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The Hoover Reports on Water Resources and Power¹—A Commentary²

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I

WHY A STUDY ON WATER RESOURCES AND POWER?

There are twenty-five federal agencies which are involved in the development of our water resources and power.³ To the extent that they overlap, duplicate functions, and conflict in policy and operations, there is a need for reorganization, definition of responsibility, and unification of basic policies.⁴

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¹ The two reports which are the subject of this paper are (1) COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON WATER RESOURCES AND POWER (June, 1955) (hereinafter cited as TASK FORCE REPORT), which is a report to the Commission itself; and (2) COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, WATER RESOURCES AND POWER, A REPORT TO CONGRESS (June, 1955) (hereinafter cited as COMMISSION REPORT), which is based largely upon the TASK FORCE REPORT.

The Commission was established by Act of July 10, 1953, c. 184, 67 STAT. 142. This 1953 Hoover Commission is commonly known as the "second Hoover Commission," the 1947 Commission being known as the "first Hoover Commission." (See Act of July 7, 1947, c. 207, 61 STAT. 246.) Both the first and second Commissions were directed to consider and recommend means to promote economy, efficiency and improved service in the executive branch, but only the second Commission was directed to look into "eliminating nonessential services, functions, and activities which are competitive with private enterprise."

This Task Force Report is but one of nineteen reports by task forces, subcommittees of the Commission, and staff studies; and this Commission Report is but one of twenty reports to Congress on various aspects of governmental activity.

The Task Force Report consists of several parts. In volume three, at pages 1003-1783, are the Special Studies prepared for the Task Force by experts on particular phases of water resource development. In volume two, at pages 275-1002, are the Reports of the four Task Groups, *i.e.*, (1) Power, (2) Reclamation, (3) Navigation, and (4) Flood Control. In volume one, at pages 1-275, is the report of the Task Force itself, which is a gathering together of the Task Group reports and some of the material in the Special Studies.

² This commentary deals principally with those parts of the Hoover reports which concern power and reclamation.

³ Special Study by Taylor, *Inventory of the Federal Agencies Handling Water Resources and Power Development and Conservation*, 3 TASK FORCE REPORT at 1003-49.

⁴ That there are overlaps and conflicts, see 1 COMMISSION REPORT at 12-15, 97. That Congress is concerned about the problem, see Act of July 10, 1953, c. 184, 67 STAT. 142, which declares it to be Congressional policy to eliminate "duplication and overlapping of services . . ."

Much heated controversy has developed over the proper federal role in the generation, transmission, distribution and sale of electric power. Many of the present federal activities could be performed by private enterprise or other non-federal interests.⁵ On the other hand, many of the activities now performed (or proposed to be performed) by private utilities could be performed, or be taken over, by the federal government.⁶ Every step by federal or non-federal organizations toward water resource development has generated political heat and argument over economic theory regarding the proper role of government and private enterprise. At a more superficial level, each step toward development also involves controversy over the type of facility which should be built, where it should be located, and what purposes it should serve. There never has been any universally accepted standard for measuring prospective benefits from a project against the costs involved in the project.⁷ Hence, each step in power development combines physical complexity with political and economic complexity, making it extremely difficult to cope with the problems.

Water resource development cannot be considered apart from the development of the lands which lie within the watersheds. With a growing population and a rising standard of living "not even the most complete acceptance and application of technology to present agricultural land resources can produce enough fruits, vegetables, and livestock products, particularly beef, to meet our requirements in 1975 It is apparent that the Nation will need to develop some new lands in order to produce enough fruits, vegetables and livestock for the consumption requirements in 1975."⁸ Irrigation is the most important factor in bringing more land into production, and in increasing the productivity of cultivated land.⁹ And yet irrigation lowers navigable depths, lowers power potentials, reduces the dilution of pollution, and permits intrusion of salt water into coastal waters, deltas and agricultural lands. Dams for hydropower interfere with fish migration and affect recreational and scenic values.¹⁰

We have reached a point in our economy when only rarely can use be made of water for some particular purpose without adversely affecting its use for

⁵ According to the Commission, 1 COMMISSION REPORT at 120.

⁶ Indeed, following *Ashwander v. T.V.A.*, 297 U.S. 288 (1936) and *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118 (1939), the T.V.A. system did acquire both hydro and steam generating plants and transmission facilities in its area from various utility companies. See 2 TASK FORCE REPORT at 415.

⁷ According to 2 TASK FORCE REPORT at 303. The Federal Inter-Agency River Basin Commission has published a "Green Book" which has received fairly general acceptance, however, and which deals with this very problem.

⁸ Special Study by Huffman, *The Reclamation of Land for Agricultural Purposes*, 3 TASK FORCE REPORT at 1171-72.

⁹ *Id.* at 1183-85.

¹⁰ Special Study by Hoyt, *Competition for the Use of Water*, 3 TASK FORCE REPORT at 1100.

some other purpose. Also we have reached a point where water stringencies are becoming more frequent and numerous.¹¹

Lack of policy determination does not mean that the factors which give rise to these conflicts and controversies are remaining static. We are merely solving our problems by default. Day by day many of the conflicts are resolved by the diversion of waters; dredging of channels or streams; pollution; building of dams; flooding of bottomland; reclamation of land; and in many other ways. Congress should know whether it is best to permit uncoordinated and diverse activities to solve our problems (or, at least, commit us to particular uses of resources); whether problems would be any better solved (and with sufficient speed) by directing their solution according to a more controlled plan; and whether any possible gains through comprehensive planning might be offset by social and economic losses resulting from more heavy-handed governmental "interference," control and competition. To know how to deal with such problems as these, Congress first needs to know what could be done if it should choose to direct a coordinated plan of water resource development.

Congress, therefore, needed a study on water resources and power which would be objective and impartial, and would contribute toward a clearing of the air by establishing some basic principles and facts which would tend to narrow the areas of controversy.

