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CONSTITUTIONAL LAW — EMINENT DOMAIN — CONDEMNATION OF RIPARIAN LANDS UNDER THE COMMERCE POWER—The power of the United States to regulate commerce comprehends a right to control navigation and the means of navigation. To the extent necessary for the enjoyment of this power the government may condemn riparian property.[1] The federal power of eminent domain is limited by the mandate of the Fifth Amendment which requires just compensation for private property taken for a public use. Usually, the standard of just compensation is the market value of the property, taking into consideration the most profitable uses for which the property is suited and likely to be used[2] at the time of the taking,[3] but not including any special value it may have solely to the taker.[4] By this test the market value of land riparian to a navigable stream would seem to include the uses a riparian owner can make of the river, including water rights and potential hydroelectric uses of the river and adjacent land. However, in *United States v. Twin City Power Co.*,[5] the Supreme Court ruled that the United States as condemner of riparian land on a navigable river need not pay the owner the value the lands have as a power dam site, even though the condemnee held the land for that purpose and the government took the land to build its own dam. The Court said that the United States has a quasi-proprietary right in navigable waters, as against the owner of the river bank, derived from its plenary power to regulate and control such waters in aid of navigation.

That a riparian landowner may be deprived of a valuable power dam site without compensation for loss of water rights is a doctrine peculiar to federal condemnation suits. Justification for

1 U.S. CONST., art. I, §8. The power of eminent domain is implied and may be used in conjunction with the express powers of the United States. Kohl v. United States, 91 U.S. 367 (1875).

2 Boom Co. v. Patterson, 98 U.S. 403 (1878).

3 Kerr v. South Park Commissioners, 117 U.S. 379 (1886). See 2 LEWIS, EMINENT DOMAIN, 3d ed., 1220 (1909).

4 Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

5 350 U.S. 222 (1956), reh. den. 350 U.S. 1009 (1956).

such a result is found in the concept of a governmental right in navigable waters. This interest supersedes the property rights of individual landowners, and has the effect of making the general rule applied in condemnation proceedings under the Fifth Amendment inapplicable to this type of case. The nature and scope of the federal power in waterways is the key to understanding when it is that the government must make compensation for riparian property and what the measure of that compensation must be.

I. *The Extent of the Commerce Power in Navigable Waters*

A. *Generally.* The power of Congress to control navigation under the commerce clause was recognized at an early date.[6] This regulatory right is absolute between the banks of a watercourse and is limited only by the express restrictions of the Constitution. There can be no objection when the United States asserts its power to extend navigation by dredging channels, removing obstacles to navigation, or by raising water levels on navigable rivers to the ordinary high water mark.[7] The number of rivers subject to the jurisdiction of Congress has been substantially increased by recent decisions. For many years a river was part of interstate commerce only if it was navigable in its ordinary condition.[8] By this standard a river was navigable if presently navigable, or if in the past it had been navigable,[9] or if by artificial means it had become navigable.[10] Navigability is a matter of judicial determination and the standards of the ultimate conclusion are questions of mixed law and fact. The scope of the navigation aspect of commerce control was extended in *United States v. Appalachian Electric Power Co.*,[11] in which the Court held that "ordinary condition" referred to the volume of water, flow, and grade of the river bed. A waterway may be navigable in law even though artificial aids are necessary to make it navigable in fact. The present test of navigability requires an evaluation of the availability of a river for navigation, taking into consideration its volume, flow, and grade, as well as the cost of improvements necessary to make the river navigable

6 Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 at 189 (1824).

7 United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Chicago, Milwaukee, Saint Paul and Pacific R. Co., 312 U.S. 592 (1941).

