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“purpose or intent to injure competitors or destroy competition.” Even if one could ascertain his competitor’s intent, or lack of it, he could not be certain whether the competitor was violating the act. Aside from the intent element, it is also questionable whether the Washington act requires an adverse *effect* upon competition; if an adverse effect is required, a seller must determine whether his competitor’s sales below cost are “destroying or tending to destroy competition.”²⁸

It is submitted that the court should be hesitant to issue injunctions restraining a defendant from selling below cost to meet competition, and should liberally construe the good faith exception as it did in the principal case. Once an injunction is issued, especially if it is phrased in the broad terms of the statutory provisions against loss leaders and sales below cost as was done in a California case,²⁹ the defendant is significantly restrained in his future pricing policy. He acts at the risk of subjecting himself to a contempt citation whenever he makes a sale which might be found to violate an ambiguous statute.

WATER RESOURCES PLANNING ACT OF 1965—AN EXPERIMENT IN CREATIVE FEDERALISM

The concept of “creative federalism”³¹ is as elusive as it is new. As a descriptive term, “creative federalism” describes not what federal-state relations presently are but what they ought to be. In order to

Under Secretary of Commerce, in *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 5 (1960), and From D. Beryl Manischewitz, National Association of Manufacturers, *Id.* at 154. The subcommittee was considering an amendment to the Federal Trade Commission Act which would have prohibited sales below cost.

²⁸ WASH. REV. CODE § 19.90.040 (1959) ends with the words “whereby a sale below cost is effected, to the injury of a competitor, and where the same destroys or tends to destroy competition.” In *Martin v. Alienikoff*, 63 Wn. 2d 842, 389 P.2d 422 (1964), defendant was charged with violating the portion of § 19.90.040 which prohibits rebates and selective extension of special services. Defendant argued that the required elements of violation included (1) a sale below cost, (2) injury to competitors, and (3) destruction or tendency to destroy competition. Plaintiff contended that only the act of granting rebates or services needed to be shown, because the three elements listed above appear in clauses disconnected from the prohibitive clauses. The court accepted defendant’s construction, except that no mention was made of element (3) in the court’s holding.

If destruction or tendency to destroy competition is required, what adverse economic effect would meet the requirement? In the principal case, the alleged injury to competition was spoilage of competitors’ unsold chickens. This may have been injury to competitors within the meaning of the act, but it is certainly arguable that there was no destruction nor tendency to destroy competition.

²⁹ *People v. Pay Less Drug Store*, 25 Cal. 2d 108, 153 P.2d 9, 15 (1944).

³¹ The phrase appeared in Ways, *Creative Federalism and the Great Society*, *Fortune*, Jan. 1966, p. 121. President Johnson reportedly used the term to refer to the Appalachian Regional Development Act, *N.Y. Times*, Jan. 24, 1966, p. 17. The cre-

appreciate the concept it is necessary to understand the argument that governmental activities no longer revolve around a politics of issues but rather now center in a politics of problem-solving.² The question no longer is: Is it to be done? Rather the inquiry is: How is it to be done? Creative federalism recognizes the need of asking state and local governments the "how to do it" questions.³ By asking these questions a federal-state partnership is formed. This partnership is designed to capture the problem-solving genius of various societal groups and to create an inner tension through the advocacy of conflicting solutions. Out of this tension is supposed to flow a creativity which will lead to the optimum solutions of today's problems.

Before creative federalism can begin to function two conditions must be met. In the first place, any existing antagonisms between the partners in the area of action must be avoided or removed. Creative federalism can not function where there are impediments to joint venture. Secondly, but not unrelated, the assumption that power is a constant to be grabbed by one group only at the expense of another must be discarded in favor of an opposite assumption.⁴ Power in many current situations is an expandable entity; an increase in federal and state power can occur simultaneously.⁵ If state and federal governments make such an assumption, then a theoretical obstacle to joint venture will be removed and incentive to embark on an experiment in creative federalism will be provided.

Initial experiments in creative federalism have been, and are being, undertaken in areas where new approaches are desperately needed.⁶

ative federalism in the Appalachia Regional Development Act, 79 Stat. 5 (1965), 40 U.S.C. § 461 (Supp. 1966), is exemplified in the Act's approach to the poverty problem. Rather than expending Federal funds where the economic need is the greatest, the Act contemplates the expenditure of funds where the expected return on public dollar investment will be the greatest. By stimulating the economy in urban areas and by building roads from the rural to urban centers, the problem of poverty is supposed to be overcome. This is significant as an effort in creative federalism because the focus in public spending is changed from the area of greatest needs to the area of production. *Fortune*, Jan. 1966, pp. 222-23.