II

WILL THESE HOOVER REPORTS FILL THE NEED?

Both the Hoover Commission which was established in 1947 and the 1953 Hoover Commission had for their purposes the promotion of more economy, efficiency and improved service in the transaction of the public business.¹² But the 1953 Commission, like the President's Water Resources Policy Commission appointed by President Truman in 1950,¹³ found authority to go beyond "streamlining" existing agencies and activities.¹⁴ Congress apparently conferred authority upon the 1953 Hoover Commission to

¹¹ *Id.* at 1099.

¹² See note 1 *supra*.

¹³ Established by Executive Order No. 10095, 15 FED. REG. 17 (1950). The Commission Report is dated December 1950, and was submitted to President Truman on December 11, 1950.

¹⁴ The added authority of the 1953 Hoover Commission is derived from Act of July 10, 1953, c. 184, 67 STAT. 142, which directs it to look toward improving government by "eliminating nonessential services, functions and activities which are competitive with private enterprise." The Commission also relied on a sentence in S. REP. No. 216, 83d Cong., 1st Sess. 1 (1953), which says that the Commission has "added authority to study all activities of the Federal Government, and to make recommendations to the Congress and the President relative to changes in Federal programs and policies."

The President's Water Resources Policy Commission was clearly established for the purpose of recommending policy. See note 13 *supra*. This Commission and the 1953 Hoover Commission Task Force on Water Resources and Power dealt exclusively in the area of water

determine the public's interest in various governmental activities, and to decide whether (or to what extent) federal participation is desirable.¹⁵ The Task Force which the Commission established to investigate Water Resources and Power considered that they had a mandate to aid in the solution of these controversial policy matters in that field.¹⁶

So the Commission undertook to provide Congress with the much needed study and report on water resources and power, and to tackle the difficult problems involved.¹⁷ That was a large undertaking, and required a good deal of courage, because in such a controversial area any policy report is certain to be critically scrutinized by Congressmen and many other persons who are interested in the subject matter. To be of help and to accomplish its purpose of narrowing the areas of controversy, any such report must be persuasive, analytical, and soundly based. These reports will probably fail to be of help because they are not sufficiently broad in scope to settle policy controversies, and because they are too easily penetrated on a superficial level. This penetration appears most likely to be based on the failure of the Commission to establish facts; its inclination to jump to conclusions as a technique for arriving at basic premises; and its lack of clear analytical reasoning. Unfortunately such criticism of the Commission's work does not get to the merits of the subject matter of the reports. Although the recommendations coincidentally may be quite sound, this cannot be ascertained by examination of the supporting material. Therefore, whether or not they are sound in their recommendations, they seem destined to fail of their intended helpful purpose.

III

THE SCOPE OF THE RECOMMENDATIONS¹⁸

For "streamlining" the operations of the existing twenty-five federal agencies, and for ironing out conflicts in operations and policies among

resources, whereas the 1947 Hoover Commission Task Force which dealt with this area did so in connection with natural resources generally. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, ORGANIZATION AND POLICY IN THE FIELD OF NATURAL RESOURCES (January 1949). Also, the latter commission conscientiously avoided policy matters as far as possible, but made a number of basic recommendations toward more efficiency and reorganization in the various agencies dealing in natural resources.

¹⁵ *Ibid.*

¹⁶ *Supra* note 14. See Moreell, *Notes on Procedure—No. 2*, 1 TASK FORCE REPORT at 239, emphasizing the sentence quoted from S. REP. NO. 217 in note 14 *supra*.

¹⁷ Or, as stated in 1 COMMISSION REPORT at ix: "The task force has made the most exhaustive study of our water problems in all their phases that has yet been undertaken."

¹⁸ The following statements are this writer's selection and summary of specific recommendations. Certain of the specific recommendations connected with "streamlining" agencies and operations are covered in Part IV hereof. A few recommendations are omitted because they are too general to discuss, make no change, or are of a minor nature.

these agencies, the Commission recommends the establishment of a Water Resources Board.¹⁹ To equalize the burden of federal investment among all taxpayers, the Commission recommends that power rates should be increased to permit payment of federal, state and local taxes (or a sum in lieu thereof),²⁰ and the abrogation of the "preference clause."²¹ To ease the investment burden upon the federal treasury, the present federal power systems should be placed more on their own as government corporations, and be permitted to issue their own securities.²²

As to basic policy for the future, the Commission recommends that the federal government assume a role in resource development only when necessary to national interest or broad national objectives, and then only when projects are beyond the means or needs of local or private enterprise.²³ Even so, the federal government should not act unless the projects are economically justified and financially feasible.²⁴ Under no circumstances should the government build any more steam plants.²⁵ Transmission lines should be built only where others cannot provide transmission service.²⁶ On any future multipurpose projects, private enterprise should be offered the opportunity to provide the capital for the electrical component and dispose of the power.²⁷

IV

DO THE RECOMMENDATIONS HAVE SUFFICIENT SCOPE TO PROVIDE A GUIDE TO CONGRESS?

A.

They Leave the "Streamlining" Problems Entirely to the Water Resources Board

The Commission, in discussing existing operations, leaves the clear impression that a good deal of streamlining and coordination is badly needed: 1. It lists six specific "inconsistencies and conflicts in policies and actions" as a summary of the "multitude" of such defects.²⁸ 2. It builds up what was originally an inventory of the twenty-five agencies interested in water

¹⁹ 1 COMMISSION REPORT at 39, Recommendation No. 2.

²⁰ *Id.* at 111, Recommendation No. 9.

²¹ *Id.* at 113, Recommendation No. 11(b). The "preference clause" is dealt with in detail in the text at note 86 *infra*.

²² *Id.* at 121, Recommendations Nos. 12, 13, and 14.

²³ *Id.* at 36, Recommendation No. 1(c).