8 The Daniel Ball, 10 Wall. (77 U.S.) 557 at 563 (1870).

9 Arizona v. California, 283 U.S. 423 (1931).

10 The Montello, 20 Wall. (87 U.S.) 430 (1874).

11 311 U.S. 377 (1940).

in fact.[12] Whether any inland waterway is free from the power of Congress is now in doubt. It has been held that the Tenth Amendment is not a bar to the exercise of federal power in non-navigable reaches of a river otherwise open to commercial uses, and the power has been extended even to non-navigable tributaries of a navigable stream.[13]

In earlier cases the Supreme Court took the view that the federal power in navigable waters could be exercised only in aid of navigation.[14] The advent of comprehensive water resource projects precipitated a judicial broadening of the scope of the power,[15] the Court adopting a position that all means having any reasonable relation to the improvement of navigation were within the means of the Federal Government.[16] In 1940 the Court stated in dictum that congressional power in navigable waters is as broad as the needs of commerce,[17] thus implying an extension of the rule. Although this proposition has never been tested, it seems clear that Congress does have power to use rivers for watershed improvement, reclamation, flood control and power plants independent of any conjectural aid to navigation.[18]

B. *The Nature of the Federal Right.* The exercise of a power delegated to Congress is qualified by the requirement that just compensation be paid for property directly taken,[19] but this requirement does not extend to the destruction of private property in the bed of a river or bay resulting from an act authorized under

12 The courts have indicated that they will seldom overrule a determination by Congress that a river is navigable, although such a conclusion is ordinarily a judicial function. Arizona v. California, 283 U.S. 423 (1931); Continental Land Co. v. United States, (9th Cir. 1937) 88 F. (2d) 104, cert. den. 302 U.S. 715 (1937).

13 Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1898).

14 Port of Seattle v. Oregon and Washington R. Co., 255 U.S. 56 (1921); United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

15 United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913), was the first case to hold that the United States could sell surplus electric power from its dam to recoup construction and maintenance costs. In Oklahoma ex rel. Phillips v. Guy Atkinson Co., 313 U.S. 508 (1941), the Supreme Court ruled it to be a matter of legislative discretion to authorize a dam to be constructed twenty feet higher than necessary in order to provide a power head.

16 Arizona v. California, 283 U.S. 423 (1931).

17 United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

18 In Kansas v. Colorado, United States Intervenor, 206 U.S. 46 (1907), it was held that the United States had no "inherent sovereign power" in navigable waters as would permit an assertion of a federal right in a reclamation project. But see United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), where it was held that a reclamation project was within the power of Congress as an exercise of the power to spend for the general welfare.

19 Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

the commerce power.[20] Even though local law may leave the title to the bed of a stream in the state or give it to the riparian owner,[21] such title cannot be asserted against the absolute power of Congress to legislate for the improvement of navigation.[22] Proprietary interests of the titleholder to the river bed are inferior and subordinate to the paramount right of the United States.[23] An exercise of this power which results in damage to property in or under the river is not a taking of private property but an exercise of the power to which the property was always subservient.[24] Thus, the United States is said to have a "dominant servitude" in navigable waters.[25] The courts have frequently used the term "dominant servitude" as a means of describing the navigation right, yet no one would suggest that Congress has a latent property interest in all level ground such as would permit condemnation of land for a military airport without compensation, and it seems illogical to find that power to control navigation gives the government an inherent property interest in rivers. The concept of a dominant servitude in navigable waters is more closely analogous to the principle that air space above the nation is public domain.[26] Inasmuch as the air above a defined level is said to be free of all claims of private ownership, it may be argued that all waterways are similarly publicly owned. However, the cases requiring a state to pay for property in a river bed are certainly inconsistent with this rationale.[27] A more plausible explanation of the quasi-proprietary nature of the navigation power is that it is derived from the common law rule that no landowner may own the flow of a river.[28] Thus the running waters must be, to some degree,

[20] Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).

[21] The title to beds of rivers within the state passed to the state on admission to the Union, and the state may grant or reserve the title when the land is granted to private owners. Fox River Paper Co. v. Railroad Commission of Wisconsin, 274 U.S. 651 (1927).

