A FEDERAL POLICY FOR DEVELOPMENT OF WESTERN WATER

I. DEFINITIONS AND DISTINCTIONS

This paper does not present a formula for the resolution of the water problems of the Western United States, either from an engineering or a political standpoint. My modest aim is to present an analysis and a prescription for action by Westerners concerned with water development which hopefully may be viewed as a contribution toward making local thinking about water development needs more practical and constructive.

The starting point has to be an unpleasant but unflinching recognition that the manner of development of Western water is and will continue to be the policy prerogative of the Federal Government. I think it now beyond question that to the full extent the federal government wants to make water policy and planning its prerogative, it may do so.
Equally requisite for our mutual examination of the subject is the intellectual discipline to separate the concepts of power and policy. As we shall see, the reach of the federal power, in the matter of development of water resources in the West particularly, is virtually without limit. But it does not necessarily follow that the Constitution or the statutes on the subject intend for the federal authority to equal the federal power.

And, in the semantics of the word policy, it will be necessary to differentiate between the specification by Congress of a federal objective, and its specification of the ways and means to reach that objective. Particularly in the latter situation, Congressional silence or the ambiguity of Congressional language has left to administrators the leeway to select methods and approaches for carrying out Congressionally mandated tasks which one may
doubt that any politically sensitive Congressman would have consciously voted for.

Another term of seeming precision but shifting meaning is "federal government". A sentence from a House Committee Report (No. 707, 87/1, July 12, 1961) reveals the problem: "The Federal agencies seem to fear that the Federal Government may be committed by the vote of its representatives, and that the commission [under a North-eastern Water and Related Land Resources Compact] so constituted may somehow interfere with the jurisdiction of the United States and the powers and prerogatives of the various Federal agencies." In my view, the various federal agencies have only such powers and prerogatives as Congress grants to them. Yet practically speaking the federal establishment is made up of constituent agencies whose missions may not mesh.
With my good friend, Wayne Aspinall, I tend to bridle somewhat at suggestions that agencies make policy, yet realistically one must recognize that they do. Still, one ought to be as precise as possible in discussing this phenomenon, to avoid confusion.

Mostly I shall be talking about water supply matters, for it is here that I can best illustrate my thesis that there is an area where the decision-making process in water matters can be shifted toward a state and local focus. But I shall not pass up the opportunity to relate these ideas to the growing problems of water quality.

Indeed, I believe that a focussing of public attention on the underlying basis for dominance of the federal government in water matters should lead toward, rather than away from, regional arrangements.

The word I use to describe what I mean isn't a very
good one; I wish I could think of a better one. It is "oughtness"; its underlying ideas are those of fairness, candor, and perhaps benevolence. The rules, regulations, practices and procedures of the federal agencies, and the very laws themselves, ought to reflect an ethical commitment to the concept of fairplay, rather than a blind adherence to legalisms and economic irrationalities which our history and heritage have made optionally available to the federal sovereignty.

II. FOUNDATIONS OF A REGIONAL WATER POLICY

A. Constitutional Considerations

The Supremacy Clause of the U. S. Constitution (Art. VI, cl. 2) requires that although enabling authority must exist to support any federal activity, where it does exist the federal role must dominate. In few spheres of federal activity is there such a profusion of Constitutional en-
abling authority to sustain the federal prerogatives as there is in the case of national (that is to say, federal) policy for water. The Commerce Clause, the Property Clause, the Compact Clause, the Treaty Clause, the Judicial Clause, the General Welfare Clause, and the War Clause have been used. I shall discuss only a few of them.

When our national energies were directed to opening the country to the free flow of men and goods, the Commerce Clause (Art. I, sec. 8, cl. 3) was found adequate in
Gibbons v. Ogden, 9 Wheat. 1, 1824 to foreclose state incursions into the regulation of navigable waters. Subsequent cases embroidered the Commerce Clause with respect to the test for navigability, the "effects" cases, that is, where the federal nexus was by way of an "effect" in navigability, (U. S. v. Rio Grande Irr. Co., 174 U.S. 690) and the flood control (Oklahoma v. Atkinson, [Denison Dam] 313 U.S. 508) and electric power (Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, Ashwander v. TVA, 297 U.S. 288, U. S. v. Appalachian Electric Power Co. 311 U.S. 377) extension of that concept. Each of the cases presents the question of the power of the federal government, a legal question, and the question of what the policy should be. Generally the policy had been determined by the Congress, and its power was questioned. Occasionally, the policy question has to be searched for
v. Grand-Hydro, 335 U.S. 359, for example, the Supreme Court, in a 5 to 4 decision sustaining a state condemnation award under state law which included power site value, reserved the question of what would be the measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act. At least with respect to those actions brought by licensees, the matter may be considered as still unsettled.