²⁴ *Id.* at 37, Recommendation No. 1(f).

²⁵ *Id.* at 111-12, Recommendation No. 10.

²⁶ *Id.* at 113, Recommendation No. 11(b).

²⁷ *Id.* at 122, Recommendation No. 15(a).

²⁸ *Id.* at 97.

resource development²⁹ into the caption: "Agency Overlaps and Conflicts,"³⁰ followed by a classification of those agencies by function, without explanation of how they conflict or overlap.³¹

To cope with this situation, the Commission recommends that (1) water resources be developed by drainage areas;³² (2) all work on hydrologic data be grouped in one agency;³³ (3) all revenues be paid to the Treasury and operations be carried on out of annual appropriations³⁴ (except for incorporated power systems); (4) revolving funds (*e.g.*, the Reclamation Fund) be abolished;³⁵ (5) Soil Conservation Service flood control headwater dam functions be transferred to the Corps of Engineers;³⁶ (6) present power systems be incorporated;³⁷ (7) a Water Resources Board be created in the Executive Office of the President;³⁸ and (8) the review functions of the Bureau of the Budget be strengthened.³⁹

These recommendations result in very few changes: (1) the only shifts in agency responsibility among the twenty-five agencies are the shift of one function from the Soil Conservation Service to the Corps of Engineers, and the grouping of hydrologic data functions; (2) there are two fiscal changes, both of minor importance; (3) federal power systems will have increased independence, but will still be numbered among the twenty-five overlapping and conflicting agencies; (4) the amount of governmental re-

²⁹ See Special Study by Taylor, *supra* note 3. This work is a descriptive study listing and describing the functions of twenty-five agencies. It draws no conclusions. It is a mere inventory.

³⁰ 1 COMMISSION REPORT at 12-15. Nowhere is there an explanation of the metamorphosis of the inventory.

³¹ In the field of power development, conflicts between the Bureau of Reclamation and the Corps of Engineers have been publicized in the daily press. But some explanation is required to show the conflicts and overlaps between the other 13 agencies listed: Bonneville Power Admin.; Bureau of Indian Affairs; Atomic Energy Comm.; Southeastern Power Admin.; Bureau of Mines; Geological Survey; Rural Electr. Admin.; Weather Bureau; Fed'l Power Comm.; Southwestern Power Admin.; Internat'l Boundary & Water Commission, U.S. & Mexico; T.V.A.; Internat'l Joint Commission, U.S. and Canada.

³² This is already being done to a considerable extent. 1 COMMISSION REPORT at 36.

³³ 1 COMMISSION REPORT at 37. But there is no indication how this recommendation answers the many problems raised in Special Study by Hoyt, *Federal Gathering of Basic Water Resource Facts*, 3 TASK FORCE REPORT at 1051-94. Hoyt indicates that although there is a need for more data, there may be even a greater need for more qualified persons to evaluate the facts which have been, and are being, gathered.

³⁴ *Ibid.* This recommendation will obviously give Congress closer control over the agencies. It is also more cumbersome, thus perhaps less "efficient."

³⁵ *Id.* at 55.

³⁶ *Id.* at 71. *Quaere* as to whether the Commission considered the entirely different nature of the Corps' huge downstream multipurpose dams, navigation and flood control installations from the Soil Conservation Service's relatively diminutive but numerous upstream flood control dams.

³⁷ *Id.* at 121.

³⁸ *Id.* at 39.

³⁹ *Ibid.*

view of proposed projects will be increased; and (5) a twenty-sixth agency, the Water Resources Board will be created, presumably to work out all of the difficult problems.⁴⁰

The net result is that the Commission has very little to say about one of its major tasks, and has recommended the creation of another agency to which it has bequeathed that task. Apparently this Hoover Commission disapproves of the conclusions reached by the 1947 Hoover Commission.⁴¹

B.

They Do Not Convincingly Settle Policy Problems

If the federal government should assume responsibility in water resource development only when "necessary to further or safeguard the national interest or to accomplish broad national objectives,"⁴² in situations where private or local enterprise will not, it is not at all clear why Congress must also find such projects "economically justified and financially feasible."⁴³ It would seem that whether a project is "essential to the national interest"⁴⁴ would be a sufficient test, and that such a test should override financial and economic aspects. The Commission does not explain why it recommends that any proposed development must pass *both* tests.

Actually, the recommendations do not define the federal role in resource development in terms of economic policy. They favor continued operation of existing facilities, including the power operations, but oppose further federal investment. One might expect economic policy to dictate the federal role along functional lines in the future,⁴⁵ rather than along the lines of a chronological division.⁴⁶ Apparently the reason for this result is that the recommendations are primarily concerned with short-run finances. They ignore (except by unusable generality)⁴⁷ the long-range, future problems of how best to develop and utilize our resources. They do not state a

⁴⁰ Not much help is offered by the Commission, which recommends the creation of the Water Resources Board "without going into details." 1 COMMISSION REPORT at 39.

⁴¹ The Committee on Natural Resources under the 1947 Hoover Commission recommended "the union into a Department of Natural Resources of the Water Development Service, the Forest and Range Service, the Geological Survey, the Bureau of Mines, the National Park Service, the Fisheries Service, the Wildlife Service and the General Land Office. The Department of Interior would cease to exist." TASK FORCE REPORT ON NATURAL RESOURCES at 7 (1949). Each of the enumerated agencies within the proposed Department was itself the result of a regrouping of functions.

⁴² 1 COMMISSION REPORT at 36, Recommendation 1(c).

⁴³ *Id.* at 37, Recommendation 1(f).

⁴⁴ *Ibid.*

⁴⁵ For example, the federal role might be the building of dams, or perhaps the generation of power, and the non-federal role should commence after those functions are performed, at least on particular types of projects.

⁴⁶ That is, the federal government will operate all facilities which it now owns, but will go slowly about creating any new facilities.

