Winter 1963

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Recommended Citation
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FEDERAL POWER IN WESTERN WATERS: THE NAVIGATION POWER AND THE RULE OF NO COMPENSATION

EVA H. MORREALE *

On February 23, 1961, the Congress of the United States received President Kennedy's "Special Message on Natural Resources." The major presidential proposal in the area of water conservation was the development of "comprehensive river basin plans by 1970." To that end, Congress was urged to "authorize the establishment of planning commissions for all major river basins where adequate plans are not already in existence." President Kennedy also expressly rejected the "no-new-starts" policy of his predecessor. The adoption of the administration's program will once more raise the question of the precise scope of the federal power over the nation's waterways.  

This article is devoted to the detailed examination of one of the bases for federal activity, the "navigation power." Attention is focused on irrigation water rights. The emphasis is justified for two reasons. One is the lack of decisions dealing with such rights. The other is the assumption that federal activity may well center in the arid and semi-arid western states. Those at least are the states

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Prepared in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. I would like to acknowledge my indebtedness and gratitude to Professors Charles Meyers and Gerald Gunther for all the inspiration, understanding and encouragement I received from them.

1. For the full text of the message see the N. Y. Times, Feb. 24, 1961, p. 12.

2. The question has arisen and has been examined before, most frequently perhaps in the context of state-federal relations. See, for example, Bannister, The Question of Federal Disposition of State Waters in the Priority States, 28 Harv. L. Rev. 270 (1915); Corker, Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957, 45 Calif. L. Rev. 604 (1957); Martz, The Role of the Federal Government in State Water Law, 5 Kan. L. Rev. 626 (1957); Sato, Water Resources—Comments upon the Federal-State Relationship, 43 Calif. L. Rev. 43 (1956); Silverstein, Jr., The Legal Concept of Navigability v. Navigability in Fact, 19 Rocky Mt. L. Rev. 49 (1946); Stone, Federal Versus State Control of Water, 12 Rocky Mt. L. Rev. 69 (1940); Note, Federal-State Conflicts over the Control of Western Waters, 60 Colum. L. Rev. 967 (1960).

3. The states commonly included in that description are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming. In almost all of them, prior appropriation has replaced common law rules of riparian ownership.
where water conservation is most urgent and where irrigation is often indispensable for the cultivation of the land.

In particular the paper will seek to answer these questions.

(1) \( A \) "owns" a state-created consumptive water right on a navigable stream.\(^4\) Is he entitled to compensation if the United States, under specific congressional authorization, erects a dam, thus causing the destruction or impairment of his right?

(2) Does a claim to compensation arise if the United States, in distributing project water among intrastate users, ignores state-created priorities in the allocation of the impounded water?

(3) Do the results in (1) or (2) change if \( A \) is located on a non-navigable tributary of a navigable mainstream?

It is the contention of this paper that the United States can destroy \( A \)'s rights without compensation if two conditions are fulfilled: the United States must proceed under the navigation power and \( A \)'s property must be "affected by"\(^5\) the navigation servitude.\(^6\)

The present investigation will deal with these conditions in that order. That is, it will first seek to probe the scope and limits of the congressional power. Thereafter it will deal in detail with the compensability of private property as against a proper exercise of the navigation power. It will, in other words, seek to ascertain just what private property is "affected by" the navigation servitude.

The final part of the investigation will seek to apply the earlier findings to consumptive water rights. Special consideration will be given to the question whether the United States may be estopped to exercise its powers.

**PART I**

**THE CONSTITUTIONAL POWER OF CONGRESS**

In 1824, Mr. Chief Justice Marshall stated that "All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation."\(^7\)

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4. No distinction needs to be made, for purposes of this paper, between state-created riparian and state-created appropriation water rights.


6. It is important to note at the very outset that the terms "navigation power" and "navigation servitude" describe two related but nevertheless distinct phenomena. Navigation power designates the regulatory power which Congress, under the commerce clause and since Gibbons v. Ogden, exercises over navigable waters. Navigation servitude designates the rule, to be discussed in detail later, that certain private property may be taken in exercise of the navigation power without the payment of compensation. Of course, a Congress willing to pay compensation could carry out a great many projects dealing with natural resources under the commerce clause generally or under the welfare clause. See United States vs. Gerlack Live Stock Co., 339 U.S. 725 (1950), upholding the Reclamation Act under the power to spend for the general welfare.

Gibbons v. Ogden thus established control over navigation as part of the control over interstate commerce which by article I, section 8 of the Constitution had been entrusted to the national government.\(^8\)

I

THE SUBJECT MATTER OF THE CONGRESSIONAL POWER

A. Navigable Streams

Gibbons v. Ogden declared navigation to be part of interstate commerce. It did not define what kinds of streams were the highways of this interstate commerce. But it did of necessity imply that "navigable" streams were such highways. The term received its definition in *The Daniel Ball*\(^9\) in a now famous formulation:

> 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 of commerce. . . .\(^{10}\)

Once a stream was navigable under this definition, federal power extended over its entire course. In *United States v. Rio Grande Dam & Irr. Co.*,\(^{11}\) the Court upheld the exercise of national control over non-navigable stretches of navigable streams in order to protect the navigable capacity downstream.\(^{12}\)

Nor was there a loss of federal power if a formerly navigable stream was no longer used for commerce and, indeed, had become "incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions."\(^{13}\) Mr. Justice Brandeis reaffirmed the proposition "once navigable—always navigable" in the first *Arizona v. California* controversy to reach the Court.

Commercial disuse resulting from changed geographical conditions and a Congressional failure to deal with them, does not amount to an

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8. Specifically, *Gibbons v. Ogden*, invalidated, as repugnant to the federal licensing statute and thus to the supremacy clause, acts of the New York legislature granting Mr. Fulton exclusive navigation rights of all waters within New York.

9. 77 U.S. (10 Wall.) 557 (1870). Navigability had been defined earlier for purposes of admiralty jurisdiction in *The Genesee Chief*, 53 U.S. (12 How.) 443 (1851). *The Daniel Ball* apparently was the first time the Court gave a definition in the navigation context.

10. *The Daniel Ball*, supra note 9, at 563. The definition was a rejection of the "ebb and flow of the tide" test of English law. See note 132 infra.


12. Here of the Rio Grande, found by the trial court and the Supreme Court of the Territory to be non-navigable in New Mexico.

13. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921). The case concerned the Desplaines River, which at the time of the decision had been out of use for over a hundred years.
abandonment of a navigable river or prohibit future exertion of federal control.\textsuperscript{14}

Congress thus has power over all parts of a navigable stream. The power is maintained although the stream falls into disuse; the failure to maintain navigability does not dislodge congressional jurisdiction.

B. The Determination of Navigability

In dealing with the scope of the federal power, the Court in these cases reserved to itself the determination of navigability. Its criterion continued to be the standard formulated in \textit{The Daniel Ball} with its emphasis on navigability in fact "when used or susceptible of being used [for navigation], in their ordinary condition."\textsuperscript{15}

\textit{United States v. Appalachian Power Co.}\textsuperscript{16} was the next major step toward further extension of federal control over the nation's waterways. The government had contended that the phrase "susceptible of being used, in their ordinary condition" should be construed so as to permit a determination of navigability in light of the effect that reasonable improvements might have. Both lower courts had rejected the argument. In the Supreme Court it carried the day. Mr. Justice Reed repeated that navigability was a factual question. But the Court also held it to be erroneous to appraise the evidence of navigability on the natural condition of the waterway only. "Its availability for navigation must also be considered."\textsuperscript{17}

An immediate and rather obvious consequence of the decision was the increase in the number of streams subject to federal control because "available for navigation" after improvements.\textsuperscript{18}

Not so obvious was its effect on the process of determining navigability. Theoretically, the decision left that question in the judicial province and merely enlarged the scope of admissible evidence. But congressional authorization of an "improvement project" implies an affirmative judgment as to its feasibility and practicability. If the government therefore asserts navigability of a particular

\begin{enumerate}
\item 77 U.S. (10 Wall.) 557, 563 (1870). (Emphasis added.) Only on the surface is there a conflict between the "navigable in fact" standard and the principle of continued federal jurisdiction over formerly navigable streams. See \textit{Economy Light & Power Co. v. United States}, 256 U.S. 113 (1921), where the Supreme Court concurred in the finding of the court of appeals that the Desplaines River had, \textit{in its natural state}, been navigable and had carried commerce, \textit{i.e.} had been navigable \textit{in fact}.
\item 311 U.S. 377 (1940) (Justices Roberts and McReynolds dissented).
\item \textit{Id.} at 407.
\item \textit{Id.} at 433.
\end{enumerate}
stream either after the actual completion or after congressional authorization of a project, the Court would almost certainly defer to the legislative judgment. Evidence of completion or authorization would thus be treated as conclusive on the issue of navigability.\(^9\) This would limit an independent judicial inquiry into navigability to those cases where improvements had not been completed or have not yet been authorized.\(^{20}\) Even that inquiry is limited by the Court's admonition that neither completion nor authorization is necessary for a finding of navigability.\(^{21}\)

One other factor makes the likelihood of an independent judicial determination improbable.\(^{22}\) As will be seen, navigability is no longer an indispensable condition for the attachment of federal jurisdiction. Given certain conditions, the navigation power may also be exercised over non-navigable streams. Therefore the government has to depend on proving navigability of a given stream only where it seeks for the first time to subject to its control a stream-system in which no stream has ever been considered navigable—whether in fact or “in the light of the effect of reasonable improvements.”

In any event, since United States v. Appalachian, no case has been decided against the United States on the issue of navigability. It is tempting to treat this as proof of the absence of any judicial fact-finding process regarding navigability.

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19. Nor would that result seem to be influenced if the improvement works were conducted by order of the Secretary of the Army under Rivers and Harbors legislation, rather than under specific congressional authorization. The conclusiveness of a federal assertion of navigability should be kept distinct from the conclusiveness of a congressional assertion that a given project will serve the purposes of navigation, discussed infra.

20. This conclusion has applicability only in the navigation power context. Occasionally title disputes have arisen between the United States and a state as to the bed of a given stream on which the United States owns abutting land. In such disputes, the state typically alleges that the stream is navigable. Therefore, title to the stream-bed passed to the state as an incident of sovereignty upon admission to the Union. The United States, on the other hand, argues that the stream is non-navigable and that title to the bed therefore is in the United States as riparian owner. In this context, of course, navigability clearly is a matter of judicial determination and not of congressional assertion. For cases involving such title controversies, see Oklahoma v. Texas, 258 U.S. 574 (1922) (United States intervened to claim the southerly half of the bed of the Red River in Oklahoma); United States v. Utah, 283 U.S. 64 (1931); United States v. Oregon, 295 U.S. 1 (1935).


22. This does not necessarily mean that judicial review has become illusory. Rather, the Court’s attitude toward the issue of navigability may well be similar to its attitude toward a congressional determination of what activities “affect commerce.” See, e.g., United States v. Darby, 312 U.S. 100 (1941) where such a congressional determination precluded an independent judicial determination but not a determination of “whether the particular activity regulated or prohibited is within the reach of the federal power.” Id. at 120-21. In this context it should be noted that the Court in the Appalachian case expressly referred to “obvious limits” to improvements as affecting navigability. The remark leaves room for a potential review of whether in a given instance suggested improvements would go beyond such “obvious limits.”
In reality, it may merely prove the reasonableness of Congress in not attempting to subject to its control every creek in the United States—notwithstanding its theoretical power to do so.28

C. Non-navigable Streams

As has already been mentioned, federal control is no longer limited to navigable streams. In Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,24 Oklahoma sought to enjoin the construction of a federal multi-purpose dam and reservoir project, to be located on the Red River. Inter alia, Oklahoma contended that no part of the Red River was navigable within the state, and that the stream was thus not subject to federal control under the navigation power.25 The Supreme Court affirmed the district court's dismissal of the bill. Mr. Justice Douglas's opinion seemingly based the decision on the fact that "the power of flood control extends to the tributaries of navigable streams."26

The case can be read more narrowly. Mr. Justice Douglas pointed out that the lower reaches of the Red River had at one time been used for commerce. Federal control had therefore continued under the principle of "once navigable—always navigable." The head of navigation had been in Arkansas. However, under the rule of United States v. Rio Grande Dam & Irr. Co.27 federal control extended to all parts of the river.

Oklahoma v. Atkinson could thus be treated as a "once navigable stream" decision. The status of non-navigable waters in relation to the navigation power therefore was left in doubt.

The doubt was resolved to some extent in United States v. Grand River Dam Authority.28 By an act passed in 1941,29 Congress had expressly incorporated

23. Again there is an analogy to the regulatory power under the commerce clause generally. The sum of such cases as (inter alia) NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941) and Wickard v. Filburn, 317 U.S. 111 (1942) can be used to demonstrate not only that practically all economic activities can "affect commerce" but also to assert that the Court would defer to any such congressional declaration. The hypothetical parade of horribles ignores that Congress has, by and large, acted reasonably and assumes that judicial deference to reasonable action would automatically be transferred to unreasonable, arbitrary one. It assumes further the breakdown of sufficient political checks thus permitting such arbitrary action to be enacted into law in the first place. The same considerations would seem to hold in the navigability context. Cf., Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).
24. 313 U.S. 508 (1941).
25. No question of compensation was involved.
27. 174 U.S. 690 (1899).
the Grand River, a non-navigable tributary of the navigable Arkansas, into a comprehensive plan for the Arkansas basin. The stated purpose was "the benefit of navigation and the control of destructive floodwaters"\(^{30}\) to protect the Arkansas River. The Court treated *United States v. Rio Grande Dam & Irr. Co.*\(^{31}\) as clearly putting the protection of the "navigable capacity" (here of the Arkansas) within the constitutional power of Congress. On the issue of non-navigable tributaries, the Court referred to its "holding" in *Oklahoma v. Atkinson* and repeated: "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."\(^{32}\)

Nevertheless, the decision should not be read as a blanket subjection *ipso facto* of all non-navigable streams to the navigation power. Indeed, the government had contended that "the navigational servitude of the United States extends also to non-navigable waters."\(^{33}\) The government could only have thought to

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30. *Id.* at 232.
33. *Id.* at 232. The government spoke of the navigation *servitude* rather than the navigation *power* because it sought to achieve two things: one, to extend federal power to the non-navigable Grand River; two, to have the private property rights here involved burdened with the servitude, thus escaping the duty to pay compensation for their taking. For a discussion of the compensation aspect of the case, see Part II, II, D(3) *infra*.