² *Fortune*, Jan. 1966, p. 122.

³ See generally Muskie, *The Challenge of Creative Federalism*, *Saturday Rev.*, June 25, 1966, pp. 12-14.

⁴ See *Fortune*, Jan. 1966, p. 122.

⁵ In other words, power is not to be viewed as a constant quantity to be carved up and distributed. When the federal government takes a larger slice of power there is no necessary reduction of power in any other sphere of influence.

⁶ For example, the Economic Development Act, the Intergovernmental Cooperation Act, the Demonstration Cities Act, and the Urban Development Act to some extent or another reflect the creative federalism approach. See *Saturday Rev.*, June 25, 1966, p. 13. See also Hart, *Creative Federalism: Recent Trends in Regional Water Resources Planning and Development*, 39 *COLO. L. REV.* 29, 38 (1966), where the author points to the Clean Waters Restoration Act of 1966, P.L. 89-753, 89th Cong., 2d Sess. (1966), as an example of creative federalism.

These efforts will either crystalize the concept or cause it to vanish as suddenly as it appeared. One recent experiment is unique in that it attacks the problems of an entire field at the very basic level of planning, and does so by creating new machinery capable of utilizing older and more proven parts. The Water Resources Planning Act of 1965⁷ is significant as an experiment in creative federalism though not consciously drafted as such an experiment. It is probable that many of the pressures which created the need for the Act also worked to bring into current use the notion of "creative federalism."

Water is a vital natural resource which must be regulated in order to insure proper utilization. If regulations are to be effective and maximize water use, they must be planned and coordinated. The Water Resources Planning Act attempts to provide for requisite planning and coordination. The Act reflects recent trends in water resource development.⁸ Originally of primarily local concern, water resource development has taken on a federal dimension in such areas as flood control, irrigation, navigation, power, water supply, and water quality control. Expanding federal involvement has created a need for planning at the national level; this was first recognized in the Hoover Commission Reports in 1948.⁹ The Report of the Water Resources Policy Commission recommended in 1951 that the Truman administration create a body to coordinate water resource development on a nationwide basis.¹⁰ An advisory committee appointed by President Eisenhower made a similar recommendation in 1955.¹¹ Finally, in 1959, the Senate created the Select Committee on National Water Resources to study fundamental requirements of national water policy. The Committee's report advocated comprehensive national planning and improvement of state and local planning as primary action areas.¹²

In 1961 President Kennedy, completing plans initiated by the Eisen-

⁷ 79 Stat. 244 (1965), 42 U.S.C. § 1962 (Supp. 1966). See U.S. CODE CONG. & AD. NEWS 1921 (1965) for the legislative history and purpose of the Water Resources Planning Act.

⁸ See Stewart, *Federal Water Resource Development*, 45 ORE. L. REV. 322, 324-29 (1966).

⁹ See generally MCKINLEY, *UNCLE SAM IN THE PACIFIC NORTHWEST* (1952).

¹⁰ See 1 PRESIDENT'S WATER RESOURCES POLICY COMM'N REP. (1950).

¹¹ See PRESIDENTIAL ADVISORY COMM. ON WATER RESOURCES POLICY, *WATER RESOURCES POLICY* (1955).

¹² See McGuinness, *Water for the United States—An Analysis of the Senate Select Committee on National Water Resources*, 2 NATURAL RES. J. 187 (1962); Schad, *An Analysis of the Work of the Senate Select Committee on National Water Resources*, *id.* at 226. See also Hamilton, *The Senate Select Committee on National Water Resources: An Ethical and Rational Criticism*, *id.* at 45 where the author questions the propriety of letting a special interest group of the Senate, as he charges, dictate national water policy.

hower administration, requested Congress to enact legislation authorizing comprehensive planning of water resource development on a national level. The request was accompanied by a proposed act which served as the foundation for the present enactment.¹³ The Kennedy bill, bi-partisan in origin and support, provided for a water resources council to oversee various plans submitted by different water basin commissions and for federal aid to states for local water resource planning. The Eighty-seventh Congress took no action on the bill requested by President Kennedy. The Eighty-eighth Congress considered revised bills but again took no action.¹⁴ In July 1965 the Eighty-ninth Congress finally passed the Water Resources Planning Act. The machinery created by the Act and its probable operation are worthy of study and analysis as a new approach not only to water resource development, but also to problem-solving in general.