In addition to the Commerce Clause, the Property Clause (Art. IV, sec. 3, cl. 2) of the Constitution gives Congress the proprietary power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Far more than the Commerce Clause, this wellspring of federal power
is of central importance in the Western, public land states. It is the basis for the Winters Doctrine (Winters v. U. S., 207 U. S. 564, 1908), affirming the paramount power of the United States to reserve waters of a non-navigable stream as against appropriation under state law, by the act of creating an Indian reservation. Arizona v. California, 373 U. S. 598, removed any lingering doubt as the efficacy of the Property Clause as enabling authority, as against the contention that Montana was a territory when the reservation was created, and that waters can be reserved as well as lands.

With respect to the Property Clause, as with the protection of navigation under the Commerce Clause, legal power and appropriate policy must be distinguished. Under F.P.C. v. Idaho Power, 344 U. S. 17 (1952) and Utah Power and Light Co. v. United States, 243 U. S. 389, the authority
of the Congress to grant licenses for hydroelectric projects was held to include the power to include conditions. The content of such conditions is a policy matter, which may or may not be explicitly stated in Congressional enactment; but whether explicit or implicit, whether delegated or retained, the determination is by nature legislative. Interior and Agriculture department regulations impose conditions on the right to cross public lands by electric utilities that the permittee shall make available to the United States, under a specified method of payment, "excess capacity" of utility lines for federal transmission purposes, and require conformance with the "power-marketing program of the United States" as a condition for the award of a permit. See 43 CFR, Part 2230, Sec. 2234.1, and 36 CFR, Part 251, Sec. 251.52.

There may or may not be a question that this is within
the federal power, whether the power exists is a legal question. Whether the Congress has delegated authority to exercise the power, and if so how the power should be exercised, are policy issues.

In the Compact Clause (Art. I, sec. 10, cl. 3), the Constitution provides that no state shall, without the consent of the Congress, enter into any agreement or compact with another state. This is also enabling authority, whereby the federal government may act in water matters. Particularly with respect to water development of the West, the Compact Clause has been a mechanism for reconciliation of federal and state or local interests since the Colorado River Compact, signed in 1922 but not consented to by Congress until 1929. Congress in the Weeks Act, in 1911 (16 U.S.C. 552), had given blanket consent to the states for compacts "for the purpose of conserving the forests
and water supply of the States," and in 1936, the Flood Control Act of that year [Act of June 22, 1936, 49 Stat. 1570] gave blanket consent to states to enter into compacts whereby they would provide certain project funds. In 1948, blanket consent was given to states for negotiation of interstate compacts for the prevention and abatement of pollution [Act of June 30, 1948, 62 Stat. 1155]. But no compacts were negotiated pursuant to any of these authorizations.

Still many interstate compacts apportion interstate waters in accordance with the interests of the states and the federal government.

(list)

These compacts illustrate a rather casual early concern about federal participation. Many of them were consented to without provision for federal participation.
Compacts:

La Plata River Compact, Act. of Jan. 25, 1925, 43 Stat. 796
South Platte River Compact, Act of March 8, 1926, 44 Stat 195
Rio Grande Compact, Act. of May 31, 1939, 53 Stat. 785
Republican River Compact, Act of May 26, 1943, 57 Stat. 86
Belle Fourche River Compact, Act. of Feb. 26, 1944, 58 Stat. 94
Costilla Creek Compact, Act. of June 11, 1946, 60 Stat. 246
Upper Colorado River Basin Compact, Act. of April 6, 1949, 63 Stat. 31
Arkansas River Compact, Act. of May 31, 1949, 63 Stat. 145
Pecos River Compact, Act. of June 9, 1949, 63 Stat. 159
Snake River Compact, Act. of April 21, 1950, 64 Stat. 29

Act creating New York Port Authority, Act of Aug. 23, 1921, 42 Stat. 174
Act providing for Bi-State Metropolitan Development District, St. Louis Area, Act of Aug. 31, 1950, 64 Stat. 568

Red River of the North Compact, Act of April 2, 1938, 52 Stat. 150
Ohio River Valley Water Sanitation Compact, Act. of July 11, 1940, 54 Stat. 752
Potomac River Compact, Act of July 11, 1950, 54 Stat. 748

New England Interstate Water Pollution Control Compact, Act of July 31, 1947, 61 Stat. 682

at all; others specified that a subordinate federal official, such as the Chief of Reclamation or the head of the Geological Survey, should look after the "federal interest".

