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question is much broader than the cited application in the Sorrells case."[63]

It seems desirable that the North Carolina court distinguish between the doctrine of entrapment as defined in the federal courts, and the defense of consent of the victim in prosecutions involving offenses to which such consent is a defense. While the two defenses tend naturally to overlap in factual settings, it should be remembered that they are entirely distinct defenses: the one, admiting commission of the offense but pleading entrapment by officers of the government, a plea whose foundation is public policy; and the other, a plea of not guilty by virtue of the fact that the conduct of the victim robbed the act of an essential element of criminality.

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Eminent Domain—Just Compensation—Hydro-Electric Dam Sites

In the past when the government has taken private property for public purposes or allowed one of its agencies to do so, the "just compensation" guaranteed to the private owner by the Fifth Amendment to the United States Constitution[1] has meant that the owner would receive the full and perfect equivalent of the property in money or money's worth.[2] Theoretically, the owner is to be put in as good a position pecuniarily as he would have been had his property not been taken.[3] In arriving at this "equivalent" the courts have sought to determine the full and perfect market value of the property at the time it was taken.[4] This has involved a consideration of the best and most profitable use to which the property was adaptable and likely to be used in the reasonably near future,[5] not

[63] *Ibid.*

[1] U. S. CONST. amend. V, ". . . nor shall private property be taken for public use without just compensation."

[2] Olsen v. United States, 292 U. S. 246, 255 (1946); Jacobs v. United States, 290 U. S. 13, 17 (1933); Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, 304 (1923); North Carolina v. Sunrest Lumber Co., 199 N. C. 199, 154 S. E. 2d 123 (1930).

[3] Olson v. United States, *supra* note 2; United States v. Miller, 317 U. S. 369, 373 (1924); Seaboard Air Line Ry. Co. v. United States, *supra* note 2.

[4] United States *ex rel.* T. V. A. v. Powelson, 319 U. S. 266, 275 (1943); United States v. Miller, *supra* note 3, at 374; Carolina & Yadkin R. R. v. Armfield, 167 N. C. 464, 83 S. E. 809 (1914); Creighton v. Water Commissioner, 143 N. C. 171, 55 S. E. 511 (1906).

[5] United States *ex rel.* T. V. A. v. Powelson, *supra* note 4, at 276; McCandless v. United States, 298 U. S. 347 (1935); Olson v. United States, 292 U. S. 246, 255 (1933); Brooks-Scanlon Corp. v. United States, 265 U. S. 106 (1924); United States v. Seufert Bros. Co., 78 Fed. 520 (C. C. D. Ore. 1897); Young v. Harrison, 17 Ga. 30 (1855); Alloway v. Nashville, 78 Tenn. 510 (1890); Sargent v. Merrimac, 196 Mass. 171 (1907); Minneapolis-St. Paul Sanitary District v. Fitzpatrick, 201 Minn. 442, 277 N. W. 394 (1937); Raymond v. The King, 16 Can. Exch. 1, 29 D. L. R. 574 (1916), *aff'd*, 59 Can. S. C. 682, 49 D. L. R. 689 (1918); *In re* Gough & The Asportia, Silloth, & District Water Board, L. R. 1904, 1 K. B. 417; Note, 34 IOWA L. REV. 695 (1949); 18 AM. JUR., Eminent Domain, §§ 244, 245 (1938).

just at the time of the taking.[6] This is, however, just an element and not the measure of damages and is to be considered as it would affect value in a transaction between private parties,[7] *i.e.*, as in a transaction between a well informed and willing seller and an equally well informed and willing buyer.[8] The fact that the property could be so used only in combination with other property does not exclude this element from consideration provided there be a reasonable possibility of such combination.[9] In the case of hydro-electric sites, the latter factor has been applied somewhat more strictly than in other cases, and it has been necessary that there be a reasonable possibility of combination without the use of eminent domain.[10]

However, since the United States Supreme Court decided *Grand River Dam Authority v. Grand Hydro Corp.*,[11] there has been some doubt as to whether this general rule would apply in eminent domain proceedings instituted by the federal government under act of Congress or by an agency or licensee of the federal government under the Federal Power Act.[12] There, Grand Hydro, a private corporation, had been granted a franchise by the State of Oklahoma for the development of water power on the Grand River and had acquired considerable property which it planned to incorporate into the project. Subsequently the state legislature created the Grand River Dam Authority, a governmental corporate agency having the power of eminent domain, to develop and sell water power and electric energy in the Grand River Basin. The Authority then received a license from the Federal Power Commission

[6] Olson v. United States, *supra* note 5, at 258; San Diego Land & Town Co. v. Neal, 78 Cal. 63, 20 Pac. 372 (1898); see generally, JAHR, EMINENT DOMAIN—VALUATION AND PROCEDURE, § 78 (1953).