I. THE ACT

A. Purpose

The preamble to the Act states that its purpose is "to provide for the optimum development of the Nation's natural resources through the coordinated planning of water and related resources . . ."¹⁵

B. Means

Optimum development is to be achieved through the work of a federal water resources council, regional river basin commissions, and federally assisted state and local agencies. The Act contemplates the coordination of federal, state and private activities in the area of water resource development.

In order to insure coordination and cooperation, certain impediments to joint venture are removed from the scope of the Act. Since some federal action had been taken without regard to, or in derogation of, state plans, continual expansion of federal activity in the area of water resource management had antagonized the states. Moreover, the federal government continued to exert federal water rights that directly conflicted with state water law.¹⁶ The Act was drafted to avoid these

¹³ S. 2246, H.R. 8177, 87th Cong., 1st Sess. (1961).

¹⁴ S. 1111, H.R. 3620, 88th Cong., 2d Sess. (1964). These bills reflected state suggestions making river basin commissions more federal-state in nature. The states were to appoint and pay their representatives.

¹⁵ 79 Stat. 244 (1965), 42 U.S.C. § 1962 (Supp. 1966).

¹⁶ Englebert, *Federalism and Water Resources Development*, 22 LAW & CONTEMP. PROB. 325 (1957). See generally Bennett, *A Symposium on Federal, State, and Local*

antagonisms by expressly preserving existing federal or state jurisdiction, responsibilities, or rights with respect to water.¹⁷

The Act also attempts to remove another impediment to joint venture by limiting certain activities of entities established or acting under it. No entity may "study, plan, or recommend the transfer of water between areas under the jurisdiction of more than one river basin commission or entity performing the function of a river basin commission."¹⁸ By this provision the sensitive question of diversion is theoretically eliminated from the scope of the Act.

The express language of the statute would seem to prohibit both the Water Resources Council and the river basin commissions from studying diversions of water from one basin to another unless both basins were under the jurisdiction of one commission. In House proceedings such a limitation was unequivocally expressed.¹⁹ But the diversion question is not settled. Despite expressions of Congressional intent, Henry P. Caulfield, executive director of the Water Resources Council, has said that he does not think that section 1962-1(d) bars forever inter-basin transfers.²⁰ Under the wording of the Act, for example, the "entity performing the function of a river basin commission" might include some study group or council of state officials who meet to study the problems of water. Thus, the diversion question is still open and may prove an impediment to joint action.

In any event the Act does not prevent but rather expressly allows federal agencies acting outside the scope of the Act to undertake any desirable studies.²¹ To this extent the limitation on the federal govern-

Cooperation in Conservation and Development of Water Resources, 45 CALIF. L. REV. 712 (1957); King, *Federal-State Relations in the Control of Water Resources*, 37 U. DET. L.J. 1 (1959).

¹⁷ 79 Stat. 244 (1965), 42 U.S.C. § 1962-1 (Supp. 1966).

¹⁸ 79 Stat. 244 (1965), 42 U.S.C. § 1962-1(d) (Supp. 1966).

¹⁹ H.R. Rep. No. 603, 89th Cong., 1st Sess. 12 (1965):

This language is intended to make it clear that the authority which is given to the Water Resources Council and to the river basin commissions established under S. 21 does not include authority to study and report upon the transfer of waters between basins or areas that are appropriate for planning on a comprehensive basis.

²⁰ Address by Henry P. Caulfield, Jr., Columbia River Water Congress for the Pacific Northwest, April 1, 1966.

²¹ 79 Stat. 244 (1965), 42 U.S.C. §§ 1962-1(b), (c) (Supp. 1966), state that federal officials acting under federal laws are not affected by the Water Resources Planning Act except in so far as they are required to carry out the provisions of planning or preparation. As long as they perform their functions under the Act, it would seem that they are free to carry out independent planning. Of course, the existence of a cabinet-level water resources planning council will probably limit Federal agency undertakings which are not germane to or which conflict with council efforts. See Hart, *Creative Federalism: Recent Trends in Regional Water Resources Planning and Development*, 39 COLO. L. REV. 29, 32-33 (1966).

ment is not a real one. It would seem that Congress was not about to let the new experiment tie its hands. The draftsmen of the Act, though perhaps assuming that power was expandable, were not going to lose anything if they were wrong. The experiment undertaken in the Act is a very controlled one.

