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COMMENTS

THE TENNESSEE VALLEY LITIGATION

By ALAN W BOYD*

Unlike the Gold Cases, the N. R. A. and A. A. A. decisions, the legislation involved in *Ashwander, et al. v. Tennessee Valley Authority, et al.*¹ has been popularly classified as a manifestation of the social policy of the national administration rather than a product of economic stress. The case actually presented and decided, however, involves the application of relatively narrow, reasonably well-settled principles about which there can be little, if any, substantial disagreement. The Tennessee Valley Authority is a body corporate created for the purpose of maintaining and operating the properties owned by the United States in the vicinity of Muscle Shoals, Alabama, "in the interest of national defense and for agricultural and industrial development and to control

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¹ U. S. Sup. Ct. Feb. 17, 1936, 80 L. Ed. 427.

the destructive flood waters in the Tennessee River and Mississippi River Basins."² It is given power to construct such dams and reservoirs in the Tennessee River and its tributaries as in conjunction with Wilson Dam and other dams constructed or to be constructed, will provide a nine-foot channel from Knoxville to the mouth of the river, and is also authorized to acquire and construct power structures and transmission lines. The stream flow is required to be regulated primarily to promote navigation and control floods and the manufacture of power is to be consistent with such purposes. To assist in liquidating the cost and aid in the maintenance of the projects of the Authority, it is empowered to sell the surplus power not used in its operations, in general giving preference to states, counties and municipalities within transmission distance as against private companies and individuals intending to resell at a profit.

On January 4, 1934, a contract was entered into between the Authority and the Alabama Power Co. for (1) the acquisition by the former of transmission lines extending from Wilson Dam to the surrounding territory in northwestern Alabama, together with certain real estate upon which Wheeler Dam is being constructed, (2) an interchange of power and the sale of surplus power to the Power Company; and (3) a territorial division of services, including an agreement by the Authority not to sell energy in the area outside that served by the transmission lines so acquired. Several months later a number of preferred stockholders demanded that the directors of the Power Company repudiate the contract. They refused on the ground that the best interests of the Company justified transferring the transmission lines for the cash consideration (approximately two-thirds of the replacement value without depreciation) plus the territorial restriction upon competition by the Authority during the life of the contract. The management of the Company took no position with reference to the legality of the Act.

Suit was then commenced by the stockholders to annul the contract primarily on account of the alleged invalidity of the Act. On motion to dismiss the District Court held³ that plaintiffs were entitled to maintain the action on behalf of the Company upon its refusal to act, and that while the Authority had the right to dispose of such surplus power as was incidentally and accidentally produced in good faith in the course of its operations for governmental purposes, Congress could not confer upon it the power to create such a surplus designedly or dispose of a surplus so created. It further held that under the averments of the bill, the Authority was shown to be engaged in the produc-

² Act of Congress of May 18, 1933, amended by the Act of Congress of August 31, 1935, 48 Stat. at L. 58, Chap. 32; 49 Stat. at L. 1075, Chap. 836, U. S. C. A. Title 16, Sec. 831c.

³ *Ashwander, et al. v. Tennessee Valley Authority* (D. C. N. D. Ala. N. E. D.) 8 Fed. Supp. 893.

tion and sale of power in an enterprise having no substantial relation to the improvement of navigation or any other granted power.

Upon hearing ⁴ the court found that the surplus intended to be disposed of was not limited to that incidentally created by governmental operations, but was the entire amount the plant was capable of producing and held that this was beyond the power of Congress to authorize.

The Circuit Court of Appeals for the Fifth Circuit reversed the District Court ⁵ holding.

(1) That Wilson Dam was validly constructed under the exercise by Congress of the war and commerce powers, and that by virtue of the lawful ownership of the dam, the government is the owner of all the water power inevitably created by the construction of the dam,

(2) That Congress, in the exercise of its power under Article 4, Sec. 3, cl. 2 of the Constitution to dispose of property of the United States, could dispose of water power created at the dam as freely as any other property of the government;

(3) That the right of disposal is not limited to an incidental or accidental surplus produced in excess of the amount strictly necessary for national defense or navigation but extends to the whole surplus created by the existence of the dam. It was said.

