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JUST COMPENSATION AND THE NAVIGATION POWER

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The fifth amendment of the United States Constitution commands that private property shall not be taken for public use without just compensation. Many cases involve the issue of what constitutes just compensation for particular private property which has been taken. Few guiding principles have been formulated, other than a general proposition that just compensation is based upon the market value of the property with due consideration of all its available uses.[1] The amount assessed under the above formula cannot be enhanced by any special use of the property to the Government, because just compensation means the amount of loss to the owner, not the gain derived by the appropriator from the taking.[2] The purpose of this comment is to outline a major exception to the usual rules of just compensation.

Where the United States appropriates private property in execution of its navigation power, the determination of just compensation proceeds upon a unique theory. Special rules have been formulated for the determination of what is private property as against the United States in and along navigable waterways, and, as shall be pointed out, these rules have a tremendous effect upon the amount of compensation due when the Government "takes" such property. The primary determination is one of property rights. It is self-evident that all property rights possessed by the United States cannot be private property, and that the exercise of these rights does not involve loss to any private owner.

The United States may "take" private property in at least three different ways. *First,* it may employ legal means of condemnation. As an instrument for implementing the necessary and proper clause of the Constitution,[3] the United States possesses the power of eminent domain. The power was early recognized as an incident of sovereignty,[4] and later recognized as impliedly authorized by the fifth amendment.[5] *Second,* it occasionally seizes private property outright, usually in wartime operation of industries or appropriation of enemy assets.[6] *Third,*

[1] United States v. Miller, 317 U.S. 369 (1943).

[2] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

[3] U.S. CONST. art. I, § 8: "The congress shall have power: ... 17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, ..."

[4] Mayor, Alderman & Inhabitants of New Orleans v. United States, 10 Pet. 662 (U.S. 1823).

[5] Kohl v. United States, 91 U.S. 367 (1875).

[6] International Paper Co. v. United States, 282 U.S. 399 (1931) (compensation required for seizure under "war power").

a "taking" may result as an incident or effect of Government action, such as flooding of lands by waters impounded by a Government dam. In each case, the question of just compensation may arise, the amount of which will be measured by the loss to the owner. The loss may be far less if the appropriation of the land should be taken in exercise of the Government's navigation power.

THE NAVIGATION POWER

In 1824, the case of *Gibbons v. Ogden*[7] established that the commerce power encompasses the field of navigation. The Federal Constitution[8] delegates the commerce power to Congress, whose judgment determines whether a particular thing is in aid of or an obstruction to navigation. This has generally been accepted by the Supreme Court since the *Belmont Bridge* cases. In the first *Belmont* case,[9] the Supreme Court found that a bridge across the Ohio River was a nuisance and an obstruction to navigation. Its maintenance at the then present level was enjoined. Congress thereupon passed an act declaring the bridge to be a lawful structure, making it a post-road and requiring ship owners to regulate their vessels so as not to interfere with the present level of the bridge. Congressional discretion in this matter was upheld in a contempt action brought for failure to obey the Court's injunction.[10] The Court held that though the bridge may still be an obstruction to navigation in fact, it was not so in the contemplation of law. Since that time, congressional determination of what is improvement of navigation has seldom been challenged successfully.

In exercise of the commerce power "to improve navigation", Congress may extend the areas of practicable navigation either by constructing channels for actual use, removing obstructions to navigation, or by improving and enlarging the navigability of already navigable waters.[11] It may block navigation at one place for the purpose of fostering it at another,[12] and as an incident thereto may engage the Government in various proprietary enterprises such as the production of electric power.[13]

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[7] 9 Wheat. 1 (U.S. 1824).
[8] U.S. CONST. art. I, § 8: "The congress shall have power: ... 3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."
[9] Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518 (U.S. 1852).
[10] Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421 (U.S. 1856).
[11] United States v. Chicago, M. St. P. & P. R. Co., 312 U.S. 592 (1941).
[12] South Carolina v. Georgia, 93 U.S. 4 (1876).
[13] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Ashwander v. TVA, 297 U.S. 288 (1936); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1941).