Recently, however, much debate has centered on the question of how the federal government should participate, and how its dominance and its prerogatives can be preserved. As alluded to earlier, this question may manifest the complexity of the federal establishment and the bureaucratic infighting within it more than it does a conscious effort to downgrade the states. Still, the result is the same. The most recent compact to get federal consent was the Delaware Compact (P.L. 87-328, Approved September 27, 1961 (75 Stat. 688)), and the report on that bill for all the executive agencies illustrates a schizophrenia on the subject:
Unlike previous interstate river basin compacts, this one would bind the United States on generally the same basis as the participating States. The Federal Government would, however, be given special standing by section 1.4 of the compact which provides that adoption of the compact would not relinquish the functions, powers, or duties of Congress with respect to control of navigable waters, and that Congress could withdraw the Federal Government as a party or revise or modify the terms under which it would remain a party to the compact. Subject to this special provision, the United States would be controlled by the State-dominated commission in future Federal activities in the basin. No Federal expenditure or commitment for construction, acquisition, or operation of a project or facility affecting the basin water resources would be deemed authorized until it was first included in the commission's comprehensive plan.

The breadth of the powers, both State and Federal, which would be conferred upon the compact commission, its distribution of voting strength, and the difficulties inherent in coordination of the commission's authority with national water resource policies developed by Congress raise serious questions as to the efficacy of the compact and as to its compatibility with appropriate State-Federal relationships.

We continue to hold the view that the Water Resources Planning Act of 1961 which the President proposed to the Congress in his message of July 13, 1961, provides generally a better method of Federal-State cooperation in planning for river-basin development. Inadequacies of the compact, even with the amendments proposed, demonstrate the need for such legislation. Nevertheless we have reached the conclusion that the urgent needs for resource planning and development in this area of mounting congestion outweigh the negative
features of the compact. We do not object to this plan for resource development in the Delaware Basin under the particular conditions set out in this report. It should, however, establish no precedent in our search for orderly maximum development of this Nation's water resources.  


Students of federal-state cooperation hailed the Delaware River Basin Compact as a constructive and hopeful innovation. 1 It has not worked out that well.

The Judicial Article of the Constitution, Art. III, sec. 2, giving the Supreme Court original jurisdiction over causes between states, has been relied upon in the development of the equivalent of a federal common law in the water field, euphemistically referred to as the doctrine of "equitable apportionment". Justice Holmes' famous aphorism that "a river is more than an amenity, it is a treasure" is often quoted without adding the sentence in the same paragraph: "The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas."


Judges by and large being practical men, jurisprudence has generally accommodated to physical environment. Consequently the riparian doctrine, and the doctrine of
appropriation, products of separate climatological circumstances, have had to be accommodated by the Supreme Court, when contesting states have invoked the Judicial Clause. In Kansas v. Colorado, 206 U.S. 46, the Supreme Court resolved a conflict between the two doctrines. Even where the contesting states share an appropriation heritage, as did both Colorado and Wyoming, the Supreme Court still was called upon to resolve differences, and apportioned the waters of the Laramie River (Wyoming v. Colorado, 259 U.S. 419). Indeed the Court's later preoccupation with its own decree's explicit language, more than with the realities of the situation, required the parties to make numerous subsequent trips to Washington (260 U.S. 1, 286 U.S. 794, 298 U.S. 573, 309 U.S. 572) finally culminating in a modification of the decree after stipulation (353 U.S. 953).
To this sketchy review of the various kinds of enabling authority, and the admixture of policy issues therein, *Arizona v. California*, 373 U.S. 546, must be added as standing for the proposition that the Congress not only has the power, but in 1928 exercised it, to delegate to the Secretary of the Interior authority to allocate Colorado River waters among lower basin states. Where the Supreme Court's decision rests upon the delegation, which in turn rests upon the existence of a power to be delegated, the Court is enunciating a new kind of federal control, albeit under the Commerce Clause. Justice Douglas identified the aspect of the matter which is the subject of this paper, when he said bitterly that "Now one can receive his priority because he is the most worthy Democrat or Republican, as the case may be." In other words, the policy expressions of the Congress, by way of...

1 373 U.S. 546, 630 (Dissent).
delineation of the criteria for the exercise of the ultimate federal power by an executive branch official, is itself a matter of high policy concern.