[22] Gilman v. Philadelphia, 3 Wall. (70 U.S.) 713 (1865).

[23] Gibson v. United States, 166 U.S. 269 (1897).

[24] United States v. Chicago, Milwaukee, Saint Paul and Pacific R. Co., 312 U.S. 592 (1941).

[25] "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone." United States v. Kansas City Life Ins. Co., 339 U.S. 799 at 808 (1950).

[26] United States v. Causby, 328 U.S. 256 (1946); 2 NICHOLS, EMINENT DOMAIN, 3d ed., §5.781, p. 127 (1950).

[27] Boom Co. v. Patterson, 98 U.S. 403 (1878); Yates v. Milwaukee, 10 Wall. (77 U.S.) 497 (1870).

[28] ". . . [T]hat the running water in a great navigable stream is capable of private ownership is inconceivable." United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 at 69 (1913). See 2 NICHOLS, EMINENT DOMAIN, 3d ed., §5.79, p. 129 (1950).

the property of the nation, and the nation may use these waters for its own development free of private claims. Policy considerations favoring more extensive development of water resources have undoubtedly inspired the sweeping implementation of this doctrine in recent years.[29]

II. *Just Compensation to Riparian Owners*

A. *When Compensation is Required.* Notwithstanding the superior servitude of the government in navigable waters, the states and individuals retain property interests therein. Absent congressional action, both have a property interest in the bed of a stream,[30] and although private ownership of the running waters of a river is impossible, usufructuary rights in the flow of water may be recognized under state law as property.[31] Assertion of responsibility for proper use of water resources by the federal government has led to vast projects which seriously interfere with the property interests of riparian owners. Not all such injuries are compensable. When damage to land by reason of flooding or overflow is contemplated, the usual approach by the government is to attempt to purchase or condemn such land.[32] However, water power projects necessarily result in unforeseen injury to upper and lower riparian proprietors, and the landowner's suit for damages becomes the only means of recovery in this case.[33] Much of the law of eminent domain rights stems from this type of informal condemnation.

The duty to make compensation arises from a taking by the government. In direct condemnation suits this presents no problem, but individuals seeking to recover damages for injury to property resulting from the establishment of water projects must first establish that their property has been taken for public use. The judicial approach to this question has been to use a reason-

29 See notes 11-13 and 15-18 and adjacent text.

30 A state may authorize improvement of navigable waters within its boundaries. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893). A state may appropriate water rights so long as there is no impairment of navigation. Kansas v. Colorado, 206 U.S. 46 (1907). On the question of state control of the rights of individuals in streams, see 1 LEWIS, EMINENT DOMAIN, 3d ed., 116 (1909); 2 NICHOLS, EMINENT DOMAIN, 3d ed., §5.7912, p. 141 (1950).

31 International Paper Co. v. United States, 282 U.S. 399 (1931).

32 Condemnation suits are necessary in only a few direct takings. In the period 1933-1939 only 6.91% of the land necessary for TVA projects was condemned. 6 REP. T.V.A. 114 (1939).

33 The difficulties of suing the United States or its agencies are discussed in 16 TENN. L. REV. 801 (1939).

ing which is essentially circular. A distinction is maintained between a "direct" injury and a "consequential" injury to property interests. This is merely a statement of a legal conclusion. If the damage is deemed to be "direct," there is a taking and the injury is compensable.[34] If the damage is not deemed to be compensable, it is "consequential."[35] Judicial inquiry regarding the compensable nature of the damage is directed to an examination of the property itself, and not to any injury to pre-existing privileges of the owner.[36] Thus, while access to the navigable channel of a river may be a valuable incident of riparian ownership, that property does not include a right of access because the servitude of the government is imposed on all interests the land derives from the river. Since riparian land is always servient to the right of the United States, the land owner loses nothing which is compensable as a result of a federal blocking of his former means of access.[37] Under this reasoning the court concludes that there has been no taking. In effect, all that has been said is that nothing requiring compensation has been done and therefore there has been no taking.