"As a practical matter, there would be no market for the incidental or accidental surplus created in the honest effort to produce only enough electricity to supply strictly governmental requirements; for no user, public or private, of electricity would become a customer unless assurance could be given of a firm and dependable supply. That the surplus or any of it need not be allowed to go to waste, but that it and all of it may rightfully be disposed of and the proceeds applied toward reimbursement of the cost of a publicly-owned dam is well settled. * * * It is within the province of Congress to adopt any reasonable means, whether of lease or sale, for disposing of the surplus. The use of transmission lines to facilitate sales cannot fairly be said by the courts to be unreasonable or inappropriate. Of course, it is true that the government of the United States cannot engage at will in private business, but it by no means follows that it cannot sell property which it owns, even though in doing so it may enter into competition with other public or private owners of property. It is not doubted that each of the several states holds in perpetual public trust dominion over the navigable waterways within its borders; but it is equally true that the rights of the states in navigable waters are subject to the supreme war and commerce powers of the general government. We live under a dual government of divided powers, not under two separate governments of conflicting powers. The power over navigable waters granted to the federal government is not in conflict with, but is necessarily superior to the dominion over such waters which the states reserved to themselves. *Gibbons v. Ogden*, 9

⁴ *Ashwander, et al. v. Tennessee Valley Authority, et al.* (D. C. N. D. Ala. N. E. D.) 9 Fed. Supp. 965. Note 48 *Harvard Law Review* 806.

⁵ *Tennessee Valley Authority, et al. v. Ashwander, et al.* (5th C. C. A.) 78 F (2d) 578. Note 35 *Columbia Law Review* 1134.

Wheat, 1, 6 L. Ed. 23. It leads nowhere to say that the federal government in exercising its constitutional powers acts within 'state domain,' since at the same time it is acting within its own domain as well."

The Supreme Court granted certiorari and affirmed the decision of the Circuit Court of Appeals. The court divided, however, on the question of the right of the petitioner stockholders to maintain the action. Four justices, in an opinion by Chief Justice Hughes, upheld the right to sue and held the Act valid. Four justices, in an opinion by Justice Brandeis, agreed with the Hughes opinion on the validity of the Act but denied the right of the petitioners to maintain the action. Justice McReynolds in a separate opinion upheld the right to sue and dissented as to the constitutionality. The decision chiefly relied upon by the majority on this branch of the case is *Smith v. Kansas City Title & T Co.*,⁶ where a shareholder of the Title Company was allowed to maintain a suit to enjoin the directors from purchasing bonds of Federal Land Banks and Joint Stock Land Banks on the ground that the bonds were not legal securities because the Act of Congress authorizing the creation of the banks was unconstitutional. In the case at bar the capacity of the power company to dispose of its property in good faith for a consideration was indisputable, and while lack of capacity of the buyer might ultimately have resulted in a rescission, it would seem arguable at least that the corporation management should have the right to conclude in good faith, as it concededly did, that the best policy was to take that chance and obtain as a part of the consideration the territorial competitive limitation, instead of risking unrestricted competition by the Authority if the attack on the Act proved unsuccessful.⁷

The prevailing opinion as to constitutionality, while somewhat more elaborate, follows in general the reasoning of the Circuit Court of Appeals. In considering its effect upon the decisions of questions which may arise as to other federal projects which may be claimed to encroach upon private business, several factors should be borne in mind.

The dam here in question was commenced in 1917 during the war and completed in 1925. No question was therefore possible as to the substantial character of the national defense motives and purposes leading to its construction. The district court found that "the maintenance of said properties in operating condition and the assurance of an abundant supply of electric energy in the event of war constitute national defense assets."⁸ Nor was there ever any question but that the Ten-

⁶ 255 U. S. 180, 65 L. Ed. 577.

⁷ 48 Harvard Law Review, 806-f.1.

⁸ Traffic on the river averaged 500,000 tons 1891 to 1895, 1,000,000 to 1,600,000 tons 1895 to 1925 and 2,000,000 tons 1926 to 1930. Brief for Tennessee Valley Authority, p. 61.

nessee River is a navigable stream,⁹ that improvement of navigation thereon had long been a matter of governmental concern,¹⁰ and that Wilson Dam is an important factor in improving navigability. Moreover, it was conceded that the surplus power generated at Wilson Dam alone is more than sufficient to supply all the requirements of the contract, and that it was therefore unnecessary to consider any other dam or the interconnection of any other dam or series of dams with the Wilson Dam.