As to its argument itself, perhaps the government thought it could be supported with dictum from the *Appalachian* case. That dictum described the authority of the government as being "as broad as the needs of commerce." Under such a criterion there would be no room to distinguish between navigable and non-navigable waterways in regard to congressional regulatory power. Likewise, the extent of the "needs of commerce" could then be said to determine the extent of the navigation servitude, i.e., the rule that certain private property may, in the exercise of the navigation power, be taken without compensation. See also Sato, *Water Resources—Comments upon the Federal-State Relationship*, 48 Calif. L. Rev. 43, 47 (1960) suggesting that the extension of the servitude upstream to non-navigable tributaries could "rationally be supported by the argument that the servitude is co-extensive with the commerce power." This speculation does not take account of two things. One, the Court in *Appalachian* made the statement in connection with navigable waterways. Two, the Court may merely have meant that Congress can exercise its powers under the commerce clause as fully when dealing with waterways as it can when dealing with highways. The Court may not have meant to imply immunity against compensation in the face of extra-navigational dealings. In other words, it may have spoken of an area covered by the commerce clause but not covered by the narrower (theoretically, at least) navigation servitude. Some support is lent to this suggestion because *Appalachian* did not involve compensability of private water rights. The Court also illustrated the "natural growth" of federal plenary power (in connection with navigability) with United States v. Cress, 243 U.S. 316 (1917). See United States v. Appalachian Power Co., 311 U.S. 377 (1940), note 35 of the opinion. The *Cress* case, far from extending the servitude to the "needs of commerce" granted the compensation claims of non-navigable tributary riparians. See Part II, II, C(2) *infra*, for a discussion of the *Cress* case.

But see Federal Power Commission, Opinion No. 356, April 19, 1962 (Docket No.
achieve with this contention the elimination of the distinction between navigable and non-navigable waterways. Congressional power over non-navigable waterways would have then existed independently rather than for the protection of the navigable mainstream. The Court avoided the issue by finding that in its view of the case "it is not necessary that we reach that contention." Its view of the case was, of course, that here the navigable capacity of the mainstream was at stake. United States v. Rio Grande Dam & Irr. Co. had already put the protection of that capacity under congressional control. There was thus no need to decide on a broader formulation of congressional power regarding the nation's waterways.

On its face, therefore, Grand River Dam Authority limits the exercise of the navigation power over non-navigable streams in two ways. One, the "navigable capacity" of the navigable mainstream must be at stake. Two, Congress must expressly exercise its power over the non-navigable tributary. Within these limits, non-navigable streams are subject to federal control.

D. Summary

Briefly then, this is the scope of congressional power as it emerges from these cases:

(1) All navigable streams are subject to the navigation power. "Navigable" means: (a) once having been navigable; (b) navigable in fact; (c) navigable due to reasonable improvements.

(2) Navigability is primarily a matter of congressional determination, subject to judicial review.

(3) Non-navigable streams which affect the navigable capacity of navigable streams are subject to the express exercise of the regulatory power.

Any stream-system in the nation could therefore be subjected to federal control by making any portion of it navigable. This would bring within the scope of the navigation power the non-navigable stretches and tributaries of the system.
if affecting the capacity of the mainstream.\textsuperscript{40} Theoretically at least, there are no waters in the United States immune from the navigation power.\textsuperscript{41}

II
THE LIMITS OF THE CONSTITUTIONAL POWER OF CONGRESS

A. The Purposes For Which The Navigation Power May Be Exercised

As will be shown in some detail later, historically the public right to navigation was intended to secure free and unhindered passage. In England the public right was limited to a "right of way"\textsuperscript{42} on the navigable stream itself with such incidental privileges as were necessary for its exercise. The jurisdiction of the Crown as "trustee and conservator" of the public right consequently was to reform and punish nuisances in all rivers that were a common passage, as well as to conserve navigability.\textsuperscript{43}

In the United States, \textit{Gibbons v. Ogden}\textsuperscript{44} made clear that the delegation of the power to regulate commerce vested in the national government the power to regulate navigation. For two reasons it was logical to assume that the protection and maintenance of navigation was the basis, the measure and the limit of the regulatory power. One was the historical content of the right of navigation as the right of the public to free passage. That content in turn had led to the historical role of the sovereign as the protector and conservator of the public right. The other was that the Court in \textit{Gibbons v. Ogden} spoke of the power over commerce. That again implied that congressional power would be limited to measures (including prohibitory measures) serving the protection and maintenance of that commerce.\textsuperscript{45}

Language in some of the early cases reflected these assumptions as to the limitation of the congressional power. In \textit{United States v. Rio Grande Dam and}

\textsuperscript{40} For similar conclusions as to the sweeping reach of potential federal jurisdiction see Sato, \textit{Water Resources—Comments upon the Federal-State Relationship}, 48 Calif. L. Rev. 43 (1960); Silverstein, Jr., \textit{The Legal Concept of Navigability v. Navigability in Fact}, 19 Rocky Mt. L. Rev. 49 (1946).

\textsuperscript{41} Whether this means that within the foreseeable future every creek in the United States will be federally regulated is another matter. Most likely, large-scale congressional dealings with the nation's waterways will be in the context of dam and reservoir projects. By their very nature, such projects would seem to require a sufficiently substantial stream system to make the project worthwhile. Hence it seems likely that once again theoretical and practical limits of congressional power are not co-extensive.

\textsuperscript{42} Coulson & Forbes, \textit{Waters and Land Drainage} 507 (6th ed. 1952) (hereinafter cited as Coulson & Forbes): "The right of navigation is simply a right of way and the right of navigation in tidal waters is a right of way thereover for all the public for all purposes of navigation, trade and intercourse."

\textsuperscript{43} The power of conservancy was early delegated to various subordinate authorities, of which the Commissioners of Sewers were the most important. \textit{Id.} at 552.

\textsuperscript{44} 22 U.S. (9 Wheat.) 1 (1824).

\textsuperscript{45} In \textit{South Carolina v. Georgia}, 93 U.S. 4 (1876) the Court sustained the power of Congress to obstruct navigation in one place in order to promote it elsewhere.
the Court spoke of the federal jurisdiction as exercisable for the purpose of taking "all needed measures to preserve the navigability of the navigable watercourses of the country." 46

Subsequent cases reiterated that the United States was limited in its dealings with navigable rivers "to the control thereof for purposes of navigation." 47

Thus it appears as though the power to control navigation at one time meant that Congress was exercising a role of "trustee" and "conservator" similar in some respects at least to that exercised by the king. 48

United States v. Appalachian Power Co., 49 Oklahoma v. Atkinson, 50 and United States v. Grand River Dam Authority 51 upheld flood control and watershed development projects as constitutionally sanctioned measures available for the preservation of navigable waterways. The magnitude of some of these projects is common knowledge. That very magnitude gives a sweep to the federal power which bears little resemblance to the power expressed in the 22nd chapter of Magna Carta providing that "all weirs from henceforth shall be utterly put down through Thames and Medway, and through all England." 52 One common bond nevertheless remains. Flood control and watershed development projects can (though need not necessarily) be as much of an exercise of the prerogative to protect navigation as "putting down weirs." Totally dissimilar conditions merely produce totally dissimilar ways in which to exercise the prerogative. Appalachian, Oklahoma v. Atkinson and Grand River Dam still leave the proposition intact that the right of the public to free and unhindered passage is the basis and measure of the federal power.

The appearance of so-called multi-purpose projects on the other hand 53 constituted a marked departure from the traditional content of sovereign dealings

46. 174 U.S. 690, 703 (1899).
47. Port of Seattle v. Oregon & W. R.R., 255 U.S. 56 (1921) is typically cited for that proposition. Actually, the controversy was between the Port of Seattle, a municipal corporation, and the railroad. At issue was the right of the railroad as owner of land adjoining East Waterway in Port of Seattle to build piers, etc. over which to secure access to a navigable channel. United States v. River Rouge Co., 269 U.S. 411 (1926) used similar language in describing the federal right. At issue was the propriety of a jury charge emphasizing the element of uncertainty inherent in the privileges riparian owners enjoy.
48. In one respect, the congressional power was broader even at this point. According to South Carolina v. Georgia, 93 U.S. 4 (1876), Congress could obstruct navigation in one place to promote it somewhere else. The right to legalize encroachments for the benefit of navigation was in England reserved to Parliament. See Gould, Waters § 21 (3rd ed. 1900) (hereinafter cited as Gould).
49. 311 U.S. 377 (1940).
50. 313 U.S. 508 (1941).
52. See Coulson & Forbes 552, giving this example of the nature of the king's jurisdiction.
53. Typically, the "extra-navigational" purposes served are the development and disposition of power.
with navigable waterways. The constitutionality of such projects had its first proponent in Mr. Justice Brandeis:

[T]hat purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power.54

The use of the word also seems to imply that Mr. Justice Brandeis intended a requirement that navigation be the primary purpose. If so, then his statement had acquired a certain “gloss” by the time it reappeared in Oklahoma v. Atkinson as authority for this proposition:

[T]hat 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... Arizona v. California. . . .55

In the conflict between “primary” and “other” purposes the balance thus had been shifted in favor of “other” purposes. In United States v. Twin City Power Co.56 finally, the Court sanctioned a project which at best benefited navigation incidentally. That at least was the manner in which the House Report accompanying the Savannah River Clark Hill Project described the navigational aspects of the project.57

For the time being, this is where the matter rests. The rule that evolves from these cases supports federal projects in the name of the navigation power for non-navigation purposes. The origin of the power still demands that one purpose be the protection or the improvement of navigation. But once that requirement has been complied with, Congress may in effect use the waters of both navigable and non-navigable streams for whatever purposes it wishes.58 For that matter, it

57. See H. R. Doc. No. 657, 78th Cong., 2d Sess. 66-67 (1944) to the effect that a suitably constructed project would “incidentally reduce downstream flood damages and improve low-water flows for navigation.” (Emphasis added.) The court of appeals had proceeded from an earlier finding in Savannah River Elec. Co. v. FPC, 164 F.2d 408 (4th Cir. 1947) that navigation improvement was not the congressional purpose. It is not clear whether the court meant not the primary purpose or not a purpose at all. For the proposition that the tenor of the entire report made it clear that the project was primarily undertaken for the development of power, see 56 Colum. L. Rev. 793 (1956).
58. At least where it expressly exercises its power over the non-navigable tributary, as opposed to an exercise of the power on the navigable mainstream only with incidentally injurious effects on the non-navigable tributary. See Part II, II infra.
is not even necessary that such “other” purposes are constitutionally sanctioned.\textsuperscript{60} Congress may for instance “go into the business” of selling power if incidental to such an enterprise there is a benefit to navigation.\textsuperscript{60}

A number of conclusions thus become inevitable. For one, navigation has ceased to be the measure and the limit of federal power. That has occurred through the sanctioning of multi-purpose projects, especially through the sanctioning of a project that only incidentally “benefited” navigation. Obviously, this constitutes a complete departure from the raison d’être of the navigation power. That power was supposed to do nothing more than secure to the public the free and unhindered passage on its waterways. Finally, and by historical necessity only, navigation has remained the basis, the constitutional touchstone of federal power. Unless all attempts at maintaining a semblance of historical justification are abandoned, it will therefore be necessary for congressional projects to “serve” navigation, albeit incidentally.

The requirement of at least an incidental benefit to navigation affords a theoretical check over the exercise of so vast a congressional power. Whether such a check, in the form of judicial control, actually exists is the question to which we next turn.

B. Judicial Supervision Over The Congressional Exercise Of The Navigation Power

Judicial supervision over congressional dealings in the name of navigation has failed to be an effective check of congressional power. It has failed because the Court has from the very outset pursued a policy of non-interference with congressional judgments. More than that, it has followed a policy of accepting at face value congressional declarations that particular projects are necessary for or would “benefit” navigation. The first important “modern” case raising the problem was \textit{United States v. Chandler-Dunbar Water Power Co.}\textsuperscript{61} It gave the Court an opportunity to deal with the question of judicial review in the face of a congressional declaration of purpose regarding a particular stream. The act

\textsuperscript{59} See Mr. Justice Brandeis’s language from \textit{Arizona v. California}, note 54 \textit{supra}.

\textsuperscript{60} It is assumed here that no attempt is made to support such an enterprise with the commerce power generally or with some other delegated power, thus leaving no other constitutionally sanctioned basis for the federal activity.

\textsuperscript{61} 229 U.S. 53 (1913). The tone had been set as early as 1855, however, in Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855). The Supreme Court had declared the defendant’s bridge across the Ohio River to be an obstruction to navigation and had ordered it removed. Subsequent to the decree, an act of Congress declared the bridges across the Ohio to be lawful structures. Held: the decree could no longer be enforced, since there was no longer any interference with the public right. In so holding, the Court spoke of the regulation of commerce as including “navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation.” \textit{Id.} at 431. Mr. Justice McLean charged in his dissent that the congressional act was an unconstitutional attempt to “alter a fact” found to be so by the Court. \textit{Id.} at 439.
involved merely stated that ownership of the stream in fee simple absolute was "necessary for the purpose of navigation of said waters." The Court concluded:

that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river . . . and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined . . . that the whole river . . . was necessary for the purposes of navigation . . . that determination was conclusive.

