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SMALL WATERSHED DEVELOPMENT—APPLICATION OF 1954 FEDERAL LEGISLATION TO KENTUCKY

Two kinds of proposals are familiarly associated with our national legislative program for flood prevention. One involves projects designed to control major river streamflow and includes the well known systems of large downstream dams normally built, operated, and maintained by the federal government at its sole expense. The other involves projects designed to curtail soil erosion and retard surface water runoff by means of agricultural land use and treatment, and by water conservation measures on individual farms located in upstream watersheds.

Congress has recognized the lack of coordination between these activities as a major obstacle to effective flood control, and during the last twenty years has enacted laws designed to bridge the gap between them. This legislation reflects a three stage development of national watershed protection policy. The first statute was the Flood Control Act of 1936, which assigned responsibility for upstream flood control, through water and soil conservation practices, to the Department of Agriculture. World War II delayed positive action under the law, but since 1947 programs have been initiated in eleven watersheds covering about thirty million acres. The second step came in 1953 when Congress appropriated five million dollars for sixty pilot watershed projects to demonstrate the benefits of combining upstream conservation practices with upstream structures, and to provide a source of experience for future local-state-federal cooperation in planning and conducting watershed protection and development programs.[1] The third step was taken in 1954 when Congress enacted Public Law 566, popularly known as the Watershed and Flood Prevention Act. The purpose of this note is to summarize the provisions of this act and to determine what authorizing legislation, if any, is needed to enable Kentucky agencies or governmental units to participate in the small watershed program.

Public Law 566 declares that the present national policy is to preserve and protect our land and water resources through intergovernmental cooperative efforts to (1) prevent damages resulting from soil erosion, floodwater and sedimentation in watersheds, and (2) further conservation, development, utilization and disposal of water.[2] The contemplated program involves the planning, installation, opera-

[1] U.S. Soil Conservation Service, Dep't of Agriculture, Pamphlet No. 276, How To Get Help Under the Watershed Protection and Flood Prevention Act 2 (1955).

[2] 68 Stat. 666 (1954), 16 U.S.C. 1001; 33 U.S.C. 701b (sup. 1955).

tion, and maintenance of project-type works of improvement, which are defined as being any undertaking for:

> (1) flood prevention (including structural and land-treatment measures) or
> (2) agricultural phases of the conservation, development, utilization and disposal of water. . . .[3]

The watersheds must include an area of less than 250,000 acres, which cannot have a single structure of more than 5,000 acre feet capacity.

The Secretary of Agriculture is authorized to implement this policy by giving technical and financial aid to specified local organizations in planning and installing works of improvement.[4] Local organizations which are eligible for this help are:

> [A]ny State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement.[5]

Upon reviewing their laws many states found that their agencies or local units did not have the required authority, and during 1955 the legislatures in twenty states passed thirty-seven new or amendatory laws designed to correct the power deficiencies.[6]

Before attempting to identify specific Kentucky agencies and the nature and scope of their authority to participate in the program it may be helpful to show when and by whom federal aid may be obtained generally.

ELIGIBILITY FOR FEDERAL AID IN GENERAL

Project-type works of improvement must be planned, installed, maintained, and operated. Who is to pay for each of these phases under a policy of conducting the program on an intergovernmental cooperative basis? Generally speaking, federal participation is restricted to the first two phases of program development, i.e., planning and installation. The sponsoring local organization has the responsibility for maintenance and operation. The exact role of the Federal government can be clarified more readily by considering planning and installation assistance as separate problems.

Free Federal Planning Services. Section 1003 authorizes the Secretary to provide financial and technical aid in the preparation of plans

[3] Id. sec. 1002.
[4] Id. sec. 1003.
[5] Supra note 2, at sec. 1002.
[6] Sandals and Adams, Progress In State Legislation Relating To The Watershed Protection and Flood Prevention Act 1 (SCS-TP°126, 1955).

for works of improvement upon application of a local organization which has been submitted to the proper authority and not disapproved by it within forty-five days thereafter. The proper state authority is the state agency having supervisory responsibility over programs provided for by the Act, or the Governor if no state agency has such responsibility.[7] Specifically, the Secretary is authorized:

> (1) to conduct such investigations and surveys as may be necessary to prepare plans . . . ;
>
> (2) to make such studies as may be necessary for determining the physical and economic soundness of plans . . . , including . . . whether benefits exceed costs;
>
> (3) to cooperate and enter into agreements with and to furnish financial and other assistance. . . .[8]

Explanatory publications of the Department of Agriculture interpret this section as authorizing such planning services without cost to the local organization and before federal aid for actual installation is approved.[9] Thus, any agency which is authorized by state law to carry out, maintain, and operate works of improvement is qualified to apply for and receive federal planning services without cost.