While decisions of the Supreme Court with reference to governmental ownership and disposition of water power are not numerous, they cover a span of forty-five years. *Kaukauna Water Co. v. Green Bay & Miss. Canal Co.*¹¹ (1891) involved the validity of a Wisconsin statute reserving to the state the water power resulting from a dam constructed pursuant thereto. The law was challenged in so far as it reserved to the state the water power created in excess of the needs for navigation. It was held that the State had the right to improve navigation by building the dam, that if by the erection of the dam a surplus was necessarily produced, the State could control and dispose of it as an incident to its right to make the improvement, and that there was no need of permitting it to be wasted. The court used the following pertinent language:

"The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the bona fide purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the State are entitled to great latitude in discretion in regard to the height

⁹ In addition to the recommendation of President Monroe in 1824, referred to in the opinion, the brief for Tennessee Valley Authority details numerous surveys and projects for navigation improvement from 1852 on, pp. 63-68.

¹⁰ A single high type dam, of the type of Wilson Dam as constructed, was found by the District Court to be the only feasible method of improving the stretch over the Muscle Shoals rapids for commercial navigation. Fdg. 131. The Corps of Engineers in a survey prior to 1930 recommended thirty-two low dams constructed by the Federal Government or seven high dams with the cooperation of private interest, on the theory that while high dams would be better, there seemed to be more opportunity of proceeding with less expensive low dams if the government was to bear the entire cost. Tennessee Valley Authority Brief, pp. 65 and 66 and record references.

¹¹ 142 U. S. 254, 35 L. Ed. 1004.

of the dam and the head of water to be created, and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement."

The result in the *Ashwander Case* would seem to be wholly consistent with the principles stated, regardless of whether they might be deemed to limit other portions of the T. V. A. program.

The right of the federal government to own and dispose of surplus water power created by a dam owned by it was sustained in *Green Bay & Miss. Canal Co. v. Patten Paper Co.*¹² (1898), holding that it could dispose of the power by sale to the Canal Company.

*United States v. Chandler Dunbar Co.*¹³ (1912) involved the question of whether the United States could be compelled to compensate riparian owners for the taking of water power rights in excess of navigation needs in connection with the improvement of a navigable stream for navigation purposes. A provision of the statute authorizing the leasing of the surplus water power was also attacked as authorizing a taking of private property for commercial use. It was recognized that under the commerce power of Congress, it could improve the navigability of the stream, that the rights of riparian owners regardless of where technical title to the bed of the stream rests are subordinate to the public right of navigation, that the determination of Congress as to the means of improving navigation is conclusive and that riparian owners have no right to the water power as against navigation needs and were entitled to no compensation for its loss. As to the provision for disposing of surplus water power by the United States, the court said.

"If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the government. The practice is not unusual in respect to similar public works constructed by state governments."

In *Arizona v. California*¹⁴ (1930), the validity of the Boulder Canyon Project Act was attacked by the State of Arizona. That act authorized the construction on the Colorado River of a dam, a storage reservoir, and a hydro-electric plant to be controlled, operated and managed by the United States for the recited purposes of flood-control, improvement of navigation of the river, reclamation of public lands

¹² 173 U. S. 179, 43 L. Ed. 658.

¹³ 229 U. S. 53, 57 L. Ed. 1063.

¹⁴ 283 U. S. 423, 75 L. Ed. 1154.

through the use of the stored waters and "for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking." Arizona contended that the river was not navigable, and that in any event the real purpose of Congress was not to improve navigation. The court found that a part of the stream was formerly navigable, that navigability would to some extent be restored by the project and held that the river was therefore navigable. It held further that it could not inquire into the motives which induced the passage of the Act; that the means provided for the control of navigation were not unrelated thereto, that it was unnecessary for the court to determine whether the particular structures proposed were reasonably necessary; and that the fact that purposes other than navigation would also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power. Except for the reference to irrigation of public lands, the following language in that opinion could as well have been used in the *Ashwander* case:

"Since the grant of authority to build the dam and reservoir is valid as an exercise of the constitutional power to improve navigation, we have no occasion to decide whether the authority to construct the dam and reservoir might not also have been constitutionally conferred for the specified purpose of irrigating public lands of the United States, or for the specified purpose of regulating the flow and preventing floods in this interstate river."