Cases on the question of taking fall into two distinct groups: those where injury is sustained by property interests in the stream, and those where the injury is done to upper riparian land. The proprietary nature of the federal navigation servitude controls the conclusion in either case.

1. *Injury to Interests in the Stream Bed.* Injuries in the bed of the stream are not takings. The navigation servitude includes the whole of the bed of a river and subjects the land between ordinary high water marks on a navigable river to congressional control in aid of navigation.[38] Title to the land and structures between high water marks is best described as defeasible. Any lawful federal action which results in a diversion of the river, a loss of land beneath the river, or of property on the river bottom is consequential.[39] A riparian owner's property is not taken when his

34 United States v. Lynah, 188 U.S. 445 (1903).

35 Gilman v. Philadelphia, 3 Wall. (70 U.S.) 713 (1865).

36 The just compensation clause of the Fifth Amendment protects property rights, not the rights of the individual. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

37 Scranton v. Wheeler, 179 U.S. 141 (1900).

38 United States v. Chicago, Milwaukee, Saint Paul & Pacific R. Co., 312 U.S. 592 (1941).

39 *Contra,* Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893). A state chartered corporation built a lock and dam at the urging of the United States. When federal authorities sought to condemn the structures it was held that the government must pay for the structures and a state franchise to collect tolls, although earlier cases had

oyster bed is damaged by dredging,[40] or when the river is raised to high water mark so as to flood permanently lands otherwise dry for part of the year.[41] He may be denied access to the river and the subsequent decrease in the value of his real estate is *damnum absque injuria.*[42] A less stringent rule is applied to non-navigable rivers. There the servitude of the government does not go beyond the low water mark, and there is a taking when the water level is raised above that mark. The landowner may demand compensation for a permanent flooding of the strip between low and high water marks.[43] However, one who erects a power dam at the confluence of a navigable and a non-navigable river which prevents the backflow of water into the non-navigable river has no protected interest in maintaining the differential levels of the two rivers.[44] When the level of the non-navigable river is also raised and overflows the owner's farm land causing a loss in value for agricultural purposes, there has been a taking.[45]

2. *Injury to Upper Riparian Land.* Injury to riparian upland is usually caused by a permanent flooding or by temporary overflows. The cases uniformly hold that a permanent flooding of the property is a taking requiring compensation.[46] The whole fee to the land need not be appropriated but the taking may be only that of a flowage easement, in which case the condemnation award is the difference in value of the lands before and after the easement is imposed.[47] If the uplands are subjected only to temporary overflows caused by interference in the regular flow of the river due to a water project, the courts refuse to give a liberal interpretation

indicated this would be a non-compensable taking. Later cases have, however, dismissed this holding as resting on estoppel. See Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

40 Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).

41 United States v. Chicago, Milwaukee, Saint Paul & Pacific R. Co., 312 U.S. 592 (1941).

42 Scranton v. Wheeler, 179 U.S. 141 (1900); United States v. Commodore Park Inc., 324 U.S. 386 (1945).

43 United States v. Cress, 243 U.S. 316 (1917).

44 United States v. Willow River Power Co., 324 U.S. 499 (1945). This case was thought to overrule or limit United States v. Cress, 243 U.S. 316 (1917), but see note 45 infra.

45 United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950). The only distinguishable difference between this case and the Willow River case is that the power dam of the Willow River Power Co. blocked the rise of the non-navigable river. The dissent in the Kansas City case pointed out that the landowner was asserting a right to have the Mississippi River maintained below the high water mark. See 18 UNIV. CHI. L. REV. 355 (1951).