⁴⁷ Such as "necessary to further or safeguard the national interest . . ." 1 COMMISSION REPORT at 36, Recommendation 1(c).

basic philosophy on which to base answers to river and land development problems. They are not concerned with such problems as how the nation will provide the food, fibre and energy needed to sustain our population and standard of living in 1975.⁴⁸ By so limiting their scope, they do not consider whether there are social purposes which may justify public investment, or subsidy.⁴⁹ Presumably the proposed Water Resources Board will give some consideration to these problems, but no criteria are suggested to guide it in dealing with the broad policy questions, or to guide Congress in enacting legislation.

V

WITHIN THEIR SCOPE, ARE THE RECOMMENDATIONS RELIABLE
AND HELPFUL?

Although not as broad and comprehensive as might be desired, nevertheless the recommendations do tackle some large problems,⁵⁰ and take some significant positions on those problems.⁵¹ If accepted, they certainly will succeed in a part of the job of clearing the air of controversy and narrowing the areas of dispute. To be accepted, they must be adequately supported by reliable background materials. Those materials are the premises, facts and analyses of the Task Groups and the Task Force, in addition to the Commission's own reasoning.

A.

Are the Premises for the Conclusions on Power Well Grounded?

1. *That the government should not be in the business of producing power.* The Task Group on Power begins with the conclusion: "It is not an Essential Federal Activity to Continue Power Operations in the Future as in the Past."⁵² This conclusion is reached by assuming (1) that most people would agree that it is not "socially desirable" for the federal government to supply a commodity in necessary daily use, like electric energy;⁵³ and (2) that such an activity of the federal government is not "necessary" for the reason that private enterprise and others could perform the function.⁵⁴

⁴⁸ This seemed to Huffman, in his Special Study for the Task Force, *supra* note 8, a rather important problem to be considered in developing policies and programs for our water resources.

⁴⁹ For an excellent and rational statement of the question of subsidy, see that in Special Study by Huffman, *supra* note 8 at 1199. This Special Study for the Task Force seems to have been ignored in large measure in subsequent Task Group, Task Force, and Commission Reports.

⁵⁰ Such as who should develop our water power resources.

⁵¹ For example, that the "preference clause" should be abrogated.

⁵² 2 TASK FORCE REPORT at 288. This is on about the twelfth page of the Report of the Task Group on Power. The prior pages contain an introduction and review of the status and development of federal power.

⁵³ *Ibid.*

⁵⁴ *Id.* at 288-91.

The conclusion that "there is substantial agreement in this country that it is not socially desirable"⁵⁵ for the federal government to engage in power activities is left totally without supporting evidence. Having entered the policy field, it was the business of this Task Group to decide *for itself* whether *it* thought federal power operations were "socially desirable." A very complex national resource is involved, requiring consideration and discussion of many more problems than what the national sentiment is on the issue, and whether private enterprise could do the job.⁵⁶ By fortifying this conclusion only with this guess as to public opinion, the Task Group has left the issue completely in the realm of opinion and controversy.

2. What are "essential" and "necessary" governmental functions? Congress asked the Commission to look for federal activities which might be eliminated because they are not essential or necessary governmental functions.⁵⁷ The Task Group found the problem of applying the statutory test to federal power operations simple indeed: federal power operations are neither "essential" nor "necessary."⁵⁸ But such a simple solution is much too literal to be helpful, and ignores the probable meaning of the words in their factual context.

Using the words in their strict sense, we could follow the Romans who contracted with private entrepreneurs for the collection of taxes;⁵⁹ and we could get along with private roads instead of public road systems; abolish public schools as a function of state governments;⁶⁰ and even follow occasional historical example in relying upon private armies for defense. Perhaps none of these functions which we usually think of as governmental

⁵⁵ *Id.* at 288.

⁵⁶ Such as regional promotion, water supply, pollution, fisheries, fish and wildlife, recreation, land management, reclamation, flood control and navigation and other aspects of obtaining maximum ultimate development. Part of the fault here lies in the fact that some of these considerations were under special study by the other three Task Groups; and part of the fault is that some of these considerations were not of particular interest to any Task Group. Later discussions by this Task Group which touch upon additional considerations (e.g., calculation of costs and benefits of projects; the ability of private utilities to build facilities; whether federal operations result in a profit or deficit) are premised on these initial conclusions which are not reexamined in light of their interrelationships. Developing river basins and water resources can be done in many ways, and by various agencies or entities, but in any event the problems are not simple and cannot be easily isolated.

⁵⁷ 67 STAT. 142 (1953). In reading the statute, and in considering the work of the Commission and Task Force, it should be kept in mind that the law was not directed solely at water resources and power; rather it was directed generally toward an investigation of all governmental activities, of which water resources and power were but one. Hence, it is not necessarily true that Congress was pointing at any particular faults in water resources development in each phrase used in the statute.

⁵⁸ 2 TASK FORCE REPORT at 288-91.

⁵⁹ FRANK, AN ECONOMIC HISTORY OF ROME 139 (1920).

⁶⁰ The current segregation cases may afford us modern experience in the advisability of radical modification of the governmental role in public education.

are strictly "necessary" or "essential" governmental functions, and using the words in the same strict sense the Task Group necessarily finds that federal power operations could be eliminated.

But there are many reasons why it may be desirable or convenient for the government to perform some such functions, *e.g.*, a function may be unprofitable; require too large an investment for private enterprise; be cheaper for the government to perform for itself; require complete governmental control; be operated as a "yardstick" for regulated industries; be for emergency purposes or of a temporary nature; be a customary governmental function; or it may support closely related governmental functions which are unprofitable. On the other hand, there may be very cogent reasons why government operation is undesirable.