THE NAVIGATION SERVITUDE

In some cases the Court has felt it sufficient to state that the United States, in appropriating land for public use in the exercise of its power to improve navigation, is liable under the fifth amendment to make just compensation therefor.[14] These statements are accurate but incomplete. The primary problem remaining is to determine the extent of the private property which has been taken, because *only private property rights are compensable.* One method utilized is to examine the other side of the coin and thereby find the extent of Government property rights. The value of the remainder is then assessed as full compensation for the exact amount of *private property* which has been taken for public use. This method employs the concept of "navigation servitude", which is a relatively modern theory developed by the Supreme Court. Earlier cases assumed that private ownership was subject to some public right of navigation.[15] Modernly, the Court speaks in terms of the navigation servitude:

> 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. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. . . . This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. *This right of the public has crystallized in terms of a servitude over the bed of the stream. . . . Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude but to award compensation where his title is not so burdened.*[16] (emphasis supplied)

In another case the servitude is described in these terms:

> The dominant power of the federal government, as has been repeatedly held, extends to the entire bed of the stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. *The damage sus-*

[14] United States v. Lynah, 188 U.S. 445 (1903); United States v. Williams, 188 U.S. 485 (1903).

[15] Gibson v. United States, 166 U.S. 269, 276 (1897): "... riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard."

[16] Mr. Justice Jackson in United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).

tained results not from a taking of the riparian owner's property in the stream bed, *but from the lawful exercise of a power to which that property has always been subject.*[17] (emphasis supplied)

A line of cases which arose prior to and overlapped into the servitude era applied a different test. If the injury complained of was a "direct" result of Government action, compensation was granted;[18] but if it was merely "consequential" as an indirect result of some public work, compensation was denied.[19] In the latter case there was only a tortious act doing injury, and there was no tort remedy against the United States.[20] Since the Federal Tort Claims Act[21] this analysis has become largely obsolete, and recent cases allow recovery for "indirect" injuries where the claimant's title is not burdened by the navigation servitude.[22] Whether the taking for the improvement of navigation is by eminent domain, by outright seizure, or is tortious, the servitude analysis provides a consistent measure of compensation. To show an injury, which will be compensated, the claimant must prove that he possesses property rights which are not burdened by the servitude. "Such economic uses are rights only when they are legally protected interests."[23] Interests subject to the navigation servitude are not legally protected. Whether the state or private persons own the bed of the stream,[24] or whether certain interests in navigable waterways are legally protected interests under *state* law are evidently immaterial, for the United States'

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[17] United States v. Chicago, M. St. P. & P. R. Co., 312 U.S. 592, 596-597 (1941).

[18] Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166 (U.S. 1872).

[19] Gibson v. United States, 166 U.S. 269 (1897); Bedford v. United States, 192 U.S. 217 (1904); Jackson v. United States, 230 U.S. 1 (1913); Sanguinetti v. United States, 264 U.S. 146 (1924).

[20] Federal dikes in the Mississippi River diverted the current against the opposite shore, washing away plaintiff's land within a year. This was held not to be a taking, that plaintiff's cause of action, if any, was in tort, and the United States was immune from tort liability. The facts were distinguished from a flooding, which evidently was considered a direct taking. Franklin v. United States, 101 F.2d 459 (6th Cir. 1939), *aff'd*, 308 U.S. 516 (1939). *Cf.* WASH. CONST. amend. IV: "No private property shall be taken *or damaged* for public or private use without just compensation having first been made, ..." (italics added.)

[21] 28 U.S.C. §§ 2671-2680 (1947). There may still be some injuries which are neither a taking nor a tort. The Government built a system of levees which had gaps or "fuse plugs" so that the plaintiff's land, in the path of a fuse plug, was still as subject to floods as it had been before the Government project. It was held that plaintiff's land had not been taken. This would probably not be a tort, either. United States v. Sponenbarger, 308 U.S. 256 (1939).

[22] United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

[23] Mr. Justice Jackson in United States v. Willow River Power Co., 324 U.S. 499, 503 (1945).