46 United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 13 Wall. (80 U.S.) 166 (1871).

47 United States v. 2,648.31 Acres of Land, (4th Cir. 1955) 218 F. (2d) 518.

to the term "taking." The navigation servitude concept does not apply to damage beyond the banks of the river,[48] but the narrow common law principle that ownership requires complete physical possession of the "thing" has survived to implement a very restricted view as to when property has been taken. There must be a more or less complete ouster of possession by the invasion of flood waters to constitute a "taking" by the government.[49] Where the invasion is less than permanent the courts also say that any injury resulting from the lawful exercise of a governmental power is merely consequential.[50] This is but another application of the circular approach so often used in this type of case. Among the reasons frequently given by the courts in finding that there has been no compensable taking are that the government's action is not the proximate cause of the damage,[51] that the injury could not be foreseen,[52] or that the government has no duty to protect a landowner from damage by maintaining a river at a level at which the owner's means of self protection are sufficient.[53]

It is readily apparent that if all claims of damage to riparian lands caused in part by the development of water control projects were to be regarded as compensable, the cost of improvements would rise tremendously. The Fifth Amendment, however, requires compensation if it can be said there was a "taking," and the physical concept of ownership should have no place in determining whether a riparian owner has suffered a compensable loss. A better approach would be to recognize that even temporary lessening of the owner's beneficial use of land is a taking when caused by governmental acts. An analogous situation was presented in *United States v. Causby*,[54] where frequent low flights of military aircraft over plaintiff's land caused a diminution in property value and were held to amount to an imposition of a servitude on plaintiff's usable air space. It was held that this was a "taking," and that a suit for compensation could be maintained in the Court of

48 This does not mean that the servitude does not have an influence on the measure of damages when upland has been taken. See text at II-B infra.

49 Transportation Co. v. Chicago, 99 U.S. 635 (1878).

50 Jackson v. United States, 230 U.S. 1 (1913); West Chicago Street R. Co. v. Illinois ex rel. Chicago, 201 U.S. 506 (1906).

51 Bedford v. United States, 192 U.S. 217 (1904); Christman v. United States, (7th Cir. 1934) 74 F. (2d) 112.

52 John Horstmann Co. v. United States, 257 U.S. 138 (1921).

53 Jackson v. United States, 230 U.S. 1 (1913).

54 328 U.S. 256 (1946).

Claims.[55] This broad interpretation of "taking" would seem to be equally applicable to riparian land overflowed at regular periods because of a downstream dam. Although the situations are not completely analogous,[56] the *Causby* case would seem to open the door to a more liberal approach to the intermittent overflow problem.

B. *Just Compensation.* The Fifth Amendment requires just compensation for property taken to a public use. The measure of that compensation which is "just" is usually expressed as the "fair market value" of the property.[57] Numerous tests have been devised to determine this measure, and, while these tests are applicable to riparian condemnations, the factors subjected to the test of fair market value differ from those involved in ordinary takings.[58] From the landowner's point of view, the value of his property is enhanced by the availability of a body of water. In spite of common law and statutory restrictions on his use of that water,[59] an adjacent river or lake does increase land values in private sales. A purchaser may desire water rights for power, wharfage, factory or resort purposes. Nevertheless, as the Court's decision in *United States v. Twin City Power Co.*[60] indicates, the test of "what a willing buyer would pay a willing seller"[61] is not the applicable standard of value when the United States condemns riparian property.

Riparian uplands are most often taken under the eminent domain power for the use of the United States as fast lands[62] for federal power dams. Since compensation is always necessary when land is to be permanently flooded, the issue in such cases is the measure of compensation to be used. An award could be based on the value of the land as a power dam site, or could be based only on its value for inland purposes. The federal courts have been consistent in ruling that dam site values are to be excluded

55 Suits against the United States in the Court of Claims to recover for a taking must qualify under the Tucker Act, 28 U.S.C. (1952) §1491. See 16 TENN. L. REV. 801 (1939).

56 As a practical matter, Causby had lost all use of the invaded air space, whereas a riparian owner may have beneficial use of his land between overflows. Also, the flights were much more frequent than intermittent floodings would ordinarily be.

57 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, 2d ed., 56 (1953).