In deciding whether federal power operations are "essential" or "necessary," these reasons and considerations relating to desirability need to be discussed. These two words, in this context, mean something akin to "desirable" or "convenient."⁶¹ It is no help to conclude without further discussion that any particular function is not "essential" or "necessary."⁶²

3. Are private utilities "private enterprise"? In the still controversial field of who shall develop our water power resources there is still a question

⁶¹ The United States Supreme Court, which is frequently called upon to construe the meaning of words used in federal statutes, said (per Marshall, C.J.) in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819): "Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing to which another may be termed necessary, cannot exist without the other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful, or essential to another."

"Essential" and "necessary" may be used as words raising questions of degree and balance, according to particular objectives. But the objectives must be defined, probably in terms of balancing governmental responsibilities, duties, expenses, benefits, traditions, customs, and special considerations for the particular subject matter being discussed. Lack of identification of these considerations permits hidden inconsistencies in reasoning and conclusions, and hidden lapses in thinking, all with an apparent sure-footedness.

⁶² The Task Force follows the Task Group into the same failure in 1 TASK FORCE REPORT at 51: "To the extent that they are *essential* to provide for the *national defense*, to *preserve* the *national domain* or to regulate interstate and foreign commerce, the Federal responsibility is basic. Otherwise, the interest of the Federal Government does not justify the preemption of the activities involved in the development of water resources and power." (Emphasis added.) A Task Force footnote defines "basic responsibility" as "responsibility for initiating, administering and paying for conservation and development of water resources."

Now we have not merely the undefined use of the term "essential," but also the undefined use of "national defense," "preserve," and "national domain." Even assuming that "essential" means something akin to its use in a strict sense (for the sake of simplicity), we are now asked to conceive congruently with the Task Force what is "essential to provide for the national defense." Are typewriters and cigarettes so essential? The people working for War Production Board and Office of Price Administration wrestled with such problems and found them difficult. "Essential," in its easily understood sense, is a word which calls for precise scrutiny of a fairly well understood operation. We could tell what is "essential" for painting a barn. "National

whether private utilities should be classed as private enterprise. It is important to classify the utilities because of the principle that the government generally should not compete with "private enterprise." Whichever way they are classified will affect the thinking of persons to whom that principle is predominant. Certainly the utilities are "private enterprise" as distinguished from the government itself; they obviously are not a formal part of the government. But they are not so much "private enterprise" when compared with the auto industry: they are granted a government-guaranteed monopoly protected from competition, are subject to more supervision and regulation by both federal and state governments, have the governmental privilege of eminent domain, and perform a function which is quite frequently performed by local governmental units. For the purpose of eliminating government competition with private enterprise, are private utilities to be classed as "private enterprise"? The Task Group assumes that they are to be so classified.⁶³ But it does not say why. It does not tell what considerations led to that classification for this purpose. Since this classification affects all of the recommendations concerning power generation, transmission and distribution, and since it could not be taken for granted that Congress had already resolved the issue,⁶⁴ this leaves a large area of the reports and recommendations still wide open and unexplained.

defense" is a term which without definition is extremely vague. "Essential to provide for the national defense" involves, at best, the application of a term of scrutiny to an impossibly vague generality. The question remains: essential to what?

It seems unnecessary to carry this discussion into the phrase "*preserve the national domain.*"

This entire meaninglessness is carried right into the Recommendations of the Commission in Its Report to Congress at 36-37, Vol. 1:

Recommendation No. 1

That the Congress adopt a national water policy on the following nine points:

....

(c) That the Federal Government should assume responsibility when participation or initiative is *necessary* to further or safeguard the *national interest* or to accomplish *broad national objectives*

....

(f) That before Congress authorizes . . . Federal participation . . . it should have substantial evidence that the project is economically justified and financially feasible, and that such project is *essential* to *national interest*. (Emphasis added.)

And again, *id.* at 115:

Certainly *nonessential* services and functions are being performed which are "not *necessary* to the efficient conduct of the Government." (Emphasis added.)

⁶³ *E.g.*, 2 TASK FORCE REPORT at 287-88, 291, 305, 313-26.

⁶⁴ Since the act establishing the Commission asks it (among other things) to eliminate unnecessary competition with private enterprise, it could be assumed that Congress suspected the existence of such competition, 67 STAT. 142 (1953). But since the statute is not particularly directed at this Task Group or these reports (which are only one in twenty such Commission projects—see note 57 *supra*), it cannot be assumed that Congress recognized the existence of that evil in this area of the Commission study. See notes 1 and 57 *supra*.

B.

What Evidence Was Relied Upon to Establish the Basic Facts?

The Task Force prints numerous statements by particular individuals (or organizations) about many problems, which statements generally tend to support the conclusions of the Task Force.⁶⁵ These statements were largely taken at the public hearings held by the Task Force (or particular Task Groups) in different parts of the country.⁶⁶ These statements seem subject to the following observations: 1. Most of the statements are directed toward a fairly complicated issue,⁶⁷ but all that is reported are excerpts, quite brief, and sometimes merely a short paraphrase.⁶⁸ It is impossible to tell anything about a witness' competence, background, reasons or thoughts, or even what underlying problems are involved. Most of the statements are statements of conclusions rather than of usable facts or reasons.⁶⁹ 2. Most of the statements appear to be of a self-serving nature. 3. There is no indication that any of the statements were independently verified or otherwise tested for accuracy, reliability or trustworthiness. There was no cross-examination, of course, nor any apparent effort to investigate or even evaluate the declarations made.

C.

Are the Supporting Arguments Persuasive?

1. *Rates for federal power should be comparable to private utility rates.* The Task Group on Power recommends that federal power rates substantially conform to private utility rates.⁷⁰ It assumes that private utility rates are a reasonable and proper standard because such rates must be approved by regulatory commissions whose duty it is to see that those rates are

⁶⁵ 1 TASK FORCE REPORT at 111-226. These statements are interspersed throughout the cited pages, which are entitled: "V. Examples, Facts, and Analyses Behind the Recommendations."