II. TITLE I—THE WATER RESOURCES COUNCIL

The Council, composed of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Secretary of Health, Education, and Welfare, the Chairman of the Federal Power Commission and any other appropriate federal agency head appointed by the President, is a federal inter-agency council created for the purpose of: (1) maintaining a continuing study and biennial assessment of the adequacy of water supplies to meet water requirements; (2) reviewing the plans of river basin commissions and transmitting such plans to Congress through the President; (3) coordinating federal planning efforts and supervising state programs that receive federal assistance; (4) appraising the adequacy of existing and proposed policies and programs; and (5) making recommendations to the President with respect to federal policies and programs. The President is authorized to appoint a Council chairman to supervise the activities of the Council and its staff.

The Council is designed to coordinate the planning activities of the several federal agencies concerned with the conservation, development, and use of water resources and to serve as the main channel of communication for state and regional views on federal water resource development.²² In addition, the Council dispenses federal funds to states to stimulate their planning endeavors and make their views more authoritative.²³ If the experiment in creative federalism is to succeed, the Council must fulfill dual roles. On the one hand, the Council must be the coordinator of the federal agencies and, on the other, guardian of regional and local interests. From the creativity generated, the Council must make "recommendations as it deems desirable in the national interest."²⁴ In the tension between federal, regional, and local interests it must chart the optimum course—a Herculean task to say the very least.

²² 79 Stat. 245 (1965), 42 U.S.C. § 1962a-3(3)(b) (Supp. 1966).

²³ 79 Stat. 251 (1965), 42 U.S.C. § 1962c (Supp. 1966). See text accompanying note 42 *infra*.

²⁴ 79 Stat. 245 (1965), 42 U.S.C. § 1962a-3(3)(a) (Supp. 1966).

III. TITLE II—RIVER BASIN COMMISSIONS

These commissions epitomize the effort to create a federal-state partnership.

A. Creation

The President has the power to create river basin commissions. Certain conditions precedent must be met before the President may exercise his power, though. In the first place, the Council or a state must request in writing the establishment of a river basin commission. Such a request must carefully define the exact geographical area to be included in the proposed commission. Secondly, such a request must be concurred in by (a) the Council and (b) not less than one half of the states located within the basin or basins concerned. Such concurrence must be in writing, identify the same geographical areas, and be signed by the governors of the concurring states.

In the creation provisions under Title II certain accommodations to special interests were made. In the event a basin is formed which includes the Upper Colorado River, at least three of the four states of Colorado, New Mexico, Utah and Wyoming must concur in such formation. For example, suppose a majority of states lying within the Upper and Lower Colorado River Basins request the formation of a two-basin commission. That request can not be considered by the Council or the President unless three of the four named states are among the states requesting the commission. In the event the Columbia River Basin is involved, at least three of the four states of Idaho, Montana, Oregon, and Washington must concur.²⁵

B. Duties

A river basin commission serves as principal agent for coordinating all federal, state, local, and non-governmental plans for water resource development in its defined area. It prepares comprehensive plans for joint action in the development of water and related resources, "*provided*, That the plan shall include an evaluation of all reasonable alternative means of achieving optimum development"²⁶ This provision, it would seem, attempts to institutionalize the tension factor of creative federalism. To better insure that such evaluations are cogent, the commission is authorized to undertake any independent study that will aid in the preparation of its plans. In addition and complemen-

²⁵ 79 Stat. 246 (1965), 42 U.S.C. § 1962b(a)(3) (Supp. 1966).

²⁶ 79 Stat. 246 (1965), 42 U.S.C. § 1962b(b)(2) (Supp. 1966).

tary to joint planning efforts, a commission shall "recommend long range schedules of priorities for the collection and analysis of basic data and for investigation, planning, and construction of projects. . . ." ²⁷

C. Composition

A chairman appointed by the President serves as coordinating officer for federal members of the commission and acts as the federal representative. The federal members are from federal agencies which the President determines have a "substantial interest in the work to be undertaken by the commission"; ²⁸ they are appointed to the commission by their respective agencies.

The commission also consists of one member from each state which lies "wholly or partially within the area, river basin, or group of river basins for which the commission is established . . ." ²⁹ The member is appointed by the state in accordance with its laws. In the absence of governing provisions, the Act states that the governor shall appoint the state member. One of the state representatives is elected by the state members to serve as vice-chairman; he acts as the states' representative on the commission.