[24] *E.g.*, WASH. CONST. art. XVII, § 1: "The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes...."

navigation servitude is paramount to all other interests.[25] Thus the compensation due from the Government may be measured differently than when the appropriation is made by a state or by a public utility.[26] It should be noted here that the servitude is only considered in cases where Congress is exercising its navigation power. Appropriation under any other power or under the Reclamation Act[27] calls for compensation under usual rules without regard to the servitude.[28] Where the navigation power is exercised, the proper measure of compensation should be the fair market value of the property *as subject to* the navigation servitude. However, some difficulty remains in the determination of exactly what the servitude includes. It is ordinarily said to include the waters themselves and the lands beneath and within the high-water mark of navigable streams.[29] For the purpose of defining the extent of the servitude, the cases have been classified according to the physical location of the "property" which is appropriated or injured.

WITHIN, UNDER OR OVER THE STREAM

Where private structures or property are located in a navigable waterway itself, upon land below the waters or over the waters, the

[25] "Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the functioning of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all." Mr. Justice Jackson in United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).

[26] In Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948), a condemnee was allowed full power-site value for an appropriation by a private utility. The Court stated that if either the United States or its licensee under the Federal Power Act were seeking the land, different considerations would arise. In a strong dissent, Mr. Justice Douglas said: "The result of this decision is to give the water-power value of the current of the river to a private party who by reason of federal law neither has nor can acquire any lawful claim to it." 335 U.S. 359, 375. Note the consistency of this position in the Twin City and Niagara cases, notes 65 and 71, *infra*. Cases construing liability of a *city* for damage in improvement of navigation: Yates v. Milwaukee, 10 Wall. 497 (U.S. 1870) (city liable for removal of wharf in widening channel); *but see* Barney v. Keokuk, 94 U.S. 324 (1877) (city not liable for filling in plaintiff's shorelands and erecting wharves). In Hewitt-Lea Lumber Co. v. King County, 113 Wash. 431, 194 Pac. 377 (1920), the county was required to compensate for destruction of plaintiff's use of Lake Washington caused by a lowering of the lake level by construction of a ship canal.

[27] 43 U.S.C. §§ 371-609 (1952). 32 STAT. 390 (1902), 43 U.S.C. § 381 (1952) expressly preserves water rights under state laws.

[28] International Paper Co. v. United States, 282 U.S. 399 (1931) (compensation required for Government appropriation of water rights under "war power"); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (requiring compensation for riparian rights appropriated under the Reclamation Act).

[29] United States v. Chicago, M. St. P. & P. R. Co., 312 U.S. 592 (1941); "The relevance of the high-water level of the navigable stream is that it marks its bed." United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).

United States may appropriate or destroy it in the improvement of navigation without any payment of compensation. Thus, in *Lewis Blue Point Oyster Cultivation Co. v. Briggs,*[30] the Government dredged the bottom of a navigable bay, thereby destroying plaintiff's oyster plantation. No compensation was required, since plaintiff operated his oyster plantation subject to the navigation servitude.[31] Likewise, other cases have denied compensation where the Government either destroyed or required removal of wharves or other structures which reached into navigable waters, and of bridges which cross them.[32] When the Government is exercising its navigation power, the servitude is so absolute within, under and over the navigable water that a corollary rule is enunciated in some cases: if the Government is free from liability, it is immaterial that a structure affected constitutes no hindrance or obstruction to, or interference with, actual navigation.[33] Entire power dams within a navigable stream have been appropriated without compensation.[34] It is amply demonstrated that one takes a calculated risk when he places structures within, under or over a navigable stream.

THE LIMIT OF THE SERVITUDE — NON-NAVIGABLE TRIBUTARIES

Though structures within a navigable stream may be taken or destroyed with impunity, the Supreme Court has refused to burden structures within non-navigable tributaries, or land riparian thereto. In *United States v. Cress,*[35] compensation was required where Government dams and locks upon a navigable stream so diminished the current of an upstream non-navigable tributary that plaintiff, a riparian owner upon the tributary, had too little power left to run his mill. In another case,[36] a Government dam maintained the Mississippi River *at its ordinary high-water mark.* This caused a waterlogging of plaintiff's land, situated one and one-half miles from the river and riparian to a non-navigable tributary. Plaintiff was awarded compensation for the destruction of the agricultural value of its land. The Court clearly held

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[30] 229 U.S. 82 (1913).