⁶⁶ See extensive and somewhat exhausting itinerary. 1 TASK FORCE REPORT at xvi-xx.

⁶⁷ Some of the issues were complicated from a technological viewpoint, e.g., 1 TASK FORCE REPORT 118: "Robert H. Gerdes, vice-president and general counsel of the Pacific Gas and Electric Co., told the San Francisco hearing that the Department of the Interior's commercial transmission facilities built as part of the Central Valley project are 'totally unnecessary.'" Some of the issues involved difficult decisions on federal power policy, e.g., *id.* at 115: "He [Robert H. Gerdes] said Pacific Gas & Electric also was willing to purchase all existing transmission lines, switchyards and substations of the Central Valley project at their present value, and to dispose of all project power through the company system."

⁶⁸ Of course the Task Force could not print the entire transcripts in this report. But if the Task Force was merely sampling public opinion on complicated issues, a statistical breakdown would have been helpful, along with an explanation of the sampling technique. Or, on the other hand, if it was gaining valuable information on complicated issues, the appearance of the Task Force's evaluation and analysis would have been helpful.

⁶⁹ The same comments apply as in note 68 *supra*.

⁷⁰ Thus, it was stated in 2 TASK FORCE REPORT at 309: "More specifically, rates for Federal power should be set at not less than the current cost of developing equivalent power by the most economical means by privately owned utilities in the region." See also *id.* at 296 and 1 TASK FORCE REPORT at 56-57 for similar statements.

reasonable and proper.⁷¹ In recent times private utilities have earned a return of 5.6 per cent to 6.9 per cent after taxes.⁷²

Whether reasonable and proper rates for private utilities are also reasonable and proper for federal power is a question not discussed. But if federal rates should follow reasonable and proper private rates, according to the Task Group assumption, there should be an adequate analysis of why private utility rates are reasonable and proper for private utilities. No consideration is given to the standards used by any of the multifarious regulatory commissions, nor to the adequacy of private utility accounting practices or rate bases. Notwithstanding these omissions, the Task Group conclusion may be true, but the omission of supporting considerations will leave many people unconvinced. It would seem elementary that if one argues that a subject under discussion should be operated in accordance with a particular model, then he must first demonstrate the virtues of that model.

Moreover, the fact that federal power operations are almost entirely wholesale is not given special consideration in connection with rates, except in calculating the tax component upon generating and transmission operations.⁷³ The Task Group analysis is that nonpayment of taxes (and lower interest) by federal facilities causes the spread between private and federal rates. But by being strictly a wholesaler, the federal government has fewer customers, all of them large consumers, and avoids such expenses as hiring people to read meters at residences, billing and collection costs, much clerical and administrative overhead, all local transmission and distribution lines and facilities, etc. Since these items are omitted from the Task Group discussion, it is impossible to tell whether its analysis is adequate.

2. Federal power operations should pay federal, state and local taxes (or make payments in lieu thereof).

There is no economic nor social reason nor reason in equity why all customers of Federal power should not pay in their rates their fair share of the costs of state and local governments.⁷⁴

⁷¹ This assumption appears in 2 TASK FORCE REPORT at 290. There is no acknowledgment of the great variety of utilities commissions, nor the differences between the commissions in different jurisdictions.

Utilities regulating bodies should be effective in protecting the public if the public takes responsibility and interest in the utilities commissions. This is one of a great many interests in the community-civic affairs, community chests, charities, health organization, youth organizations, national and international affairs—which an alert and public-minded citizen should have, in addition to his own business or employment. All of these affect him. The private utility which has to live with the commission makes that a paramount interest; it is its business to take an interest in appointments and decisions of utilities commissions. Perhaps, since public attention has not been drawn to utilities commissions in particular of late, it could be assumed that they are doing their jobs fairly satisfactorily. But this looks like a matter to which a Task Force investigating power policy should give consideration, prior to reaching conclusions.

⁷² See 2 TASK FORCE REPORT at 290.

⁷³ Which appears in 2 TASK FORCE REPORT at 295. The wholesale nature of federal operations is mentioned descriptively in other connections, but not in the discussion of rates.

⁷⁴ 2 TASK FORCE REPORT at 296.

The same conclusion is reached in the same terms, with respect to the payment of federal taxes.⁷⁵ Both statements are truisms, and beg the question: What is "their fair share"?

Merely saying that there are no good reasons is no way to settle a controversial subject matter. These conclusions are supported only by the opinion of the Task Group and Task Force as to the "fairness" of the policy, and a brief statement that it results in lower power rates which are "subsidized" by the other taxpayers.⁷⁶ But whether recipients of federal power receive an "unfair" benefit or are "subsidized" requires a discussion of some of the "economic," "social," and "equity" factors alluded to in the conclusion.⁷⁷ In the absence of such discussion, the question simply remains unsettled.

3. Federal power operations result in a deficit. The Task Group on Power has demonstrated that instead of a claimed profit, federal operations have in fact resulted in a deficit of \$332 million since beginning operations.⁷⁸ The word "deficit" and its companion "subsidy" are used in a relative sense, which should be understood. The federal operations have (1) earned interest during construction and ever since at 3 percent per annum on the investment; (2) amortized or depreciated all capital investments over a 50-year period (or in the case of steam plants, 35 years) which is considered to be not longer than their useful life; (3) paid all operating expenses; (4) provided for all interim replacements; and (5) returned \$194 million to the Treasury,⁷⁹ which is about a 4 per cent return. But if they had paid state, federal and local taxes (as figured for private retailers of power)⁸⁰ in the

⁷⁵ *Id.* at 295.

⁷⁶ In 2 TASK FORCE REPORT at 294-99 there appears a discussion which is largely a repetition of that in 1 TASK FORCE REPORT at 156-59. These short discussions have already assumed premises, and consist chiefly of conclusions, which is one reason that such a topic can be so briefly handled.