Particular attention should be given to the words "each state which lies wholly or partially within the area . . ." The importance of defining the exact geographical area of a river basin has been well illustrated. Governors in the Northwest have asked the Water Resources Council and the President to authorize a Pacific Northwest River Basin Commission. The geographical area was initially defined in those requests as "those parts of Idaho, Montana and Wyoming which are within the Columbia River Drainage, plus all of Washington and Oregon except for the Klamath River." ³⁰ By excluding the Klamath River, the Northwestern states thought that California's participation on such a commission would be precluded. But California argued that the proposed river basin commission would include the Great Basin Drainage, Goose Lake, and the Smith and Rogue Rivers and that such inclusions gave California the right to representation on the Commission. ³¹ Utah and Nevada also asserted their claims for representation.

²⁷ 79 Stat. 246 (1965), 42 U.S.C. § 1962b(b)(3) (Supp. 1966).

²⁸ 79 Stat. 247 (1965), 42 U.S.C. § 1962b-1(b) (Supp. 1966).

²⁹ 79 Stat. 247 (1965), 42 U.S.C. § 1962b-1(c) (Supp. 1966).

³⁰ See Colorado River Ass'n, Newsletter, Sept. 1966.

³¹ It should be noted that under § 1962-1(d) of the Act, the right of a river basin commission to study the question of diversion is limited to those areas under the jurisdiction of the commission. See text accompanying notes 19 and 20 *supra*. Thus, were California to become a member of the Pacific Northwest River Basin Commission, the issue of diversion to southern California probably could not be raised be-

The Water Resources Council then asked the states which had applied for a Northwest River Basin Commission to define more precisely the area to be included. New descriptions undoubtedly will attempt to eliminate the claims of California, Nevada, and Utah.

In addition to federal and state representatives, interstate agencies and international commissions which function within the area covered by the river basin commission are entitled to membership; however, Congress must have consented to the interstate compact before the interstate agency established under such compact qualifies for membership.

D. Operation

A river basin commission is designed to function only through the voluntary cooperation of all its members. In fact, participation on a commission is voluntary; no state is required to provide a representative. The draftsmen of the Water Resources Planning Act did not provide a rigid operational structure probably for fear that such rigidity would discourage states from forming commissions and would lessen the effectiveness of any commission created. Relations between the various members are supposed to be symbiotic, not parasitic.

1. *Consensus.* The concept of consensus in the Act is the very essence of the experiment in creative federalism. "In the work of the commission every reasonable endeavor shall be made to arrive at a *consensus* of all members on all issues; but failing this, full opportunity shall be afforded each member for the presentation and report of individual views . . ." ³² Provision is made for recording divergent views when disagreements arise, but consensus is the predominant operational approach in other than procedural matters. ³³

Original formulations of the Water Resources Planning Act contained voting provisions pursuant to which the chairman representing the federal agencies and the vice-chairman as the states' representative were each given a vote. This procedure was attacked on ground that voting provisions "would tend to foment and perpetuate dissension, and seem singularly unsuitable for developing or arriving at a constructive consensus." ³⁴ Similarly, any procedure which would give

cause no river basin in southern California would be under the jurisdiction of the proposed commission.

³² 79 Stat. 248 (1965), 42 U.S.C. § 1962b-2(d) (Supp. 1966).

³³ *Ibid.*

³⁴ *Hearings Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 1st Sess., 17 (1963).

each member one vote would be unsuitable because there is no proper constituency for such votes to represent. Interests of various participants can not, for practical political reasons, be accorded equal weight. For example, it is unlikely that Washington would favor a plan which gave Wyoming an equal vote on a river basin commission which included the Columbia River. Moreover, the number of federal members on a river basin commission is limited only by the good judgment of the President. It is easy to foresee a situation where only a few states belong to a commission whose federal members are numerous. Voting arrangements in such a situation would presumably be unacceptable to the states involved. Because voting provisions were likely to create inequities and dissention, the idea of "consensus" evolved.

As used in the Act, "consensus" does not mean unanimity or even majority opinion. For example, a commission may decide by consensus to submit plan A to the Council, but several members on the commission might prefer plan B. The Act requires that plan A when submitted include an evaluation of plan B.³⁵ If the views of members are too divergent, the Chairman records the position of the federal agencies and the vice-chairman records the positions of the states. All views are then transmitted to the Council; the Council thereby becomes arbiter of all very controversial issues. "The arrangement resembles that of a Congressional conference committee, in which decisions are reached not by majority vote of the members, but by agreement between the two sides representing the two Houses."³⁶ "[A] commission, failing to agree, has not reached a deadend, but has the means for agreeing to disagree, for continuing its activities in the hope of reaching consensus, and for referral of alternatives for legislative decision at the appropriate level of government."³⁷ In effect, the notion of consensus permits the existence of a tension which is creative, not destructive, and allows the experiment to proceed.

