

CHAPTER 1

THE FEDERAL RESPONSIBILITY IN WATER RESOURCES

1-1. General. The Constitution of the United States limits the authority of the Federal Government to those powers expressly delegated or as may reasonably be inferred from those granted. All other powers belong to the states or the people. Regardless of the character of Federal undertakings, enabling authority must be found among the powers conferred upon the Federal Government by the states. Over the years the Congress has enacted large amounts of legislation in accordance with those powers to define the Federal responsibility.

1-2. Federal Powers. Legislation which has been passed to define the Federal role in water resource development is in conformance with the following delegated powers.

a. Commerce Power. Federal commerce authority includes navigation, and Congress has jurisdiction over all navigable waters of the United States. This power may be extended to non-navigable waterways and tributaries if the navigable capacity of the navigable waterway or interstate commerce is affected.

b. Proprietary Power. The Property Clause of the Constitution, entrusts Congress with unlimited authority to control the use of Federal public lands. This power is the basis for the 1902 Reclamation Act and provides the authority to sell power generated at Federal dams.

c. War Power. The scope of this power in relation to water resources is largely unexplored by the judiciary. However, the Court has found that the Wilson Dam on the Tennessee River was constructed in the exercise of war and commerce powers.

d. Treaty-Making Power. This power has importance, particularly on international streams. Important functions with respect to international streams have been vested in international agencies created pursuant to the provisions of treaties. This power is also the basis for treaties with Indian Tribes through which certain rights to use of water have been reserved.

e. General-Welfare Power. This power must be exercised for the common benefit as distinguished from some mere local purpose and provides sufficient power for many large-scale water resource projects and other internal improvements.

f. Judicial Power. Using this power the Supreme Court has applied the principles of equitable apportionment to resolve disposition of water controversies between states.

g. Compact Power. This power provides that no state may enter into an agreement with another state without the consent of Congress.

1-3. The Navigation Servitude. This sovereign power allows the Government to use lands under navigable waters for navigation related purposes without payment under the Fifth Amendment. The power includes the right to remove any structures within the servitude. The navigation servitude is derived from rights recognized under Roman civil law and English common law for the public to use navigable

waterways without payment, despite the private ownership of the bed or bank. The navigation servitude was incorporated into United States law as part of the Commerce Power under the U.S. Constitution. Hence, in exercise of Congress' power over navigation stemming from the Commerce clause of the Constitution, no further Federal real estate interest is required for navigation projects in navigable waters below the ordinary high water mark. Further, the courts have also generally held that, under the navigation servitude, claims of consequential damages arising from Federal development for navigation, with respect to property values or otherwise, are not compensable. However, Congress has, to a degree, foregone that advantage through what some may view as a definition of compensation for Federal real property acquisitions (Section 111, Public Law 91-611, 31 December 1970) and the definition of non-Federal sponsor cost-sharing requirements (Title I of Public Law 99-662, 17 November 1986).

1-4. Sharing of Responsibility. In authorizing Federal participation in water resource development projects Congress seeks to maintain a reasonable balance between the powers of the Federal Government and those retained by the states, local governmental entities, and private enterprise. Many of the laws which Congress has enacted permit Federal agencies to exercise latitude in developing plans which must be specifically authorized by Act of Congress before they may be carried out. This latitude requires that the responsible Federal agency recommend to Congress, for each project or program planned, a division of responsibility between Federal and non-Federal entities. This division of responsibility should represent a reasonable balance between what the Federal Government should undertake and what should be left to non-Federal interests. Arriving at that division requires careful consideration of indicators of Congressional intent, as well as the principles and policies spelled out by the legislation authorizing the agency to propose projects and programs.

1-5. Degrees of Federal Responsibility. Acts of Congress, and interpretations thereof by the Supreme Court, clearly indicate that the Federal Government may participate to some degree in all aspects of water and related land conservation, development, and management. However, the degree of Federal participation and financing is not the same for all purposes. Also participation varies between planning, construction, and operation and maintenance activities. Federal participation in planning, construction, and operation or maintenance activities is guided by careful consideration of applicable precedent and law; the likelihood of widespread and general benefits; local ability to solve problems; and savings to the Nation that might be achieved by meeting needs through economies of scale.

1-6. Dynamic Nature of Federal Policy. Legislative enactments reflect both long- and short-range National priorities and require progressive adaptation. Rigid policies are undesirable when dealing with resources which affect the well-being of our people, and which have broad economic, environmental, and social implications. Changing technology and public priorities require flexible policies and informed leadership to meet urgent needs and to assure the welfare of future generations. Unusual and unique circumstances may present a valid basis for exceptions to existing policies. However, approval of departures from established Corps policies is not a delegated authority. Reporting officers must request special guidance in such circumstances. The Chief of Engineers will consult with higher authority when necessary.