[7] Olson v. United States, 292 U. S. 246, 257 (1933); New York v. Sage, 239 U. S. 57 (1915); Boston Chamber of Commerce v. Boston, 217 U. S. 189 (1910); Moulton v. Newburyport Water Co., 137 Mass. 163 (1884); In Boston Chamber of Commerce v. Boston, *supra*, at 195, Mr. Justice Holmes said, ". . . [A]nd the question is, what has the owner lost? Not, What has the taker gained?"

[8] Olson v. United States, *supra* note 7, at 257; United States v. Miller, 317 U. S. 369, 374 (1942); Nantahala Power & Light Co. v. Moss, 220 N. C. 200, 205, 17 S. E. 2d 10, 13 (1941); 18 AM. JUR., *Eminent Domain*, § 242 (1938).

[9] United States *ex rel.* T. V. A. v. Powelson, 319 U. S. 266, 275 (1943); McCandless v. United States, 298 U. S. 342, 348 (1935); Olson v. United States, 292 U. S. 246, 256 (1935); New York v. Sage, 239 U. S. 57, 61 (1915); Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195 (1909).

[10] United States *ex rel.* T. V. A. v. Powelson, *supra* note 11, at 276; See also, Olson v. United States, 292 U. S. 246 (1933); North Kansas Development Co. v. Chicago B. & Q. R. Co., 147 F. 2d 161 (8th Cir. 1945), *cert. denied*, 325 U. S. 867 (1945); Boetger v. United States, 143 F. 2d 391 (1st Cir. 1944), *cert. denied*, 323 U. S. 772 (1944); United States v. Boston C. C. & N. Y. Canal Co., 271 Fed. 877 (1st Cir. 1921); ANNOT., 124 A. L. R. 955 (1937); Notes, 35 HARV. L. REV. 76 (1921); 44 YALE L. J. 1095 (1935).

[11] 335 U. S. 359 (1948), *affirming*, 200 Okl. 157, 201 P. 2d 225 (1947).

[12] 49 STAT. 838, 16 U. S. C. § 791 (1935). For history see Wheeler, *The Federal Power Commission As An Agency of Congress*, 14 GEO. WASH. L. REV. 1 (1945); Lea, *The Federal Power Commission as an Agency of Congress*, 14 GEO. WASH. L. REV. 5 (1945); Pinchot, *The Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9 (1945).

granting to it the sole right to develop water power on the Grand River. Thereafter, Grand Hydro assigned its property to the Authority with a stipulation that the value should be determined as though the assignment had not been made. The parties were unable to agree on the value of the property and the Authority filed action to condemn the property. The Supreme Court of Oklahoma, with two dissents, held that even though the Authority had been licensed by the Federal Power Commission and had been granted an exclusive right to build the project by the State of Oklahoma, it could not take private property without just compensation, and the court felt that just compensation included the special adaptability of the property for development as a hydro-electric dam site.[13] On appeal the United States Supreme Court in a five to four decision affirmed the decision of the Supreme Court of Oklahoma and held that the Federal Power Act had not so far affected the value of property as a prospective site for hydro-electric development as to exclude the state law of damages in a state proceeding. The court expressly pointed out, however, that (1) no reference was made in the petition for condemnation to possible rights under the Federal Power Act and (2) the Federal Power Act merely attached certain conditions to the use of the land as a power site.[14] Finally, the court stated that it would ". . . express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act."[15]

Writers commenting on *Grand River Dam Authority v. Grand Hydro Corp.*[16] and two decisions from the ninth circuit, *Continental Land Co. v. United States*[17] and *Washington Water Power Co. v. United States,*[18] have indicated that the special adaptability of property for hydro-electric dam site construction would not and should not be considered as an element of "just compensation" where the taking happened to be by the federal government or its licensee. In each of the above mentioned cases the federal government took private property with the intention of using it for hydro-electric development, and compensation on the basis of its special adaptability was denied. In neither of these cases, however, was there a reasonable possibility that private power interests would have been able to combine the necessary land without using the power of eminent domain,[19] and the circuit court employed this factor

[13] 200 Okl. 157, 201 P. 2d 225 (1947).
[14] Note, 27 N. C. L. REV. 359 (1949).
[15] 335 U. S. at 373.
[16] Notes, 62 HARV. L. REV. 694 (1949); 34 IOWA L. REV. 695 (1949); 27 N. C. L. REV. 359 (1949).
[17] 88 F. 2d 104 (9th Cir. 1937).
[18] 135 F. 2d 541 (9th Cir. 1943), *cert. denied,* 320 U. S. 747 (1943).
[19] In Washington Water Power Co. v. United States, 88 F. 2d 104 (9th Cir. 1937), any private power project would have flooded lands belonging to the federal government.

to exclude the element of special adaptability from consideration. But, in addition, the court stated in each of these cases that a private owner has no compensable interest in the prospective use of water power where the federal government has exercised its superior right.