2. *Financing.* Commission members will be compensated by their respective agencies or states. The federal government will pay the salary of the chairman. "Each commission shall recommend what share of its expenses shall be borne by the Federal Government, but such share shall be subject to the approval of the Council."³⁸ The remainder of the commission's expenses shall be otherwise apportioned

³⁵ 79 Stat. 245 (1965), 42 U.S.C. § 1962a-3(3) (b) (Supp. 1966).

³⁶ Address by Henry P. Caulfield, Jr. *supra* note 20.

³⁷ Address by Henry P. Caulfield, Jr., Cornell Conference on State Planning, March 24, 1966.

³⁸ 79 Stat. 250 (1965), 42 U.S.C. § 1962b-6(a) (Supp. 1966).

as the commission may determine. The federal share is expected to be fifty per cent of operating costs. The remaining fifty per cent will be apportioned amongst the states, probably on the basis of their interests. The federal share can not exceed \$750,000 annually in direct aid to a river basin commission.³⁹

It is quite possible that the federal government will support directly or indirectly more than half of the commissions' operating expenses. Under Title III (discussed *infra*) funds are available to states which undertake special projects. Such projects might be launched under the auspices of a river basin commission or some other federal legislation. Nothing in the Act prevents the Council from approving a federal grant to a state for a project that state was obligated to undertake to fulfill its financial obligations as a member of a river basin commission. Were such a grant made, the federal government, in effect, would be supporting more than fifty per cent of a river basin commission's operating costs. And, the funds made available to a state for its own local water planning activities could free other funds and further enable a state to meet its commission obligations.

In examining river basin commission financing, an interesting hypothetical question is raised: What if a state refuses to pay its allocated share of the expenses and withdraws from the commission? First, probably nothing would happen. The entire Act is built upon a notion of voluntary cooperation and participation. It is possible, of course, that some contractual arrangements may have been made that would create a legal obligation that the state would have to meet. But barring such occurrence, nothing would happen. Second, the question may remain academic. Once a state joins a river basin commission there would be few if any situations that would prompt the state by itself to leave the commission. Such a move would only cut off a potentially valuable line of communication for that state's interests. In resigning from a river basin commission, a state would likely antagonize the Council and lessen its chances for federal assistance for state projects under Title III.

E. Termination

"A commission shall terminate upon decision of the Council or agreement of a majority of the states composing the commission."⁴⁰ Whereas the creation of a commission requires the consent of both

³⁹ 79 Stat. 253 (1965), 42 U.S.C. § 1962d (Supp. 1966).

⁴⁰ 79 Stat. 248 (1965), 42 U.S.C. § 1962b-2(a) (Supp. 1966).

parties,⁴¹ the termination of the federal-state partnership may be effected unilaterally by either party. If the experiment in creative federalism does not serve the purposes of the various parties, the experiment can be easily stopped. With such facile termination provisions, the creative tension between partners must be controlled so that it does not become so intense as to cause one party to terminate the creative endeavor. Hopefully the consensus approach will provide the requisite control.

IV. TITLE III—FINANCIAL ASSISTANCE TO THE STATES

Congress drafted Title III "in recognition of the need for increased participation by the States in water and related land resources planning."⁴² Basically Title III gives the Water Resources Council the power to decide which states and which projects will receive federal assistance on a matching basis. States apply to the council for funds. The Council "shall not disapprove any program without first giving reasonable notice and opportunity for hearing to the State agency administering such program."⁴³ The hearing requirement is the only effective limitation on the discretionary power of the Council. Hopefully the hearing requirement will encourage the Council to act as a partner, and cause it to persuade through the exercise of reason rather than intimidate by using economic or political sanctions.

A. Designation of a State Agency

The Act requires a state to designate an agency to carry out comprehensive water and related land resource development in order to qualify for federal assistance.⁴⁴ A state, of course, may create an entirely new agency to carry out the task of water and related land resource planning. Such action may involve unnecessary time and expense, however, and may lead to duplicity in administrative function. Rather than asking the legislature to create a new agency, a governor may choose to designate an existing agency.