58 Ibid. Orgel does not consider the effect of the federal servitude in riparian condemnations, but explains those decisions on the basis of ordinary valuation rules.

59 Since 1899, e.g., it has been illegal for individuals to build structures in navigable waters without federal permission. 30 Stat. 1151 (1899).

60 350 U.S. 222 (1956), reh. den. 350 U.S. 1009 (1956).

61 New York v. Sage, 239 U.S. 57 (1915).

62 Fast lands are those lands which will be flooded by waters impounded behind a dam.

from the property valuation when the United States condemns land to aid navigation. Two overlapping lines of reasoning, however, have been used to support this conclusion.

A number of cases have been decided on the basis of settled principles of ascertaining "fair market value" set forth in other eminent domain cases. They hold that the value did not include power site value,[63] and, conceivably, all condemnation cases involving riparian land might be rested on these principles. The fair market value may include the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future."[64] This measure is tempered by the requirement that only those uses available to the present owner may be considered as contributing to the value of the property.[65] A possible special value to the taker is not to be part of the award. Thus, when a large quantity of fast land is required to hold the flood waters of a dam, the owner of a relatively small plot cannot claim that his land had a foreseeable future use as a dam site. Even if a landowner has property ideally situated for dam purposes, and owns enough land for that purpose, so that there is a real possible use for dam purposes, his right to build a dam is merely conditional, as it is perfected only by the grant of a federal license. If that license were refused, the owner would no longer have the opportunity to use his land for a power dam and the value-to-the-owner test would reflect this limitation. It could be argued that the lands are still available for power dam purposes and therefore the test of available uses should be applied. Only the government could avail itself of the land for power purposes, however, and it is a settled rule that a value available only for public use is not part of the owner's compensation award.[66]

The more predominant group of cases, however, hold that it is the federal dominant servitude which precludes the allowance of value as a power site. The navigation servitude bars the landowner's assertion of any value derived from water rights. Just as title to the river bed and usufructuary rights in the flow are subject to defeasance without compensation at the instance of the

[63] United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943) (non-navigable river); Olson v. United States, 292 U.S. 246 (1934); Continental Land Co. v. United States, (9th Cir. 1937) 88 F. (2d) 104, cert. den. 302 U.S. 715 (1937).

[64] Olson v. United States, 292 U.S. 246 at 255 (1934).

[65] Kimball Laundry v. United States, 338 U.S. 1 (1949).

[66] United States v. Miller, 317 U.S. 369 (1943); United States v. Cors, 337 U.S. 325 (1949).

government, when the United States takes the land as well as the river for a public use, the water flowing over the river bed adds no compensable value to the land.[67]

It is not quite accurate to say that these two groups of cases are clearly defined. Nearly all the decisions use both approaches to reach the conclusion that fast lands can have no flood land value. It is notable that the courts have often seemed unsure of their ground and preferred to use a valuation approach. This confusion is apparently due to the somewhat inconsistent positions taken by the Court in *United States v. Chandler-Dunbar Water Power Co.*[68] where the United States sought to condemn the lands of four power companies for the expansion of the Sault Sainte Marie ship canals. Two questions relevant to this discussion were involved. The Supreme Court held (1) that riparian uplands held as a factory site have no additional value derived from the hydroelectric potential in the fall of the river, and (2) that the government must pay the prospective value of land which was ideally suited for a water lock and which was certain to be used for that purpose. It would seem that both issues presented substantially similar questions. The ruling that lands could not reflect additional value from their potential use for power purposes was primarily based on the principle that a riparian owner's private property interest in the river is subservient to the complete dominion of the government between the banks of the river. The Court also relied upon the "value to the owner" concept in this part of the decision. In reaching its conclusion on the other branch of the case, i.e., that the award should include the land's value for lock purposes, the Court appears to have overlooked a possible application of the navigation servitude. The lock-land award was based on the rule that it is permissible to consider that land has a value for a public purpose.[69] The separate parts of the holding are irreconcilable, unless it is upon the ground that the value for lock purposes was not dependent on the power potential of the river, whereas the factory value of the upland was grounded on the prospective use of the river fall for electricity. Certainly the Court overlooked the "value to owner" concept in the lock-

67 United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1956), reh. den. 350 U.S. 1009 (1956).

68 229 U.S. 53 (1913).

