UNITED STATES

# Memorandum

September 25, 1981

B-198376, B-198377, B-198378-O.M.

TO: Director, CEDD - Henry Eschwege

FROM: Acting General Counsel - Harry R. Van Cleve


SUBJECT: Review of Federal Water Marketing Practices: B-198376, B-198377, and B-198378-O.M.

Incident to your division's assessment of the Federal Government's water marketing practices, we received several requests for legal opinions. The requests were submitted in connection with three CEDD audit studies: "Legal Requirements, Cost Allocations, and Water Subsidies" (Code 085540), B-198376; "Uncontracted Federal Water and Marketing Alternatives" [Code 85550) B-198377; and "Evaluation of Water Pricing and Rate Making Techniques" (Code 085530), B-198378. Questions relating to the legal basis of the irrigation subsidy which were asked in connection with the study of "Legal Requirements, Cost Allocations and Water Subsidies" were answered in a separate memorandum, B-198376-O.M., July 10, 3981. Other questions submitted in connection with the three studies are answered in this memorandum except for those questions which have been dropped as no longer necessary to your staff's reviews.

## Interest

Question 1 (question 1, code 085550). May interest be charged on capital costs originally allocated to irrigatioc. if the water or storage space is actually used by industrial consumers? Answer: *Yes.*

In answering this question, the relevant statutory provision is § 9(c) of the Reclamation Project Act of 1939 (1939 Act), 43 U.S.C. § 485h(c) (1976).

Under the above section of the 1939 Act, the Secretary of the Interior (Secretary) is authorized to furnish water for "municipal water supply or miscellaneous purposes * * *." It is understood, though not made explicit, that miscellaneous purposes include domestic and industrial supply. 2 Waters and Water Rights § 122.2 at 246 (R. Clark ed. 1967) (Clark). See also the Act of June 21, 1963, Pub. L. No. 88-44, 77 Stat. 68, in which Congress expressly authorized the renewal of contracts previously made by the Secretary under the 1939 Act for "municipal, domestic, or industrial water supply." 43 USC § 485 h note

In marketing water from reclamation projects for municipal and industrial purposes (M&I), two main types of contracts are used: a repayment-type contract under § 9(c)(1), requiring fixed periodic payments

over a period of years, and a water service-type contract under § 9(c)(2), requiring periodic payments based on a charge per acre-foot of water used during the period, but with certain minimum payments. Subsection 9(c) of the 1939 Act provides as follows:

> "The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: Provided, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3 1/2 per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year * * * . No contract relating to municipal water supply or miscellaneous purposes * * * shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

It is important to note that amounts payable to the Government for interest, any type of O&M charges, and certain other charges are excluded from the definition of "construction charges." 1939 *Act* § 2(d), 43 U.S.C. § 485a(d) (1976).

A review of the legislative history of § 9 of the Act shows that the Secretary was meant to have brqad powers of allocation of the costs between irrigation, power, and miscellaneous purposes. Letter from Acting Secretary of the Interior to President of the Senate (June 9, 1939) in S. Rep. No. 758, 76th Cong., 1st Sess. 4, 6; Reclamation Act of 1939% Hearings on H.R. 6773 before the House Comm. ,on Irrigation and Reclamation, 76th Cong., 1st *Sess.* 26, 34 (1939) (statement of John C. Page, Commissioner, Bureau of Reclamation). (It should be noted that § 9(c) of H.R. 6773 was identical in wording to § 9(c) of H.R. 6984, 76th Cong. 1st *Sess.* which became § 9(c) of the 1939 *Act.)* See also letter from Comptroller General to the Honorable Abraham Kazen, Jr., E?-196345, May 1, 1980, which acknowleges the Secretary's broad power of allocation in the context of the power preference clause of § 9(c).

Thus, in contracting for M&I supplies under § 9(c)(1), the Secretary may make a contract requiring repayment in a maximum of 40 years at interest not exceeding 3 1/2 percent if he deems an interest charge to be proper. Alternatively, under § 9(c)(2), the Secretary may contract to supply water for periods not exceeding 40 years at rates at least sufficient to produce revenue adequate to cover an appropriate share of annual O&M costs and an appropriate share of such fixed charges as the Secretary deems proper.

Interest is not explicitly provided for under § 9(c)(2), and "fixed charges", probably refers primarily to construction costs (which if deemed to be the same as "contruction charges" would exclude interest), see Clark § 122.2 at 246-47, but see Memorandum of Chief Counsel Fix to Commissioner, March 26, 1947 (interest is one of the items which may be properly included within the classification of "fixed charges"), and Memorandum of Associate Solicitor, Energy and Resources to Commissioner, October 15, 1980, (§ 9(c)(2) authorizes Secretary to include interest among the fixed charges to be recovered by payment of the water service rate). It is within the Secretary's broad discretion to determine what an "appropriate share" of these fixed charges would be as well as to include interest as a fixed charge.

Based on the foregoing, the Secretary has the authority to include interest in contracts for M&I water supplies. However, under § 9(c)(1) he is not required to do so. (See question 3 C.) The fact that the water supply was reallocated from irrigation use rather than being originally allocated to industrial use does not preclude the Secretary from including interest in the repayment contract, since such action would reflect the actual use of the water. See our answer to question 10, below. Accordingly, we conclude that under the 1939 Act, § 9(c) interest may be charged on capital costs originally allocated to irrigation where the water or storage space is actually used by industrial consumers.

Question 2 (question IB, Code 085530). What is the appropriate authority for computing the rate for interest during construction and repayment of the M&I function of the Central Valley Project (CVP) for contracts entered into under the Reclamation Project Act of 1939, § 9(c)(2)? Answer: The Secretary has complete discretion to determine the applicable rate of interest, in the absence of a provision in a specific project's authorizing legislation.

Section 9(c)(2) gives the Secretary discretion to: (1) determine the time period for which the Government will contract to supply water, with a maximum of 40 years; (2) determine the service rate to be charged for the water supplied, as long as the rate covers an appropriate share of the annual O&M cost; and (3) determine the propriety of including fixed charges in the water service rate, and what those charges will be.