The State of Washington, for example, might decide to assign the duties of water resource planning to the existing Water Pollution Control Commission or some similar agency. The statute creating the Water Pollution Control Commission could be read as authorizing

⁴¹ 79 Stat. 246 (1965), 42 U.S.C. § 1962b (Supp. 1966).

⁴² 79 Stat. 251 (1965), 42 U.S.C. § 1962c(a) (Supp. 1966).

⁴³ 79 Stat. 252 (1965), 42 U.S.C. § 1962c-2 (Supp. 1966).

⁴⁴ 79 Stat. 252 (1965), 42 U.S.C. § 1962c-2(3) (Supp. 1966).

such action.⁴⁵ In any event, an organizational scheme which places water resource planning and water pollution control under one agency would be advantageous. First, the agency could effectively divide its functions and avoid duplicity in state planning responsibilities. Second, a wiser development of water resources would be possible because the parties concerned with water development would be forced by association, if nothing more, to examine the goals of water resource planning—*i.e.* the conservation of water that is fit for required uses. Third, such an organization would provide machinery that would enable a state to fulfill its proper function as a member of a river basin commission. The centralization of water resource planning in one state agency would make the state a stronger partner with the federal government and other states in water and related land resource planning. The experiment in creative federalism, a federalism that depends so much on the endeavors at the local level,⁴⁶ would have a much greater chance of succeeding.

B. Implicit Integration of Existing Programs

Implicit in the Act is the ability of existing study and planning groups to be integrated into the structure of the Water Resources Planning Act.⁴⁷ For example, the Columbia Basin Inter-Agency Committee consisting of seven governors and federal representatives, which has water and related land resource responsibilities in the seven Columbia Basin States, might begin reporting to the Water Resources Council rather than the Inter-Agency Committee on Water Resources. In effect the Columbia Basin Inter-Agency Committee which has facilitated coordination of water resources policies and programs since 1946 could become a quasi-river basin commission (a commission not formally created under the Act but subservient to the Council) if the

⁴⁵ WASH. REV. CODE § 90.48.010 (1961), enunciating the general policy of the Water Pollution Control Commission, says in part: "And to that end require the use of all known and available and reasonable methods by industries and others to prevent and control the pollution of waters of the State of Washington." Certainly proper water resource planning would "prevent and control" pollution. WASH. REV. CODE § 90.48.035 (1961), enumerates the general powers of the Commission, encouraging cooperation with other states, and specifically authorizes interstate projects. Finally, WASH. REV. CODE § 90.48.153 (1961), authorizes cooperation with the federal government.

⁴⁶ See Fortune, Jan. 1966, p. 228, where the author points out that success of federal urban development projects depends heavily upon local investigative and administrative efforts.

⁴⁷ See, *e.g.*, Water Resources Planning Act, 79 Stat. 244, 42 U.S.C. § 1962-1(d) (Supp. 1966) where the "or entity performing the function of a river basin commission" language easily supports an implication that quasi-river basin commissions were to be included under the Act.

states do not follow through with their plans to create a Pacific Northwest River Basin Commission.⁴⁸

If the states refuse to form river basin commissions, the experiment in creative federalism may fail but the Water Resources Planning Act may still be able to provide a valuable service of integration and coordination among the federal agencies. There are at present some twenty studies proceeding under the auspices of quasi-river basin commissions; another fourteen studies are planned.⁴⁹ If the Council were to become the repository of these studies, the Water Resources Planning Act could achieve some positive results without the aid of the states. In fact, the tension generated between the various federal agencies might be controlled so as to achieve a partial degree of creativity. But experience in other undertakings, such as urban renewal, has demonstrated that superior results are obtained if state and local arms participate actively and intelligently.⁵⁰

V. AN EVALUATION

The Water Resources Planning Act of 1965 represents a controlled and limited experiment in creative federalism. The Act is designed to remove such impediments to joint venture as the federal and state dispute over water rights. By expressly stating that existing centers of power will be preserved, the Act allows the federal and state partners to assume what they will about the constancy or expandability of power. In a final effort of accommodation the Act tries to avoid the sensitive area of water diversion and grants special consideration to states in the Upper Colorado and Columbia River Basins. Even though the diversion issue remains obscure, the resulting ambiguity may be helpful in postponing the study of diversion until the subject can be approached with less passion. In any event the unanimous support that the Act received in Congress testifies to the degree to which its draftsmen succeeded in formulating an acceptable approach