In the case developing the equitable apportionment doctrine, and in Arizona v. California, the judicial branch has dabbled in the policy waters. The equitable maxim that what ought to have been done may be considered to have been done might support a finding that Congress intended that the Secretary of the Interior should apportion future shortages in the allocated flow of a river, but one may question whether it should be lightly inferred that Congress intended that he should be furnished no criteria or guidelines. The result reached in Udall v. FPC also seems more oriented to the majority's sense of "oughtness" than to that of the Congress.

The treaty-making power of the federal government of
course cannot be excluded among the enabling authorities for federal action. The Northeast drought of a few years ago, the concern about the lake level in the Great Lakes Region, the salinity of the Colorado as it flows into Mexico, and U. S.-Canadian treaty on the development of the Columbia, all present problems which bear upon our title.

Water quality presents the same dichotomy between law and policy, but little time need be spent on it, beyond a reference to the intensifying debate about the authority of the Secretary of the Interior to determine that state water quality standards are not consistent with the Federal Water Pollution Control Act if they fail to include a uniform standard of nondegradation as published by the Secretary.

\[1\] 33 U.S.C. $466-466k (1964)
\[1\] 78 Stat. 903
\[1\] The "publication", as hereinafter, was in a Press Release from the Office of the Secretary, 26-8, 1968.
B. Geography

In the field of water resources, particularly in the Western States, the word "region" connotes that two or more states are involved, or a river basin. The term entraps us, whether seen in the context of the inability of state mechanisms to respond to interstate situations, or in the context of the desirability of relating planning to some basis more rational than state boundaries. In water matters California ten or fifteen years ago reflected in its State Water Plan all the arguments about the rights of the "counties of origin" that are now being asserted by the Pacific Northwest as against California and the Pacific Southwest. The existence of both an Upper and Lower Colorado River Basin, each with a separate compact, illustrates that following nature may to some extent beg the question.
C. The Federal System

Overall, as I have tried to point out, the national government unquestionably has the dominant role in water matters in any event. It begs the real question to frame this truism on the basis that water problems which involve more than one state ought to be cast up for resolution by the federal government; it likewise begs the question to find, as the Supreme Court seems to have done, an overriding policy that the problems ought to be disposed of by interstate compact. Still, so concluding should not lead us to discard the idea that a regional focus for resource planning, particularly water resource planning, may be both practicable and desirable. There has been obvious progress in this direction. This progress probably has its roots in two opposite forces in our political system, which in this situation happen to be working in the same direction. One force
is the expansionist tendency of the national government in resource matters; the other is the state and local drive to counter this force by banding together and pooling their efforts.

President Franklin Roosevelt, in his message to Congress calling for a TVA, said that the Muscle Shoals "power development of war days leads logically to national planning for a complete watershed involving many States and the future lives and welfare of millions." Herbert Hoover, while Secretary of Commerce, wrote:

Each [drainage] system must be considered as a whole and organized to the maximum results. We need immediate determination of the broad objective and best development of every river, stream, and lake in our country in order that we do not undertake or permit haphazard development, whether public or private, that will destroy the possibilities of the maximum future returns. (Annual Report of the Secretary of Commerce, 1926, p. 10, as quoted in Swain, Federal Conservation Policy, 1921-1933, p. 104).

President Truman created a Water Resources Policy Commission by Executive Order and charged it to produce...
a water policy, regionalization, and particularly the necessity for planning for a river basin as a whole was the key tenet of its deliberations and its report. The legislative branch has consistently taken the same approach. In 1961, the Senate Select Committee on National Water Resources, constructed its findings and recommendations on the regional framework.

We have seen, of course, the growth of the compact idea obviously nurtured by the Supreme Court, and no one here needs to be told that unmeasurable effort constantly goes on between and among state water officials to keep the regional focus dominant.

Generalizations are dangerous, but my experience is that institutional preoccupation with the "federal prerogative" in the field of water resources displaces local authority and responsibility in the very programs where local authority and responsibility are Congressionally-
specified goals. (Congress on the record consistently has sought to protect and nurture the state and local role.

But it has used general and hortatory language which does not ultimately control in the courts, or it has used grant-in-aid programs which have a built-in federal prerogative. From time to time, specific legislative resolution of federal-state conflicts in favor of the states has been enacted, but these instances are relatively rare. The principle is honored only in the abstract.