While flood-prevention is not referred to in the opinion in the *Ashwander Case* as a factor supporting the validity of the T V A. and while *Arizona v. California* does not decide that flood-prevention alone will justify the erection of the dam, Wilson Dam is unquestionably an important factor in flood-prevention as well as in the improvement of navigability.¹⁵ These authorities seem to support amply every question now decided with reference to the validity of T V A. except as to the means of disposition of the surplus, previous disposition having been in general by sale or lease, and in this connection, the question is narrowed to the right to acquire the transmission lines and sell at a distance rather than at the site. In this connection, it is said in the opinion by Justice Hughes:

"We know of no constitutional ground upon which the Federal Government can be denied the right to seek a wider market. We suppose that in the early days of mining in the West, if the Government had undertaken to operate a silver mine on its domain, it could have acquired the mules or horses and equipment to carry its silver to market. And the transmission lines for electric energy are but a facility for conveying to market that particular sort of property, and the acquisition of these lines raises no different constitutional question, unless in some way there is an invasion of the rights reserved to the

¹⁵ Brief of Tennessee Valley Authority, pp. 62, 63.

State or to the people. We find no basis for concluding that the limited undertaking with the Alabama Power Company amounts to such an invasion. Certainly, the Alabama Power Company has no constitutional right to insist that it shall be the sole purchaser of the energy generated at the Wilson Dam; that the energy shall be sold to it or go to waste."

This would seem to be well within the familiar principle that the choice of means if reasonably related to the end sought to be accomplished in this prerogative of Congress, or, as stated by counsel for T V A.:¹⁶

"It cannot seriously be maintained that while the determination of Congress to employ independent contractors to serve the contracts of the Government with purchasers of electricity is wholly reasonable (Boulder Dam method), a determination of Congress to employ its own officers for the same purpose is wholly capricious."

The Hughes opinion goes to unusual lengths to limit the decision to the exact case presented and to avoid deciding anything not essential thereto and, both by reason of what is said in this connection and what is left unsaid, further litigation is almost certain to ensue. Certainly the facts with reference to the authorization of each individual dam are left open to judicial inquiry but if it appears to bear a substantial relation to national defense or the improvement of a navigable stream, it is difficult to see how its validity can be further questioned. Once this hurdle is surmounted the right to generate the maximum amount of electricity from the water power created by the flow of the stream seems no longer open to argument. The right to transmit and sell at least within reasonable distances is also apparently settled. Nor is there any apparent principle upon which the selection of the character of the market or the purchasers should not remain with Congress, provided the method chosen is one "adopted in the public interest, as distinguished from private or personal ends," "consistent with the foundation principle of our dual system of government," and "not contrived to govern the concerns reserved to the states."

The question of interconnection of dams and power plants which the Court finds it unnecessary to pass upon would seem to depend upon whether such interconnection is actually in furtherance of national defense, improvement of navigation or the exercise of other federal powers. If so, the additional water power created thereby, if any, should be subject to the same principles as the disposition of the surplus created by individual dams. Another interesting question mentioned in the opinion, but not involved in the decision of the cause, is whether in order to dispose of the power the Government would have the right to establish mills, factories and other competitive commercial enterprises. In

¹⁶ Brief of Tennessee Valley Authority, p. 109.

general, the solution of such problems ought to depend upon whether the enterprise is incidental to the disposition of governmental property or the latter is a mere subterfuge for engaging in the enterprise. Certainly, if there were no other suitable method of marketing a valuable governmental asset, the United States would not be debarred from realizing its value, though in order to do so it should be necessary to change its form or even to utilize it in a commercial enterprise. On the other hand, the constitutional power to dispose of property of the United States would scarcely seem to warrant permitting the Government to engage in competitive commercial enterprises merely because they involve the use and ultimate disposition of property lawfully acquired.
