (1922); 286 U. S. 494 (1932); 298 U. S. 573 (1936); 309 U. S. 572 (1940); see Donovan, State Compacts as a Method of Settling Problems Common to Several States (1931) 80 U. of Pa. L. Rev. 5, 8; Interstate Comm. on the Delaware River Basin Annual Report (1945) 21.

8. The threatened invasion of rights must be of serious magnitude and clearly proved before the Court will act, and the burden of proof on a plaintiff state is much heavier than that placed upon a private litigant. North Dakota v. Minnesota, 263 U. S. 365, 374 (1923); New York v. New Jersey, 256 U. S. 296, 309 (1921); Missouri v. Illinois, 200 U. S. 496, 521 (1906). In fact, up to 1944, the Court had granted injunctive relief in only three interstate water disputes. See Note (1944) 44 Col. L. Rev. 437, 439 n. 12, 441; Nat. Resources Bd. Rep. (1934) 379.


11. Nebraska v. Wyoming, 325 U. S. 589, 655 (1945). In his dissenting opinion Justice Roberts protested that, by the decision, "three states, with respect to their quasi-sovereign rights, will be in tutelage to this court henceforth." Id. at 663.

12. See Carpenter, Interstate River Compacts and Their Place in Water Utilization (1928)
limitations and has on several occasions suggested the application of more sophisticated administrative devices to the solution of interstate water disputes.\(^{13}\)

State and lower federal courts have dealt with water problems emerging from interstate diversions by individual litigants. Contradictory results have been reached with respect to the conveyance of appropriated water across state lines\(^{14}\) and also as to the source of water rights in non-navigable interstate streams.\(^{15}\) When the appropriation occurs in one state and the use in a second, some courts have refused to render a judgment which involves the determination of water rights having a foreign situs; others have surmounted the jurisdictional problem.\(^{16}\)

**Federal Administrative Techniques for the Control of Drainage Basins**

The long history of the establishment of federal responsibility for water resource development has been detailed elsewhere.\(^{17}\) National programs for navigation improvement, flood control, irrigation and reclamation encouragement, and power production have been rested by the courts upon the Commerce Clause, the War Power, the Treaty Power, and the general power over national lands and property.\(^{18}\) Judicial opinions have radically extended the traditional definition of navigability, enlarged federal jurisdiction to include both the tributaries and the non-navigable portions of navigable streams, established the national government's right to sell electricity generated at its projects, and authorized the United States to construct trans-

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20 J. Am. Water Works Ass'n 756, 764-5; Ireland, Recent Developments in the Use of Interstate Water Compacts (1944) 21 DICTA 77, 78-9.


17. See Fly, loc. cit. supra note 1; Ransmeier, The Tennessee Valley Authority (1942) 3-28.

18. U.S. CONST. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2; Art. IV, § 3, cl. 2. For a general discussion of the constitutional basis of federal powers over water resources, see Carman, The Riddle of Governmental Power in the Use of Public Waters (1931) 6 Olson, op. cit. supra note 15, at 139-52. The elements of a sound national water program are set forth in Nat. Resources Committee Rep., Drainage Basin Problems and Programs (1937 Rev.) 7.
mission lines to reach favorably situated markets.\textsuperscript{10} In the \textit{Appalachian Power} case, moreover, the Supreme Court rejected the necessity for relating all federal programs to navigation, perhaps implying the ultimate abandonment of the navigability test;\textsuperscript{20} but subsequent lower court decisions have not yet attempted to extend national authority to all interstate streams regardless of navigability.\textsuperscript{21}

\textit{Departments, Bureaus, and Independent Commissions.} The administration of the national policy has been generally entrusted to the old-line departments and bureaus which had historically vested interests in particular phases of the problem. Thus, a survey in 1938 indicated that six federal departments—Agriculture, Commerce, Interior, State, War and Treasury—and twenty-three subdivisions were embroiled in water control activities.\textsuperscript{22} In addition, nine independent agencies, four of which are presently defunct, were vested with important related functions: the Emergency Conservation Work, National Resources Committee, Public Works Administration, Work Progress Administration, Farm Credit Administration, Federal Power Commission Panama Canal Office, Reconstruction Finance Corporation, and the Tennessee Valley Authority.\textsuperscript{23} As late as 1945, seven separate bureaus in

\begin{itemize}
  \item \textit{Dep't of Agriculture:} Bureau of Agricultural Engineering, Bureau of Biological Survey, Bureau of Entomology and Plant Quarantine, Bureau of Plant Industry, Forest Service, Soil Conservation Service, and Weather Bureau. \\
  \item \textit{Dep't of Commerce:} Bureau of the Census, Bureau of Fisheries, National Hydraulic Laboratory, United States Coast and Geodetic Survey. \\
  \item \textit{Dep't of the Interior:} Bureau of Mines, Bureau of Reclamation, Grazing Division, General Land Office, National Park Service, Office of Indian Affairs, United States Geological Survey—Water Resources Branch, United States Geological Survey—Conservation Branch. \\
  \item \textit{Dep't of State:} International Boundary Commission—United States and Mexico, International Joint Commission—United States and Canada. \\
  \item \textit{War Dep't:} Corps of Engineers. \\
  \item \textit{Treasury Dep't:} Public Health Service. See NAT. RESOURCES COMMITTEE REP. \textit{WATER PLANNING} (1938) 8-9 and \textit{FEDERAL AGENCIES CONCERNED WITH WATER USE AND CONTROL} (1936). The 1938 survey did not include the U. S. Coast Guard which enforces federal law upon the navigable waters.
\end{itemize}

\begin{itemize}
  \item \textit{Ibid.} The 1938 survey omitted reference to the work of the Rural Electrification Administration which is briefly described in the 1936 compilation.
\end{itemize}
the Department of the Interior were simultaneously administering water programs in the Missouri Valley.\textsuperscript{24}

Three major Departments are charged with the construction and operation of extensive systems of dams, reservoirs, canals and drains. Since 1902, the Bureau of Reclamation of the Department of the Interior has been assigned the functions of irrigation and reclamation, but its programs have incidentally involved navigation, flood control, power production, recreational area development, municipal water supply studies, and fish and wildlife propagation.\textsuperscript{25} The Army Corps of Engineers is the chief federal agency for the construction of flood control and navigation improvement projects,\textsuperscript{26} while the Soil Conservation Bureau of the Department of Agriculture administers national plans for erosion and drought alleviation.\textsuperscript{27} Equally important is the Federal Power Commission which is vested with licensing authority over dams constructed on all navigable waters and on non-navigable streams subject to national control; the Commission also has the power to regulate the interstate transmission and sale at wholesale of electrical energy.\textsuperscript{28}

The most obvious characteristic of the existing organizational pattern is the absence of nation-wide machinery for coordinated planning and for the reconciliation of conflicting water uses as translated into departmental projects.\textsuperscript{29} It was not until 1945, for example, that an effort was made to corre-

\textsuperscript{24} The activities of each agency in the Valley are described in detail in \textit{Hearings Before Committee on Commerce on S. 555, 79th Cong., 1st Sess.} (1945) 175-229; \textit{Hearings Before Committee on Irrigation and Reclamation on S. 555, 79th Cong., 1st Sess.} (1945) 362-70.

\textsuperscript{25} The statutory basis of reclamation activities is set forth in \textit{DEP'T OF INT'mIOr, RECLAMATION HANDBOOK} (1942) 19-28. For a description of the achievements of the Bureau, see also \textit{NAT. RESOURCES COMMITTEE REP., DRAINAGE BASIN PROBLEMS AND PROGRAMS} (1937 Rev.) 83; \textit{INSTITUTE FOR GOVERNMENT RESEARCH, THE UNITED STATES RECLAMATION SERVICE, Service Monographs of the United States Government No. 2} (1919); \textit{DEP'T OF THE INTERIOR, THE BUREAU OF RECLAMATION; ITS FUNCTIONS AND ACCOMPLISHMENTS} (1927); \textit{DEP'T OF THE INTERIOR (Bureau of Reclamation), THE PLACE OF HYDRO-ELECTRIC POWER IN RECLAMATION} (1940).