Installation—Cost Sharing. Section 1004 makes it mandatory that the Secretary require, as a condition to furnishing assistance for installation costs, that the local organization: (1) acquire all lands, easements, or rights of way needed for the project; (2) acquire water rights needed for installation and operation; (3) assume such proportionate share of installation costs as the Secretary deems equitable; (4) arrange, to the Secretary's satisfaction, to meet the costs of operating and maintaining the works of improvement without federal help; and (5) obtain agreements from landowners to carry out recommended soil conservation measures on at least fifty percent of the land in the drainage area above each floodwater-retarding structure to be built with federal aid.[10] Thus, even though a local organization may have, by express grant, sufficient authority to sponsor an application and get free federal planning services, it must share the costs of installation. It can get federal assistance to meet installation costs only if it has and is prepared to exercise two kinds of power: (1) legal power to (a) acquire property rights to land and water, and (b) enter into contractual arrangements with individuals and the federal government for the purpose of construction, maintenance and operation of the

[7] Supra note 2, at sec. 1003.
[8] Supra note 2, at sec. 1003 (1)-(3).
[9] Supra note 1, at 9.
[10] Supra note 2, at sec. 1004.

projects; and (2) fiscal powers to defray (a) a share of the project installation costs, and (b) all costs of maintenance and operation.

After the local organization meets these requirements, the Secretary is authorized to assist in developing specifications and preparing contracts for construction, and to participate in project installation in accordance with the approved plan, provided that: (a) the Secretary and the local organization have reached final agreement on a work plan; (b) the Secretary has determined that benefits will exceed costs; (c) the Secretary has submitted the plan to Congress, through the President, at least forty-five session days before installation begins; and (d) the Secretary shall not construct or enter into contracts for construction work, unless no local organization is authorized by state law to do so, and in no event after July 1, 1956.[11]

NATURE AND EXTENT OF POWERS OF LOCAL ORGANIZATIONS IN KENTUCKY

State Agency. P.L. 566 requires that some agency at the state level, or the Governor, receive and pass on applications, and establish priorities by which project proposals within the state will be considered by the Secretary of Agriculture.[12] It would be most unwise to add this task to the burdensome load of administrative detail already handled by the Governor's office, particularly if some existing state agency is functionally suited to assume responsibilities of this nature. It has been suggested that an agency having general responsibility for administering programs pertaining to water and soil resources could best represent the state in the watershed protection program, and that its authority should be extended to empower it to: (a) work with the federal agencies in the planning and installation phases of the program under P.L. 566; (b) coordinate the operation of all state agencies and local units participating in the program; and (c) establish priorities by which project proposals will be considered by the Secretary.[13]

In Kentucky the nine-member Soil and Water Resources Commission has state-level responsibility for administering programs of a nature

> . . . relating to flood control, drainage and other activities with respect to the conservation, utilization, or control of soil or water resources.[14]

[11] Supra note 2, at sec. 1005. The House version authorized the Secretary to actually construct works of improvement. The Senate deleted this authority, and the Conference version as finally enacted permitted him to do so only in the absence of local authority. The July 1, 1956 cut-off date applies to federal construction authority, and not to other federal aid under the act. Conf. Rept. No. 2297, July 20, 1954 (To accompany H.R. 6788).

[12] Supra note 1, at 3.

[13] Proceeding Nat'l Watershed Cong., Report of Committee IV, Development of Adequate State Agencies 44-45 (1954).

[14] Ky. Rev. Stat. sec. 146.110 (2) (1953).

This authority extends to allow the Commission to:

> (a) give . . . financial and other aid to the (soil conservation) districts and perform such services for them at their request as may be possible under available appropriations and resources, and
> (b) . . . take any action it may consider necessary or proper in order to discharge . . . any of the State's functions and responsibilities or duties . . . in this field.[15]

Thus, by virtue of the nature of the functions it is now authorized to perform, the Kentucky Soil and Water Resources Commission is, structurally speaking, ideally suited to handle state-level responsibilities for the watershed program. Although its authority may extend, by reasonable implication, to permit handling of program matters under P.L. 566, an express grant of such authority would avoid any possible doubts as to whether its actions would be ultra vires.

