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Eminent Domain and Water Law

Richard S. Harnsberger
University of Nebraska College of Law

EMINENT DOMAIN AND WATER LAW*

Richard S. Harnsberger**

OUTLINE

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** B.S., M.A. and J.D., University of Nebraska; Jur.S.D., University of Wisconsin; Professor of Law, University of Nebraska. The invaluable assistance of William A. Garton in connection with the preparation of this article is acknowledged with appreciation. Mr. Garton, a member of the Nebraska Bar, was the Student Articles Editor of the Nebraska Law Review when the initial manuscript was written. The work by Mr. Garton was supported in part by funds provided by the United States Department of the Interior, Office of Water Resources Research, as authorized under the Water Resources Research Act of 1964. The paper is published with the approval of the Director as paper No. 2524, Journal Series, Nebraska Agricultural Experiment Station.

I. THE NATURE AND SCOPE OF THE EMINENT DOMAIN POWER

A. Introduction.

The doctrine of eminent domain[1] has played a unique role in the attainment of social and economic goals in the United States because it permits property to be taken rather easily from private persons for public uses and purposes. Today condemnation procedures are particularly significant tools in urban renewal projects, municipal and state expressways, national interstate and defense highways, multipurpose water development undertakings, sewerage, and flood control works.

One of the most troublesome legal questions growing out of the doctrine of eminent domain is whether the government should be required to pay compensation for particular property taken or damaged by its action. This article examines that question generally and in the context of selected situations in water development and allocation.

B. Sources of Eminent Domain Power.

The power of both state and federal governments to acquire private property for a public or a semipublic use is well recognized[2] and is theoretically explained as either a "reserved right" or a power inherent in "sovereignty." Under the "reserved right" theory, the state is the presumed original owner of all property and subsequent private ownership is deemed subject to the prerogative of the sovereign to resume possession whenever the best interests of society require. The presumption necessary to this theory has proven unsatisfactory to American jurists because it does not explain the power in terms of either American history or the federal system. Much land in this country, for example, was privately owned before the formation of the federal government and consequently the idea that at the time of the original grant the government reserved a right to resume possession is an absurd fiction. Further, the reserved right theory, based upon ultimate governmental control, does not adequately account for the simultaneous

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[1] "Eminent domain is the right to take private property for public use." 3 American Law of Property § 13.17 (Casner ed. 1952), citing Light v. City of Danville, 168 Va. 181, 190 S.E. 276 (1937).

[2] "It is an inherent power." 1 P. Nichols, The Law of Eminent Domain § 1.14 [2] (rev. 3d ed. 1964) [hereinafter cited as Nichols]. *See also* James v. Dravo Contracting Co., 302 U.S. 134 (1937); 11 E. McQuillin, The Law of Municipal Corporations § 32.11 (3d ed. 1964) [hereinafter cited as McQuillin].

existence of the power in both state and federal governments.[3] Under the more widely accepted "sovereignty" theory, the state is deemed to possess the power to regulate or expropriate property in the public interest as a necessary attribute of sovereignty.[4] The power is inherent in the very concept of a state and exists independently of any constitutional provisions.[5] The people, not having the power of eminent domain individually, cannot grant such authority to the state in any constitution established by them. Rather, a constitution creates the type of state desired and the power of eminent domain then attaches to the state as an element of sovereignty. References in constitutions to the power are a recognition that it exists, and they constitute limitations upon its use[6] which are necessary to protect property rights.[7] The usual limitations in the United States are that the taking be for a "public use" and that "just compensation" be paid. It is interesting to note, that in exercising the power of compulsory acquisition, no written constitution binds the English Parliament and it may act without restraint. The practice, however, is to provide for compensation in every act which authorizes the taking of property for a public use, and it is doubtful that a parliamentary majority in England would ever authorize any substantial expropriation without such a provision.[8] Nevertheless, the matter is one of policy rather than of power.

Although our federal government is one of constitutionally delegated powers and the prerogative of eminent domain is not explicitly granted to it, the United States Supreme Court in *Kohl*

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[3] Judicial criticisms of the "reserved right" theory are referred to in 1 NICHOLS, *supra* note 2, at § 1.13 [3]. *See also* Wolfe, *The Appropriation of Property for Levees: A Louisiana Study in Taking Without Just Compensation*, 40 TUL. L. REV. 242 (1966).

[4] 1 NICHOLS, *supra* note 2, at § 1.13 [4]; 11 MCQUILLIN, *supra* note 2, at § 32.11.

[5] "It requires no constitutional recognition." Boom Co. v. Patterson, 98 U.S. 403, 406 (1878). *See* 1 NICHOLS, *supra* note 2, at § 1.14 and the cases cited therein. Reter v. Davenport, R.I. and Northwestern Ry. Co., 243 Iowa 1112, 54 N.W.2d 863 (1952).

[6] United States v. Jones, 109 U.S. 513 (1883). *See also* 11 MCQUILLIN, *supra* note 2, at § 32.11.

[7] 1 NICHOLS, *supra* note 2, at § 1.14 [2]. The Supreme Court has spoken of the provision as an instrument for the socialization of the costs of federal projects. Armstrong v. United States, 364 U.S. 40 (1960); United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). *See also* Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 429 (1935).

[8] Megarry, *Compensation for the Compulsory Acquisition of Land in England*, in LAW AND LAND: ANGLO-AMERICAN PLANNING PRACTICE 212 (C. Haar ed. 1964).

v. United States[9] used the sovereignty theory to affirm the power of eminent domain in the federal government. The Court found the power to acquire property to be necessary "for the exercise of the conceded powers of the Federal government,"[10] and described the fifth amendment provision that private property shall not be taken for public use without just compensation as an "implied recognition" of the power of eminent domain.[11] The United States thus has inherent sovereign power to take property for the purpose of carrying out its constitutional activities.[12]

C. PUBLIC USE.

By definition the sovereign power of eminent domain applies only to a taking for a public use and does not exist if the proposed use is private.[13] Any taking for private use is therefore without either sovereign or constitutional authority, and the due process clause of the Constitution renders such governmental action invalid.[14] The concept of public use, however, is given a broad definition in eminent domain proceedings as demonstrated by the Supreme Court opinion in *Brown v. United States*.[15] In *Brown* the question arose whether taking land for a reclamation reservoir is a public use even when an entire town has to be moved and only a specific group of private individuals will benefit. The Court held the use a public one entitling the Government to expropriate not only the old town but, in addition, land for a substitute city as near as possible to the old one. The opinion states, "[T]he acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project

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

[10] *Id.* at 372.

[11] *Id.* at 372-73.

[12] United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 679 (1896).

[13] Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896). *But see* discussion of what constitutes "public use" *infra.*

[14] For a history of the limitations on the power of eminent domain imposed under natural law theory, as they became incorporated into the meaning of "due process," see Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); also, Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931), wherein he asserts at page 65: "[T]he modern definition of 'due process' is merely the 'natural justice' of Story, Marshall, Miller, Field, *et al.* under a new name, 'reasonableness.'"

[15] 263 U.S. 78 (1923). *See also* United States v. Power County, Idaho, 21 F. Supp. 684 (D. Idaho 1937) (relocation of town upheld); Burley v. United States, 179 F. 1 (9th Cir. 1910); Comment, *Substitute Condemnation*, 54 CALIF. L. REV. 1097 (1966). *See also* Brest v. Jacksonville Expressway Auth., 194 So.2d 658 (Fla. Dist. Ct. App. 1967), *aff'd*, 202 So.2d 748 (1967); 5 HOUSTON L. REV. 198 (1967).

that the public use of the reservoir covered the taking of the town site."[16] In another case, a Tennessee Valley Authority reservoir flooded a highway which was the only practical access to a thinly inhabited area located between the reservoir and a national park. Finding it cheaper to condemn the isolated region than to build a replacement or substitute road, the Authority commenced eminent domain proceedings. The United States Supreme Court, reversing both the District Court and the Circuit Court of Appeals for the Fourth Circuit, held the taking to be for a public purpose.[17]

It has also been held that when substantial and direct benefits are provided to people within the state authorizing a condemnation, the taking is not unconstitutional because a major portion of the benefits are received by residents of another jurisdiction. Thus it is a proper public use when a water company in Connecticut makes diversions both for meeting obligations to supply customers within Connecticut and for sale to a New York water supplier for utilization within New York State.[18]

Condemnations for access control, boat launching facilities, picnic areas, rental cottages in parks, restaurants, motels, and marinas for pleasure craft have been held to be for a public use;[19] and takings are not defeated even though leases are made with private persons or firms for operating facilities such as swimming pools, service stations, and stores.[20] The incidental private benefits do not override the paramount public interest, but leases must include appropriate provisions to insure that the uses will remain public.[21] For instance, a delegation of eminent domain powers

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16 Brown v. United States, 263 U.S. 78, 81 (1923).

17 United States *ex rel.* T.V.A. v. Welch, 327 U.S. 546 (1946).

18 Adams v. Greenwich Water Co., 138 Conn. 205, 83 A.2d 177 (1951); Greenwich Water Co. v. Adams, 145 Conn. 535, 144 A.2d 323 (1958). *See* R. REIS, CONNECTICUT WATER LAW: JUDICIAL ALLOCATION OF WATER RESOURCES 60-62 (1967).

19 Pearl River Valley Water Supply Dist. v. Wood, 248 Miss. 748, 160 So.2d 917 (1964). United States v. Bowman, 367 F.2d 768 (7th Cir. 1966) (property taken by United States to be turned over to State and franchises for profit to be granted by State to individuals for developing recreation in connection with Government reservoir). *See also* Gregory Marina, Inc. v. City of Detroit, 378 Mich. 364, 144 N.W.2d 503 (1966) (municipal expenditure for public purpose even though few boat owners could use facility), and 53 VA. L. REV. 743 (1967).

20 Horne v. Pearl River Valley Water Supply Dist., 249 Miss. 358, 162 So.2d 504 (1964).

21 Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 156 So.2d 572 (1963).

which leaves a condemning agency free to lease or sell the property without restriction as to its use has been held unconstitutional.[22]

D. NECESSITY.

As distinguished from public purpose, the extent of public necessity for construction of an improvement and its location are legislative questions and not subject to judicial review.[23] The constitutional requirements are met when the purpose is public and just compensation is paid, and, accordingly, to make the issue of necessity nonjusticiable infringes no rights of a condemnee.[24] But if the determination of necessity by an administrative agency or quasi-public corporation is based upon bad faith, fraud, or abuse of discretion, there are decisions stating the condemnor's judgment should be overruled.[25] As a practical matter, however, proof problems and the narrow limits of review place the possibility of reversing administrative decisions on these grounds almost beyond the pale.

United States v. 620.98 Acres of Land[26] illustrates the difficulties when arbitrariness or excessiveness is claimed. The Government condemned the fee simple title of a small land tract for use in connection with the Dardanelle Lock and Dam on the Arkansas River and it was conceded the property would be subject to overflow possibly once in fifty years. Consequently, the landowner argued the taking should be limited to a flowage easement only. The court, however, found the decision of the Secretary of the Army was

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22 Rudee Inlet Authority v. Bastian, 206 Va. 906, 147 S.E.2d 131 (1966), 53 VA. L. REV. 743 (1967). *See also* Horne v. Pearl River Valley Water Supply Dist., 249 Miss. 358, 162 So.2d 504 (1964).

23 North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925). *See generally* 26 AM. JUR.2d *Eminent Domain* § 111; 27 AM. JUR.2d *Eminent Domain* § 404 (1966).

24 People v. Superior Court of Merced County, — Cal.2d —, —, 436 P.2d 342, 348, 65 Cal. Rptr. 342, 348 (1968).

25 *See* Southern Pacific Land Co. v. United States, 367 F.2d 161, 162 (9th Cir. 1966) which collects the citations to various courts of appeal cases which say that an exception to judicial non-reviewability exists when an administrative decision to condemn a particular property is alleged to be arbitrary, capricious, or in bad faith. *See* Banach v. City of Milwaukee, 31 Wisc.2d 320, 143 N.W.2d 13 n. 7 (1966); Bailey v. Board of Levee Comm'rs, 204 So.2d 468 (Miss. 1967); 1 NICHOLS, *supra* note 2, at § 4.11 [2]; Comment, 44 WASH. L. REV. 200, 216-58 (1968).

26 255 F. SUPP. 427 (W.D. Ark. 1966). *Also see* Chapman v. Public Utility Dist. No. 1, 367 F.2d 163 (9th Cir. 1966) (action by Federal Power Commission licensee in condemning fee rather than flowage easement upheld).

neither arbitrary nor capricious, and held it to be final. Numerous other federal cases reach a similar result,[27] and the situation appears to be generally the same in the state courts.

In *People v. Chevalier*,[28] the Supreme Court of California in a landmark case set forth the general proposition that necessity is not a judicial question and ruled that necessity cannot be considered by the courts even though facts constituting fraud, bad faith or abuse of discretion on the part of the condemning body are alleged. These issues may only be raised by a condemnee in an effort to show a taking is not for a public use.[29] A different approach is shown by a recent New Jersey decision, *Texas East Transmission Corp. v. Wildlife Preserves, Inc.*,[30] in which the plaintiff commenced proceedings to condemn a right of way across land which the nonprofit eleemosynary defendant corporation devoted to the preservation of wildlife. In its answer, defendant claimed plaintiff's choice of the right of way through important wooded areas constituted arbitrariness when a suitable alternative route on the land owned by Wildlife Preserves was available. The trial court struck defendant's answer as insufficient in law. The New Jersey Supreme Court reversed and remanded the matter for trial. In its opinion, the court said:

> On the remand hearing in the trial court the ultimate burden of proving arbitrariness in the choice of route will be on Wildlife Preserves. Procedurally, however, if it introduces reasonable proof of (1) the serious damage claimed to result from installation of the pipeline on the path chosen by plaintiff, and (2) an apparently reasonably available alternate route or routes, which will avoid the serious damage referred to, the burden of going forward with the evidence will shift to plaintiff. A *prima facie* case of arbitrariness having been made out, Texas Eastern may present its evidence to the contrary, which it claims indicates that the location of the right of way selected represented a reasonable and not capricious choice, considering all the factors which may properly enter into the question of what course of action is reasonably required to serve

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[27] *E.g.*, United States v. Mischke, 285 F.2d 628 (8th Cir. 1961); West, Inc. v. United States, 374 F.2d 218 (5th Cir. 1967).

[28] 52 Cal.2d 299, 340 P.2d 598 (1959), *noted in* 48 CALIF. L. REV. 164 (1960). *See also* People v. Lagiss, 223 Cal. App.2d 23, 35 Cal. Rptr. 554 (1963) and United States v. Mischke, 285 F.2d 628 (8th Cir. 1961) (assertion of bad faith or arbitrary action does not make issue of necessity justiciable).

[29] The *Chevalier* case relies to some extent upon a 1913 amendment to section 1241 of the California Code of Civil Procedure.

[30] 48 N.J. 261, 225 A.2d 130 (1966). For an excellent article which includes a discussion of necessity, judicial review, and standing to sue, see Forer, *Preservation of America's Park Lands: The Inadequacy of Present Law*, 41 N.Y.U.L. REV. 1093, 1104-06, 1110-14, 1122 (1966).

> the public convenience and necessity. In this connection plaintiff has suggested that the alternate route proposed by defendant will be much more costly than the one chosen. Of course, cost is a factor for consideration, but a relative one. Within reasonable limits the fact that an alternate route will be more expensive should not deter its selection by a utility, if the public convenience and necessity are better served thereby.... Information on the subject of such additional costs should be regarded by the trial court as within the knowledge and experience of the plaintiff. If opposition to a serviceable alternative route shown by defendant is to be predicated upon that ground, evidence of additional and disproportionate cost should be treated as part of plaintiff's burden of meeting defendant's *prima facie* case.[31]

Wildlife Preserves was unsuccessful in meeting this burden of proof for the judge found plaintiff's selection of the right of way route represented a reasonable exercise of judgment and was neither arbitrary nor capricious.[32] The effect of the decisions in this area is to give determinations of necessity almost complete immunity from attack regardless of how ill-founded they may be although it has been stated there "is a tendency in decisions for the courts to apply a stricter test with private corporations than with state and federal agencies in determining that decisions of necessity are actually arbitrary or capricious."[33]

E. Due Process Requirements, Compensation in Money, Procedural Points, and Consequential Damages.

In addition to prohibiting the taking of property for private purposes, the due process clause of the constitution requires that eminent domain, as an exclusively legislative prerogative, be authorized by action of the legislature.[34] A statutory grant of authority to condemn should not be construed so strictly that an apparent legislative objective is defeated; and once the power is granted, it cannot be surrendered.[35] A recent decision of the

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[31] Texas East Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 275-76, 225 A.2d 130, 138-39 (1966).

[32] Texas East Transmission Corp. v. Wildlife Preserves, Inc., 49 N.J. 403, 230 A.2d 505 (1967). Counsel for Wildlife Preserves, Inc., has written in favor of a more liberal rule. McCarter, *The Case That Almost Was*, 54 A.B.A.J. 1076 (1968).

[33] Lavine, *Extent of Judicial Inquiry into Power of Eminent Domain*, 28 So. Calif. L. Rev. 369, 377-80 (1955).

[34] *E.g.*, United States v. Parcel of Land, 100 F. Supp. 498 (D.D.C. 1951). *See also* Slattery Co. v. United States, 231 F.2d 37 (5th Cir. 1956) holding that an improper method of determining compensation deprives an owner of property of due process of law.

[35] State *ex rel.* Devonshire v. Superior Court, 70 Wash.2d 630, 424 P.2d 913 (1967).

Washington Supreme Court, *Bellevue School Dist. No. 405 v. Lee*,[36] would indicate the legislative grant is not jurisdictional, but this appears questionable.[37] In the *Lee* case a school district commenced proceedings to condemn 30 acres under a statute which prevented condemning more than 15 acres. The court held that the landowners could not raise the defense of legislative authorization on appeal when they had failed to object at the trial. In connection with procedure, several matters are of sufficient importance to mention. First, there is no right under the federal constitution to a jury trial in condemnation cases.[38] Federal Rule of Civil Procedure 71 A (h) provides that there shall be a jury trial, if demanded, "unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it."[39] When the request of a party for a jury is denied, the appellate court has a duty to review the reasons for appointing a commission; and if both parties ask for a jury, a denial should be the exception and not the rule.[40]

The due process clause does impose other procedural safeguards in favor of the property owner. The principle established by *Mullane v. Central Hanover Bank & Trust Co.*,[41] that due process requires direct notice rather than notice by publication be given

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[36] 70 Wash.2d 947, 425 P.2d 902 (1967).

[37] *See* 26 AM. JUR. 2d *Eminent Domain* § 114 (1966).

[38] Bauman v. Ross, 167 U.S. 548 (1897) and cases cited at 167 U.S. 593. 28 U.S.C. § 2402 states that actions against the United States under 28 U.S.C. § 1346 (1964) (except tax cases) shall be tried without jury. Accordingly, Tucker Act cases are tried by a judge in federal district courts. *See* Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 HARV. L. REV. 29 (1927); Hines, *Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in All Condemnation Proceedings?*, 11 VA. L. REV. 505 (1925); Annot., 12 A.L.R.2d 7 (1950). For a discussion of the TVA Act and procedure, see *Hearings on H.R. 4846, H.R. 10351, H.R. 11181, H.R. 11269, H.R. 17178 and S. 1637 before the Subcomm. on Flood Control of the House Comm. on Public Works*, 90th Cong., 2d Sess. (1968).

[39] When Congress expressly constitutes a tribunal for trying the issue of just compensation as in the case of the TVA and the District of Columbia, that tribunal determines the issue. *See* W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1525 (rules ed. 1958); 7 J. MOORE, FEDERAL PRACTICE 2789 (2d ed. 1966). For standards of supervision which a district court is to apply to commissions, see United States v. Merz, 376 U.S. 192, 197 (1964).

[40] Sykes v. United States, 392 F.2d 735 (8th Cir. 1968). *See* Juergensmeyer, *Federal Rule of Civil Procedure 71A (h) Land Commissions: The First Fifteen Years*, 43 IND. L.J. 677, 684-707 (1968).

[41] 339 U.S. 306 (1950).

defendants where feasible, was applied to condemnation proceedings in *Walker v. City of Hutchinson*,[42] and in *Schroeder v. City of New York*.[43] In the latter case, proceedings to condemn riparian interests in the flow of a river were held to violate the due process clause because the only notices given were published in a newspaper and posted near the river, but not on defendant's property. "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."[44]

The due process clause of the fourteenth amendment makes all constitutional limitations—including that of just compensation[45]—binding upon the states[46] and their subdivisions;[47] and in any event, all but a few states explicitly provide in their own constitutions for just compensation when property is taken for public use. In the remainder of the states, payment is required under other constitutional provisions.[48] "Just compensation"[49] under the general rule is compensation in money.[50] It has been held, for instance, that a condemnor cannot provide water from a substitute source in lieu of money if the condemnee objects.[51] The Utah Supreme Court has analogized this to offering a condemnee of land a different piece of

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[42] 352 U.S. 112 (1956).

[43] 371 U.S. 208 (1962).

[44] *Id.* at 212-13.

[45] Chicago, Burlington, and Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897). *See also* Annot., 18 L.Ed.2d 1388, 1406-07 (1968).

[46] *See* Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966).

[47] Griggs v. Allegheny County, 369 U.S. 84 (1962).

[48] In New Hampshire, compensation is required under N. H. CONST. Part I, art. 12th. *See also* Ash v. Cummins, 50 N.H. 591 (1872); DeBruhl v. State Highway & Public Works Comm., 247 N.C. 671, 102 S.E.2d 229 (1958).

[49] The word "just" adds "nothing to the meaning." 3 NICHOLS, *supra* note 2, at § 8.6. *See also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Laws*, 80 HARV. L. REV. 1165 (1967).

[50] Vanhorne v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (1795). The Supreme Court has recognized that private property can be taken and transferred to a public comdemnee as indemnification. In the case, a private owner objected to the condemnation of his property for use as a substitute town site. Brown v. United States, 263 U.S. 78 (1923). *See also* Jefferson Co. v. TVA, 146 F.2d 564 (6th Cir. 1945), *cert. denied*, 324 U.S. 871 (1945) (substituted highway system of equal utility satisfies Government's obligation to public comdemnee); County of Sarpy v. United States, 386 F.2d 453 (Ct. Cl. 1967).

[51] Shurtleff v. Salt Lake City, 96 Utah 21, 82 P.2d 561 (1938).

property.[52] This approach, however, fails to recognize that the rule prohibiting substitution of land is based upon the proposition that each parcel of land is unique, and it has been urged that exchanges of water should be allowed so long as the condemnee is supplied, at no cost to him, with an equivalent quantity equally suitable for his purposes.[53] The extent to which a user should be obligated to accept different water, however, may depend upon whether the diverter acts gratuitously or is under an obligation to replenish the original supply. If there is no legal right to compel continuance of the new substitute supply, diversion from the original source should be enjoinable.[54]

In *Collier v. Merced Irrig. Dist.*,[55] an irrigation district reduced stream flow by impounding waters behind a dam and plaintiff, a riparian owner, commenced an action for an injunction and for damages. Because a public use had intervened, the action became one of inverse condemnation and the defendant-condemnor then made a written guaranty never to impound or divert water from the river unless a specified quantity was flowing in the main channel at the location of the condemnee's lands. The condemnee objected to the jury's considering this offer on the ground it resulted in compensation in kind rather than in money. The court, in rejecting the objection, held the situation was one of a partial taking with a reservation of part of the property for the condemnee's use.[56] This follows the general rule that a condemnor is under no obligation to take the whole interest of the condemnee, and is distinguishable

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[52] *Id.* at 28, P.2d at 565. *But see* Comment, *Substitute Condemnation*, 54 CALIF. L. REV. 1097 (1966). *See also* Weyel v. Lower Colorado River Authority, 121 S.W.2d 1032 (Tex. Civ. App. 1938); Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499, 1513 (1966).

[53] Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 255, 289 P. 116, 120 (1930) (separate opinion of Judge Hansen); Bd. of Directors v. Jorgensen, 64 Idaho 538, 136 P.2d 461 (1943). *See* A.B.A. SECTION OF MINERAL AND NATURAL RESOURCES LAW, 1967 REPORT OF COMM. ON WATER RESOURCES 220 (1967) for a discussion of California State Water Rights Board Decision D1259, August 31, 1966, permitting exchange of ground water for surface water. In Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 P. 369 (1926), the court stated no injunction would issue if the junior appropriator (a public carrier) of ground water furnished water to the senior.

[54] Neal v. City of Rochester, 156 N.Y. 213, 50 N.E. 803 (1898).

[55] 213 Cal. 554, 2 P.2d 790 (1931); *Accord*, Olympia Light & Power Co. v. Harris, 58 Wash. 410, 108 P. 940 (1910); Spokane Valley Land & Water Co. v. Arthur D. Jones & Co., 53 Wash. 37, 101 P. 515 (1909).

[56] "We have here then a partial taking, with a relinquishment to the stream of a portion of the right seized." Collier v. Merced Irr. Dist., 213 Cal. 554, 566, 2 P.2d 790, 795 (1931). In an original action a reservation rather than a relinquishment would be involved.

from cases in which a condemnor attempts to mitigate damages by offering to return a portion of the property taken after the condemnee has been divested of title.[57]

When the property interest taken is for temporary use only, it has been held unconstitutional to authorize, rather than a single lump sum payment, an annual determination and payment of damages. The rule has been applied where rights in a river are temporarily utilized.[58] If property is used on a temporary basis but no condemnation proceedings are instituted, just compensation is due for all damages affecting the value of the land. For instance, in *Patrick v. City of Bellevue*,[59] debris from the city's garbage dump obstructed the natural drainage causing water, garbage and debris to flow onto plaintiffs' lands. The trial court held no damages were payable because the city was engaged in a governmental, as distinguished from a proprietary, function and no issue of a public nuisance was involved. The Nebraska Supreme Court reversed on the ground that a temporary taking had occurred and compensation was due from the city notwithstanding it was engaging in a governmental function and regardless of whether the use was or was not a nuisance.

Consequential Damages.

As late as the early part of the 20th century, the prevailing doctrine limited a landowner's recovery of compensation under eminent domain to a direct as distinct from a "consequential" taking of property. For example, recovery was denied for damages due to smoke, cinders, gases and vibrations caused by passing trains because no physical invasion or permanent taking occurred. Numerous cases arose in which municipalities lowered or raised street grades leaving adjoining buildings without ingress or egress and often without lateral support. Although it was totally inequitable, recovery was denied because the property, although damaged or ruined, had not actually been taken. Courts regarded such damages as merely consequential or incidental.[60] For such injuries it was said the law provided no recovery.

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[57] *See* Reynolds v. State Board of Public Roads, 59 R.I. 120, 194 A. 535 (1937), *noted in* 51 HARV. L. REV. 741 (1938) (statute permitting reconveyance of property taken in condemnation in mitigation of damages is unconstitutional.); Smith v. Potomac Electric Power Co., 236 Md. 51, 202 A.2d 604 (1964).

[58] Waterbury v. Platt Brothers & Co., 76 Conn. 435, 56 A. 856 (1904).

[59] 164 Neb. 196, 82 N.W.2d 274 (1957).

[60] *See* Searle v. City of Lead, 10 S.D. 312, 73 N.W. 101 (1897); Johnson v. City of Parkersburg, 16 W.Va. 402 (1880).

Beginning with Illinois in 1870, a number of state constitutions were amended to change the rule to provide that private property shall not be taken or *damaged* for public use without compensation.[61] The purpose of the amendments was to permit recovery for damages which previously would have been regarded as consequential.[62]

Relief still is frequently denied in water cases however if an inquiry is found to be too "remote," or when special rules regarding public rights are interpreted to prevent private ownership of certain properties connected with navigable waters. Recent bridge cases show various aspects of the problem. In *State v. Masheter*,[63] decided in 1964 under the Ohio Constitution which limits compensation to a "taking," a highway bridge was constructed over a river about one mile downstream from a marine terminal and grain elevators owned by the plaintiff, a limited partnership. The bridge blocked grain ships which formerly had been able to reach the terminal and plaintiff brought suit for destruction of its right to use the river in connection with its business. The Ohio Supreme Court in denying relief held no physical invasion of the property had taken place and that a riparian right of access to navigable waters does not include a right of access to the entire outside world. In reaching this conclusion, the court divided plaintiff's right. First, there is a private right to get into the water from riparian land, and subsequently a public right to navigate which is shared with every other citizen. As only the public right was impaired at the bridge, the court thought plaintiff's damages were no different in that regard than those of the general public.

Plaintiff obviously did suffer more than ordinary persons however and the loss was not remote. Thus a somewhat more justifiable rationale for the holding might have been that before compensation is due a complete destruction of property is necessary under a constitution which requires payment only when property is "taken." But this viewpoint is unsound because intangible and non-physical rights are as valuable as tangible ones and as much subject to being taken. The *Masheter* opinion does imply plaintiff could have recovered under a constitutional provision requiring compensation when property is "damaged" as well as taken;[64] and in this con-

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[61] *See* Richards v. Washington Terminal Co., 233 U.S. 546, 555 (1914).

[62] Patrick v. City of Bellevue, 164 Neb. 196, 82 N.W.2d 274 (1957).

[63] 1 Ohio St.2d 11, 203 N.E.2d 325 (1964).

[64] *Id.* at 13-14, 203 N.E.2d at 327-28.

nection *Colberg, Inc. v. State*,[65] a 1967 declaratory relief decision by the Supreme Court of California, is of interest. In the *Colberg* case two large shipyard businesses which had constructed and repaired ocean going vessels for more than sixty years were held not entitled to eminent domain damages resulting from erection across a navigable waterway of two low-level, state highway bridges which curtailed access by water to the shipyards. The court said, *inter alia*, that compensation would have been required if a physical invasion or encroachment had occurred but that the California constitutional provision requiring compensation for both "taking" and for "damaging" did not necessitate payment. The case was finally decided on an expanded view of the navigation servitude doctrine which is discussed later, but, nevertheless, to discuss a right of recovery on the basis of physical versus non-physical invasion appears contrary to the intent of a constitutional provision for compensation whenever property is damaged. The purpose of such a provision is to make loss of intangible property interests compensable if the damages are substantially greater than those suffered by the general public.[66]

This view is supported by *Commonwealth v. Thomas*[67] in which the Kentucky Court of Appeals pondered both the *Masheter* and *Colberg* decisions and did not follow them. After remarking that legal research in the area of riparian access rights leads "to a jungle of confusion and inconsistencies," the Kentucky court concluded that a right of ingress and egress from riparian property would be virtually meaningless unless the riparian were allowed access to the main body of water. As Professor Prosser has observed, the problem in such cases is one of degree.[68] One reason for narrowly construing the riparian access right is fear that low bridges on busy waterways will result in damage claims so widespread as to prevent projects. One of the favorite examples used by condemning authorities is a low-level drawless bridge at the mouth of the Mississippi River. This prospect, as Justice Friedman said in the *Colberg* litigation, may be a theoretical possibility, but it is not a practical one unless the federal government abdicates all responsibility of control over the nation's river systems. The continuing legitimate needs

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[65] 67 Cal.2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968), *noted in* 72 DICK. L. REV. 375 (1968), 21 VAND. L. REV. 277 (1968) and 13 VILL. L. REV. 667 (1968).

[66] *See* J. BEUSCHER, LAND USE CONTROLS 545 (4th ed. 1966).

[67] 427 S.W.2d 213 (Ky. 1967).

[68] Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1022 (1966). *See also* Justice Peters, dissenting in Colberg, Inc. v. State, 67 Cal.2d 426, 432 P.2d 15, 62 Cal. Rptr. 413 (1967); Justice Herbert, dissenting in State v. Masheter, 1 Ohio St.2d 15, 203 N.E.2d 328 (1964).

of governmental units for more property are constantly expanding, and prospective damages can of course reach monumental proportions. If they do, administrators should then examine alternatives because a proper balancing of interests would preclude established businesses from bearing a disportionate cost of public improvements. In weighting different interests, those who have already developed and used their lands in connection with the navigability of a watercourse are in a different position than the general public or riparians claiming loss of a mere naked legal right. Existing businesses suffer damages which are not only direct and substantial but different in both degree and kind from those sustained by the public generally. It is also important that a right to enter onto navigable water in front of riparian land usually is of little value if that is as far as one can go. In his dissenting opinion in the *Colberg* case, Justice Peters stressed that the damages to the shipyards were not incidental or consequential and that constitutional provisions requiring compensation when property is damaged as well as taken, show an intent to expand the area of compensability. The majority did not make any serious claim to the contrary. Other cases which consider questions of consequential damages are considered later.

Other Procedural Points.

In addition to requiring money compensation whenever property is taken or damaged, some state constitutions contain other safeguards for private property such as the right to a jury trial in condemnation actions, payment of security before the taking, and provision that the owner shall be compensated in full for the property taken irrespective of any benefit conferred upon his remaining property by reason of the condemnation.[69] Constitutional provisions sometimes also declare certain uses to be public, or authorize taking for certain private purposes, thus narrowing the scope of property protection.

In the absence of an adequate remedy which can be invoked by condemnees, a constitutional requirement for just compensation is self-executing and the courts are obliged to provide a means for enforcing its provisions.[70]

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[69] For a discussion of state constitutional provisions, see Comment, 43 IOWA L. REV. 303 (1958).

[70] Loup River Public Power Dist. v. North Loup River Public Power and Irrig. Dist., 142 Neb. 141, 153, 5 N.W.2d 240, 248 (1942); Hurley v. State, 143 N.W.2d 722 (S.D. 1966).

When the federal government institutes a condemnation action, it proceeds under the Federal Declaration of Taking Act[71] and Federal Rules of Civil Procedure Rule 71A.[72] The meaning of "property" is a federal question[73] and Congress can determine "within constitutional limitations"[74] what constitutes property for federal condemnation purposes.[75] Where Congress has not spoken, reference will be made to state law[76] except where the "property" is part of a navigable stream.[77]

When the government "takes" property without compensation, the injured owner may sue the government in "reverse" or "inverse" eminent domain.[78] It should be noted that when the United States is the plaintiff, it proceeds only against property described in the complaint and declaration of taking. For instance, in a proceeding to condemn property for flooding, an owner cannot claim compensation for property other than that referred to in the government's pleadings. Any claim for the additional property which the landowner contends will also be flooded would have to be the subject

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[71] 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1964). *See also* Rivers and Harbors Act, 40 Stat. 911 (1918), 33 U.S.C. § 594 (1964). For a discussion of the Declaration of Taking Act, see 6 NICHOLS, *supra* note 2, at § 27.25. The Government is not, however, *required* to proceed under the Declaration of Taking Act. United States v. Certain Tracts of Land, 225 F. Supp. 549 (D.C. Kan. 1964).

[72] For a discussion of the Rule, see 7 J. MOORE, FEDERAL PRACTICE c. 71A (2d ed. 1966); 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND FEDERAL PROCEDURE § § 1515 to 1530 (rules ed. 1958); Paul, *Condemnation Procedure Under Federal Rule* 71A, 43 IOWA L. REV. 231 (1958).

[73] United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943). When the federal government reduces the assessment base of a drainage or irrigation district by condemning land within the district, it becomes necessary to determine whether a compensable "property" interest has been taken. *Compare* Columbia Irr. Dist. v. United States, 268 F.2d 128 (9th Cir. 1959) with Adaman Mutual Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960). *See* United States v. Howell, 251 F. Supp. 787 (D. Ore. 1965) (condemnee irrigation district had no interest in land which was subject to annual assessment by District for operation and maintenance charges); Helena Valley Irr. Dist. v. State Highway Comm'n, 433 P.2d 791 (Mont. 1967); 2 WATER AND WATER RIGHTS 169 (R. Clark ed. 1967).