The water service rate which the Secretary adopts is to reflect to some degree the Government's reimbursable costs for the water project, including the cost of borrowing money for construction and to operate and maintain the facility after it is in operation. Therefore, the Government may charge the water user, as a reimbursable cost, the interest on money borrowed for those purposes. It is not clear, however, at what rate interest may be charged, because S 9(c)(2) does not set a specific interest rate nor explicitly require the repayment of interest charges.

According to Interior, the water service rate for M&I purposes under § 9(c)(2) should be equivalent to the cost of the service received, including appropriate interest on the investment. This would allow the Secretary to assess a financing interest rate on this investment and include that rate in the "fixed charges" component of the water service rate equation. "Fixed charges" probably refers primarily to construction costs (which if deemed to be the same as "construction charges" would exclude interest). See Clark § 122.2, at 246-47, but see memorandum of Chief Counsel Fix to Commissioner, March 26, 1947 (interest is one of the items which can be properly included within the classification of "fixed charges"). Nevertheless, it is within the Secretary's discretion to decide what an "appropriate share" of these fixed charges would be. The Supreme Court has held that under § 9(c) of the 1939 Act the authority and discretion to fix rates covering municipal water service was delegated to the Secretary and it is within his power to determine the appropriate charge.. City of Fresno v. California, 372 U.S. 627, 631, (1963).

The legislative history of the 1939 Act does not to indicate what Congress thought to be a desirable interest rate. Possible guidance appears in § 9(c)(1) of the 1939 Act and in the Water Supply Act of 1958 (1958 Act), 43 U.S.C. § 390b (1976). Section 9(c)(1) in marked contrast to § 9(c)(2) which is silent on the subject, provides for fixed repayment contracts "with interest not exceeding the rate of 3-1/2 per cent per annum if the Secretary determines an interest charge to be proper * * *." In entering water service contracts under § 9(c)(2) the Secretary does not appear to be limited to the 3 1/2 percent interest rate prescribed in § 9(c)(1). The two provisions take different approaches. The interest rate provided in § 9(c)(1) is for the repayment of an appropriate share of construction charges, while a § 9(c)(2) contract is a service contract concerned with establishing a rate reflecting an appropriate share of the cost of operating and maintaining the facility and such fixed charges as the Secretary deems proper. Congress could have included specific authority to charge a maximum of 3 1/2 percent interest for service contracts under § 9(c)(2), but chose not to.

The 1958 Act, which may be used by Interior for M&I purposes as an alternative to the 1939 Act, provides the following formula for repayment of interest for water supply contracts, 43 U.S.C. § 390b(b):

> "The interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue."

The interest rate to be used for computing interest during construction and on the unpaid balance of the costs of the project allocated to municipal water supply is similar to that in the 1958 Act and in subsequent Acts authorizing the Secretary to construct, operate and maintain reclamation projects for purposes which include furnishing M&I water supplies. For example, Pub. L. No. 90-503, § 2(b), September 21, 1968, which authorizes the Secretary to construct, operate and maintain the Mountain park reclamation project in Oklahoma, provides:

> "The interest rate used for computing interest during construction and interest on the unpaid balance of the costs of the project allocated to municipal water supply shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is commenced, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations which are neither due nor callable for redemption for fifteen years from date of issue, and by adjusting such interest rate to the nearest multiple of one-eighth of 1 per centum if the computed average interest rate is not a multiple of one-eighth of 1 per centum."

See also Pub. L. No. 90-562, § 2(c), October 12, 1968 (Palmetto Bend Project, Texas); Pub. L. No. 89-596, § 4(b), September 20, 1966 (Tualatin Project, Oregon). Pub. L. No. 89-292, § 2(b), October 22, 1965 (Southern Nevada Water Project) makes Congress' preference even clearer by providing, that project costs allocated to M&I water supply shall be repayable under either the provisions of the Federal reclamation laws or the 1958 Water Supply Act, but, in either case, repayment of such costs shall include interest on the unamortized balance of such allocations at a rate equal to the average rate paid by the united States on its marketable long-term securities on the date of this Act, with adjustment to the nearest one-eighth of 1 percent.

These project authorization Acts indicate that the Congress has decided that the formula for determining interest rates set forth in the 1958 Act is preferable for at least some water service contracts (and

fixed repayment contracts). The 1939 Act, however, does not establish a standard for determining the interest rate to be charged on M&I water service contracts generally. Accordingly, under the 1939 Act this charge is left to the discretion of the Secretary. However, the Congress may specify a particular interest rate in authorizing legislation for a specific project.

Question 3 (question 4, code 085540) A. Although the 1958 Act states that it is an alternate to and not a substitute for the 1939 Act is it legal for the Secretary of the Interior to limit the interest rate in contracts under the 1958 Act to 3 1/2 per cent, in accordance with the 1939 Act, if tbe interest rate computed under the provisions of the 1958 Act would be higher than 3 1/2 per cent, especially when interest rates are at such high levels? Answer: No, unless the specific project Act gives such authority.

Under § 9(c)(1) of the 1939 Act, the interest rate to be charged is not *to* exceed 3 1/2 per cent for fixed repayment contracts while under § 9(c)(2) for water service contracts, the rates are at the Secretary's discretion. Under the 1958 Act, § 301(b), the interest rate is to be—

> "* * * determined by the Secretary of the Treasury, as *of* the beginning of the fiscal. year in which construction is initiated, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable obligations, which are neither due nor callable for redemption for fifteen years from date of issue. The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be an alternative to and not a substitute for the provisions of the Reclamation Project Act of 1939 (53 Stat. 1187) relating to the *same* subject."

As indicated in our answer to the second part of this question, below, the 1958 and 1939 Acts provide separate and distinct authorities to Interior *for* M&I water supply. It follows, therefore, that the interest rate provision specified for each respective Act is controlling for a project constructed under that Act. Accordingly, *the* interest rate for a project constructed under the 1958 Act must be based on the Treasury rate for marketable obligations as specified in §301(b). In cases where the authorizing Act for a project permits construction under either authority, the rate of interest to be charged under that authority may be a factor in making a choice. Some individual project Acts may grant additional authority to Interior to vary the rate of interest to be charged.