Thus the Court declined to exercise its own judgment as to what was necessary for the regulation, protection, or improvement of navigation. Presumably, some retention of judicial control could be implied from the statement that Congress had not acted "arbitrarily" in appropriating the entire flow of the river for navigation purposes. However, the judicial control so retained has remained dormant. The Court has never found congressional "navigation measures" to be unreasonable or arbitrary.

Two years later the Court retreated further. In *Greenleaf Lumber Co. v. Garrison* it made clear that the conclusiveness of the congressional judgment embraced the determination of what was or was not an obstacle to navigation. Again there was an indication that arbitrary action might meet with judicial review. Again, there is no case that has realized that warning.

In *Arizona v. California,* Arizona gave its attack on the Boulder Canyon Project Act a different emphasis. It urged that the act's recital of navigation was a mere subterfuge. Having refused to examine congressional providence, the Court, predictably enough, declined to examine congressional consciences.

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64. The *Chandler-Dunbar* case was decided in 1913. Until 1937, the Court exercised a formidable amount of judicial control over the exercise of the commerce power. It would be interesting to know the reasons for the totally different attitude toward the congressional use of the navigation power.
67. 237 U.S. 251 (1915).
68. And again, of course, the question arises whether that phenomenon is attributable to judicial deference or to congressional reasonableness. See also note 23 supra.
69. 283 U.S. 423 (1931).
70. The Boulder Canyon Project Act was enacted December 21, 1928, ch. 42, 45 Stat. 1057.
Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this Court may not enquire. 71

As for the measures proposed in the act, the Court thought them "not unrelated to the control of navigation." It reiterated that their reasonable necessity was for Congress to determine. 72

Thus Arizona v. California relinquished the judicial hold over congressional declarations professing to exercise the navigation power. 73 All that remained was the suggestion of an independent assessment of the nexus between the proposed means and navigation. 74 It is possible that the mere suggestion of such an independent assessment has had a certain restraining influence on Congress. If so, that has been its sole contribution to the history of Congress and the navigation power. 75

Almost twenty years later, in United States v. Gerlach Live Stock Co., 76 the Court suddenly gave notice that judicial review might yet come to mean more than the almost automatic acceptance of congressional declarations. 77 The case involved the Central Valley project in California and more particularly, Friant

71. 283 U.S. 423, 455 (1931). Only five years later, in United States v. Butler, 297 U.S. 1 (1936), the majority of the Court struck down the Agricultural Adjustment Act after an extended examination of the congressional purpose.


73. See also Corwin concluding that the Court "has come, in effect, to hold that it will sustain any act of Congress which purports to be for the improvement of navigation ...." The Constitution of the United States of America, Prepared by the Legislative Service, Library of Congress, Ed. S. Corwin 131 (1952). (Emphasis added.) The inevitability of that conclusion (as well as of the one reached in the text) becomes even clearer when it is considered that in Arizona v. California, for instance, the Court must have been aware that the Boulder Dam project had to destroy downstream navigation—given the already then existing, clearly established, irrigation demands.

74. It could of course be argued that there is (today at least) no greater control in other areas of regulation and that there is consequently nothing unique about the navigation power. Undeniably, in many instances judicial control over regulatory powers is limited to an assessment of "nexus." And if that assessment actually occurred in the navigation context, there would indeed be nothing much unique about the navigation power. However, the facts of Arizona v. California make it rather doubtful that the assessment exists anywhere but on paper.

75. See also United States v. River Rouge Improvement Co., 269 U.S. 411, 419 (1926). Finding that the trial court's charge to the jury had overemphasized the uncertainty of riparian rights, the Court spoke of the necessity of "some positive relation to navigation" preventing Congress from arbitrarily destroying riparian rights by legislation which "has no real or substantial relation to control of navigation or appropriateness to that end."


77. In the meantime, the Court had reaffirmed its "hands off" attitude. See United States v. Commodore Park Inc., 324 U.S. 386 (1945) (destruction of navigability in one place to promote navigation elsewhere); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).
Dam. At issue was the compensability of certain state-created water rights. Ultimately the Court held that the federal government had the constitutional power to construct reclamation works under the Reclamation Act as an incident of the power to spend for the general welfare. That power does not carry with it immunity against compensation as does the navigation power. Under section 8 of the Reclamation Act therefore, the federal government had to pay for the impairment of private property.

The government had sought to avoid compensability by bringing the project under the navigation power. The project had been authorized in the Rivers and Harbors Act of August 26, 1937 and again in the Rivers and Harbors Act of October 17, 1940. In both enactments, Congress said that "the entire Central Valley project . . . is . . . declared to be for the purposes of improving navigation. . . ." The government contended that this overall declaration of purpose applied to Friant Dam; consequently the rule of no compensation was said to apply to the destruction of riparian interests. Friant Dam finally was described as involving "a measure of flood control, an end of which is sensibly related to control of navigation."

The Court found no congressional intent to exercise the navigation power.

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78. The claimants were owners of so-called "uncontrolled grass lands." Their claim was for the unhindered enjoyment of the natural, seasonal fluctuation of the San Joaquin River. The project was to put an end to such largely unutilized peak flow. 339 U.S. at 730.
80. "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right," Reclamation Act of 1902, ch. 1093, § 8, 32 Stat. 390.
82. 339 U.S. at 731.
83. Id. at 736.
84. The Court arrived at its conclusion notwithstanding the recital of navigation in the two enactments of the Rivers and Harbors Act mentioned above. A number of factors explain this result. One, the 1937 and 1940 enactments "reauthorized" a project initiated by President Roosevelt in 1935 by the allotment of funds for Friant Dam under the Federal Emergency Relief Appropriation Act. The original authorization of the Friant Dam project had provided that it be "reimbursable in accordance with the reclamation laws." Two, the Secretary of the Interior had at the time made a "finding of feasibility" required for projects under the Reclamation Act. His finding made no
Consequently, it did not decide the constitutional issue. But neither did it entirely by-pass the problem.

Accordingly, we need not decide whether a general declaration of purpose is controlling where interference with navigation is neither the means . . . nor the consequence . . . of its advancement elsewhere. Similarly, we need not ponder whether, by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream . . . without compensation. . . . We have never held that or anything like it, and we need not here pass on the question of constitutional power. . . .

Whatever import these words would turn out to have, by no means could the Gerlach case be read as a rejection of the "superior rights theory" of the navigation servitude, as has been contended. More likely, the intention was to signal an end of the Court's acquiescence into judicially unchecked congressional dealings with the nation's waterways. If so, the ominous sounds faded when Mr. Justice Douglas reasserted, in United States v. Twin City Power Co.:

It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. . . . The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate. Courts should respect that decision until and unless it is shown to involve an impossibility. . . .

reference to navigation. Three, the congressional "reauthorization" again made reference to reclamation laws. Finally, both the Friant Dam and San Joaquin projects had been administered by the Bureau of Reclamation.

85. 339 U.S. at 737. (Emphasis added.) But note the opinion of Mr. Justice Douglas (concurring in part and dissenting in part) at 756. He leaves no doubt that but for the congressional agreement to pay, which he sees contained in section 8 of the Reclamation Act, no rights existed which could have withstood the exercise of the navigation power. And see also note, The Supreme Court, 1949 Term, 64 Harv. L. Rev. 114, 137 (1950) pointing to the striking feature of Gerlach, which allows recovery to riparians on navigable streams in the states covered by the Reclamation Act where the owners of similar "property" in other states would not be allowed compensation.


87. 350 U.S. 222, 224 (1956). (Emphasis added.) Justices Burton, Frankfurter, Minton and Harlan dissented. The dissenters thought it unnecessary to discuss whether the project was primarily in the interest of navigation, since in any event the United States had the power of eminent domain. This obscures the vital distinction between the navigation power and the power of eminent domain, i.e., that compensation may not be payable under one but is payable under the other.
Thus all was quiet again on the Potomac. Furthermore, it remained that way. In *United States v. Grand River Dam Authority* the Court spoke once more of the legislative character of the determination that a given project will benefit navigation.

All of this means that Congress is the body that determines the measure and limit of the navigation power. The Court plays practically no role in this determination, absent obviously arbitrary and capricious congressional action. It has limited itself instead to noting and accepting at face value the perfunctory reference to navigation as the basis of the respective congressional project so reciting it. That at least seems to be the Court's position where Congress makes clear that it is exercising the navigation power. But Congress does not always make that clear. What the Court does in face of ambiguous congressional declarations is therefore the next question briefly to be explored.

**C. Ambiguities In Congressional Enactments**

*United States v. Gerlach Live Stock Co.* raised the question whether a general declaration to improve navigation lets the United States appropriate water and water rights of particular streams without compensation. The case did not answer the question. Nor did it give much indication of the Court’s attitude. That came for the first time in *FPC v. Niagara Mohawk Power Corp.* The Commission argued that such state-created rights as were involved could constitutionally be abolished without compensation and that Congress had already done so. The Court had no quarrel with the first of these contentions. As to the second, however, it required a “clear authorization” such as had been present in *United States v. Chandler-Dunbar Water Power Co.*

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89. It would seem that the “showing of an impossibility” (*Twin City*) allows for an even narrower margin of judicial review than the evaluation of the nexus—even assuming such an evaluation actually takes place. But see note 74 *supra*.
91. Here contained in the 1937 and 1940 Rivers and Harbors Acts. See notes 81 and 84 *supra*.
93. 347 U.S. 239 (1954) (Justices Douglas, Black and Minton dissented and Justices Reed and Jackson took no part in the decision).
94. The rather complex question raised was whether the Federal Water Power Act of 1920 had abolished state-created, private proprietary rights to the use of water of navigable streams for power purposes. If so, then the FPC would be justified in disallowing expenses paid by the licensee for the use of such rights from being deducted in the computation of his amortization reserve under section 10(d) of the act.
95. 229 U.S. 53 (1913).
It failed to find in the Federal Water Power Act an "express" assertion of the governmental right to use the flow of a navigable stream to the exclusion of existing users.

The requirements of a "clear authorization" and an "express assertion" of the superior federal right were drawn into doubt by the Twin City decision. By admission of both Congress and Court the project benefited navigation only incidentally. Nevertheless, the Court attributed to Congress an intent to invoke the navigation power. It has been argued that this attribution was a modification of the Niagara Mohawk rule. Undoubtedly, there was no "clear assertion" in Twin City that the Clark Hill project was an exercise of the navigation power. By the same token, Congress did speak in terms of particular rivers and basins. The Twin City case therefore did not answer the question whether Congress may appropriate without compensation the waters of a particular river, if it relies only on a general statutory declaration. FPC v. Niagara Mohawk Power Corp. strongly suggests a negative answer. United States v. Twin City Power Co. does not suggest an affirmative one. Consequently prudence alone would seem to make it advisable for the United States to precede the appropriation of particular waterways with an "express assertion" of its superior right.

D. Summary

The conclusions reached in this chapter can be summarized in these propositions:

(1) The protection or improvement of navigation has remained the constitutional touchstone of congressional power.

(2) The protection or improvement of navigation has not remained the measure and the limit of congressional power. Under the auspices of the navigation power, Congress may engage in extra-navigational projects which would, but for some connection with navigation, lack constitutional authorization. The constitutionality of such projects seems assured as long as navigation is benefited, although only incidentally.

97. See note 57 supra.
98. See 56 Colum. L. Rev. 795 (1956).
99. This conclusion does not bar the United States from preventing interferences with the navigable capacity of the nation's waterways under the Rivers and Harbors Act. Act of Sept. 19, 1890, ch. 907, § 7, 26 Stat. 454; Rivers and Harbors Act. 30 Stat. 1151 (1899), as amended, 33 U.S.C. §§ 401-26 (1958). Passage of rivers and harbors legislation constituted an exercise by Congress of its power to regulate navigation. Any burden thereby cast on the states or private individuals falls under the rule of no compensation, although no express declaration precedes individual measures taken under the act.
101. See cases cited note 100 supra.
(3) A congressional declaration that a given project will serve the interests of navigation is legislative in character and non-reviewable save for a showing of impossibility. 102

(4) A congressional judgment regarding the reasonableness of the means chosen for the protection or improvement of navigation is conclusive and non-reviewable save for a showing of obvious arbitrariness. 103

(5) Congressional declarations of dealings with the nation's waterways should contain a clear assertion of the navigation power. 104

PART II
THE NAVIGATION SERVITUDE

I
THE RULE OF NO COMPENSATION

A. Introduction

In the preceding discussion, reference has been made to the "navigation servitude"—as a shorthand expression for the rule that in the exercise of the navigation power certain private property may be taken without compensation. 105 That rule has been the occasion for speaking of the unique character of the navigation power as compared to other regulatory powers. 106 What such descriptions drive at is this: control over navigation was in Gibbons v. Ogden described as part of the control over interstate commerce. The description has been adhered to ever since. 107 Yet the navigation power is said to differ in one striking regard from other aspects of the power over interstate commerce and, for that matter, from other regulatory powers. In the exercise of these other powers Congress may

107. See for instance Mr. Justice Douglas in United States v. Grand River Dam Authority, 363 U.S. 229, 233 (1960): "When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause...." (Emphasis added.)
take private property for public purposes but only upon payment of just compensation, as required by the fifth amendment. But where Congress exercises the navigation power, the basic inhibitory principle against the taking of private property without compensation is said in effect to break down. Congress may thus destroy or impair with impunity certain private rights and values in water courses—for which it would have to pay full compensation were it to destroy the same, identical rights in the exercise of a different power.