\textsuperscript{27} "The land phase of the water problem involves the planned use and treatment of drainage areas to retard run-off, and thereby to reduce soil erosion and sedimentation, to lessen flood damages and to alleviate the effects of drought by subsoil storage." \textit{NAT. RESOURCES COMMITTEE REP., supra note 25, at 106. See also Bennett, \textit{Soil Conservation Among the 48 States} (1945) 18 ST. GOVT. 173; DEP'T OF AGRICULTURE, A \textit{STANDARD STATE SOIL CONSERVATION DISTRICTS LAW} (1936) and \textit{STATE LEGISLATION FOR BETTER LAND USE} (1941) 35-7.

\textsuperscript{28} The functions of the Commission are treated comprehensively in \textit{BAUM, op. cit. supra note 20; CUSMAN, THE INDEPENDENT REGULATORY COMMISSIONS} (1941) 275-97; \textit{FOSTER, THE FEDERAL POWER COMMISSION AND STATE JURISDICTION} (1940).

\textsuperscript{29} See the discussion between Senator Murray and the head of the Soil Conservation Bureau in \textit{Hearings before Committee on Irrigation and Reclamation on S. 555, 79th Cong., 1st Sess.} (1945) 145:
late federal activities in the Missouri Valley region. The logical consequence has been a haphazard development of resources accompanied by bitter jurisdictional conflicts. Moreover, Congressional statutes defining the functions of the various national agencies have attempted to compartmentalize responsibility for particular water uses despite the fact that the development of the multi-purpose project has rendered any rigid segregation impossible.

Thus, legal restrictions on the Bureau of Reclamation confine its activities to a territorially delineated area in seventeen western states and to projects deemed "economically feasible." The Bureau is impotent to prevent the

Senator Murray: "I would like to ask you . . . if the Soil Conservation Service is in full agreement with the Bureau of Reclamation and Grazing Division on conservation?"

Mr. Bennett: "I do not think I can answer that question just at the moment. We have had so much work to do on this job . . . that maybe we have been a little negligent about going around seeing what other boys are doing."

See also Nat. Resources Committee Rep., Regional Planning (1936) Part I, 178; Mead, Federal Reclamation: What It Should Include (1926) 3; Ransmeier, op. cit. supra note 17, at 425; Cooke, Rivers and Prosperity (1944) 111 New Republic 825, 826; Pritchett, Coordinated Control of Water Resources (1945) 18 St. Govt. 27-8.

30. See Hearings Before Committee on Irrigation and Reclamation on S. 555, 79th Cong., 1st Sess. (1945) 383. The results of the uncoordinated federal programs on the Missouri River were bitterly described by a proponent of the Missouri Valley Authority in Hearings Before Committee on Commerce on S. 555, 79th Cong., 1st Sess. (1945) 293:

"According to the hostile press we had the advantage of 'seasoned' agencies with long experience, while down in the Tennessee Valley the people were at the mercy of undisciplined faddists. Well, a lot of us would like to trade. Our hard-headed men with their tested agencies are still with us. So are our floods. So is our balky river. So is our problem of soil erosion. So are our millions of semiarid acres which could be irrigated."

31. (a) Between the Departments of War, Interior, and Agriculture prior to the Federal Power Commission, see Cushman, op. cit. supra note 28, at 275-6. (b) Between the Federal Power Commission, the Corps of Engineers, and the States, see Baum, op. cit. supra note 20, at 127; Federal Power Commission Report (1939) 18. (c) Between the Departments of Agriculture and Interior, see note 29 supra. (d) Between subdivisions of the Department of the Interior, see statement of Secretary Ickes:

"The various agencies in the Department . . . cannot always resolve among themselves . . . the conflicts that inevitably arise between their several programs of resource conservation and development. It is no rare occurrence, but practically a daily event, for such problems to be laid before me."

Hearings before the Committee on Commerce on S. 555, 79th Cong., 1st Sess. (1945) 120. (c) Between the Bureau of Reclamation and the Corps of Engineers, id. at 3, 9, 252, 271, 295-7; 91 Cong. Rec. 1155 (1945); Howard, Golden River (1945) 190 Harpers 511; Hearings before Committee on Irrigation and Reclamation on S. 555, 79th Cong., 1st Sess. (1945) 52-3, 185, 227-9.

32. The technical advantages of the multi-purpose project are detailed in Ransmeier, op. cit. supra note 17, at 102-29; Dep't of the Interior, Reclamation Handbook (1942) 1-3; Lilienthal, TVA—Democracy on the March (1944) 48-50; Lilienthal, A New Way—An Old Task (1945) 18 St. Govt. 23-4.

33. See Nat. Resources Committee Rep., Drainage Basin Problems and Programs (1937 Rev.) 83; Dep't of the Interior, op. cit. supra note 32, at 12, 35-6, 40; Mead,
destructive silting of its reservoirs and to increase the flow of water to its works because the necessary powers are lodged in other agencies. The Corps of Engineers may not investigate projects without Congressional authorization or undertake construction until appropriations have been voted; and, as the Missouri River controversy indicates, the success of its down-stream flood control program may be directly contingent upon up-stream diversions under the control of a separate federal department. The ambitious plans of the Soil Conservation Bureau cannot be effectuated without powers of land planning, zoning, and eminent domain presently vested in the individual states. Although the Federal Power Commission is charged with the administration of the national power policy, it may only recommend that power facilities be added to War Department dams; and both the Bureau of Reclamation, the world's largest operator of power installations, and the Tennessee Valley Authority are exempt from its regu-

The Place of Federal Reclamation in a Federal Land Policy (1931) 4. Moreover, all reclamation projects must be transferred to private water user associations as soon as practicable. See Dep't of the Interior, The Bureau of Reclamation; Its Functions and Accomplishments (1927) 21. And Congressional appropriations must precede whole or part construction of all projects. Dep't of the Interior, op. cit. supra note 32, at 37.

34. Neither the Bureau of Reclamation nor the Corps of Engineers has the authority to hold the rain where it falls, to minimize run-off waters, and to halt overstocking of the ranges. It is estimated that 16 per cent of the capacity of the Guernsey Reservoir has consequently become filled with silt. See statements of Mr. Bashore and Mr. Coyle in Hearings Before Committee on Commerce on S. 555, 79th Cong., 1st Sess. (1945) 159, and Hearings Before Committee on Irrigation and Reclamation on S. 555, 79th Cong., 1st Sess. (1945) 256.


36. The Corps of Engineers, supported by the lower basin states, offered a plan for flood control in the Missouri Valley in 1943. Almost simultaneously, the Bureau of Reclamation, with the backing of the upper basin states, presented a totally different scheme directed at irrigation and reclamation improvement. The Corps of Engineers planned to use Ft. Peck, Garrison Dam, and two large reservoirs for flood control; the Bureau of Reclamation insisted upon the use of the same waters for irrigation, and upon the construction of 27 small installations in the place of the two Army reservoirs. Both bureaus openly condemned each other's projects as expensive and totally unnecessary but a hasty compromise was arranged shortly after the introduction into Congress of Senator Murray's bill for a Missouri Valley Authority. For details of the "shameless, loveless, shot-gun wedding," see Howard, Golden River (May 1945) 190 Harpers 511.

37. The federal government may acquire property within a state without local consent only in the exercise of a constitutional federal public purpose; to effectuate a "public purpose" of the state, local eminent domain powers must be utilized. See United States v. Eighty Acres of Land, 26 F. Supp. 315 (E. D. Ill. 1939); United States v. Dieckmann, 101 F. (2d) 421 (C. C. A. 7th, 1939). The broad state land regulatory powers are discussed in Dep't of Agriculture, State Legislation For Better Land Use (1941).

38. 49 Stat. 839 (1935), 16 U. S. C. § 797 (a) (1940). Since the statute does not require the War Department to follow this recommendation, the plans of the two agencies frequently diverge. See Baur, op. cit. supra note 20, at 129; Federal Power Commission Report (1939) 18.