⁷⁷ Some such factors might be the public interest in regional promotion; whether federal taxpayers should permit their property to pay local and state taxes in addition to the direct economic benefits which those localities and states obtain from federal development; whether there is a public interest in simply developing national resources by public agencies; whether using the revenue from power to support reclamation and other purposes is a sufficient drain on public power revenues, without adding the drain of taxation; etc.

⁷⁸ 2 TASK FORCE REPORT at 404 *et seq.*, 379 *et seq.*

⁷⁹ These conclusions are all derived from Table A-22, *id.* at 379.

⁸⁰ As pointed out in the dissent of Commissioner Holifield, 2 COMMISSION REPORT at 78-79, the Commission used tax payment figures taken from retail utilities, whereas it might have been much more pertinent to have taken the tax payment figures from utilities which perform principally a wholesale function. According to Holifield, this would result in a very substantially lower tax burden.

amount of \$527 million, there would have been a deficit of \$332 million. Note that the federal taxpayer would not have received the entire \$527 million, because a part of this sum would have gone for state and local taxes. But he would have received more than the \$194 million which he got, and therein lies the deficit.⁸¹

But what of the long run? Within 50 years after construction (35 years for steam plants) the investment on any particular project is paid off, and there is no more interest on the debt. It may be proper to cease charges for depreciation or amortization, at that time, when considering long-run economics. The Commission and Task Group most certainly should have taken the "long run" into consideration in a report which it hoped would have much influence in shaping future federal power policy, particularly since they are in disagreement with a Special Study which was prepared for them at their request.⁸²

4. *Private utilities are better able to meet power needs than federal power—a hasty conclusion.* The Task Force Report states:⁸³

At present the only areas in the country where serious electric power shortages are anticipated in the future are those areas where the Government's power activities have become so dominant that the normal local non-Federal utilities have not been in position to function as in the rest of the country.

This conclusion overlooks the effect of lower federal power rates and the greatly accelerated industrial expansion (particularly of aluminum and atomic energy) where the government stepped into areas which had a paucity of power, with massive developments which were beyond the capacity of private utilities when the principal federal facilities were built.⁸⁴ The conclusion also needs to be reconciled with the spectre of ever expanding and rapidly growing federal power operations. This spectre appears in all of

⁸¹ This technique is somewhat like setting up a special standard and then whatever falls short of that standard is a "deficit." But on the other hand, there is no denying that the taxpayer would receive more if federal power rates were as suggested by the Commission, and the same volume of power sale continued.

⁸² See Special Study by Page, *Patterns of Federal-Non-Federal Partnership in Water Resource Development*, 3 TASK FORCE REPORT at 1669: "Non-Federal development of revenue-producing projects offer some prospects for short-term elimination of potential Federal budget items, but no long-term relief is accomplished since these projects are self-liquidating. There is a chance that tax burdens may be indirectly increased since power subsidy of other developments would be lost, and since non-Federal developers must be expected to exert pressure on the cost-allocation mechanism so as to have the Federal Government shoulder higher costs for the non-revenue elements in dams which it finances. Consumers pay the entire costs, no matter what method of financing is used."

⁸³ 1 TASK FORCE REPORT at 202.

⁸⁴ That private enterprise was unable to finance such developments during the '30s, see 1 COMMISSION REPORT at 119.

the reports dealing with power.⁸⁵ The quoted conclusion carries no weight because it is completely lacking in analysis. It was an unnecessary conclusion, and its appearance is most unfortunate because it can be used to reflect upon the reliability and rationality of other conclusions contained in the report.

5. *The preference clause produces discrimination between States.* Most of the federal statutes dealing with power provide for a preference to public bodies and cooperatives in the sale of federal power.⁸⁶ In discussing this policy, the Commission uses as its primary illustration and concluding argument:⁸⁷

The preference clause has resulted in serious inequities and discrimination between the citizens of the various States. Thus, as of 1953, Washington, in which State there are numerous preference customers, received almost 85 percent of the Federal power produced by the Columbia River projects, and Oregon, where private power enterprise in power distribution is more prevalent, received less than 15 percent.

The Bonneville Power Administration reports⁸⁸ that for the year 1953 the distribution of power, by class of customer, was:

Customer class:	kwh (thousands)	Percent
Industry:		
Aluminum	6,546,677	40%
Other*	1,947,129	12%
Publicly owned utilities	5,110,297	31%
Privately owned utilities	2,789,175	17%
Totals	16,393,278	100%

* Includes federal agencies.

Whether or not the regional distribution is 85 per cent to Washington and 15 per cent to Oregon, it most certainly is of grave concern that the Commission attributes this "discrimination" to the preference clause, in an attack on that clause. The failure to note the consumption by aluminum, or that 57 per cent or more⁸⁹ of the power is taken by non-preference customers, without explanation of the omission, or of the analysis, is indefensible.

6. *Reclamation projects are not economically justifiable.* The primary illustration used by the Commission in reporting to Congress "Excessive Esti-

⁸⁵ E.g., 1 TASK FORCE REPORT at 9-10 (Report of the Task Force), and at 304, 337 (Report of Task Group on Power). See also 1 COMMISSION REPORT at 90.

⁸⁶ See, e.g., Act of May 18, 1933, 48 STAT. 58, 64; Act of December 22, 1944, 58 STAT. 887, 890; Act of June 18, 1954, 68 STAT. 255, 256.

⁸⁷ 1 COMMISSION REPORT at 112.

⁸⁸ Taken from U.S. DEP'T OF THE INTERIOR, BONNEVILLE POWER ADMINISTRATION REPORT 23 (1954).