Two caveats have to be sounded before this description of the navigation servitude and its “unique” character can be accepted as correct. One is that the rule applies only to “certain” private property. It would thus be misleading to assume that the scope of the navigation power is commensurate with the navigation servitude. In other words, power and servitude are not interchangeable concepts. Rather, given a proper exercise of the power, the question still left to be examined is in all cases: are these private property rights burdened with or affected by the servitude?

The second point goes to the contrast between the navigation power and other regulatory powers. The assertion is that under the former certain private property may be taken without compensation which under the latter would be compensable. As will be seen, the cases bear out the assertion. Nevertheless, some qualification of too sweeping a claim for uniqueness is in order. Under all regulatory powers property rights may be “diminished” albeit not “taken”—and an impressive array of cases attests to the often thin line between non-compensable “regulation” and compensable “taking” of property.

Certainly at least some of the “servitude cases” can be explained as involving non-compensable regulation or “consequential injury” without necessitating recourse to unique compensation rules.

108. See International Paper Co. v. United States, 282 U.S. 399 (1931) where the United States took the petitioner’s right to use water in a power canal in the exercise of the war power. Payment of compensation was required. And see the Gerlach Livestock case again (although not involving a regulatory power) upholding the power of the federal government to spend for the general welfare and to take state-created water rights upon payment of compensation.


110. As a matter of fact, Part II, infra, is devoted to the detailed examination of just what rights are destructible without compensation.

111. See Mr. Justice Holmes’s discussion of the “regulation” versus “taking” problem in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922). And compare United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952) where destruction of private property (to prevent its use by the Japanese) by the armed forces was held not to be a compensable taking. “This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign. No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts.” Id. at 155-56 (Justices Douglas and Black dissented).

112. The requirement that there must be a “direct” appropriation rather than merely “consequential injury” resulting from the exercise of a lawful power goes back to The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870). See Corwin, supra note 73, at 867,
Nevertheless, there remains a crucial area wherein private property is taken (rather than regulated or injured consequentially) and where no compensation is payable if Congress proceeds under the navigation power, but where compensation would be payable if Congress had exercised another of its regulatory powers. That area may appropriately be spoken of as unique and the no compensation rule governing it as anomalous. Yet the rule is firmly established. But for all its unquestioned acceptance, there is little explanation of its origin or basis to be found in either the cases or the literature.

B. Explanations Offered By The Cases

The Supreme Court, in its earliest as well as in its latest opinions, typically refers to the navigation power as a “dominant right,” a “right of plenary nature,” a “superior power.”113 Both the states and the people are said always to have been subject to this “established prerogative.”114 By definition therefore, the exercise of the prerogative is held not to result in a taking of property because the owner’s title is “at best a qualified one . . . subordinate to the public right of navigation.”115

The explanation is unsatisfactory. All powers of the federal government are “superior.” They are superior in the sense that they are capable of pre-empting state legislation.116 Thus they can subject the states as well as the people to the “superior power” of the national government. By the same reasoning, all titles to private property can be said to be “qualified” because all such titles can be subordinated to “superior” federal power in those areas in which the national government has become active. It does not follow, however, that the owner of the potentially subordinate title is “therefore” not entitled to compensa-
tion upon its destruction. The supremacy of federal power vis-à-vis state-created private property is one question. It has been settled in favor of the federal government. Whether or not the United States should pay a price in the form of just compensation for the exercise of its power is another, quite different question. In the adoption of the fifth amendment that question has been answered in favor of the individual owner—at least where his property has indeed been taken.\textsuperscript{117} That is, in principle at least private property is subordinate but compensable.

The fact of subordination of private water rights to the "public right of navigation"\textsuperscript{118} therefore does not per se explain their non-compensability. Nor does it explain why the very same rights must be compensated if the United States destroys them in exercise of a different, yet presumably equally "superior" power.\textsuperscript{119} The insufficiency of the Court's explanation becomes especially apparent in light of the persistent characterization of the servitude as derived from and indeed narrower than the commerce power.\textsuperscript{120} The characterization as but part of one of the constitutionally delegated regulatory powers makes the rule of no compensation all the more anomalous.

\textbf{C. Explanation Offered By The Literature}

Nor can much help be found in the literature on the navigation power where it deals at all with the origin of the no compensation rule. For the most part, it merely accepts the explanation of the Supreme Court.\textsuperscript{121} The commerce power is said to include control over navigation. That control in turn is described as "complete" and private usufructuary rights are acquired subject to whatever paramount rights have always existed.\textsuperscript{122} One writer has suggested that:

\begin{quote}
The primary determination is one of property rights. It is self-evident that all property rights possessed by the United States cannot be private
\end{quote}

\textsuperscript{117} Again this remark must be understood against the background of the "regulation" versus "taking" problems and such cases as United States \textit{v. Caltex}, note 111 supra.

\textsuperscript{118} United States \textit{v. Chandler-Dunbar Water Power Co.}, 229 U.S. 53 (1913).

\textsuperscript{119} Such as the war power, relied on in International Paper Co. \textit{v. United States}, 282 U.S. 399 (1913).

\textsuperscript{120} See Mr. Justice Burton in United States \textit{v. Kansas City Life Ins. Co.}, 339 U.S. 799, 808 (1950): "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases."

\textsuperscript{121} For that matter, most of the writers focus their investigation on other problems and take the rule more or less for granted.

\textsuperscript{122} See Sato, \textit{Water Resources—Comments upon the Federal-State Relationship}, 48 Calif. L. Rev. 43 (1960). Again, there is no further inquiry into the origin of the rule. Nor is there any explanation as to why the navigation power is so much more "complete" than the commerce power generally or any of the other regulatory powers.
property, and that the exercise of these rights does not involve loss to any private owner.\textsuperscript{123}

In order therefore to show a compensable injury, the claimant would have to possess property rights unburdened by the servitude, for rights that are burdened are not legally protected. Far from providing the “consistent measure of compensation” claimed for this “servitude analysis,” it leaves the most important question unanswered. The question of course is an indication as to the basis for such a “property right” of the United States.\textsuperscript{124}

D. The “Notice Theory”

A degree of justification for the rule of no compensation could perhaps be found in a sort of “notice theory.” The Supreme Court has never developed a sound and comprehensive notice theory as an explanation or justification for the rule of no compensation. But it has at times bolstered the rejection of compensation claims by reference to the claimant’s “knowledge” of the superior federal right.\textsuperscript{125} In other words, all who make use of navigable waterways presumably “know” that any rights they may acquire are subject to destruction without compensation. Therefore they make investments at their own risk and cannot reasonably expect to be protected. There is a superficial analogy to certain aspects of zoning law. If land has been restricted for residential use, payment upon condemnation is made for the restricted use. The value of any subsequently created non-conforming use would be disregarded.\textsuperscript{126} It is questionable whether the disregard is based solely on “notice.” More likely it merely follows from the refusal of the state, expressed in a valid police regulation, to sanction the creation of such a property right. Nevertheless, notice of the restriction does help to make the expectation of compensation for the non-conforming use unreasonable. Pre-existing non-conforming uses on the other hand require compensation in terms of their existing value. Protection is thus given to the reasonable expectations of those who relied on the state of the law at the time of their investment. Similarly, waterways could be said to be “restricted.” That is, they may be used


\textsuperscript{124} See also Comment, \textit{Constitutional Law—Eminent Domain—Condemnation of Riparian Lands under the Commerce Power}, 55 Mich. L. Rev. 272 (1956) which speaks of a “quasi-proprietary right” of the United States, an explanation that leaves substantially the same question. And see Part II, I, E infra, for the proposition that there was never any recognition of the \textit{jus privatum} of the Crown in this country which could conceivably serve as the basis for a proprietary claim.

\textsuperscript{125} See, \textit{e.g.}, Louisville Bridge Co. v. United States, 242 U.S. 409 (1917); Union Bridge Co. v. United States, 204 U.S. 364 (1907). Both cases are discussed in Part II, II, B infra.

\textsuperscript{126} 6 Powell, \textit{Real Property} § 869 (1958).
only as long as the United States does not invoke its "plenary power" to abolish private rights completely or to condition their exercise. Since the restriction has "always" existed, pre-existing uses are not possible. All uses are subsequent ones and reliance on their continued existence or protection is unreasonable.127

The analogy is superficial and the notice theory unsatisfactory. First of all, it is doubtful to what extent notice of some superior (though obviously not federal) right can be said to have existed in the original colonies.128 Secondly, knowledge that one's title to private property is "qualified" and potentially subordinate to a dominant power does not per se make it unreasonable to expect compensation for investments made prior to the actual exercise of that power. As has already been pointed out, the supremacy of the sovereign power and the compensability of private property are two separate questions. It was not unreasonable to expect compensation for the exercise of the "superior" war power.129 It was not automatically unreasonable to expect compensation for the exercise of the "superior" navigation power. Yet there was as much notice of one power as there was of the other. Nor could it have been clear at the outset just what private property rights were non-compensable if destroyed in the exercise of the navigation power.130 Today, of course, the situation is different. However anomalous the no compensation rule may be, there is ample knowledge of its existence. Presumably therefore, investments made today are made without reliance on a right to compensation and any such expectation would be unreasonable. This consideration is of small comfort to those whose investments antedate the gradual determination of the magnitude of the federal power.

Finally, the notice theory fails to take account of two pertinent developments. One is the constitutionally sanctioned increase in federal activity under the navigation power from its humble beginnings in *Gibbons v. Ogden*. The other is the expansion of the word "navigable." Today that expansion subjects streams to federal control which not long ago would have been treated as non-navigable and thus as immune from the dominant federal power. To justify the no compensation rule by the idea of notice of a paramount federal right in navigable

127. It is interesting to note that some notion of "notice" runs through the cases upholding eminent domain and taxing and police powers over contract clause claims. See Hale, *The Supreme Court and the Contract Clause* (pts. 1-3) 57 Harv. L. Rev. 512, 621, 852 (1944). One example is West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848) dealing with the reacquisition (under eminent domain power) of previously granted property: "But into all contracts . . . enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature . . . they are always presumed, and must be presumed, to be known and recognized by all. . . . Such a condition is the right to eminent domain." Id. at 532. (Emphasis added.)

128. But see E (3) infra, under Part II, I.

129. As was shown in *International Paper Co. v. United States*, 282 U.S. 399 (1931).

130. Nor is that question entirely settled at this date. See for instance Sato, "the limitation (of the servitude) is not presently subject to precise definition." Sato, supra note 122, at 46.
streams would require that navigability be defined as of the time the private right in question was acquired. The cases make no such distinction. Nor is it likely that the United States would be estopped in favor of investments made before federal activity or the concept of navigability had reached their present scope—before, in other words, there was any meaningful notice. There is the general reluctance to invoke estoppel against the sovereign. Beyond that, uniformity would then call for the use of estoppel against the expansion of all constitutionally granted powers. The proposition seems absurd and in conflict with our basic tenet of constitutional interpretation.

E. Historical Aids

There appears then at this point no satisfying explanation for the no compensation rule. The dissatisfaction with the Court's language about a "superior federal power" rests largely on the simultaneous characterization of that power as part of the broader commerce power. Yet property taken in exercise of the commerce power generally would require the payment of compensation. The dissatisfaction with a notice theory rests largely on the difficulty of finding a meaningful notice before the inception of the Union and throughout its early history up to a time of some certainty about the kinds of property subject to destruction without compensation.

It is here that "a page of history" might well go a long way. This paper lays no claims to being an historical study of the treatment of navigation by the early common law. Yet even a superficial glance elucidates what the Court may have in mind when it speaks of federal "plenary power" or "knowledge" of the superior right.

The common law attached great importance to two rights of the public in navigable waters: navigation and fishing.131 The English definition of navigable waters differed (and differs today) from the American.132 The difference is not

131. This paper will give no consideration to fishing rights. They are mentioned only because public fishing rights in navigable streams were historically considered as important as navigation.

132. In English law, "navigable" waterways are those in which the tide ebbs and flows. As the Supreme Court pointed out in Packer v. Bird, 137 U.S. 661 (1891), under that rule such rivers as the Po, Nile, Rhine, Danube etc. are non-navigable rivers, while a small creek might be navigable because near enough to the ocean for the tide to ebb on it. However, the rule makes sense for England since all rivers of any importance are subject to the tides there. The totally different situation of the United States led to the rejection of the English rule first for admiralty jurisdiction and then for navigation control. See The Genesee Chief, 53 U.S. (12 How.) 443 (1851); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); Packer v. Bird, 137 U.S. 661 (1891); Gould § 42 et seq. on the English rule. American common law originally followed Roman law on the question of navigability. Roman law (and through it continental law) divided waterways into public and private ones. Broadly speaking, public waterways (fluem publicum) were those that were navigable in fact. There has been much controversy over the exact scope of the concept of fluem publicum. See Ossig, Roemisches Wasserrecht (1898). However, the
important. Important rather are certain consequences that attached once a waterway was considered "navigable."

1. The Law of England

Under the law of England, the Crown has the right of property in the arms and inlets of the sea within the realm. The right also includes tidal rivers—in other words navigable rivers under the English test of navigability.

These rights of the Crown are classed among the regalia or prerogative rights. Prerogative rights are by the common law accorded to the king as an incident to the powers of government: for the protection of the realm and in the interest of commerce.

*De Jure Maris* described the Crown's interest in navigable waters as being of a twofold nature. One was said to be the *jus publicum*, the right to jurisdiction and control for the benefit of the subjects. The other was said to be the *jus privatum*, the right of private property of the Crown, independent of any ownership of the adjoining lands. The existence of the *jus privatum* has been much disputed. But there has apparently never been any conflict over a number of other propositions. Foremost of those was the right of the public to free and unhindered passage. That right was spoken of as a "natural right," a right "whose origin is lost in antiquity." It was, in any event, a right that took account of the obvious importance of navigable waterways (by whatever definition) to a developing society. That the rights of the public were limited to navigation and fishing has rather plausibly been explained by their being the only general uses of which such waterways were in early days supposed to be capable.