The Commission has been designated the quasi-coordinator of the water development schemes of private industry; but its authority extends only to the licensing of particular dams, and under existing decisions it is unable to protect its own licensees from damage suits in the state courts stemming from the very water diversions which it has authorized.

Regional Valley Authorities. To escape the administrative rigidity characteristic of the regular federal department, Congress may immunize individual bureaus from existing restrictions or create government corporations which enjoy characteristics both of independent private entities and of national instrumentalities. Thus, federal corporations have been held suable in tort and contract, liable to attachment and perhaps garnishment, free from supervision by the Comptroller-General and the Director of the Budget, exempt from federal purchasing, expenditure, and civil service requirements, and subject to certain minor burdens which non-corporate agencies evade; yet, simultaneously, corporations have been found im-

40. See Baum, op. cit. supra note 20, at 101, n. 74. A series of statutes has given the Commission authority to prescribe a uniform accounting system for the TVA, to examine proposed contracts covering loans from TVA to public bodies and non-profit organizations, and to consult with the Bonneville Project Administrator on the sale and disposition of electrical energy. See Lewis, The Role of the Federal Power Commission Regarding the Power Features of Federal Projects (1945) 14 Geo. Wash. L. Rev. 96 passim.

41. Section 10(a) of the Federal Power Act charges the Commission with ensuring that each licensed project will be "best adapted to a comprehensive plan for improving or developing a waterway . . . for the . . . benefit of interstate . . . commerce, . . . utilization of water-power development, and for other beneficial public uses . . . ." See Baum, op. cit. supra note 20, at 91. Under Section 9(b) the Commission must be satisfied that all applicants have complied with state law; but if state requirements conflict with the Federal Power Act, the Commission need not demand such compliance. See First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 66 Sup. Ct. 906, 914 (U.S. 1946).


44. "It is difficult to quarrel with the result reached in any of these decisions taken singly, but it has become equally difficult to predict when the interposition of the separate entity of the corporate agency will be ignored and when it will be given considerable weight or even taken as controlling." Glick, The Federal Subsistence Homesteads Program (1935) 44 Yale L. J. 1324, 1354. Since there is no general federal incorporation statute, each corporation must be formed by separate act, its legality depending upon the purposes for which it was created. See Culp, Creation of Government Corporations by the National Government (1935) 33 Mich. L. Rev. 473, 490–511; McGuire, Some Problems Arising from Government Corporations (1937) 85 U. of Pa. L. Rev. 778, 782–4.

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mune from state taxation and regulation, entitled to governmental priority and rates for telegraph service, and not subject to defenses based upon the statute of limitations. Likewise, frauds against a national corporation may be considered frauds against the government itself, and the United States regarded as the real party plaintiff in a suit by the corporation on a contract.

The success of the Tennessee Valley Authority is at least partially attributable to the freedom of operation and management and the administrative flexibility characteristic of the corporate form. It has benefited substantially from the financial freedom achieved by the power to issue obligations and to utilize its revenues for current activities. Moreover, the


49. The TVA does not wholly conform to the typical pattern of corporate financial characteristics since it is largely dependent upon periodic Congressional appropriations. See Regional Factors, op. cit. supra note 2, at 114; Pritchett, op. cit. supra note 45, at 266. The early practice was for the United States to assume no responsibility for corporate obliga-
The semi-autonomous nature of the Authority has facilitated experimentation with a regional approach impossible with federal agencies which must refer all important decisions to a department head in Washington. The principal contribution of the Valley Authority principle, however, lies in its repudiation of the attempt to divide natural resources so as to conform to the organization chart of the national government. In consequence, it envisages an integration into a single administrative agency of all federal authority and responsibility for regional planning and development. The chief legal deficiency of Valley Authority legislation is perhaps the failure to authorize an analogous fusion of federal and state powers, the absence of which renders the success of federal programs contingent upon continuous, voluntary, local cooperation.

The states have at their disposal positive means of hindering the operation of any federal valley authority. They might require the corporation to secure certificates of convenience or necessity, refuse to approve particular purchases, leases or extensions, prescribe electrical rates and terms of service, or levy inspection, license or other taxes; efforts to regulate corporate accounting practices, examine records, or inquire into management might also be made. In addition, full local participation which is essential to the national program might be impeded by the failure to enact special enabling and permissive legislation. Thus the states, in order to ensure cooperation with other federal corporations, have in the past authorized their executive agencies or political subdivisions to invest in corporate bonds, borrow money unhampered by constitutional debt limitations, construct and operate electrical plants and transmission lines, contract freely for corporate electricity.

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50. "The Tennessee Valley's resources were not ... dissected into separate bits that would fit into the jurisdictional pigeonholes into which the instrumentalities of government had by custom become divided." Lilienthal, *A New Way—An Old Task* (1945) 18 St. Govt. 23. See also REGIONAL FACTORS, *op. cit.* supra note 2, at 83; Cooke, Rivers and Prosperity (1944) 111 New Republic 825.

51. The Tennessee Valley Authority has cooperated with and utilized the services of the old line federal departments on different occasions but has always retained responsibility for valley programs. See *op. cit.* supra note 48, at 113–28. In the past ten years the record of collaboration has been so successful that not a single conflict has arisen between the Authority and a federal department necessitating a conference with the President. *Lilienthal, TVA—Democracy on the March* (1944) 165.

52. See Comment (1934) 44 Yale L. J. 326, 331. Local public service agencies originally attempted to assert jurisdiction over the Tennessee Valley Authority but subsequent legislation and decisions exempted the Corporation from this regulation. See Tennessee Valley Authority v. Kinzer, 142 F. (2d) 833 (C. C. A. 6th, 1944); Posey v. Tennessee Valley Authority, 93 F. (2d) 726, 727 (C. C. A. 5th, 1937). The Authority, by Congressional mandate, now pays large sums to state and local agencies in lieu of taxes. This procedure has been termed "... almost as bad as charging Santa Claus for the privilege of coming down the chimney." Edelmann, *Public Ownership and Tax Replacement by the TVA* (1941) 35 Am. Pol. Sci. Rev. 727, 733.
facilitate the erection of local sewage disposal plants, form soil conservation districts, accept lump sum payments in lieu of taxes, and actively encourage extensions of rural electrification.53

The success of a valley authority may also depend upon the voluntary exercise of important powers bearing upon water resource development currently vested in the states.54 Local governments may, for example, assist the national flood-control program by exercising powers of rural zoning to prevent construction and residence in flood-hazard areas, or perhaps to restrict such lands to forestry, grazing, and recreation. State legislatures alone can modify the existing doctrines of water rights which frequently assign to specified lands water which could be put to better use on soil of higher productivity. State enactment of strict farm-tenancy laws would directly aid a national erosion policy inasmuch as better soil conservation practices tend to appear on lands subject to continuous owner operation. The power of the states to purchase and condemn property may be employed to rotate soil-depleting crops or to supplement rural zoning by the removal of non-conforming uses. In addition, local executive agencies may be delegated authority to plan and develop intra-state streams, select appropriate project sites thereon, retard run-off waters, regulate range practices, encourage reforestation, and abate pollution.55

The experience of the Tennessee Valley Authority has demonstrated that administrative cooperation with the individual states is essential to an effective regional plan.56 In its water control program, for example, the