[31] The result of this case has now been changed by statute: 28 U.S.C. § 1497 (1948).

[32] Bedford v. United States, 192 U.S. 217 (1904); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915); Willink v. United States, 240 U.S. 572 (1916); Louisville Bridge Co. v. United States, 242 U.S. 409 (1917); United States v. Commodore Park, 324 U.S. 386 (1945).

[33] Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915); United States v. Chicago, M. St. P. & P. R. Co., 312 U.S. 592 (1941).

[34] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

[35] 243 U.S. 316 (1917).

[36] United States v. Kansas City Life Insurance Co., 339 U.S. 799 (1950).

that his title was not burdened with the navigation servitude since it was riparian to a *non*-navigable stream.

In *United States v. Willow River Power Co.*,[37] slightly different facts produced an opposite result. There, a non-navigable tributary ran for some distance closely parallel to a navigable stream. Plaintiff had diverted the entire flow of the tributary through a new channel and into the navigable river, using the diversion to produce power from an artificially created drop. A Government dam downstream raised the level of the navigable river substantially *above* its ordinary high-water mark, thereby diminishing plaintiff's power head. Plaintiff sought compensation for loss of power value. The Court held that a riparian owner has no right of run-off into a *navigable* stream as against the navigation servitude. The *Cress* case was distinguished in that it had involved a right of run-off into a non-navigable tributary, not into the navigable stream itself. It is submitted that such a distinction is difficult to justify. If, by reason of the servitude, the Government may maintain the navigable stream at ordinary high-water mark, its servitude should also burden all lands affected thereby. In the *Cress* case the the run-off was ultimately into the navigable stream, though proximately into the tributary. It would appear that maintenance of ordinary high-water level is merely the exercise of the servitude as to all the world, and that the *Kansas City* case[38] is not as consistent with the servitude theory as it might be. But the rule from all three cases is reasonably clear: the navigation servitude does not burden lands which are not riparian to navigable streams.[39] It is fair conjecture whether this rule may be qualified by the *Twin City* case, discussed below.

Lands Riparian to Navigable Streams

Under the common law of most states, certain riparian rights are incident to ownership of land abutting on navigable streams.[40] Perhaps one of the more valuable riparian rights is that of access to the stream, for without access the riparian land has no special quality except

[37] 324 U.S. 499 (1945).

[38] See note 36, *supra*.

[39] It should be noted that § 23 of the Federal Power Act, 41 Stat. 1075 (1920), 16 U.S.C. § 817 (1952) provides that an FPC license is necessary for a riparian owner upon a *non-navigable* stream to construct a power project. Congressional power of flood control extends to non-navigable tributaries of navigable streams, State of Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).

[40] See Comment, 3 Catholic U.L. Rev. 33 (1953). For the state of riparian rights on navigable waterways in Washington, see Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891); State *ex rel.* Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945 (1912); Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56 (1921).

scenery. Yet, in the improvement of navigation, the United States may deprive a riparian owner of access to a navigable stream without liability for compensation.[41] This being true, the navigation servitude is not limited to the actual area within ordinary high-water mark, but also burdens some of the riparian rights which are an incident of ownership, and which make up much of the value of riparian land. As against the servitude there is no right to a continued flow of the stream at the same level,[42] nor is there any right to use the water itself or its flow as water power.[43] Such rights, even if inviolate under state law, are not "legally protected interests" as against the United States, and no compensation is due for taking them.

Lands riparian to navigable streams are known as "fast lands", and the Supreme Court has said that compensation must be paid for their taking.[44] Since riparian rights may constitute much of the "value" of fast lands, and since just compensation is determined with reference to the servitude in these cases, riparian rights which are burdened by the servitude have no "value" which is compensable. Few cases have considered the question of the measure of compensation due for fast lands appropriated in improvement of navigation.