Secondly, the public right was paramount to any rights the Crown might have in navigable waters. Consequently, the Crown could not use its property so as to derogate navigation. Nor could it invest its grantee with greater power than it details of that controversy need not concern us here. American law at first adopted the same test. See *The Daniel Ball*, supra. The present-day viability of the rule of "navigable if navigable in fact" has been examined in Part I, II, *A supra.*

133. The following description of the law of England is for the most part taken from Gould. But see also Phear, *Rights of Water* (1859) for valuable insight into English rules. For English modern law see Coulson & Forbes.

134. See Gould § 20 quoting Bacon: "All prerogatives must be for the advantage and good of the people; otherwise they ought not to be allowed by law."

135. The 17th century treatise commonly ascribed to Lord Hale.

136. In the course of that conflict Hale's authorship was seriously disputed, mostly because it lent great weight to the authority of *De Jure Maris* See Gould § 18. The conflict was finally settled in favor of the existence of a private interest in the Crown, apart from adjoining lands. Gould § 3.

137. So for example Phear, *supra* note 133.


139. That at least is Phear's explanation. And see Gould § 1: "The sea is serviceable for important uses, especially for navigation and fishing."
itself had. Thus the grantee's property was equally subject to the public right and he, too, could do nothing in derogation of it.\textsuperscript{140}

Thirdly, the right of navigation extended over every part of the navigable river. All rights necessary for the free and convenient passage of vessels were incidental to the main right of navigation, although their exercise injured "private property."\textsuperscript{141}

Finally, any interference with the paramount right of the public created an abatable nuisance.\textsuperscript{142} The king, as conservator and protector of navigation had jurisdiction to reform and punish such nuisances.\textsuperscript{143}

These were the relevant rules regarding tidal waters. Basically, they have remained unchanged, "jealously guarding" the right of navigation as a "great public interest."\textsuperscript{144}

One other development clearly demonstrates the importance of navigation to the early common law. Under its terminology, only "tide waters" were "navigable waters" that is, "public waters" belonging \textit{prima facie} to the Crown but being subject as a matter of "natural right" to the \textit{jus publicum} of navigation and fishing. In rivers above the ebb and flow of the sea, title to the soil rested \textit{prima facie} in the riparian owners and the right of fishing was private.\textsuperscript{145} Nevertheless, \textit{De Jure Maris} spoke of the king's jurisdiction to reform and punish nuisances in all rivers that were a common passage, whether fresh or salt. The treatise clearly supported the doctrine that the public had a right of navigation in fresh-water rivers, albeit the only right. After a period of some doubt,\textsuperscript{146} the present

\textsuperscript{140} In modern times, any grant by the Crown for uses detrimental to the \textit{jus publicum} are void as to such parts open to that objection or fail to divest the Crown and to invest the grantee. Gould § 21; Coulson & Forbes 517.

\textsuperscript{141} The case used by both Phear and Gould involves an oyster bed, damaged by a vessel that had ascended the stream during the tide and then remained aground during the ebb, awaiting the return of the tide. Again it is emphasized that the property owner could not interfere with the paramount public right and that any attempt to hinder the vessel would have created a public nuisance.

\textsuperscript{142} As opposed to perpresatures, a term properly limited to injuries to the \textit{jus privatum}. Perpresatures may or may not also be public nuisances, depending on whether as a matter of fact there is or is not a violation of the \textit{jus publicum}.

\textsuperscript{143} The supervision of navigable waters is entrusted to so-called "conservancies." One of the earliest conservancies was that of the Thames, established in the mayor and corporation of London during the reign of Richard II. Coulson & Forbes 552. Because the \textit{jus privatum} is subject to the \textit{jus publicum}, the king cannot license a public nuisance and such a royal license would not constitute a good defense. Gould § 21.

\textsuperscript{144} Gould § 91 citing Rex v. Clark, 12 Mod. 615, 88 Eng. Rep. 1558 (1702) and C. J. Holt's statement that to hinder the course of a navigable river was against Magna Charta.

\textsuperscript{145} That at least was the rule since the 17th century, laid down in the \textit{Case of the Royal Fishery of the Banne}, Davis (Irish) 55, 80 Eng. Rep. 540 (1611). Earlier cases had left the question in doubt and Bracton, writing in the 13th century, had claimed all rivers with perpetual flow to be "public" rivers. Gould § 49.

\textsuperscript{146} The question apparently was still unsettled in 1838. See Gould § 52 quoting C. J. Lord Denman in Williams v. Wilcox, 8 Ad. & El. 314, 333, 112 Eng. Rep. 857 (1838): "It is clear that the channels of public navigable rivers were always highways: up to the
English rule was established. It recognizes the right of navigation in freshwater rivers. But it makes that right dependent upon prescription, thus resting it on grounds different from those of the earlier authorities.\textsuperscript{147} The public right is said to be an easement to which the title of the riparian owners is subject. There is, however, a general presumption of an easement and the owner can neither prevent its acquisition or exercise nor obtain compensation for the subordination of his private property to the common use.\textsuperscript{148}

In effect then, the public has a right of free passage on all waterways capable of such use, whether in other respects they are private property or not. As the necessary corollary, neither the Crown nor the adjacent owners may obstruct or limit that passage.\textsuperscript{149}

2. Effect on American law—the states

The early English settlements in this country were territories acquired by discovery. Therefore, the rights of the new settlers were determined by the law of the mother-country.\textsuperscript{150} That meant that “navigable streams” were subject to the public right of navigation. It also meant that here as in England the public right could not be obstructed or limited either by the Crown or by adjacent owners. Of course some of the principles of the English common law were modified in accord with the different circumstances of the new country. Probably the most important change was the abandonment of the ebb and flow of the tide as the test for navigability and the adoption of the rule that those streams were “navigable” which were navigable in fact, be they tidal or fresh-water streams.\textsuperscript{151} After some early hesitation, American courts furthermore rejected the rule that navigable fresh-water streams were subject to the public right only upon a showing of long user.\textsuperscript{152}

\textsuperscript{147} That is, different from \textit{De Jure Maris} and such cases as the one mentioned in the preceding footnote. But see Gould § 55 suggesting that as a matter of theory prescription is the only ground upon which to reconcile navigation with the private ownership of the soil.

\textsuperscript{148} It is for these reasons that Gould speaks of the “anomalous nature of this doctrine.” On the same grounds he rejects the common analogy to the case of a highway on land, where public use, as he points out, arises by statute (\textit{with} compensation) or by consent, whether in the form of dedication, contract or prescription. See Gould § 55.

\textsuperscript{149} Roman law equally reflects the importance with which navigable waterways were looked upon. There is much controversy whether the “flumina publica” were subject to state ownership or state sovereignty only. There is no controversy that they were dedicated to the common use, whether as \textit{res publicae in publico usu} or as \textit{res nullius}. The most important form of the common use was navigation, which was preferred over all
Finally, the idea of a *jus privatum* or private property right of the Crown to the shores of the sea and tidal waters never found acceptance in this country.\textsuperscript{153} The revolution therefore vested in the succeeding states the *jus publicum* only. That is, dominion over navigable waters (however defined) vested *prima facie* in the respective states. But such state "ownership" was for the public benefit and the power acquired by the succession was no more than that which the king could have exercised before the revolution.\textsuperscript{154} The change in dominion thus did not affect or impair the right of the public. Nor was the public right destroyed where states in their sovereign capacity created property rights in the soil of navigable streams in favor of abutting owners.\textsuperscript{155} Again the private grantee could have no greater rights than his grantor-state. Thus his private property remained subject to the public right of navigation. The states were in no way disabled from interfering with such private property by legislation.
regulating or preserving navigation. Such interference is not a taking, for the private right had from its creation been impressed with the public right.\textsuperscript{156}

3. Effect on American law—the federal government

The creation of the federal sovereign in no way changed the public right of navigation. On the contrary, its protection and preservation had thereby become a matter of national control.\textsuperscript{157} By definition, the continued right of the public to free passage on its navigable streams had to be accompanied by the continued subjection of any private rights in such waters to the public right. Furthermore, the states had to yield where the federal government exercised its power to regulate the “navigable streams of the United States,”\textsuperscript{158} to protect, in other words, the right of navigation in the interest of all its citizens. The power of the federal government to do so is “superior.” That superiority explains why lesser rights have to yield. It does not explain why they have to yield without compensation, as has been pointed out earlier. The historical notion of the paramount right of the community to navigate and fish its navigable waterways free from any interference does explain it. Even the king could do nothing to abridge that right, let alone his grantee. Whatever made up the bundle of “property rights” in navigable streams, the impairment of navigation was not part of the bundle. The “superior” federal right serves to maintain the “superior” public right.

Perhaps all of this is implied when the Supreme Court speaks of the “dominant” or the “paramount” or the “superior” federal right. Certainly it ought to be implied. Historical considerations also lend some support to the “notice theory” discussed earlier. If the settlers indeed brought with them the law of

\textsuperscript{156} For this reason Lewis does not think the question of title to the bed of the stream is important. He divides navigable streams into private navigable streams and public navigable streams, with title in the latter being in the public. Such is the case for instance in Pennsylvania. If title is in the public, it is held in trust for the public use. If title is in the riparian owner, again it is subject to the exercise of the public rights of navigation and fishing. According to Lewis, any damage to a riparian owner on a public stream not caused by purposes connected with these public rights constitutes a compensable taking. He admits, however, that the decisions on this point in states where navigable streams are public streams are adverse to his view. The question of title therefore does assume importance if the problem arises outside the navigation (or fishing) context. For our purposes it may be indeed be ignored. 1 Lewis, Eminent Domain § 94 et seq. (3d ed. 1909).

\textsuperscript{157} See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824). The states, however, are not per se pre-empted from exercising their sovereign rights over navigable streams within their borders. At least since Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865) there has been little doubt that in the absence of conflicting legislation by Congress States were entitled to enact legislation adapted to the local needs of interstate and foreign commerce. . . .” Corwin, note 154 supra, at 229, discussing Gibbons v. Ogden, Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) and Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). Corwin adds that the states must use this power “reasonably”—thus perhaps indicating that no undue burden may be imposed on interstate commerce under general commerce clause principles even absent congressional action.

England, then they brought with them knowledge of the fact that "navigable" streams were subject to the public right. There could be no doubt regarding tidal waters. There could be some doubt regarding fresh waters. Until navigability was defined as navigability in fact, use of fresh waters by the public could be thought to depend on an easement by prescription. But the distinction between tidal and fresh waters was eliminated early. And even in England the easement was presumed and its acquisition could not be prevented.159 For all practical purposes, therefore, there could be no doubt over the status of private rights in fresh waters.

Nevertheless, the objections voiced earlier against the notice theory remain. Congressional activity in the name of navigation has expanded—as has the concept of navigable streams. The cases have not taken account of either development and its respective effects on notice.

For that matter, the cases take little account of the origin of the rule of no compensation. The rule has perpetuated itself from the days when free use of the waterways was an absolute necessity for the survival of the community. In many instances waterways undoubtedly were the only adequate, important arteries of commerce. Today there are others, equally important. A choice between two courses of conduct seems to exist: extend the rule of no compensation to all arteries of commerce on the basis of their supreme importance to the welfare of the nation, or have the community as a whole bear the cost of "free and unhindered passage." It is of doubtful propriety to rationalize the continued preference of waterways on the basis of reasons that are no longer applicable. However, the full sweep of that preferential treatment is yet to be examined. Perhaps it is best therefore to postpone further evaluation of the no compensation rule until the end of this article.

II

CONSEQUENCES TO PRIVATE PROPERTY160

A. Introduction

In speaking thus far of the rule of no compensation, it has merely been said that it applies to "certain" private property rights. No attempt has been made to ascertain what these rights are with any degree of accuracy. The following investigation makes that attempt.161 For purposes of analysis, the cases to be discussed have been divided into three categories.

159. See text following note 147 supra.
161. As has been pointed out earlier, some of the cases (especially the earlier ones) to be examined here are explainable as involving non-compensable injury incident to a
(1) The United States prevents or burdens the use of a navigable river, its flow or its bed.

(2) The United States raises the stream level of the navigable mainstream. Damage results to private property (a) situated on the navigable mainstream; (b) situated on a non-navigable tributary.