The issue was presented to the United States Supreme Court recently in *United States v. Twin City Power Company.*[20] The Twin City Power Companies [21] between 1901 and 1911 had acquired substantially all the property along the Savannah River necessary for the construction of a hydro-electric project with a dam at Price's Island which was very suitable for that purpose.[22] Congress, upon the recommendation of the Secretary of War, granted its approval in six acts passed between 1901 and 1919. In 1926 the Federal Power Commission granted Twin City Power Co. a preliminary permit for the development. From 1928 until 1932 the Savannah Electric Co. held a federal license to build at Clark's Island and to incorporate the Twin City property into the larger project. During this period other private companies showed interest in the property. Finally Congress, in the Flood Contral Act of 1944,[23] authorized the construction of the project by the federal government using public funds, and the Savannah Electric Co. was denied a license by the Federal Power Commission.[24]

Mr. Justice Douglas, writing for a majority of five,[25] elaborated upon his dissenting opinion in *Grand River Dam Authority v. Grand Hydro Co.* and determined that the adaptability of this property for such development would not be allowed as an element in determining compensation.[26] In doing so he overturned two circuit court decisions which

[20] 350 U. S. 222 (1956).

[21] Twin City Power Co., a South Carolina corporation, and Twin City Power Co. of Georgia, a wholly owned subsidiary of the former.

[22] "Twin City's 4,700 acres would include all except about 170 acres of land and rights necessary for the location of a dam, plant, and reservoir basin with a 60-foot head of water at Price's Island. A 60-foot head at that point with a 5-foot surcharge would require about 400 additional acres instead of 170, a 70-foot head with a 5-foot surcharge, 1,250 acres, and an 80-foot head with a 5-foot surcharge, 2,800 acres. The Twin City land was not only available but essential for such development in the vicinity of Price's Island." 350 U. S. 222, 231 n. 2.

[23] Flood Control Act of 1944, c. 665, § 10, 58 STAT. 887, 894 (approving the Savannah River Basin Project for flood control and other purposes as recommended by the Chief of Engineers in H. R. Doc. No. 657, 78th Cong., and the construction of the Clark Hill Reservoir on the Savannah River at an estimated cost of $35,300,000.00).

[24] See Savannah River Electric Co. v. Federal Power Commission, 164 F. 2d 408 (4th Cir. 1947), affirming the refusal of the license on the ground that Congress had declared its intent to exclude private development.

[25] Mr. Justice Burton, joined by Justices Frankfurter, Minton, and Harlan, dissented.

[26] 335 U. S. 359, 375 (1948). By passing the Federal Power Act, Congress asserted the exclusive dominion and control of the public over this water power and intended to defeat the claims of private parties. It was felt that the majority opinion gave to the private parties compensation for something in which they had no interest.

had determined that Twin City Power Co. should be allowed to recover this element of value.[27]

Seemingly, the line of reasoning adopted by the majority in the principal case is that the federal government, under the commerce power granted Congress in the Constitution,[28] has a dominant interest[29] in the flow of a navigable stream which may, in the discretion of Congress, be exerted to the exclusion of any conflicting or competing riparian interests, state or private.[30] By passing the Flood Control Act of 1944,[31] reasoned the court, Congress expressly exercised this dominant power and thereby deprived riparian owners of any interest in the power potential of the stream. This claim of the owners, further states the court, is a claim for a special value inherent in their land due to its proximity to a navigable stream and compensation is, in effect, sought for an interest in the flow of the stream which they could not own and from which they had been expressly excluded by Congress.

In this opinion Mr. Justice Douglas cites *Chandler-Dunbar Co. v. United States*[32] as the controlling case and quotes extensively from a portion of that decision relating to a claim for compensation for certain dams, dykes, and forbrays which had been used in the claimant's lock-canal system and incidentally to produce electricity, and which the Secretary of War had determined to constitute hindrances to the development of the navigation potential of the Niagara River by the federal government. Also, there is a reference to a portion of the decision relating to certain riparian property which had possible value as factory sites with the factories to be supplied with electricity from the excess water power.