⁸⁹ Depending upon how many in the "other industry" classification are non-governmental.

mates of Benefits"⁹⁰ in connection with reclamation is that some reclamation projects cost \$509 for each acre benefited, although the land would not be worth more than \$150 per acre after the benefit.⁹¹

The difficulty with using land-value figures for determining economic soundness is that they are not sufficiently relevant. Certainly they have some relevancy,⁹² but they need considerable background explanation which is lacking in the reports, and the Commission could have demonstrated lack of economic justification more convincingly and with more precision. It is suggested that increased productivity is a more relevant test.

If a \$509 per acre investment in a reclamation project may last as long as 50 years, then the annual cost of the improvement is about \$10 per year, plus maintenance, repair, operation and interest. The over-all annual costs might total \$15, for example. Now then, if the project results in increased productivity of only \$10 per year, the lack of economic justification is more clear; whereas if it results in increased productivity of \$20 or more per year, then the lack of economic justification has not been proven. This technique amortizes the cost of the project over its useful life, during which the land is expected to benefit from the project.

When a business is deciding on making capital improvements, the issue is whether the new plant or machinery will return its cost and sufficient profit over its useful life.⁹³ The improved value of the land is not ordinarily a primary consideration, and is not at all an easy figure to use without a good deal of background which will enable a person to fully understand its relevancy.⁹⁴ As a result of its unexplained use in the Commission Report, the extent of, and even the fact of, economic unsoundness is not clear.

7. Costs on reclamation projects are underestimated. The Commission reports that costs of reclamation projects have exceeded their cost estimates enormously: 343 per cent in one group of projects; and 192 per cent in

⁹⁰ 1 COMMISSION REPORT at 21.

⁹¹ *Ibid.*

⁹² Certainly land values should to some extent reflect productivity. But before one can rely upon a rule-of-thumb as to a ratio between land value and project justification, he needs to know something about local market conditions, and to just what extent the land value does reflect productivity. This may take him into a study of regional attractiveness, and agricultural economics.

From the taxpayer's point of view, it will make a big difference whether the newly irrigated land will produce surpluses which the taxpayer must purchase but not use, or will produce other commodities; or whether supplemental irrigation will permit the farmer to diversify and produce useful crops instead of just more of his prior surpluses for the taxpayer to buy. (As to this last consideration, we are told in 2 TASK FORCE REPORT at 635: "With the possible exception of cotton, there are no significant surpluses of agricultural commodities produced on irrigated land in the West.")

⁹³ DEAN, CAPITAL BUDGETING 20-27, 34-35, 121-27 (1952).

⁹⁴ See note 92 *supra*.

another.⁹⁵ One has to turn to another section of the report,⁹⁶ or back to the Report of the Task Group on Reclamation⁹⁷ to find information which throws light on these figures. It appears that:

- [a.] [A]ll of the 21 successful projects started between 1902 and 1910 were under construction more than 22 years, and 7 more than 40 years.⁹⁸
- [b.] Of the 10 successful projects initiated between 1911 and 1932, construction periods varied from 2 to 22 years, 8 being over 10 years.⁹⁹
- [c.] The 34 projects authorized between 1932 and 1942 varied greatly in length of construction stage, 17 were incomplete in 1952, 2 had been completed 2 years, 11 were under construction 14 years or more. Most of the remaining projects were, or had been, under construction from 6 to 8 years.¹⁰⁰
- [d.] Of 20 projects authorized between 1943 and June 30, 1952, only 16 are, or had been, placed under construction, of which 9 have been completed. Construction periods ranged from 1 to 5 years on completed projects.¹⁰¹

This information places an entirely different light upon those "excessive cost" percentage figures, rendering them quite useless. Such use of figures is deceptive for its failure to point out the effect of (1) increase in price levels;¹⁰² and (2) project modifications, alterations or extensions resulting from changes in population, technology, consumer demands, etc., during these lapses of time. The Commission has utilized a half-truth.

The Commission may be right that there is a shocking excess of cost over estimates. And it may be that the causes of increase in cost should not ameliorate our condemnation of that excess, or of the underestimation. But failure to present the whole story weakens the Commission's presentation, and tends to divert attention from the merits to the Commission's procedures.

CONCLUSION

The reports do not adequately include considerations other than power, reclamation, flood control and navigation—the divisions of the Task

⁹⁵ 1 COMMISSION REPORT at 20.

⁹⁶ *Id.* at 48, but which is not tied into the percentage figures.

⁹⁷ 2 TASK FORCE REPORT at 677-85.

⁹⁸ *Id.* at 657.

⁹⁹ *Ibid.*

¹⁰⁰ *Id.* at 659.

¹⁰¹ *Id.* at 659-60.

¹⁰² In connection with some Corps of Engineers' projects the Commission states that "only 57 percent of the increase could be attributed to soaring prices." 1 COMMISSION REPORT at 20. It omits the balance of the percentages: 17.6% for authorized project extensions; 4.1% for changed local needs; 6.3% for structural and engineering modifications; 8.5% for unforeseen conditions; and 5.8% for inadequacies of estimates. 1 TASK FORCE REPORT at 130. The omission of the balance of the percentage figures in the Commission Report leaves the inference that the entire balance was attributable to inadequacies of estimates.

Groups. Although the Recommendations tackle some broad policy questions, they are neither sufficiently comprehensive and well integrated among themselves nor well supported by the underlying materials. Hence, they will be difficult for Congress to use in developing an integrated water resources policy and program.

There is much good material in these reports, particularly in the Special Studies which contain some very good and impressive studies and discussions of particular aspects of our resources problem. Many of these studies give clear evidence that their authors have had many years of familiarity with water and land development problems.

The conclusions and recommendations may or may not prove to be for the best. Merely because they are not adequately supported by background analysis does not disprove them. But such lack of support results in a failure to contribute toward a clearing of the air; a failure to state persuasively the issues and considerations so as to make progress toward a nonpartisan approach and a narrowing of the controversies.