(3) The United States condemns land abutting (a) on a navigable stream; (b) on a non-navigable stream. The owner claims compensation for its special location or site value.\footnote{162}

\section*{B. The United States Prevents Or Burdens The Use Of A Navigable River, Its Flow Or Its Bed}

The discussion proper of the kinds of property rights subject to the rule of no compensation begins with an anti-climax. \textit{Monongahela Nav. Co. v. United States},\footnote{163} the first compensation case to reach the Court, made the United States pay for the value of a toll-collecting franchise in the Monongahela River. Under the commerce clause, Congress was said to have the power to appropriate the owner's locks and dam. By the same token, the power was said to be subject to the fifth amendment. In view of the already then accepted idea of navigation as the historically paramount public right, \textit{Monongahela} was erroneously decided. For by making the United States pay for the intangible value of the franchise, the Court gave recognition to a "property right" dependent on the use of the river. The Court later repeatedly distinguished \textit{Monongahela} as having rested on estoppel, namely that the locks and the dam had been constructed at the "instance and implied invitation" of Congress.\footnote{164} There would be no reason to resurrect it, had not the Court recently referred to it, although it is unclear to what avail.\footnote{165}

The lawful exercise of the regulatory power rather than "unique" navigation servitude rules. They are discussed here because this chapter brings together most of the cases in which the navigation servitude plays a part—albeit the denial of compensation in some of the cases is not unique; because the Court at times used the "consequential injury" approach merely as an alternative basis for decision; and because all the cases have bearing on the question ultimately to be examined, namely the compensability of irrigation water rights.\footnote{166}

It should further be noted that the compensation problem in these cases arises in two different contexts. One is a specific congressional enactment covering particular projects. The other is suits brought under the Rivers and Harbors Act. Both groups are included in the discussion without attempt at separation.\footnote{167}

\footnote{162. United States v. Grand River Dam Authority, 363 U.S. 229 (1960) will be treated separately. Its importance for the more particular inquiry of this paper merits such highlighting.}

\footnote{163. United States v. Virginia Elec. & Power Co., 365 U.S. 624, 631 (1961) citing \textit{Monongahela} for the notion that the word "just" in the fifth amendment evokes "ideas of fairness and equity."}

\footnote{164. See United States \textit{ex rel. TVA v. Powelson}, 319 U.S. 266 (1943); Omnia Co. v. United States, 261 U.S. 502 (1923); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913).}

\footnote{165. United States v. Virginia Elec. & Power Co., 365 U.S. 624, 631 (1961) citing \textit{Monongahela} for the notion that the word "just" in the fifth amendment evokes "ideas of fairness and equity."}
Gibson v. United States\textsuperscript{166} first translated the paramount nature of the federal power to protect navigation into federal immunity against compensation. No compensation was held to be available where access to the navigable Ohio was cut off by the construction of a federal dike. The Court gave two reasons. One, the loss of access was said to be an "incidental consequence" of the lawful exercise of a governmental power rather than a "taking" of property and thus not compensable under eminent domain principles. Two, the Court rested its decision on the obligation of riparian ownership "to suffer the consequences of improvement of navigation in the exercise of the dominant right of the government."\textsuperscript{167} Any damages were therefore the result of the exercise of the servitude "to which [the] property had always been subject."\textsuperscript{168}

More recently, United States v. Commodore Park\textsuperscript{169} affirmed the principle of the access cases. The issue arose when a navigable bay was dredged. One of its arms was used as a deposit place for the dredged materials, thus destroying its navigability. Compensation was claimed for the resulting decrease in market value of the abutting land, although there had been no physical invasion. Predictably enough, the Supreme Court denied to the riparian owner "a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation because deprived of that privilege."\textsuperscript{170} Nor was that rule inapplicable because the United States had destroyed navigability—"there is power to block navigation at one place to foster it at another."\textsuperscript{171}

In United States v. Bellingham Bay Boom Co.\textsuperscript{172} an injunction was sought for the removal, as an obstruction to navigation, of a boom constructed across the Nooksack River in Washington, held by the Court to be navigable.\textsuperscript{173} Suit was brought under section 10 of the 1890 Act, prohibiting "[T]he creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters [of] . . . the United States."\textsuperscript{174} The boom had been constructed prior to 1890 under authority of the state legislature. Reading "authorized by law" to include state law, the Supreme Court held the boom to be authorized, if it

\begin{itemize}
\item \textsuperscript{166} 166 U.S. 269 (1897).
\item \textsuperscript{167} Id. at 276.
\item \textsuperscript{168} Id. at 276. See also Scranton v. Wheeler, 179 U.S. 141 (1900) another "access" case. Again the Court spoke of a consequential injury to a right which must be enjoyed "in due subjection" to the rights of the public.
\item \textsuperscript{169} 324 U.S. 386 (1945).
\item \textsuperscript{170} Id. at 390.
\item \textsuperscript{171} Id. at 393.
\item \textsuperscript{172} 176 U.S. 211 (1900).
\item \textsuperscript{173} Although the river was located entirely within Washington it came under federal jurisdiction because it emptied into a bay and thence into the Pacific. This, incidentally, destroys one justification offered for the result in United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), namely that the San Joaquin is not a navigable stream "of the United States." See Note, 13 Mont. L. Rev. 102, 109 (1952).
\item \textsuperscript{174} Act of Sept. 19, 1890, ch. 907, § 10, 26 Stat. 454.
\end{itemize}
conformed to the state statute. Nevertheless, the United States could order the abatement of the obstruction, but only upon payment of compensation, citing Monongahela Nav. Co. v. United States. Again recognition was given to the presumably erroneous notion that private rights good against paramount federal power could vest in the use of the nation's waterways.

Recognition of the error may have been the reason why the next "bridge case" did not mention the Bellingham decision. In Union Bridge Co. v. United States the Secretary of War found the bridge to be an unreasonable obstruction to the navigation of the Allegheny River and demanded that changes be made. Construction of the bridge had been authorized in 1873 by an act of the Pennsylvania legislature. The case arose under the 1899 enactment of the Rivers and Harbors Act. The major thrust of the Bridge Company's argument centered on the constitutionality of the failure to provide compensation, here for the amounts necessary to comply with the required changes. On the basis of the "access" cases, the Court held there was no "taking" but only "incidental" damage.

The result of the Union Bridge case was far from startling. But Mr. Justice Harlan's opinion for the Court made a number of points worth considering. It rejected once and for all the efficacy of state sanction—a result written into section 10 by the 1899 enactment. It also posited the possibility that the bridge, when erected, was not an "obstruction to navigation as then carried...


176. 148 U.S. 312 (1893).

177. At least that was the principle stated by the Court. It went on to find non-conformance of the boom with state regulations. As an "illegal" obstruction it could therefore be removed without compensation.

178. 204 U.S. 364 (1907).

179. That was the official entrusted with the administration of the Rivers and Harbors Act. The title of the office was later changed to Secretary of the Army. Act of July 26, 1947, ch. 343, § 205, 61 Stat. 501.

180. The Court also considered (and rejected) the argument that the act contained an unconstitutional delegation of congressional power by authorizing the Secretary of War to order changes whenever he had reason to believe a bridge to constitute an unreasonable obstruction to navigation.


182. Nor was it "unique"—that is, non-compensability here seems more an example of the "regulation cases" than of the applicability of the navigation servitude to otherwise compensable private rights.

183. See note 175 supra. This may also explain why the Court felt it unnecessary to mention United States v. Bellingham Bay Boom Co., 176 U.S. 211 (1900).
The Court made clear that that circumstance would not have altered its decision. The company constructed the bridge with knowledge of the paramount authority of Congress . . . [and] subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions.\textsuperscript{185}

Finally, the Court posited the possibility that the bridge had been an unreasonable obstruction from its erection. That, too, would not have changed the decision. No obligation accrues to Congress to pay compensation now because of its earlier inaction.

The opinion thus gives expression to the idea of notice as justifying non-compensability. But it makes clear that neither a change in the mode of navigation nor congressional inaction calls for a deviation from the rule. The result could be rationalized by incorporating into the idea of notice an element of futurity, \textit{i.e.}, there is notice of the paramount power and of its future exercise under changed conditions. On the other hand, this extension of an already questionable rationale seems merely another way of disallowing the sovereign to be estopped. Nor is there reason to assume that the Court would react differently if the problem concerned changing concepts of \textit{navigability} rather than \textit{navigation}.

The Court dealt expressly with the estoppel issue in \textit{Louisville Bridge Co. v. United States},\textsuperscript{186} almost identical to the \textit{Union Bridge} case. This time, however, the bridge was built under congressional rather than state authorization. The Court nevertheless held that the authorization conferred no irrepealable franchise and no "vested right" requiring compensation for changes subsequently found necessary in the interest of navigation. The injection of the \textit{Monongahela} case\textsuperscript{187} raised the question of estoppel. Theoretically, the Court did not foreclose its application altogether: "We need not go so far as to say that Congress could not [be estopped] . . . from [changing] . . . a regulation once made," but it was quick to add that "grants of special franchises and privileges are to be strictly construed in favor of the public right. . . ."\textsuperscript{188}

In the course of its opinion, the Court suggested that perhaps it might be assumed that the parties foresaw eventual obsolescence. Hence they might have

\begin{itemize}
  \item \textsuperscript{184} 204 U.S. 364, 400 (1907). (All italicized in original.)
  \item \textsuperscript{185} \textit{Id.} at 400.
  \item \textsuperscript{186} 242 U.S. 409 (1917).
  \item \textsuperscript{187} \textit{Monongahela Nav. Co. v. United States}, 148 U.S. 312 (1893). It was distinguished as involving an "actual taking over" of property.
  \item \textsuperscript{188} 242 U.S. 409, 417 (1917). The principle of strict construction of franchises is far from being unique to the navigation power. See the contract clause cases beginning with \textit{The Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge}, 36 U.S. (11 Pet.) 420 (1837).
\end{itemize}
conducted their business in such a manner as to recoup their investment during that period. The argument is appealing that one making use of a navigable river and having full knowledge of the paramount right can recoup his investment by the exercise of some business foresight. It almost establishes the fairness of the no compensation rule. Unfortunately, it is practically illusory. The advent of obsolescence may in no way coincide with the development of new modes of navigation, converting the given structure into an "obstruction." And the most perspicacious of business judgments would have difficulty harmonizing the length of the recoupment period with the point in time at which Congress might decide to appropriate the entire flow of the river. The argument makes sense only if the federal authorization were to carry with it some guarantee of an estimated recoupment period. This could be achieved either by assuring no federal intervention for that period, or, that being a very impractical proposition, by allowing federal intervention during the period only upon payment of compensation. Even this solution would not help those whose use of the stream presumably requires no federal authorization under any of the present provisions of the Rivers and Harbors Act.

In the meantime, the no compensation rule had pursued its course in still another direction. The occasion was United States v. Chandler-Dunbar Water Power Co. The case involved a condemnation proceeding for a power plant as well as uplands, instituted by the United States under a specific act of Congress appropriating the entire flow of the St. Mary's River. There was no review of the congressional determination that the entire flow of the river should be appropriated and kept free for the use of navigation. If structures placed in the river were obstructing navigation, Congress could "require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation." The license which Chandler-Dunbar had procured for its plant was a mere "revocable permission;" that Chandler-Dunbar "did not thereby acquire any right to maintain these constructions in the river longer than the government should continue the license, needs no argument." Furthermore, the company knew that the permit was likely to be revoked at any time. Thus there was nothing in the facts "which savors of estoppel in law or equity."

The decision as to the plant itself merely carried out what had been implied

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189. 229 U.S. 53 (1913). The case will also be discussed as a problem of the valuation of abutting land, with a different formulation of the issue it presents.
192. Id. at 68. The inefficacy of a federal license was reaffirmed in Louisville Bridge Co. v. United States, 242 U.S. 409 (1917). See text at note 186 supra.
by Mr. Justice Harlan in the Union Bridge decision. The Court faced a new question in the water power capacity of certain rapids. In the court below, that claim had resulted in an award for the value of "raw water," i.e., the present money value of the rapids to the company as riparian owners. The Supreme Court sustained the exception of the United States.

First of all, Chandler-Dunbar had no longer any right to place in the river the structures necessary for the commercial exploitation of the water power. Aside from that, the award could only be based on the erroneous hypothesis of a private property interest in the water power of the river.

Ownership of a private stream wholly upon lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

The use of the word "ownership" has brought forth the charge that the Court confused it with jurisdiction. One writer has asserted that any implication "that there can be no usufructuary water rights in a navigable stream . . . is mischievously wrong." But with one qualification that is precisely the implication of Chandler-Dunbar. The qualification is that the non-recognition of private usufructuary rights is limited to the relationship between the owner and the national government in the exercise of the navigation power. Within that relationship, whatever rights exists, exist by the grace of Congress. They are not of the kind to be compensable upon their destruction or impairment. Their characterization seems irrelevant. "Ownership" of navigable waters may indeed be beside the point—the subjection of usufructuary rights to the paramount federal power is not. Nor has the Court deviated from that rule absent an indication by Congress that it meant for such rights to be treated differently.

195. The award below also had included an element of value contributed by the uplands "for lock and canal purposes." 229 U.S. 53, 75 (1913). The propriety of this award is discussed in Part II, II, D, (1) infra.
198. As opposed to claims of stream-users inter sese, where full recognition would be given a state-created private usufructuary right.
199. See Corker, supra note 197, at 616.

The Niagara Mohawk case did so as a matter of statutory interpretation, concluding
Following Chandler-Dunbar, other cases strengthened and reaffirmed the principles on which it was based.

Thus, the Court held in *Lewis Blue Point Oyster Cultivation Co. v. Briggs*\(^{201}\) that no compensation could be had for the destruction of an oyster bed incident to the dredging of lands underlying Great South Bay in New York. The title to such lands is "defeasible" by the exercise of the power.

Nor did the plaintiff in *Greenleaf Johnson Lumber Co. v. Garrison*\(^{202}\) succeed in obtaining compensation for the removal of wharves located within a harbor line subsequently established by the Secretary of War. It was again irrelevant that the wharves, when constructed, conformed to the harbor lines as then located by Virginia and the United States. The company's attempted distinction between structures that *availed of* the river's navigability and those that *hindered* it, failed to overcome the conclusive congressional judgment as to what was or was not an obstruction of navigation.

A subsequent change of harbor lines in the Savannah River prevented the claimant in *Willink v. United States*\(^{203}\) from renewing wharves and pilings needed to conduct his ship-repair business. His loss in earnings was non-compensable. The decision is important because it contains one of the early pronouncements on the physical boundaries of the servitude. Since the river was navigable, the Court reasoned, claimant's rights in the land "below the mean high-water line were subordinate to the . . . power of Congress."\(^{204}\) And since the structures in question were located below that line, Congress could "prevent their renewal without . . . compensation therefore."\(^{205}\) Although the

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\(^{201}\) Id. at 580. (Emphasis added.)

\(^{202}\) Id. at 580.
Court made no mention of it, its analysis and resulting conclusion seem in conflict with United States v. Lynah,\textsuperscript{206} to be discussed presently.