54. See DEPT OF AGRICULTURE, STATE LEGISLATION FOR BETTER LAND USE (1941) especially 8, 30-2, 46, 88, 114.
55. Tarpey v. McClure, 190 Cal. 593, 213 Pac. 983 (1923) (determining the feasibility of projects); Commonwealth v. Hyde, 230 Mass. 6, 118 N. E. 643 (1918) (issuing pollution abatement regulations); State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P. (2d) 637 (1935) (construction of irrigation and flood control project); Conway v. New Hampshire Water Resources Board, 89 N. H. 346, 199 Atl. 83 (1938); Clarke v. South Carolina Public Service Authority, 177 S. C. 427, 181 S. E. 481 (1938) (construction of power and navigation projects). In one case, however, Blackstone, Montesquieu and Story were invoked as authority for denying to a commission the right to exercise discretion in the choice of project sites. Hodges v. Public Service Commission, 110 W. Va. 649, 159 S. E. 834 (1931).
56. It has been estimated that the Authority cooperates with 160 national, state, and local governmental agencies plus 79 voluntary lay organizations. See HODGE, op. cit. supra note 48, at 114-5, 119-22, 126, 130-3, 150-5, 160-1, 184-98; REGIONAL FACTORS, op. cit. supra note 2, at 99-102; LILIENTHAL, TVA—DEMOCRACY ON THE MARCH (1944) 81-2, 127, 132, 135; Satterfield, TVA—State-Local Relationships (1946) 40 AM. POL. SCI. REV. 935 passim.
Authority relies on state highway departments for construction data and advice, on state relief offices for labor, on local agencies for geological information and assistance, and on the state universities for engineering facilities and personnel. Seven land-grant colleges furnish reports on soil and fertilizer requirements, perform research for new plant foods, and make available their laboratories and experimental farms to demonstrate crop rotation, farm practices, and fertilizer use. State farm organizations have made experimental plantings of vegetables and fiber flax and have assisted the Authority in the discovery and production of a new phosphate chemical for soil revitalization. Local forestry bureaus have been instrumental in fire prevention, wildlife conservation, and migratory bird control.

The large concentrations of population in dam areas have produced certain health problems, such as the control of malaria, which the Authority has solved through state public health agencies. Official intra-state planning bodies have made studies of land use, public works, and resources, which are of great value to the Authority. Moreover, the entire electrical program would be adversely affected if municipalities were unable to purchase Authority electricity or if the wholesale power contracts were invalidated by the state courts; in one instance, the Authority saved $15,000 as a result of a single town ordinance permitting it to locate transmission lines along particular streets.

The techniques employed for this Federal-State cooperation have included the exchange of data and personnel, informal understandings, direct joint committees, financial assistance, and written contracts. Formal agreements are the basis of the electrical distribution system and bind the municipalities or cooperatives to adopt rate schedules, administer their electrical systems and accounts, and apply their revenues in conformity with federal specifications. Written agreements have been utilized in other Authority programs, including Agriculture, Fertilizer, Health, Education, and Stream Pollution.

The achievements in the Tennessee Valley have served to encourage proponents of federal regulation of water resources and, in consequence, ten new proposals for regional valley authorities are now before Congress. The most prominent example of this legislation is the Murray bill for the Missouri Valley which is modeled directly after the Tennessee Valley Authority with certain modifications to meet the requirements of the semi-arid western region. However, other measures which have been introduced subject the proposed government corporation to the direct control of the Department of the Interior or other bureau head, thus destroying the autonomous nature of the Authority.

57. For a discussion of the various proposals see Clark, Proposed "Valley Authority" Legislation (1946) 40 Am. Pol. Sci. Rev. 62; Erickson, A Missouri Valley Authority—Its Effect Upon Water Appropriation, Use, State Control and Vested Rights (1945) 18 Rocky Mt. L. Rev. 1; Slaughter, Valley Authority Bills (1945) 6 Fed. B. J. 316.

58. The Department of the Interior proposal was outlined by Secretary Ickes in Hearings Before Committee On Commerce on S. 555, 79th Cong., 1st Sess. (1945) 126-32. It re-
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All “encroachments” by the federal government through valley authorities have been resisted by those who profess to view the Authority device as a “super-state” and who visualize solution of water problems through state or interstate action; and indeed, in recent years, there has been a growing recognition by the states of their responsibilities in the field of resources development. Thus, the state governments have frequently created intra-state planning agencies with a specific mandate to cooperate with similar bodies in neighboring states. For more serious and complicated regional problems, interstate commissions and compacts have thus far been utilized.

Interstate Planning Commissions. In 1936 the Interstate Commission of the Delaware River was constituted by New York, New Jersey, Pennsylvania, and Delaware to serve as a fact-finding body, a planning organ, and a correlator of all programs relating to the Delaware Basin. INCODEL resembles the informal regional planning commissions of New England and the Pacific Northwest in its lack of coercive authority, but deviates from this pattern in the absence of direct federal representation on the Commission and its semi-official statutory position. Through its powers of persuasion received a cool reception from the supporters of the autonomous Valley authority principle, one of whom commented: “We don’t mean to imply . . . that Mr. Ickes’ ambitions have no bounds . . . He has as yet shown no desire to take over the Army, the Navy, or the State Department.”

59. New Mexico and Colorado each set up an executive agency headed by the state engineer to administer the La Plata Compact. See Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92, 97 (1938). And New York and New Jersey originally did likewise to preserve the Palisades Interstate Park. See COMMISSION OF THE PALISADES PARK—NEW YORK (Annual Report 1926) 4.


61. Robinson, Voluntary Regionalism in the Control of Water Resources (1940) 207 AN- NALS 116, 118; INTERSTATE COMMISSION ON THE DELAWARE RIVER BASIN ANNUAL REPORT (1945) 8; Turner, The Place of the States in the Field of Watershed Development (1945) 18 ST. GOVT. 19, 22; Allen, The Delaware River Basin (1944) 36 J. AM. WATER WORKS ASS’N 1, 3.

62. For a review of the organization and activities of the informal regional planning commissions, see NAT. RESOURCES COMMITTEE REP., Regional Planning Part I and Part III (1936); Hodge, op. cit. supra note 48, at 17–24. INCODEL derives its authority from the joint legislative commissions on interstate cooperation which were established by the basin states. Robinson, supra note 61, at 119.
sion, INCODEL induced the basin states to sign an agreement for the abatement of stream pollution and prepared the plans which were subsequently adopted by Pennsylvania for ridding the Schuylkill River of silt and culm from coal mine operations. A twenty-five year old water diversion dispute between New York, New Jersey and Pennsylvania was settled through the Commission after a Supreme Court decision had failed to satisfy the parties. With more than fifty per cent of the growth-producing cover of agricultural areas washed away, INCODEL is currently engaged in the formulation of a joint state program for forest development and soil conservation. Moreover, it has assisted the federal government in the preparation of flood control plans for the basin area. Yet the limited annual budget under which it functions, the failure to combine powers of planning with powers of development, the frequent resort to federal funds and agencies, and the ever-present possibility that it may be rendered totally impotent by the recalcitrance of a single state, suggest the chief deficiencies of INCODEL as a model device for future regional development without detracting from its indisputable value for the preparation of plans and the collation of basic data.

Interstate Compacts. A more formal and comprehensive coordination of

63. See Robinson, supra note 61, at 120; ANNUAL REPORT, op. cit. supra note 61, at 18-20. In other states, the exemption of important industries coupled with inadequate delegations of administrative discretion and power have rendered ineffective anti-pollution legislation. NAT'L RESOURCES COMMITTEE REP., Water Pollution in the United States (1939) 70-1.

64. “Although more than twenty-five years and a million dollars were spent in litigating the problem before the United States Supreme Court in 1930, the basic question of the respective rights and responsibilities of the States was not settled by this controversy. ANNUAL REPORT, op. cit. supra note 61, at 21.

65. The Commission prides itself on its small budget. “A thirty-five thousand dollar per year budget does not permit it to embark upon any all-inclusive, broad-range program of activities. That is a good thing. It effectively prevents any thought of spreading out too ambitiously.” Id. at 13-4.

66. Significantly, other informal regional planning commissions have recognized their deficiencies and have recommended supplemental legislation including public corporations and compacts. See PACIFIC NORTHWEST REGIONAL PLANNING COMMISSION REP. (1935) 28-30; ST. LOUIS REGIONAL PLANNING COMMISSION REP. (1936) 1, 62; NEW ENGLAND REGIONAL PLANNING COMMISSION REP. (1936) 61.