⁴⁸It is somewhat puzzling why the Columbia Basin Inter-Agency Committee (CBIAC) is being supplanted by a Pacific Northwest River Basin Commission. In original drafts of the Water Resource Planning Act the special "three out of four states concurring" provision for the Columbia River Basin was absent, suggesting a continued reliance on CBIAC. But prior to the passage of the final act the special provisions were added, indicating a change in attitude toward the CBIAC. Perhaps the five states presently formulating the Pacific Northwest River Basin Commission thought that they could protect their special interests better in a river basin commission that did not include Utah and Nevada. Under the existing CBIAC a diversion of Columbia River water to Utah or Nevada could have been studied.

⁴⁹An address by Henry P. Caulfield, Jr., 1965 Water for Texas Conference, Nov. 23, 1965.

⁵⁰See Fortune, Jan. 1966, p. 228.

to water resource planning. In fact the actual drafting process itself, it would seem, was an example of creative federalism at work.

The Act provides for the creation of river basin commissions which are to provide the life blood of the creative process. The tension required to generate creativity is maintained by conducting investigations and making recommendations employing a "consensus" process. The process of consensus controls the degree of tension generated in federal-state joint enterprises by allowing for divergence of opinion. But even so, the partnerships will not be easy to maintain. The notion of consensus may work to maximize the effectiveness of commissions, but some issues may arise which are incapable of accommodation. The delicacy with which these issues are handled will determine the fate of the experiment.

The Water Resources Council is in a difficult pivotal position. It must chart a proper course for water resource development by using the recommendations of the basin commissions, the alternative proposals, and its own experience. In delicate situations it will become the sole arbiter of conflicting viewpoints. Its federal composition may prevent it from fairly evaluating alternative courses or may at least create the appearance of unfairness.

Title III of the Act, if properly administered by the Council, may be the key to a successful experiment. The need for growth and innovation at the local level is great. Final plans adopted by Congress or appropriate state bodies can only be as effective as the investigations which spawned them. Federal financial assistance might very well improve the quantity and quality of local investigative efforts. And the requirement that a state designate a state agency will certainly improve the quality of state endeavors by introducing an element of coordination. However, anyone who would wager that the states will be able to fulfill their role in the creative federalism experiment will be ignoring recent historical trends,⁵¹ but the states are not prisoners of history.

If the states capitulate, the experiment in creative federalism may fail, but the Water Resources Planning Act can bring to the Federal agencies some needed coordination in the area of water resource development. Middle management's reluctance to cooperate with coordination efforts may be overcome if the Council is able to function as a

⁵¹ See Sanford, *New Era Ahead for Your State*, Nation's Bus., July 1965, pp. 56-57, where an ex-governor advocates the strengthening of state government unaccompanied by the weakening of federal government to solve state deficiencies.

cabinet-level body.⁵² Existing conditions may be improved for quasi-river basin commissions if their reports are sent to the Water Resources Council instead of their respective agencies.⁵³

At this time it is impossible to predict with any certainty the course that the Water Resources Planning Act will follow.⁵⁴ The Act could prove a very viable experiment in creative federalism—one which eventually moves from planning to implementation. It might produce only limited results in the area of water resource development because: (1) operation by consensus does not work satisfactorily, or (2) the Council is too federally oriented, or (3) the states fail to meet their responsibilities. Or, finally, it might fail totally. Much will depend upon the ingenuity and imagination of the men charged with the responsibility of implementation. The Act has been set on its proper course through the efforts of such men as Henry P. Caulfield, Jr. But the work has just begun. Perhaps the men who experiment with this and other acts can more readily succeed in their endeavors after sufficient experience precipitates a clearer understanding of what an experiment in creative federalism can involve.

⁵² See Muskie, *The Challenge of Creative Federalism*, Saturday Rev., June 25, 1966, p. 12, for a discussion of middle management's reluctance to coordinate with Federal agencies other than their own.

⁵³ By submitting their reports directly to the Water Resources Council, the quasi-river basin commissions would not have to compete with programs outside the area of water resource development. The Water Resources Council could give the reports a more thorough and perhaps more intelligent appraisal.

⁵⁴ As of May 1966 a Great Lakes Commission and a Northeast Commission had partially been created. As of this writing the Pacific Northwest River Basin Commission awaits only the approval of President Johnson. But as can be seen, the life of the Act has been too short to predict even the direction it will take.