B. Does the combination of the 1939 Act and the 1958 Act give the Secretary the authority to charge interest rates ranging from the maximum

under the 1958 Act to the minimum (zero) under the 1939 Act? Answer: The Secretary has to elect one Act or the other, and charge the rate which is applicable to the alternate selected.

The combination of the two Acts does not give the Secretary the authority to charge interest rates ranging from the maximum under the 1958 Act to the minimum under § 9(c)(1) of the 1939 Act. Each statute states what interest rates are applicable to the project it governs. The 1958 Act is a separate and distinct authority from the 1939 Act and each governs the projects it addresses. Environmental Defense Fund, Inc. v. Morton, 420 F. Supp. 1037, 1044 (D. Mont. 1976). Thus, depending on what project is involved, and which authority was elected, interest rates are determined by the applicable law, not a combination of laws.

C. Does the Secretary have to charge interest on the municipal and industrial investment? Answer: No, under the 1939 Act. Yes, under the 1958 Act.

The Secretary does not necessarily have to charge interest on the M&I investment. Under the 1939 Act, there are both repayment and water service contracts. The Secretary need not charge interest or a particular rate for either type of contract. Section 9(c)(1) which governs fixed repayment contracts, states that interest can be charged "not exceeding the rate of 3 1/2 per centum if the Secretary determines an interest charge to be proper * * *." (Emphasis added.) Obviously, he retains discretion to determine that such a charge is not proper. As to water service contracts, § 9(c)(2) does not specify that interest is to be charged. The amount of such interest, if any, to be incorporated in water rates is at the Secretary's discretion (see Question 2). Under the 1958 Act, however, there is no discretion as to the interest rate to be charged for projects developed under it.

Question 4 (question 9, Code 085540). The authorizing legislation for the Colorado River Basin Project (43 U.S.C. § 1501, et seq.) states:

> "The interest rate applicable to those portions of the reimbursable costs of each unit of the project which are properly allocated to commercial power development and municipal and industrial water supply shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which the first advance is made for initiating construction of such unit, * * * ." 43 U.S.C. § 1543(h).

There are currently two conflicting Interior Solicitor opinions as to how the interest rate provision should be applied to units of the Central

Arizona Project (CAP) which is part of the Colorado River Basin Project (CRBP). The Associate Solicitor, Energy and Resources thinks that the CAP is a unit of the CRBP and all features of the CAP, even though they will be constructed in phases over a long period of time, should bear the same interest rate (which is quite low).

The Assistant Solicitor, Audit and Inspection, thinks that each feature of the CAP is a unit and the interest rate should be computed at the start of construction of each feature. Your staff states that if such were the intent of the Congress, the Government would collect about $175 billion in additional revenues.

Can the more flexible (advantageous to the U.S. Government) interest rate provision be applied? Answer: yes.

If the Secretary of the Interior chose to do so, he could consider a "unit" to be some subpart of CAP so that different interest rates would be applicable to each unit, based on the date of initial construction of each unit. However, we cannot say that the CRBP Act requires the Secretary to do so.

We are unable to state definitely what the Act meant by the word "unit" because, as the Solicitor opinions referred to above indicate, the Act and its legislative history point in two directions. On the one hand, a good case can be made that the CAP is a unit of the CRBP. On the other hand, there is an equally good argument that the term "unit" refers to some subset of the CAP. This subset might be a "feature" of the CAP, or it might be a grouping of features or elements which the Secretary of the Interior considers to be a logical unit for purposes of repayment and cost allocation.

Because the Act and its legislative history are ambiguous, we agree with the January 30, 1980, opinion of the Assistant Solicitor, Audit and Inspection, that the Secretary of the Interior has discretion to resolve this ambiguity. We think that the Secretary should either treat each feature as a unit, or designate a number of larger groupings as units of the CAP. As between these two alternatives, we think there is more support for the latter since, in other reclamation Acts, a "feature" or "work" is usually treated as part of a unit, rather than as a unit itself. See, e.g., Reclamation Project Act of 1939, §2(c),(h),(i); 43 U.S.C. §485a(c),(h),(i) (1976).

In summary, we cannot say with certainty what the Act requires. We think the Act permits several interpretations of the word "unit", and we would not object to your making recommendations along the lines of those in the January 30, 1980, opinion of the Assistant Solicitor, Audit and Inspection.

Question 5, (question IIA, Code 085530). The Water Supply Act of 1958 states that interest during construction and interest on the unpaid balance shall be at the Treasury rate as of the beginning of the fiscal-year in which contruction is initiated. What did Congress mean by "in which construction is initiated?" Answer: We are not sure. The Act does not define the phrase "in which construction is initiated," nor is there indication in the legislative history as to its intended meaning.

Section 301(b) of the 1958 Act, 43 U.S.C. §390b (b), provides:

> "* * * The interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated * * *."

The Army Corps of Engineers (Corps) has considered construction as having been initiated on the date when the first lands of the project are acquired or on the date when the first construction contract is let, whichever is earlier. Its reasoning is that either event represents a commitment to construct the project and that all preconstruction requirements must be metprior to the occurrence of either event.

We understand that the Bureau of Reclamation (Eureau) sets interest on capital costs at a rate determined when construction starts, It recognizes that the specific action that constitutes the start of construction may vary, but the key date is when Federal funds are irrevocably committed to the project's construction. The Bureau notes that acquisition of the land does not irrevocably commit Federal funds, because the land could be resold.

This Office has held that the word "construction" does not, by definition *or* necessary implication, cover the purchase of land upon which a public project is to be constructed, E-6962, December 1, 1939. This decision took the position that purchasing land is not a part of construction, even though it may be an 'essential prerequisite, because construction is defined as "building". Under this view the first purchase of land could not constitute the initiation of construction. In fact, it suggests that only physical construction could serve as marking the initiation of construction.

This is a literal reading of the meaning of construction, and it Is not the only reasonable interpretation. Acquisition of the first lands for a project may represent a definite commitment toward construction, and if it can be demonstrated that other actions do in fact signify a definite commitment to a project, then such actions could also signify the initiation

of construction. We would be inclined to defer to the preferred interpretation of whichever agency is administering the project in question.