67. Although pollution control is generally regarded as a state problem, extensive operations in that field are beyond the capacity of the states. Thus, the Reconstruction Finance Corporation financed a $10,000,000 plant for industrial waste regulation, and the Corps of Engineers has assisted in the dredging operations on the Schuykill River. Rep. op. cit. supra note 61, at 19-20. For a brief summary of INCODEL’s relations with federal planning and investigatory agencies, see Stevenson, Quality and Quantity: Cooperative Engineering in the Delaware Basin (1937) 10 St. Govt. 115.

68. “If any state or any authorized representative of a state is not willing to bear a share of the Commission’s work or to agree in the programs which have been co-operatively formulated, the work of all is to that extent crippled.” Robinson, supra note 61, at 122. And INCODEL concedes that only a federal corporation can operate in regions where the states have serious social and political differences. See Turner, supra note 61, at 21.
local authority over interstate waters is illustrated by the use of the compact clause of the Federal Constitution, as exemplified by the Colorado River Compact, to reach basic agreement on water apportionment. This method facilitates the application of technical engineering skills to the complex problems, avoids continuous litigation, and provides an effective outlet for local responsibility and participation in regional programs.62 But the process of negotiation is tedious, and the normal method of amendment cumbersome and inflexible.70 Adjustments recorded by compact are too often the product of political compromise and bargaining power rather than efficient water planning. The process of formulating a compact assumes the sovereign equality of the negotiants, whereas effective water planning demands a distribution along lines of maximum utility regardless of state boundaries.71

Although the legal problems inherent in the compact method have not been fully explored, certain tentative hypotheses may be advanced. The power of the states to compact with one another and with the federal government is said to be qualified by the compact clause itself, 7 by other relevant provisions of the federal constitution, 7 and by individual state constitutional

69. The various advantages of the compact method have been dealt with at length. See for example Donovan, State Compacts as a Method of Settling Problems Common to Several States (1931) 80 U. of Pa. L. Rev. 5, 8–15; Dimock and Benson, Can Interstate Compacts Succeed (1937) 3–4; Corry, The Federal Dilemma (1941) 7 Can. J. Econ. and Pol. Sci. 215, 221–2; Communication to Yale Law Journal from the Attorney General of New Mexico, June 29, 1946. For a listing of the important interstate water compacts, see Ireland, supra note 12.

70. It has taken 14 years to negotiate a compact for the abatement of pollution in the Ohio Valley and final agreement has not yet been achieved. See Reid, Pollution Control—A Post-war Public Works Opportunity for the States (1945) 18 St. Govt. 30, 32.

71. “Sectional prejudice, political expediency, and other irrelevant, often selfish, considerations which have no relation whatever to the merits of the proposition, are apt to be controlling, and the considerations which may influence the legislature of one state may be totally different from those which influence . . . another state.” Minard, The Future of Water Allocation and Developments in Interstate Agreements (1937) 29 J. Am. Water Works Ass'n 942, 946. For discussion of the disadvantages inherent in the compact method, see Graves, Uniform State Action (1934) 24; Routt, Interstate Compacts and Administrative Cooperation (1940) 207 Annals 93, 95; Corwin, The Lessons of the Colorado River Compact (1927) 16 Nat. Mus. Rev. 459, 461; Clark, Interstate Compacts and Social Legislation II (1936) 31 Pol. Sci. Q. 36, 42–3.

72. See Notes (1935) 35 Col. L. Rev. 76, 77, (1938) 23 Iowa L. Rev. 618, 619–20; Olson, The Colorado River Compact (1926) 66; Rep. Commissioners on Compacts to National Conference on Uniform State Laws (1917) 1–2. But a strong argument is often made to the effect that all compacts need not be approved by Congress. See Virginia v. Tennessee, 148 U. S. 503, 520–1 (1893); Bruce, The Compacts and Agreements of States with One Another and With Foreign Powers (1918) 2 Minn. L. Rev. 500, 516; Ely, Oil Conservation Through Interstate Agreement (1933) 389–93.

73. The 14th Amendment, the Commerce Clause, the Supremacy Clause, the Treaty Power, and the Impairment of Contracts Prohibition are cited as restraints on state authority to compact. Donovan, The Constitutional Authority of Several States to Deal Jointly With Social and Labor Problems (1936) 20 Marq. L. Rev. 78, 79; Olson, op. cit. supra note 72, at 68; Burke, Interstate Compacts (1936) 29 Pa. B. A. Q. 25, 30; Note (1938) 23 Iowa L. Rev.
barriers. By seemingly incongruous reasoning, such agreements have been held “binding” upon the legislatures, administrative officials, courts, and citizens of the signatory states. A compact may be enforced against a defendant state solely by suit of another signatory to the agreement, but its validity may be challenged by individual citizens in both local and federal courts. The interpretation of a compact does not of itself present a federal question, and, where the states themselves are not parties to an action, federal jurisdiction must be predicated upon diversity of citizenship. In at least one case, specific performance was granted by the Supreme Court, and it is possible that the traditional remedies of injunction, mandamus, or money damages for breach may also lie. However, the execution of a judgment for money damages presents serious legal difficulties because the Supreme Court cannot compel state legislatures to levy taxes or make appropriations; nor may it seize property held for public purposes to satisfy a judgment. Not infrequently, recalcitrant states have openly defied the

618, 624, 628-9; La Plata River and Cherry Creek Ditch Co. v. Hinderlider, 101 Col. 73, 70 P. (2d) 849 (1937) rev’d 304 U. S. 92 (1938); Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421, 433 (U. S. 1855); Hancock v. Walsh, 11 Fed. Cas. No. 6012, at 407 (C. C. W. D. Tex. 1879).

74. See Note (1938) 23 IOWA L. REV. 618, 629.


77. People of New York v. Central Railroad of New Jersey, 12 Wall. 455 (U. S. 1870); Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92, 106 (1938); South Carolina v. Georgia, 93 U. S. 4 (1876); Clark, supra note 71, at 53, n. 152; Note (1935) 35 COL. L. REV. 76, 86.

78. See Kentucky v. Indiana, 281 U. S. 163 (1930); Note (1935) 35 COL. L. REV. 76, 86. In Kentucky v. Denison, 24 How. 66, 109-10 (U. S. 1860), the Supreme Court indicated that it was without authority to mandamus the Governor of the state, but its decision in Virginia v. West Virginia, 246 U. S. 565, 591 (1918) appears to represent a wholly different attitude. Curiously, the Court has not been equally reluctant to coerce action by municipalities through the writ of mandamus. Labette County Commissioners v. Moulton, 112 U. S. 217 (1884).

decisions of the Supreme Court.\textsuperscript{80} It thus appears that the enforcement of a compact against a signatory state rests ultimately upon public opinion and voluntary cooperation rather than upon hypothetical legal remedies.\textsuperscript{81}

**Interstate Public Authorities.** An escape from the necessity of submitting the interpretation of all compact provisions to the courts is afforded by superimposing a Public Authority upon the agreement and vesting it with sufficient powers to furnish continuous administrative supervision.\textsuperscript{82} The first agency of this nature was the Port of New York Authority, created in 1921 by New York and New Jersey to effectuate a comprehensive plan for the development of the port.\textsuperscript{83} By the compact the Authority was granted power to purchase, construct, lease, and operate terminal and transportation facilities within the port district with a view to simplifying freight movements. Although it may make recommendations to the state legislatures, it has no power to compel the carriers to unify their facilities. The George Washington Bridge, the Bayonne Bridge, the Lincoln Tunnel, and the Inland Railroad Terminal Number 1 in New York are examples of its successful operations in the construction field. The Authority appears regularly before the Interstate Commerce Commission in port differential cases, and before the Maritime Commission in matters relating to steamship schedules and rates; but with the exception of recommendations to the Corps of Engineers with respect to channels, anchorages and pier lines, it has never attempted to control the interstate waters of the Hudson River.\textsuperscript{84}

Although the Public Authority device has withstood severe constitutional attacks premised on local home rule provisions, state debt limitations, and the delegation of powers theory, serious difficulties remain in addition to the normal compact enforcement problems.\textsuperscript{85} The courts and commentators


\textsuperscript{81} See Warren, *The Supreme Court and Sovereign States* (1924) 87–9; Dincick and Benson, *op. cit. supra* note 69, at 17; Clark, *Interstate Compacts and Social Legislation II* (1936) 51 POL. SCI. Q. 36, 52.