[74] United States v. Certain Parcels of Land, 250 F. Supp. 255, 258 (E.D. Pa. 1966).

[75] *See* United States v. Certain Property, 306 F.2d 439 (2d Cir. 1962).

[76] United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943). *See also* United States v. Causby, 328 U.S. 256 (1946).

[77] *See* discussion of federal servitude for navigation *infra.*

[78] *See* discussion of reverse condemnation *infra.*

of a separate inverse condemnation action.[79] Of course, where only part of a tract is taken, an owner may claim severance damages to the remainder.[80]

II. EMINENT DOMAIN AND POLICE POWER.

A. Distinguishing Compensable "Takings" from Non-compensable "Regulations."

The general concepts governing eminent domain and the police power cut across many types of decisions and become significant when determining whether compensation is payable. For that reason, it is worthwhile to briefly look at some of the principles before discussing cases falling exclusively within the area of water law. The rules are simple to state; but, as Justice Holmes said, the lines are pricked out gradually by a contact of decisions on opposing sides of the boundary line which separates eminent domain from police power.[81]

When private property is taken for a public use under the power of eminent domain, the owner is entitled to receive just compensation from the taker. Conversely, if a restriction upon the utilization of property is merely a proper exercise of the government's police power, no compensation is due.[82] A general regulation for preservation of the public health, morals, safety or general welfare is frequently found not to be a taking of property requiring compensation to an owner even though his property is destroyed or its value substantially decreased.[83] Theoretically, the owner in these situations is deemed sufficiently compensated because he shares in the

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[79] *See* United States v. 9 Acres of Land, 100 F. Supp. 378 (E.D. La. 1951), *aff'd sub nom.*, Oyster Shell Products Corp. v. United States, 197 F.2d 1022 (5th Cir. 1952), *cert. denied*, 344 U.S. 885 (1952); United States v. 29.40 Acres of Land, 131 F. Supp. 84 (D. N.J. 1955); United States v. Merchants Matrix Cut Syndicate, 219 F.2d 90 (7th Cir. 1955), *cert. denied*, 349 U.S. 945 (1955).

[80] An increase in value of remaining riparian land due to improvement of navigation is a special benefit and may be deducted from the value of the property taken. *See* United States v. River Rouge Imp. Co., 269 U.S. 411 (1926); *See also* United States v. Mills, 237 F.2d 401 (8th Cir. 1956); United States v. 9 Acres of Land, 100 F. Supp. 378 (E.D. La. 1951); United States v. Easements and Rights Over Certain Land, 259 F. Supp. 377 (E.D. Tenn. 1966).

[81] Noble State Bank v. Haskell, 219 U.S. 104 (1911), *rehearing denied*, 219 U.S 519 (1911).

[82] 1 Nichols, *supra* note 2, at § § 88, 100.

[83] *E.g.*, Mugler v. Kansas, 123 U.S. 623 (1887); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Marblehead Land Co. v. Los Angeles, 47 F.2d 528 (9th Cir. 1931), *cert denied*, 284 U.S. 634 (1931).

benefits which result from the government action. Even though a regulation may harm one landowner to a greater degree than others, unless he is able to prove specific injury to his property which other members of the public did not also incur,[84] a court will not usually find a compensable taking. For example, a municipal zoning setback line which denies property owners the right to use a portion of their property for most purposes, is merely an exercise of police power by the municipality and the owners are not entitled to compensation for any decrease in property value.[85]

Zoning which limits riparian lands to residential uses also frequently causes a decline in value because agricultural, industrial and business uses are excluded. In *Poneleit v. Dudas*,[86] an action was brought to enjoin a boat livery business conducted in an area zoned residential B where businesses were prohibited. The court upheld the ordinance and stated that defendants' damages were incidental to the valid exercise of police power and there was no taking of property for which compensation had to be paid. But a zoning ordinance prohibiting a marina is confiscatory unless there is proof to indicate it might constitute a private or public nuisance or irreparably menace the public welfare.[87]

Because absence of compensation makes exercise of the police power harsh from the viewpoint of private owners, the paramount question in the adjudicated cases is when do acts cease to be valid under the police power and become a "taking" under eminent domain. Many cases are plain. Prohibition by the government of commercial animal herds in highly urbanized areas or forbidding the storage of oily rags in attics and basements are valid restrictions under a state's police power; and an obvious exercise of eminent domain is the taking of land for construction of a United States post office. But between such polar examples is a nebulous area

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[84] *E.g.*, Feltz v. Central Neb. Power & Irr. Dist., 124 F.2d 578 (8th Cir. 1942).

[85] Gorieb v. Fox, 274 U.S. 603 (1927) (building line approved as part of comprehensive zoning plan but not as a means to lower the cost of future public acquisition). In connection with flood plain encroachment lines, see Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959); Beuchert, *State Regulation of Channel Encroachments*, 4 NATURAL RESOURCES J. 486 (1965); 50 IOWA L. REV. 552 (1965).

[86] 141 Conn. 413, 106 A.2d 479 (1954). *See also* Dennis v. Village of Tonka Bay, 64 F. Supp. 214 (D. Minn. 1946), *aff'd*, 156 F.2d 672 (8th Cir., 1946) (property is not taken without compensation when effect of zoning ordinance is to forbid boat renting business on riparian property). *See* Comment, *Role of Local Government in Water Law*, 1959 WIS. L. REV. 117, 137.

[87] Johnson v. Apton, 18 N.Y.2d 668, 219 N.E.2d 868 (1966).

where courts encounter almost insoluble difficulties in deciding which of the two doctrines applies. Justice Holmes described the problem succinctly in *Bent v. Emery*:

> We assume that one of the uses of the convenient phrase, police power, is to justify those small diminutions of property rights, which, although within the letter of constitutional protection, are necessarily incident to the free play of the machinery of government. It may be that the extent to which such diminutions are lawful without compensation is larger when the harm is inflicted only as incident to some general requirement of public welfare. But whether the last mentioned element enters into the problem or not, the question is one of degree, and sooner or later we reach a point at which the Constitution applies, and forbids physical appropriation and legal restrictions alike unless they are paid for.[88]

In part, the determination also turns on whether the relation between the restriction and its purpose is a reasonable one, and it has been asserted that: "A point is reached—sooner or later, depending upon the particular court—where police regulation may in fact become a 'taking' of the private property, i.e., it exceeds the judicial boundaries of reasonableness. Compensation must then be paid by the public agency."[89] The judicial boundaries, however, are indistinct and do not become apparent after reading what Professor Allison Dunham calls the "long series of judgments that appear to make up a crazy-quilt pattern of Supreme Court doctrine on the law of expropriation."[90]

A similar situation exists in the state court decisions. Although the principal tests to distinguish non-compensated restrictions under the police power from compensable takings appear definite, their inadequacies readily become apparent in concrete cases. A consideration of the chief standards articulated by courts is helpful nevertheless when attempting to find the misty line separating police power from eminent domain.

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[88] 173 Mass. 495, 496, 53 N.E. 910, 911 (1899). *See also* 1 C. RATHKOPT, THE LAW OF ZONING AND PLANNING c. 6, p. 5 (3d ed. 1966); E. FREUND, THE POLICE POWER § 518 (1904).

[89] Haar & Rodwin, *Urban Land Policies: United States, Housing and Town and County Planning*, BULL. 7 U.N. at 129 (ST/SOA/SER. C/7. Sales number 1953. IV.22) (1953).

[90] Dunham, *Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law*, in THE SUPREME COURT REVIEW 63 (P. Kurland ed. 1962). *See also* Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 46 (1964) ("A survey of the recent cases... leaves the impression that the Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem.").

B. RESTRICTION OR TAKING.

A number of courts state that compensation is payable whenever an owner is physically dispossessed, but that only consequential damages occur when there is no dispossession.[91] This test fails to demonstrate the method of reasoning and merely places the problem in new terms which are no more helpful and are one step removed from the primary terms, police power and eminent domain.

The physical appropriation theory was better suited for an earlier era but breaks down under present activities which do not amount to actual physical occupation but nevertheless cause increasing hardship to private owners. The airplane cases made this clear. In *United States v. Causby*,[92] a compensable taking was found where low flying planes flew directly over the plaintiffs' land and effectively destroyed the use of the property as a chicken farm, frightened the owners, and deprived them and their family of sleep. Theorizing that flights through the airspace directly above the land are an invasion of plaintiffs' physical property, Justice Douglas stressed the position of the aircraft in order to rest the outcome upon an "easement of flight," or a physical appropriation. The case was remanded to the Court of Claims so an "accurate description of the property taken" could be delineated.[93]

Causby was followed by *Griggs v. Allegheny County*,[94] where the Court held that frequent flights in and out of defendant's county airport at very low altitudes over plaintiff's residence resulted in the taking of an air easement for which compensation was required by the due process clause of the fourteenth amendment.

The question next arises whether identical injuries to neighboring properties from airplane flights would constitute compensable takings. If a "physical appropriation" is essential, no recovery would be granted unless the planes passed directly over the property and recent cases in the lower federal courts have so held.[95] Thus,

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91 *See* Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221 (1931). *See also* 1 J. LEWIS, A TREATISE OF THE LAW OF EMINENT DOMAIN 16 (3d ed. 1909) [hereinafter cited as LEWIS]; 11 MCQUILLIN, *supra* note 2, at 276.

92 328 U.S. 256 (1946).

93 *Id.*

94 369 U.S. 84 (1962).

95 Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Bellamy v. United States, 235 F.Supp. 139 (E.D. S.C. 1964); Bennett v. United States, 266 F. Supp. 627 (W.D. Okla. 1965). *See also* Schubert v. United States, 246 F.Supp. 170 (S.D. Tex. 1965); Leavell v. United States, 234 F.Supp. 734 (E.D. S.C. 1964). For cases indi-

it has been stated that use of old property concepts leads to unjust results because "discrimination between noise interference based on the position of the source only serves to perpetuate the outworn common-law concept that property consists primarily of the right to exclusive possession of a particular space."[96]

Standards are admittedly essential to protect the public from limitless claims. Such standards, however, should be tempered by financial injury which may result from governmental activity. This viewpoint was expressed in his dissenting opinion by Judge Murrah in *Batten v. United States*[97] when he said, ". . . the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone."

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cating there can be a taking "even though the noise vector may come from some direction other than perpendicular" see Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962), *second appeal*, 244 Ore. 69, 415 P.2d 750 (1966). Martin v. Port of Seattle, 64 Wash.2d 309, 391 P.2d 540 (1964); City of Jacksonville v. Schumann, 167 So.2d 95 (Fla. Dist. Ct. App. 1964). The *Schumann* rule has been held inapplicable to highway noises, dust, and vibrations. Northcutt v. State Road Dept., 209 So.2d 710 (Fla. Ct. App. 1968). The Florida and Oregon constitutions provide compensation only for a "taking"; Washington's specifies "taking or damaging." In the absence of overflight, the New Hampshire Supreme Court has held there is a cause of action for nuisance but not for inverse condemnation. Ferguson v. City of Keene, 108 N.H. 409, 238 A.2d 1 (1968). *Also* A.B.A. SECTION OF LOCAL GOV'T LAW, 1965 REPORT OF COMM. ON CONDEMNATION AND CONDEMNATION PROCEDURE 71-75 (1965); Fleming, *Aircraft Noise: A Taking of Private Property without Just Compensation*, 18 S. CAR. L. REV. 593 (1966).

[96] Note, *Airplane Noise, Property Rights, and the Constitution*, 65 COLUM. L. REV. 1428, 1444 (1965). *Compare* Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1391-96, 1404-10 (1965) which argues governments should not be liable except in cases of direct overflights *and* Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 233-36 (1967). *See also* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, in THE SUPREME COURT REVIEW 63, 87 (P. Kurland ed. 1962); Note, *Airplane Noise: Problems in Tort Law and Federalism*, 74 HARV. L. REV. 1581 (1961); Seago, *The Airport Noise Problem and Airport Zoning*, 28 MD. L. REV. 120 (1968). *See generally*, Gormley, *Changing Constitutional Concepts*, 41 N.D. L. REV. 316 (1965).

[97] 306 F.2d 580, 587 (10th Cir. 1962). In United States v. Cress, 243 U.S. 316 (1917), the Supreme Court said, "[I]t is the character of the invasion, not the amount of the damage resulting from it, . . . that determines the question whether it is a taking."

When there is an actual physical ouster as in the case of permanent flooding,[98] no further question should arise; but to think in terms of whether there has been a taking or merely regulation provides little assistance for solving the close questions. For instance, in *Miller v. Schoene*,[99] the Virginia Cedar Rust Act required destruction of red cedar trees to prevent communication of plant disease to apple orchards in the vicinity. The cedar trees were not themselves injured in any way as a result of becoming hosts of cedar rust, and both apple trees and cedar trees as alternating host plants were interchangeably responsible for the existence and continuance of the rust. At the trial, defendant offered to prove his cedar trees were worth between 5,000 dollars and 7,000 dollars but he was not permitted to do so because their destruction was held to be a non-compensable one. The Supreme Court affirmed the decision on the ground that the state's action was a proper exercise of the police power.

From the owner's viewpoint, there was a taking despite the fact that the cut trees were permitted to remain in his possession; but had the statute given the condemnor power to take possession of the trees and use the lumber from them, compensation probably would have been required. The decision raises the question, who should bear the cost when legitimate property rights of one private group are destroyed for the benefit of another group—the cedar tree owners, the owners of the apple orchards, or the public? If the owners of the apple orchards, then the result could be achieved in numerous ways, i.e., by delegating the state's power of eminent domain to the apple growers or by the state itself paying just compensation upon condemnation and obtaining reimbursement by a levy on the orchard owners in proportion to benefits.[100] As pointed

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98 Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871). Compare cases holding no taking occurs when flooding is temporary or intermittent. *E.g.*, Sanguinetti v. United States, 264 U.S. 146 (1924); Goodman v. United States, 113 F.2d 914 (8th Cir. 1940). Recovery for loss of crops due to temporary flooding has been permitted when it is reasonably inferable that in the normal operation of a project a discharge of reservoir waters will be repeated in the future. Lindsey v. City of Greenville, 247 S.C. 232, 146 S.E.2d 864 (1966).

99 276 U.S. 272 (1928). This decision is cited in Southwest Eng'r Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955) to sustain the proposition that when water is scarce in critical areas, lands presently irrigated may be preserved as against lands potentially reclaimable but presently unirrigated.

100 *See* Kelleher v. Schoene, 14 F.2d 341 (W.D. Va. 1926); Miller v. State Entomologist, 146 Va. 175, 135 S.E. 813 (1926); Bowman v. State Entomologist, 128 Va. 351, 105 S.E. 141 (1920).

out later, the same question arises in a larger context when the United States undertakes public improvements. Should the losses be socialized, borne by the persons and groups benefited, or sustained by those in the path of the project?[101]

C. IMPACT OF THE INJURY UPON THE OWNER.

In an excellent article by Kratovil and Harrison, the authors support the following conclusion which balances the needs of the community vis-a-vis the economic harm to the property owner:

> It has come to be recognized that only a difference in degree exists between non-compensable damage to a property owner under the police power and a deprivation of property rights under the power of eminent domain. And in appraising the damage to the property owner to determine whether or not the line between the police power and the power of eminent domain has been crossed, the extent of the diminution of the owner's rights must be weighed against the importance of that diminution to the public.[102]

The most widely cited of all eminent domain decisions, *Pennsylvania Coal Co. v. Mahon*,[103] is based upon this rationale. The case involved an attack by a single private home owner on the constitutionality of the Kohler Act which prohibited the mining of anthracite coal in such a way as to remove supports and cause a subsidence of the surface. In finding that the act could not be sustained as a valid exercise of the police power in those places where the right to mine had been reserved, Justice Holmes said:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree—and therefore cannot be disposed of by general proposition.[104]

In a dissenting opinion, Justice Brandeis used the "taking-regulation" test for his conclusion that the police power had been properly invoked. He wrote: "The property so restricted remains in the possesion of its owner. The state does not appropriate it or make any use of it."[105]

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101 *See* United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

102 Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 608-10 (1954).

103 260 U.S. 393 (1922).

104 *Id.*

105 *Id.* at 417.

In *United States v. Sponenbarger*,[106] Justice Black relied upon the insignificant damage principle when he said:

> ... if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner. While this Court has found a taking when the Government directly subjected land to permanent intermittent floods to an owner's damage, it has never been held that the Government takes an owner's land by a flood program that does little injury in comparison with far greater benefits conferred.

A number of jurisdictions have litigated the authority of a state legislature under its police power to shift from an existing common law system of water rights to a statutory method of prior appropriation.[107] These alterations of legal arrangements have almost always been sustained against attacks upon their constitutionality, and the basis generally has been that the losses inflicted upon non-using owners are so infinitesimal that no compensation is due when such rights are subordinated or cut off.[108]

In *Knight v. Grimes*,[109] the issue was "... whether the legislature may, without compensation, abolish the rule of (so-called) absolute ownership of unappropriated percolating waters and substitute the doctrine of appropriation for beneficial use under state super-

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[106] 308 U.S. 256, 266 (1939). *See also* Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221, 226-29 (1931); 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 17 (2d ed. 1953) [hereinafter cited as ORGEL].

[107] The constitutionality of the plans has been discussed in numerous articles, *e.g.*, Fisher, *Due Process and the Effect of Eastern Appropriation Proposals on Existing Rights with Special Emphasis on the Michigan Proposal*, in THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 441 (D. Haber ed. 1958); Lauer, *The Riparian Right as Property*, in WATER RESOURCES AND THE LAW 131 (Pierce ed. 1958); King, *Regulation of Water Rights Under the Police Power*, in WATER RESOURCES AND THE LAW 269 (Pierce ed. 1958); O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549 (1962); Note, 41 N. D. L. REV. 545 (1965); 11 S. D. L. REV. 374 (1966). For additional citations, see Harnsberger, *Nebraska Ground Water Problems*, 42 NEB. L. REV. 721, 752 n. 155 (1963); S. SATO, WATER RESOURCES ALLOCATION IV at 16-19 (Univ. of Calif. at Berkeley Sch. of Law 1962).

[108] *See* McCook Irr. & Water Power Co. v. Crews, 70 Neb. 109, 123, 102 N.W. 249, 252 (1905). Mr. Farnham remarked that Wisconsin considered the riparian right to exclusive fishing privileges "as of too little value to require protection." *See* 2 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 1368 (1904), citing Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898).

[109] 80 S.D. 517, 127 N.W.2d 708 (1964).

vision?"[110] The South Dakota Supreme Court said that, "[b]eyond doubt there has been an invasion of a pre-existing right or interest";[111] but then the court sustained the constitutionality of the act by the direct approach of holding that the legislature was justified in imposing reasonable regulations under the police power. The decision is also based upon the rationale that unregulated withdrawals of ground water are detrimental because the public welfare demands maximum protection and utilization of the state's water supply.

Because the degree of quantitative diminution depends upon precisely identifying and evaluating the property affected, numerous definitional problems are involved; and the valuation of unused riparian rights is one of the most difficult.[112] Because of such problems in compensable situations, the test of economic harm to private owners has been challenged as an incorrect approach.[113] The decisions probably turn on both the extent of the taking and the magnitude of the public interest,[114] but the criticism of the diminution of value theory has considerable merit. The doctrine nevertheless has the advantage of permitting a flexible approach to fit new circumstances as the impact of regulation continues to shift rapidly with greater urbanization and increasing technology.

D. OTHER SUGGESTED STANDARDS.

Professor Dunham has taken the position that no compensation is payable where a regulation forces an owner to bear the external costs or burdens of his private activities; but that compensation should be paid when an owner's activities are regulated so that benefits to the community accrue. In other words, an activity or enterprise should assume the burden or the cost which it creates, but it is not proper to compel a particular owner to undertake an activity to benefit the public.[115]

> There is much in American constitutional law to support this distinction although precise accuracy in application is not required under the rule of deference to the legislative judgment. Thus it has been held unconstitutional to compel an owner, without compen-

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110 *Id.* at 520, 127 N.W.2d at 711.

111 *Id.*

112 *See* Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 Tex. L. Rev. 24, 57 (1954).

113 Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 60 (1964).

114 See the fourth paragraph of Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

115 Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 669-70 (1958). *See also* Dunham, *Flood Control via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

> sation, to leave his land vacant in order to obtain the advantages of open land for the public or in order to save the land for future public purchase, but it is within constitutional power to compel an owner to leave a portion of his land vacant where building would be harmful to the use and enjoyment of other land (*e.g.*, set-back lines). It is unconstitutional to compel an owner to commit his land to park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for a park where the need for a park results primarily from activity on other land of the owner. It is unconstitutional to compel him to use his land as a parking lot in order to obtain a parking lot for the community, but it is within constitutional power to compel an owner to provide a parking lot for the parking needs of activities on his own land. It is improper to compel a railroad to install grade-crossings for highways in order to promote the convenience of highway users, but it is permissible to compel the railroad to install grade-crossings so as to eliminate dangers and hazards from the railroad's use of its own property. It is not permissible to compel an owner to hold land in reserve for industrial purposes by restricting his use to industrial purposes only, but it is permissible to exclude industrial development from districts where such development will harm other uses in the district. It is beyond state power to compel an owner without compensation to set aside or give land to the public for a street or highway, but it is within that power to compel him to do so where the need for the streets is related to the traffic generated by the owner's use of his other land. Likewise the state may compel an owner to furnish other community facilities such as water and sewer lines at his own expense where the need for such facilities results in part at least from activities on his other land.[116]

Some authorities believe the determination should depend upon the nature of the evil which is to be corrected. One of the best known statements of the rule is:

> If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in relation which the property affected bears to the danger or evil which is to be provided against. Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because "the property itself is the cause of the public detriment.[117]

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[116] Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 666-67 (1958).

[117] E. FREUND, THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS 546-47 (1904). 11 MCQUILLIN, *supra* note 2, at 276; Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME LAW. 380, 384 (1930); 27 HARV. L. REV. 664, 665 (1914); Philadelphia v. Scott, 81 Pa. 80 (1876); Knight v. Grimes, 80 S.D. 517, 522, 127 N.W.2d 708, 713 (1964) (upholding statutes restricting right to appropriate water).

This reasoning appears in *Vartelas v. Water Resources Comm'n*,[118] a leading flood plain zoning decision. The plaintiff owned five stores and six apartment buildings on land which was mostly within flood encroachment lines established by the commission. After the structures were destroyed by disastrous floods in 1955, plaintiff applied for permission to build a retail market. The application was denied on the ground that the construction would seriously impair the capacities of the channel and result in increased upstream water stages in time of flood. On appeal, the trial court sustained plaintiff's claim that establishment of the line constituted an unconstitutional taking of private property for a public use without payment of just compensation. The Supreme Court of Errors of Connecticut reversed, stating that the flood plain zoning was a valid exercise of the police power because uncontrolled use would be harmful to the public interest and a hazard to life and property in the event of recurring floods. The court added that the fact plaintiff was denied the right to construct by use of cinder blocks on a poured concrete cellar and foundation did not mean he would be forbidden to build another type of structure which would not impair flood capacity such as one on piers or cantilevers.

This is somewhat parallel to the doctrine of Justice Harlan in *Mugler v. Kansas*[119] that a private use in the nature of a "nuisance" may be restricted or completely abated without payment of compensation. There is no doubt that certain types of businesses and activities may be prohibited or severely restricted because they create public evils,[120] but most of the cases arise from a conflict between two lawful uses, one of which has been taken or damaged because of the other. Further, as Professor Sax points out:

> ... in Harlan's day the standard sort of government activity—regulation of liquor, prostitution, fertilizer works or brickyards—can quite understandably be described as the mere regulation (rather than appropriation) of noxious (rather than innocent) uses; such activity is easily distinguished from the invasion which occurs when the government appropriates property for a highway or a post office. In addition, since the exercise of the police power was generally limited in Harlan's time to the sort of rudimentary functions just mentioned, it was quite possible to accept those functions, and the Harlan theory, without seeing any substantial or fundamental threat to the institution of private property.

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[118] 146 Conn. 650, 153 A.2d 822 (1959). *See also* Beuchert, *State Regulation of Channel Encroachments*, 4 NATURAL RESOURCES J. 486 (1965).

[119] 123 U.S. 623 (1887).

[120] For a collection of cases, see P. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 901 (3d ed. 1966).

> As the scope of governmental regulations grew, however, the economic impact of government regulation undermined the rationality of Harlan's conceptual distinctions. Particularly with the growth of zoning, conservation legislation, and pervasive business regulation, the impact of the police power, however defined as qualitatively distinct, upon the traditional perquisites of private ownership could hardly be ignored.[121]

In 1964 Professor Sax attempted to formulate a standard and proposed that the government pay compensation when it takes private property for its own benefit, but that no liability arise when the government acts to reconcile disputes between private persons.

> This analysis rests upon the distinction between the role of government as participant and the government as mediator in the process of competition among economic claims. The losses to individual property owners arising from government activity of the first type result in a benefit to a government enterprise; losses arising from the second type of activity are the result of government mediating conflicts between competing private economic claims and produces no benefit to any government enterprise.[122]
>
> The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.[123]
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> The precise rule to be applied is this: when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.[124]

One need not agree with all Professor Sax's conclusions[125] to recognize that the distinctions he makes have utility and that they do explain the results in many adjudicated decisions.[126] Regardless of the outcome in future controversies, however, the final deter-

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121 Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 39-40 (1964).

122 *Id.* at 62.

123 *Id.* at 63.

124 *Id.* at 67.

125 *E.g.*, Comment, *The Validity of Airport Zoning Ordinances*, 1965 DUKE L. J. 792, 798-802.

126 Under the Sax analysis, Miller v. Schoene, 276 U.S. 272 (1928) is a correct decision but a number of cases would have had a different outcome. *E.g.*, Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

minations will ultimately depend, as they should, upon the value judgments of the judges rather than on any single formula which points to one choice over another.[127] For instance, if the cedar trees and the apple orchards in *Miller v. Schoene*[128] had been worth identical amounts, should the state then be permitted without payment of compensation to order the destruction of one class of private property to save another or should the Holmes' view be invoked that ". . . if regulation goes too far it will be recognized as a taking."[129]

In the final analysis, the Court is not apt to adopt any fixed standard which would remove the factor of balancing the interests of the public against the harm to the individual in each situation, and as Justice Clark has stated, "[t]here is no set formula to determine where regulation ends and taking begins."[130] This statement (unhelpful as it may be in advancing the decision making process) is one that becomes ever more meaningful in constitutional law as the old distinctions become less workable.[131]

III. PRIVATE UNDERTAKINGS AS PUBLIC USES

A. Introduction.

Because the power of eminent domain is theoretically based upon sovereign or public necessity, it follows that the property taken is to be put to public use.[132] Even though a legislature approves a project as a public one, the ultimate decision whether the use is in fact public rests with the courts.[133] The condemnor's

127 "The Fifth Amendment expresses a principle of fairness. . . ." United States v. Dickinson, 331 U.S. 745, 748 (1947); "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'. . . ." United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950). *See also* Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 631 (1961).

128 276 U.S. 272 (1928).

129 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

130 Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); "No rigid rules can be laid down to distinguish compensable losses from non-compensable losses. Each case must be judged on its own facts." United States v. Caltex (Philippines), Inc., 344 U.S. 149, 156 (1952). "No plain and catholic formula exists. . . ." Spiegle v. Beach Haven, 46 N.J. 479, 491, 218 A.2d 129, 137 (1966).

131 "No one seems to have attempted to formulate a comprehensive definition of the term 'police power'. . . ." Stevens v. City of Salisbury, 240 Md. 556, 564, 214 A.2d 775, 779 (1965). *See* D. Baker, Legal Aspects of Zoning 26 (1927).

132 *See* 2 Nichols, *supra* note 2, at § 7.1.

133 *E.g.*, Pearl River Valley Water Supply Dist. v. Wood, 248 Miss 748, 160 So.2d 917 (1964); People v. Superior Court of Merced County, 65 Cal. Rptr. 342, 348, 436 P.2d 342, 348 (1968).

identity does not of itself resolve this issue because a legislature may delegate to any agent[134] including individuals; but such identity does constitute one of the relevant factors in formulating criteria upon which to make a determination of public use.

There is no exact definition of the term "public use," and most courts make no effort to formulate one.[135] There have been many interpretations, and the courts are widely split.[136] Under the "narrow" doctrine, which gained wide acceptance in the mid-nineteenth century, "public use" is equated with "use by the public," and condemnation is allowed only if the public or its agents will have a legal right to use the condemned property.[137] Today many courts follow a more liberal doctrine and find a "public use" in the public advantage or benefit that will be served by certain condemnations. However, even the most "liberal" courts have not abrogated the public use requirement completely, and they thus permit eminent domain to be exercised only when it will further a recognized public goal or policy.

One goal of every state is economic development and ". . . condemnations necessary for exploitation of natural resources vital to local prosperity may be for a public use."[138] Whether particular condemnations are within the above category is dictated by local conditions and local courts. Thus under the abstention doctrine, federal courts should stay proceedings when local "law" is unclear and it appears that a state court determination can be obtained within a reasonable time.

In *Kaiser Steel Corp. v. W. S. Ranch Co.*,[139] a diversity action, the ranch company sought to enjoin Kaiser from trespassing upon company land. Kaiser claimed that the laws of New Mexico granted the right of eminent domain to private corporations for the purpose of securing water to be used in coal mining and that Ranch's sole remedy was compensation in an inverse condemnation proceeding. In response to this, Ranch contended if the statutes were so con-

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134 A. JAHR, LAW OF EMINENT DOMAIN: VALUATION AND PROCEDURE § 14 (1953) [hereinafter cited as JAHR]; 2 NICHOLS, *supra* note 2, at § 3.21; 50 IOWA L. REV. 799, 803-05 (1965).

135 53 VA. L. REV. 743, 744 n. 7 (1967).

136 2 NICHOLS, *supra* note 2, at § 7.2.

137 *See* Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 BOSTON U. L. REV. 615, 617 (1940) [hereinafter cited as 20 BOSTON U. L. REV.]. *See also* Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499, 1504-05 (1966); Sackman, *The Right to Condemn*, 29 ALBANY L. REV. 177, 182 (1965).

138 20 BOSTON U. L. REV., *supra* note 137 at 623-24.

139 Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968).

strued they would violate the New Mexico Constitution which permits taking private property only for "public use." The crucial question was whether coal mining in New Mexico, like irrigation for example, is a public use. New Mexico law on this point was unclear, and therefore Kaiser suggested the proceedings be stayed until the question was decided by the state courts in a pending declaratory judgment action. The trial court refused to abstain, and decided on the merits that the ranch company's property had been taken for a public use.

The Court of Appeals for the Tenth Circuit reversed on the ground that coal mining in New Mexico is not such an essential or paramount industry as to justify giving it powers of eminent domain.[140] Consequently, any statute attempting to do so, expressly or impliedly, would be unconstitutional. On certiorari, the Supreme Court of the United States held that the federal proceedings should have been stayed pending decision of the state law question by the New Mexico courts. In addition, the Court ordered the federal district court to retain jurisdiction so as to insure a just disposition if anything prevented a prompt state court decision.

The Supreme Court view is correct because the "public use" question presented a major policy issue dealing with vital resources of a state. In these cases, federal courts can do no more than forecast what local policy will be after the matter has been resolved later in the state courts,[141] and an erroneous forecast means that parties to the federal litigation will be bound by a different rule than that applicable to others. From the viewpoint of judicial administration, the outcome should be the same in both federal and state litigation when the development, allocation or use of water is involved. This type of expropriation case therefore should not routinely be given the *Erie* treatment as though it were a run-of-the-mill diversity suit.[142] Rather, when state law is obscure, the circumstances justify invoking the doctrine of abstention.[143]

Early examples of private condemnations arose under the milldam acts.[144] These acts gave private persons the right to flood

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[140] W. S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967).

[141] Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 27 (1959).

[142] *See* Judge Brown, dissenting in W. S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 264 n. 6 (10th Cir. 1967).

[143] *See* Mr. Justice Brennan, concurring in Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 594 (1968).

[144] For discussions of the milldam cases, see 2 NICHOLS, *supra* note 2, at § 7.623; 1 LEWIS, *supra* note 91, at § § 275-80; 20 BOSTON U. L. REV., *supra* note 137, at 619-21; Beusher, *Appropriation Water Law Elements in Riparian States*, 10 BUFFALO L. REV. 448, 453 (1961).

riparian lands to raise a head of water and took away the right of the injured landowners to enjoin such interferences by limiting their remedy to damages.[145] On the grounds that the public good justified the procedure,[146] milldam legislation was upheld as a valid exercise of eminent domain despite its private character. The public frequently had a legal right to receive the services of the mill,[147] but such a right was not essential to the validity of the acts.[148]

One reason for judicial acceptance of the measures was the precedent provided by similar practices during colonial days;[149] and, another is found in the recurring statement that, "[t]he will or caprice of an individual would often defeat the most useful and extensive enterprises if it were otherwise."[150] In these situations eminent domain was the only practicable means of utilizing water power, and it followed there was a very real necessity to exercise the power if the water resources were to be put to fullest advantage.[151]

The rationale of the milldam cases, reinforced in many instances by constitutional provisions, was applied in other situations to allow condemnations for additional uses vital to local prosperity.[152] For

145 A number of the early mill acts are collected in an extensive footnote in 1 LEWIS, *supra* note 91, at 545-47.

146 Olmstead v. Camp, 33 Conn. 532, 551 (1866).

147 2 NICHOLS, *supra* note 2, at § 866.

148 Some courts took the view that practical considerations made a legal obligation to serve the public superfluous. "If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Whoever heard of a refusal?" Boston & Roxbury Mill Corp. v. Newman, 29 Mass. (12 Pick.) 467, 477 (1832). *See also* Olmstead v. Camp, 33 Conn. 532, 549 (1866). However, a number of later courts have taken a contrary view. *See e.g.*, Gaylord v. Sanitary Dist., 204 Ill. 576, 68 N.E. 522 (1903), and other cases collected in 2 NICHOLS, *supra* note 2, at § 869 note 11.

149 "For more than a century the mill owner has had the right to raise a head or pond of water by flowing the lands of others, paying the damage." Boston & Roxbury Mill Corp. v. Newman, 29 Mass. (12 Pick.) 467, 478 (1832). In Fiske v. Framingham Mfg. Co., 29 Mass. (12 Pick.) 68, 70 (1831), it is said that "the origin of these regulations (mill acts) is to be found in the provincial statute of 1714."

150 Boston & Roxbury Mill Corp. v. Newman, 29 Mass. (12 Pick.) 467, 480 (1832); Olmstead v. Camp, 33 Conn. 532, 547 (1866); Newcomb v. Smith, 2 Pin. 131, 140 (Wis. 1849).