69 Cf. Clark's Ferry Bridge Co. v. Public Service Commission of Pennsylvania, 291 U.S. 227 (1934). See also note 66 supra.

land award, for it is doubtful if the provisions of the Rivers and Harbors Act of 1899[70] would permit an owner to build locks himself.

The *Chandler-Dunbar* decision is most notable for the Court's application of the navigation servitude to diminish the value of the award for uplands. The Court said at page 66: ". . . [T]he Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland. The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use." This has been the controlling principle in the valuation of riparian fast lands since the case was decided in 1913. The navigation servitude does not extend beyond the high water mark of the stream in determining whether or not there has been a taking, but it does extend to the uplands in the sense that no compensable value is derived from the river flow when the land is condemned by the United States. Fair market value of fast land is to be measured without regard to the uses which the owner might have made of the river itself.[71] Although the courts frequently rest their decisions on other valuation rules, no holding on navigable rivers[72] has been contrary to this.[73] Valuation of fast lands, according to *Chandler-Dunbar* principles, depends wholly on the proprietary aspect of the federal right in navigable waters, and this is precisely the basis of the reasoning in the *Twin City* decision.

The *Twin City* case marks the end of an apparent retreat from this position which was evident in intervening cases. The most

70 Note 59 supra. 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, 2d ed., 359, n. 38 (1953), suggests the Court did not pay sufficient attention to this award because of the small amount of money involved.

71 In United States v.Twin City Power Co., 350 U.S. 222 (1956), reh. den. 350 U.S. 1009 (1956), the land was finally valued at $37 an acre for agricultural purposes. The commissioners had originally set its value at $267.02 per acre as power site land.

72 United States ex rel. TVA v. Powelson, (4th Cir. 1943) 138 F. (2d) 343, cert. den. 321 U.S. 773 (1944), on remand from 319 U.S. 266 (1943), allowed riparian land value to include some elements of power site value, but this was a non-navigable river. In Grand River Dam Authority v. Grand Hydro, 335 U.S. 359 (1948), a federal licensee was required to pay the power site value of riparian land. This too was a non-navigable river and the Court expressly left the question open as to whether the United States would have to pay such value.

73 United States v. 2,979.72 Acres of Land, (4th Cir. 1955) 218 F. (2d) 524, requiring the United States to condemn a flowage easement which was owned by a power company, with the fee in a third party, was reversed sub nom. United States v. Virginia Electric and Power Co., 350 U.S. 956 (1956).

noticeable inroads on the servitude concept were made in *Federal Power Commission v. Niagara Mohawk Power Co.*,[74] and *United States v. Kansas City Life Ins. Co.*[75] Neither case involved valuation of fast lands, but the language of both opinions indicated that the Court was unwilling to rely on the proprietary nature of the federal navigation power where the government's acts interfered with the property of individuals. In the *Niagara Power* case it was held that the Federal Power Act had not destroyed state recognized usufructuary rights in the flow of a river, and that the United States could be compelled to pay for these rights. This was a matter of statutory interpretation, but the dissenting opinion of Justice Douglas pointed out that the government was being forced to pay for something which the Court had previously said was owned by the United States. The *Kansas City Life Ins.* case is most noteworthy for the statement that the navigation servitude extends no further than the banks of a navigable river. The effect of this case was to rule that a lawful raising of a navigable river to its high water mark amounted to a taking when water was backed up a non-navigable river. Justice Douglas, joined in dissent by three other justices, protested that the effect of the servitude was nullified if it did not exonerate the government of all damage incurred as a result of a lawful rise in a navigable water level.