However, the majority in the principal case ignored another portion of *Chandler-Dunbar Co. v. United States* which was relied upon by the two circuit courts and by the dissenters, and which is perhaps more

[27] United States v. Twin City Power Co., 215 F. 2d 592 (14th Cir. 1954) and United States v. Twin City Power Co. of Georgia, 221 F. 2d 299 (5th Cir. 1955).

[28] U. S. CONST., art. I, § 8, "The Congress shall have the power . . . (3) To regulate commerce. . . ."; United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940), (The power of the United States over its waters which are capable of interstate commerce arises from the Commerce Clause of the Constitution. The power to regulate commerce necessarily includes the power to regulate navigation. United States v. Applachian Electric Power Co., *supra,* at 405.)

[29] Federal Power Commission v. Niagara Mohawk Power Co., 347 U. S. 239, 249 (1954); United States v. Commodore Park, Inc., 324 U. S. 386, 391 (1945), (dominant servitude); United States v. Gerlach Livestock Co., 239 U. S. 725, 736 (1950), (superior navigation easement): *Accord,* United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 312 U. S. 592 (1941); United States v. Cress, 343 U. S. 316 (1916); United States v. Willow River Power Co., 329 U. S. 499 (1913); and St. Anthony Falls Water Power Co. v. St. Paul Water Commission, 168 U. S. 349 (1897).

[30] See note 28 *supra.*

[31] See note 23 *supra.*

[32] 229 U. S. 53 (1913). "Ownership in a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of ownership is inconceivable." *Id.* at 69.

directly analogous. Chandler-Dunbar Co. also owned certain fast land which it had set aside for further canal and lock development and which was the only property in the vicinity suitable for that purpose. The court affirmed the decision of the lower court allowing compensation based upon this element of special adaptability, basing the decision upon the general rule of damages in spite of the fact that the special value of the property necessarily arose from and involved a use of waters from the river.[33]

Although there is undoubtedly a logical basis for the theory propounded by Justice Douglas, there is a basis in justice as well as logic for the contrary argument expressed by Mr. Justice Burton in the dissenting opinion and by Chief Judges Parker and Hutchenson of the fourth and fifth circuits respectively. This argument is, in essence, that the dominant interest of the government is limited to the bed of the stream as defined by the high water mark. The adjacent landowner, it is true, does not own the water power value in the current of the stream, but neither does the government have any servitude over the adjacent fast land. The Supreme Court itself has pointed out that the Federal Power Act does not abolish private riparian rights vested under state laws[34] and that these rights remain unimpaired until the federal government elects to exercise its rights.[35] The land is as necessary as the water for any such development and, until Congress passed the Flood Control Act of 1944, the necessity and adaptability of the property for the project would have been a determinative factor as to value in any negotiations between private parties. Thus, when the federal government takes property which, as here, has been privately combined expressly for the purpose for which it was taken and is specially adaptable and absolutely necessary for that purpose, this special value must be allowed as an element of compensation.[36] Otherwise the government is extending its navigation servitude above the high water mark and fastening it upon the fast land and is violating the constitutional mandate that the compensation be just.

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[33] Accord, United States v. Kansas City Life Insurance Co., 339 U. S. 799 (1949); McGovern v. City of New York, 229 U. S. 363 (1913); Shoemaker v. United States, 147 U. S. 282 (1892); Boom Co. v. Patterson, 98 U. S. 403 (1878); Young v. Harrison, 17 Ga. 30 (1855); Alloway v. Nashville, 88 Tenn. 510 (1890); Sargent v. Inhabitants of Merrimac, 196 Mass. 171, 81 N. E. 970 (1907); Gearhart v. Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891 (1902); *In re* Gough & Asportia, Silloth, and District Water Board, L. R. 1904, 1 K. B. 417.

[34] Federal Power Commission v. Niagara Power Corp. 347 U. S. 239 (1954); *cf.* Henry Ford and Sons, Inc. v. Little Falls Fiber Co., 280 U. S. 369 (1929), (Where a licensee of the Federal Power Commission impaired private riparian rights, the court said that even though these rights are not immune from destruction, the present legislation does not purport to authorize the Federal Power Commission to impair such rights, recognized by state law, without just compensation.).

[35] See note 34 *supra*. Compare Monongahela Navigation Co. v. United States, 148 U. S. 312, 330 (1892).

[36] See Monongahela Navigation Co. v. United States, 148 U. S. 312 (1892).