The Senate Select Committee called for the federal government, in cooperation with the states, to prepare and keep up to date plans for comprehensive water development and management of all major river basins. One may reasonably conclude that the "cooperation" the Senate Committee called for was not of the traditional, "be reasonable, do it my way", sort, but was sincere. One may equally safely
conclude that once the idea was encased in statutory language, those parts of the federal government charged to cooperate with the states to regulate flood plain use, study water shortage problems, study future needs for storage, and hold public hearings, would find it their duty to insist upon the ultimate federal prerogative.

Water problems are intensely local problems. Although we know that the federal establishment may not be the most efficient instrumentality for handling them, and we believe that every public problem ought to be resolved at the lowest level of government capable of dealing with it effectively, we also know that water problems are national problems, we know they have out-grown the states. Meanwhile, the national government has shown a capacity to function well both regionally and locally. TVA and the Bonneville Power Administration
and the federal responsibility for hydro-electric licensing and interstate wholesaling of electric energy (to name but a few) are the products of national legislation which has pushed the federal establishment down to very low levels of government. This trend is not likely to be reversed.

The two forces of federal expansionism and state mutual aid resistance to it, seem no longer capable of resolution by the compact approach, nor by the federal instrumentality (TVA and Bonneville Power Administration) route. The federal government is disenchanted with the former, and there is strong evidence that the Congress, although well satisfied with the TVA and BPA, is in no mood to attempt their duplication.

But the two forces may well be harnessed for renewed effectiveness in the field of water resources, if more
attention is turned to the kinds of policy questions
which I have lumped into my term "oughtness".

III. FEDERAL POLICY

Two ideas are implicit in my hypothesis. One is
that Congress is the proper forum. The other is that
the implications of the Supremacy Clause for federal
dominance in water policy matters, by no means preclude
Congress from doing a better job of articulating and
circumscribing the way in which the executive instru-
mentalities carry out the federal programs.

The Congress stands with a foot in each camp. It
is national, and it is local. It can and does shift
the emphasis in one direction or another from time to
time.

A. The Concept of "Oughtness"

Being reconciled to the dominance of the federal role,
those interested in rationalizing the myriad conflicts in the field of water resource development, should focus their attention intensively toward the ground rules under which the federal role is exercised. It is as legitimate and proper, under the concept of this being a government of laws, to demand fair practice and procedure as it is to demand a good program.

Congress recognized this basic idea in the charter of the Public Land Law Review Commission. Therein, Congress looked toward a review of the practices and procedures of the land managing agencies. In a companion bill, the Congress directed the Secretary of the Interior to "develop and promulgate regulations containing criteria" designed to cover an array of land uses. As we shall see in a

\[ \text{Stat.} 98 \]
later section of this paper, this is the concept reflected in the Kuchel-Moss bill concerning rights vested under state water laws.

The diligent efforts of the American Bar Association toward Freedom of Information and revisions of the Administrative Procedure Act go in the same direction.

In my opinion, this "oughtness" approach is a sound one.

B. The Anatomy of Policy-making

There is a temptation, in our complex social situation, for individuals, whatever their station, to abdicate responsibility of decision-making more and more to technical experts, to study commissions, to universities, to interest groups -- to almost anyone who seems to have the time and the motivation to grapple with the issues of our time. Such abdication of public responsibility is a threat
to public control of the public business.

With respect to natural resources, nature's bounty has forgiven us for past lapses. The prospect that it cannot continue to do so gives us a sense of panic which leads us to search out the "expert".

At the same time, resource questions are posed to the public in over-simplified terms as if the policy extremes of uncontrolled exploitation or total preservation could be workable guides.

Resource planning, and particularly water resource project evaluation are complex subjects. The public understanding of the involved issues must be improved.

In this connection, it is well to remind ourselves that decision-initiating may be equivalent to decision-making.

The Flood Control Act of 1944 introduced the requirement that federal project plans be submitted to the affected
states for comment. Opportunity for comment is a fine thing, but if it comes only after plans are already formulated and designed, the local input may be illusory.

By a better spelling-out of the ground rules for planning, for operations, for comment and consultation, we could expose, rather than gloss over, some of the real paradoxes hidden in our resource legislation. We could rationalize some of the problems which threaten to bog down water projects endlessly.

I believe the Congress would respond favorably to the suggestion that it spend more time spelling out the rules by which water resource problems would be resolved, than in umpiring the myriad issues on a case-by-case basis. This is not to say that I advocate any diminution or delegation of Congress's power. Rather, I think it could take a hand in laying out the essentials of analytical
integrity, the givens for planning, and the methods by which local, state, and regional variations can be accommodated.