The tone of the opinion in *Twin City* indicates that a majority of the Court have returned to the view of the *Dunbar-Chandler* case. The Court holds in no uncertain terms that Congress, by reason of its plenary regulatory power in all waters affecting interstate commerce, has a proprietary servitude in those waters. No private owner may assert his title against the United States when it is acting in aid of navigation, and riparian land cannot derive value from the possible uses the owner might have made of that water.

III. *Conclusion*

The *Twin City* decision leaves several questions unanswered. One of the most pressing of these is whether or not the proprietary nature of the federal servitude may be applied when the government's acts with regard to a stream are not in aid of navigation. The servitude doctrine was developed at a time when all water development was directed toward improvement of navigation.

[74] 347 U.S. 239 (1954).
[75] 339 U.S. 799 (1950).

Statements often appear that the quasi-proprietary aspect of the servitude is limited to acts done for navigation alone.[76] However, expansion of federal power in this area on the basis of the power to promote commerce generally,[77] as well as certain powers derived from the ability to spend for the general welfare,[78] raise the question as to whether the application of the servitude doctrine will be so limited. It is unlikely that an answer will be forthcoming in the immediate future. Congress has always phrased its acts relating to rivers and harbors so as to include navigation as a purpose,[79] and the role of the judiciary in determining the wisdom of congressional action is very limited.[80] When the question is brought to the Court, it is likely that it will be resolved in favor of extending the proprietary servitude to all means in aid of commerce as a whole. Federal power in navigable rivers is only a part of the commerce power. The servitude seems to have been imposed on rivers because they are highways of commerce, and thus it would be unreasonable to restrict the government's property interest in running waters to navigation alone. An early lower court decision which has been cited by the Supreme Court lends strength to this view.[81]

A different approach is required to enable the government to use riparian property for welfare purposes without liability for just compensation. Although rivers are highways of commerce, it is difficult to say they are also tools of public welfare. Federal taking of rivers and fast land for such non-commercial purposes as reclamation projects would be an exercise of its powers to implement under the necessary and proper clause the express power to spend for the public welfare. Unless the Court were to go further than it has ever gone before and declare the navigable waters of

[76] Note 14 supra.

[77] United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

[78] United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

[79] In the Twin City case the Court of Appeals for the Fifth Circuit based its decision to award power site value to the respondent on the ground that the federal dam could not aid navigation because it would block the river. United States v. Twin City Power Co., (5th Cir. 1955) 221 F. (2d) 299. The Supreme Court reversed this finding.

[80] Berman v. Parker, 348 U.S. 26 (1954); United States ex rel. TVA v. Welch, 327 U.S. 546 (1946).

[81] Stockton v. Baltimore and New York R. Co., (D.C. N.J. 1887) 32 F. 9, app. dismissed 140 U.S. 699 (1891), was cited with approval in Scranton v. Wheeler, 179 U.S. 141 (1900). The Stockton case held that a taking of river bottom for a bridge pier was in aid of commerce and was not compensable. But see Iriarte v. United States, (1st Cir. 1948) 166 F. (2d) 800, cert. den. 335 U.S. 816 (1948), where, in connection with a condemnation of harbor land under the military powers of Congress, it was held proper to consider the possible use of the land for docks and terminals.

the country to be in the public domain for all lawful federal purposes, the property facet of the navigation servitude would not seem to cover the exercise of a naked constitutional power resulting in the derogation of a private interest. Some members of the present Supreme Court, however, have indicated that they would hold otherwise. Justices Black and Douglas have intimated that, in their opinion, the right of the United States in waterways is absolute. The *Twin City* opinion places great reliance on the principle that there can be no private ownership in the flow of a river. The cases to date have said only that the river cannot be owned by an individual as against the superior right of the United States to improve navigation. The willingness that the Court has displayed to extend the scope of the federal power in rivers warrants the conclusion that the next step may be to extend the proprietary aspect of the power to be as sweeping as the power itself.

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