151 Fiske v. Framingham Mfg. Co., 29 Mass. (12 Pick.) 68, 70 (1831); Olmstead v. Camp, 33 Conn. 532, 547 (1866).

152 "The courts of the western states have, as a rule, adopted a liberal view of the term 'public use,' and in the main have largely followed the so-called 'Mill Cases' of New England. They have applied the doctrine announced in those cases to the development of irrigation and mining." Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 123-24, 88 P. 773, 775 (1907).

example, in Georgia a gold mining company was permitted to condemn property for a canal right-of-way to transport water needed in its mining operation,[153] and a lumbering company was allowed to condemn land for a reservoir necessary to float logs in a stream in Idaho.[154] Agriculture is another important industry with urgent water needs, and for many years several state courts have allowed eminent domain to be exercised to accomplish farmland irrigation.[155]

Some of these cases were carried to the United States Supreme Court under the fourteenth amendment. That Court upheld the right to condemn for the purpose of irrigating arid California land in *Fallbrook Irrigation Dist. v. Bradley*,[156] and went one step further in *Clark v. Nash*,[157] holding that under proper circumstances a private person might exercise eminent domain for the sole purpose of irrigating his own land. The next year the Court upheld the right of a mining corporation to condemn a right-of-way for its own use.[158] Thus the fourteenth amendment does not forbid the exercise of eminent domain by a private party in his own behalf when his purpose is of public as well as private importance. Although *Fallbrook* and *Clark v. Nash* were supposedly limited to the particular factual situations presented, their rationale would make it difficult to raise a successful fourteenth amendment objection to a condemnation which is claimed to be essential for the prosperity of a state.[159] The controlling factors are local needs and conditions, and state legislative and judicial appraisals of these factors are given great deference by federal courts.[160]

Courts uphold the private power to condemn for a private use where the personal objectives coincide with the public aim of developing resources in those economic areas which most clearly

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153 Hand Gold Mining Co. v. Parker, 59 Ga. 419 (1877).

154 Potlatch Lumber Co. v. Peterson, 12 Idaho 769, 88 P. 426 (1906).

155 *See, e.g.*, Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886); Paxton & Hershey Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co., 45 Neb. 884, 64 N.W. 343 (1895).

156 164 U.S. 112 (1896).

157 198 U.S. 361 (1905).

158 Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).

159 In Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896), the Supreme Court reversed a Nebraska decision allowing the taking of railway lands for the purpose of erecting grain elevators. The claim that such measures were vital to state prosperity was apparently neither urged by counsel nor considered by the Court; but it would not seem to be a very convincing argument because the grain elevator business is not in itself an industry vital to Nebraska's economic well-being, and the effect of the attempted condemnation on the prosperity of the agricultural industry probably would have been unnoticeable.

160 Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

manifest prevalent state interests and aspirations. The power of eminent domain in these cases is delegated to an individual to be exercised in his own behalf, not as an individual, but ". . . on account of the expected public purpose he would serve by augmenting the national resources. He was granted it as a class of individuals, though he happened to be the only member of the class."[161] Individual activities are an instrument of state policy, and private persons are clothed with the power of eminent domain to better enable them to effectuate that policy.

Needless to say, most state courts have not extended the private right of eminent domain as far as they might under *Clark v. Nash.* They require "public use" in varying degrees, and generalizations are of little value in determining the applicable law in a particular jurisdiction. Local factors are usually decisive, and the law of each state must be studied independently. Whether condemnation of water, or condemnation to facilitate the use of water, will be allowed in a specific case depends upon the application of the public use decisions to the specific use in controversy, plus the following factors.

B. CONSTITUTIONAL PROVISIONS.

Water is so important in arid states that many constitutions have provisions for its utilization. These declare either that certain uses of water are to be deemed "public" or that eminent domain may be exercised for specified private uses; and some change earlier law by authorizing previously forbidden condemnations.[162]

Constitutional provisions take several different forms. Idaho has a very broad provision, which allows condemnation for irrigation, mining, and ". . . any other use necessary to the complete development of the material resources of the state."[163] Condemnations relating to the use of water in lumbering[164] and the generation of electricity for private consumption[165] have been allowed under this clause. In Montana and Oregon taking land to store or trans-

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161 J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 328 (Univ. of Wisc. Press ed. 1957).

162 *See* Steele v. County Comm'rs, 83 Ala. 304 (1887). In H. A. Bosworth & Son, Inc. v. Tamiola, 24 Conn. Supp. 328, 190 A.2d 506 (1963), the court stated that a statute authorizing condemnation by an individual for land drainage may operate unconstitutionally if the general community advantage is only incidental.

163 IDAHO CONST. art. I, § 14.

164 Potlatch Lumber Co. v. Peterson, 12 Idaho 769, 88 P. 426 (1906) (condemnation of land for reservoir for the purpose of improving the navigation of a stream for logs).

165 Bassett v. Swenson, 51 Idaho 256, 5 P.2d 722 (1931).

port water for beneficial use is itself a public use,[166] and some constitutions provide that the sale, rental or distribution of water is a public use.[167] Provisions approving condemnation for reservoirs or rights-of-way across private lands for drainage or for conveying water for irrigation, mining, manufacturing, milling, or domestic uses are common in Western state constitutions.[168]

Constitutional provisions regarding use of water may affect the right to condemn in two ways. First, of course, they obviate the need to establish in each case the public character of the proposed use. In addition, they may remove any requirement for legislative authorization to condemn, for some "use" provisions have been held to be self-executing. However, the term "self-executing" may refer to any of several different results. The Colorado provision, which declares that "[a]ll persons and corporations shall have the right of way . . . [for certain uses] upon payment of just compensation" is "self-executing" and apparently is effective without any legislative action.[169] But not all of the constitutional provisions have such an effect, perhaps because they are not so explicit in conferring the power—they merely declare certain uses to be public or approve condemnation for private uses. As applied to the Idaho provision, "self-executing" means that legislative authority to condemn for the specified purposes is not necessary, *other than* to provide the applicable judicial procedure.[170] And the provision in the Montana constitution, although said to be "self-executing," apparently requires that the legislature determine whether the power should in a given instance be exercised, who should exercise it, and what property should be taken. In other words, the provision confers no grant of power.[171]

Constitutional provisions affecting the power of eminent domain for special uses have thus been held to produce widely varying effects upon the necessity of legislative authorization to condemn,

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166 MONT. CONST. art. III, § 15; ORE. CONST. art. I, § 18.

167 *E.g.*, CAL. CONST. art. XIV, § 1.

168 *See* provisions collected in LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 460 (2d ed. 1959); 2 NICHOLS, *supra* note 2, at § § 7.32, 7.621 [1] (irrigation); 7.6223 [1] (drainage); 7624 (mining); 7.626 [1] (private roads).

169 *See* Town of Lyons v. City of Longmont, 54 Colo. 112, 116, 129 P. 198, 200 (1913). The court chose to ignore Colorado's eminent domain statutes, stating: "Independent of statutory provisions cited by counsel for plaintiff in error, we think this right is conferred by the constitutional provision above quoted."

170 Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 155 P. 680 (1916).

171 *See* State v. Aitchison, 96 Mont. 335, 30 P.2d 805 (1934).

and to characterize a particular provision as "self-executing" is not to define its effect. The interpretation given to a particular provision regarding this question should therefore be studied on an individual basis.

C. PREFERENCES.

In the Western states, the existence of water preference provisions also may affect the right of eminent domain. Generally, preferences manifest a policy to favor certain uses of water over other uses and are enacted as either constitutional or statutory provisions. Most of the seventeen contiguous Western states have established such preferences. These universally favor domestic and municipal uses over all others, and usually give agricultural uses a higher preference than manufacturing uses.[172] Some preference provisions explicitly require the payment of compensation when water rights are taken.[173] Where compensation is not mentioned, a preference provision is construed with general eminent domain provisions and does not give a junior preferred user the right to divest senior rights without payment of compensation.[174]

Since preferences do not of themselves affect vested water rights, they are of little importance after rights to all available water have been established except insofar as they relate to the right of eminent domain.[175] Some state statutes grant authority to condemn for a preferred use,[176] but others do not expressly relate preferences to eminent domain law.[177] An interesting question is

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172 Excellent articles on preferences generally are Thomas, *Appropriations of Water for a Preferred Purpose*, 22 ROCKY MT. L. REV. 422 (1950); Trelease, *Preferences to the Use of Water*, 27 ROCKY MT. L. REV. 133 (1955); Gross, *Condemnation of Water Rights for Preferred Uses—A Replacement for Prior Appropriation?*, 3 WILLIAMETTE L. J. 263 (1965).

173 *E.g.*, NEB. CONST. art. XV, § 6.

174 *See, e.g.*, Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908).

175 "If political sub-divisions or agencies of the state having the power of eminent domain are permitted to exercise such rights in accordance with, and limited to, the order of use as stated in this [preference] section, the section becomes meaningful." Noe, *Water Law Procedures in Kansas*, 5 KAN. L. REV. 663, 671 (1957).

176 *See, e.g.*, WYO. STAT. ANN. § § 41-2 to 41-4 (1957).

177 "This legislative mandate [referring to the Kansas preference statute] is not clear, and there is nothing to guide the administrator or the courts in carrying it into effect.... And if it is intended to relate the right to condemn an inferior use of water in favor of a preferred use, then that needs clarification." Hutchins, *Western Water Rights Doctrines and Their Development in Kansas*, 5 KAN. L. REV. 491, 533, 570 (1957).

whether a preference provision might imply the authority to condemn for a preferred use. It was said in a Nebraska case, for example, that the provision is "self-executing," but the statement is clearly dictum.[178] Although there apparently is no direct authority for the proposition that the right of eminent domain is implied in a preference,[179] analogies might be made to other situations in which the power has been granted by implication.[180] Where the preferred use is "public" and the condemnor is qualified to exercise the power and the condemnation would serve an important public policy, an implied grant of the eminent domain power might well be recognized.

D. THE PARTY EXERCISING THE POWER.

Another factor which may be important is the identity and the interests of the condemning party. The doctrine represented by *Nash v. Clark*,[181] which allows a private person to exercise eminent domain to acquire property for his own exclusive use, is followed in several Western states. However, in others a private person cannot exercise eminent domain in his own behalf notwithstanding the property will be used for what would otherwise be a "public purpose". For example, in Nebraska, where the irrigation of arid lands has been held to be a "public use,"[182] an individual farmer is not allowed to condemn for the purpose of irrigating his own land.[183]

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178 "Section 6 of article XV of the Constitution, fixing a priority of uses for which public waters may be appropriated, is a self-executing provision and the courts, in the absence of a statutory method, would be obliged to provide the means for enforcing its provisions." Loup River Public Power Dist. v. North Loup River Public Power & Irrigation Dist., 142 Neb. 141, 153, 5 N.W.2d 240, 248 (1942).

179 *See* Thomas, *Appropriations of Water for a Preferred Purpose*, 22 ROCKY MT. L. REV. 422, 427-31 (1950) for cases that by negative implication indicate that perhaps an inferior use might be condemned under a preference provision. *But see* Brazos River Conservation & Reclamation Dist. v. Harmon, 178 S.W.2d 281, 291 (Tex. Civ. App. 1944).

180 *See, e.g.*, Ziegler, *Acquisition and Protection of Water Supplies by Municipalities*, 57 MICH. L. REV. 349, 353-56 (1959) (power of municipality to condemn property outside its boundaries implied from power to condemn within municipality or power to purchase and hold property outside municipality); 11 MCQUILLIN, *supra* note 2, at § § 32.16, 32.17 (implied grant of eminent domain power to municipalities). *Cf.* Town of Lyons v. City of Longmont, 54 Colo. 112, 129 P. 198 (1913) (constitutional provision authorizing condemnation for waterways self-executing).

181 27 Utah 158, 75 P. 371 (1904), *aff'd*, 198 U.S. 361 (1905).

182 Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co., 45 Neb. 884, 64 N.W. 343 (1895).

183 Vetter v. Broadhurst, 100 Neb. 356, 160 N.W. 109 (1916).

The right is denied not on the ground that the power of eminent domain may not be delegated to a private person, but on the ground that the taking in that situation is not for a public use.[184] Even in these jurisdictions it is likely that a private condemnation would be allowed for a purpose in which the public could more directly participate, e.g., for a toll bridge.[185] What the courts forbid is not condemnation by a private party, but condemnation by a private party for his own exclusive use and enjoyment.

Condemnations of property for exclusive use by private individuals must in these jurisdictions be carried out by companies which are "public" or "quasi-public," rather than by the interested individual. In this way desirable condemnations are within the framework of a "narrow" public use doctrine; and courts are spared the burden of deciding whether the social value of a proposed use justifies eminent domain by an individual.

How much private initiative is inhibited by requiring a public condemnor when property is to be used exclusively by private persons depends upon the difficulty of getting others to associate in a company and the extent of the control imposed after its organization. Certainly the effect of the rule is mitigated by a corollary to the "narrow" doctrine of public use which provides that "public" as used in this connection need not refer to the entire public. Rather, the requirement may be satisfied even if only a very small segment of the public will use the condemned property.[186] Although the practical difference between this arrangement and condemnation by an interested individual may be slight, it has been predicted increased irrigation needs will force broader judicial acceptance of the doctrine that a private individual may exercise eminent domain to irrigate his own land.[187]

E. Local Conditions.

Since public needs obviously must be determined in relation to environment, local conditions are an important factor in any jurisdiction which considers public benefit or advantage in determining whether private utilization of condemned property is for a "public use." In *Fallbrook Irrigation Dist. v. Bradley*[188] the Supreme Court

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184 *Id.*

185 Foltz v. City of Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955) and cases cited 234 Ind. at 665 and 666.

186 2 Nichols, *supra* note 2, at § 7.2.

187 Yeutter, *A Legal-Economic Critique of Nebraska Watercourse Law*, 44 Neb. L. Rev. 11, 48-9 (1965).

188 164 U.S. 112 (1896).

upheld the use of eminent domain to facilitate irrigation in California because the arid conditions in many parts of that state created a need so pervasive throughout the community as to make application of water upon private land a "public use."

One of the most famous examples of the consideration given local conditions is in *Clark v. Nash*[189] where the Court held that because of the extremely arid Utah climate, eminent domain by a private party for the irrigation of his own lands was a "public use." The doctrine of that case has been stated by Professor Wiel:

> The situation of a State and the possibilties and necessities for the successful prosecution of various industries, and peculiar condition of soil or climate or other pecularities, being general, notorious and acknowledged in the State so as to be judicially known and exceptionally familiar to the courts without investigation—such conditions justify a State court in upholding a statute authorizing the taking of another's private property by one individual for his own enterprise, where it believes, *by reason of the above*, that such a taking will, through its contribution to the growth and prosperity of the State, constitute a public benefit, and the Supreme Court of the United States will follow the decision of the State court in such a case.[190]

The "necessity" for accomplishing what is sought to be done through eminent domain is determined by local conditions, and is significant in several questions. Some of these questions are legislative ones into which courts may not inquire. There are, however, at least two questions of "necessity" which do bear upon whether the underlying purpose is "public", and this of course is a judicial matter. Both questions must be answered in terms of the relation of physical factors to economic conditions as found in the particular local setting.

The first such question of necessity is, "[h]ow necessary is the industry to be benefited by the condemnation to the economic prosperity of the state?" State courts are reluctant to impede the success of industries which are of vital economic importance. When water power was needed for manufacturing in New England the courts upheld the milldam acts stating, *inter alia*, "[i]t is of incalculable importance to this state to keep pace with all others in the progress of improvements, and to render to its citizens the fullest opportunity for success in an industrial competition."[191] Courts in many of the dry Western states recognized the importance of agriculture and

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189 198 U.S. 361 (1905). *See also* Pine Martin Mining Co. v. Empire Zinc Co., 90 Colo. 529, 11 P.2d 221 (1932).

190 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES § 611 (3d ed. 1911) [hereinafter cited as WIEL].

191 Olmstead v. Camp, 33 Conn. 532, 551 (1866).

allowed private condemnations to facilitate irrigation.[192] Another interesting illustration is found in *Potlatch Lumber Co. v. Peterson*,[193] in which private condemnation was allowed to facilitate transportation of logs down a stream. The court justified the procedure not alone on the economic significance of logging, but also on the importance of establishing a profitable means of clearing the timber so that the lands might then be devoted to agriculture. The importance of the mining industry to the Nevada economy controlled in *Dayton Gold & Silver Mining Co. v. Seawell*[194] where a condemnation to facilitate mining was held to be for a public use. The court pointed out that because inherent physical limitations precluded most industries common in other states, mining would have to form the basis of Nevada's economy if the state were to prosper.

An early Georgia case, *Loughbridge v. Harris*,[195] held condemnation of an easement by persons owning the banks on both sides of a stream in order to flood upper riparians for the purpose of operating a mill was unconstitutional as a taking for private use only. Just six years later however, in *Hand Gold Mining Co. v. Parker*,[196] the same court held a grant of eminent domain power in the charter of a gold mining company not to be invalid as condemnation for a private use. The court rested its decision on the "public good" to be gained because gold mining would ". . . . necessarily result in an increase of the constitutional currency of the country, and thereby add to the permanent wealth of the state. . . ." Although the court attempted to distinguish the decision from *Loughbridge*, the most important reason for the inconsistent results appears to be the court's view of the role of the manufacturing industry and the gold mining industry in the economy of Georgia.

The second question of necessity relating to public use is, "[h]ow necessary is the proposed activity to achieve reasonable prosperity in the industry to be benefited?" In the milldam cases, for example, the necessity for flooding certain riparian lands as a means of raising a head of water to operate the mills was noted by the courts in sustaining this form of private eminent domain. Where the

192 *See, e.g.*, Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886); Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co., 45 Neb. 884, 64 N.W. 343 (1895).

193 12 Idaho 769, 88 P. 426 (1906). *See also* McKenney v. Anselmo, 416 P.2d 509 (Idaho 1966).

194 Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394 (1876). Gallup American Coal Co. v. Gallup Southwestern Coal Co., 39 N.M. 344, 47 P.2d 414 (1935).

195 42 Ga. 500 (1871).

196 59 Ga. 419 (1877).

success of farming in a particular state depends upon artificial irrigation, irrigation is likely to be held a "public use" in that state. Such was the case in *Fallbrook Irrigation Dist. v. Bradley*,[197] where the Supreme Court indicated that if farming could have been reasonably successful without irrigation the constitutional objections to the condemnation would have been sustained. The success of dry-land farming in Nebraska prompted that state's supreme court to rule that conditions there did not justify an exercise of eminent domain by a farmer for irrigation purposes.[198]

Although absolute necessity is not required either as to the importance of the industry or the means of making it successful, it is axiomatic that a higher degree of necessity will present a stronger case for allowing the condemnation. Of course, it does not always follow that an exercise of eminent domain will be allowed upon showing that it is warranted by "local conditions." Such other factors as precedents, often established under different conditions, and purely doctrinal "public use" considerations are also quite important in determining whether an exercise of eminent domain to serve private interests will be allowed.

IV. MUNICIPAL WATER SUPPLIES

A. INTRODUCTION.

"Towns and cities are everywhere empowered by either statute or state constitution to condemn private water rights to secure water for public or domestic uses,"[199] and this effectively gives them

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[197] 164 U.S. 112 (1896).

[198] "Even if it should be held that a great and general public advantage may, in some cases, constitute a public use, we take judicial notice of the fact that neither climatic, agricultural, industrial, nor social conditions in this state indicate that any such advantage will accrue by permitting such a taking as this statute authorizes." Vetter v. Broadhurst, 100 Neb. 356, 363, 160 N.W. 109, 115 (1916).

[199] C. MARTZ, CASES AND MATERIALS ON THE LAW OF NATURAL RESOURCES 144 (1951). Usually municipalities are authorized to condemn property outside their territorial limits. *E.g.*, Schroeder v. City of New York, 371 U.S. 208 (1963). Although it was held in City of Canton v. Shock, 66 Ohio 19, 63 N.E. 600 (1902), that a municipality may take water for sale to its inhabitants without compensating downstream riparians who are injured by the diversion, the general rule is that a riparian municipality does not have the right to make such diversions. *See* 2 NICHOLS, *supra* note 2, at § 5.795; 1 C. KINNEY, IRRIGATION AND WATER RIGHTS § 482 (2d ed. 1912); 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 137 (1904). "The case of *Canton v. Shock* . . . seems to stand practically alone in its suggestion to the contrary, and we find it wanting in valid argument to support the conclusion reached." Pernell v. City of Henderson, 220 N.C. 79, 81, 16 S.E.2d 449, 451 (1941).

a preference to use water on condition that the owners are compensated. As a general rule municipal use is public and justifies exercise of eminent domain.[200] But "municipal use" needs to be defined, for much of the water from a municipal supply goes to private consumers. Providing for the domestic water needs of a municipality is a long established public use, and it is probably equally settled that ". . . other uses are included, such as are fairly incidental to the ordinary modes of living in cities and large towns, and as involve the operation of motors requiring but a small quantity of water which may reasonably be supplied from an aqueduct of such capacity as would be needed to meet the ordinary requirements of the inhabitants for domestic and other similar purposes."[201]

The power to condemn for municipal use may be inapplicable where the municipality plans to supply the water to large manufacturing and commercial enterprises. These uses of themselves do not generally justify an exercise of eminent domain and are usually well down on the preference schedule if one is applicable. The generally accepted view is that these condemnations are invalid;[202] however, the question of the nature of the use is apparently one of degree, and there is not enough recent authority on point to consider the issue closed.[203] Of course, there is also the possibility in

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200 2 NICHOLS, *supra* note 2, at § 7.5153; 11 MCQUILLIN, *supra* note 2, at § 32.63.

201 Watson v. Inhabitants of Needham, 161 Mass. 404, 410, 37 N.E. 204 208 (1894).

202 Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967) (supplying private users outside city). *See* In re Barre Water Co., 62 Vt. 27, 20 A. 109 (1889) (condemnation of water from a stream above mill dams to sell to motor owners in town held unconstitutional as being for private use); 11 MCQUILLIN, *supra* note 2, at § 32.63, citing Attorney General v. City of Eau Claire, 37 Wis. 400 (1875) and City of Austin v. Nalle, 85 Tex. 520, 22 S.W. 668 (1893). In State *ex rel.* Shropshire v. Superior Court for Pacific County, 51 Wash. 386, 99 P. 3 (1909), the court said that water delivered for the purpose of supplying steam power for private manufacturing concerns was for private use, but allowed the condemnation because of the city's need of water for fire protection, sewerage purposes, etc., and to supply its inhabitants for domestic uses.

203 The question of a municipality's disposition of the water is not discussed in many cases. Perhaps this is because domestic need alone will justify the condemnation even where it is proposed to supply private manufacturing concerns [State *ex rel.* Shropshire v. Superior Court for Pacific County, 51 Wash. 386, 99 P. 3 (1909)] as well as the difficulty of tracing the condemned water to the private uses where the municipality has several sources of water supply. Light v. City of Danville, 168 Va. 181, 190 S.E. 276 (1937), where the court said that incidental private benefit may be disregarded where it is so blended with public use that it is difficult to observe the line of demarcation. "It would be unreasonable to deny to the city the exer-

such cases that the particular manufacturing or commercial use might be held to be public in itself because of the economic benefit it confers upon the community. In this event, its characterization as a municipal use would be unnecessary.[204]

When no extra-territorial power of eminent domain is expressly granted to a municipality, important questions may arise concerning the condemnation of a water supply outside its boundaries. In view of the strong policy considerations for allowing a municipality to obtain a water supply for its inhabitants, it is not surprising that the weight of authority implies an extra-territorial power of eminent domain either from the power to purchase property outside the city, or from the power to condemn a water supply within the city.[205] There is good reason in these situations for not strictly construing statutes which delegate the power of eminent domain, since "[w]ithout the power of eminent domain, a municipality, because of local animosity or inability to reach a monetary agreement, may effectively be deprived of a water supply outside its jurisdiction even though it has the power to purchase and hold outside property."[206] If municipalities are allowed to condemn water supplies, they can get an impartial determination of value in condemnation proceedings; whereas if the cities are forced to purchase water rights, they might often be in a very unfavorable bargaining position, especially where there are few competing sources of supply.[207]

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cise of such a public service [supplying electric power] in behalf of its citizens merely because in rendering that service it may incidentally, and to its own advantage, be helpful to others of the public than those to whom it is directly obligated. Dillon on Mun. Corp. (5th Ed.) § 1300." 168 Va. at 208, 190 S.E. at 287.

204 *See* Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 69 A. 870 (1908).

205 *See* Ziegler, *Acquisition and Protection of Water Supplies by Municipalities*, 57 MICH. L. REV. 349, 354-56 (1959). City of North Sacramento v. Citizens Utilities Co., 192 Cal. App. 2d 482, 13 Cal. Rptr. 538 (1961), where a city, empowered to condemn that portion of a water system within its boundaries, was held to have the implied power to condemn that portion outside its boundaries. The system had been operated as a unit, but it appeared that the portion outside the city could be severed and operated separately. Compare City of Birmingham v. Brown, 241 Ala. 203, 2 So. 2d 305 (1941), where the acquisition was for park rather than water supply purposes; implication of extra-territorial power of eminent domain was denied.

206 Ziegler, *Acquisition and Protection of Water Supplies by Municipalities*, 57 MICH. L. REV. 349, 356 (1959).

207 Reference to problems of this nature was made in Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161 (1896): "[T]he cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase that it would be practically impossible to build the works or obtain the water."

Because the rate of municipal use is rapidly increasing at the same time that unclaimed water sources are diminishing,[208] it is often expedient for municipalities to acquire a larger supply of water than is presently needed to provide for future expanded needs. Despite general disfavor in the law for "excess" condemnation,[209] courts sometimes allow municipalities to condemn water sufficient to provide for future needs, so long as the determination of the quantity to be needed is reasonable.[210] Cities may also protect the purity and conserve the quantity of a public water supply by restricting riparian rights or acquiring a "buffer strip" around the source of water through exercise of the eminent domain power.[211] And to give public water supplies a further measure of stability, it has been suggested that where established municipal diversions have no appreciable effect on navigation, their rights to withdraw water should be confirmed by Congress as against any claims of the United States under the navigation servitude.[212]

B. EFFECTS OF LOCAL DOCTRINES.

The amount a municipality must pay when condemning water rights depends upon local water law. For instance, the quantity of water that may be diverted by a riparian owner and the uses to which it may be applied vary among states committed to the riparian doctrine. Under one early theory every riparian landowner had the right to have the stream flow across or past his land in its natural quantity and purity. Diversions were sometimes permissible even under this theory, such as for domestic, livestock, and even small scale irrigation uses where the stream flow was not substantially affected. But any diversions which went beyond these strict limitations were enjoinable by downstream riparians. The

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208 *See* Martz, *Water for Mushrooming Populations*, 62 W. VA. L. REV. 1 (1959).

209 *See* 2 NICHOLS, *supra* note 2, at § 7.5122.

210 *E.g.*, New Haven Water Co. v. Russell, 86 Conn. 361, 85 A. 636 (1912). Trelease, *Preferences to The Use of Water*, 27 ROCKY MT. L. REV. 133, 138-40 (1955). For discussions of economic and legal matters pertaining to condemnations by New York City, see Lee, *Acquisition of Riparian Rights in New York*, in PROCEEDINGS OF ABA SECTION OF MINERAL AND NATURAL RESOURCES LAW 13 (1964); J. HIRSHLEIFER, J. DEHAVEN & J. MILLIMAN, WATER SUPPLY—ECONOMICS, TECHNOLOGY, AND POLICY 255-88 (1960); and Hirshleifer and Milliman, *Urban Water Supply: A Second Look*, 57 AM. ECON. REV. 169 (1967).

211 *See* City of Tacoma v. Welcker, 65 Wash. 2d 677, 399 P.2d 330 (1965).

212 WITMER, FEDERAL WATER RIGHTS LEGISLATION—THE PROBLEMS AND THEIR BACKGROUND, HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., 2D SESS., FEDERAL WATER RIGHTS LEGISLATION 21 (Comm. Print 19 1960).

effect of this theory upon condemnation of a water supply is very drastic, for it implies that every downstream riparian or littoral owner must be compensated for the diminished flow even when he cannot show that the water was usable on his property.[213]

The "natural flow" riparian doctrine is extremely wasteful in that it gives every riparian the right to have stream waters flow uselessly into the sea, and it has been replaced in many jurisdictions by a "reasonable use" riparian doctrine. California, by constitutional amendment in 1928, prohibited riparians who were not making a reasonable use of the water from complaining about nonriparians and appropriators who were.[214] In 1966 New York rejected the natural flow philosophy when it enacted section 429-j of the Conservation Law. This specifies that a harmless alteration in a natural watercourse or lake, whether for the benefit of riparian or nonriparian land, is not actionable and does not create a cause of action essential to the initiation and establishment of a prescriptive right.[215]

The reasonable use doctrine promotes beneficial water utilization by allowing riparians to divert such water as they may reasonably use to satisfy the natural demands for water upon their riparian property. Under this doctrine a vital question for a condemnor is whether the right to use water may be severed from the riparian land. If a diversion to non-riparian land is by definition held to be an unreasonable use as against a riparian use,[216] a condemnor of a water supply for non-riparian use would be liable to every downstream riparian who could show that he needed the water for his own reasonable uses. But if riparian rights to water may be reserved or conveyed to non-riparian land, a condemnor might acquire the rights to the amount of water to which the riparian condemnee would be entitled without being required to compensate other riparians. Development of such a "severability doctrine" under the riparian doctrine can be supported as necessary to remove obstacles to condemnation of water supplies and to facilitate the

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213 6A AMERICAN LAW OF PROPERTY § § 28.56, 28.57 (A. J. Casner ed. 1954); Harnsberger, *Prescriptive Water Rights in Wisconsin*, 1961 WIS. L. REV. 47, 50-54.

214 *See* 1 AMERICAN LAW OF PROPERTY § 28.3 (A. J. Casner ed. 1952).

215 Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377 (1968).

216 *See, e.g.*, Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Authority, 145 Me. 35, 71 A.2d 520 (1950); Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954).

most economic development of water resources in riparian jurisdictions.[217]

The usual measure of damages under the riparian doctrine for taking of water is the depreciation in the value of the riparian land.[218] This rule probably results from the idea that riparian rights are mere incidents of ownership of riparian land and that the measure of "just compensation" is the "value" of the property taken, as distinct from the loss suffered by the owner or the gain realized by the taker. In most instances, moreover, it is the only suitable method available for measuring compensation.[219] However, a Massachusetts case[220] states that if riparian rights have recently been sold in the vicinity, the "market value" established by the transactions may be evidence of the condemnee's loss.[221]

Since numerous persons may have riparian interests in the waters of a lake or stream, it has been suggested that the best way to condemn water in riparian jurisdictions is through inverse eminent domain. In this way the taker is not required to ascertain all the riparian interests in advance, and is concerned only with those who have a sufficient interest to initiate an action against him. Where a state constitution requires that compensation be made before the taking, the availability of inverse condemnation is doubtful and a riparian might be allowed to enjoin the diversion until

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217 *See* Martz, *Water for Mushrooming Populations*, 62 W. VA. L. REV. 1, 12 nn. 37-41 (1959), for a list of state statutes which may affect severability of riparian rights. *Cf.* Carlsbad Mut. Water Co. v. San Luis Ray Development Co., 78 Cal. App.2d 900, 178 P.2d 844 (1947).

218 *See* Annot., 58 L.R.A. 240, 253-56 (1903).

219 "[W]hile the riparian right is a part and parcel of the land in a legal sense, yet it is an usufructuary and intangible right inhering therein and neither a partial nor a complete taking produces a disfigurement of the physical property. The only way to measure the injury done by an invasion of this right is to ascertain the depreciation in market value of the physical property." Collier v. Merced Irr. Dist., 213 Cal. 554, 571, 2 P.2d 790, 797 (1931).

220 Amory v. Commonwealth, 321 Mass. 240, 72 N.E.2d 549 (1947).

221 *Cf.* Clough v. State, 208 Misc. 499, 144 N.Y.S.2d 392 (1955), where the diversion of claimants' water was only temporary. The court said that the usual measure of damages (the difference in the market value of the riparian land before and after the taking) was inapplicable and that compensation should be based upon "the usable value of the water of which claimants were deprived, the effect of the interference with the operation of claimants' business as a going concern, its production schedule, its loss of profits and the expense necessarily incurred due to shutdowns. National Cellulose Corp v. State, 292 N.Y. 438, 446, 55 N.E.2d 492, 495 (1944)." *Id.* at 503, 144 N.Y.S.2d at 397.

direct condemnation proceedings are brought and compensation is paid.[222]

In the Western states the right to a continuous supply of a specific quantity of water from a stream or lake may be obtained by appropriating it for a beneficial use. Once such an appropriative right has attached it may not be taken without payment of compensation.

Under the appropriation doctrine, diversions can be made to any lands where the water may be advantageously employed, and a change in both place and type of use usually may be made upon approval of a state agency or officer.[223] Moreover, an appropriation is fixed in quantity and therefore more certain than a riparian's indefinite right. Thus under the appropriation doctrine, a condemnor is not faced with issues which arise under the riparian system. He need be concerned only with the appropriator whose water right he is taking. When the rights of others using water from the same source are unaffected by the transfer, no one except the appropriator whose water is being taken may claim compensation.

While an appropriator may be entitled to have the loss to the value of his land considered as an element of his damages,[224] courts speak primarily in terms of the "market value" of the water taken, and it is said that the appropriator must be paid the market value of his water as affected by the demand or "market" that exists for it.[225] A problem arises when the condemnor diverts water from the same source but at a different location than the appropriator whose right he is taking. As water travels downstream a portion of it evaporates into the atmosphere or seeps into the ground around the stream bed. Thus, some of the water diverted by a condemnor upstream from the appropriator's point of diversion would never have reached the appropriator in any event. It becomes necessary, therefore, to decide whether the condemnor must pay full value for all of the water he actually diverts or only for the amount that would have reached the appropriator after natural loss through evaporation and seepage. In *Sigurd City v. State*,[226] for example,

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222 *See* Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEX. L. REV. 24, 55-8 (1954); 1 WIEL, *supra* note 190, at § 616.

223 *See* W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 378-84 (1942).

224 *See* Sigurd City v. State, 105 Utah 278, 142 P.2d 154 (1943).

225 Shurtleff v. Salt Lake City, 96 Utah 21, 82 P.2d 561 (1938).

226 105 Utah 278, 142 P.2d 154 (1943).

the condemnor's diversion was made many miles upstream from the appropriator's point of diversion, and transportation loss would have occurred before the appropriator could have diverted the water. It was said that the appropriator's rights were not property rights in the water itself, but only the right to make beneficial use of the water that reached his land; the deprivation of the right to *use* the water formed the basis of his damages. Since the water lost by evaporation and seepage was not usable by him, just compensation did not require payment for such quantities.[227]

C. VALUE TO MUNICIPALITY.

When a municipality condemns property to obtain an entirely new source of supply from a ground water reservoir, or to expand an existing well field, proceedings are typically commenced against an owner of agricultural land who, because of the property's adaptability for water production, demands substantially more than the market value would be for farming purposes.[228] Frequently in such situations, no actual sales have occurred and the condemnor invokes the fundamental rule that "the question is, What has the owner lost? not, What has the taker gained?"[229] This rejection of the

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227 *See also* City of Walla Walla v. Dement Bros. Co., 67 Wash. 186, 121 P. 63 (1912), where the condemnor diverted water at a point thirteen miles upstream from defendant's mill. It was held that defendant's loss was to be measured by the quantity actually lost to it, and not by the entire quantity the city was taking at its point of diversion.

228 *See generally* 1 ORGEL, *supra* note 106, at c. VI (2d ed. 1953); Hale, *Value To The Taker in Condemnation Cases*, 31 COLUM. L. REV. 1 (1931). A recent example is City of Connersville v. Joseph J. Riedman, Fee Book 85, page 576, case number 66-C-194, Henry Circuit Court of Indiana sitting at New Castle, 1967 ($35,000 jury verdict for 10.97 acres of land having a daily potential recovery of water in excess of five million gallons). If an interest in ground water has been severed before condemnation, a separate sum for the water rights may be awarded. United States v. 4.105 Acres of Land, 68 F. Supp. 279 (N.D. Cal. 1946). The general rule, however, appears to be that evidence of the value of minerals separate and apart from the overall value of the land is inadmissible. In re Appropriation of Easements for Highway Purposes: Preston, Director of Highways v. Stover Leslie Flying Service, Inc., 174 Ohio St. 441, 190 N.E.2d 446 (1963); Iske v. Metropolitan Util. Dist. of Omaha, 183 Neb. 34, 157 N.W.2d 887 (1968). The existence of multiple interests does not warrant separate trials; therefore, a motion for dismissal of mineral interests from a condemnation proceeding should be denied. Phillips v. United States, 243 F.2d 1 (9th Cir. 1957). *See also* A. W. Duckett & Co. v. United States, 266 U.S. 149 (1924).