Question 6 (question IIC, Code 085530). Why should the rate of interest during construction be set at the first purchase of land instead of at the rate the Government borrows the funds to construct the project? Answer: Under the 1958 Act the interest rate depends on the construction initiation date.

The 1958 Act requires establishing the rate of interest during construction as of the beginning of the fiscal year in which construction is initiated. The Corps has interpreted the Act as requiring the interest rate to be determined at the time the first land purchase was made or at the award of the first construction contract, whichever is earlier. (See Question 5.) In any event, the statute clearly precludes charging the actual interest rate experienced in each year of construction where this differs from the rate of interest in effect at the beginning of the year in which construction is initiated.

Question 7 (question 3, code 085550). Did the Congress intend that all operation and maintenance expenses be reimbursed to the Treasury for water allocated to municipal and industrial users? Answer: That depends.

Your staff's submission states that the practice of the Bureau is to 'use appropriated funds to pay for annual O&M expenses until water is physically put to use by a user under a long term contract. Any O&M expenses associated with uncontracted water (where there is no contractor), water under contract but unused, or water used under temporary contracts, are paid from appropriated funds and not reimbursed by project users or potential users. Additionally, the submission states that--

> 'We would like to claim that the Congress required all O&M expenses for municipal and industrial purposes be reimbursed to the Treasury. We would propose that these costs be annually capitalized and treated as a long term commitment of existing or future project users. Annual project user repayments would then be used first to repay annual O&M expenses. If revenues exceeded these annual charges, they would then go into project capital payment."

With regard to repayment-type contracts under §9(c)(1) of the 1939 Act, O&M costs are covered under a separate charge which is payable in advance by the water user. Under the water service-type contracts pursuant to § 9(c)(2) a charge or rate per acre-foot, payable in advance, includes O&M charges.

Section 9(c)(2) requires that the rates will produce revenues "at least sufficient to cover an appropriate share of the annual operation

and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper and shall require the payment of said rates each year in advance of delivery of water for said year." (Emphasis added.) If the phrase "annual operation and maintenance cost" refers to years before water delivery began, there would be no difficulty with capitalizing the past O&M costs. However, this phrase may also be understood as referring to each current ("annual") year, for the service which is delivered in that year. Thus, it is unclear if it is legally permissible to capitalize past O&M expenses for water service contracts under the 1939 Act.

In the 1958 Act which makes no reference to O&M costs, it is specifically provided that no payment need be made with respect to construction costs for storage for future water supply until such supply is first used. 43 U.S.C. § 390b(b).

It is important to distinguish between construction costs and O&M costs. The need for incurring the latter is within the discretion of the Secretary, United States v. Fort Belknap Irrigation District, 197 F. Supp. 812 (D. Mont. 1961), and can be imposed on the water users despite their objections. Swigart v. Baker 229 U.S. 187 (1913); Act of August 13, 1914, ch. 247, § 5, 38 Stat. 687, 43 U.S.C. § 492 (1976) (dealing generally with O&M charges). It would seem that the cognizant Secretary, in imposing O&M charges, might include a component for past charges, at least for those charges related to upkeep of the facility so that it would be available for present use.

Question 8 (question IA, code 085530), A. Is the United States required to recover all operation and maintenance costs from Central Valley Project (irrigation) water service contracts? Answer: No.

In addition to a construction charge:

> "Every water-right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance cnarge based upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made €or each acre-foot *of* water delivered; but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water." 43 U.S.C. § 492 (1976).

This statute indicates that for irrigation purposes each recipient of water service must pay an O&M charge based on the total O&M cost for the project.

When the Secretary of the Interior enters water service contracts to furnish water for irrigation purposes, each contract shall be --

> "* * * at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost * * *." Reclamation Project Act of 1939, § 9(e), 43 U.S.C. § 485h(e) (1976).

This statute clearly does not require the recovery of all O&M costs. It states that recovery of only an amount "at least sufficient to cover an appropriate share of the annual operation and maintenance cost" is necessary. The legislative history does not indicate what constitutes an "appropriate share" of the cost. It is left to the Secretary's judgment to determine what constitutes an appropriate share: the need for incurring O&M costs falls within the sound discretion of the Secretary. United States v. Fort Belknap Irrigation District, above, at page 823.

B. Is the United States estopped from recovering all operation and maintenance costs where contract terms provide otherwise? Answer: Yes.

The United States is bund by the provisions of its contracts for water supply.

> "A contract is a contract, regardless of whether it is made between individuals or between individuals and a government agency; and if made with an agency, the latter should not have a right to change any terms of the duly executed and partially performed contract."

United States v. Coachella Valley County Water District, 111 F. Supp. 172, 180 (S.D. Cal. 1953). See United States v. Fort Belknap Irrigation District, above, at page 818, note 5.

where there is a conflict between the terms of a contract and the applicable statute, the rights of the parties must be determined by a construction of the statute, rather than of the ccntract, since the contract is to be treated as if all the provisions of the applicable statute are written into it. 94 C.J.S. § 361(c); Gulf Coast Water Co. v. Cartwright, 160 S.W. 2d 269, 273 (Tex. Ct. Civ. App. 1942); Faught v. Platte Valley Public Power & Irrigation District, 51 N.W. 2d 253, 259 (Neb. Sup. Ct. 1952). However, the applicable statues leave contract provisions prescribing the rates for O&M costs to the discretion of the Secretary, and thus there is no conflict between a contract not requiring recovery of all O&M costs, and the applicable statutes. Therefore, when there is a contract not providing for recovery of all O&M costs, the United States may not unilaterally increase the charges for these costs.

Question 9 (question IIB, code 085530). Is there a prohibition in the 1958 Act which prevents the Corps from the accrual and capitalization of past operation and maintenance costs, and requiring users to repay this cost once they start using the future water supply storage? Answer: NO. The Act neither specifically prohibits nor specifically authorizes this treatment of O&M costs.