In *Monogahela Navigation Co. v. United States*,[45] the Government condemned a dam and lock in a navigable river, and apparently voluntarily paid for the dam and lock. The appeal involved an asserted right to compensation for the value of Monogahela's state franchise, which the Court held compensable. There was no intimation in the case of a servitude theory; the opinion indicated a view that the navigation power was merely a superior right of condemnation. The Court subsequently expressed the view that *Monogahela* was based upon estoppel, since the company had been operating under a federal license.[46] In light of the other cases discussed herein it would appear that *Monogahela* has been overruled many times by implication.

The principal case prior to 1956 was *United States v. Chandler-Dunbar Water Power Co.*[47] Chandler-Dunbar operated a dam and some locks in and along a navigable stream, and owned certain fast

[41] Gibson v. United States, 166 U.S. 269 (1897); Scranton v. Wheeler, 179 U.S. 141 (1900); United States v. River Rouge Improvement Co., 269 U.S. 411 (1926); United States v. Commodore Park, 324 U.S. 386 (1945).

[42] United States v. Willow River Power Co., 324 U.S. 499 (1945).

[43] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1941).

[44] United States v. Willow River Power Co., 324 U.S. 499 (1945).

[45] 148 U.S. 312 (1893).

[46] Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915).

[47] 229 U.S. 53 (1913).

lands adjacent thereto. The Government condemned the entire property, and the principal issue before the Court was the valuation of the fast lands. Compensation was denied for any value in certain of the fast lands for use as factory sites in consequence of their availability in connection with proposed water-power development, since this value was viewed as being derived from the water power, thus subject to the navigation servitude. This part of the case clearly follows the servitude analysis, since any such value was dependent upon use of the flow of the stream, a use which was subject to the servitude. But the Court allowed compensation for other fast lands based upon their value based on their availability for lock and canal purposes. The explanation for this seemingly inconsistent holding was:

> That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such a purpose it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.[48]

Since locks and canals would require use of the water itself just as would the production of power, the latter holding of the *Chandler-Dunbar* case cannot, like the first issue, be reconciled with the servitude theory. The implication of the language above quoted is that the two parts of the case may be reconciled upon another ground: that notwithstanding the servitude, compensation is payable for fast land value due to an *immediately prospective* use, whereas the servitude denies compensation for value due to a remote or conjectural use of the water in the stream. This rule was applied in *United States ex rel. TVA v. Powelson,*[49] where all the land condemned lay along a *non-navigable* stream. Without relying upon *Chandler-Dunbar,* the Court held that the condemnee was not entitled to compensation for any value based upon a planned four dam power project, since it had not acquired all the necessary land, probably could not do so, and thus the project was too remote. The Court refused to take into consideration the condemnee's state-granted power of eminent domain as making the

[48] *Id.* at 76.
[49] 319 U.S. 266 (1942).

projected use less remote. As has been illustrated above, the navigation servitude does not burden non-navigable streams or lands riparian thereto, so it was not considered in the *Powelson* case. Thus the issue was properly that of the usual condemnation case, whether such use was too conjectural to attach any value to the land taken.

The ninth circuit produced two cases which closely follow *Chandler-Dunbar*. In *Continental Land Co. v. United States*,[50] the issue was the amount of compensation due for fast lands which formed the site for Grand Coulee Dam. The court relied upon *Chandler-Dunbar*, stating that no value could attach to the fast lands due to use of the stream. It was also pointed out that no reasonable probability existed that private capital would or could buy or utilize the damsite; therefore, such a use was remote and unlikely, there being no market for the land as a damsite. Since the land consisted of two granite cliffs, its value for "just compensation" was undoubtedly nominal, though in the hands of the Government it constituted one of the finest damsites in the world. The use to the condemnor is not a factor in assessing just compensation; the measure is the loss to the owner.[51] In *Washington Water Power Co. v. United States*,[52] the power company had expended over $400,000 in acquiring, surveying and planning use of certain fast lands at Kettle Falls on the Columbia River as a power site. The United States paid a condemnation price of $7,000, since the court excluded evidence of value as a power site in reliance upon the *Continental* case. Again, the prospective use was quite remote, since the contemplated project would have flooded certain Government lands including part of an Indian reservation. The company had no power to acquire those lands. The Supreme Court denied certiorari in each of these ninth circuit cases.[53] Both, however, are thoroughly consistent with *Chandler-Dunbar* upon either servitude or remote use grounds.