229 Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910). For collections of cases see 3 NICHOLS, *supra* note 2, at § 8.61; 27 AM. JUR. 2d *Eminent Domain* § 282 (1966); 1 ORGEL, *supra* note 106, at § 81.

taker's gain favors the condemnor and raises the issue whether a property's worth to the taker should ever be considered in determining fair market value. In other words, is the owner entitled to a larger compensation award because the special adaptability of the land for a water supply coincides with the condemnor's purpose for condemning.

Under the rule that market value is based upon all available uses, including the highest possible use to which the land is or may be put in the reasonably near future,[230] the condemnor's need competes with similar needs of others and some cases therefore include the condemnor on the buyer side of the market.[231] It has been stated: "Courts do not agree on whether or not the hypothetical market includes the present taker. If it does include him, the peculiar adaptability of the property for his purposes may influence the hypothetical market value. It would certainly affect what he would be willing to pay if his only alternative were to do without the property, and in this respect it would influence the hypothetical market value. *Quaere*, does all this overemphasize the true influence of a given taker?"[232] Due to fear of such influence, other courts prohibit consideration of the condemnor's needs[233] but most decisions are ambiguous on whether the taker has been included in or excluded from the hypothetical market.[234]

When the condemnor is the only potential taker, the decisions again are not uniform.[235] In a large number of the cases, however,

230 1 ORGEL, *supra* note 106, at § § 29, 30. Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N.W.2d 168 (1944).

231 In re Gilroy, 85 Hun. 424, 32 N.Y.S. 891 (Sup. Ct. 1895); Conan v. City of Ely, 91 Minn. 127, 97 N.W. 737 (1903); In re Daly, 72 App. Div. 394, 76 N.Y.S. 28 (1902); Union Electric Light & Power Co. v. Snyder Estate Co., 65 F.2d 297 (8th Cir. 1933); Ford Hydro Electric Co. v. Neeley, 13 F.2d 361 (7th Cir. 1926), *cert. denied*, 273 U.S. 723 (1926).

232 Dodge, *Acquisition of Land by Eminent Domain*, in J. Beuscher, LAND USE CONTROLS-CASES AND MATERIALS 535-36 (4th ed. 1966). *See also* 1 ORGEL, *supra* note 106, at § 87.

233 *See* 1 ORGEL, *supra* note 106, at § 88; 4 NICHOLS, *supra* note 2, at § 12.315; State Highway Comm'n v. Arnold, 218 Ore. 43, 343 P.2d 1113, *modifying* 218 Ore. 43, 341 P.2d 1089 (1959). United States v. Boston, C.C. & N.Y. Canal Co., 271 F. 877 (1st Cir. 1921) (if special adaptability for use is exclusive to government, such adaptability does not enhance market value). *See* United States v. Catlin, 204 F.2d 661 (7th Cir. 1953); State *ex rel.* State Highway Comm'n v. Howald, 315 S.W.2d 786 (Mo. Sup. Ct. 1958).

234 Hale, *Value To The Taker in Condemnation Cases*, 31 COLUM. L. REV. 1, 17 (1931); Dodge, *Acquisition of Land by Eminent Domain*, in J. BEUSCHER, LAND USE CONTROLS—CASES AND MATERIALS 536 (4th ed. 1966); 1 ORGEL, *supra* note 106, at § 89.

235 *See* 1 ORGEL, *supra* note 106, at 374. McGovern v. City of New York, 229 U.S. 363 (1913). In United States v. Boston, C.C. & N.Y. Canal

the condemnee will be able to show that other potential users are present in the market. For instance, often the highest and most profitable use of land is for industrial purposes and the availability of a water supply does make property desirable for industries needing large quantities. Steam generating plants, abattoir, and industrial plants are examples.

As distinguished from the taker's necessity to obtain the property which is generally never considered[236] evidence of special adaptability for the taker's purpose is proper.[237] In *Langdon v. Loup River Public Power District*,[238] the court stated:

Co., 271 F. 877, 893 (1st Cir. 1921), it was said: "We are of the opinion that, in ascertaining the market value of property taken in a condemnation proceeding the utility or availability of the property for the special purpose of the taker cannot be shown, if the taker is the only party who can use the property for that purpose. If, however, the property has a special utility or availability, not only to the taker, but to other parties who could use the property for the particular purpose intended by the taker, then this utility or availability may be shown."

236 1 ORGEL, *supra* note 106, at § 91; 4 NICHOLS, *supra* note 2, at § 12.21; Metropolitan Water Dist. v. Adams, 116 P.2d 7 (Cal. Sup. Ct. 1941). Niagara, Lockport & Ontario Power Co. v. Horton, 231 App. Div. 402, 247 N.Y.S. 761 (1931) ("The defendants are not entitled to have for their land what it may be worth to the plaintiff, nor what it would damage the plaintiff not to be able to obtain it. They are entitled to what it is worth on the market for the best use to which it is adaptable." *Id.* at 405, 247 N.Y.S. at 765).

237 *See* 27 AM. JUR. 2d *Eminent Domain* § 282 (1966); Annot., 124 A.L.R. 910 (1940). Mr. Farnham stated: "When lands are taken for any purpose in connection with the establishment of a municipal water supply... every element which will give a value to the land may be considered. If the land is favorably situated for the purposes for which it is desired by the government, that fact may be considered in estimating the damages.... The availability of the property for the purpose for which it is sought is to be considered, but no fictitious value can be given it by the fact that it is the only property of the kind which is available for the purposes of the municipality." 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 794-95 (1904). *See* Union Elec. Light & Power Co. v. Snyder Estate Co., 65 F.2d 297 (8th Cir. 1933).

Evidence that property contains water and water yielding formations is admissible; but it appears that generally market value can not be reached by evaluating the land and the deposits separately. *In re* Appropriation of Easements for Highway Purposes: Preston, Director of Highways v. Stover Leslie Flying Service, Inc., 174 Ohio St. 441, 190 N.E.2d 446 (1963). Cases reaching a contrary result are cited in the opinion. *See also* 4 NICHOLS, *supra* note 2, at § 13.23; City of Springfield v. Beals Industries, Inc., 106 Ohio App. 452, 155 N.E.2d 501 (1958).

238 Langdon v. Loup River Public Power Dist., 144 Neb. 325, 331, 13 N.W.2d 168, 172 (1944). 4 NICHOLS, *supra* note 2, at § 12.3142(2); JAHR, *supra* note 134, at § 89.

> The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaption may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted? The correct rule is as stated in *Alloway v. Nashville*, 88 Tenn. 510, 13 S.W. 123: "witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaption for certain uses, this may be shown, and if such peculiar adaption adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?"

The difference between the rule of special adaptability and the rule of value to the taker is illustrated by *Lynn v. City of Omaha*.[239] The city condemned land to enlarge its municipal airport; and on appeal from an 11,625 dollars judgment, it contended the utility or availability of property for the special purpose of the condemnor cannot be considered in determining market value if the taker is the only person who can use the property for that purpose. Based upon this contention, the city alleged the trial court erred in refusing to instruct that, "plaintiff is entitled to the market value of property taken for the use to which it may be most advantageously put and for which it would sell for the highest price in the market, but you are not entitled to base your award of damages upon your estimate of the value of the real estate for enlargement of the airport."[240] In its discussion, the Nebraska Supreme Court said:

> As stated in Minneapolis-St. Paul Sanitary District v. Fitzpatrick, 201 Minn. 442, 277 N.W. 394, 124 A.L.R. 897: "The market value of property taken in condemnation is not measured by the benefits to, or needs of, condemnor. The question is, What has the owner lost? not, What has the taker gained?" Therein the court, by quoting from Stinson v. Chicago, St. P. & M. Ry. Co., 27 Minn. 284, 6 N.W. 784, goes on to say: " 'No reason can be given why property taken under the eminent domain by a railroad company, or for any public purpose, should be paid for at a rate exceeding its general value—that is to say, its value for any purpose. Any use for which it is available, or to which it is adapted, is an element to be taken into account in estimating its general value. But where a condemnation is sought for the purposes of a railroad, to single out from the elements of general value the value for the special purposes of such railroad, is in effect to put to a jury the question,

239 Lynn v. City of Omaha, 153 Neb. 193, 43 N.W.2d 527 (1950).
240 *Id.*

> what is the land worth to the particular railroad company, rather than what is it worth in general? The practical result would be to make the company's necessity the landowner's opportunity to get more than the real value of his land.'" See, also, State v. Platte Valley Public Power and Irrigation District, 147 Neb. 289, 23 N.W.2d 300.
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> As stated in Olson v. United States, 292 U.S. 246: "Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled."
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> And in United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53: "But in a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes.[241]

The court then pointed out that the rule is not to be confused with the doctrine which permits evidence concerning all the circumstances which show that a property is peculiarly adapted to some particular purpose.[242]

V. CONDEMNATION FOR PUBLIC PROGRAMS

A. Introduction.

Controlling floods, canalizing channels, developing watersheds and river basins, and stabilizing watercourses for downstream purposes such as municipal and domestic consumption, industrial utilization and generation of power are programs primarily undertaken by the federal government, and, with the major exception of California, states have not entered into these areas to any significant degree. When these programs are effectuated, properties which have vested in private persons under state laws are frequently appropriated without payment of compensation. An understanding of how and when federal power supersedes such private "rights," is possible only upon a detailed examination of the nature and extent of the so-called dominant federal navigation servitude applicable to waters of the United States. This servitude is limited to waters over which the federal government has jurisdiction, and it is necessary to define the extent of those waters over which Congress may properly exercise control.

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241 *Id.*

242 *Id.* at 198, 43 N.W.2d at 530. *See also* United States v. 3295.61 Acres, 83 F. Supp. 626 (N.D. Tex. 1949), reversed on a different point, 366 F.2d 915 (4th Cir. 1966) (possibility of removal of water from beneath pasture lands for industries should be considered in determining market value).

B. THE SCOPE OF THE COMMERCE POWER IN NAVIGABLE WATERS OF THE UNITED STATES.

The federal government is one of delegated powers and the most important in connection with water originates in the commerce clause. It provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." Federal jurisdiction over water under the commerce clause is based on the now long accepted construction of Chief Justice Marshall in *Gibbons v. Odgen.*[243] He reasoned that "commerce" includes "transportation" and the latter includes "navigation." Forty-one years later Congressional power to regulate navigation was held to comprehend control of waters for the purposes of navigation;[244] and in 1870 the classic definition of "navigable waters" was set forth in *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[245]

Thus a watercourse was deemed subject to the power of Congress if navigable in its natural condition, and for the next seventy years this test remained relatively unchanged. Minor modifications occurred and the basic test was broadened by adoption of the following rules:

1. The extent and manner of actual commerce on a watercourse are of no great significance. The test is whether the stream is capable of sustaining commerce in its natural state.[246]

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243 22 U.S. (9 Wheat.) 1 (1824). For a discussion of Supreme Court decisions in connection with the test of navigability for determining title to beds, see Johnson & Austin, *Recreational Rights and Titles of Beds on Western Lakes and Streams*, 7 NATURAL RESOURCES J. 1, 15 (1967); For navigability to determine admiralty jurisdictions, see Doran v. Lee, 287 F. Supp. 807 (W.D. Pa. 1968); GILMORE AND BLACK, THE LAW OF ADMIRALTY § § 1-11 (1957).

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

245 77 U.S. (10 Wall.) 557, 563 (1870).

246 The Montcello, 87 U.S. (20 Wall.) 430, 441 (1874).

2. Rivers which have been dammed or canalized remain navigable waters of the United States despite the artificial improvements.[247]

3. Waters once meeting the test of navigability remain forever navigable even though changed economic conditions or artificial obstructions in the channel make the watercourse incapable of being presently used for commerce.[248]

4. Navigability does not depend upon the particular mode in which commerce is carried on—whether by steamboats, sailing vessels or flatboats—nor on the presence of occasional difficulties in navigation.[249]

A great liberalization of the federal navigability test came in 1940 when the Supreme Court decided the *New River* case, *United States v. Appalachian Power Company.*[250] The decision added to the test of natural susceptibility for commercial use the element of whether the watercourse could be made commercially usable by construction of dams, locks, canals or other improvements. If so, the waters were navigable even though Congress had no present intention of authorizing such improvements. Mr. Justice Reed, speaking for the Court, specified one circumscription when he said: "The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful.[251]

Whether a watercourse constitutes navigable waters of the United States is a federal question to be decided under federal

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

248 Economy Light & Power v. United States, 256 U.S. 113 (1921). *See* Starr, *Navigable Waters of the United States—State and National Control,* 35 HARV. L. REV. 154 (1921).

249 United States v. Holt State Bank, 270 U.S. 49 (1926).

250 311 U.S. 377, *rehearing denied,* 312 U.S. 712 (1940). *See* Laurent, *Judicial Criteria of Navigability,* 1953 WIS. L. REV. 8; Comment, 3 So. DAK. L. REV. 109 (1958).

251 311 U.S. at 408. Wisconsin Public Service Corp. v. FPC, 147 F.2d 743, 745 (7th Cir. 1945), *cert. denied,* 325 U.S. 880 (1945). In United States v. 531.10 Acres, 243 F. 981, 990 (W.D. S.C. 1965) (reversed on a different point, 366 F.2d 915 (4th Cir. 1966)), the judge said, "[T]he evidence indicates that the river was susceptible to having been made navigable at great cost by a system of locks and canals, but... the cost of making the Seneca navigable in the legal sense, and a useful artery of commerce was so out of proportion to the use and benefits to be derived therefrom by the public that it was not reasonable or practicable to undertake such improvements." The court's award of compensation was reversed on appeal without consideration of the findings below regarding the Seneca's navigability. 366 F.2d 915, 921 (4th Cir. 1966).

law.[252] The Government bears the burden of establishing the navigability of a stream when it seeks to avoid paying just compensation because of the navigation servitude.[253] Professor Morreale points out that since the *New River* case, no decision on the issue of navigability has been decided against the government,[254] and critics have said that navigation doctrines appear to be "applicable to Pennsylvania Avenue through the expenditure of enough funds."[255]

If navigability of a main stream is established, federal jurisdiction over waters also extends to non-navigable tributaries and to headwaters of navigable watercourses. In *United States v. Rio Grande Dam and Irrigation Co.*,[256] an 1899 decision, the federal government successfully enjoined erection of a dam on the non-navigable upper reaches of the Rio Grande River in New Mexico because the diversions for irrigation purposes would affect navigation on the lower river. And in *Oklahoma* ex rel *Phillips v. Guy F. Atkinson Co.*, the Supreme Court held in 1941 that the federal construction of a flood control dam on the non-navigable Red River in Oklahoma, a tributary of the Mississippi River, was a proper exercise of the commerce power. In the opinion, Justice Douglas said that "we now add that the power of flood control extends to the tributaries of navigable streams. For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part on its tributaries."[257]

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252 United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926).

253 *See* United States v. 531.10 Acres of Land, 243 F. Supp. 981, 986 (W.D. S.C. 1965), *reversed on a different point*, 366 F.2d 915 (4th Cir. 1966). For the criteria used by the Corps of Engineers in determining navigability of waterways, see 33 C.F.R. § 209.260 (1962). In connection with the views of the Federal Power Commission, see Union Elec. Co., 27 F.P.C. 801 (1962), *aff'd*, FPC v. Union Electric Co. (Taum Sauk), 381 U.S. 90 (1964). Nantahala Power & Light Co. v. FPC, 384 F.2d 200 (4th Cir. 1967). In a condemnation action, findings of the FPC as to navigability constitute some evidence but such findings are not conclusive on a federal court when they are made ex parte. United States v. 531.10 Acres, 243 F. Supp. 981 (W.D. S.C. 1965), *reversed on a different point*, 366 F.2d 915 (4th Cir. 1966).

254 Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 5 (1963) [hereinafter cited as Morreale].

255 *See Hearings Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 86th Cong., 1st Sess., ser. 9 at 255 (1959). *See also* United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).

256 174 U.S. 690 (1899).

257 313 U.S. 508, 525 (1941). *See also* United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

Apparently, under this rationale, almost every creek in the country is at least theoretically subject to Congressional control under the navigation power of the United States,[258] and as Professor Sax has written, ". . . the constitutional scope of federal power . . . is almost embarrassingly extensive."[259] The touchstone is navigation. So long as Congress states an intention to promote and aid navigation (and its statement is almost beyond challenge),[260] federal control over navigable and non-navigable watercourses is legitimate although Congress may advance other purposes which alone would not justify federal intervention.[261]

C. PRIVATE RIPARIAN RIGHTS AND THE NAVIGATION SERVITUDE.

Riparian owners[262] have a number of special rights which are recognized by state laws as being inseparably connected to the land, and just compensation is due when they are taken for public uses.[263] Generally speaking, a riparian proprietor has a right to: (1) use the water for general purposes such as bathing and domestic uses;[264]

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258 *See* Justice Roberts, dissenting in United States v. Appalachian Elec. Power Co., 311 U.S. 377, 433 (1940) and Morreale, *supra* note 254, at 9. *See also* Sato, *Water Resources—Comments Upon the Federal-State Relationship*, 48 CALIF. L. REV. 43 (1960); Silverstein, *The Legal Concept of Navigability v. Navigability in Fact*, 19 ROCKY MT. L. REV. 49, 57 (1946).

259 J. SAX, WATER LAW-CASES AND COMMENTARY 413 (1965).

260 Morreale, *supra* note 254, at 4-6.

261 Arizona v. California, 283 U.S. 423, 456 (1931); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941) (flood control is recognized as a source of power having equal validity with aid of navigation and objectives such as power development will not invalidate an improvement project if it is concerned at some point with navigation or with flood control).

262 Ownership of land in the bed is not a prerequisite to riparian status. Lyon v. Fishmongers' Co. (1876) 1 App. Cas. 662; Diedrich v. Northwestern Union Ry., 42 Wis. 248 (1877); United States v. Chandler-Dunbar Co., 229 U.S. 53, 63 (1913). *See* A. WISDOM, THE LAW OF RIVERS AND WATERCOURSES 71-72 (1962). For a contrary view, see RESTATEMENT, TORTS § 843 (1939).

263 4 NICHOLS, *supra* note 2, at § 13.23; JAHR, *supra* note 134, at § § 43, 58. *See* Lauer, *The Riparian Right as Property*, in WATER RESOURCES AND THE LAW 131 (W. Pierce ed. 1958). The usufructuary right is real property and "as fundamental under the law of riparian rights as under the law of appropriation." 1 WIEL, *supra* note 190, at § 18 p. 21.

264 *See* Hilt v. Weber, 252 Mich. 198, 225, 233 N.W. 159, 167-68 (1930); Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956) (city ordinance which prohibited bathing, boating and swimming in a lake where city obtained water supply held unconstitutional on ground it exceeded the limits of the police power); People v. Hulbert, 131 Mich. 156, 91 N.W. 211 (1902). *Contra*, State v. Heller, 123 Conn. 492, 196 A. 337 (1937); State v. Morse, 84 Vt. 387, 80 A. 189 (1911). *See* Note,

(2) build wharves and piers out into deep water if this can be done without interferring with navigation;[265] (3) have access to the water;[266] (4) take title to accretions and alluviums; and (5) make a beneficial use of the streams and lakes even though the water level is lowered so long as the use does not unreasonably interfere with similar rights of other riparians.[267]

However, regardless of whether title to the beds of streams and lakes is in these private persons or retained in the state,[268] the ownership and the rights described above are subordinate to the power of the United States when exercised by Congress in aid of navigation. Federal supremacy over private property in such circumstances is sometimes expressed in terms of superior rights,[269] plenary power,[270] a dominant servitude,[271] or a superior navigation easement,[272] but generally it is called the navigation servitude.[273]

1959 WIS. L. REV. 341; Comment, *Just Compensation and Riparian Interests*, 3 CATHOLIC U.L. REV. 33 (1953); Annot., 56 A.L.R.2d 790 (1957). *See also* People v. Elk River Mill & Lumber Co., 107 Cal. 221, 40 P. 531 (1895) (riparian owners cannot be prevented from causing a reasonable degree of pollution without condemnation of the rights when stream is required for a public water supply). In Snavely v. City of Goldendale, 10 Wash.2d 453, 117 P.2d 221 (1941), the court indicated that a municipality by condemnation may obtain a right to pollute a watercourse. *See also* Sheriff v. Easley, 178 S.C. 504, 183 S.E. 311 (1936).

265 *See* United States v. River Rouge Imp. Co., 269 U.S. 411 (1926); Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870); Transportation Co. v. Parkersburg, 107 U.S. 691 (1882); Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272 (1868); Ryan v. Brown, 18 Mich. 196 (1869); City of Grand Rapids v. Powers, 89 Mich. 94, 50 N.W. 661 (1891); City of Janesville v. Carpenter, 77 Wis. 288, 46 N.W. 128 (1890).

266 JAHR, *supra* note 134, at § 59.

267 *See* Taylor v. Commonwealth, 102 Va. 759, 773, 47 S.E. 875, 880 (1904).

268 For a discussion of the effect of federal grants during territorial days and after statehood, see A Four-State Comparative Legal Analysis of Private and Public Rights in Water and of the Levels and Agencies of Government that Enunciate Them at 45 (Phase Rept. No. 21, Contract No. 12-14-100-1010 (43) between the Univ. of Wis. and the U.S. Dept. of Ag, Beuscher and Ellis editors, 1961).

269 *E.g.*, United States v. Willow River Power Co., 324 U.S. 499, 510 (1945). *See also* United States v. Chicago, M., St. P. & Pac. R.R., 312 U.S. 592, 596 (1941).

270 *E.g.*, South Carolina v. Georgia, 93 U.S. 4, 10 (1876).

271 *See* United States v. Commodore Park Inc., 324 U.S. 386, 391 (1945); FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954).

272 United States v. Gerlach Live Stock Co., 339 U.S. 725, 736 (1950); United States v. Grand River Dam Authority, 363 U.S. 229, 231 (1960).

273 United States v. Twin City Power Co., 350 U.S. 222, 233 (1956).

This dominant navigation easement has been said to "chill" litigation whenever private owners assert they are entitled to compensation for a "taking" of their "property",[274] and the servitude's effectiveness is well recognized:

> This title of the owner of fast land upon the shore of a navigable river to the bed of the river... is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers.[275]
>
> The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.[276]

The concept of a servitude reserving to the federal government a latent right or superior title in the nation's waterways is unique. The United States pays compensation whenever it acts under other provisions of the Constitution and the existence of an analogous valid claim in any property other than in watercourses has never seriously been urged. For instance, no federal servitude exists for military airplane flights which effectively destroy or appropriate private property[277] or for obtaining property to carry out such constitutionally delegated functions as highways, post offices and military installations.

D. "Takings" Under the Navigation Servitude.

Activities of riparian proprietors and the United States frequently interfere with uses the other wants to make of the stream flow or of the bed. Many early cases between the Government and the riparians involve federal programs which did not alter the

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274 United States v. Willow River Power Co., 324 U.S. 499, 505 (1945).

275 United States v. Chandler-Dunbar Co., 229 U.S. 53, 62 (1913). *See also* Franklin v. United States, 101 F.2d 459, 461 (6th Cir. 1939), *aff'd*, 308 U.S. 516 (1939) ("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.").

276 Scranton v. Wheeler, 179 U.S. 141, 163 (1900). *See also* United States v. Grand River Dam Authority, 363 U.S. 229, 231 (1960).

277 United States v. Causby, 328 U.S. 256 (1946).

water level, but the majority of recent cases involve large scale projects which either change the level of the water or the direction of its flow.

When an injured riparian proprietor is denied recovery, the court has generally reasoned either that (1) although there has been a taking of property, the damages are only "consequential" rather than direct, or (2) even though the property has been expropriated by the government, no "taking" has occurred because such property was at all times subject to the dominant overriding prerogative to take without payment of compensation. Under this latter view, riparian titles are nullities against the United States and defeasible whenever the servitude governs. The following grouping of the early cases illustrates the scope of the doctrine.

E. CUTTING OFF THE RIPARIAN OWNER'S ACCESS TO THE WATER.

In *Gibson v. United States*,[278] which appears to be the first decision referring to a servitude, a government dike concentrated the waters of the Ohio River in the main channel, obstructed use of the claimant's landing, and thereby reduced the value of her land from 600 dollars to 200 dollars per acre. The Supreme Court denied recovery even though claimant's right of access to the navigable part of the river was substantially damaged, because neither a physical invasion nor an ouster from possession had taken place due to the Government's activities. The Court stated: "No entry was made upon the plaintiff's lot" and the damage was "merely incidental to the exercise of a servitude to which her property had always been subject."[279] The doctrine was followed in *Scranton v. Wheeler*,[280] where compensation was denied a riparian owner who was cut off from access to the watercourse by a long pier which the United States had constructed to aid navigation.

In 1945, the earlier access decisions were reaffirmed in *United States v. Commodore Park*.[281] The Government had dredged in a bay and deposited the dredged materials in a connecting creek. This resulted in cutting off access of plaintiff's lands contiguous to the creek at a place approximately one mile from the filled-in segment. The Court reversed an allowance of damages for loss of the riparian right of access for navigation, boating and fishing because "no physical invasion" was involved and under the Government's absolute power navigation may be blocked at one place to

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278 166 U.S. 269 (1897).
279 *Id.* at 276. *Accord*, Transportation Co. v. Chicago, 99 U.S. 635 (1879).
280 179 U.S. 141, 163 (1900).
281 324 U.S. 386 (1945).

foster it at another. *Commodore Park* was followed in *United States v. Rands*,[282] a 1967 United States Supreme Court decision; and in *Sherrill v. United States*[283] where recovery was denied when the Government moved the channel of the Colorado River west to improve navigation. This left plaintiff's land separated from the river by the land of third parties instead of fronting on the channel as it had before. The decision was based not only on the federal navigational servitude doctrine but also on the view that Arizona law does not recognize riparian rights and therefore plaintiff lost nothing under local law when the United States moved the stream. The court refused to recognize plaintiff's assertion that there is a distinction between riparian rights to use the water and a riparian right of access to the watercourse. Judge Davis agreed with the result but thought it unnecessary and inappropriate to decide the state-law issue of riparian access.[284]

The access cases illustrate that the Court's interpretation of the servitude is broader than the English one for at common law a riparian had a right of access which could not be destroyed even for improvement of navigation unless compensation had been paid.[285] The rule in England is still the same,[286] but few American jurisdictions follow it.[287]

F. INJURY TO RIPARIAN PROPERTY IN THE STREAM BED.

In *Lewis Blue Point Oyster Cultivation Co. v. Briggs*,[288] dredging of a bay pursuant to Congressional authorization threatened oyster beds on submerged lands owned under the laws of the state by

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282 United States v. Rands, 389 U.S. 121 (1967).

283 Sherrill v. United States, 381 F.2d 744 (Ct. Cl. 1967).

284 *Id.* at 747.

285 *See* 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 65 (1904); Farnham, *Right of Damages for the Destruction of Riparian Owner's Access to Navigability by Improvement of Navigation*, Annot., 21 A.L.R. 206, 211 (1922).

286 H. COULSON AND V. FORBES, THE LAW OF WATER, SEA, TIDAL, AND INLAND AND LAND DRAINAGE 142 (6th ed. 1952); A. WISDOM, THE LAW OF RIVERS AND WATERCOURSES 62 (1962); Annot., 89 A.L.R. 1156 (1934).

287 *See* 41 W. VA. L. REV. 426 (1934).

288 229 U.S. 82 (1913). In 1948, the Court of Claims was given jurisdiction to determine claims by oyster growers for damages resulting from dredging operations connected with river and harbor improvements. Act of June 25, 1948, 62 STAT. 941, 28 U.S.C. 1497 (1964). H. J. Lewis Oyster Co. v. United States, 107 F. Supp. 570 (Ct. Cl. 1952), *cert. denied*, 345 U.S. 939 (1953). *See also* Hawkins Point Light-house Case, 39 F. 77 (C.C.D. Md. 1889) (occupation of lands under navigable waters for erection of lighthouse in aid of navigation held not a taking of riparian property).

plaintiff's lessors. Recovery was denied because the deepening of the channel was in the interest of navigation, and the servitude includes the right to use the bed even though property underneath is totally destroyed.

In *Greenleaf-Johnson Lumber Co. v. Garrison*,[289] the plaintiff constructed a wharf within harbor lines established by the State of Virginia and the Secretary of War of the United States. Thereafter, the Secretary made a new harbor line and approximately 200 feet of plaintiff's wharf extended outside the proper limits. Plaintiff commenced court proceedings to enjoin the Government from removing or interferring with its property located in violation of the reestablished line. The Court held that the wharf could be demolished without payment of compensation to the plaintiff under the rule expressed in *Philadelphia Co. v. Stimson*[290] that Congress may establish harbor lines and is not thereby precluded from changing them at a later time.

G. STRUCTURES IN NAVIGABLE STREAMS.

In *Union Bridge Co. v. United States*,[291] the defendant was fined in a criminal proceeding for failing to make certain alterations in its bridge in compliance with orders by the Secretary of War. On appeal, the defendant argued that the bridge was lawfully constructed pursuant to authorization from the State of Pennsylvania, that it was not an unreasonable obstruction to existing navigation, and that the United States had no authority to require alterations in

289 237 U.S. 251 (1915).

290 223 U.S. 605 (1912). *See also* Willink v. United States, 240 U.S. 572 (1916). Riparian owners cannot build wharves, piers or other structures outside harbor lines without the permission of the Secretary of War. Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. 403 (1964). Where Congress has not taken exclusive control of navigable waters, joint assent of the state and federal governments is necessary. Cummings v. Chicago, 188 U.S. 410 (1903); Montgomery v. Portland, 190 U.S. 89 (1903); Economy Light & Power Co. v. United States, 256 F. 792, 799 (7th Cir. 1919), *aff'd*, 256 U.S. 113 (1921). Minor obstructions and entirely routine work may be authorized by a letter of permission from the District Engineer without public notice. For one of the pertinent regulations, see 33 C.F.R. § 209.130 (a) (6) (1962).

291 204 U.S. 364, 399 (1907). *See also* Levingston Shipbuilding Co. v. Ailes, 358 F.2d 944 (5th Cir. 1966); Puente de Reynosa, S. A. v. City of McAllen, 357 F.2d 43 (5th Cir. 1966). Legislation has been passed making it unlawful to construct bridges or other structures across or in navigable streams until the consent of Congress and the approval of the Chief of Engineers and Secretary of War has been obtained. Act of March 3, 1899, c. 425 § 9, 30 Stat. 1151 (1899), 33 U.S.C. 401 (1964).

the structure unless it paid compensation for the reasonable cost. The Court rejected these contentions and held no taking of property had taken place stating:

> The damage that will accrue to the Bridge Company, as the result of compliance with the Secretary's order, must, in such case, be deemed incidental to the exercise by the government of its power to regulate commerce among the States, which includes... the power to secure free navigation upon the waterways of the United States against unreasonable obstructions.... Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power.[292]

H. Summary of Decisions Where Injuries Occur Between the High Water Marks of a Navigable Stream.

Under the foregoing decisions, a riparian owner's rights are qualified by the federal navigation servitude whenever his property is located in the bed of a stream below high water level.[293] He is

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[292] 204 U.S. 364, 399 (1907).

[293] For methods of determining the location of the high water line, *see* 2 H. Farnham, The Law of Waters and Water Rights § 417 (1904); J. Gould, *A Treatise on the Law of Waters* § 45 (3d ed. 1900); 2 Nichols, *supra* note 2, at § 5.7913 [4]: ("[T]he decisions seem to be uniform in laying down the rule that... [the line of the ordinary or mean high water line upon the ground] is to be found at that point where the action of the water ceases to affect the soil or the vegetawhere the action of the water ceases to affect the soil or the vegetation upon it."); Plager and Maloney, *Multiple Interests in Riparian Land,* Urban Law 41 (1968). *See* Borough of Ford City v. United States, 345 F.2d 645 (3d Cir. 1965). In Public Util. Dist. No. 1 v. City of Seattle, 382 F.2d 666, 668 n. 1 (9th Cir. 1967), the court stated that uplands are those above the mean high water mark, while shorelands are between the line of navigability of the river and the mean high water mark. For a discussion pertaining to tidal waters, *see* Gay, *The High Water Mark: Boundary Between Public and Private Lands,* 18 U. Fla. L. Rev. 553 (1966); Corker, *Where Does the Beach Begin, And to What Extent Is This A Federal Question,* 42 Wash. U. L. Rev. 33 (1966). *See* Hughes v. Washington, 389 U.S. 290 (1967).

entitled to no compensation for destruction of: a submerged bed,[294] access to the water,[295] wharves and other structures,[296] bridges over the watercourse,[297] or rights in the flow of the water.[298] Different considerations arise, however, when injuries are caused to property above the high water marks of navigable watercourses.

I. Background to the "River" Cases.

The liability of the government for artificially changing the level of the water and for backing up or changing the direction of flow has been considered in numerous cases beginning with *Pumpelly v. Green Bay Co.*[299] and ending with *United States v. Kansas City Life Insurance Co.*[300] The cases encompass the period from 1871 to 1950 and arise chiefly from governmental flood control activities. A summary of federal flood control activities showing the magnitude of the interests involved and the inverse condemnation procedure is a necessary prerequisite to consideration of litigation between the United States and private owners.

Congress began systematic programming to improve the navigability of the nation's watercourses in 1879, and since that time federal improvement projects have continued to increase in number and size. In 1890, the Army Corps of Engineers was given jurisdiction over the improvement of rivers, but until 1917 the major obligation remained with local agencies and local interests; and almost all levees constructed before 1917 were for improving channels rather than to protect lands from overflows.[301] The change from this predominantly navigational emphasis began with the "308" reports outlining possibilities for irrigation, power and flood

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

295 Gibson v. United States, 166 U.S. 269 (1897); Scranton v. Wheeler, 179 U.S. 141 (1900); United States v. Commodore Park Inc., 324 U.S. 386 (1945); United States v. Rands, 389 U.S. 122 (1967).

296 Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Chicago, M., St. P. & Pac. R.R., 312 U.S. 592 (1941), *modified*, 313 U.S. 543 (1941) (land between high and low water marks).

297 Union Bridge Co. v. United States, 204 U.S. 364 (1907); Louisville Bridge Co. v. United States, 242 U.S. 409 (1917) (bridge constructed in accordance with Congressional acts).

298 *E.g.*, United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

299 80 U.S. (13 Wall.) 166 (1871).

300 339 U.S. 799 (1950).

301 A. Frank, Development of the Federal Program of Flood Control on the Mississippi River, 140 (1930). *See also* H. Barrows, Floods—Their Hydrology and Control 190 (1948).

control,[302] and in 1917 Congress authorized federal funds for flood control projects as such. Legislation thereafter, especially in 1928, broadened federal participation, but major flood control activities outside the Mississippi River Valley did not take place until after passage of the 1936 Flood Control Act. Thus, federal flood control legislation is a comparatively recent development.[303] It is, nevertheless, the basis for the largest program of public works ever undertaken in the United States. Federal appropriations exceeded four and one-half billion dollars for Corps of Engineers civil works allocated to flood control new work for the period 1918 to 1962; and at the present time Corps flood control projects under construction are estimated to cost approximately 5.1 billion dollars when completed.[304] Since 1944 especially these projects have been of particular concern to private landowners. During that year construction of multi-purpose projects began on the tributaries of navigable streams "under the guise of navigation control;"[305] and the resulting effects upon properties located in the river valleys inevitably has led to extensive litigation between the riparians and the Government.