Section 301(b) of the 1958 Water Supply Act as amended by section 10, Pub. L. No. 87-88 (July 20, 1961), states:

> "* * * That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project: And provided further, that the entire amount of the construction costs, including interest during construction allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest-free period exceed ten years.* * *"

Section 301(b) is silent about O&M costs. We are aware of no provision which specifically addresses these charges as they relate to future water supplies. such charges would be treated in a manner similar to present water supplies when incurred after future water deliveries commence. However, the accrual and capitalization of all or part of past O&M costs to be paid by future water supply users is neither prohibited nor specifically authorized by statute. Consequently, such a practice may be legally permissible if regarded as a reasonable exercise of the general administrative authority of the Secretary of the Amy (or of the Secretary of the Interior). It might be desirable to recommend specific Congressional authorization of this practice, or specific disapproval, to eliminate all doubts.

## Reclassification Of Water Uses

Question 10 (question 4, code 085550). Can water be "temporarily" reallocated to "nonreimbursable" use *to* avoid repayment requirements? Answer: The practice is questionable.

The submission states that on the Fontenelle Reservoir, the Bureau:

> "has 'temporarily' reallocated' water originally intended for irrigation (later reallocated to industrial use) to nonreimbursable use, This means that there can be no cost recovery for capital or O&M costs associated with this water. If the water remains in that category, the Treasury will never be reimbursed for costs associated with the water. The reallocation seems to have as its only purpose to make reimbursable costs nonreimbursable."

The practice of "temporarily" reallocating water originally intended for a reimbursable purpose, to a nonreimbursable purpose, where the water is not in fact used for the nonreimbursable purpose, as described above, is questionable. 43 U.S.C. 390b.

The 1958 Act § 302(b) provides:

> "That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be." 43 U.S.C. § 390b(b)(1976).

Reimbursable benefits, which include irrigation and drainage, M&I water supply, and commercial power generally accrue directly to the users of the water, while nonreimbursable benefits which include flood control, navigation, and certain aspects of fish and wildlife enhancement and highway relocation are usually benefits to the public-at-large. F. Dominy, "Acquisition of Water from Federal Reclamation Projects for Industrial and Community Development," 15 Mineral Law Institute 337, 344 (1969).

The above categorization of reimbursable and nonreimbursable benefits has its origins in practices developed under the 1939 Act and other reclamation laws, see Clark, § 123.2(A). We have fcund no indication in the legislative history of the 1958 Act that the Congress meant to disturb this type of classification.

The above-quoted provision of the 1958 Act clearly vests broad discretion in the Secretary of the Army, and for reclamation law purposes, in the Secretary of the Interior. B-196345, May 1, 1980; B-170905, November 2, 1970 (both dealing with § 9(c) of the 1939 Act); Swigart v. Baker, above, (dealing with the Reclamation Act of 1902). However, any secretarial decision must reflect the realities of the situation in

question. For example, water originally intended for irrigation, a reimbursable purpose, cannot by administrative fiat become water temporarily allocated to flood control, a nonreimbursable purpose, if it is not used for flood control.

Thus, while the Secretary has broad discretionary powers, his determination can be upset upon a showing that it was fraudulent, or so arbitrary, capricious or grossly erroneous as to constitute bad faith. See United States v. Fort Belknap Irrigation District, above. The reclassification of a water use, even on a temporary basis, without a corresponding change in its actual use, invites challenge because a user receiving direct benefits would be shielded from the necessity to share equitably in the costs of multiple purpose construction and O&M costs.

Question 11 (question IID, code 085530). A. What authority does the Corps have to charge present value for reallocated storage space? Answer: present value appears to be a reasonable measure of value for this purpose.

Section 301(d) of the 1958 Act, 43 U.S.C. § 390b(d) (1976), provides:

> "Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law."

The statute applies where the reallocation of storage space is considered to constitute a modification of a reservoir project which would seriously affect the purposes for which the project was authorized.1/ It only states that congressional approval is required for such changes and makes no mention as to the cost to be assigned to the reallocated use. If congressional approval is required under the statute, the Congress may, of course, choose to use that opportunity to establish a price to be charged for the reallocated storage space. The statute does not specifically authorize the Corps to charge present value for such space nor does it prohibit charging present value.

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1/ The Corps has developed regulations defining what storage reallocations are insignificant and, therefore, do not have to go to the Congress for authorization. Change 15 to Engineering Manual 1165-2-105 (March 1, 1977).

Under its general authority to manage the projects, the Corps has developed a system for setting a price which reflects present day price levels. This system is based on the fact that the reallocation of storage space deals with the physical *cost* of storage (construction costs) and, without the modification of existing project uses, the local interest would probably have to develop an alternative project to provide an equivalent quality and quantity of water. Thus, despite the legislative silence on this issue, the present value seems to be a reasonable measure for charges for reallocated storage space for significant modifications, approved by the Congress but for which it did not establish a price, as well as for minor modifications not requiring approval by the Congress.

B. Shouldn't the updating of value apply to interim reallocations as well as permanent reallocations? Answer: Yes, this appears appropriate for interim reallocations.

The current Corps practice is to use the regulation referred to above only for those contracts where storage will be permanently reallocated, and not to interim uses. Therefore, while the present value standard is applied to permanent reallocations, a prior cost basis apparently is used to determine the price for interim reallocations. It would seem that the present cost of alternate water supplies would provide an appropriate basis for determining the price to be charged for interim water supplies. While a similar quantity of water storage will differ in value where it is permanently available as opposed to being available only for a limited period, this does not preclude the use of current data in determining the price of interim water supplies.

## Binding Nature And Contents Of Contracts

Question 12 (question 5, code 085550). May the Eureau of Reclamation require as a condition of a change in project water use that contractor "Profits" be shared with the Treasury? Answer: When not contrary to contract or the specific project authorization, the Bureau may require part of Proceeds to be paid into the reclamation fund.

The submission indicates that a contract with an irrigation district Provides that excess revenues from project water sales be for the benefit of the district's members. However, the district wishes to sell some water for industrial use. Since this is a change from agricultural to industrial purposes the Bureau's permission is required.