The question remained open whether compensation was payable by the United States for the value of fast land *as a power site* where such use was immediately prospective, and where there was a present market value of such land for such use. This issue was settled rather surprisingly in 1956, in *United States v. Twin City Power Co.*[54] In 1901, Twin City began to acquire certain fast lands along the Savannah River for the purpose of eventual development of a hydro-electric project.

[50] 88 F.2d 104 (9th Cir. 1937).
[51] United States v. Miller, 317 U.S. 369 (1943).
[52] 41 F. Supp. 119 (E.D. Wash. 1941), *aff'd*, 135 F.2d 541 (9th Cir. 1943).
[53] Continental Land Co., v. United States, 302 U.S. 715 (1937); Washington Water Power Co. v. United States, 320 U.S. 747 (1943).
[54] 76 Sup. Ct. 259 (1956).

The Savannah River is navigable and forms the boundary between Georgia and South Carolina. By 1919, some six Acts of Congress had authorized Twin City to build the contemplated project. In 1925 Twin City obtained a preliminary permit from the Federal Power Commission. Contention developed between Twin City and a rival utility as to which would build the project.[55] Finally in 1944, no project having been built and no permit issued to authorize it, Congress authorized the Clark Hill project, by which the federal government would develop the site as part of a comprehensive navigation and flood control program. The United States thereupon brought condemnation proceedings to acquire Twin City's properties. Since the lands were situate in two states, multiple litigation was necessary.

In the first reported case,[56] just compensation was held to include the value of the fast lands as a site for potential power development:

> To hold that the Government by the act of taking, strips this land of all such value, which it had heretofore possessed, but that immediately after the taking, it reacquired such value in the hands of the Government, conforms neither to logic nor justice.[57]

The "logic" and "justice" of the court failed to recognize the existence of the well-established navigation servitude. The precise question to be decided was what the court assumed: *whether the land had ever possessed such value as against the United States.*[58]

In the second case in the district court,[59] more indication was given of the method of evaluation used. Three engineers, testifying before court commissioners, gave the sums of $1,500,000, $1,600,000 and $1,900,000 respectively as the amounts which a prudent buyer would pay a prudent seller for these fast lands. The commissioners fixed the award at $1,257,033.20. The court approved this amount, saying:

> The report, construed in its entirety, is a finding that $1,257,033.20 is the fair market value of all the Twin City holdings, *taking into consideration all the factors of value, including their potential use for hydroelectric purposes.* . . . Since the award to Twin City is not the value of its properties for any particular purpose but represents its fair market value after *considering all of the reasonable uses of the property which were not too remote or speculative,* this amount is the "just compensation" required by the Fifth Amendment . . .[60] (emphasis supplied)

[55] See Twin City Power Co. v. Savannah R. Electric Co., 163 S.C. 438, 161 S.E. 750 (1930); discussed in Note, 18 VA. L. REV. 307 (1932); Savannah River Electric Co. v. Federal Power Commission, 164 F.2d 408 (4th Cir. 1947).
[56] United States v. 1532.63 Acres of Land, 86 F. Supp. 467 (W.D.S.C. 1949).
[57] *Id.* at 469.
[58] See note 25, *supra.*
[59] United States v. 3928.09 Acres of Land, 114 F. Supp. 719 (W.D.S.C. 1953).
[60] *Id.* at 724-725.

The Government had argued alternatively that no compensation was due for power site value due to the navigation servitude, and even if there should be, the project was too remote since the Federal Power Commission had not intended to license Twin City since 1928. The court answered this contention by pointing out that there had been two prospective purchasers from Twin City, the rival utility and the United States. Any consideration of value from the prospect of federal appropriation is clearly wrong. Just compensation means loss to the owner, not the gain to the appropriator.[61] A better answer would have been that Twin City was ready, willing and able to develop the power site, had the Government so authorized. The project was therefore, immediately prospective, and not remote.