Unlike the usual condemnation proceedings which the United States begins when it needs property for a highway or an airport, the Government frequently does not find it necessary to physically oust owners from possession in order to commence work. Rather, unless it is clear that work will result in a taking of property, the

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302 *See* 3 PRESIDENT'S COMM'N ON WATER RESOURCES POLICY, WATER RESOURCES LAW 408 (1950).

303 *See generally* SENATE SELECT COMMITTEE OF NATIONAL WATER RESOURCES, 86th Cong., 2d Sess., FLOODS AND FLOOD CONTROL 10-15 (Comm. Print 15, 1960); Wolfe, *The Appropriation of Property for Levees: A Louisiana Study in Taking Without Just Compensation*, 40 TUL. L. REV. 233, 239 (1966); 3 PRESIDENT'S COMM'N ON WATER RESOURCES POLICY, WATER RESOURCES LAW ch. 4 (1950).

304 *See Hearings Before the House Committee on Interior and Insular Affairs on Policies, Programs, and Activities of the Department of Interior*, 88th Cong., 1st Sess. 49 (1963); *Hearings Before the Subcommittee on Flood Control—Rivers and Harbors of the Senate Committee on Public Works*, 89th Cong., 2d Sess. 4 (1966).

305 *See* Martz, *Water for Mushrooming Populations*, 62 W. VA. L. REV. 1, 55 (1959). For studies of coping with floods by regulating use of land in flood plains, *see* Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959); Beuchert, *State Regulation of Channel Encroachments*, 4 NATURAL RESOURCES J. 486 (1965) (discusses the Model Act and contains the text of a Model Floodway Encroachment Act). Note, *Flood Plain Zoning for Flood Loss Control*, 50 IOWA L. REV. 552 (1965) (all conclude that channel encroachment laws, if properly drafted, are valid exercises of the police power). For an exhaustive study concerning flood-plain regulation, *see* Murphy, Regulating Flood-Plain Development (Dept. of Geography Research Paper No. 56, Univ. of Chicago, 1958).

Government will proceed to carry out its plans without instituting condemnation actions. Thus compensability is unacknowledged before wreaking such injuries as backing water upon land, diverting water from property, blocking ways of access to channels, and altering currents so as to cause erosion which otherwise would not occur. This method of taking is proper under the Constitution which does not require that the power of eminent domain be exercised by formal proceedings. In *United States v. Dow*, the Supreme Court said:

> Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. § § 1346(a) (2) and 1491, to recover just compensation. See *Hurley v. Kincaid*, 285 U.S. 95, 104. Under the second procedure the Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land, Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. § 257; Act of August 18, 1890, 26 Stat. 316, 50 USC § 171, or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained. Act of July 18, 1918, 40 Stat. 904, 911, 33 U.S.C. § 594, Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177 (employed by the Government in the present case).
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> Although in both classes of "taking" cases—condemnation and physical seizure—title to the property passes to the Government only when the owner receives compensation, see *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587, or when the compensation is deposited into court pursuant to the Taking Act... the passage of title does not necessarily determine the date of "taking." The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues. See *United States v. Lynah*, 188 U.S. 445, 470, 471; *United States v. Rogers*, 255 U.S. 163; *Seaboard Air Line R. Co. v. United States*.[306]

Physical seizure of water rights by the United States may be accomplished by either a physical invasion of land or interference with the flow of the water upstream as occurred in *Dugan v. Rank*.[307] The ability of the United States to appropriate property by physical seizure, rather than by direct condemnation, has produced many

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[306] 375 U.S. 17, 21 (1958).

[307] 372 U.S. 609 (1963).

major decisions in eminent domain law involving reverse, or inverse, situations, i.e., the injured party is forced to begin the litigation as plaintiff. The inverse condemnation action is based on the theory that the federal and state constitutional guarantees of just compensation for public takings are self-executing consents by governments to be sued for such compensation and thus governmental immunity from suit is waived.[308]

The Ninth Circuit Court of Appeals explained the rationale behind inverse condemnation litigation as follows:

> The term 'inverse or reverse condemnation' contemplates the situation in which property has been taken by the exercise of the power of eminent domain, but without any payment of compensation therefor having been made. The theory upon which such an action is brought is that since a taking, which is otherwise lawful, would be a violation of due process of law if done without compensation, it must be presumed that the taker intends to pay for the property condemned.[309]

Whether physical seizure occurs or harm is reasonably threatened without institution of a condemnation action or formal eminent domain proceedings are started, the landowner's most direct remedy is injunctive relief[310] which may be granted for a number of reasons. An injunction will issue, for example, when there are technical procedural deficiencies, when the taking is not for a public purpose[311] or the property already is devoted to a superior public use,[312]

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308 J. BEUSCHER, LAND USE CONTROLS—CASES AND MATERIALS, 540 (3d ed. 1964).

309 California v. United States District Court, 213 F.2d 818, 821 n. 10 (9th Cir. 1954). Recovery may be had through inverse condemnation for both real and personal property. Sutfin v. State, 67 Cal. Rptr. 665 (St. App. 1968); Van Alstyne, *Saturday Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 739 (1967).

310 Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967). *See* footnote 327 *infra.*

311 *Id.*

312 1 NICHOLS, *supra* note 2, at § 2.2 [8]. The federal government is supreme in its power of eminent domain and property which a state or city is devoting to a public purpose may be condemned pursuant to federal authorization. United States v. Carmack, 329 U.S. 230 (1946), *rehearing denied*, 329 U.S. 834 (1946). United States v. 20.53 Acres of Land, 263 F. Supp. 694 (D. Kan. 1967); City of Davenport v. Three-Fifths of An Acre of Land, 147 F. Supp. 794 (S.D. Ill. 1957) (condemnor authorized by federal government to construct an addition to an existing bridge which could not be done without condemnation of public lands possessed by neighboring city). For a discussion of whether a city licensed under the Federal Power Act to construct a dam may condemn state owned property dedicated to a public use when the state has not conferred such power upon its political sub-

or if an excessive amount of property is being taken. The remedy is, of course, an equitable one and will be denied if an adequate remedy at law exists or if a balancing of the equities favors the public interest over harm to the individual.[313] In *Cubbins v. Mississippi River Commission*,[314] plaintiff's lands were flooded and he sought to enjoin the commission and state levee boards from maintaining and repairing levees. In the opinion denying relief, the court said:

> Assuming, as we must on a motion to dismiss the bill for want of equity, that the allegations in the complaint are true, and also assuming that they are sufficient to make these districts responsible for the damages sustained by plaintiff, why has he not a complete and adequate remedy at law? If the land has become utterly worthless, then the proper measure of damages would be the value of the land before the injury was inflicted; if the value of the land has not been utterly destroyed but materially damaged, then the depreciation of its value by reason of the alleged unlawful acts of the defendants would be the proper measure of compensation.[315]

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division, *see* City of Tacoma v. Taxpayers of Tacoma, 49 Wash.2d 781, 307 P.2d 567 (1957), *rev'd*, 357 U.S. 320 (1958). *See also* Beezer v. City of Seattle, 62 Wash.2d 569, 383 P.2d 895 (1963), *rev'd*, 376 U.S. 224 (1964). It is doubtful the United States can interfere with states when the latter exercise duties under the federal constitution, Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); Fifield v. Close, 15 Mich. 505 (1867), but a possible adverse effect upon state tax revenues is no bar to federal condemnation. Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941). As between parties seeking to condemn the same water rights, the first condemnor to file its action prevails; the remedy of the other is to press its claim of a higher and better right in the earlier proceedings. *See* San Bernardino Valley Mun. Water Dist. v. Gage Canal Co., 37 Cal. Rptr. 856 (Dist. Ct. App. 1964).

In Illinois Cities Water Co. v. City of Mt. Vernon, 11 Ill.2d 547, 144 N.E.2d 729 (1957), the Supreme Court of Illinois held that a municipality can condemn property of an existing public utility devoted to the same use as that contemplated by the city. The court distinguished the situation involving two public utilities because a municipality's use is larger in scope and of more general benefit to the public. *See also* City of Beaumont v. Beaumont Irr. Dist., 63 Cal.2d 291, 46 Cal. Rptr. 465, 405 P.2d 377 (1965). *See generally* Dau, *Problems in Condemnation of Property Devoted to Public Use*, 44 TEX. L. REV. 1517 (1966); Johnson, *Condemnation of Water Rights*, 46 TEX. L. REV. 1054, 1072 (1968).

313 For collections of cases, *see* Annot., *Injunction Against Exercise of Power of Eminent Domain*, 93 A.L.R.2d 465 (1964); Annot., 133 A.L.R. 11 (1941); Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. L. Q. 210. *See also* Bronson v. Albion Telephone Co., 67 Neb. 111, 117, 93 N.W. 201, 203 (1903) where Roscoe Pound says that to grant injunctions rather than damages would prevent many useful public improvements.

314 204 F. 299 (E.D. Ark. 1913).

315 *Id.* at 305.

> ... Injunctions are not matters of right, and while they are issued, not in the arbitrary or whimsical will, but in the judicial discretion of the court guided by the established principles, rules, and practice in equity, regard must be had for the comparative injury which will be sustained if the injunction were granted or refused. If it appears that the granting of the injunction, although plaintiff may be ordinarily entitled to it, would inflict such great damage on the defendants or the public that that suffered by the plaintiff, if the injunction is refused, will be relatively insignificant, an injunction must be refused.[316]
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> ... If the plaintiff had claimed damages in his bill as an alternative relief in case the court held that he is not entitled to an injunction, it would have been the duty of the court to transfer the case to the law side, provided the allegations of the bill showed that he is entitled to such relief ....[317]

The effect of an intervening public use upon a plaintiff's right to enjoin a taking is discussed in *Hillside Water Co. v. City of Los Angeles*:

> When a public use has attached a prohibitory injunction should be granted only in the event that no other relief is adequate. (*Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, [77 Pac. 1113].) In such cases compensation in lieu of injunction is preferred. (*Newport v. Temescal Water Co.*, 149 Cal. 531, 538 [87 Pac. 372, 6 L.R.A. (N.S.) 1098].) The doctrine that intervention of a public use will foreclose the right to an injunction rests not only on estoppel. The doctrine may be applicable even though the aggrieved party be in ignorance of the violation of his rights. In other words, implied dedication to public use is not essential to the operation of the doctrine. Public policy in favor of a continuance of the public use may also be invoked to prevent a prohibitive injunction. (*Peabody v. Vallejo, supra*, p. 378). When public use has attached for any recognized reason reverse condemnation proceedings may be invoked and applied. No good reason has been advanced why such a proceeding should not be employed in this case. It would appear to be the only appropriate course to pursue. To that end the judgment must be reversed. (See *Collier v. Merced Irr. Dist.*, 213 Cal. 554 [2 Pac. (2d) 790].)[318]

Professor Sato notes that there is little authority to indicate whether a party raising the intervening public use as a defense must have the power to condemn. If the effect of the defense is deemed to be the transformation of the action into an inverse condemnation proceeding, then the party should be required to have the power. If, however, the primary effect of the defense is deemed to be

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316 *Id.* at 307.

317 *Id.* at 308.

318 10 Cal.2d 677, 688, 76 P.2d 681, 687 (1938). *See also* Fortenberry, *Exercise of Eminent Domain by Private Bodies for Public Purposes*, 1966 U. ILL. L. F. 131, 165-66; 1 ROGER & NICHOLS, WATER FOR CALIFORNIA, § § 312, 313, 403 (1967).

prevention of hardship to the public, it would not be dependent upon the defendant having a right of condemnation.[319]

A plaintiff faces numerous problems when the United States or a federal officer is the defendant stemming in part from uncertainties with getting jurisdiction over the federal government. The United States is free from suit, of course, unless an action may be brought within the constitutional provision that property can not be taken without just compensation or Congress expressly waives the Government's immunity as it has done by statutes such as the Tucker Act, the Federal Tort Claims Act, and the McCarran Amendment.[320] Professor Davis has pointed out that cases are often lost

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[319] *See* S. SATO, WATER RESOURCES ALLOCATION IX at 10-12 (Univ. of Calif. at Berkeley School of Law 1962). In Rank v. Krug, 142 F. Supp. 1, 131 (S.D. Cal. 1956) the California decisions are discussed, and the court holds that the defense of the intervention of a public use can only be asserted under the California law by one capable of condemning property under the power of eminent domain. For the later disposition of the litigation, see Dugan v. Rank, 372 U.S. 609 (1963); Fresno v. California, 372 U.S. 627 (1963). *See also* W. HUTCHINS, CALIFORNIA LAW OF WATER RIGHTS, 279-81 (1956).

[320] The McCarran Act, 66 Stat. 560 (1952), 43 U.S.C. § 666 (a) (1964) provides that "Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit." In connection with the Act and problems of sovereign immunity generally, *see* Comment, *Adjudication of Water Rights Claimed by the United States—Application of Common-Law Remedies and the McCarran Amendment of 1952*, 48 CALIF. L. REV. 94 (1960); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Davis, *Suing the Government by Falsely Pretending to Sue An Officer*, 29 U. CHI. L. REV. 435 (1962); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Sperling & Cooney, *Judicial Review of Administrative Decisions*, 1 LAND & WATER L. REV. 423, 426-34 (1966). 28 U.S.C. § § 1361 and 1391 (e) (1968) vest original jurisdiction in the United States District Courts over actions in the nature of mandamus to compel federal officials to perform their legal duties, extends the range of service of process, and makes venue requirements more liberal. *See* WRIGHT, FEDERAL COURTS § 22 (1963).

because lawyers choose the wrong theory of liability.[321] He states, for instance, that a claim for relief based upon a taking may be preferable to suing under the Federal Tort Claims Act[322] which

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FED. R. CIV. P. 81 (b) abolishes the writ of mandamus in the district courts and provides that the "relief heretofore available" by mandamus may now be obtained by appropriate action or motion. 3A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1692 (rules ed. 1958). For a discussion of suits seeking affirmative relief against the government under the Venue and Mandamus Act, *see* Eyse and Fiocca, *Section 1361: the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967); Town of East Haven v. Eastern Airlines, Inc., 282 F. Supp. 507 (D. Conn. 1968).

321 3 K. DAVIS, ADMINISTRATIVE LAW 452 (1958).

322 *Id.* at 452-53. Professor Davis cites Thomas v. United States, 81 F. Supp. 881 (W.D. Mo. 1949) as a "good example." In the *Thomas* case, plaintiffs brought suit under the Federal Tort Claims Act alleging that the Corps of Engineers "carelessly and negligently planned and caused to be installed the said revetment at such angle to the main current of the Missouri River as to deflect and direct the flow of said current against and upon lands of the plaintiffs...." This theory probably was used to avoid decisions denying recovery where erosion results from a change in direction of stream flow. *E.g.*, Franklin v. United States, 101 F.2d 459 (6th Cir. 1939) *aff'd*, 308 U.S. 516 (1940). Schwartz & Jacoby have written, "Query, too, decisions holding construction of navigation and hydrological improvements to be discretionary [under the Federal Tort Claims Act] and thus denying liability for consequent flooding, *e.g.*, Coates v. United States, 181 F.2d 816 (8th Cir., 1950); California v. United States, 146 F. Supp. 341 (S.D. Cal. 1956); Cooley v. United States, 172 F. Supp. 385 (D.S.D. 1959); *cf.* McGillic v. United States, 153 F. Supp. 565 (D.N.D., 1957). Compare the not dissimilar cases under the Tucker Act..." D. SCHWARZ & S. JACOBY, GOVERNMENT LITIGATION, CASES AND NOTES 427-28 (1963). Coates later presented his demands in the Court of Claims, but failed to prove a causal connection between his losses and installation of Government dikes. Coates v. United States, 93 F. Supp. 637 (Ct. Cl. 1950), 110 F. Supp. 471 (Ct. Cl. 1953).

As amended July 18, 1966, 28 U.S.C.A. § 2675 (a) of the Federal Torts Claim Act provides: "An action shall not be instituted... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." Failure of the agency to act within six months is deemed a final denial. A claim must be filed with the agency within two years after it accrues and any tort action must be brought within six months after final denial of the administrative claim. 28 U.S.C.A. § 2401. One caveat is that in the absence of newly discovered evidence an action cannot be brought for a sum in excess of the amount of the claim presented to the federal agency. 28 U.S.C.A. § 2675 (b). For the legislative history of the act, PUB. L. No. 89-506, see 1966 U.S. Code Cong. and Administrative News 2515. Settlements by the Justice Department do not need court approval under the new law; settlements by federal agencies in accordance with regulations prescribed by the Attorney Gen-

necessitates overcoming such defenses as the "discretionary function exception."[323]

In *Dugan v. Rank*,[324] claimants of riparian and other water rights along a river sued officials of the Bureau of Reclamation and the Government to enjoin the storage and diversion of water at a dam which was part of the Central Valley Project in California. Alternatively, the claimants sought to obtain a physical solution by judicial decree of water rights to which they asserted superior claims by virtue of state law. They did not, however, seek relief as between claimants or the establishment of priorities as to appropriative and prescriptive rights. The Court found that no suit was presented "for the adjudication of rights to the use of water of a river system or other source" within the meaning of the McCarran amendment allowing suit against the United States. Because immunity of the Government is waived only when all parties claiming from a common source are before the court at the same time to adjudicate their rights against each other,[325] the litigation was

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eral must receive his, or his designee's, approval if the amount exceeds $25,000.00. An extensive bibliography of the Tort Claims Act covering books and periodicals from 1946 to 1964 appears in *Symposium on the Federal Tort Claims Act*, 24 FED. B. J. 206 (1964).

323 For an extensive discussion of authorities, refer to L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES, c. 12 (1966). *See* Dalehite v. United States, 346 U.S. 15, 42 (1953). *See also* Dwyer, *Responsibility of the Federal Government for Acts of Its Officials*, 11 ROCKY MT. MINERAL LAW INSTITUTE 395 (1966); James, *The Federal Tort Claims Act and The "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184, (1957); Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956); Note, 41 WASH. L. REV. 340 (1966); Annot., 99 A.L.R.2d 1016 (1965).

324 372 U.S. 609 (1963). For a discussion of the decision and of the sovereign immunity doctrine generally, see K. DAVIS, ADMINISTRATIVE LAW ch. 27 (1965).

325 Nevada v. United States, 279 F.2d 699 (9th Cir. 1960); Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957); The McCarran Act, 43 U.S.C. § 666 (1964), is applicable to class actions. Spanish Fork West Field Irr. Co. v. United States, 9 Utah 2d 428, 347 P.2d 184 (1959). A waiver of immunity under the McCarran Act operates in suits brought in state courts and the United States cannot remove to federal district court solely by virtue of the Act. *In re* Green River Drainage Area, 147 F. Supp. 127 (D. Utah 1956). *See also In re* Green River Adjudication v. United States, 17 Utah 2d 50, 404 P.2d 251 (1965) (Government's failure to claim specified water rights is res judicata and prevents it from asserting rights which might exist by virtue of withdrawing public lands under theory of Federal Power Comm. v. Oregon (Pelton Dam case), 349 U.S. 435 (1955). 2 WATERS AND WATER RIGHTS 209 (R. Clark ed. 1967).

viewed as a private suit between the plaintiff, the Government and Government officials. In this situation, claimants were told that their proper remedy was under the Tucker Act.[326] Further, it was held that the sovereign immunity doctrine prohibits enjoining officers of the United States from seizing private property if they are acting within the scope of their statutory authority and the actions are constitutional ones. The real basis of the decision, however, is that an injunction would have interfered with operation of a large-scale project contrary to the intent and mandate of Congress.

Injunctive relief which would cause the Government to be "stopped in its tracks" is rarely granted;[327] and in nearly every case where a physical seizure of water rights results from the operation of a vast reclamation project, the practical procedure will be to sue for damages under the Tucker Act.

Once the riparian owner commences court proceedings for a money judgment under the Tucker Act,[328] the Government again

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[326] *See also* Fresno v. California, 372 U.S. 627 (1963) and Hurley v. Abbott, 259 F. Supp. 669 (D. Ariz. 1966). Whenever the United States is an indispensable party and cannot be joined, an action must be dismissed. Ogden River Water Users' Ass'n v. Weber Basin Water Conservancy, 238 F.2d 936 (10th Cir. 1956); Franz v. East Columbia Basin Irrig. Dist., 383 F.2d 391 (9th Cir. 1967) (United States indispensable party when withdrawal of lands from irrigation district affects solvency of project and repayment of money invested in project by Government). *Also see* Turner v. Kings River Conservation Dist., 360 F.2d 184 (9th Cir. 1966); City of Anadarko v. Caddo Elec. Co-op., 258 F. Supp. 441 (W.D. Okla. 1966). 3 J. MOORE, FEDERAL PRACTICE § 19.15 (2d ed. 1968); 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 141 (rules ed. 1961) ("The United States was held to be a necessary party to an action claiming water rights superior to those of the United States and if the question should arise would probably be held indispensable."). When a defendant's rights are severable, such as those of a grazing lessee, then condemnation of the defendant's interest is permissible without joining the United States as an indispensable party where its interests will be unaffected. Monterey Co. Flood Control & W. Con. Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

[327] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949); Dugan v. Rank, 372 U.S. 609, 621 (1963). *See also* Comment *Traps for the Unwary—The Problems in Seeking Injunctive or Monetary Relief From An Uncompensated Taking by the Federal Government*, 46 NEB. L. REV. 816, 820-21 (1967). That a federal officer violates property rights or commits a tort under general law does not necessarily mean he is acting beyond his powers. Gardner v. Harris, 391 F.2d 885 (5th Cir. 1968).

[328] 36 Stat. 1093, 1136 (1911), 28 U.S.C. § § 1346, 1491 (1964). A discussion concerning procedure and the nature and jurisdiction of the Court of Claims appears in 2 WEST'S FEDERAL PRACTICE MANUAL chs. 39 and 40 (Volz ed. 1960); a review of Tucker Act decisions appears in 6 NICHOLS, *supra* note 2, at ch. 29.

has a number of advantages.[329] Tucker Act cases are based upon an implied contract or promise to pay which arises by reason of the taking; and as illustrated in the later discussion of the decisions, this has permitted the United States to make a number of technical defenses based upon whether the elements of an implied contract exist. The judicial trend, however, does not favor such defenses, and as Justice Frankfurter has pointed out, it is really immaterial whether the plaintiff's theory in a Tucker Act case rests upon an implied promise of the Government or whether it rests upon a taking under the fifth amendment which also invokes the Act. "In either event," he said, "the claim traces back to the prohibition of the Fifth Amendment . . . ."[330]

All actions under the Tucker Act are barred unless the petition is filed within six years after the right of action first accrues, and the rule is the same in both the district courts and in the Court of Claims.[331] If a private litigant attempts to enjoin activities of Governmental officials affecting his land, he must bring his action in district court because the Court of Claims has jurisdiction only to award damages, not give specific relief.[332] By the time it has

329 For treatment of problems which arise in suing under the Tucker Act, see Fitts and Marquis, *Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801 (1941); Morton, *Some Real Property Aspects of Avigation*, 35 NEB. L. REV. 277 (1956); Mandelkar, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3; Note, 50 YALE L.J. 668, 670-72 (1941). *See also* D. SCHWARTZ AND S. JACOBY, GOVERNMENT LITIGATION, CASES AND NOTES ch. II, § VII (1963). Joinder of individuals as defendants with the United States is not permitted in Tucker Act cases. *See* 3 J. MOORE, FEDERAL PRACTICE § 20.07 [3] (2d ed. 1968), and 2 *id.* § 1.05 (2d ed. 1968). The same theory is not necessarily applicable to suits against the United States under the Tort Claims Act. *Id.*

330 United States v. Dickinson, 331 U.S. 745, 748 (1947). *See also* Abend, *Federal Liability for Takings and Torts: An Anomalous Relationship*, 31 FORDHAM L. REV. 481, 487-88 (1963); Marcus, *The Taking and Destruction of Property Under a Defense and War Program*, 27 CORNELL L. Q. 476, 510-11 (1942); Cotton Land Co. v. United States, 75 F. Supp. 232, 234 (Ct. Cl. 1948) and cases cited. Further, it has been pointed out that the defense that if the case were against a private individual, his liability would be in tort and there is no tort remedy against the United States may no longer be valid since passage of the Federal Tort Claims Act in 1946. Annot., 94 L. Ed. 1288, 1290 (1950).

331 28 U.S.C. 2501 (1964); 28 U.S.C. 2401 (1964).

332 Gaines v. United States, 131 F. Supp. 925 (Ct. Cl. 1955). *See* Glidden Co. v. Zdanok, 370 U.S. 530, 557 (1962). The court can exercise equitable jurisdiction only if it is ancillary or essential for awarding or refusing a money judgment. For instance, it could reform a contract. *E.g.*, Sutcliffe Storage & Warehouse Co. v. United States, 112 F. Supp. 590 (Ct. Cl. 1953).

finally been adjudicated that a claimant is not entitled to an equitable remedy from a federal district court, it may be too late then to sue the Government in the Court of Claims for a monetary judgment. To correct this dilemma, explicit provisions should be made for a plaintiff to present all his claims for relief in one court.[333] In any event, Congress should either extend the limitation period or provide that it is tolled during the time when a litigant is diligently and in good faith pursuing a remedy for relief other than a money judgment. To abolish the limitation period completely would tip the present inequity the other way and would not be a satisfactory answer to the problem.[334]

There is also some difficulty in determining when the statute of limitations begins to run. The Supreme Court has stated that the period does not commence until the consequences "have so manifested themselves that a final account may be struck."[335] "[W]hen the government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.' "[336] Despite such statements, the matter frequently is a difficult one for the practicing lawyer.[337]

J. THE "RIVER" CASES.

The preceding background of inverse condemnation is necessary in understanding the numerous United States Supreme Court decisions in the "river" cases. These decisions, despite some inconsistent and confused reasoning appearing in the opinions, are important precedents for determining what rights to what kinds of property may be successfully asserted in seeking compensation for condemnation against the United States. In addition, the Supreme

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333 *See* 28 U.S.C. § 1500 (1964). *See generally*, Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 GEO. L. J. 573-74 (1967).

334 For a discussion of proposed legislation, see Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423, 503-504, 508-509 (1966). *Hearings on S. 1275 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess. 123-26 (1964).

335 United States v. Dickinson, 331 U.S. 745, 749 (1947).

336 *Id. See also* Pittle, *Suits Against the United States for Taking Property Without Just Compensation*, 55 GEO. L. J. 631, 640-42 (1967).

337 *E.g.*, Konecny v. United States, 388 F.2d 59 (8th Cir. 1967) (fluctuation of lake level because of government dam); Boardman v. United States, 376 F.2d 895 (Ct. Cl. 1967) (aircraft overflights).

Court cases are persuasive authority in state courts.[338] It is in this context that the so-called *Pumpelly* or *Cress* line of decisions is of great interest and importance.[339]

In *Pumpelly v. Green Bay Co.*,[340] decided in 1871, the defendant acting under state authority, built a dam across the Fox River which was an outlet of Lake Winnebago in Wisconsin. This caused the lake waters to rise and completely inundate plaintiff's land. No formal act of condemnation took place, and, when sued, the defendant asserted that the damages were a merely consequential result of the government's legitimate attempt to improve navigation and no compensation was due.

The United States Supreme Court held that the flooding of a riparian's land above the "ordinary level" of a watercourse constitutes a compensable taking, and Mr. Justice Miller answered defendant's arguments in a paragraph which has been quoted extensively in later opinions:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[341]

This construction recognizes that a taking may occur when loss results to the owner even though the taker receives no property, but the opinion is limited to those situations "where real estate is actually invaded by superinduced additions of water, earth, sand,

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338 *E.g.*, Brazos River Auth. v. City of Graham, 163 Tex. 167, 215, 354 S.W.2d 99, 130 (1961).

339 *See* Annot., 89 L.Ed. 1114 (1945); Annot., 94 L.Ed 1288 (1949) (Compensability of damage resulting from government's exercise of its power to improve navigation). A list of related A.L.R., L.R.A. and L.Ed annotations may be found *id.* at 1278.

340 80 U.S. (13 Wall.) 166 (1871).

341 *Id.* at 177.

or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness."[342]

Forty-two years later, in *United States v. Lynah*,[343] the federal government constructed a dam causing waters of a navigable stream to rise above natural level, back up against plaintiff's enbankment, and overflow. As a result, plaintiff's rice fields, a large part of which were located between high water and low water mark, became an irreclaimable bog. Even though the dam was built to improve navigation, the Court held an implied promise to pay by the United States existed within the meaning of the Tucker Act and decided further that after the compensation was paid, title to the fee and to riparian rights would pass to the Government.

The dissenting judges found the damage resulted because plaintiff no longer had drainage into the river which was merely consequential to the Government activity and not compensable. They reasoned that an alleged overflow could be stopped by raising the plaintiff's embankment; and once this was done, a subsequent contention that the land was worthless would constitute an admission that the damage resulted from the inability to drain the property which would not be a direct taking.[344]

The *Lynah* doctrine permitting recovery on the theory of an implied contract to pay for the damage under the Tucker Act was limited in *Horstman v. United States*.[345] In *Horstman* the United States had constructed an irrigation project a considerable distance from plaintiff's property which caused an unexpected nineteen foot rise in the levels of Soda Lakes destroying their value and the value of plaintiff's works.[346] Damage to one lake was 35,000 dollars; to the other 170,000 dollars. Relief was denied in the Supreme Court be-

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342 *Id.* at 181. *See* Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L. J. 221, 233 (1931). A great number of cases hold that permanent flooding of land by a dam is a taking. 26 AM. JUR. 2d *Eminent Domain* 838 n. 15 (1966).

343 188 U.S. 445 (1903). Doubt was expressed concerning whether the damage was caused by overflowing or blockage of drainage but the court below had found damage resulted both from seepage through the embankment and overflow above it.

344 *Id.* at 484. The majority had distinguished Mills v. United States, 46 Fed. 738 (S.D. Ga. 1891) in which Mills' rice plantation had been damaged from the same improvement as in the principal case. The distinction was on the ground that in the *Mills* case the damage arose from the blockage of drainage rather than from overflowing, and the injury was a consequential one which could be remedied for $10,000.

345 257 U.S. 138 (1921).

346 The Court assumed a causal connection between the government's work and the damage to plaintiff. *Id.* at 145.

cause the injuries were unforeseeable. Thus the necessary implied intent to pay on the Government's part was not established.[347]

Proof of an actual intention to take property is unnecessary,[348] however, and an implied intention may be shown from the fact that the natural consequences of a government activity would be to take dominion.[349]

In *United States v. Cress*,[350] the United States built dams and locks to aid navigation in the Cumberland and Kentucky rivers and thereby backed water into non-navigable tributaries. Several cases involving damages from the projects were tried together. In one,

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[347] *Cf.* Cotton Land Co. v. United States, 75 F. Supp. 232 (Ct. Cl. 1948) in which recovery was permitted when a government dam caused the Colorado River to lose velocity and thus increased siltation. The subsequent rise in elevation of the river bed resulted in the overflowing and backing up of water onto plaintiff's lands. The court considered whether the damages were remote, *i.e.*, unpredictable and lacking causal relationship, and decided they were not. It has been stated that under Supreme Court decisions the damage in *Cotton Land Co.* would appear to be "consequential." *See* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 42 n. 125. An advance engineering study in *Cotton Land Co.* would have shown the danger and this caused the court to reject the Government's argument that the injuries were consequential and remote. In Albers v. County of Los Angeles, 62 Cal.2d 250, 398 P.2d 129, 42 Cal Rptr. 89 (1965), 17 STAN. L. REV. 763 (1965), 13 U.C.L.A. L. REV. 871 (1966), a survey failed to disclose a hidden geologic condition and thereafter road construction by the county caused a landslide. An inverse condemnation judgment for $5,360,000 was upheld by the California Supreme Court which said a plaintiff need only show that the damage proximately resulted from the construction of a public work deliberately planned and carried out by a public agency. It is not necessary that the damage be foreseeable nor does there need to be a finding of intentional or negligent acts. In Brazos River Auth. v. City of Graham, 163 Tex. 167, 354 S.W.2d 99 (1961) construction of a dam caused a diminished speed of flow causing foreseeable siltation which in turn raised the water level and resulted in a taking by flooding of a city's sewage disposal plant. *See also* Jacobs v. United States, 45 F.2d 34, 38 (5th Cir. 1930) (the "government anticipated that the construction of the dam mentioned would cause flowage damage to lands located above it," and it had attempted to obtain a flowage easement from the plaintiff).

[348] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922).

[349] B Amusement Co. v. United States, 180 F. Supp. 386 (Ct. Cl. 1960). *See also* Tempel v. United States, 248 U.S. 121 (1918); Columbia Basin Orchard v. United States, 132 F. Supp. 707 (Ct. Cl. 1955); California v. United States, 151 F. Supp. 570 (N.D. Cal. 1957).

[350] 243 U.S. 316 (1917); Jacobs v. United States, 45 F.2d 34 (5th Cir. 1930) (land more subject to overflows after construction of dam). *Cf.* Jackson v. United States, 230 U.S. 1 (1913).

plaintiff's normally uninvaded lands were permanently subjected to frequent overflows. The Government argued there was no taking because the property was depreciated only one-half of its value.[351] The Court held complete destruction need not be shown and found the United States liable for damages in exchange for an easement to subject the land to intermittent but inevitably recurring flooding. In the opinion, Mr. Justice Pitney said: "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking."[352]

In the second case, the Kelly Appeal (No. 718), the head of water necessary to operate plaintiff's mill was destroyed by the rise in the natural level of the non-navigable tributary. The Supreme Court permitted recovery for the depreciation in value of plaintiff's mill property finding that Congressional control over navigation does not of necessity include control of non-navigable tributaries and the right to raise the water level in them.

In *United States v. Chicago, M., St. P. & Pac. R. R.*,[353] the United States raised the level of the Mississippi River in aid of navigation and damaged the defendant's tracks located between high and low water marks. Under state law a riparian owned the soil to ordinary low water mark. The Government claimed no compensation was payable for property within the river bed between high water marks since such areas are subject to the servitude; the railroad contended that since its structures did not either obstruct or adversely affect navigation, the servitude doctrine in favor of navigation was inapplicable. The Supreme Court held the entire bed of a navigable watercourse between its ordinary high-water marks is subject to the dominant power of Congress and that any structure placed in the bed is subject to the risk of injury or destruction without compensation. The absence of physical interference with navigation was deemed immaterial to the right of compensation.

The case was remanded to determine the railroad's claim that part of its property was located above high water mark, and that a part abutted on a non-navigable tributary rather than upon the navigable Mississippi. By remanding for determination of these questions, the Supreme Court effectively held that the navigational

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351 United States v. Cress., 243 U.S. 316, 328 (1917). *Cf.* Christman v. United States, 74 F.2d 112 (7th Cir. 1934). When flooding is temporary, Goodman v. United States, 113 F.2d 914 (8th Cir. 1940) or intermittent, Sanguinetti v. United States, 264 U.S. 146 (1924), compensation has often been denied. *See also* Brazos River Auth. v. City of Graham, 163 Tex. 167, 220, 354 S.W.2d 99, 134 (1961).

352 243 U.S. 316, 328 (1917).