This question is discussed more fully in B-202671-O.M., May 29, 1981, in response to a request for legal assistance from your Associate Director in connection with a report to the Honorable George Miller, House of Representatives.

Repayment Periods

Question 13, (question 7, code 085540). Clarification is needed between §§ 7(b) and 9(d) of the Reclamation Project Act of 1939 regarding development periods during which time irrigators may receive project water on a toll charge basis without repaying construction costs. A. *Are* development periods authorized for projects that are not for the most part on public lands? Answer: Yes.

Section 7(b) of the 1939 Act, (43 U.S.C. § 485f(b) (1976)) by its terms, applies only to a project or portions of a project which, at the time the Act was enacted, (1) was under construction, or for which appropriations had been made, and (2) for which no repayment contract had been executed. It is § 9(d) which covers development periods for new projects (i.e., other than those defined under § 7(b)). However, with respect to development periods, both sections contain basically the same provisions.

Section 9(d)(1) authorizes the Secretary of the Interior to permit a development period of up to 10 years for an irrigation block, regardless of whether the lands in the block are public or private. Special permissive rules apply "where the lands included in an irrigation block are for the most part lands owned by the United States." These lands may receive water, under development period terms, prior to execution of a repayment contract, whereas the normal rule is that "[n]o water may be delivered for irrigation of lands in connection with any new project * * * until an organization has entered into a repayment contract * * *." § 9(d)(1). Section 7(b) contains a similar permissive provision. It states that for a "project, division, or development unit, on which *the* lands involved are public lands of the United States, the Secretary, 'prior to entering into a repayment contract, may fix a development period for each irrigation block, if any, of not to exceed 10 years from and including the first year in which water is delivered for the lands in said block * * *."

B&C. Does public land refer to the same area served by the project water, or the land the dam and reservoir sits on? Answer: It refers to the area served by the project water.

Sections 7(b) and 9(d)(1) refer to a "development period for each irrigation block." The Act defines "irrigation block" as "an area of arid or semiarid lands in a project in which, in the judgment of the Secretary, the irrigable lands should reclaimed and put under irrigation at substantially the same time, and which is designated as an irrigation block by order of the Secretary." § 2(j). The Act clearly encompasses irrigation blocks that include public lands which may be suitable for irrigation.

D. IS is legal to defer capital and O&M repayment during development periods? Answer: It depends.

By "capital" repayment, we assume you are referring to construction charges. The very purpose of the development period is to defer payment of construction costs during the initial operation of a project. The payment scheme outlined by § 9(d) is as follows:

> "[T]he part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization.* * * § 9(d)(2).
>
> * * * * *
>
> "[T]he general repayment obligation of the organization shall be spread in annual installments * * * over a period of not more than 40 years, exclusive of any development period. * * *" § 9(d)(3).

This means that the organization is not obliged to repay construction costs during the development period. Instead, water is delivered —"* * *, at a charge per annum per acre-foot, or other charge, to be fixed by the secretary each year and to be paid in advance of delivery of water * * *." § 9(d)(1). It appears that this charge was intended to cover O&M costs since § 9(d)(1) also provides that "After the close of the developnt period, any such charges collected and which the Secretary determines to be in excess of the cost of the O&M during the development period shall be credited to the construction cost of the project in the manner determined by the Secretary." However, § 9(d)(1) gives the Secretary discretion to determine the charges during the development period, and thus it cannot be said that the statute requires the charges to be sufficient to cover all O&M costs.

43 USC 390b

Question 14 (question 6, code 085550). Does the Water Supply Act of 1958 allow 40 years for repayment of all municipal and industrial costs or 40 years from the initiation of each use? In other words, should each succeeding contract after first delivery of water be for less than 40 years? Answer: The Act allows forty years from the start of each use for repayment, following a 10-year start-up period.

It is understood that your question relates to future water supplies, The legislative history of the 1958 Act supports the current practice of allowing 40 years for repayment of M&I costs commencing separately with the initiation of each use. The text of the Act provides, that "no payment need be made with respect to storage for future water supply until such supply is first: used." 43 U.S.C. §390b(b). (Emphasis added.)

In considering Title III of S. 3910, 85th Cong., 2nd Sess. which ultimately was enacted as the 1958 Act, the Senate Committee on Public Works stated:

"It is the intention of the committee that the application of the portion of Title III dealing with future water supplies would be as follows:

"1. It is expected that when a portion of such capacity is first utilized then repayment for that portion will be started and repaid within the life of the project but not to exceed 50 years.

"2. The portion of such capacity which is allocated to future use or demands would require no payments for 10 years. After 10 years, interest payments would be made and repayment of principal would not be required until the reserved future capacity is first used. When use is first made of any portion of the capacity reserved for future use, then payment would be made on both the interest and principal component. The total Cost allocated to future water supply would be repaid within a period not to exceed 50 years, including the 10-year interest-free period." (Emphasis added.) S. Rep. No. 1710, 85th Cong. 2d Sess. 133-34, (1958).

See also, B-157984-O.M., November 14, 1979, which held that under the Act, repayment of construction costs attributed to future water supply does not begin until actual delivery to the user but that the repayment period may not extend beyond the life of the project.

Appropriate Share Of Costs

Question 15 (question 7, code 085550). What happens if no one buys project water? If 40 or 50 years elapse and water remains unsold, can power revenues be used to reimburse the Treasury? Many projects have not sold all or, in some cases, any of their water. Who is responsible for repayment if there are no contracts? Can some contractors be required to pay for entire projects even if they only use part of the water? Answer: Where no one has bought the water or reservoir storage space and there are no contracts for repayment the Government bas no one to be reimbursed by, and the taxpayers must bear this burden.

Whether some contractors can be required to pay €or entire projects even if they only use part of the water or reservoir storage space ultimately depends on the scope of the Secretary's authority in setting contractual terms, and of course the water users' willingness to agree voluntarily to them.

Section 9(c)(1) of the 1939 Act, 43 U.S.C. § 485h(c)(1) (1976) provides that the contract:

"shall require repayment * * * of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes;" (Emphasis added.)

section 9(c)(2) of the 1939 Act, 43 U.S.C. §485h(c)(2) states that the contract:

"shall be * * * at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual O&M costs and an appropriate share of such fixed charges as the Secretary deems proper * * * ." (Emphasis added.)