IV. POLICIES FOR A WATER REGION

A. National Conservation Imperatives

The single most troublesome ingredient of any planning exercise in this era is the ascribing of cost and benefit with respect to the natural environment. In this area, we can only hope that an improvement of analytical techniques in the quantifiable aspects will narrow the range of controversy, and that the coordination or cooperation procedures for public decision-making if sufficiently improved will lead to something approaching a public consensus on many of the specific projects.

The whole country has come to recognize the need to devote more attention to natural resources undisturbed.
This has led us to attempt to measure "wilderness values", and caused us to pile recreation use statistics one on the other. Quantifying the unquantifiable gives the wrong appearance of certainty in many uncertain matters. Arthur Ross, the retiring Commissioner of Labor Statistics, in a recent article [Washington Post, June 30, 1968] observed that "government officials are prone to take statistics too literally, to ignore their limitations, and to confuse partial truths with the whole truth about complex realities."

Mr. Ross goes on:

No harm is done if a quantitative measure is seen for what it really is. But trouble sets in when the statistical abstraction is confused with the more complex underlying reality. There are two principal dangers in this process. First, immeasurable aspects of the problem may be vastly more important than the measurable. Second, the validity of a particular measure may have been undermined by economic and social changes.

B. Legal Engineering

These ideas, taken together, can be fleshed out on
the skeleton of "legal engineering". The great projects on our rivers are monuments of technical achievement wherein the hazards of failure have been reduced to the vanishing point, but our legal engineering is imprecise and rudimentary.

Writing laws is art, not science, but this does not excuse the too-common practice of burying irreconcilable disagreements in purposely ambiguous language for the future to resolve.

From time to time over the past seven years, I have discussed the evident fact that "stare decisis" seems to mean more in the administrative process than in the courts. Whether you start with the Reclamation Act of 1902, or the Mining Law of 1872, or other of the land entry laws, you will find a dense underbrush of an agency's published and unpublished precedent which makes "the law"
undiscovered and undiscoverable.

The Public Land Law Review Commission is engaged in a monumental task which in part may attack this problem. Particularly, it proceeds on the premise that the starting point for a policy review looking toward new law is a clear understanding of the present law.

This is a much larger task than most people, including most Congressmen, realize. The difficulties in part stem from the growing "activism" of the judiciary. The
United States Supreme Court, in a landmark decision of
the term just ended, *Permian Basin Area Rate Cases*, Nos.
90 et cet., May 1, 1968, illustrated the point:

The [Federal Power] Commission's authority to
regulate . . . is derived entirely from the
Natural Gas Act of 1938. The Act's provisions
do not specifically extend to producers or to
wellhead sales of natural gas,\(^5\) and the Com-
mission declined until 1954 to regulate sales
by independent producers to interstate pipe-
lines. Its efforts to regulate such sales began
only after this Court held in 1954 that inde-
pendent producers are "natural gas companies"
within the meaning of sec. 2(6) of the Act.
The Commission has since labored with obvious
difficulty to regulate a diverse and growing
industry under the terms of an ill-suited
statute.

\(^5\) Indeed, sec. 1(b), provides in part that
the "provisions of this Chapter . . .
shall not apply to . . . the production
or gathering of natural gas."

If you are dealing with "law" which is engrained by
judicial or administrative construction, however sound the
process, you are not likely to have statutory guidelines
for its execution. And it is in the execution that the
real issues may be decided.
V. SOME SPECIFIC ISSUES

A. Kuchel-Moss Bill

Consider, as an example, the pending bill by Senators Moss and Kuchel "to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams." (S. 2919, introduced Feb. 5, 1968). That bill, as presently drafted, is a classic of what I consider to be the proper approach to a sticky problem. Senator Kuchel stated the point admirably:

We are not concerned with doctrinaire disputes and the source of the Federal power. We do not pass upon the contention of some Federal lawyers that the Government owns the rights to all the water originating in Federal lands, because the King of Spain owned them and ceded them to Mexico, and Mexico ceded them to the United States. We do not argue the question of whether the United States has paramount power. We do not debate the question of whether, after creation of a State, it controls the water originating on the Federal lands in that State. We do not interpret old Federal statutes to discover whether they did or did not recognize appropriations of navigable waters, or dissect the claims of the States to the beds of navigable streams, with their attendant effect on water rights, especially riparian rights. All we do is to say that
whatever the constitutional basis of the Federal point may be—whether the commerce clause, the property clause, the war power, the general welfare, or whatever—when the United States exercises its constitutional power to consider a project for the development and use of water resources, and the construction or operation of that project causes damage to, or conflicts with a pre-existing property right in those waters which arose under the laws of the State, then the Federal power may, of course, be exercised, but compensation shall be paid for the taking of the water right, just as for any other real property. (Congressional Record, Feb. 5, 1968, p. S837.)