353 312 U.S. 592 (1941).

servitude does not extend to land beyond the bed of a navigable river. The decision expressly overrules *Lynah*[354] which permitted recovery for plaintiff's property located between low and high water marks on a navigable river. The *Cress* decision and *United States v. Chicago, M., St. P. & Pac. R. R.* established that no compensation is due for "takings" in aid of navigation below the natural high water level of navigable watercourses, but compensation is required for takings in non-navigable streams and for fast lands.

In *Franklin v. United States*,[355] a leading case decided in 1939 by the United States Court of Appeals for the Sixth Circuit, the Government had constructed dikes under the Mississippi River Flood Control Act a short distance above and opposite plaintiff's land. The river current which previously had been away from the property was deflected toward it at almost a right angle which caused all but a few acres to be washed away within less than a year. Thus, at the time of suit, the land which previously had been useful at all times for farming was now the bed of the river. After the Government demurrer to plaintiff's complaint was sustained by the district court, the plaintiffs appealed to the circuit court of appeals which held no "taking" occurs when an artificial change in the natural course of a stream by the United States results in the washing away of riparian lands. In its opinion, the court reasons that the government dikes "at no point touch upon appellants' land,"[356] and in the absence of a physical invasion such damage is only consequential.

This test of consequential damages is frequently used to distinguish the "flooding" from the "erosion" decisions. In a 1957 case, *Latourette v. United States*,[357] construction and maintenance of a rock jetty prevented sand from accreting as it had in the past. As a result, there was no equalization for normal winter erosion and ultimately the ocean washed plaintiff's land away. In holding that the Government is not liable to compensate riparian owners for consequential damages caused by improvements upon navigable waterways in aid of navigation, the court said:

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

355 101 F.2d 459 (6th Cir. 1939), *aff'd*, 308 U.S. 516 (1940), *noted in* 52 HARV. L. REV. 1176 (1939); 24 IOWA L. REV. 779 (1939); 18 N.C.L. REV. 43 (1939); 25 VA. L. REV. 854 (1939).

356 101 F.2d at 461.

357 150 F. Supp. 123, 125 (D. Ore. 1957). *See also* Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 143 P.2d 1 (1943) (compensation denied when breakwater erected by city in aid of navigation caused water to flow so as to erode beach of littoral proprietor); Camp Far West Irr. Dist. v. United States, 68 F. Supp. 908 (Ct. Cl. 1946), *noted in* 31 MARQ. L. REV. 175 (1947) (no taking when Government removed gravel from stream bed near small irrigation dam making diversion of water impossible).

> The term "consequential damages" as used herein is deemed to mean damages to property not *actually taken* (emphasis ours) but an injury to property that occurs as a natural result of an act lawfully done by another and for which no liability exists. The term "consequential damages" is sometimes taken to mean damages which would not have been actionable in common law if done by a private individual. 29 C.J.S., Eminent Domain, § 111, p. 919, and notes therein.

When erosion results directly from flooding, rather than from a change in the direction of stream flow, however, the damage is not merely consequential and a compensable taking occurs. In *United States v. Dickinson*,[358] the Court awarded damages for the value of an easement to permanently flood plaintiff's lands and also awarded severance damages for erosion based on the cost of protective measures which the landowners might have taken to prevent the loss. In the opinion, Justice Frankfurter, writing for the Court, said that if the Government cannot take the acreage it wants without also washing away more, that additional property becomes part of the taking.[359] Even in flooding situations, compensation is denied when the damage arises from levees constructed on the opposite side of a watercourse from the overflowed property[360] unless the water level is raised so high that an injured party cannot take moderate measures to protect himself.[361] Where property is in a flood zone and has overflowed in the past, many decisions deny recovery on the ground the injury would have taken place in any event,[362] and a plaintiff usually cannot show a sufficient causal con-

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358 331 U.S. 745 (1947).

359 *Id.* at 750.

360 Jackson v. United States, 230 U.S. 1 (1913) (all riparians, including the United States, may build levees to protect themselves from major floods without incurring liability to others). In Salliotte v. King Bridge Co., 122 Fed. 378, 384 (6th Cir. 1903), *cert. denied*, 191 U.S. 569 (1903), the court indicated plaintiff might have guarded against damage resulting from an increase in the volume and force of the water due to construction by defendant.

361 *See* Sponenbarger v. United States, 101 F.2d 506 (8th Cir. 1939), *rev'd*, 308 U.S. 256 (1939), where plaintiff claimed she was deprived of the right to protect her property and the value of her lands, located within a floodway established pursuant to a comprehensive federal flood control plan. Levees opposite the property had been raised while those on plaintiff's side had been left at their previous height. In reversing, the Supreme Court said plaintiff's right of self defense had not been taken away.

362 Danforth v. United States, 308 U.S. 271 (1939) (retention of water from unusual floods for somewhat longer period or increase in depth or destructiveness by reason of set-back levee is not a taking); Sanguinetti v. United States, 264 U.S. 146 (1924); Coleman v. United States, 181 Fed. 599 (C.C.N.D. Ala. 1910).

nection between the Government's activity and his harm to allow recovery.[363]

Diversion of water from a channel which washes away property by erosion arguably constitutes as much of an invasion as taking by submersion. Both are direct encroachments although the foreseeability of damage probably is greater in the flooding situations. When the Government plans a dam project, it can determine the total amount of land which will be permanently flooded in order to maintain a particular water level. Property which will be subjected to intermittent but recurring flooding as in the *Cress* case[364] also can be forecast. In the former situation, the fair market value of the land to be permanently flooded is the estimated cost of acquiring the fee title; in the *Cress* situation, the sum necessary to obtain flowage easements is the calculable acquisition expenditure.[365]

Because damage is much less predictable, some courts and writers have thought that imposition of liability for injuries other than permanent backwater flooding is undesirable.[366] They reason that, unless damages can be anticipated quite accurately, the ultimate cost of river improvements will be unpredictable and thereby operate as a practical prohibition of improvements on navigable streams.[367] Withholding compensation on a policy argument against burdening public improvements with unpredictable costs, however, results in the distorted concept that damage resulting from deflection of the current is "consequential".[368] The plaintiffs in the

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363 Yazel v. United States, 93 F. Supp. 1000, 1004 (Ct. Cl. 1950); Christman v. United States, 74 F.2d 112 (7th Cir. 1934). *See also* Bedford v. United States, 192 U.S. 217 (1904); W. A. Ross Const. Co. v. Yearsley, 103 F.2d 589, 593 (8th Cir. 1939), *aff'd*, 309 U.S. 18 (1940); Coates v. United States, 110 F. Supp. 471 (Ct. Cl. 1953).

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

365 *See* Saxon, *Appraising Flowage Easements*, in CONDEMNATION APPRAISAL PRACTICE 363 (1961); Boettcher, *Appraisal of a Flowage Easement*, in *id.* at 374; United States v. Easement, 284 F. Supp. 71, 73 (W. D. KY. 1968).

366 In John Horstmann Co. v. United States, 257 U.S. 138 (1921) the Supreme Court denied recovery on the ground that the damages were unpredictable and that to hold the Government liable for unforeseeable injuries would deter useful enterprises due to the factor of immeasurable liability.

367 Fitts and Marquis, *Liability of the Federal Government and Its Agents For Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801, 826 (1941). Coleman v. United States, 181 Fed. 599, 604 (C.C.N.D. Ala. 1910). *But see* Brazos River Auth. v. City of Graham, 163 Tex. 167, 176, 354 S.W.2d 99, 105 (1961).

368 For divergent state decisions see 2 NICHOLS, *supra* note 2, at 244-45. In Alexander v. City of Milwaukee, 16 Wis. 264 (1892), no recovery was granted when a large portion of plaintiff's land washed away after the city has cut through a strip of land which previously gave

Franklin case clearly should have recovered for the washing away of their land. The Government's activities were the proximate and sole cause of the erosion. It was direct. It was substantial. To withhold compensation under such circumstances shifts the burden of public improvements to individuals and violates the mandate of the fifth amendment. If owners of flooded property are entitled to be compensated, there can be no valid reason why loss of land resulting from submersion due to erosion should go uncompensated. Damaged individuals are entitled to the reasonable cost of whatever protection is made necessary by the Government's works.[369] If public undertakings change the physical situation so extensively that erection of levees, sea walls and piles are ineffective and no other means of self-protection exist, then full compensation should be given for all takings which are proven within the proximity of time and space.[370] To achieve a proper perspective between private rights and the rights of people as a whole, the rule should be formulated to give recovery in the greatest number of cases where direct injuries are the outcome of public works.

Under the *Cress*[371] doctrine, compensation is required for loss of a power head when the United States causes the level of water in a non-navigable tributary to rise. Is the result different when the loss of a power head results from a rise in the natural level of a navigable watercourse? In *United States v. Willow River Power Co.*,[372] plaintiff operated a dam and hydro-electric plant on the non-navigable Willow River close to its junction with the St. Croix river, a navigable stream. Tail waters flowed off unobstructed until the United States by means of a dam on the Mississippi River raised the level of the St. Croix. This reduced the operating head three feet, using ordinary high-water as the standard, and decreased the capacity of the plant to produce electric energy. No fast lands, i.e., lands to be flooded by backwater from the dam, were involved. The only difference between *Cress* and *Willow River Power Co.* was the

protection from Lake Michigan waves. It is doubtful the case would be followed in Wisconsin. *See* Arimond v. Green Bay & Mississippi Canal Co., 31 Wis. 316, 335 (1872); Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50 (1870). *See also* Albers v. County of Los Angeles, 62 Cal.2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

369 United States v. Dickinson, 331 U.S. 745 (1947).

370 *See* 52 HARV. L. REV. 1176 (1939).

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

372 324 U.S. 499 (1945), *noted* in 45 COLUM. L. REV. 792 (1945). The reasoning of United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913), that a shore owner has no right in two natural levels of water or to use of the natural difference between as a head for power production was followed.

distance from the navigable stream.[373] The Willow River Power Company dam was at the confluence and because of its location kept water from backing into the non-navigable tributary. In *Cress* water backed a short distance up the non-navigable watercourse to where plaintiff's mill was situated.

The Supreme Court denied compensation to the Willow River Power Company on the theory that riparian owners on navigable streams have no right which the Government has to pay for when it alters the flow; and the company could not improve its claim as a riparian on the navigable St. Croix by alleging to be riparian to the non-navigable Willow River so as to come within the holding of the *Cress* case. The Court reasoned that the Government had not interfered with the natural flow of the Willow past the company's lands and the company's only interest in the level of the navigable St. Croix arose from its riparian status thereon. Thus, it was not helped by the fact that its only utilization of riparian lands on the St. Croix involved "conducting over them at artificial levels waters from the Willow."[374]

It is difficult to reasonably explain why a property right exists in the level of water on a non-navigable stream but not in the level of a navigable one, and the case appears to seriously weaken the decision in *Cress*.[375] The Court recognized that the petitioner in *Willow River Power Co.* had an economic interest in keeping the navigable St. Croix at its natural level, but Justice Jackson utilized the concept of "no property—no right—no compensation" when he said:

> ... [A] head of water has value and ... the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.[376]

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373 Justice Roberts stated in his dissenting opinion that he could not see any real difference between the decisions and that *Cress* was "disregarded or overuled." 324 U.S. at 514. The majority in the *Willow River Power Co.* case attempted to distinguish *Cress* on the ground that the Government there was charged with the consequences of changing the level of a non-navigable stream while in *Willow River Power Co.* it was sought to be charged with the consequences of changing the level of a navigable one.

374 324 U.S. at 504.

375 In United States v. 531.13 Acres of Land, 366 F.2d 915, 922 (4th Cir. 1966), the court stated "... *Cress* on the Kelly appeal has been so severely pared as a precedent on the present point that we do not feel justified in allowing it to prevail here. Its scope was sharply straitened by United States v. Willow River Power Co...."

376 324 U.S. at 502.

Before the Supreme Court's 1950 decision in *United States v. Kansas City Life Insurance Co.*,[377] it was assumed that there had been an abandonment of the *Cress* doctrine[378] which held the servitude does not extend to non-navigable tributaries.[379] In the *Kansas City* case, the plaintiff owned a farm located one and one-half miles from the Mississippi River on a non-navigable tributary creek. The land was several feet above the normal level of the creek, and surface as well as underground waters drained into it. After the United States began operation of a dam on the Mississippi so as to back up waters and cause them to remain constantly at ordinary high-water mark, drainage of both surface and subsurface waters was blocked and the water table was raised sufficiently to soak the land and destroy its value for agriculture.

The Court held in a 5-4 decision, that the navigation servitude does not extend to land located beyond the bed of a navigable river because owners on non-navigable tributaries, unlike riparians on navigable streams, never had notice their property could be taken without compensation. The decision therefore limits the servitude to ordinary high water mark on navigable waterways and makes the Government liable for damages on non-navigable tributaries when it exercises its power to raise the level in navigable streams.[380] Justice Douglas protested that when the Government properly exercises its servitude by lawfully raising the water level in navigable streams, then it should be freed from liability for all damages which result. Further, he found it incongruous to deny compensation to owners adjacent to navigable streams and require it for those bordering on the tributaries when they sustain like injuries from what is the lawful act of raising the level of a river to high water mark.

The decision finds underflowing similar to flooding and broadens the definition of taking to include subterranean flood damage; but it fails to clarify the circumstances under which recovery will be permitted for blocking drainage. In writing the Court's opinion, Justice Burton pointed out that, "The destruction of land value, without some actual invasion of the land and solely by preventing

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377 339 U.S. 799 (1950).

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

379 *See* Justice Douglas dissenting in United States v. Kansas City Life Ins. Co., 339 U.S. 799, 812 (1950). *See also* Frank, *The United States Supreme Court: 1949-50*, 18 U. CHI. L. REV. 1, 15-18 (1950).

380 The result is different when the Government exercises its control over non-navigable watercourses as part of a comprehensive flood protection program. *See* United States v. 531.13 Acres of Land, 366 F.2d 915 (4th Cir. 1966); United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

the escape of its own surface water, is not before us."[381] He then added that if a right of drainage existed by virtue of state law, liability might be imposed upon the Government. If this view were to prevail, the extent of liability would be made dependent for the first time upon rights created by state law.

In *North v. United States*,[382] the claimant alleged his basement flooded because the high water level of a Bureau of Reclamation reservoir interfered with the natural flow of ground waters from his property. Admittedly no water from the reservoir backed upon claimant's lands and none reached his property through underground percolation. Therefore, because the actual reservoir water did not come within 500 feet of the land at any time, the court distinguished the situation from that which had taken place in the *Kansas City Life Insurance Co.* case. No government waters had mingled with other waters to invade the land, and the court concluded no direct encroachment had occurred. In any event the Court noted that *United States v. Kansas City Life Insurance Co.* was a five to four decision in which "the logic of the dissenting judges is more persuasive than the reasoning of the main decision."[383]

K. Problems of Valuation.

Many complex problems arise in attempting to define and measure just compensation,[384] and opinions differ over the methods to be used in establishing the value of the property taken.[385] The matter may be regarded from the viewpoint of value to the taker, value to the owner, or value in the market;[386] but almost universally the accepted formula is the fair market value of the property at the

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381 339 U.S. at 810.

382 94 F. Supp. 824 (D. Utah 1950).

383 *Id.* at 828.

384 *See generally* Orgel, *supra* note 106. McCormick, *The Measure of Compensation in Eminent Domain*, 17 Minn. L. Rev. 461 (1933). For citations to recent law review articles on payment of compensation for the taking of privately owned damsites, see Comment, 14 Stan. L. Rev. 800 n. 4 (1962).

385 Annot., 106 A.L.R. 955 (1937) (Measure and Items of Compensation for Damages for Flooding Property Under the Right of Eminent Domain). When government witnesses testify to the value of an easement with and without the burden, condemnee's witnesses cannot be compelled to adopt that evaluation method rather than their own method of giving opinions concerning damages to the entire tract. *See* United States v. Brumfield, 354 F.2d 882 (5th Cir. 1966).

386 1 Orgel, *supra* note 106, at § § 12-15.

time of the taking.[387] Potential utilization of the property by the owner is a relevant factor, but no special value to the condemnor may be made a part of the award.[388] Of course, no piece of property, especially if it is mineral land, has a definite, specific value and some degree of speculation is inherent in all valuation.[389] Therefore the final award of just compensation in the majority of cases is determined by choosing a figure somewhere between conflicting appraisals by expert witnesses of what is fair market value.[390]

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387 *E.g.*, Olson v. United States, 292 U.S. 246 (1934); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924); United States v. Miller, 317 U.S. 369, 373 (1934); Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946). *See* 2 LEMIS, *supra* note 91, at 1174. Where a public condemnee has a legal duty or one arising from necessity to replace a condemned facility, then under the "substitute facilities" doctrine it is entitled to the cost of constructing a functionally equivalent substitute regardless of whether the cost is more or less than the market value of the facility taken. United States v. Certain Property in Borough of Manhattan, 403 F.2d 800 (2d Cir. 1968). *See also* Pennsylvania Gas & Water Co. v. Pennsylvania Turnpike Comm'n, 428 Pa. 74, 236 A.2d 112 (1967) (water company entitled to either repair or replacement value of condemned reservoir site); Note, *Just Compensation and the Public Condemnee*, 75 YALE L. J. 1053 (1966). For criteria when no market can be established, see United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396 (1949); Port Auth. Trans-Hudson Corp. v. Hudson R. T. Corp., 20 N.Y.2d 457, 285 N.Y.S.2d 24, 231 N.E.2d 734 (1967).

388 United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). *See* Hale, *Value to the Taker in Condemnation Cases*, 31 COLUM. L. REV. 1 (1931).

389 United States v. 180.37 Acres of Land, 254 F. Supp. 678 (W.D. Va. 1966); United States v. 64.10 Acres of Land, 362 F.2d 660, 668 (3d Cir. 1966).

390 *See* United States v. 244.48 Acres of Land, 251 F. Supp. 871, 874 (W.D. Pa. 1966) and 1 J. BONBRIGHT, VALUATION OF PROPERTY 426-27 (1937). As is well known, many other types of evidence such as location, nearby sales, offers, earning capacity, cost, reproduction value, use value, rents, etc. are used. *See* C. HAAR, LAND-USE PLANNING 485-88 (1959); Note, *Valuation Evidence in California Condemnation Cases*, 12 STAN. L. REV. 766 (1960); Sengstock & McAuliffe, *What Is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 J. URBAN L. 185 (1966) (this article discusses value, market data, capitalization of income, and reproduction or replacement costs. The authorities cited are extensive). For an interesting chart showing computations of flooding by acre-days, see Clemones v. Alabama Power Co., 250 F. Supp. 433, 437 (N.D. Ga. 1966). The competency of expert witnesses testifying about valuations in eminent domain proceedings in a federal court is governed by Fed. R. Civ. P. 43 (a). United States v. 60.14 Acres of Land, 362 F.2d 660 (3d Cir. 1966).

L. MILLER RULE—DATE OF COMMITMENT.

Large public works such as reclamation projects involve not only the damsite but often hundreds of thousands of acres of land, and it is commonplace that rumors concerning proposed plans and contemplations of need lead to widespread speculation and inflated prices.[391] To protect the government from paying for the increased value resulting from its own activities, the so-called *Miller* rule,[392] formulated in connection with litigation involving the Central Valley Project in California, specifies that if property is "probably within" the scope of a project from the time the government is committed to the undertaking, even though ultimately it might not be taken, any increase in value due to the project is excluded.

In *United States v. Miller*, a railroad had to be relocated in connection with construction of the Shasta Dam in California. Because of the project, a boomtown developed on what formerly had been low-grade agricultural land; and when the United States condemned a portion of this boomtown property in December of 1938 for the railway relocation, the owners sought to establish their land values by using sales of comparable land near that date. These sales would, of course, have included the enhanced boomtown valuations. The Supreme Court said property is to be valued as of the date of taking as a general rule but in certain situations another date should be used if necessary to exclude increments due to initiation of a project. The Court therefore held that valuation on the date of Congressional commitment to the project, rather than valuation at the time of the taking, was proper.

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these

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A recent addition to the rules of the Court of Claims in New York sets forth an elaborate procedure for filing and exchanging appraisals. N.Y. COURT OF CLAIMS RULE 25a (McKinney Supp. 1967). For the proposed federal rule concerning discovery of facts known and opinions held by experts, see COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS RELATING TO DEPOSITION AND DISCOVERY, RULE 26 (b) (4) (Nov. 1967). The proposal is discussed in 68 COLUM. L. REV. 271, 280-83 (1968).

391 1 J. BONBRIGHT, VALUATION OF PROPERTY 414-15 (1937).

392 United States v. Miller, 317 U.S. 369 (1943). For a discussion of the Miller rule, see Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319, 347-52 (1963); 1 ORGEL, *supra* note 106, at 429-30. The Miller rule is generally followed in the state courts. Annot., 147 A.L.R. 66 (1943).

other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of hte other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

In which category do the lands in question fall? The project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation.... If, in the instant case, the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. In so charging the jury the trial court was correct.[393]

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393 317 U.S. at 376-77, 379. The *Miller* rule is not inapplicable because the property ultimately will be controlled or used by a local entity or by private interests. United States v. First Pyramid Life Ins. Co., 382 F.2d 804 (8th Cir. 1967). It has been suggested that "The scope of the project rule should be replaced by a rule which requires that the government, under sanction of having to pay enhanced value for after-acquired land, condemn all the property it needs at the outset of the project." Note, 39 So. CALIF. L. REV. 323, 328 (1966). Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319, 328 (1963), also argues for an earlier valuation date.

Thus decisions made after the government is "committed" cannot affect market value for purposes of calculating just compensation.[394] If plans for a dam and reservoir do not include a tract which the government subsequently finds it necessary to take, then any increased value arising from proximity to the reservoir must be paid because this later acquisition is outside the scope of the original undertaking.[395]

The *Miller* case involved enhancement in the market value of the condemned property. Frequently, however, large federal works cause values to become depressed as the threat of condemnation drives buyers from the market.[396] The Supreme Court's 1961 decision in *United States v. Virginia Electric & Power Co.* had a significant effect on just compensation because it applied the *Miller* principle to protect property owners from decreases in value as a result of a project. The Court said:

> The value of the easement must be neither enhanced nor diminished by the special need which the Government had for it. *United States v. Cors*, 337 U.S. 325, 332-334; *United States v. Miller*, 317 U.S. 369; *Olson v. United States*, 292 U.S. 246, 261; *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76. The court must exclude any depreciation in value caused by the prospective taking once the Government "was committed" to the project. *United States v. Miller, supra*, at 376-377; see *United States v. Cors, supra*, at 332. Accordingly, the impact of that event upon the likeli-

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394 *See* Redevelopment Agency of City of Santa Monica v. Zwerman, 49 Cal. Rptr. 443 (Dist. Ct. App. 1966).

395 United States v. 244.48 Acres of Land, 251 F. Supp. 871 (W.D. Pa. 1966).

396 Rumors or announcements that particular property will be taken for a project, or preliminary action by officials, normally will eliminate buyers from the market; but in some situations there is speculation either on what the Government will pay or on the possibility the land will not be taken but will be near enough to a project to receive benefits that raise valuations. *See* STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISTION, HOUSE COMM. OF PUBLIC WORKS, 88th Cong. 2d Sess., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 62 (Comm. Print No. 31, 1964). It is not the owner's investment, but the value of his interest in the property, for which compensation is paid. Thus speculation is risky. Kinter v. United States, 156 F.2d 5 (3rd Cir. 1946). *Also see* Riley v. District of Columbia Redevelopment Land Agency, 246 F.2d 641 (D.C. Cir. 1957).

It should be noted that where enhancement results from general governmental policy rather than from the taking for a special project, the increased value may be included in the award. United States v. Douglas, 207 F.2d 381 (9th Cir. 1953) (increase resulting from regional irrigation development); United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951). *See also* Iriarte v. United States, 157 F.2d 105, 111 (1st Cir. 1946).

hood of actual exercise of the easement cannot be considered. As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat ... [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned. 1 Orgel, Valuation under Eminent Domain, § 105, at 447 (2d ed.); see *Congressional School of Aeronautics v. State Roads Comm'n*, 218 Md. 236, 249-250, 146 A.2d 558, 565.[397]

Obviously a major problem is determining the critical date when the United States becomes "committed" to a project, and the guideposts are not too clear.[398] As a general rule, however, it appears the Court will pick the date of Congressional authorization or the date of an appropriation for a project.[399]

M. THE "POSSIBILITY OF COMBINATION" RULE AND VALUES ATTRIBUTABLE TO STREAM FLOW.

A perusal of the decisions reveals that private owners have been confronted with a number of legal hurdles in their efforts to obtain compensation from the government and it can be argued that the Supreme Court's philosophy has been a tremendous encouragement to large scale projects.[400] In this connection the control of damsite and riparian land values by use of the possibility of combination with other properties doctrine is of interest. Generally, the rule is that if the property under consideration must be consolidated with other properties to make it suitable for a special use, such special use cannot be considered in the valuation unless the possibility of effecting the necessary combination is so likely that market value is affected.

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397 365 U.S. 624, 636 (1961).

398 *See* STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88th Cong. 2d Sess., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 62-67 (Comm. Print No. 31, 1964); Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319 (1963); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 90-105.

399 *See* United States v. Miller, 317 U.S. 369 (1943). *Cf.* United States v. 172.80 Acres of Land, 350 F.2d 957 (3d Cir. 1965) with United States v. Chance, 341 F.2d 161 (8th Cir. 1965). United States v. 811.92 Acres of Land, 404 F.2d 303 (6th Cir. 1969) (Whether property within scope of project proper question for jury).

400 *See* Comment, *Just Compensation and the Navigation Power*, 31 WASH. L. REV. 271, 284 (1956); Fitts and Marquis, *Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801, 802, 826-27 (1941); 50 YALE L. J. 668, 675, 679 (1941).

The first principal decision occurred during 1878 in a diversity action between a private corporation with the power of condemnation and a riparian owner.[401] The condemnor argued that because it had an exclusive state franchise to control logs on a river, the value of the condemnee's property as a boom site should be excluded from the award. The United States Supreme Court held that the state could not confer such an exclusive use of navigable waters; that there could be other possible users for boom purposes besides the condemnor; and that in such cases the rule of law is that in determining market value consideration must be given to all available uses for which the property is suitable. This rule would appear to mean that in a condemnation action by the Government, riparians should receive payment for all potential uses of the uplands including their use as a damsite or flowage area. It was this formula, however, which the Supreme Court later limited by the possibility of combination standard, a standard it used until 1956 to effectively restrict the amount private owners received in connection with eminent domain awards.[402]

In the leading decision, *Olson v. United States*,[403] which involved condemnation of flowage easements upon lands bordering Lake of the Woods, the condemnees asked payment for the value of their lands as a reservoir site on the theory that that was the most profitable use to which the lands were adaptable. The opinion reasserts that the test of fair market value is to be based on all possible available uses which would include reservoir easements in connection with the development of power generation. The Court said:

> The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.[404]

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

402 McGovern v. New York, 229 U.S. 363 (1913); New York v. Sage, 239 U.S. 57 (1915); Continental Land Co. v. United States, 88 F.2d 104 (9th Cir. 1937) *cert. denied*, 302 U.S. 715 (1937); United States v. Washington Water Power Co., 41 F. Supp. 119 (E.D. Wash. 1941); *aff'd*, 135 F.2d 541 (9th Cir. 1943), *cert. denied*, 320 U.S. 747 (1943). *Cf.* United States v. 1532.63 Acres of Land, 86 F. Supp. 467 (W.D. S.C. 1949).

403 292 U.S. 246 (1934). *See* Highmark, *Legal Aspects of Highest and Best Use*, in CONDEMNATION APPRAISAL PRACTICE 25 (1961).

404 292 U.S. at 355.

Nonetheless, the Court thereafter affirmed the trial court awards which were based upon the value of the land for agricultural, not reservoir, purposes. The Court first noted that even though the most profitable use of a tract necessitates combining it with other lands, such use can be included in the valuation if the possibility of combination is reasonably sufficient to affect market value. The particular facts of the case, however, convinced the Court there was no possibility of the owner or others—excluding the expropriating authority —using the condemned property in consolidation with other American and Canadian shore lands for reservoir purposes. This conclusion was based upon the fact that Indian lands were involved, the unlikelihood of Canada ever consenting to private use, and the diversity of ownership of the numerous lands which would have to be flooded. Without a power of eminent domain, the chance of acquiring all property essential for the most profitable use was deemed too remote and speculative to be allowed.

United States ex rel. TVA v. Powelson,[405] a decision in 1943 involving a non-navigable stream, considered the probability of combination rule when the condemnee has the power of eminent domain. Powelson, the assignee of a utility company which possessed the power of eminent domain under the laws of North Carolina, sought to establish a valuation based upon the theory that the condemned property, plus other company land, could be united with tracts owned by strangers to permit erection of a four-dam hydroelectric project. The condemnee's basic position was that the possibility of acquiring the necessary lands was reasonably probable because of the company's power to condemn.

Justice Douglas, writing for the 5-4 majority, thought this contention was out of the question because the condemnee's eminent domain power was as yet unexercised and was revocable by the state at any time. It followed that once the element of eminent domain power was discarded, the chances of combining the necessary land became too remote to affect the valuation. He added that if North Carolina were taking the property, it would not pay an increased award based upon the condemnee's privilege to use the power of eminent domain, and that when the state need not pay, the United States need not.

This result is proper because once the United States decides to take over a site, any existing local interest in developing water power at the location necessarily ends. When the local plan expires, the power of eminent domain to effectuate the plan termi-

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[405] 319 U.S. 266 (1943).

nates by implication due to the federal pre-emption of the project. In other words, once the development ability of the state and its permittees is pre-empted by federal power, there is no longer any reason for the delegated authority from the state. The United States should therefore not be liable for any valuation which depends upon such authority. When the condemnor is other than the federal government, of course, different considerations govern.

In *Powelson*, the United States had contended that no recovery could be had for the water power value of a non-navigable stream, but the Court refused to consider whether the servitude extends to a non-navigable watercourse so as to preclude recovery. Five years later in *Grand River Dam v. Grand-Hydro*,[406] both the condemnor, an Oklahoma conservation and reclamation district, and the condemnee, a public utility, had a state granted power of eminent domain. In addition, the condemnor had a license from the Federal Power Commission authorizing it to develop the Grand River, a non-navigable stream. The Commission had found a proposed dam on the stream would affect navigable waters of the United States to which the stream was tributary,[407] but the condemnation proceedings were based upon state law as the condemnor placed no reliance on either its federal license or the Federal Water Power Act. Under these circumstances, the Supreme Court did not view as an issue in the case the matter of whether the Act would prevent determining value under state laws and held Oklahoma law applicable. Oklahoma permitted evidence of value based upon availability as a damsite even though a condemnee had neither a state nor federal permit to develop a site. Therefore, compensation based upon such evidence was awarded. The Court expressly observed it did not purport to decide whether the same rule would apply in the event the United States or its licensee were acquiring property under the Federal Water Power Act.

Justice Douglas, the author of the opinion in *Powelson*, was joined in *Grand River* by three other dissenting justices in his view that the United States had asserted exclusive control over the water power by virtue of the Federal Water Power Act. Thus, when the condemnor received its federal permit to develop the site, the condemnee thereafter had no claim to any water power value. The effect of the majority opinion, according to Justice Douglas, is to make condemnors holding federal licenses pay private claimants for privileges which only the United States can give. "[T]he conse-

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[406] 335 U.S. 359 (1948).

[407] Union Elec. Co., 27 F.P.C. 801 (1962).

quence is to give private parties an entrenched property interest in the public domain, which the Federal Power Act was designed to defeat."[408]

N. EFFECT OF FEDERAL WATER POWER ACT ON PRIVATE RIGHTS.

The minority view never prevailed. In *FPC v. Niagara Mohawk Power Corp.*,[409] decided in 1954, the Court held that the Federal Water Power Act did not abolish rights, existing under state law, to use the water of a navigable stream; and in an earlier decision, *Henry Ford & Son v. Little Falls Fibre Co.*,[410] it had been decided that when the United States delegates its power by granting a license under the Federal Water Power Act, the licensee must pay for damage to private riparian rights even though the riparians would have been unable to recover from the federal government for the same harm. The opinion in the *Henry Ford* case states that while Congress could exercise its dominant servitude if it desired, the terms of the Act showed that it did not intend to exempt federal licensees under the Act from paying damages.

The *Henry Ford* decision was followed during 1967 by the United States Court of Appeals for the Ninth Circuit in *Public Utilities District No. 1 of Pend Oreille Co. v. City of Seattle.*[411] After obtaining a license from the Federal Power Commission to construct a hydroelectric project on the Pend Oreille River, a navigable stream flowing from the State of Washington into Canada, the City of Seattle commenced proceedings to condemn both uplands and shorelands[412] owned by the Utility District. At the pretrial con-

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408 Grand River Dam v. Grand-Hydro, 335 U.S. 359, 376 (1948) (dissenting opinion). In Public Util. Dist. No. 1 of Pend Oreille Co. v. City of Seattle, 382 F.2d 666 (9th Cir. 1967), the court assumed the condemnee could, without resort to eminent domain, assemble the land package necessary to engage in a certain use; but it stated, "Accepting that in a proper case land may be evaluated by capitalization of earnings of the project into which it is to be incorporated, we hold that such methods of evaluation are not proper, since the contemplated use is too remote, when that use requires a federal license which has not been obtained and where the condemner is the successful competitor for a federal license."

409 347 U.S. 239 (1954). *See* Schwartz, *Niagara-Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?*, 102 U. PA. L. REV. 31 (1953).

410 280 U.S. 369 (1930).

411 Public Util. Dist. No. 1 of Pend Oreille Co. v. City of Seattle, 382 F.2d 666 (9th Cir. 1967). Petitions for certiorari have not been passed on. Docket Nos. 22 and 23, 37 U.S.L.W. 3014 (1968).

412 Shorelands "are between the line of navigability of the river and the mean high water mark." Uplands are above mean high water mark. *Id.* at 668 n.1.

ference in the district court, the issue arose whether Seattle, as a federal licensee, could assert the dominant navigational servitude of the United States. If it could, no evidence would be admissible concerning the value of the shorelands. In holding the property was free from the non-compensable effect of the servitude, the court distinguished the position of a Federal Power Commission licensee from that of the Government on the ground that the United States acts in the public interest on a national scale but licensees frequently perform only on local projects which do not justify asserting national power. Further, licensees are often privately owned profit-making utility companies or manufacturers; and if compensation were not paid by them for destruction of state-created property rights, the benefits would go to the utility shareholders, power consumers, and manufacturers. In choosing between the competing interests, the court did not believe property rights and the power of a state to create them should be destroyed unless Congress clearly intended this should be done. No such intent was found in the Federal Power Act. Rather, it was pointed out that section 10 (c) expressly provides:

> Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

The court thereafter cited with approval from its 1931 opinion in *United States v. Central Stockholders' Corp.*:

> The Supreme Court held in the *Ford* case, in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee.... [T]he general purpose of the act was to permit what would otherwise be an infringement of the rights of the federal government and an interference with navigation, that is, to permit a purpresture, requiring the permittee, however, to make due compensation where the project involved the taking of private property.[413]

The court concluded that if the shorelands were necessary for the city's projects "they must be *taken* in the constitutional sense, and compensation for the taking must follow."[414]

Judge Byrne dissented.[415] He distinguished between condemnation actions brought in state courts under state law such as *Grand River Dam Authority v. Grand-Hydro*[416] from those brought "in

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[413] 52 F.2d 322, 332 (9th Cir. 1931).
[414] 382 F.2d at 672.
[415] *Id.* at 674.
[416] 335 U.S. 359 (1948).

reliance upon rights under the Federal Power Act." In the latter case, he said no reason exists to distinguish between the United States and its licensee and the licensee is entitled to the benefit of the federal navigation servitude. Judge Byrne also thought that the United States has a direct interest in minimizing construction costs because it retains a right to take over licensed projects after fifty years by paying the licensee's net investment.