Soil Conservation Districts, Cities and Counties. The Department interprets the provision defining works of improvement to include such measures as planting vegetation cover or erecting structural impediments to protect gullies and eroding soil, and building dams, levees, dikes, and terraces to control waterflow and water-borne sediment.[16] Clearly, the dominant features of these types of projects are closely related, in nature, to functions usually conducted by soil conservation districts. Thirteen states used this close relationship as a basis for broadening the powers of their districts by amendments enabling them to conduct the watershed program under P.L. 566.[17] This approach has merit in that it respects existing laws and agencies and does not require additions to the governmental complex. Further, it places program authority and responsibility in an agency which has wide experience in conducting similar and related programs. This certainly would be true in Kentucky, since our districts carry out soil conservation measures of this nature, including engineering operations such as the construction of terraces, terrace outlets, checkdams, dikes; the seeding and planting of plants, trees and grasses; and the rotation of crops.[18]

Our districts probably qualify as local organizations entitled to free federal planning services under present state law, which gives them authority to "construct, improve and maintain structures necessary or convenient for the performance [of their] operations."[19] In any event, by only a slight modification the existing enabling statute could be amended to read "carry out, maintain and operate works of improve-

[15] Ibid.
[16] Supra note 1, at 3.
[17] Supra note 6, at 2.
[18] Ky. Rev. Stat. sec. 262.020 (1953).
[19] Ky. Rev. Stat. sec. 262.290 (2) (1953).

ment as provided for under P.L. 566." Present law clearly gives them power to acquire property rights to land and water for flood control purposes by condemnation proceedings,[20] option, or in any other lawful manner,[21] and to enter agreements and cooperate with any agency, governmental or otherwise, or any owner or occupier of land within the district.[22]

However, Kentucky soil conservation districts do not have independent fiscal powers to raise revenue for the purpose of sharing installation costs and defraying all costs of operation and maintenance, but are financially dependent upon the budgetary allocations of the Soil and Water Resources Commission. Since P.L. 566 permits a combination consisting of a state agency and soil conservation districts, the program could be financed, under present law, by means of appropriations from the general fund to the Commission, which, in turn, would allocate available funds among the districts.

This arrangement has the advantage of centralizing administrative responsibility, but is subject to certain disadvantages. First, the program would be in competition with other programs for an adequate share of the general fund which is seldom sufficient to meet the multiple demands upon its resources. Second, the cost burden would rest upon the general taxpayer instead of owners within the watershed area whose property would be increased in value by direct benefits of the program. Finally, present districts are not particularly well suited to administer the program since they were created without reference to natural boundaries of watersheds.

It is significant that a number of states which broadened the powers of their soil conservation districts did so by creating within them watershed subdistricts to be governed by the same body as the parent district whose powers were increased.[23] Typical features of these laws provide: (a) express authority to build, maintain, and operate works of improvement for the purpose of conducting a watershed program under P.L. 566, and to enter into contracts or otherwise meet the requirements of that Act; (b) power to condemn private property; (c) power to issue bonds within specified limits; and (d) limited power to assess, levy, and collect an ad valorem tax on property within the district.[24]

The major objection to creation of special purpose districts is that it adds to a governmental complex which already is characterized by

[20] Ky. Rev. Stat. sec. 104.170 (1953).
[21] Ky. Rev. Stat. sec. 262.290 (2) (1953).
[22] Ky. Rev. Stat. sec. 262.320 (2) (1953).
[23] Supra note 6, at 3-5.
[24] Ibid.

overlapping jurisdictions and resultant inefficient duplication of services.[25] This objection has weight where actual duplication results, but in view of the fact that under this proposal the governing bodies of existing units are to conduct the added services, the objection does not obtain. The proposal is more nearly an expansion of existing authority than the creation of a new one. Moreover, a recent inventory of governmental activities meets the objection generally with the conclusion that, from the standpoint of benefits derived from specialized services rendered by single-function governments, the duplication generally alleged to result is more apparent than real.[26]

If the objection is fatal to this proposal, another means is available to accomplish the desired end without increasing the number of existing governmental units. This involves co-sponsorship by soil conservation districts, cities, and counties, and deserves careful consideration. Under present laws city legislative bodies and county fiscal courts have the power to participate wholly or partially in any soil conservation district program and/or policy, and to spend money out of their tax levies for the purpose of giving such assistance.[27] Under this scheme, if expressly authorized to do so, soil conservation districts could assume primary responsibility for planning, installing, maintaining, and operating works of improvement. Since cities and counties are mere creatures and administrative arms of the state, they could act as an intermediate fiscal agency between the state and the districts by undertaking to assess and collect taxes to meet the required financial obligations. This scheme has considerable merit, and should not be disregarded as a possible alternative. However, it is subject to the possible criticism that it places undue emphasis upon so-called local initiative, and involves a diffusion of responsibility which could be integrated only by intricate contractual arrangements among several participating local units, area landowners, and the Federal government.

By way of conclusion it seems clear that some state-level agency is needed to handle applications for federal aid under P.L. 566. The Soil and Water Resources Commission is ideally suited to undertake this responsibility because of the closely related nature of its present functions. To avoid any doubt as to its power to act it should be granted express authority to: (1) receive and pass on district applications for federal aid in developing proposed works of improvement under P.L. 566; (2) work with the federal agencies in the planning

[25] Chatters and Hoover, An Inventory of Governmental Activities In The United States 3 (1947).