At this point the Government commenced its appeals, contending that it should pay only for the value of the land for timber and agricultural uses plus an allowance for assembly of title under a single ownership. Valuation of the land for these uses by the commissioners amounted to $150,841.85, a difference of $1,106,191.35 from the compensation awarded in the district court.

The Fourth Circuit affirmed the award, saying:

> We do not think that, because the availability of the land for water power purposes arises from the fact that it is appurtenant to a navigable stream, such availability should be ignored in appraising value for purposes of condemnation. What is being taken is, not the flow of the stream or the bed of the stream, but adjoining land which is being taken to form the basin of a reservoir; and if its present availability for such use adds to its market value, there is no reason why this must not be taken into consideration in determining the compensation to be paid the owner. . . . It [the Government] is taking, not the bed of the stream, but lands adjacent to the stream and *is taking them, not for the purpose of navigation, but for the primary purposes of flood control and the development of power.*[62] (emphasis supplied)

The latter distinction clearly violates the well-established rule of judicial reluctance to question congressional determination that the project was for the purpose of improving navigation.[63] A duplicate appeal to the Fifth Circuit[64] brought a like holding for substantially the same reasons. Both circuits expressed disapproval of the *Continental* and

[61] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Olson v. United States, 292 U.S. 256 (1935); United States v. Miller, 317 U.S. 369 (1943); see notes 1, 2 and 51, *supra.*

[62] United States v. Twin City Power Co., 215 F.2d 592, 596, 597 (4th Cir. 1954).

[63] See notes 9, 10 and 33, *supra.* For a similar criticism of the case see Note, 8 ALA. L. REV. 145 (1955).

[64] United States v. Twin City Power Co., 221 F.2d 299 (5th Cir. 1955); for a criticism of this case see Note, 1 VILL. L. REV. 167 (1956).

Washington Water Power cases, and purported to follow *Chandler-Dunbar.*

On certiorari, the Supreme Court ordered reversal of the awards for power site value. In an opinion written by Mr. Justice Douglas, five members of the Court clearly held that power site value was encompassed by the navigation servitude:

> An effort is made by this argument to establish that this private land is not burdened with the Government's servitude. The flaw in that reasoning is that the landowner here seeks a value *in the flow of the stream,* a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses. It is no answer to say that payment is sought only for the location value of the fast lands. That special location value is due to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account. . . . It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute "private property" within the meaning of the Fifth Amendment. . . . If the owner of the fast lands can demand water-power as part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withold as it chooses. The right has value or is an empty one dependent solely on the Government. What the Government can grant or withold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys. . . . To require the United States to pay for this water-power value would be to create private claims in the public domain.[65]

The majority states that *Chandler-Dunbar* is controlling. Considering that case, the following language from the *Twin City* case is of interest:

> . . . The location of the land was not determinative. It was the dominion of the Government over the water power that controlled the decision. Both in Chandler-Dunbar and in this case it is the water power that creates the special value, *whether the lands are above or below ordinary high water.*[66] (emphasis supplied)

Here is the first clear statement by the Court that the burden of the navigation servitude runs beyond the physical point of ordinary high

[65] United States v. Twin City Power Co., ——U.S.——, 76 Sup. Ct. 259, 261-263 (1956).

[66] *Id.* at 262. *Cf.* Mr. Justice Jackson's statement in United States v. Willow River Power Co., 324 U.S. 499, 509 (1945): "This Court then [in Chandler-Dunbar] took a view quite in line with the trend of former decisions there reviewed, that a strategic position for the development of power does not give rise to right to maintain it as against interference by the United States in aid of navigation. We have adhered to that position."

water. The locks and canals award made in *Chandler-Dunbar* is not mentioned by the majority, though it is heavily relied upon by the four dissenting Justices, who advocate a rule of compensation based upon prospective or remote use, the rule which *Chandler-Dunbar* had seemed to establish when construed in its entirety.

The rule of the *Twin City* case will have a tremendous impact upon future Government navigation projects. Fast lands appropriated for navigation purposes are received by the Government at bargain prices, since their value for compensation purposes is diminished by the burden of the navigation servitude. The servitude burdens fast lands to the extent of any of their value derived from the use of the stream or the flow of the stream. Whatever value fast lands may have due to their riparian character is an empty value as against the navigation power of the United States. The test now appears to be quite precise and uniform, and its effect will undoubtedly discourage speculation and planning by private power companies along navigable streams.