Niagara Mohawk,[417] which arose in a different context, also squarely presented the issue of whether or not the Federal Water Power Act destroys private usufructuary rights in navigable streams. The company had a federal license to divert water from the navigable Niagara River to operate a hydroelectric plant for fifty years; and under the provisions of section 10 (d) of the Act, after the first twenty years of the period it had to establish amortization reserves out of any surplus earned in excess of a reasonable return upon net investment. At the expiration of the license, the United States could take over or "recapture" the project upon payment of the licensee's net investment, an amount equaling the original cost of the project less the amortization reserves. In computing earnings to determine its amortization reserves, Niagara Mohawk deducted as a proper expenditure sums it had paid or incurred to rent water rights from others who held them under the laws of New York. The Federal Power Commission refused to allow these rentals as valid operating expenses on the ground that a licensee under the Federal Water Power Act can use the waters specified in its license without renting them from persons who may have state recognized rights. The Commission's conclusion therefore was that the licensee's payments were unnecessary and improper as items of expense. The effect of disallowing the water-right payments was to decrease the amount which the Government would have to pay if it decided later to take the property. Conversely, permitting the payments as expenses increased the ultimate obligation of the United States.

In a 4-3 decision sustaining the licensee's position, the Court said that although the Government could take riparian rights under the dominant navigational servitude, exercise of the servitude to eliminate state water rights requires clear Congressional authorization and the Act itself does not justify such an interpretation. On the contrary, the references in the Act to pre-existing rights imply that these are to be given continued recognition. For instance, section 14 states, "nor shall the values allowed for water rights . . . [used in computing a licensee's net investment] be in excess of

[417] FPC v. Niagara-Mohawk Power Corp., 347 U.S. 239 (1954).

the actual reasonable cost thereof at the time of acquisition by the licensee. . . ." Thus under the *Niagara Mohawk* reasoning, the federal government in the first instance does not have to pay compensation for state recognized water rights falling within the scope of the servitude, but if it grants a license under the Federal Water Power Act and thereafter decides to recapture the project it has to pay an amount which includes the licensee's investment in state created water rights. The dissenting judges in *Niagara Mohawk* objected to construing the Federal Water Power Act as requiring the United States to pay for something it already owns.[418]

O. NON-COMPENSABILITY OF LOCATIONAL VALUES ATTRIBUTABLE TO USE OF THE FLOW.

In *United States v. Twin City Power Co.*,[419] a 1956 decision, the Court finally faced a situation in which the owner of a damsite had acquired all the necessary property so that a project was neither speculative nor remote. The area, about 4700 acres which included a waterfall, had been acquired by Twin City and held at all times for the purpose of developing a power damsite. The Government condemned the property which was still vacant so it could build a multipurpose structure for hydroelectric power generation and flood control. Special commissioners denied a motion to strike evidence of potential damsite value, and found as a damsite the compensation due was 1,257,033 dollars but as farm land the property was worth only 150,841.85 dollars. The larger sum was awarded by the United States District Courts in Georgia and South Carolina and the Fourth and Fifth Circuit Courts of Appeals affirmed. On certiorari, the Supreme Court in a 5-4 decision reversed. Both the majority and the four dissenting judges relied on the same case, *United States v. Chandler-Dunbar Co.*,[420] a 1913 decision which was the leading case until the *Twin City* decision.

In *Chandler-Dunbar*, the defendant had constructed facilities in the navigable St. Mary's River pursuant to permits from the Secretary of War. It was developing and selling water power when Congress ordered that the permits be revoked and all necessary land and structures, plus the entire flow of the river, be taken to improve the Sault River. In the condemnation proceedings which followed, Chandler-Dunbar claimed compensation for loss of: (1) uplands adjacent to the river bank, (2) a proprietary right in the

418 *Id.* at 258.

419 350 U.S. 222 (1956). For a discussion of the cases in the District and Circuit courts, see Note, 65 YALE L. J. 96 (1955).

420 229 U.S. 53 (1913).

bed of the stream opposite its shore which it owned to the middle of the watercourse under local Michigan law, and (3) structures in the stream resting upon the river bottom. Further, the company asked that an element of additional value be added because of the potential adaptability of the land for a factory site and for locks and canals. It also contended that another special value attached to the fast lands due to the company's interest in the undeveloped water power in excess of navigational needs. This, of course, constituted a claim of an ownership interest in the raw water.

The trial court held that the United States could exercise its navigation servitude to eliminate, without compensation, the company's dams and other structures on the submerged land within the bed of the river below high-water mark, but that compensation was payable for the taking of land above that level. No dispute arose regarding these matters in the Supreme Court. Rather, the controversy centered upon awards to the company for values associated with the flow of the watercourse. In fixing compensation, the lower court allowed:

(1) 550,000 dollars for water rights, i.e., the additional value of the lands above high water mark—fast lands—attributable to suitability for producing water power,

(2) 20,000 dollars in connection with an eight acre strip of fast land which was a potential factory site,

(3) 25,000 dollars based upon availability of the same eight acres for canal and lock purposes and 10,000 dollars for a small area consisting of two acres of fast lands for "its special value for canal and lock purposes."

The Supreme Court reversed the first awards but sustained the "canal and lock" judgment.

In the Supreme Court, the Chandler-Dunbar claim that because it owned the fast lands it owned the river and the inherent power of the falls and rapids was rejected on the grounds that although the company was entitled to payment for the uplands it had no right to the flow of the water.

> Ownership of 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 private ownership is inconceivable.[421]

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[421] *Id.* at 69.

Later in the opinion, while considering the factory site value, the Court referred back to the claim of interest in the raw water and said:

> Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the 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.[422]

Therefore no value could attach for loss of the water, and in any event, use by Chandler-Dunbar depended upon the Government's permission which had been cancelled. The company, no longer having a right to maintain the structures essential for utilizing the stream for power, could claim no damage for water it could not put to use. Chandler-Dunbar also argued that it had been deprived of all the water and should receive compensation for any surplus not necessary for navigation and commerce. To this the Court answered that once Congress decided to promote navigation by excluding the company from use of the bed, no valid objections could be made concerning disposition of the excess power. After exclusion, the company had no interest in the matter whatsoever.

It is difficult to reconcile denying special value to the fast lands because of their suitability for a "factory site" with granting special damages to the fast lands for their availability for "canals and locks." Both involve use of the water. A license was necessary for the canal and lock as well as for the dam; therefore, the situations are indistinguishable on the basis of the Government's power to withhold utilization of the water. This contradiction was recognized by the Court and it tried to explain the canal and lock award by saying:

> 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 purpose, it is proper to consider the fact that the property is so situated that it will probably be desired

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[422] *Id.* at 76.

> and available for such a purpose. Lewis on Eminent Domain, § 707. *Boom Co. v. Patterson*, 98 U.S. 403, 408; *Shoemaker v. United States*, 147 U.S. 282; *Young v. Harrison*, 17 Georgia, 30; *Alloway v. Nashville*, 88 Tennessee, 510; *Sargent v. Merrimac*, 196 Massachusetts, 171.[423]

With this as the background, Justice Douglas, for the majority in *Twin City*, faced the problem of damsite valuation in a situation where all the essential land for the project was in a single ownership. He reduced the controversy to one question which appeared uncomplicated to him. In his view, the federal government can, without giving compensation, exclude riparian owners from the benefits of navigable watercourses. To hold otherwise would necessitate payment for the right to the flow of a stream. Such a result, by taking into consideration value attributable solely to the flow, would be directly contrary to the rationale of *Chandler-Dunbar*.[424] In answer to the condemnee's argument that uplands on a navigable stream are unburdened by the navigation servitude, the Court answered:

> 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.[425]

Twin City thus holds that when the United States exercises its navigation easement riparian lands on a navigable watercourse can gain no value from possible uses of the water which an owner might have made; and the decision by implication overrules the "canal and lock" award in *Chandler-Dunbar*.[426] The Court did not, however, expressly disapprove the "canal and lock" award and lower federal courts continued to follow it.[427] It should be noted that *Twin City* also inferentially overrules *Monongahela Navigation*

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423 *Id.* at 76-77.

424 In a footnote, the majority opinion said that the lock and canal award in *Chandler-Dunbar* perhaps is understandable because such use was "wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation." United States v. Twin City Power Co., 350 U.S. 222, 226-27 (1956).

425 *Id.* at 225-26.

426 In the *Chandler-Dunbar* case, the canal and lock damages were small and it appears the Court failed to thoroughly consider its ruling concerning the matter. *See* 1 ORGEL, *supra* note 106, at 369, n. 38.

427 *E.g.*, Rands v. United States, 367 F.2d 186 (9th Cir. 1966), *rev'd*, 389 U.S. 121 (1967).

Co. v. United States,[428] an early decision. In a number of opinions, *Monongahela* has been distinguished and overruled by implication; but only overruling the decision and the "canal and lock" award could provide a consistency in doctrinal approach. This appears to have been done in *United States v. Rands*, a 1967 decision.[429] The Rands owned two tracts of land along the Columbia River in Oregon which were about six miles upstream from the John Jay Dam. On November 1, 1962, they leased the land to the State for inclusion in an industrial park. The lease gave the State an option to buy most of the property for 150,000 dollars, but a portion was denominated "port-site property" and priced at 400 dollars per acre. During August of 1963, before the option was exercised, the United States condemned the tracts in connection with a river development project of which the John Jay Dam and the reservoir were a part. Almost all of the Rands' land was flooded.

The United States then conveyed the land by federal deed to the State of Oregon under the provisions of a statute authorizing the Secretary of the Army to sell excess river development project land to states for port and industrial purposes when the objectives of the over-all project are served.[430] Oregon, after paying considerably less than the option price which the Rands had hoped to receive from the state, turned the property over to the Boeing Company, a private corporation, under the terms of a lease agreement.

When the case came before the Supreme Court of the United States, the issues were those arising from the action of the trial judge in the United States District Court for Oregon. He had limited the compensation payable to the value of the tracts for sand, gravel and agricultural purposes and had excluded an offer of proof that the land was worth at least 50,000 dollars as a port-site. When the Rands were awarded only about one-fifth of the alleged port-site value, they appealed to the Court of Appeals for the Ninth Circuit which reversed on the ground that the trial judge was wrong when he ignored the port-site value.[431] Judge Duniway, writing for the court of appeals, distinguished *Commodore Park* on two grounds. First, there was a taking or invasion of the Commodore Park company's tangible property; second, the fact that access to navigable waters may be cut off without compensation does not mean access cannot be considered in an eminent domain case when it is shown to be part of the value of the land actually taken. The court of appeals

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[428] Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).
[429] United States v. Rands, 389 U.S. 121 (1967).
[430] River and Harbor Act, 33 U.S.C. § 578 (1964).
[431] Rands v. United States, 367 F.2d 186 (9th Cir. 1966).

relied strongly on the "lock and canal" award in *United States v. Chandler-Dunbar Co.*[432] and on *Monongahela Nav. Co. v. United States.*[433]

The United States Supreme Court reversed and remanded with direction to reinstate the district court judgment. In doing so, the Supreme Court reaffirmed the rationale of the *Twin City* decision that an owner is not entitled to compensation for location values attributable to uses, actual or potential, which are dependent upon use of the water or access to it. In answer to the inconsistent holdings upon which the court of appeals relied, the Court said:

> Our attention is also directed to *Monongahela Navigation Co. v. United States*, 148 U.S. 312, (1893), where it was held that the Government had to pay the going-concern value of a toll lock and dam built at the implied invitation of the Government, and to the portion of the opinion in *Chandler-Dunbar* approving an award requiring the Government to pay for the value of fast lands as a site for a canal and lock to bypass the falls and rapids of the river. *Monongahela* is not in point, however, for the Court has since read it as resting "primarily upon the doctrine of estoppel..." *Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502, 513-514, (1923). The portion of *Chandler-Dunbar* relied on by respondent was duly noted and dealt with in *Twin City* itself, 350 U.S. 222, 226, n. (1956). That aspect of the decision has been confined to its special facts, and, in any event, if it is at all inconsistent with *Twin City*, it is only the latter which survives.[434]

The court of appeals had also relied on 33 U.S.C. § 595 which provides that when land is taken for a river improvement compensation is to be reduced by any special and direct benefits conferred upon the owner's remaining land by the project, and upon *United States v. River Rogue Improvement Co.*[435] In that case, the United States took property to widen the River Rogue and this made other property of the riparian condemnee more valuable because it was given direct access to the stream for building wharves and piers. The Court held this special benefit to the remainder should be subtracted from the award for the property taken even though the benefits could be destroyed by exercise of the navigation servitude at any time by the Government without payment of compensation. The Rands argued, and the court of appeals agreed, that if it is fair to reduce an award on the basis that the enhancement of value due to a riparian location is a real resulting benefit, then fairness and consistency dictates that the

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432 229 U.S. 53 (1913).

433 148 U.S. 312 (1893).

434 United States v. Rands, 389 U.S. 121, 126-27 (1967).

435 269 U.S. 411 (1926).

same value attributable to the same source (port-site value due to riparian location) be recognized in the award when riparian property is taken by the Government. The Supreme Court answered that there was no inconsistency. It reasoned that in the River Rogue situation, the condemnee received a valuable right he did not have before and this right was secure against other riparians and even against the State. Therefore, setting off such enhanced value against the award simply allocated these special values to the public rather than to private interests. If at a later time the United States acquires the port-site value of the remainder by condemnation, it obtains only values it was already entitled to under the doctrine of *Twin City*.

P. THE TWIN CITY DISSENT AND THE DECISION IN THE GRAND RIVER DAM AUTHORITY AND THE VEPCO CASES.

In contrast to the majority, the dissenting judges in *Twin City*, relying on the "canal and lock" award in *Chandler-Dunbar*, argued that the navigation servitude should not be interpreted to allow government acquisition of a damsite at a lower cost than a private power company would have to pay.[436] In addition, the dissenters viewed the case as governed by the clear language in *Olson v. United States*[437] and *Boom Co. v. Patterson*[438] which would require payment for all immediately prospective uses because:

> The potential use of this land for dam, plant and reservoir purposes is far from speculative in the light of the 50 years of recognition of its availability and suitability for those purposes. The land was accumulated by Twin City for this very purpose and it is now flooded as part of the Clark Hill project.... If a purchase price had been sought by negotiation in 1947, it is inevitable that a primary consideration would have been the value of the flowage rights and of the dam and plant locations in relation to water-power development.[439]

The minority objected to the majority view that when the federal government is the condemnor, then the usual measure of

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[436] United States v. Twin City Power Co., 350 U.S. 222, 269 (1956) (dissenting opinion). The minority said that compensation was denied for the "factory site" in *Chandler-Dunbar* due to "the speculative nature of the proposed use," and that compensation was required for the "canal and lock" purposes because the use was established and within the "immediately prospective" use doctrine, *i.e.*, the possibility of such use "had passed beyond the region of the purely conjectural or speculative."

[437] 292 U.S. 246 (1934).

[438] 98 U.S. 403 (1878).

[439] United States v. Twin City Power Co. 350 U.S. 222, 237 (1956) (dissenting opinion).

compensation, what a willing buyer will pay a willing seller, becomes inoperative. The next question is whether the United States would have the same advantage in relation to private power companies if the uplands were adjacent to a non-navigable, rather than a navigable stream. A factual situation presenting this matter arose in Oklahoma a few years after the decision in *Twin City*.

In *United States v. Grand River Dam Authority*,[440] the Authority was an agency of Oklahoma created to develop hydroelectric power on the Grand River, a non-navigable tributary of the navigable Arkansas River. After its creation in 1935, the Authority proposed a river development plan in Pensacola, Markham Ferry and Ft. Gibson although an Army Engineers' report in 1930 had concluded federal development of the three sites was uneconomical at that time. The Authority obtained a license from the Federal Power Commission and completed the Pensacola project in 1940. A year later, in the Flood Control Act of August 18, 1941, Congress adopted a 1939 recommendation of the Army Engineers for a federal three-dam coordinated undertaking on the Grand River. Pursuant to the Act, the United States completed the Ft. Gibson project as "an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of power on the Arkansas River and its tributaries."[441] In connection with this project, the Government condemned a seventy-acre tract of land and flowage rights. The Authority claimed payment for the alleged taking of its water power rights at Ft. Gibson and for its exclusive state franchise to develop electric power at the site. The Government refused payment and the Authority sued in the court of claims which held the United States liable. The Supreme Court reversed.

It was recognized that the United States would not be liable for depriving the Authority of the stream flow to produce power if the same rule applied to a non-navigable tributary as was held applicable to a navigable stream in *Twin City*. In addition, there would be no liability if the servitude were applicable to non-navigable watercourses and the Government urged adoption of that view. But conversely, in *United States v. Cress* and in *Kansas City Life Ins. Co. v. United States*, compensation had been awarded when Congressional regulation of a navigable watercourse indirectly interferred with private owners on non-navigable watercourses. Neither decision, however, answered the question whether compensation is due when the United States expressly and directly exercises its power over non-navigable tributaries of navigable streams.

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440 363 U.S. 229 (1960).
441 *Id.* at 230.

The Court unanimously held that no rights attach to the flow of a non-navigable tributary when Congress exercises its power to control floods in aid of navigation on a main stream which is navigable. Riparians on both navigable and non-navigable streams hold their property subservient to the power of Congress to regulate and improve navigable waters of the United States and the power is applied when Congress specifies the waters which it believes are necessary in aid of navigation. The following language from the opinion clearly shows this:

> Congress by the 1941 Act, already mentioned, adopted as one work of improvement "for the benefit of navigation and the control of destructive floodwaters" the reservoirs in the Grand River. That action to protect the "navigable capacity" of the Arkansas River (*United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 708) was within the constitutional power of Congress. We held in *Oklahoma v. Atkinson Co.*, 313 U.S. 508, that the United States over the objection of Oklahoma could build the Denison Dam on the Red River, also nonnavigable, but a tributary of the Mississippi. We there stated, "There is no constitutional reason why Congress cannot, under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries." *Id.*, at 525. And see *United States v. Appalachian Power Co.*, 311 U.S. 377, 426; *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 373. We also said in *Oklahoma v. Atkinson Co., supra*, that "... the power of flood control extends to the tributaries of navigable streams." *Id.*, at 525. We added, "It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character." *Id.*, at 527. We held that the fact that the project had a multiple purpose was irrelevant to the constitutional issue, *id.*, at 528-534, as was the fact that power was expected to pay the way. *Id.*, at 533. "[T]he fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress." *Id.*, at 533-534.
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> We cannot say on this record that the Ft. Gibson dam is any less essential or useful or desirable from the viewpoint of flood control and navigation than was Denison Dam. When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one.[442]

The *Grand River Dam Authority* decision was followed by the Fourth Circuit Court of Appeals during 1966 in *United States v. 531.13 Acres of Land.*[443] To construct the federal Hartwell Dam project on the navigable Savannah River, the United States con-

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[442] *Id.* at 232-33.

[443] 366 F.2d 915 (4th Cir. 1966).

demned 531.1 acres along the non-navigable Seneca River which were owned by Duke Power Company. This land included 27.4 acres occupied by the company's dam and reservoir, which together with a powerhouse, substation and transmission lines, constituted the hydroelectric facilities. All were entirely inundated when impoundment of waters behind the dam flooded the entire length of the Seneca. The district court sustained a commission's $500,000.00 award of compensation for the taking. Since the Duke operation did not in any way influence the flow of the Savannah, the court relied on the *Cress* case[444] as authority for the proposition that the Government had no greater interest in the non-navigable Seneca than did the defendant power company. On appeal, the court of appeals disregarded the navigability issue and reversed. It justified federal control of the Seneca on the basis of flood control and an exercise of power over a tributary of a navigable watercourse. After citing *Grand River Dam Authority* and *United States v. Willow River Power Co.*,[445] the decision points up the dichotomous state of the Supreme Court cases by the following statement:

> Undebatably, *United States v. Cress*, 243 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1917), in the Kelly appeal No. 718, relied upon by Duke is a holding contrary to our conclusion here....
>
> However, *Cress* on the Kelly appeal has been so severely pared as a precedent on the present point that we do not feel justified in allowing it to prevail here. Its scope was sharply straitened by United States v. Willow River Power Co....Finally, Grand River... squarely refutes and rebukes the thought that *Cress* warrants recovery by Duke.[446]

In the *Twin City* case the Supreme Court had denied compensation for the value of riparian lands attributable to the flow of a navigable watercourse. It appears to many lawyers that the Court retreated from this holding in 1961 when it permitted a private power company to share in compensation for nonriparian uses because it owned a flowage easement over the property. In *United States v. Virginia Elec. Co.*,[447] [hereinafter called Vepco] the federal government condemned a flowage easement over 1840 acres of private riparian lands on a navigable stream for a dam project. On 1540 of the acres Vepco already owned a flowage easement which it had acquired for use in connection with erection of a power dam. When litigation commenced to condemn the Vepco easement, the Government's position was that it was worthless when appropriated by the United States because it could only be exercised in conjunc-

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444 United States v. 531.10 Acres, 243 F. Supp. 981; 991 (W.D. S.C. 1965).
445 324 U.S. 499 (1945).
446 366 F.2d 922 (4th Cir. 1966).
447 365 U.S. 624 (1961).

tion with water power development of the stream's flow. The sole question in the case was the amount of compensation, if any, due Vepco for the destruction of its easement.[448]

Justice Stewart, writing for the majority, said the procedure of the district court was correct in excluding all value attributable to the riparian location of the land,[449] *i.e.*, in eliminating consideration of stream flow, and then basing the damages to all the interests in the property by taking the difference between the value of the land before and after imposition of the government easement. It was held error, however, to apportion the damages between the owner of the fee and Vepco on the basis that the fee interest was worthless and that Vepco's flowage easement had a value equivalent to all non-riparian uses of the fee. In other words, the Court held Vepco should not be awarded damages as though it owned the unencumbered fee.[450]

The Vepco easement had value, according to the Court, because it could be used to destroy all nonriparian uses which might be made on the property, *i.e.*, agriculture, forestry and grazing. The Court said the value of the easement therefore was "the nonriparian value of the servient land discounted by the improbability of the easement's exercise."[451] For instance, if the nonriparian value of a property were 1,000,000 dollars and the chances of the flowage easement being exercised were 75 per cent (or 25 per cent improbable), then the computation would be:

Nonriparian market value	$1,000,000
Less 25 per cent improbability of easement's exercise times $1,000,000	250,000
Value of the easement	$ 750,000

A simpler formula is that an easement's value is the nonriparian value of the servient land, 1,000,000 dollars multiplied by the probability the easement will be put to use, 75 per cent.

Thus in apportioning an award between the owner of the fee and the owner of a right to flood the land, the probability of the easement being exercised has to be assessed. If an assessment shows

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448 The servient fee owner agreed to convey for $1.00 because of her interest in developing the balance of her estate as a wild life preserve. A contiguous artificial lake presumably would enhance this use. *See* United States v. Virginia Elec. Co., 365 U.S. 624, 625 n.1 (1961).

449 *Id.* at 631.

450 *Id.* at 633.

451 *Id.* at 635.

that the easement holder is in a position to flow the lands, the rights are valuable. But conversely, if the evidence is that the easement holder could never exercise its easement, then it would not be entitled to any compensation and the entire award would be payable to the owner of the fee. The question of how to measure the "improbability of the easement's exercise" is an extremely difficult one. The Court adopted language from the decision of the Court of Appeals for the Fifth Circuit in *Augusta Power Co. v. United States*,[452] which stated that the factors to be considered in the valuation of flowage easements include the chances of a power company assembling the necessary lands for its project and getting the necessary license from the Federal Power Commission, the need for additional power in the area, and the increasing advantage of steam plants over hydroelectric ones.

In making the assessment of probability or improbability, there must be excluded from consideration the prospect of appropriation by the United States and any depreciation which such a prospect might cause. If the government decision to construct the project were taken into account, the easement would be valueless because all possibility of Vepco ever exercising it would be gone. But even after excluding completely the prospect of a government dam, there still existed the possibility that neither Vepco nor other private interests would build and thereby use the easement. If the assessment of improbability test showed this to be so, then any payment to Vepco would violate the usual rule that compensation should not exceed what the owner lost. It was for this reason, according to the Court, that a decision had to be made concerning division of the award.

Justice Douglas, who wrote the majority opinion in the *Twin City* case, concurred on the ground that Vepco stood in the shoes of its grantor, the owner of the fee. He then asserted that although a fee owner is not entitled to any element of value from the flow of the stream, from any head of water, or from the strategic location of the land for hydroelectric development, still he and his grantee of the flowage easement have all the other property rights which the fifth amendment protects.[453]

The dissent protested that Vepco was not entitled to any compensation because exercise of the easement, Vepco's sole right in the lands, required erection of a dam to back the river's waters; erection of a dam was dependent upon securing a license from the Federal

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[452] 278 F.2d 1 (5th Cir. 1960).
[453] 365 U.S. 624, 636 (1961) (concurring opinion).

Power Commission; and once the Government decided to build the dam itself, there was no possibility that Vepco could ever get a license. In addition, Vepco's flowage easement was necessarily dependent upon using the water of the river to overflow the riparian lands and under the rationale of the *Twin City* case such a claim to the flow is non-compensable.[454]

However, in a situation where the estate has been severed, denial of compensation seems unjust to the owner of the flowage easement and it should be noted that recovery in both *Twin City* and *Vepco* was limited to the nonriparian value of the property. In *Twin City* the Government purchased the right to destroy the nonriparian uses from the owner; in *Vepco*, the Government purchased the right from the one who possessed it, *i.e.*, the holder of the flowage easement. Under this analysis, the opinions are not inconsistent and *Vepco* would not be construed as a retreat from the rationale of *Twin City*.

Q. SUMMARY OF SERVITUDE DECISIONS RELATING TO COMPENSABILITY.

In reviewing the servitude cases, several important factors stand out. First, the servitude is not co-extensive with the power of the United States over the country's watercourses under the commerce clause. The navigation power today extends to watercourses navigable in fact, those which are non-navigable but can be made navigable by artificial improvements at a reasonable cost, and non-navigable tributaries.[455] Justice Burton alluded to this in *United States v. Kansas City Life Ins. Co.*[456] when he wrote, "It is not the broad constitutional power to reguluate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases."

Second, recovery against the Government is more likely if the level of the water in the watercourse is raised. This is shown by those cases holding damages are consequential when they result from Government works which deflect the current and cause riparian lands to wash away.[457] Third, there have been few recoveries against the Government between *Pumpelly v. Green Bay Co.*,[458] the 1871 decision awarding compensation for flooding riparian

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[454] *Id.* at 624. *Cf.* Comment, 14 STAN. L. REV. 800 (1962) (Hofeldian analysis concluding case correctly decided).

[455] *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

[456] 339 U.S. 799, 808 (1950).

[457] *E.g.*, Franklin v. United States, 101 F.2d 459 (6th Cir. 1939), *aff'd*, 308 U.S. 516 (1939).

[458] 80 U.S. (13 Wall) 166 (1871).

uplands, and *United States v. Kansas City Life Insurance Co.*,[459] which permitted recovery in 1950 when the waters of a non-navigable tributary were backed under riparian property.

Fourth, the principal compensable situation arises when work done by the United States for improvement of navigation causes water to permanently overflow lands above ordinary high water mark.[460] If the property is subjected to periodic overflows, the Government is liable for the value of a flowage easement rather than for the taking of a fee. Damages from temporary flooding are, however, consequential and no liability is incurred by the Government to the landowner.[461]

An award for the flooding of uplands must exclude all elements of value associated with the riparian location of the land. Thus recovery for value of property as a damsite is impermissible because the servitude bars private rights in the flow of the watercourse and the essential federal license is unattainable once the United States decides to condemn a location.[462]

Fifth, the Government incurs no liability for activities in aid of navigation when these are carried on between the ordinary high-water marks of navigable stream beds; but when the Government exercises its power over navigable streams and thereby causes interference or injuries to private property on non-navigable tributaries, compensation is payable.[463] For instance, it has been pointed out that in the *Cress* case, federal power was exercised solely on and for a navigable stream, but the damage occurred on another stream in which Congress had not asserted to exercise the servitude. Therefore the damage to property in congressionally unspecified waters was compensable.[464] But when the United States expressly appropriates the flow of either a navigable or a non-navigable watercourse to promote navigation, no compensation is due for injuries to property which may be vested in riparians under state law.[465] In other words, when the United States, to aid navigability on the main stream, invokes the servitude with specificity as to particular non-navigable tributaries, no compensation is payable to riparians for damages sustained by them below the high-water level.

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459 339 U.S. 799 (1950).

460 *E.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871); United States v. Grizzard, 219 U.S. 180 (1911).

461 For cases, see Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 41 n.122.

462 United States v. Twin City Power Co., 350 U.S. 222 (1956).

463 United States v. Cress, 243 U.S. 316 (1917); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

464 *See* Comment, 35 N.Y.U.L. REV. 1384, 1387 (1960).

465 United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

R. A BRIEF CRITIQUE OF THE SERVITUDE DOCTRINE.

Awarding compensation to riparians on non-navigable streams for damages when water in the main channel is lawfully raised to improve navigation[466] relieves them from bearing part of the cost of a federal project (although they may not receive compensation if the power of the United States is expressly invoked).[467] However, as Justice Douglas points out, why should a riparian on a non-navigable stream be made whole while a riparian on a navigable main stream who suffers damages from the same act is denied relief?[468]

Some early decisions simply assumed private owners were obligated "to suffer the consequences"[469] when improvements were made in aid of navigation, but later opinions of the Court regularly injected the concept of a servitude to explain the denial of compensation. A review of the decisions leads to the conclusion that the Court is not confident about how the concept became the *raison d'etre* of plenary federal power over the nation's watercourses. It has been stated that the source of the power is in:

1. The commerce clause of the Constitution.[470] This is an unsatisfactory explanation because the Constitution does not say that the clause giving Congress power over commerce is superior to the provision guaranteeing that private property shall not be taken for public use without just compensation.[471] Further, only in the "river" cases is the commerce clause given such a construction.

2. The fact that persons acquiring property on navigable streams have had "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."[472] In *Union Bridge Co. v. United States*,[473] the Court indicated notice was an important basis of the doctrine when it said that a bridge across

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466 United States v. Cress, 243 U.S. 316 (1917); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

467 United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

468 *See* Justice Douglas, dissenting in United States v. Kansas City Life Ins. Co., 339 U.S. 799, 812 (1950).

469 Gibson v. United States, 166 U.S. 269, 276 (1897).

470 *E.g.*, United States v. Twin City Power Co., 350 U.S. 222, 224 (1956); United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62 (1913); Gibson v. United States, 166 U.S. 269 (1897); United States v. Rands, 389 U.S. 121 (1967).

471 *See* Annot., 21 A.L.R. 206, 220-21 (1922).

472 United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).

473 204 U.S. 364, 400 (1907).

navigable waters had been erected "with knowledge of the paramount authority of Congress to regulate commerce" and "subject to the possibility that Congress might, at some future time . . . exert its power. . . ." During 1967, in *United States v. Rands*, it is again stated:

> The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.[474]

To base the servitude on a theory of notice ignores that the pre-1937 Court limited the federal commerce power to navigable streams but today almost all watercourses in the country are subject to exclusive Congressional control.[475] Thus the bootstrap nature of the notice language becomes apparent whenever a Supreme Court decision enlarges the scope of the servitude so as to eliminate rights which previously could not have been taken without payment of just compensation. If notice were the basis of the doctrine, the scope of federal power would be dependent upon the definition of navigation at the time when an owner obtained title under local law, but the rule denying compensation has uniformly been applied with no consideration of this factor.

3. The common law of England. A comparison between the servitude doctrine and the English law gives persuasive weight to the conviction that the doctrine has its roots in antiquity. Support for this hypothesis is found in statements by eminent experts in the area of water law[476] and in *United States v. Kansas City Life Ins. Co.*

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474 United States v. Rands, 389 U.S. 121, 123 (1967).

475 *See* Sato, *Water Resources—Comments Upon the Federal-State Relaship*, 48 CALIF. L. REV. 43 (1960); Silverstein, Jr., *The Legal Concept of Navigability v. Navigability in Fact*, 19 ROCKY MT. L. REV. 49 (1946); B. SCHWARTZ, THE SUPREME COURT 45-46 (1957); Justice Roberts, dissenting in United States v. Appalachian Elec. Power Co., 311 U.S. 377, 429 (1940).

476 *See Hearings Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 86th Cong., 1st Sess., ser. 9, pt. 1, at 332-33 (1959); *Hearings on Federal-State Water Rights Before the Senate Comm. on Interior and Insular Affairs*, 87th Cong., 1st Sess. 97 (1961) (statements by Mr. Elmer Bennett, Under Secretary of the Interior). *See also* STAFF OF HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 89th CONG., 2d SESS., REPORT ON FEDERAL WATER RIGHTS LEGISLATION 17 (Comm. Print No. 19, 1960); Fitts and Marquis, *Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements*, 16 TENN. L. REV. 801, 813 (1941); Morreale, *Federal Power in Western Waters: the Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 25 (1963). Also Comment, 55 MICH. L. REV. 272, 275 (1956).

where Justice Burton refers to authorities discussing the English law of public rights on navigable waters.[477] The true origin is important because government immunity would tend to become narrower if the Court's philosophy were to move towards a view that the fundamental purpose of the doctrine is to grant immunity only for those activities which are closely related to aiding navigation. There is a vast difference between power under the commerce clause and under the English doctrine that the King controlled navigable watercourses to benefit subjects who used them for navigation purposes. For this reason a brief summarization of the English law is appropriate.

S. EARLY ENGLISH LAW.[478]

Without tracing in detail the complete historical development of English water rules, it appears that in the very early times the King treated all waters and the soils under them as his own. He disposed of the uplands which bordered on streams, on lakes and on the sea as he pleased, and he likewise gave away or sold lands submerged under both tidal and nontidal waters. No question arose concerning whether he held title in a representative capacity for the benefit of the public or in a proprietary private capacity for his own advantage and profit. He treated the title as private, acting on the theory that anything he owned he could use, sell, or give away; therefore, the common experience in England was that fishing rights and water beds under both navigable and non-navigable waters were conveyed into private hands except insofar as the King retained them for his own pleasure or profit.[479] In ancient times, there were no waters in all the kingdom to which Englishmen could assert a common right of use.

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477 339 U.S. 799, 808 (1950). The citations are J. GOULD, A TREATISE ON LAW OF WATERS, ch. IV, § § 86-90 (1883) and 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS, § 29 (1904). In the same paragraph, Justice Burton also finds the source of the servitude in "notice" and in the "commerce clause."

478 A more detailed discussion of the early English law appears in R. Harnsberger, The Status of Public and Private Rights in Wisconsin's Waters 524-35 June 1, 1959. (unpublished thesis in Law Library, Univ. of Wis.). *See also* Morreale, *Federal Power in Western Waters: the Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 26-28 (1963).

479 Stuart A. Moore in his noted treatise, S. MOORE, A HISTORY OF THE FORESHORE (3d ed. 1888) at page 27 states: "The Crown therefore had parted with almost all the seacoast by grants to its subjects before the end of the reign of King John." *See also* Annot., 23 A.L.R. 757 (1923), and 1 H. FARNHAM, LAW OF WATERS AND WATER RIGHTS 166 (1904).