\textsuperscript{82} "If interstate compacts are to promote state cooperation rather than merely to forestall disputes and litigation, the need for a continuing interstate authority must be emphasized." Clark, *supra* note 81, at 43; Olson, *op. cit. supra* note 72, at 199–210; Regional Factors, *op. cit. supra* note 2, at 200.

\textsuperscript{83} The organization and achievements of the Port of New York Authority are discussed in Bard, *The Port of New York Authority* (1942); Cohen, *The Port of New York Authority* (1940); *The Port of New York Authority, A Monograph* (1936); Nichol, *The Port of New York Authority* (1935).

\textsuperscript{84} Communication to *Yale Law Journal* from the General Counsel of the New York Port Authority, May 25, 1946.

have declared that an Authority is vested with the essential legal characteristics and administrative advantages of the government corporation, but in New York and New Jersey, the Port of New York Authority is not suable. According to the typical rationale, an Authority is a separate entity which does not pledge the credit of the government; but if it issues a mortgage which bears foreclosure rights, the Courts may regard the obligation as a debt of the state or municipality and, to avert foreclosure, may invalidate the mortgage. An important source of revenue may be obtained through issuance of income bonds, but the rights of these creditors in the absence of a statute have not been fully defined. The right to institute receivership proceedings has never been granted, but it has been intimated that the temporary intervention of trustees may be sustained, an accounting ordered, or an injunction issued to prevent misapplication of revenues. A legal obstacle to the program of any interstate Authority is presented by the paramount interest of the national government in navigation, which empowers it to forbid the construction of particular projects or to condemn those already constructed. Finally, special problems may be raised by peculiarities in individual enabling legislation; thus, decisions of the Port of

86. An Authority is regarded as a separate entity and therefore free from state personnel, compensation and financial regulations. See Bard, op. cit. supra note 83, at 269-72; Nichol, op. cit. supra note 83, at 60-1; Nehemkis, The Public Authority: Some Legal and Practical Aspects (1937) 47 Yale L. J. 14, 15-6; XI N. Y. State Constitutional Convention Committee (1938) 238-41. Thus, the income, bonds and property of the Port of New York Authority have been exempted from the federal and state income tax and from local property, sales, utility, gas, and recording taxes. See Bush Terminal Co. v. City of New York, 282 N. Y. 306, 26 N. E. (2d) 269 (1940); Bard, op. cit. supra note 83, at 275, 279; Nehemkis, supra at 27; Cohen, op. cit. supra note 83, at 26.


New York Authority are subject to veto by the governor of each state, and all new major projects must be specifically authorized by both legislatures.91

THE FUSION OF FEDERAL AND STATE POWERS

The administrative organs thus far described have not proved completely satisfactory for the execution of unified regional water programs. Their principal defect is a failure to coordinate national and local planning and to combine into a single agency all available federal and state powers of development. The following discussion suggests one possible method for achieving a desirable fusion of federal and state authority in a manner immune from legal attack. It proposes the creation of a national corporation by Congressional statute and the negotiation of an interstate compact which embodies a delegation to this Corporation of important state powers over water resources.92

In order to eliminate the jurisdictional conflicts between national bureaus competing for water, all federal powers for regional development should be centralized in a single agency; the flexibility of the corporate form suggests its utility for the purpose of regional administration. This Corporation should be modeled in functions and organization along the lines of the Tennessee Valley Authority, but would be established by a more specific Congressional mandate. Enabling legislation should detail the area of operations, provide for federal incorporation, and immunize the agency from state regulation and taxation.93 A statutory provision might be added to encourage the utilization, where practicable, of the personnel of the experienced old-line departments and bureaus without impairing the primary responsibility of the Corporation for the regional program. Congress should also create a Consultative State Advisory Committee to provide a continuous policy liaison between the drainage basin states and the Corporation; this technique appears preferable to placing state representatives on the Corporation itself thus opening the door to possible rivalries for internal control.94

91. The veto power has been used on only one occasion and has, by interpretation, been severely restricted. See Bard, op. cit. supra note 83, at 270–1; Cohen, op. cit. supra note 83, at 14, n. 34.

Insufficient grants of power to the Authority impede its construction program and its efforts to unify transportation facilities. See Dimock and Benson, op. cit. supra note 69, at 10; Regional Factors, op. cit. supra note 2, at 41.


94. For discussions of the role of lay agencies in regional planning, see Hodge, The Tennessee Valley Authority (1936) 162–83; Ransmeier, op. cit. supra note 92, at 440;
The Congressional mandate would do well to exempt the valley authority from the restrictive Government Corporation Control Act of 1945 which may eliminate the very features which have made federal corporations useful administrative devices. This legislation, suggested by Senator Byrd of Virginia, subjects corporations to the supervision of the Budget Bureau (by requiring the annual submission of a "business-type budget") and to the General Accounting Office (by authorizing an audit by the Comptroller General of all corporate accounts). The financial freedom of these agencies has been further curtailed by granting the Secretary of the Treasury power to approve the time, terms, and conditions under which bonds are to be sold to the public, and to regulate the sale or purchase by the corporations of United States government securities.

Attention should simultaneously be directed towards the preparation, as a cooperative federal-state venture, of a comprehensive scheme for regional development, the principal features of the plan to be incorporated into an interstate compact to which the federal government and the states shall be parties. The substantive provisions of this agreement should contain a delegation by the states to the Federal Corporation of the principal state powers affecting water resource control previously discussed.

To sustain the legality of the proposal against attacks based upon the prohibition against delegations of power, the compact should embody a mandatory instruction that the delegated authority is to be exercised by the Corporation in strict conformity with the general plan of development and the additional "primary standards" established by the signatory states. As a minimum, the standards thus enumerated in the compact should detail the legal system of water rights to prevail in the region, the relative priority of major water uses, the rights to return and waste waters, a policy towards appropriations for diversion to foreign watersheds, uniform formulas beyond which pollution may not continue, and particular techniques to be employed when physical relocation of families and towns is rendered essential. In addi-

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NATIONAL RESOURCES COMMITTEE REP., Regional Planning Part I (1936) 189. Eight bills now before Congress provide for some form of lay committee to collaborate with the federal valley authority. Clark, Proposed "Valley Authority" Legislation (1946) 40 Am. Pol. Sci. Rev. 62, 64-5.


96. The Drainage Basin survey of 1937 was the product of a similar joint federal-state cooperative venture. See Warne, The Drainage Basin Studies: Cooperative Federalism In Practice (1938) 23 Iowa L. Rev. 565.
tion, the compact should bind the Corporation to avoid interference, as far as practicable, with existing water rights and to indemnify individuals in the event that temporary interruptions of vested uses are unavoidable. This is not a legal problem since the Supreme Court has indicated that water apportionments by compact supersede all pre-existing individual rights; however, a provision of this nature should make the proposal more acceptable to irrigation interests in the arid West.97

LEGAL IMPEDIMENTS TO THE FUSION OF STATE AND FEDERAL AUTHORITY

Although there is no precise precedent for a merger of federal and state legislative powers, there have been at least five important examples of joint governmental administrative cooperation.99 Shortly before the demise of the National Industrial Recovery Act, an interstate compact for the sale and distribution of convict-manufactured goods was executed, and the duty of its enforcement and interpretation delegated to a mixed federal-state commission.99 A second attempt to achieve unified administration was exemplified by the Interstate Commission proposed to administer the New England Minimum Wage Compact.100

A third type of cooperation is evidenced by the well-established governmental practice of employing officials of another jurisdiction to enforce domestic legislation. The states, for example, have deputized federal personnel as state fish and game wardens, designated Tennessee Valley Authority guards as county police officers, and, more recently, vested national Office of Price Administration employees with executive powers under the New York State Rent Control Act.101

97. Sections 10 and 11 of the proposed Missouri Valley Authority legislation expressly validate existing vested rights of appropriation and give strict priority to the use of water for domestic and irrigation purposes. The standards enumerated in the text supra at 296-7 go far beyond the safeguards for private rights written into the Murray Bill of which it has been said:

"A careful study of the Missouri Valley Authority Act in comparison with existing legislation indicates that so far as the legal status of water use in the semiarid section of the Missouri Basin is concerned, establishment of an Authority will have little effect." Erickson, supra note 57, at 12.

