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CONSTITUTIONAL LAW -INTERSTATE COMMERCE -NAVIGABLE WATERS -VALIDITY OF FEDERAL WATER POWER ACT

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — NAVIGABLE WATERS — VALIDITY OF FEDERAL WATER POWER ACT*— The Federal Power Commission found that the plaintiff's proposed hydroelectric development on the non-navigable New river in Virginia would affect interstate commerce on the navigable Kanawha river to which the New river was tributary. The Commission thereupon tendered the plaintiff a standard or major form license for the project. Such a license, had it been accepted by the plaintiff, would have subjected it to all the provisions of the Federal Water Power Act of 1920, including those concerning the regulation of rates, issuance of securities, expropriation of excess profits, amortization reserves, and recapture at the end of fifty years on the basis of net investment. The plaintiff refused to accept a license on these terms and brought a bill to remove the cloud upon the title of its real estate created by the Commission's action which was alleged to be unconstitutional. *Held*, that the Federal Water Power Act was a valid exercise of the power of Congress over navigable streams, and, therefore, the bill should be dismissed. *Appalachian Electric Power Co. v. Smith et al.*, (D. C. W. D. Va. 1933) 4 F. Supp. 6.

That the power given to Congress to regulate interstate commerce vests it with complete and paramount control over navigation on all navigable waters is

*The Circuit Court of Appeals has reversed the decision of the District Court in the foregoing case. The reversal is based entirely on jurisdictional grounds, and does not deal with the merits of the case. The decision of the Circuit Court of Appeals will be discussed in a later issue of the Review.—*Ed.*

settled beyond dispute.[1] The vital constitutional question faced by the federal district court in passing on the validity of the Federal Water Power Act of 1920[2] was whether the federal government's plenary power over navigation, including the power to improve navigable streams and protect them from obstructions, embraced the further power to regulate hydroelectric developments on such streams. It is no doubt true that Congress possesses no power over the waters, or water power, as such, of navigable streams, and that its control over navigable waters finds its sole source in the power to protect and facilitate navigation.[3] But where Congress exercises a legitimate control in behalf of navigation, may it not, as properly incidental thereto, exercise a regulatory control not immediately related to navigation? Most writers dealing with this question have expressed the view that Congress is invading the reserved powers of the States in assuming control over hydroelectric developments as incidental to its power to protect and improve navigable streams.[4] It becomes necessary for them to decry the decision in *United States v. Chandler-Dunbar Co.*,[5] where the Supreme Court held that the federal government which had built a dam and locks for the purpose of improving navigation could lease the surplus water power thereby created. If the federal government may itself erect a dam to improve navigation, and, incidental thereto, assume control over the water power thereby created, it is difficult to see why it may not license a private corporation to erect dams that will improve navigation, and, at the same time, reserve regulatory control by stipulation or agreement with respect to the hydroelectric power thereby created. If the power to regulate hydroelectric development is properly exercised as incidental to the power to improve navigable streams, it should be deemed immaterial that under the Federal Water Power Act the regulation of hydroelectric development is in itself one of the primary ends sought to be achieved, provided that the power project is actually related to the improvement of a navigable stream.[6] The de-

[1] Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (1824); Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96 (1866); United States v. Chandler Dunbar Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667 (1913).

[2] 41 Stat. 1063, U. S. Code, tit. 16, c. 12, sec. 791-823.

[3] Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655 (1907).

[4] See C. Sherman, 48 N. Y. S. B. A. REP. 120 (1925); M. Hooper, 8 MARQ. L. REV. 1 at 7 *et seq.* (1923); J. S. Shields, 73 UNIV. PA. L. REV. 142 (1925); J. H. Small, 38TH PROC. NAT. ASS'N R. R. & UTIL. COMM'RS 69 (1926); R. J. Le Boeuf, Jr., 15 GEO. L. J. 201 (1927); C. B. Elder, 25 ILL. L. REV. 759 at 761-762 (1931); J. H. Cohen & K. Dayton, 3 N. Y. S. B. A. BULL. 209 (1931); H. McMorrow, 8 P. U. FORT. 289 (1931). See also REPORT OF COUNSEL AND LEGAL STAFF TO THE SAINT LAWRENCE POWER DEVELOPMENT COMMISSION 33 *et seq.* (1931).

For an argument in support of the federal power sought to be exercised in the Federal Water Power Act, see J. G. KERWIN, FEDERAL WATER-POWER LEGISLATION 84 (1926).

[5] 229 U. S. 53 at 72-73, 33 Sup. Ct. 667 (1913).

[6] "But nothing is better settled by the decisions of this court than that, when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives." Smith v. Kansas City Title & Trust Co., 255 U. S. 180 at 210, 41 Sup. Ct. 243 at 249 (1921). Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529 (1918), represents a contrary view, but this case stands by itself as a departure from the usual doctrine so it can hardly be con-

cision in the instant case is in accord with these views. Undoubtedly an appeal will be taken to the Supreme Court which has not yet passed upon the constitutional questions raised by the Federal Water Power Act.[7]

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sidered as controlling at the present time. For a citation of articles criticizing the decision see D. H. Ford, "Controlling Oil Production," 30 MICH. L. REV. 1170 at 1220, n. 209 (1932). See also H. E. Wahrenbrock, "Federal Anti-Trust Law and the National Industrial Recovery Act," 31 MICH. L. REV. 1009 at 1052 (1933), and E. S. Corwin, "Congress's Power to Prohibit Commerce," 18 CORN. L. Q. 477 at 493-501 (1933).

[7] An attempt was made to have the Supreme Court pass on the validity of the Federal Water Power Act in New Jersey v. Sargent, 269 U. S. 328, 46 Sup. Ct. 122 (1926), but the Court dismissed the case as presenting no justifiable issue.

In an earlier lower federal court decision, the Act was sustained as a valid exercise of Congress's power over navigable waters. Alabama Power Co. v. Gulf Power Co., (D. C. M. D. Ala. 1922) 283 Fed. 606.