T. DEVELOPMENT OF THE DOCTRINE UNDER WHICH THE "JUS PUBLICUM" COULD NOT BE SOLD OR GIVEN AWAY BY THE KING.

As Englishmen later agitated for navigation rights and then for fishing privileges, the lines became blurred concerning whether the King held the waters of the Kingdom for himself or for his subjects. Gradually however, his dual capacity as a private person and as ruler of the country became apparent; and, once this was perceived, fixed distinctions began to emerge concerning rights to use the waters between the monarch and the common people. Thereafter, certain rights attached to public waters, and Englishmen could pass and repass without payment of toll. In addition, at least from the time of Magna Charta, 1215, the public had a right to fish in tidal waters where the King was presumptively the owner of the submerged land.[480]

As finally recognized, English waters were classified either as public or as private. Public waters were those the use of which belonged to all Englishmen in common for fishing and for navigation and its incidents. These use rights of the public were held by the King in his representative capacity in trust for all the people; the title, a sovereign or political one for the benefit and advantage of the general public, was called the jus publicum. It was inalienable on the part of the King; he could neither surrender nor transfer such waters into private hands.

However, rights other than fishing and navigation existed in connection with English waters and the submerged beds. These remaining rights, such as to minerals, to wreck and to treasure trove, were held by the Crown in a proprietary ownership; and, unlike the jus publicum, this private ownership in submerged soils, or the jus privatum, could be given away or granted by the King and always remained alienable at common law until the right was taken away during the reign of Queen Anne. But all grants of the jus privatum were subject to the jus publicum, and as it actually developed the questions most frequently litigated were whether grantees of the jus privatum from the King could destroy the jus

480 Some authorities indicate that it was not clear whether a public right existed in the public to fish in tidal waters before King John granted Magna Charta in the year 1215. The fact that the King before that time did grant the exclusive right of fishing to individuals and excluded the public is, however, of only academic interest because it remained unquestioned that after Magna Charta exclusive fisheries could not be granted by the Crown to individual subjects. *See* Malcomson v. O'Dea, 11 Eng. Rep. 1155, 1165-66 (H. L .1863); Fitzhardinge v. Purcell, [1908] 2 Ch. 139, 167. *See* Annot. 23 A.L.R. 757 (1923).

publicum.[481] In the cases it was held that an absurdity would result if the subject could destroy the jus publicum which the King himself as sovereign had a duty to maintain.[482] Statements found in the American cases which assume that the King could not grant the beds of navigable waters, the jus privatum, into private ownership are wrong.[483] And, even though the King's power to grant the jus privatum finally was taken away, it must be remembered that the right to make such grants was assumed by Parliament.

U. Development of the Doctrine Under Which the "Jus Privatum" Became Inalienable on the Part of the Crown.

About 1568, during the reign of Queen Elizabeth, Thomas Digges, an attorney for the Crown, wrote a brochure entitled, *Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof*,[484] which was absolutely contrary to the actual facts, presupposing as it did that the lands between high-water and low-water mark had not been already granted or given by the Crown into private hands. This proposition, enlarged to include all sub-

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[481] Mr. Fraser has pointed out that the disputed question in the English cases was not whether the King could grant submerged tidal land but what public uses the lands were subject to in the hands of the grantees. *See* Fraser, *Title to the Soil Under Public Waters—The Trust Theory*, 2 Minn. L. Rev. 429, 435 (1918). Sir Mathew Hale, Lord Chief Justice of England who died in 1676, wrote a noted treatise in about 1666 entitled M. Hale, De Jure Maris (1666). It is set out in 1 Hargrave's Tracts 5-44 (1787) and in Moore, A History of the Foreshore (3rd ed. 1888) beginning at page 185. In Chapter VI, Hale states: "the people have a publick interest, a jus publicum, of passage and repassage with their goods by water and must not be obstructed. ... For the jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the King's subjects; as the soil of a highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or damnified."

[482] *See* Attorney General v. Tomline, 12 Ch. D. 214 (1879), 14 Ch. D. 58 (1880) and Attorney General v. Parmeter, 10 Price 378, 400-01, 147 Eng. Rep. 345, 352 (1811).

[483] *See* Fraser, *Title to the Soil Under Public Waters—The Trust Theory*, 2 Minn. L. Rev. 429, 433 (1918). "The statement that the title of the Crown to the subaqueous lands was not a proprietary right, if that means without any right of enjoyment or power of alienation, is incorrect. It has no support in the English common law and the authority to the contrary is conclusive."

[484] For discussions pertaining to Mr. Digges' theory see S. Moore, A History of the Foreshore 180-84 (3d ed. 1888); 1 H. Farnham, The Law of Waters and Water Rights § 39 (1904); Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 Minn. L. Rev. 313, 317-21, 337 (1918); Coudert, *Riparian Rights: A Perversion of Stare Decisis*, 9 Colum. L. Rev. 217, 219-21 (1909); and Riggs, *The Alienability of the State's Title to the Foreshore*, 12 Colum. L. Rev. 395, 398-400 (1912).

merged soils as far as the sea flowed, was adopted by the Stuart kings, because if accepted, the Crown presumptively would own all soils underlying the tide waters. This would provide a means to secure revenue by reselling the foreshore and tidal river beds to the subjects. Of course, the landowners strenuously resisted, for, as Mr. Stuart A. Moore points out, the Crown theretofore had asserted no title to the foreshore when the subjects claimed it and before Elizabeth the English law had presumed the subjects owned to low-water mark.[485] Further, riparian titles generally rested on Crown grants centuries old, and those had been lost. Digges' doctrine, if once judicially recognized, would, by creating a presumption of Crown ownership, permit it to take over lands whenever riparian owners failed to prove title resting upon ancient sovereign grant. Proof of such title was an insurmountable task, and the Crown would unjustly recover solely on the weakness of the riparian owners' proof. This would allow the Crown to get back what it had already parted with, and riparians then would be forced to purchase, or lose access to the water because title to the strip between the high-water mark on their uplands and the low-water mark would rest either in the Crown or in the third party grantee from the King. A strip of land separating the privately owned uplands from the water would create an intolerable situation.

After lengthy and bitter litigation extending over more than a half century between the riparian landowners on the one side and the Crown or Crown grantees on the other side, it finally became settled that lands covered by the tide are prima facie in the Crown and that riparians claiming to the contrary have the burden of proving their right of ownership.[486]

This acceptance of Digges' doctrine, which was established only after the Crown had exerted considerable pressure on the English courts, was one of the causes of the revolution,[487] and one of the charges which led to King Charles I losing his crown was "the taking away of men's rights under colour of the King's title to land between high and low water marks."[488]

The ultimate outcome was that after it became well established that Crown rights in tidal waters could be conveyed only subject to public rights, it became settled that as a part of the coronation

485 S. MOORE, A HISTORY OF THE FORESHORE 169, 177 (3d ed. 1888).

486 The first case recognizing the doctrine is Attorney General v. Philpot, reported in MOORE, A HISTORY OF THE FORESHORE, app. I (3d ed. 1888). *See also* Attorney General v. Richards, 2 Anst. 603, 614, 145 Eng. Rep. 980, 983 (Ex. 1793).

487 S. MOORE, A HISTORY OF THE FORESHORE XXXV (3d ed. 1888).

488 *Id.* at 310.

procedure the King was required to grant all submerged soils for the common good.[489] And, finally, in the first year of the reign of Queen Anne, 1702, a statute was enacted which prevented the Crown from making any grants except upon conditions imposed by Parliament.[490]

Thus in the common law it developed that both the public rights of use, the jus publicum, and the private rights of use and enjoyment, the jus privatum, became inalienable on the part of the Crown. The jus publicum had been inalienable for centuries and the jus privatum became so by Acts of Parliament and by custom.

V. The Common Law Right of the Public to Navigate in Private Waters.

The right of the public in England to use the tidal waters ultimately became associated with public ownership of the subaqueous soil. Because title to submerged beds under tidal waters was presumptively in the Crown—the sovereign state—use of tidal waters was common to everyone. The resulting general rule became settled that such waters were public waters, the right of the public being limited by the ebb and flow of the tide.

Above the flow and reflow of the tide, title to the underlying stream beds was prima facie private and waters uninfluenced by the tide were regarded private both as to right of use and ownership of the bottom.[491] The theory under which the Crown held prima facie title to land under the tidal waters never applied to submerged beds of fresh waters because the claim of the large landowners whose lands bordered on fresh water streams was too firmly established, and besides, most of the important English waters were tide waters. Therefore, the desire of the Crown for further extension of its ownership was never great.

In this situation the courts faced a dilemma because use of the large fresh water rivers in England was essential for passage of boats bearing products of the country and carrying on commerce.

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489 1 H. Farnham, The Law of Waters and Water Rights, § 36, at 170 (1904).

490 The Crown Lands Acts of 1702, 1 Anne, c. 7, § 5, 3 Halsbury's Statutes of England 214 (1929); *see also* The Crown Lands Act of 1829, 10 Geo. IV, c. 50, § 8, 3 Halsbury's Statutes of England 223 (1929).

491 M. Hale, De Jure Maris (1666), in S. Moore, A History of the Foreshore 270 (3d ed. 1888). For an exhaustive treatment of this subject, see Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 Minn. L. Rev. 313 (1918). *See also* Note, 32 Minn. L. Rev. 484 (1948), and Blount v. Layard, [1891] 2 Ch. 681, 689 (printed in note to Smith v. Andrews, [1891] 2 ch. 678).

Yet the submerged soils of these rivers above the tide had been in private hands from the earliest times and it had to be conceded as a matter of principle that public use of the water for navigation is inconsistent with private ownership of the beds. It had further to be conceded that the private ownership would be infringed if the Crown's title were extended to the soil under fresh waters for the purpose of giving a right to navigate over what would then have become public waters.

To solve this difficulty, a legal fiction called "navigable in law" was introduced to limit the Crown's title solely to tidal waters. This fiction meant simply that in connection with determining title to the seashore and to soils underlying streams no waters were regarded as navigable above the places where the tide ebbed and flowed. The fiction had no effect whatsoever on public rights to fish and to pass and repass in tidal waters[492] but affected only title determinations.

Once the King's title was limited, the dilemma of giving Englishmen the indispensable right they needed to navigate in fresh waters where the submerged beds were in private ownership was solved by judicial evolution of another doctrine. This was "navigable in fact." Under this doctrine the rule came to be that streams and lakes which were actually capable of navigation, even though uninfluenced by the tide, were subject to a public right to navigate. The theory upon which this right rested was never too clear,[493] but, from whatever source derived, the rule became settled that the public had a "servitude" for boat passage in the navigable rivers of the Kingdom above the tide as well as in tidal waters. The tide remained the prima facie test of public use and enjoyment generally, but the test of the public right to pass and repass became navigability.[494]

Thus it finally became settled that tidal waters could be used for the benefit of all the subjects; and in the private waters actually capable of commerce Englishmen secured a right to navigate by virtue of the judicial decisions even though the courts always had

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492 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 23f, at 117 (1904).

493 *See* H. COULSON AND U. FORBES, THE LAW OF WATERS AND LAND DRAINAGE 279 (6th ed. 1952); Phear, *Rights of Water* 15, cited in J. GOULD, A TREATISE ON THE LAW OF WATERS § 55 at 119 n.5 (3d ed. 1900).

494 *See* 1 C. KINNEY, LAW OF IRRIGATION AND WATER RIGHTS 560-62 (2d ed. 1912); *See also* J. GOULD, A TREATISE OF THE LAW OF WATERS § § 52, 53, 55, 81 (3d ed. 1900); M. HALE, DE JURE MARIS (1666) in S. MOORE, A HISTORY OF THE FORESHORE 374 (3d ed. 1888).

difficulty formulating any well-founded rationale to give everybody this enforceable claim to boat as against private riparian landowners who owned the submerged beds.

A public right to navigate was recognized in the Colonies; and after adoption of the Constitution, the federal government became the preserver of the privilege of free passage. The United States Supreme Court made certain basic modifications of the common law to accommodate the conditions and topography of the country,[495] but the concept continued that waters navigable in fact were public as to use. If the concept of the "servitude" as it existed in the English law were followed, the scope of property encompassed would be reduced considerably and the liability of the United States to pay compensation when exercising its "navigation easement" would thereby be enlarged. In 1964, the United States Court of Appeals for the Third Circuit said it still considered the law to be that compensation must be paid for interfering with access or for taking property below the ordinary highwater line unless the taking either aids navigation or bears some positive relation to its control.[496] Nevertheless, statements by the Supreme Court appear to broaden the rule to permit at least a limited exercise of the servitude in the interest of factors such as commerce generally.[497] Invoking the servitude where navigability has not really been an economic fact was one cause of concern for the Senate Select Committee on National Water Resources.[498]

At the state level, power may be exercised either under the doctrine that the ownership of water is held in trust for the people[499] or the navigational servitude. The doctrines vary from state to state, and for that reason great care must be used in applying precedents in one jurisdiction to cases in another. However, with few exceptions the state courts hold payment must be made when private rights are taken unless a project is closely related to acknowledged public rights in navigable waters. Further, it is not enough that the public works aid navigation incidentally. The

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495 The fact of navigability was substituted for the fiction of ebb and flow of the tide. Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). For a discussion of the reasons behind the Genesee Chief decision, see J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 8, 12-13 (1950).

496 United States v. 50 Foot Right of Way 337 F.2d 956 (3d Cir. 1964).

497 *E.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426 (1940); Note, 72 DICK. L. REV. 375, 390 n.75 (1968).

498 S. REPT. No. 29, 87th Cong., 1st Sess. 66 (1961).

499 *See, e.g.*, Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542, 567.

purpose must be to improve or control navigation.[500] On the other hand, in denying compensation to shipyard owners where access was blocked by a low-level highway bridge, the California Supreme Court recently stated that the servitude in California is not limited to purposes of navigation and that such a circumscription is obsolete.

> The limitation of the servitude to cases involving a strict navigational purpose stems from a time when the sole use of navigable waterways for purposes of commerce was that of surface water transport.... That time is no longer with us. The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse—all of these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public, should not be burdened with an outmoded classification favoring one mode of utilization over another.[501]

The *Colberg* decision may foreshadow a change of viewpoint in other states. Its rationale is profitable to the public and to those directly interested in large scale developments because more of the burden is shifted to riparian proprietors. Also, there can be no disagreement with the concept that legal rights must be reevaluated from time to time for admittedly things have changed since formation of the English law and since 1789 when it took George Washington a week to travel from Alexandria to New York for his inauguration. But to permit non-navigational improvements without payment of compensation for injured property rights is not only unsound historically, it conflicts with the purpose of harmonizing public rights and private interests by subordinating the latter only when navigation is advanced. To expropriate riparian rights to advance any type of commerce, *e.g.*, automobile traffic on freeways, would appear to make the government's power almost unlimited. The California doctrine expounded in *Colberg* is too expanded a view of the navigation servitude doctrine unless riparian rights are so outmoded that their taking should be now made non-compensable.[502] Not all courts will agree that riparians must sacrifice so much.

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[500] Beidler v. Sanitary Dist., 211 Ill. 628, 71 N.E. 1118 (1904). Annot., 18 A. L. R. 403 (1922); Note, 72 DICK. L. REV. 375, 388 n.68 (1968); 13 VILL. L. REV. 667, 668 n.16 (1968); 21 VAND. L. REV. 277, 279 n.14 (1968); Colberg, Inc. v. State, 67 Cal 2d 408, 434-35, 432 P.2d 3, 20, 62 Cal. Rptr. 401, 418, (1967) (dissenting opinion).

[501] Colberg, Inc. v. State, 67 Cal. 2d 408, 421-22, 432 P.2d 3, 12, 62 Cal. Rptr. 401, 410 (1967), *cert. denied*, 390 U.S. 949 (1968).

[502] *See* Baldwin, *The Impact of the Commerce Clause on The Riparian Rights Doctrine*, 16 U. FLA. L. REV. 370, 421-22 (1963).

W. STATUS OF STATE CREATED RIGHTS, INCLUDING IRRIGATION DIVERSION WORKS AND CONSUMPTIVE USES.

It is impossible to calculate the effect of the federal navigation servitude on private investments, but it is noteworthy that a subcommittee of the American Bar Association on Public Land Use reported during 1967 that the servitude "has inhibited the development of waterfront areas over navigable waters by private enterprise" and that the doctrine:

> creates a hazard to financing which makes the development of such projects difficult from the practical point of view. Title companies generally list this right as an exception in policies of title insurance which has the effect of rendering the property largely unmortgageable.[503]

At the present time, another, important problem relates to the effect of the servitude upon diversions for irrigation, municipal supplies, and other comsumptive uses. It appears that because of the servitude private diversions "rest upon a slippery legal foundation and that there is merit, in law if not in practice, to the complaint that a sword of Damocles hangs over them, due allowance being made for the exaggeration in any such statement as this."[504] In a comprehensive article, Professor Morreale of the Rutgers Law School has written:

> It should be noted that none of the previously discussed cases, whether denying or granting compensation, concerned a consumptive water right or, more narrowly, an irrigation water right. Congress, of course, has often been solicitous of state-created Western water rights....
>
> But while there is no case subjecting irrigation water rights to the rule of no compensation nothing on the other hand suggests their compensability....
>
> Any assertion therefore that the use of a navigable stream for irrigation purposes is the kind of "vested property right" that survives the exercise of the congressional power to deal with the nation's waterways is unfounded. The congressional appropriation of a navigable river for the (perhaps only incidental) benefit of navigation leaves the owner of state-created water rights without recourse. Regarding actual diversion works, placed in the river, *United States v. Chandler-Dunbar Co.* is directly applicable....
>
> As for the actual withdrawal of the water, *Chandler-Dunbar* again seems conclusive of the issue. The claim to the non-consumptive use of water constituted the assertion of private ownership over "the running water in a great navigable stream." The claim to the consumptive use of such water must then do likewise. And if such an assertion was "inconceivable" in the one case, so ought

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503 2 A.B.A. REAL PROPERTY AND TRUST J. 597 (1967).

504 STAFF OF HOUSE COMM. OF INTERIOR AND INSULAR AFFAIRS, 86th CONG., 2D SESS., REPORT OF FEDERAL WATER RIGHTS LEGISLATION 20 (Comm. Print No. 19, 1960).

> it to be in the other. Nor would the "owner" of the water right in question be permitted to show that his individual diversion does not impede navigation. The congressional declaration that the protection or improvement of navigation requires the appropriation of the entire stream flow would again have the legislative and conclusive effect similar declarations have had in the past.
>
> Thus the question of the compensability of a state-created, consumptive water right on a navigable stream must be answered in the negative. Any destruction or impairment of such a use, caused by a federal dam, constructed under congressional authorization and serving, perhaps incidentally only, the improvement of navigation, is merely the exercise of a power to which such use had always been subject.[505]

Congress, however, may exercise less than its entire power and in the past has frequently recognized state law.[506] The O'Mahoney-Milliken Amendment to the 1944 Flood Control Act,[507] for instance, prefers beneficial uses over navigation in the Western states by providing:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth

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505 Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 64-66 (1963) (footnotes omitted). *See also* Sato, *Water Resources—Comments Upon the Federal-State Relationship*, 48 CALIF. L. REV. 43, 47 (1960); Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of* 1957, 45 CALIF. L. REV. 604, 618-21 (1957); Comment, *Western Water Rights: May They Be Taken Without Compensation*, 13 MONT. L. REV. 102 (1952).

506 *See Hearings on S. 1658 Before the Subcomm. on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess. 709-16 (1964); *Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess. 302-310 (1964). S. REP. No. 2587, 84th Cong., 2d Sess. 9, 41-46 (1956). In United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806, 841 (S.D. Cal. 1958), Judge Carter collects numerous Congressional acts which he describes as "an almost unbroken line of statutes by which Congress has deferred to state laws concerning water." The major acts which have general application are the Reclamation Act of 1902, the Federal Power Act of 1920, and the Watershed Protection and Flood Prevention Act of 1954. For an excellent discussion of section 8 of the Reclamation Act of 1902, *see* Sax, *Problems of Federalism in Reclamation Law*, 37 U. COLO. L. REV. 49 (1964).

507 58 Stat. 887 (1944), 33 U.S.C. § 701-1(b) (1964). Exercise of the overriding federal navigation servitude to destroy state created water rights without compensation is prohibited. The water user's remedy is damages in an inverse condemnation action, not injunction. Turner v. Kings River Conservation Dist., 360 F.2d 184 (9th Cir. 1966). For a discussion whether hydroelectric power generation is granted a priority over navigation, see STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 87TH CONG., 1ST SESS., MISSOURI BASIN WATER RIGHTS (Comm. Print 1961).

> meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Congress also has indicated that compensation be paid even in situations where there would be no obligation. *United States v. Gerlach Live Stock Co.*,[508] is a case in point. There construction of the Fraint Dam as part of the Central Valley Project in California deprived riparian owners on the San Joaquin River of their traditional use of seasonal stream overflow and made their lands barren. The federal government attempted to avoid payment of compensation for the taking on the theory Congress has declared the "entire Central Project . . . is . . . for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage, and for the delivery of the stored waters thereon. . . ." The court of claims found the purpose of the dam was to irrigate nonriparian lands, not aid navigation, and entered awards against the United States for compensation. On appeal, the Supreme Court affirmed the judgments but avoided the question whether the Government can destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of rights recognized by state law. Justice Jackson, writing for the majority, said that Congress had showed no intent to invoke the navigation servitude and intended to require compensation for all damages to water rights under the Reclamation Act of 1902.

X. Conclusion.

Previously it has been shown that the navigation servitude originated in the common law, not in the commerce clause. It became incorporated in American constitutional law at a time when the federal government's main concern was limited almost entirely to maintaining streams, lakes and harbors as free public highways for trade. The emphasis was on lighthouses, public piers, locks, canals, and harbor and river improvements. Over the years, the federal interests have expanded tremendously until today the United States is engaged extensively in irrigation reclamation projects, municipal water supply, pollution control, flood regulation, recreation, and hydroelectric power generation and distribution.[509]

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[508] 339 U.S. 725 (1950).

[509] Ashwander v. TVA 297 U.S. 288 (1936); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) (Congress may prohibit all obstructions in navigable waters and therefore may also license obstructions for generation of power).

The question thus arises whether the servitude power has expanded with the enlarged definition of navigable waters of the United States or whether it is, as it was at common law, coextensive with protection and promotion of a paramount public right of navigation. Counsel for the House Committee on Interior and Insular Affairs has stated the question to be:

> whether the existence of the servitude and its benefits depend upon the nature of the stream (in which case any navigable stream may be used by the Federal Government for any of its constitutional functions without compensation) or upon the nature of the use (in which case it is only a navigation use or, at most, a use cognizable under the commerce clause of the Constitution which carries with it the right to use without compensation).[510]

The theoretical base of the servitude doctrine is federal power over watercourses as public highways and matters not in aid of navigation are outside the scope of the doctrine. As a practical matter, though, the Supreme Court will not interfere with a Congressional declaration that a particular activity promotes navigation; consequently, "takings" for federal projects can be sheltered under what even the Court has referred to as a "strained interpretation" of the power over navigation.[511]

Prior to the Court's statement in *Gerlach* that ". . . this Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed,"[512] language in the decisions

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[510] WITMER, FEDERAL WATER RIGHTS LEGISLATION—THE PROBLEMS AND THEIR BACKGROUND, HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., 2D SESS., REPORT ON FEDERAL WATER RIGHTS LEGISLATION 21-22 (Comm. Print No. 19, 1960).

[511] United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950).

[512] *Id.* at 737. In *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926), the Court said: "The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation.' Port of Seattle v. Oregon Railroad Co. 255 U.S. 56, 63 (1921). And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, . . . it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end." In United States v. Appalachian Elec. Power Co., 311 U.S. 377, 425 (1940), the Court said *River Rouge* involved a right of access, a use fixed by state law, and the conclusion that the United States could not interfere, except for navigation, with the right of access required no appraisal of other rights. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 334 (1958), states that it is no longer open to question that the federal government "has dominion, to the exclusion of the States, over navigable waters of the United States."

emphasized the Court's abstention from determining whether navigation is in fact advanced.

> So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.[513]
>
> [T]he question... whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character....[514]

In *Arizona v. California*,[515] decided in 1931, Arizona claimed that the Congressional declaration of purpose to improve navigation in connection with the Boulder Dam Project Act was "a mere subterfuge and false pretense." Mr. Justice Brandeis, writing for the Court, discussed whether the Congressional statement was conclusive or whether the Court could inquire into the contention that the real intent was to destroy navigability by diversions for consumptive uses such as irrigation. He concluded that the motives which induced members of Congress to approve the Act could not be examined and it was for Congress rather than for the Supreme Court to decide whether the particular structures proposed were reasonably necessary.

Although some authorities believed *Gerlach* was a rejection of the paramount rights theory,[516] the Court since that decision has reaffirmed the finality of Congressional assertion of its power. In *United States v. Twin City Power Co.*,[517] exercise of the servitude was upheld in connection with the Clark Hill project which was primarily for development of power and which benefited navigation only incidentally, if at all. The court of appeals had found improvement of navigation was not the purpose of the project which it said was constructed for flood control and development of power, but the Supreme Court concluded the decision of Congress that the project would serve the interests of navigation was final "unless it is shown 'to involve an impossibility.' "[518]

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513 United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 64 (1913).

514 *Id.* at 65. *See also id.* at 66 and Greenleaf Johnson Lbr. Co. v. Garrison, 237 U.S. 251 (1915).

515 283 U.S. 423, 455 (1931). *See also* United States v. Commodore Park, Inc., 324 U.S. 386 (1945) which indicates the activity need have no connection with aid to navigation.

516 *See* Treadwell, *Developing a New Philosophy of Water Rights*, 38 CALIF. L. REV. 572 (1950).

517 350 U.S. 222 (1956).

518 *Id.* at 224.

In recent years, numerous efforts have been made to subject the federal government to state water law. The much discussed Barrett bill, the Western Water Rights Settlement Bill of 1957,[519] was one of the first. Any hope for its passage was unrealistic but the bill did serve to focus attention upon the area of federal-state relations.[520] In considering the matter, the outstanding feature is the overriding federal interest in the comprehensive development of the national land and water resources[521] and the obvious concern of the United States to maintain control over the engineering, economic and financial soundness of the country's vast public works.[522] Flood control[523] and maintenance of navigability clearly are federal functions; but when no significant navigation in fact exists, exercise of the servitude to avoid payment of just compensation is "highly fictional."[524] The Supreme Court has gone too far in equating non-compensable takings under the navigation servitude with federal power over navigation ever to return completely to historic English origins. Nevertheless, a shift in philosophy to original principles would tend to restrict use of the servitude doctrine to activities closely associated with preserving navigable waters such as removal

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519 S. 863, 84th Cong., 1st Sess. (1955).

520 *See* Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 634 (1957). Recent bills include S. 1275, 88th Cong., 1st Sess. (1963); S. 1636, 89th Cong., 1st Sess. (1965). For a list of numerous bills introduced in the House see STAFF OF HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., 2D SESS., REPORT ON FEDERAL WATER RIGHTS LEGISLATION 1 (Comm. Print No. 19, 1960).

521 Fox & Craine, *Organizational Arrangements for Water Development*, 2 NATURAL RESOURCES J. 1 (1962). For suggestions regarding strengthening the role of the states see Engelbert, *Federalism and Water Resources Development*, 22 LAW & CONTEMP. PROB. 323, 325, 344 (1957). *See also* Veeder, *The Pelton Decision: A Symbol—A Guaranty That the Development and Conservation of Our Nation's Resources Will Keep Pace With Our National Demands*, 27 MONT. L. REV. 27 (1965).

522 *See* First Iowa Hydro-Elec. Co-op v. FPC, 328 U.S. 152, 172, 181, (1946).

523 *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, (1940) ("Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise [in addition to navigation] parts of commerce control."); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, (1941); United States v. West Virginia Power Co., 122 F.2d 733 (4th Cir.), *cert. denied*, 314 U.S. 683 (1941); STAFF OF SENATE SELECT COMM. ON NATIONAL WATER RESOURCES, 86TH CONG., 2D SESS., REPORT ON FLOOD, AND FLOOD CONTROL IN THE UNITED STATES (Comm. Print No. 15, 1960).

524 United States v. Gerlach Live Stock Co., 339 U.S. 725, 737 (1950).

of physical obstructions and abatement of pollution.[525] These affect stream flow and federal power should be and is plenary. When Congressional action affects the uplands, however, so as to benefit private interests, there are other considerations.

Again the *Gerlach* decision is illustrative. The United States was not taking the water for itself but rather was exercising its power in connection with construction of a reclamation project. The effect was to transfer water rights from one private group to another, and the project costs were to be reimbursed over a forty year period by those who obtained use of the water. This reimbursement feature places reclamation cases in a different category from those in which the Government itself takes and uses the flow. The question of compensation is a matter of whether private interests should secure so direct an economic advantage by virtue of governmental activities, and the answer is no. Employment of the servitude to take property for public welfare ends would be an abuse of power. Further, the controversial subject of subsidies in federal irrigation projects[526] is a factor when consideration is given to the appropriateness of paying compensation for takings of riparian interests in furtherance of reclamation plans. The Supreme Court, in other decisions in which the federal interest is a peripheral one, frequently has found compensation payable.[527] Further, since the *Gerlach* decision, it is indisputable that Congress has the power under the general welfare clause to tax and appropriate for large-scale reclamation and irrigation projects and other works of internal improvement.[528] The former custom of invoking the navigation

525 For a discussion whether stream flow abatement which prevents raw sewage and wastes from being carried away is a compensable taking see Lewis, *The Phantom of Federal Liability for Pollution Abatement in Condemnation Actions*, 17 MERCER L. REV. 364 (1966). A number of state cases hold compensation is payable when the purpose of a public work such as a dam is not to improve navigation. *E.g.*, Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936).

For other cases, see Mr. Justice Peters, dissenting in Colberg, Inc. v. State, 67 Cal.2d 408, 426, 62 Cal. Rptr. 401, 418, 432 P.2d 3, 20 (1967); 21 VAND. L. REV. 277 (1968); 13 VILL. L. REV. 667 (1968).

526 *See* HUFFMAN, IRRIGATION DEVELOPMENT AND PUBLIC WATER POLICY 87-91 (1953). *See also* 3 PRESIDENT'S WATER RESOURCES POLICY COMM'N., WATER RESOURCES LAW 204 (1950); Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13 (1965); Clark, *Northwest-Southwest Water Diversion—Plans and Issues*, 3 WILLIAMETTE L. J. 215, 254-56, 258-61 (1965); J. HIRSHLEIFER, J. DE HAVEN & J. MILLIMAN, WATER SUPPLY: ECONOMICS, TECHNOLOGY AND POLICY 226-30 (1960).

527 *See* Henry Ford & Sons, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930); International Paper Co. v. United States, 282 U.S. 399 (1931); FPC v. Niagara-Mohawk Power Corp., 347 U.S. 239 (1954).

528 The foundation case is United States v. Butler, 297 U.S. 1 (1936).

power to buttress federal authority in sanctioning internal improvements is therefore unnecessary and should be discontinued unless federal interests are directly involved.

In view of the plenary power of the United States, the matter of compensability is almost entirely a matter of Congressional policy. Professor Morreale, who has considered the servitude problem exhaustively,[529] recently wrote an excellent article on Congressional clarifying legislation[530] in connection with the federal-state relationship in the Western states. She concluded that "private rights which would be compensable under the fifth amendment if taken in exercise of any other federal power should be compensable if taken for water resources development."[531] This would return closer to the English origins of the servitude, abolish time-worn fictions, and reach a justifiable result.

Limited permit systems are not uncommon at the state level in the East, and proposals have been advanced that permits or licenses be issued by federal agencies for a period of time sufficiently long to permit amortization of investments which are made in reliance upon a continued source of water supply.[532] One suggestion is that a new federal agency modeled after the Federal Power Commission grant permits (some conditioned on payment in money or in water supply) to private developers, states, local communities, regional authorities or any combination of public and private groups.[533] Possibly these should not take effect until expiration of a certain time after they have been reported to Congress. Congressional handling could be either by a single committee in each House or by committees meeting in joint session such as the Public Works Committee and the Committee on Interior and Insular Affairs in the Senate. Most permits would be routine, but hearings might be called for in connection with projects such as the $600,000,000 one

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529 Morreale, *Federal Power in Western Waters: The Navigation Power and The Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963).

530 S. 1636, 89th Cong., 1st Sess. (1965) would require payment of compensation even though the taking were by virtue of the navigation servitude. Section 2 which would require the United States to respect state laws does not apply when the Government establishes "water rights under its own laws."

531 Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423, 512 (1966).

532 2 ABA REAL PROPERTY, PROBATE AND TRUST J. 599 (1961) (proposal of Association of the Bar of the City of New York); Forer, *Water Supply: Suggested Federal Regulation*, 75 HARV. L. REV. 332, 347-49 (1967).

533 Forer, *Water Supply: Suggested Federal Regulation*, 75 HARV. L. REV. 332, 348 (1967).

proposed on filled in land along lower Manhattan.[534] When consumptive diversions do not affect in-the-channel uses, and it is foreseeable that they will not do so within the time covered by the permit, it would appear reasonable for Congress to authorize a procedure for such licensing. Permits, even though they might not work an estoppel against the Government,[535] would as a practical matter confer a degree of tenure security and go far to alleviate feelings of apprehension and distrust, especially in the West.

Lastly, it may be observed that among the numerous memorable passages from opinions of the United States Supreme Court, two are especially appropriate as the "thinking through" process continues.

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them.[536] Ownership of 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 private ownership is inconceivable.[537]

Toward the end of his excellent article entitled, *Interposition—Wild West Water Style*,[538] which discusses the old states' rights arguments, Mr. B. Abbott Goldberg concluded:

> The real answer to fear of federal encroachment is the assumption of greater responsibilities by the state, not the head-on collision of forces. In such a collision the states are bound to come out second best. It is possible for a state and the United States to develop a reasonable *modus vivendi*, as the parallel existence of the California State Water Project and the Central Valley Project shows.

Taking a long view, it must be recognized that the federal government has by and large acted with restraint, that many proponents of "state rights" are private interests in disguise, and that efforts to balkanize the country in the field of resource development are doomed. Extreme legislation which is upsetting to the principle of federalism is not the answer, but more protection for private investments is a desirable step.

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534 N.Y. Times, May 13, 1966, at 1, col. 2; 2 A.B.A. REAL PROPERTY, PROBATE AND TRUST J. 597 n.127 (1967).

535 For an excellent discussion see Morreale, *Federal Power in Western Waters: The Navigation Power and The Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 67 (1963). *See also* STAFF OF HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG. 2D SESS., REPORT OF FEDERAL WATER RIGHTS LEGISLATION 21 (Comm. Print No. 19, 1960).

536 United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).

537 United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913).

538 17 STAN. L. REV. 1, 37 (1964). *See also Trelease, Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961).

Governmental agencies and authorities are necessities. They are capable of rendering great and beneficent public services. But any appeal to the tradition of our laws which omits a decent regard for private property rights is both inaccurate and distorted. It is because of this regard that our governmental agencies and authorities in acquiring properties for their public purposes are generally required to proceed under the power of eminent domain rather than under the police power. Such a policy has not resulted in a destruction of flood control and improvement agencies in the past and there is no reason to apprehend that the continuation of such policy will prove overly costly or inimical to the American way of life in the future.[539]

[539] Brazos River Authority v. City of Graham, 163 Tex. 167, 176, 354 S.W.2d 99, 105 (1961).