98. There have also been important examples of federal-state cooperation on the legislative level. By statute, Congress has come to the aid of state law enforcement agencies particularly where commerce in liquor, prison manufactured goods, or oil is concerned. The Connolly Act, for example, makes it unlawful for any producer to ship in interstate commerce any oil which is produced in excess of quotas set under state law. See Comment (1942) 51 YALE L. J. 608, 613. For a discussion of similar federal statutes in the field of liquor control, see Note (1946) 55 YALE L. J. 815.

99. See CLARK, THE RISE OF A NEW FEDERALISM (1938) 80, 125; Clark, Interstate Compacts and Social Legislation (1936) 51 POL. SCI. Q. 36, 50-1.

100. See THE NEW HAMPSHIRE COMMISSION ON INTERSTATE COMPACTS AFFECTING LABOR AND INDUSTRIES REP. (1935) 13; Clark, Interstate Compacts and Social Legislation (1936) 51-pol. Sci. Q. 36, 50.

101. See CLARK, THE RISE OF A NEW FEDERALISM (1938) 248-54; PM, July 3, 1946,
Another striking example of inter-governmental administrative cooperation is illustrated by the provisions of the New York Milk Control statute. This Act authorizes the State Commissioner of Agriculture and Markets to collaborate with representatives of the federal government in conducting joint investigations and hearings. It also permits the Commissioner to issue orders jointly with federal officials and to employ agents to carry out and enforce any such concurrent federal-state orders.\textsuperscript{102}

Still a different mode of cooperative administration is exemplified by the four Congressional statutes authorizing the creation of "joint boards" representing the states and vesting these boards with the full authority of the federal commission with which they are to work. Under the Motor Carriers Act,\textsuperscript{103} for example, joint boards hear applications for the issuance or revocation of certificates, permits, or licenses, requests for the authorization of consolidations and mergers, and complaints as to violations of the Interstate Commerce Commission's regulations and rates. The joint boards can administer oaths, require testimony of witnesses, take depositions, and issue directives which become the orders of the Commission if the latter does not specifically review them. The exercise of this authority enables the states to share directly in the policy formulations of federal agencies and in the interpretation of federal statutes. Neither the joint boards nor the above-mentioned forms of cooperative federalism have been successfully challenged in the courts; nonetheless, a threat to the suggested fusion of federal and state authority may be presented by additional projections of the prohibition against the delegation of powers into the area of inter-governmental relations.

\textit{Delegations of State Powers to State Executive Agencies.} The prohibition against the delegation of powers is a conceptual formula, thought to be implied from the very nature of a tri-partite system of government, and evolved to limit transfers of authority among branches of the federal government; but the Supreme Court and the state courts have applied the formula

\textsuperscript{102} See \textit{New York Agriculture and Markets Law} § 258-n. The same procedure has been utilized in the area around Fort Wayne, Indiana. See Cadwallader, \textit{Government and Its Relationship To Price Standards in the Milk Industry} (1938) 22 Minn. L. Rev. 789, 828; Comment (1937) 46 Yale L. J. 1359, 1358.

without substantial modification to measure delegations by state governmental agencies. Modern decisions which do not completely ignore the dogma are couched generally in terms of adequate compliance or non-compliance with legislatively established "primary standards." The courts profess to discover these administrative guides in the explicit wording of particular statutes, in general statutory language coupled with a survey of the surrounding circumstances, and, occasionally, in implications apparently derived from the nature of the delegated power.

Assuming that a satisfactory standard can be discerned, state and federal courts have been liberal in upholding the delegation in question. Although the state decisions are rarely explicit on the point it has become clear from the federal cases that there are many well defined escapes from the seemingly rigid formula. Thus, transfers of legislative authority may be sustained by the courts by a contention that in fact there was no real delegation, or that the administrative agent merely had power to fill in the details of a statute, or that the executive official was acting as an agent of the legislature, or that only "purely" or "strictly" legislative authority is non-delegable, or even by frank admissions that some delegations are permissible.

Indeed the predictability with which a court will affix the label "ministerial duty" rather than "legislative function" in order to sustain a statute may depend more on the subject matter to be regulated than on the particular form in which the delegated power is clothed. Delegation of State Powers to other States or to the Federal Government.

With certain exceptions to be discussed subsequently, the same doctrinal limitations on delegated authority have been applied in the area of intergovernmental relations. A majority of the state court decisions involving delegations to agencies of the federal government have sustained the statutes in question on the ground that the state legislatures had defined appropriate

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106. Delegations of power from state governments to local legislative bodies are rarely challenged by the courts. See Aiken, The Nature and Exercise of Legislative Power (1938) 26 GEOR. L. J. 606, 629; Withrow, loc. cit. supra note 104. And state delegations to private groups including lot owners, universities, railroads, and clubs have been liberally sustained. See Ex parte Gerino, 143 Cal. 412, 77 Pac. 166 (1904); Note (1932) 32 COLUM. L. REV. 80.


standards for administrative action. Moreover, the courts have given their approval to three important types of statutes which directly involve transfers of legislative authority to a foreign jurisdiction. Thus state adoption statutes which delegate the power to set the standards for domestic law enforcement agencies have been generally upheld. Reciprocal and retaliatory legislation, common in the fields of liquor regulation and interstate taxation, transfer to another state the authority to determine the operative date of domestic statutes; yet these statutes are generally approved. And the courts have validated state efforts to exempt from their anti-trust laws individuals and associations complying with specified federal regulations.

The execution of the national grant-in-aid program with its virtual subsidization of state activities furnishes persuasive evidence that prohibitions against inter-governmental delegations of power have not been strictly construed. In order to maintain what it considers proper supervisory control over the allocated funds, the federal government has induced the states to revamp their administrative machinery, prescribed detailed standards for state personnel, penalized states for failing to carry out their obligations, and demanded the submission of comprehensive plans, budgets, and progress reports. It has also required state contributions of a specified amount as a condition precedent to the disbursement of federal funds. National administrative standards have been enforced by temporary suspension of the flow of funds, by disallowance of particular state expenditures deemed undesirable, and even by total absorption of the entire state grant-in-aid distribution. Despite allegations that supervisory controls of this nature represented invasions of state sovereignty, the Supreme Court has refused to invalidate the grant-in-aid program where the monetary grant has been made directly to the state governments.

109. "The incidental objection that the delegation [is]... to the President of the United States... does not greatly impress us. The correlative rights of state and nation are of great importance, but we are a nation not an alliance of foreign states, and our President is not a foreign potentate." Ex parte Lasswell, 1 Cal. App. (2d) 183, 203, 36 P. (2d) 678, 687 (1934). See Valley National Bank of Phoenix v. Glover, 159 P. (2d) 292 (Ariz. 1945); People v. Sell, 310 Mich. 305, 17 N. W. (2d) 193 (1945); Underwood Typewriter Co. v. Chamberlain, 94 Conn. 47, 108 Atl. 154 (1919); Johnson v. Elliot, 168 S. W. 968 (Tex. Civ. App. 1914); James v. Walker, 141 Ky. 88, 132 S. W. 149 (1910); City of Pittsburgh v. Robb, 143 Kan. 1, 53 P. (2d) 203 (1936); Brock v. Superior Court, 9 Cal. (2d) 291, 71 P. (2d) 209 (1937); Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202 (1922).