Fairplay principles are honored in a different way in another section of the bill, which requires that if a federal administrator asserts water rights retroactively to the date of an old withdrawal or reservation, he shall specify the magnitude of the asserted claim and shall promulgate it both in the Federal Register and by giving Congress 60 days within which the Congress might vacate the claim. This is nothing more nor less than an assertion of the paramount legislative prerogative, but it does assure a review of the questions presented in a forum not dominated with legalistic thinking.
Another Congressional proposal presenting the "oughtness" idea is H. R. 10256 (90th Congress, 1st. Sess., May 23, 1967) by Representative Tunney and others. Under the bill, if the United States seeks to establish its title in accretion or avulsion of the Colorado River it "shall be subject to all legal and equitable defenses which are available against a private party litigant." In an adverse report on the bill (May 1, 1968) the Department of the Interior asserted that the doctrines of equitable estoppel, adverse possession, and laches should not run against the Government as a matter of public policy. What is true in terms of traditional sovereignty, however, may not be true in cases where the United States asserts a claim based on common law principles. The protective equitable shields designed to protect the citizen in long continued peaceful possession should not necessarily be fashioned into swords to achieve the opposite result.
B. Damages for Interference with Private Rights

Earlier in this paper, I referred to the Supreme Court's 5-4 split sustaining a state condemnation award which included power site value, reserving "the appropriate measure of value . . . in reliance upon rights derived under the Federal Power Act." Thereafter, United States v. Twin City Power Co. 350 U.S. 222, established that the interest of the United States in the flow of a navigable stream amounts to a "dominant servitude" which need not be condemned by the United States.

This is good constitutional law. A similar result has been reached by the California Supreme Court in Colberg v. State, 432 P. 2d 3 (1967) which held that the right of access to navigable water is not a private property right within the meaning of the California
Constitution, and hence no compensation need be paid.

In the latter case, the State of California was faced with a claim for compensation because two fixed low level highway bridges to be built over a navigable waterway near Stockton, cut off access to deep water for 81 percent of the business of one shipyard, and 35 percent of the business of another. Additional clearance would have added millions of dollars to the cost of the bridges.

This, I submit, presents a problem of "oughtness" both in the federal and the state situation. The non-compensability of a claim under valid law does not necessarily mean there is no value to the claim, or no economic cost to its taking. In both the state and the federal situation, the Constitution, in setting the outer limit to what the legislature may do, did not preclude a policy decision short of that outer limit.
In this sense, Congress might well be asked to recognize, as it is asked to recognize in the Kuchel-Moss bill, that the exercise of the federal right should be in the context of the real cost of that exercise—whether the "property" taken is a water right established under state law, or a going shipbuilding business.

The problem may be highlighted by supposing in the California case that one of the shipyards was private, one public. Should the site of the privately-owned shipyard be chosen for the bridge because it would "cost" less?

C. Acreage Limitations

Water development and land development cannot be considered separately, and the writing of social policy or economic policy into land or water development laws has spawned administrative difficulties which in sum
are probably far greater than the engineering and technical difficulties involved in meeting water needs for the West. Only a brief mention can be made here of the problem itself; there is neither time nor space for its full discussion.

Still the concept of "oughtness" might help us over a few of the legal hurdles. The determination by the Secretary of the Interior in December 1964, that the farmers of the Imperial Valley (and their lawyers who had for thirty years reviewed and approved abstracts of title) had misplaced their reliance on Secretary Wilbur's interpretation of the applicability of the 160-acre limitation to their lands set off a chain-reaction on the land values and public attitudes which cast a shadow on federal-state relationships with respect to all water development in the West. This is the kind of problem, which, under my
thesis, a legislative review under an objective of "oughtness" could pay large dividends.

D. The FPC and Regional Water Policy

The Federal Power Commission's charter to license hydroelectric projects is national in form, but geography makes its impact fall mostly in the mountainous Western and Appalachian states. The Commission, in water development matters, has had its charter expanded by interpretation on both substantive and procedural levels. As earlier pointed out, the Commerce Clause was fleshed out in such decisions as the New River (U. S. v. Appalachian Electric Power, 311 U.S. 377) and related cases. It was in Taum Sauk (F.P.C. v. Union Electric Co., 381 U.S. 90) that the Supreme Court, by a divided vote, found that pumped storage projects were subject to FPC licensing, not on the navigation test but on the test of trans-
mission of electric energy in interstate commerce.