[26] Ibid. See also Lepawsky, Administration, The Art and Science of Organization and Management 358 (1949).

[27] Ky. Rev. Stat. sec. 262.260 (1953).

and installation phases of projects; (3) coordinate activities of all state agencies and local units participating in the program; and (4) establish priorities by which the applications will be considered by the Secretary of Agriculture.

Soil conservation districts might qualify as local organizations entitled to free planning services under present law, and a combination consisting of the Soil and Water Resources Commission and the districts could qualify for installation aid. However, two alternative schemes are preferable to this arrangement. One scheme would create watershed subdistricts, within existing soil conservation districts, to be governed by the same body as the parent district, and confer upon them express authority to (a) build, operate, and maintain works of improvement for the purpose of conducting a watershed program under P.L. 566; (b) enter into contracts with individuals and the Federal government agencies for this purpose; (c) issue improvement bonds within specified limits; and (d) assess, levy, and collect ad valorem taxes on property within its boundaries. Another would expressly authorize soil conservation districts to plan, install, operate and maintain works of improvement under P.L. 566, and leave it to local initiative to consummate the contractual arrangements among the districts, cities and counties to meet the required financial obligations.

These suggestions are recommended as mere stop-gap measures which are needed immediately if Kentucky is to participate in the watershed program. They do not reach the more fundamental defects in our overall water resource program. Modern experience proves that water resource administration requires an approach of close coordination of its many phases. However, Kentucky's water resources are presently administered by a miscellany of uncoordinated agencies, each operating under its own legislative mandate. Previous discussion makes it clear that our soil conservation districts and the State Soil and Water Resources Commission have flood control and conservation authority over water for agricultural purposes. Under Chapter 104, Kentucky Revised Statutes, the State Flood Control and Water Usage Board has flood control and conservation authority over water for municipal and industrial purposes. Chapter 266 confers levee construction and maintenance authority upon fiscal courts and boards of levee commissioners for drainage and reclamation purposes. Chapters 267 and 268 assign more general authority over water for drainage and reclamation purposes to special purpose districts, and Chapter 269 is entitled *Miscellaneous Provisions As To Ditches, Drainage and Reclamation.*

Such piecemeal diffusion of administrative authority and responsibility over a common resource is unrealistic, antiquated and wasteful. The scope and severity of the problem require a comprehensive study of the entire legislative framework within which our water resources are now administered, with a view toward long range reforms. It is a task worthy of the most careful attention of the Kentucky Department of Conservation in performing its function of designing governmental policy in this area.*

* *(Editor's Note: Since this note was prepared the Kentucky legislature established a watershed development program by enacting Senate Bill 95. The act, which became effective in July, 1956, provides that the program be administered by formation of watershed sub-districts. The extent to which provisions of this act satisfy the needs identified by this note will be treated supplementally in a subsequent issue of the Kentucky Law Journal.)*

William E. Bivin

EFFECT OF THE UNIFORM PARTNERSHIP ACT ON DEATH TAXATION OF A NON-RESIDENT PARTNER'S INTEREST

When Kentucky adopted the Uniform Partnership Act in 1954, it became the 34th state[1] to get on the bandwagon and provide a comprehensive and studied statutory framework under which partnerships might be formed and conduct business. For the most part the Act simply codified common law concepts. But when jurisdictions applied a different rule to solve a particular problem, the drafters, in order to achieve the desired uniformity, were forced to choose the best reasoned of the views and incorporate that view into the Act.[2]

This paper will explore one such choice of divergent state rules, and its possible effect upon the Kentucky inheritance tax laws. Specifically the problem to be dealt with is whether Kentucky can tax, under Kentucky Revised Statutes, sec. 141.010,[3] the passage at death of a nonresident decedent's interest in a Kentucky partnership.

[1] See Table of States Wherein Act Has Been Adopted, 7 U.L.A., 1955 Cumulative Annual Pocket Part. 6. Since Kentucky adopted the Act, Arizona (1954) and Oklahoma (1955) have adopted the Act with modifications. A total of 36 states now have the Act.

[2] Ham, Kentucky Adopts Uniform Partnership Act. 43 Ky. L.J. 5 (1954); Lictinbergen, The Uniform Partnership Act, 63 U. Pa. L. Rev. 639 (1915).

[3] Ky. Rev. Stat., sec. 140.010 reads in part as follows:

All real and personal property within the jurisdiction of this state . . ., *all intangible property* belonging to nonresidents that has acquired a *business situs* in this state, . . . which shall pass by will or by the laws regulating intestate succession, . . . to any person . . . is subject to a tax. . . . (emphasis added)