112. Wilson v. Shaw, 204 U. S. 24 (1907); Millard v. Roberts, 202 U. S. 429 (1906);
A second series of state court decisions, however, has voided attempted statutory delegations to agencies of the federal government, thus giving rise to speculation that any such delegation would be forbidden by state constitutions. But a careful reading of the opinions reveals that the gravamen of the judicial complaint in each instance was the total absence of state-established primary standards to serve as a guide for the administrative officials and not the incidental factor that the delegation in question was to an official of the federal government. In analogous cases, the courts have disapproved attempted adoption by reference of prospective federal legislation, but this form of adoption statute is equally invalid when it purports to adopt prospective state legislation.

There remains a more damaging line of decisions which explicitly contend that all delegations to the federal government are in derogation of state "sovereignty" and therefore void. These cases ignore the judicially approved history of cooperative federalism exemplified by the state delegations under the grant-in-aid program. Moreover, their verbal protestations about "sovereignty" are readily met on the same level by the argument that sovereign "rights" are not abandoned by a state which voluntarily relinquishes, for a stated period, its "privilege" of exercising them.

Three New York lower court opinions stress the sovereignty rationale, but apparently they are not regarded as controlling authority even in New York; thus, in Darweger v. Staats the Court of Appeals ignored the argument raised below and invalidated the Schackno Act which purported to adopt by

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Alabama Power Co. v. Ickes, 302 U.S. 464 (1938). In United States v. Butler, 297 U.S. 1 (1936) the Court differentiated between federal grants to the states which it approved and direct federal grants to individual farmers. The use of federal funds to implement the Social Security Act was upheld in Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis 301 U.S. 619 (1937).


114. Thus, in Hutchins v. Mayo, 143 Fla. 707, 713, 197 So. 495, 498 (1940), the court admitted that the statute might have been sustained had it merely adopted existing regulations. A few courts have departed from the general rule and have allowed the adoption of prospective legislation. Compare Commonwealth v. Alderman, 275 Pa. 483, 119 Atl. 551 (1923).

115. When presented with apparent delegations of "sovereignty," some courts have distinguished "sovereignty" and "jurisdiction" and held that only the latter was transferred. Clarke v. Ackerman, 243 App. Div. 446, 278 N. Y. S. 75 (1st Dep't. 1935); Central R. R. v. Jersey City, 70 N. J. L. 81, 56 Atl. 239 (Sup. Ct. 1903); City of New York v. Wilcox, 115 Misc. 351, 189 N. Y. S. 724 (Sup. Ct. 1921); Fitchett, supra note 92, at 208.

116. See Cline v. Consumers' Co-operative Gas and Oil Co., 152 Misc. 653, 671, 274 N. Y. S. 362, 383 (Sup. Ct. 1934); De Agostina v. Parkshire Ridge Amusements, Inc., 155 Misc. 518, 524-5, 278 N. Y. S. 622, 629 (Sup. Ct. 1935); Darweger v. Staats, 153 Misc. 522, 529, 275 N. Y. S. 394, 403 (Sup. Ct. 1934). The remarks in the Cline case may be treated as dicta inasmuch as the court had already dismissed plaintiff's complaint on other grounds.
reference federal NRA codes, solely because adequate standards had not been established by the state legislature.\(^1\) Three decisions from other jurisdictions appear to support the New York lower court view,\(^1\) but subsequent judges might readily distinguish these precedents on the grounds that there was in each case a failure to prescribe standards or an attempt to adopt prospective legislation. Inasmuch as other courts have found little difficulty in sustaining statutes similar to the one held unconstitutional in New York, it may be inferred that they will regard subsequent delegations with a greater liberality than do the New York cases.\(^1\)

Apart from the problem of delegated authority, there exist few serious legal impediments to the proposal previously outlined. Enabling legislation, as indicated previously, will be required.\(^2\) Difficulties may be presented by restrictions in a few states forbidding local participation in programs of "internal improvements" and placing severe limitations upon the purposes for which state funds may be expended or bonds issued.\(^2\) Any effort to provide for financial contributions to the corporate program may encounter state constitutional debt limitations\(^1\) or, conceivably, provisions barring the pledge or loan of state revenues to private corporations.\(^1\) However, it is likely that the benefits accruing to these states from regional water development coupled with a judicious use of federal grants will evoke considerable liberalization of these restrictions. The conclusion that state constitutions do not bar the plan is fortified by the results of a recent informal questionnaire; of replies received from thirty-two Attorney Generals, only three

\(^{117}\) New York Laws 1933, c. 781; 267 N. Y. 290, 196 N. E. 61 (1935). The Court declared: "The Legislature has left too many things to be determined by other bodies to make this law constitutional." Id. at 304, 196 N. E. at 65.


\(^{120}\) See note 53 supra.

\(^{121}\) See DEPT. OF AGRICULTURE, STATE LEGISLATION FOR BETTER LAND USE (1941) xiv–xx; Communication to YALE LAW JOURNAL from the Attorney General of Florida, July 30, 1946.

\(^{122}\) At one time Pennsylvania was unable to accept a large federal grant prompting Governor Earle to comment bitterly: "I consider $81,883,806 a great deal of money to lose because of an antiquated constitution." Graves, State Constitutional Provisions For Federal-State Cooperation (1935) 181 ANNALS 142, 143.

\(^{123}\) See Communication to YALE LAW JOURNAL from the Attorney General of Florida, July 30, 1946. State laws preventing the grant of special privileges or immunities to any corporation may conceivably be applied to a government corporation. But see State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P. (2d) 637 (1935).
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indicated definitely that proposals for the fusion of federal and state functions would, in their opinion, be forbidden by state law.\textsuperscript{124}

CONCLUSION

The scarcity of water in the arid and semi-arid regions of the United States, coupled with the interstate character of drainage basin problems, has produced demands for effective federal-state water control and regional development. Since continuous administrative supervision is a necessity, the Supreme Court appears inherently incapable of resolving the frequent interstate conflicts. The National Departments and the Regional Valley Authority have been hindered to date by jurisdictional disputes and by an inability to utilize powers currently vested in the states. The scope of programs which can be administered by the states acting through commissions and compacts is limited because major responsibility and authority for water planning and development rests with the federal government. The fusion of national and local powers into a single agency would overcome the principal administrative obstacle to a unified governmental water program, and may be successfully reconciled with current judicial opinion.\textsuperscript{125}

\textsuperscript{124} The questionnaire submitted to the states was in a general form and did not contain the details set forth in the text. The replies received were all informal and are not, of course, binding upon the Attorney Generals. All agreed that there was no specific precedent for the proposal, and Indiana, Tennessee and Nevada indicated that any cooperative program of this nature would be unconstitutional. However, the responses from Kentucky, Utah, West Virginia, Georgia, Washington, and California suggest that the legal barriers are not insuperable.

\textsuperscript{125} Reconciliation of the plan with current political opinion may present a more formidable obstacle. The bitter opposition of the Montana Copper and Power Company to the proposed MVA indicates that private power interests remain unimpressed with the prospect that valley authority legislation will open up new markets for cheap electricity. Prior to the formation of the Federal Power Commission, the late Gifford Pinchot remarked, "the electric power interests were all for Federal control—because there wasn't any. Now these same interests are all for state control—because for nearly all practical purposes there isn't any." Quoted in Scott, \textit{Is Federal Control of Water Power Incompatible with State Interests?} (1941) 9 GEO. WASH. L. REV. 631, 634. A second line of opposition may come from private associations like the National Reclamation Association which, although approving many of the objectives of valley authority legislation, are closely identified with the methods and administration of the old-line federal bureaus. See Howard, \textit{Golden River} (May 1945) 190 HARPER'S 511, 517. Finally a considerable body of opinion may oppose any extension of federal activity on the grounds that it leads to overcentralization and to the destruction of "states rights"; this attitude is well exemplified by the position of the Council of State Governments. For an illustration of this reasoning, see Communication to \textit{Yale Law Journal} from the Attorney General of Nevada, June 28, 1946.