LICENSES UNDER THE FEDERAL POWER ACT

The fact that Congress *may* take land and structures in and along navigable streams at minimal or no cost does not mean that it *must* do so. The Federal Power Act of 1920[67] deserves special notice here. Though under the act a federal licensee may build a dam in outright violation of state law,[68] full compensation is generally required from such licensees for riparian rights appropriated from private owners.[69] As has been amply illustrated above, the Government itself need not make such compensation. Licensees under the act are required to compute and credit, from surplus earnings, "reserve payments" for the purpose of amortizing their net investment. The purpose of such amortization is to lessen the amount payable to them in case of appropriation of their facilities by the federal government. In *Federal Power Commission v. Niagara Mohawk Power Corp.*,[70] the Court held that the Federal Power Act had not abolished private property rights under

[67] 41 STAT. 1077 (1920), 16 U.S.C. §§ 791-825 (1952).

[68] First Iowa Hydro-Electric Corp. v. Federal Power Commission, 328 U.S. 152 (1946).

[69] Henry Ford & Son v. Little Falls Fiber Co., 280 U.S. 369 (1930); United States v. Central Stockholders' Corp., 52 F.2d 322 (9th Cir. 1931) (where the United States unsuccessfully attempted to enjoin its licensee's state court action to condemn water rights); accepting the law to be that FPC licensees must compensate for water rights appropriated is Great Northern Railway Co. v. Washington Electric Co., 197 Wash. 627, 86 P.2d 208 (1939).

[70] 347 U.S. 239 (1954); for a thorough discussion of the Federal Power Act and its application to the Niagara case, see Schwartz, *Water Rights Under the Federal Power Act*, 102 U. PA. L. REV. 31 (1953).

state law, and that expenses of the licensee for use of private proprietary rights in the water of the stream were deductible in computing surplus earnings from which amortization "reserve payments" were to be made. Mr. Justice Douglas dissented, saying that the effect of the decision was to require the Government to pay for the use of navigable waters:

> It may be that Niagara is under a legal duty to pay for its water rights under state law. And I agree that the Federal Power Act was not intended to interfere with water rights created by state law. But it is not true that the United States can be made to pay, directly or indirectly, for the use of the waters of a navigable stream. . . . If Niagara must pay for its water rights without being reimbursed by the United States, that is the price Niagara must pay for its federal license.[71]

The quoted portion of the dissent effects an excellent reconciliation of the act with the navigation servitude, but anticipates that possible appropriation by the Government will be for the purpose of improving navigation, and not under any other power. Congressional intent is presupposed. Congress may choose to pay for the use of the waters as a concession to its licensee.

The critical section of the act is couched in ambiguous terms. It provides that the United States shall have the right to take over the works of a licensee, *at or after* the expiration of its license, and that compensation therefor shall be "net investment" plus severance damages, if any:

> Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands in excess of the actual reasonable cost thereof at the time of acquisition by the licensee; *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.[72]

The proviso does not refer to the same measure of compensation as is provided for a taking *at or after* the expiration of a license. Under the *Twin City* holding, condemnation by the United States may be much cheaper if done *prior to* the expiration of a license, in execution of the navigation power. This prospect should be rather unsettling to FPC

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[71] Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 258 (1954).

[72] 41 STAT. 1071 (1920), 16 U.S.C. § 807 (1952).

licensees, as is the *Twin City* case to all other private owners of land riparian to navigable streams.

CONCLUSION

The navigation servitude is now well defined. It is a consistent tool for determination of property rights, which must be clearly delineated as the first step in assessing just compensation. The *Twin City* decision was predictable from the denial of access cases, and is logically consistent with the servitude theory. Whether the servitude is a reasonable outgrowth of the commerce clause may be debatable, but the Supreme Court decisions indicate that it is here to stay.

> Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property. . . . Such losses may be compensated by legislative authority, not by force of the Constitution alone.[73]

[73] Mr. Justice Jackson in United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).