\textbf{C. The United States Raises The Level Of The Navigable Mainstream, Damaging Private Property}

The cases in the next two subsections raise questions about the physical boundaries of the navigation servitude. None of the prior cases needed to concern themselves with that determination. The private rights claimed in them were rights to use of the stream itself, or to its flow or its bed.\textsuperscript{207} Within those limits it had always been clear that the public right of passage superseded the private right. The prior cases have one other thing in common. They all deal with the stream in its natural condition; in none of them had the United States attempted to alter its level. Again it had been clear since the early common law that the public rights of navigation and fishery extended to the line marked by the ordinary or neap tides of tidal waters\textsuperscript{208} and the ordinary high-water mark of fresh waters.\textsuperscript{209} The ordinary high-water mark was also the limit of the public right in the United States.\textsuperscript{210} Not clear was the power of the United States to maintain a navigable stream artificially, by means of dams, at its ordinary high-water level. That of course results in covering the strip of soil located between the ordinary low and high-water marks \textit{permanently}. Absent a dam maintaining the river at the ordinary high-water mark, that strip is not covered permanently. Thus it is available to the owner for such use as he may be able to make of it. Under the circumstances, the use will be a limited one. But that alone obviously does not determine its non-compensability in the event of a taking.

\textsuperscript{206} 188 U.S. 445 (1903).
\textsuperscript{207} Gibson v. United States, 166 U.S. 269 (1897) (access); Louisville Bridge Co. v. United States, 242 U.S. 409 (1917); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (bridges across navigable streams); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (power plant in river); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913) (oyster bed); Willink v. United States, 240 U.S. 572 (1916); Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915) (wharves and pilings in river).
\textsuperscript{208} See Gould § 27 referring to Hale who mentioned three kinds of tides as giving rise to three kinds of shores: (1) high spring tides which happen at the two equinoctials; (2) spring tides which happen twice every month and (3) ordinary or neap tides which happen twice in 24 hours. Hale concluded that the rights of the sovereign and the public extended only to the line reached by the ordinary tides.
\textsuperscript{209} "The low-water mark is the point to which the river recedes at its lowest stage. The high-water mark is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation. . . ." Gould § 45. See Howard v. Ingersoll, 54 U.S. (13 How.) 381, 417 (1851).
\textsuperscript{210} See Willink v. United States, 240 U.S. 572 (1916) where claimant's rights in the land \textit{below the mean} high-water line were said to be subject to the public right. That of course is merely the corollary of the rule that the public right extends up to the mean high-water mark. Note that the Court seems to use the terms "ordinary" and "mean" interchangeably.
The following cases then deal with claims made for the alleged taking of private property due to a change in the stream level, brought about by the United States.

1. The property is situated along a navigable stream

Only two cases have dealt with the problem. In *United States v. Lynah*\(^{211}\) the government dam raised the level of the Savannah River. The claimant used the land between the high and low water marks for the cultivation of rice. The land was protected from the river by an embankment and drained by means of trunks equipped with floodgates. The outer opening of the trunks was approximately one foot above the ordinary *low* water level. The government dam permanently raised the river level above that point. Drainage thus became impossible and the area unfit for cultivation.

There was no dispute about the facts up to this point. There was dispute whether the findings of fact supported the contention that the dam also caused the water to go over the embankment and flood the land.\(^{212}\) The Court in any event treated *Lynah* as a case of flooding.\(^{213}\) Such flooding was considered a taking within the fifth amendment notwithstanding that which was done was done in exercise of the power to improve navigation,\(^{214}\) and notwithstanding further that the land in question was located *below* the high-water mark.\(^{215}\) Thus the decision gave the owner a right in the unchanged level of the water within its natural banks. Such a private property is irreconcilable with the "paramount" public right of navigation, extending up to the ordinary high-water mark. It should make no difference that the water is artificially maintained at that level.\(^{216}\)

\(^{211}\) 188 U.S. 445 (1903).

\(^{212}\) The Court's opinion is not clear on this point. The dissenting Justices White, Fuller and Harlan read the findings as showing the damage to be due solely to the interference with drainage, caused by raising the "mean low tide."

\(^{213}\) It was on this basis that the Court one year later distinguished *Bedford v. United States*, 192 U.S. 217 (1904). In *Bedford*, the United States constructed revetments along the banks of the Mississippi to prevent erosion. As a result, the claimant's land was eventually eroded. The Court refused compensation. It distinguished *Lynah* as having involved an "actual invasion and appropriation of land as distinguished from consequential damage." *Id.* at 225.


\(^{215}\) The fifth finding of law stated that the land was located between high and low water marks. *Id.* at 448-49.

\(^{216}\) The difference between the river in its "natural" condition and in its "artificial" condition was to trouble the Court again in *United States v. Cress*, 243 U.S. 316 (1917), discussed *infra*. It may also be responsible for the decision in the *Willink* case, where a change in harbor lines prevented the claimant from renewing his wharves. The claimant's loss was non-compensable because rights in the land "below the mean high-water line were subordinate to the public right of navigation." *Willink v. United States*, 240 U.S. 572, 580 (1916). On its face, the decision conflicts with *Lynah*, unless it is to be distinguished because in *Willink* the United States did nothing to alter the natural condition of the stream.
FEDERAL POWER IN WESTERN WATERS

A considerable time later, United States v. Chicago, M., St. P. & Pac. R. R., so held. The government dam here had raised the level of the Mississippi River. At issue before the Court was the compensability of that part of the embankment which was located between high and low water marks. Again the attempt was made to confine the government to the “natural” condition of the stream, limiting it to “constructing channels for actual use or . . . removing obstructions to navigation.” The Lynah case was said to call for compensation where the improvement took the form of raising the level of the stream.

But the Court refused to perpetuate any distinction between “natural” and “artificial” conditions. It accepted instead the government’s contention that its power embraces the exercise of every appropriate means for the improvement of navigable capacity; and that, in the provision of any such means, it is entitled to deal with and alter the level of the stream to any extent up to ordinary high-water mark without being answerable to riparian owners for injury . . . below that line.

The servitude was said to extend “to the entire bed of a stream, which includes the lands below ordinary high-water mark.” United States v. Lynah was expressly overruled.

At least for navigable streams, therefore, the rule seems simple enough. The servitude extends over the bed of the stream up to the ordinary high-water mark. The United States can permanently raise the stream to that level. If it injures the claimant’s property, that lying below the ordinary high-water mark is not “taken,” i.e., not compensable; that lying above the ordinary high-water mark is “taken,” i.e., compensable.

2. The property is situated along a non-navigable stream

The Chicago case did not decide the compensability of property adjoining a

217. 312 U.S. 592 (1941).
218. Actually, the water level was raised above the ordinary high-water mark. The government had conceded compensability of that part of the embankment which was located above the high-water mark.
219. 312 U.S. 592, 597 (1941).
220. Id. at 595. (Emphasis added.)
221. Id. at 597.
222. Id. at 598. More accurately perhaps, the Court held Lynah to be in “irreconcilable conflict” with its later decisions so far as it sanctioned compensation for injury to riparian property in the bed of a navigable stream. Lynah had also been cited as authority for the doctrine that a taking of property for public use gives rise to an implied promise to pay compensation.
223. This conclusion once more demonstrates that a general statement that the exercise of the navigation power inevitably invokes a no-compensation rule for all property affected would be inaccurate.
non-navigable tributary and injured by improvements on the navigable mainstream. However, the Court had dealt with that question earlier, in *United States v. Cress.* The government dam was again constructed on the navigable stream, thereby raising its level to the ordinary high-water mark. The resulting backflow at the same time raised the level of a non-navigable tributary. Two independent claims were raised by two riparian owners located on the non-navigable tributary. The Court combined the two cases since it considered the claims identical in nature and calling for the same rule.

In the first case, the dam caused frequent overflow of plaintiff's (tributary) riparian land, depreciating its value. In the second case, the dam prevented the operation of a mill located on the non-navigable tributary by destroying the drop necessary to run the mill. No part of the mill or the land of this plaintiff were overflowed.

The Court granted compensation for both claims. The property "taken" was that which "was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks." Since the rule of the *Cress* case has retained its validity, a detailed examination of the Court's analysis seems justified.

One year before the *Cress* case, the Court had decided *Willink v. United States.* It had spoken of the servitude as subjecting all rights "below the mean high-water line . . . to the . . . power of Congress." Therefore, the issue in the *Cress* case properly framed should have been: Does the "mean high-water line" rule extend the servitude to all property, regardless of its location, which will be affected by raising the navigable mainstream to that level? Or is the rule to be limited to property adjoining the navigable mainstream, all other property being compensable? Instead, the Court took its approach from *United States v. Lynah.* That, however, seemed to turn on the fact that the United States, in improving navigability, had not limited itself to clearing away obstructions or the like, but had raised the level of the river. In effect, the *Lynah* case had sanctioned a right to the unchanged flow of the river. *United States v. Cress* did the same. The Court recognized the general rule which

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224. 243 U.S. 316 (1917).
225. Id. at 317.
226. Case No. 84, id. at 318.
227. Case No. 718, id. at 318-19.
228. Id. at 327. (Emphasis added.)
230. 240 U.S. 572 (1916). *Cress* was decided in 1917.
231. Id. at 580.
232. 188 U.S. 445 (1903).
233. The opinion in the *Lynah* case contains no clear enunciation of that doctrine. However, the case has been understood that way. That becomes clear from its discussion in the *Chicago* case, the case which abolished the distinction between the "natural" and the "improved" condition. See text at note 217 supra.
234. 243 U.S. 316, 321 (1917), citing, inter alia, to the *Willink* case.
subjects private ownership in navigable streams to the public right of navigation. It then spoke of the limits of the rule and of the necessity "to ascertain the dividing line between public and private right[s]" in navigable waters. In the Court's view, the public right of navigation was limited to the stream in its "natural condition."

"It has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

The servitude was for one, then, limited to streams navigable in fact in their ordinary condition. That was not a new proposition, however. But for another, the servitude was now also said to be "confined to the natural condition of the stream."

The Court supported its conclusion, inter alia, with The Daniel Ball. That case was said to have "held in effect" that the test of navigability in fact should be applied to streams in their natural condition. The Daniel Ball is not a convincing precedent. It sought to establish a concept of navigability more appropriate for conditions in this country than the rule of the flow and ebb of the tide. It did not define the measure or the limit of the public right of navigation, let alone make it commensurate with the natural condition of the stream, or talk about compensation.

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235. Id. at 321.
236. Ibid. (Emphasis added.)
237. Id. at 326.
238. 77 U.S. (10 Wall.) 557 (1870). It also cited Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871), where a state dam flooded the claimant's land. According to Cress, "The raising of the river above its natural stage, by means of an artificial structure, was the gravamen of the complaint." United States v. Cress, 243 U.S. 316, 324-25 (1917). (All italicized in original.) United States v. Lynah, 188 U.S. 445 (1903), was said to have followed the same principle. The Lynah case had indeed discussed Pumpelly. But it should be noted that Pumpelly as well as Lynah did not really discuss the problem of "natural" versus "artificial" (or improved) condition. Both courts were troubled by the question whether there could be a "taking" where there was physical invasion yet no "absolute conversion" of title. To that extent, neither case dealt adequately with the impact of the navigation power on the question of a taking.

239. That of course was the English common law test, navigable in England being synonymous with tidal. The question here raised should not be confused with that in United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940), namely whether a stream can be made subject to federal control by "improving it into" a navigable stream.

240. Nor did other cases decided before Cress support the Court's conclusion. That
But whatever the validity of the Court's analysis, its basis was destroyed in *United States v. Chicago, M., St. P. & Pac. R. R.*\(^{241}\) The *Cress* case turned on the distinction between the "natural" and the "artificial" condition of the stream. The *Chicago* case eliminated that distinction and recognized the federal power "to deal with and alter the level of the stream . . . up to [the] ordinary high-water mark."\(^{242}\) Of course, *Chicago* still did not decide whether the rule included tributaries as far as affected or whether it was limited to the navigable mainstream. But neither did *Cress* analyze that situation. Instead, *Cress* inquired into navigability, concluding that just as the public right was limited to streams navigable in their natural condition, so it was limited to the natural condition of such a stream. That the damage had occurred on a non-navigable tributary did not, for this approach, constitute a material fact.

Regrettably, the *Chicago* case paid no heed to the manner in which the *Cress* decision had been reached. It contented itself with "confining" *Cress* to its facts. Thus the rule of the *Cress* case remained, albeit without the support of an acceptable analysis. That meant that compensation for injury to property between low and high water marks, brought about by raising the level of a navigable stream, turned solely on its location. If the property was located on the navigable mainstream, no compensation was due under *Chicago*. If it was located on the non-navigable tributary, compensation was due under *Cress*. It has been suggested that no reasonable justification exists for the greater protection of the "tributary-riparian" as opposed to the "mainstream-riparian"\(^{243}\) in the face of the valid exercise of federal power "to deal with and alter the level of the stream to any extent up to the ordinary high-water mark."\(^{244}\) Some measure of justification could be found in the idea of notice of the paramount federal right in navigable streams. The inadequacies of the notice explanation make this measure of justification indeed a small one. For the most part, the criticism of the *Cress-Chicago* dichotomy is valid.

The Court itself apparently considered the diverging results under *Chicago* and *Cress* undesirable. In *United States v. Willow River Power Co.*\(^{245}\) the *Cress* case was further "distinguished."

The claimant here had diverted the flow of the non-navigable tributary through a new channel in order to have it fall from an artificially created drop into the navigable mainstream. The opinion gives no clear idea as to the location applies even to *United States v. Lynah*, see note 238 supra. The two "access" cases decided prior to *Cress*, i.e., *Gibson v. United States*, 166 U.S. 269 (1897), and *Scranton v. Wheeler*, 179 U.S. 141 (1900) imply that damage done in the course of construction in a navigable stream does not *per se* lead to compensability. The Court distinguished them as involving merely "consequential" injury.