In the procedural category, the Scenic Hudson case wrote new administrative law, both in the matter of the standing of a citizen group to intervene, and as to the methodology to be followed by the Commission in considering alternatives in the process of determining the best development of a site, under the statutory criterion of "comprehensive". Here, the Commission was adjured to take into account non-economic values.

In a paper I delivered to the American Bar Association's Section on Natural Resources Law last August, I outlined what Scenic Hudson, and the High Mountain Sheep case (Udall v. FPC) meant in the administrative context.

In terms of the subject of this paper, let me quote a few sentences from that paper:
Our country is built upon the rule of law. The concept of the rule of law encompasses the concept of fair procedures. Complexity of the modern society puts particular strains on these concepts, as we wrestle with inconsistent and overlapping government activity, deadening delay in the decisional processes, and mounting proliferation of agencies and offices.

The Federal Power Commission, and the other regulatory agencies, can teach the executive branch much in the matter of procedural fairness; such agencies on the other hand have much to learn in attaining decisiveness and expedition. The point of resolution of these goals is the Congress.

I cannot, of course, discuss them here in any substantive way, but the High Mountain Sheep project, and proposals for the generation of additional power on the Colorado River, are a part of the overall problem of regional development about which we have been talking.

Power site withdrawals on rivers proposed for inclusion in a wild rivers system pose policy conflicts
for the future which, as another example of how I think the Congress ought to approach these problems. In that legislation, Senator Jordan of Idaho proposed an amend-
to create a National Wild + Scenic River
ment which I would like to quote:

River Board, made up of both federal +
state officials, which was to be chaired with
(attached)

the duty of affording reports to both
Congress A

In addition, it would be changed to include

"continuing comparative studies" m
Tives. Such report shall contain a discussion of any significant developments since the date of enactment of the Act, or since the last report, including but not limited to the following subjects: Technology of passage of fish over dams; status and trends of anadromous fish runs; activities by way of construction or otherwise pursuant to international agreements relating to any basin in which national wild or scenic rivers areas are designated; projected national, regional, or local demand for additional electrical generating capacity, particularly as related to existence or possibility of declarations of national emergency; and Federal or State legislative changes which affect the financing of river or reclamation development projects, including basin account authorizations relative to any basin in which national wild or scenic rivers areas are designated. The National Wild and Scenic Rivers Review Board is authorized and directed to conduct continuing comparative studies which would measure the balance of benefits and detriments of each national wild or scenic river area to the State in which it is located, and to report to Congress, as appropriate, recommendations to assure that, wherever it is found that the reclamation of arid land would better serve the public interest of such State, the same shall not be prejudiced by the national wild or scenic rivers status of any stream.
The Federal Power Commission is part of the "federal establishment" which is concerned about the protection of its prerogatives, and the federal prerogative generally. But it is also sensitive in a constructive way to the ideals of fairplay and procedural protection, and to regional and local needs, which have been presented in this paper.
VI. CONCLUSION

A "federal policy for development of Western water" presently exists, in the sense that the Congress and the Executive Branch are committed to further development of the water resource potential of the Western states. However, an affirmative attitude is not equivalent to a unified and coordinated policy. Notwithstanding the fact that the sum of all the bits and pieces of legislation affecting land and water matters of the West constitutes an imposing array of constructive and positive federal support for development, the failure of the components to mesh has created considerable friction and mistrust of the "federal government" at the regional, state, and local levels.

It is the burden of this paper that it is not constructive for Westerners to resist the federal government in water resource matters on "states' rights" or legalistic
ground; the overwhelming authority is to the contrary.

Similarly, it is not constructive to "piggy-back" a particular federal program, whether that of the Corps of Engineers, the Bureau of Reclamation, or the Bonneville Power Administration, for the long-term resolution of a regional, state, or local objective of water development.

Rather, I advocate a new analysis of our water development needs, and a drive toward enactment of legislation which will incorporate into water planning and water development legislation legislative criteria, and legislatively-directed policies for the recognition of rights and equities on an "ought" basis. This will call for a new exercise of responsibility by the Congress, a new standard of performance by the administering agencies, and a new confidence in the process on the part of the public.

I've been silent, so far, about the most troublesome
challenge in the whole water resources field -- the unresolved conflict between Senate and House on the Central Arizona Project. The Congress, in that controversy, has asserted itself, and I have confidence that it will resolve the problem well. It is, as I have said before and as I would like to say in conclusion, a forum in which we can have confidence.