The 1358 Act, 43 U.S.C. §390b(b) provides that:

"* * * the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be; * * *." (Emphasis added.)

The crucial statutory terms "appropriate share" and "share equitably" are not further defined. Indeed, it would be difficult, if not impossible, to adequately define them without reference to a specific legal context. Such terms are indefinite and are frequently used in legislation to provide for broad administrative flexibility and discretion, whose outer limits, nevertheless, are intended to preclude arbitariness. *See* B-133053-O.M. December 30, 1959 at 5; C. Dallas Sands, 1A Statutes and Statutory Construction (4th Ed. 1972) § 21.16.

It seems clear, especially in light of the wide discretion given to the Secretary that an "appropriate share" is not necessarily synonymous with a "proportionate share," or a "pro-rata" share, although such a reading is not absolutely precluded. See use of term "proportionate share" in 54 Comp. Gen. 1 (1974). The legislative history of the 1939 Act merely States, with reference to § 9(c), that "[w]here the construction is of a multiple-purpose dam, it would permit an equitable allocation of construction costs to the various purposes to be served." Reclamation Project Act of 1939: Hearings on H.R. 6773 before the House Committee on Irrigation and Reclamation, 76th Cong., 1st Sess., June 15, 1939 at 26-27 (Statement of John C. Page, Commissioner of the Bureau of Reclamation). Thus, an "appropriate share" could mean an "equitable allocation."

With regard to the 1958 Act, the term "share equitably" is also an indefinite term whose full meaning must be determined from the context in

which it is used. In one case involving a utility company, the United States Supreme Court noted, with reference to the beneficiaries of an entire project who were to "share equitably in the cost", that "considerations of fairness, not mere mathematics, govern the allocation of costs." Colorado Interstate Gas Co., v. Federal Power Commission, 324 U.S. 581, 591 (1945).

In the light of the lack of a definitive interpretation of the terms "appropriate share" and "share equitably", the following two examples may help to illustrate their meaning and impact on contractual terms. We believe that under both the 1939 and the 1958 Acts, the Secretary might require that although a water user would only use 50 percent of the water, he would be responsible for repayment of 55 percent of the capital costs. On the other hand, the Secretary might not properly demand that a water user of 50 percent of the water be responsible for 100 percent of the repayment because such terms might be arbitrary and unfair. As a practical matter, the economic realities of the situation will probably dictate reasonableness on the part of both parties, and the water users' "remedy" is to refuse to sign the contract. See Reclamation Project Act of 1939: Hearings on H.R. 6773, above at 41-42.

The question as it relates to the use of power revenues to repay the costs of construction allocated to irrigation is considered in a separate memorandum, Legal Basis of the Irrigation Subsidy, B-198376-O.M. July 10, 1981. Also, as to a change in cost allocations for power, see the answer to question 17, below.

Question 16 (question IE, code 085530). A. Does the Secretary have the discretion under the 1939 Act to require continuing payment until all assigned irrigation costs have been repaid, notwithstanding the specific identification of costs that appear to be implicit for §§ 9(d) and 9(e)? Answer: Not unilaterally.

In essence, the question appears to be whether or not the Secretary can amend or renegotiate water service contracts to ensure repayment of the entire amount of expenses incurred. 2/

Sections 9(d) and 9(e) of the 1939 Act govern irrigation contracts. Section 9(d) directs that the part of the construction costs allocated to irrigation shall be included in a general repayment obligation of the contracting organization. Section 9(e) provides that in lieu of entering a

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2/ There is no such problem with fixed repayment contracts (§ 9(d)) since they are aimed at paying off the construction costs, not O&M costs.

§ 9(d) contract, the Secretary may enter either short or long-term water service contracts (under which the terms are similar to § 9(c)(2) contracts for M&I water supplies) with due consideration being given to that part of the cost of construction allocated to irrigation. Like § 9(c)(2) & § 9(e) leaves determination of the amount of the charges to the discretion of the Secretary. It does not obligate the water users to pay all costs; only those costs that the Secretary determines to be an appropriate share. Accordingly, a contract resulting in a deficit for the Government is not contrary to the applicable law and is within the authority of the Secretary. (See Question 8B.) Thus, a contract which does not result in payment of all expenses incurred is a valid contract and the Secretary does not have authority to unilaterally alter the contract to require the water user to pay all costs incurred.

B. Within the Central valley Project, where you have a multipurpose project, can agricultural water service contracts be converted to fixed repayment contracts? Answer: *Yes.*

The Act of July 2, 1956 ch. 492 (43 U.S.C. § 485h-1) governs conversion of irrigation repayment contracts. The Act states that:

> "* * * in administering section 9, subsections (d) and (e) of the Reclamation Project Act of 1939 (53 stat. 1187, 1195), the Secretary of the Interior shall—
>
> "(2) include in any long-term contract hereafter entered into under said subsection (e) with a contracting organization provision, if the organization so requests, for conversion of said contract, under stated terms and conditions mutually agreeable to the parties, to a contract under subsection (d) at such times as, account being taken of the amount credited to return by the organization as hereinafter provided, the remaining amount of construction cost which is properly assignable for ultimate return by it can probably be repaid to the United States within the term of a contract under said subsection (d); * * *."

We are aware of no provision which would allow the conversion of M&I water service contracts under § 9(c)(2) to fixed repayment contracts under § 9(c)(1). It appears that the portion of a multipurpose project directed toward agricultural purposes may be converted from a water service contract to a fixed repayment contract. There is no indication in the Act of July 2, 1956 or its legislative history that any different treatment is to be afforded multipurpose projects, (which were not uncommon at the time of the Act).

It is indicated that the Bureau contends that construction costs are by CVP-wide function and not project, and it would be impossible to determine

the appropriate share of the full CVP costs to be paid by each contractor.

A statute is not interpreted in such a manner as to presume Congress has done a useless, ineffective or absurd thing, Consumers Union of United States, Inc., v. Sawhill, 512 F. 2d 1112. 11118 (Emer. Ct. 1975), rehearing, 525 F. 2d 1068 (Emer. Ct. 1975), for the law is to be presumed to have been intended to produce reasonable consequences. United sates v. Cook, 311 F. Supp. 618, 621 (W.D. Pa. 1970). It was Congress' apparent intention to allow conversion of all agricultural water service contracts, including those which are part of a multipurpose project, and consequently it must be presumed that there are means available for carrying out that intention. Even if difficulties in administration do exist, such difficulties would not change the law. It remains the responsibility of those administering the law to develop accounting methods which are consistent with the law and to negotiate reasonable terms under the conversion provision which irrigators may elect to utilize.

Question 17 (additional question 2, code 085550). Does section 302(a)(3) of Pub. L. No. 95-91, dated August 4, 1977, mean that the Congress must approve all cost reallocations involving power? Answer: Only for those reallocations previously requiring congressional approval.

Section 302(a)(3) of Pub. L. No. 95-91, now codified as 42 U.S.C. § 7152(a)(3) (Supp. III, 1979), provides:

> "(3) The functions tranferred in paragraphs (1)(E) and (1)(F) of this subsection shall be exercised ,by the Secretary [of Energy,] acting by and through a separate and distinct Administration within the Department which shall be headed by an Administrator appointed by the Secretary. The Administrator shall establish and shall maintain such regional offices as necessary to facilitate the performance of such functions. Neither the transfer of functions effected by paragraph (1)(E) of this subsection nor any changes in cost allocation or project evaluation standards shall be deemed to authorize the reallocation of joint costs of multipurpose facilities therefore allocated unless and to the extent that such change is hereafter approved by Congress."

The final sentence was added as a floor amendment by Senator McGovern just before the passage of S. 826, 95th Cong. 1st Sess., which was enacted as the Department of Energy Organization Act, 123 Cong. Rec. 15300, 15399 (1977) (remarks of Senator McGovern). The purpose of this amendment is to:

> "* * * make certain that *cost* allocations and project evaluations with respect *to* joint costs of multi-purpose

projects shall not be changed without the approval of the Congress.

"While I am concerned specifically about the Missouri Basin project, it is proper to protect the allocation of joint costs on all projects, when they have been properly made by Congress. Congress should determine *cost* allocations as we do now, and project repayments as we now do." Id. at 15300 (Emphasis added.)

ordinarily, the authorizing Acts for particular multi-purpose projects including those having power as an authorized purpose, provide for the a p portionment of project benefits to the various purposes and cost allocations are made on this basis. Where a major change of project purposes is indicated, which also is reflected in the cost allocations, congressional reauthorization is necessary. If the change is minor or of a temporary nature, congressional authorization is not generally obtained. Our review of the provision in question shows that its purpose was to preclude cost reallocations without specific congressional approval which might be founded on the transfer of power-related functions of the Department of the Interior to the Department of Energy contained in § 302. Consequently, it appears that the effect of the McGovern amendment is to reaffirm the need for specific congressional approval in accordance with prior practices for then-existing cost allocations for multi-purpose projects which involve power functions. As the Senator stated, "Congress should determine cost allocations as we do now, and project repayments as we now do."

Receipts

Question 18 (additional question 1, code 085550). Does § 701c-3 of Title 33 of the United States Code apply to the Bureau of Reclamation? Answer: No.

Title 33 U.S.C. § 701c-3 (1976) provides:

"75 per centum of all moneys received and deposited in the Treasury of the United states during any fiscal year on account of the leasing of lands acquired by the United States for flood control, navigation, and allied purposes, including the development of hydro-electric power, shall be paid at the end of such year by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county, or counties, in which such property is situated, or for defraying any of the expenses of county government in such

> county or counties including public obligations of levee and drainage districts for flood control and drainage improvements: Provided, that when such property is situated in more than one State or county, the distributive share to each from the proceeds of such property shall be proportional tu its area therein."

The section quoted above was originally enacted as § 7 of the Flood Control Act of 1941, Act of August 18, 1941, c. 377, 55 Stat. 650, and has undergone three subsequent amendments which, respectively, raised the percentage figure to its present level, expanded the scope of the statute, permitting use of its funds for county expenses, and finally in 1954 added "navigation, and allied purposes, including the development of hydroelectric power," to flood control purposes. See Act of July 24, 1946, c. 596, § 5, 60 Stat. 642; Act of June 16, 1953 c. 114, 67 Stat. 61; Act of September 3, 1954, c. 1264, Title II, § 206, 68 Stat. 1266.

The legislative history of the above section demonstrates that its purpose was to provide some measure of compensation to the local taxing units for the loss of taxes which results when lands acquired by the United States for flood-control purposes are removed from the local tax-rolls. S. Rep. No. 151, 83rd Cong., 1st Sess. 1 (1953). H.R. Rep. No. 2165, 79th Cong., 2nd Sess. 7 (1946). Of course, lands acquired for navigation and allied purposes, including the development of hydroelectric power are now also included by the 1954 Act.

We do not think, however, that 33 U.S.C. § 701c-3 is applicable to the Bureau. Under 43 U.S.C. §392a (1976), with exceptions not here relevant—

> "All moneys received by the United States in connection with any irrigation projects, including the incidental power features thereof, constructed by the Secretary of the Interior through the Bureau of Reclamation * * * shall be covered into the reclamation fund, except in cases where provision has been made by law or contract for the use of such revenues for the benefit of users of water from such project. * * * "

Thus, these irrigation project funds are not received and deposited in the Treasury as 33 U.S.C. § 701c-3 and its legislative history contemplate. H.R. Rep. No. 2155, 79th Cong., 2nd Sess. 7 (1946). Furthermore, 33 U.S.C. § 701c-3 was originally enacted as § 7 of the Flood Control Act of 1941 which applied only to the Corps of Engineers. There is no indication in that Act or its legislative history, nor in the subsequent amendments to that Act and their legislative histories, that 33 U.S.C. § 701c-3 was intended to apply to the Interior Department, or that the disposition of its irrigation project funds under 43 U.S.C. § 392a was to be altered.