\(^{241}\) 312 U.S. 592 (1941).
\(^{242}\) Id. at 595. (Emphasis added.)
\(^{243}\) Note, *The Supreme Court, 1949 Term*, 64 Harv. L. Rev. 114, 137 (1950-51).
\(^{244}\) United States v. Chicago, M., St. P. & Pac. R.R., 312 U.S. 592, 595 (1941).
\(^{245}\) 324 U.S. 499 (1945) (Justices Roberts and Stone dissented).
of the power plant. A government dam, raising the level of the mainstream, caused the reduction of claimant's operating head. No compensation was allowed. The Court looked upon the claim as the assertion of a property right in the flow of the navigable stream, or more precisely, in the difference between the natural and the artificially maintained level. In an analogy to the Chandler-Dunbar decision such a right to "run off" into the navigable stream was rejected. Mr. Justice Jackson distinguished Cress as having dealt with "the consequences of changing the level of a non-navigable stream; here it [the government] is sought to be charged with the same consequences from changing the level in a navigable one." The speciousness of the distinction is obvious. In both cases, the government dam was constructed so as to raise the stream-level of the navigable mainstream. In both cases, there was an impact on the tributary: in Cress to diminish its current and to flood land between the natural and the artificial level; in Willow River to diminish its current and to destroy the differential between the natural and the artificial level. And in both cases, run-off ultimately had to be into the navigable main-stream. Thus it is difficult to deny the charge of the dissenting opinion that the Cress case had either been disregarded or overruled.

The issue of damage to property located on the non-navigable tributary arose again in United States v. Kansas City Ins. Co. This time the Court formulated the issue as it should have done in the Cress case, namely whether:

- the United States . . . may raise a navigable stream to its ordinary high-water mark and maintain it continuously at that level in the interest of navigation, without liability for the effects of that change upon private property beyond the bed of the stream.

The Court answered its question in the negative. The dam was erected in the Mississippi, raising its level to the "previously ascertained ordinary high-water mark." The private property was located one and a half miles from the river and was riparian to the non-navigable tributary. The underflow caused by

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247. 324 U.S. 499, 506 (1945). The Cress case was considered binding precedent by the Court of Claims, as well as by the dissenting Justices, Roberts and Stone.
248. Id. at 514 (dissenting opinion). That charge has found wide support. See Powell, Just Compensation and the Navigation Power, 31 Wash. L. Rev. 271 (1956); Comment, Informal Condemnation and the Revival of the Cress Case, 18 U. Chi. L. Rev. 355 (1950); 45 Colum. L. Rev. 792 (1945).
250. Id. at 800-01.
raising the water level of the Mississippi destroyed the agricultural value of the land.

The majority clearly based its decision on two propositions: One, that the United States has “power to improve its navigable waters . . . without liability for damages resulting to private property within the bed of the navigable stream.”252 Two, that “the ordinary high-water mark has been accepted as the limit of the bed of the stream.”253 From these two propositions the Court derived the rule that damage beyond the area of the servitude as so defined, e.g., on the non-navigable tributary, is compensable. Willow River was unconvincingly distinguished as denying compensation “because the loss of power . . . occurred within the bed of the navigable river.”254 If that is the explanation for Willow River, then the respondent’s loss in Kansas City resulted from his lack of right to the “unfettered flow of the Mississippi in its natural state,” as Mr. Justice Douglas described the basis of the compensation claim.255

In essence, the Court re-established the incongruity, as the dissenters charged, to “deny compensation to owners adjacent to navigable rivers and require it for others bordering their tributary for like injuries caused by the single act of lifting the river’s mean level to the high-water mark.”256 At times, of course, there is much merit in achieving certainty, even if that certainty is bought at the expense of good sense. But there is also no doubt that the real problem before the Court was to accommodate congressional power and the rights of adjacent landowners.257 It is rather doubtful that the conflict of interest was most efficaciously solved by leaving the decision to the fortuitous circumstance of location. Whatever its merits, though, the Court’s decision did answer the question of the physical boundary of the servitude in navigable streams; it extended to the ordinary high-water mark, burdening bed and embankment in and adjacent to the navigable stream up to that point, and clothing the United States with immunity for injuries inflicted in that area; it failed to extend this immunity to (1) land adjacent to the navigable mainstream but above the ordinary high-water mark, so-called “upland” and (2) the non-navigable tributary, com-

251. Id. at 801.
252. Id. at 804.
253. Id. at 805.
254. Id. at 807.
255. Id. at 812 (dissenting opinion).
256. Id. at 812 (dissenting opinion). The dissenters are not the only ones reading Kansas City as a reaffirmance of the Cress case. See 55 Mich. L. Rev. 272 (1956); 18 U. Chi. L. Rev. 355 (1950).
257. “The line therefore must be drawn in accommodation of the two interests.” United States v. Kansas City Ins. Co., 339 U.S. 799, 813 (1950) (dissenting opinion). The dissent would have the ordinary high-water mark rule include that part of the bed of the non-navigable tributary which is affected by raising the navigable mainstream to its ordinary high-water mark.
pensable private property being that which was "unaffected by the flow of the rivers or their tributaries" prior to raising the navigable mainstream.

The solution of the conflict between the Cress case on one hand and the Chicago and Willow River cases on the other as reached in the Kansas City decision can be formulated differently; the navigation servitude does not, without more, underlie non-navigable streams. For all these cases have this in common, that the federal power was exercised solely on and for the navigable stream. In none of them had Congress sought to exercise expressly its control over the non-navigable tributary, as it did in United States v. Grand River Dam Authority. When the Court there by-passed the government's claim that the servitude per se extended to non-navigable waters, it implicitly reaffirmed the dichotomous mainstream-tributary compensation rules in the event the navigation power is exercised on the navigable mainstream only.

D. The United States Condemns Land And The Owner Claims Compensation For Its Special Location Or Site Value

The Kansas City decision bounded the servitude along the "ordinary high-water mark" of navigable streams, and of navigable streams only. That acknowledged the principle that any taking of the unburdened uplands (i.e., the lands located above the ordinary high-water mark) was a compensable taking under the fifth amendment requiring just compensation.

The cases in the next two sections deal with the measure of that compensation, particularly vis-à-vis a claim that the special location or site value of the property is an element properly includible in the computation of a "just" recompense.

1. The property is located on a navigable stream

It has previously been suggested that United States v. Chandler-Dunbar Water Power Co. could well be brought into the category presently under

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258. United States v. Cress, 243 U.S. 316, 327 (1917). That means, of course, that tributary riparian land is compensable even below the ordinary high-water mark, contrary to land riparian to the navigable mainstream which, under the Chicago rule, is non-compensable. In other words, whatever property in or to the non-navigable tributary has been affected by lifting the navigable mainstream must be compensated regardless of location (i.e. above or below high-water mark) or the type of use (agricultural or power development) that is at stake.

259. Just as non-navigable streams are not per se subject to federal control under the navigation power. See discussion in Part I, I, C. supra, especially note 33 supra.


261. See text at note 33 supra.


263. 229 U.S. 53 (1913).
discussion. Chandler-Dunbar came to the Court on exceptions by the United States to the award below in a condemnation proceeding. The award had included the value of "raw water," i.e., the present money value of certain rapids and falls to the company as the riparian owner. The Supreme Court held that the award erroneously recognized a private property interest in the water power of the river. The formulation of the claim as one to the flow of the water explains the original categorization of the decision. As a matter of computation, however, the flow or "raw water" value constituted but one element which, together with others, made up the award for the uplands. Thus it was possible to characterize the claim as one for the "site or availability value" of the uplands. The Court itself spoke in a number of places of the value allowed (by the lower courts) because "of the availability of the parcels in connection with" water power development. It is difficult to see any meaningful distinction between the value of the water flow itself and the value added by its mere existence to the abutting land. That most likely explains the different ways in which the Court referred to the claim. However, formulating the problem of Chandler-Dunbar as a claim for the flow of the river avoids compounding it with the question of the physical boundary of the servitude. That is, it avoids the question of how to bound the servitude along the ordinary high-water mark and yet preclude from the assessment of unburdened land any consideration of its special adaptability.

Chandler-Dunbar was decided before the Kansas City decision clearly focused on the relationship between the physical boundary of the servitude and the rules of compensation. But regardless of some of its language, the Court must have looked upon the claim as one seeking compensation for private rights in the navigable stream itself, rather than for the special location of the uplands. That

264. Id. at 55.
265. Id. at 59.
266. Id. at 74.
267. Namely in the section dealing with the use of the navigable stream, its flow or its bed.
268. Id. at 74-75.
269. For articles treating Chandler-Dunbar as a problem of injury to or valuation of upper riparian land see Powell, supra note 248; 55 Mich. L. Rev. 272 (1956). But see Sato, Water Resources—Comments upon the Federal-State Relationship, 48 Calif. L. Rev. 43 (1960), describing the claim as one for the loss of water power.
270. 229 U.S. 53, 75 (1913). And again at 76: "[T]he Government cannot be justly required to pay for an element of value which did not inhere in these parcels as uplands."
271. By the same token, the formulation as a claim to the flow of the river makes it that much easier for the Court to take the servitude "out." Quaer whether a better balancing process between the public power and the private right would result if the Court treated the issue as one of the valuation of land, that is, started to some extent with a presumption of compensability.
272. But it was decided after Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893) which it ignored or helped overrule, as has been suggested. See Powell, supra note 248.
becomes clear from the Court's treatment of a second element of the award. That element, included in the total evaluation of the uplands, was for the availability of the land "for lock and canal purposes." The Supreme Court overruled the exceptions of the United States to this portion of the award. It recognized thereby a special site value derived from nothing but the proximity of the lands in question to the navigable stream. This left three possibilities for why it spoke of (and rejected any claim based on) "the availability of the parcels in connection with water power development."

One, the Court was fully aware of the basic synonymity of a claim for (a) the flow of the water and (b) the value thereby added to abutting land, but changed its mind between the first and second portion of the award. Even those fond of likening Supreme Court decisions to railroad tickets should find this proposition outside the realm of the possible. After all, "good for this day and train only" presumably means at least for one entire trip.

Two, the Court recognized the synonymity of the claims just referred to, but sought to distinguish availability for (a) water power development and (b) locks and canals. Efforts have indeed been made to rescue the decision from its hopeless internal inconsistency on that basis, i.e., by arguing that the "lock value" is not dependent on the power potential, whereas the "development value" is dependent on the power potential. The distinction is not convincing. As a practical matter, locks and canals require the use of water as much as does the development of power. If the Chandler-Dunbar Company as riparian owner had "no private property right" to use the water for one purpose, it remains inexplicable why it should have such a right for another purpose.

The most plausible explanation therefore is that the Court, despite some language to the contrary, did not clearly recognize the "water flow claim" and the "site or availability claim" to be two different ways of articulating a claim to the water, for one or another purpose. Only lack of clear analysis could bring forth two such irreconcilable rulings in the same decision.

The Court's approach to the two claims lends further support to this explanation. When it dealt with the "raw water" award, it analyzed the claim in terms of the navigation servitude. When it dealt with the "lock and canal" award, it analyzed the claim solely in light of eminent domain rules. The latter analysis, however, meant one of two things: the Court overlooked the applicability of the servitude or it assumed its non-applicability. That is so because eminent domain rules, determining fair market value of compensable property, should come into play only after a finding that the servitude neither makes the property in question altogether non-compensable nor, as in the case of uplands, "subtracts" from its

274. Like Mr. Justice Roberts, See Smith v. Allwright, 321 U.S. 649, 669 (1944) at 669 (dissenting opinion).
compensable value. For the Court here to speak solely of eminent domain compensation rules therefore means to have answered (or overlooked) the first question, i.e., is the property affected by servitude compensation rules? The Court could, of course, have distinguished “site value” from “water flow value” or “availability for water development” from “availability for locks and canals.” But the two claims were too similar to examine the applicability of the servitude to the first and not to the second claim. These claims clearly called at least for the same analysis; most likely, they also called for the same result. That there was neither can again only be explained by the Court’s failure to recognize their identical nature.

An attempt has been made to reconcile the two rulings by compounding eminent domain and navigation servitude rules. In discussing the “lock and canal” award, the Court had found that the prospective value of the land for the construction of the locks was “beyond the region of the purely conjectural or speculative,” and an “immediate probability.” The reconciliation of the two rulings is based on the theory that despite the servitude the special site value was compensable because of the “immediately prospective” use. On the other hand, the servitude denied compensation for the “remote and conjectural” use of the flow of the water.

The juxtaposition of “immediate” and “conjectural” could theoretically be used to reconcile the inconsistencies. But there is no indication at all that the Court meant to evolve a theory of the servitude that, for reasons unknown, made its applicability turn on such (in this context) meaningless concepts as “immediate” and “conjectural.” For that matter, the assumption that use of the water flow for power development was “remote and conjectural” is itself conjectural. Since the Court never got to an examination of the waterflow claim under rules of eminent domain, it never concerned itself with the probability of the use. At least there is nothing in the opinion precluding a contrary assumption, i.e., that such use, too, was “immediately prospective,” thus leaving the attempted reconciliation without any support.

Olson v. United States next posed the question whether the special adaptability of certain shorelands for the flowage and storage of water could properly be considered in ascertaining just compensation. The Court answered the question in the negative, but solely on principles of eminent domain, without even a

276. At least that analysis seems called for where compensation is granted. It must be distinguished from the situation where the Court finds that in no event is compensation due under eminent domain rules and dispenses with the servitude question on that ground. See Olson v. United States, 292 U.S. 246 (1934).

277. Powell, supra note 248.

278. 229 U.S. 53, 77 (1913).

279. Ibid.

280. Nor does Mr. Powell suggest any.

281. 292 U.S. 246 (1934). The case involved a condemnation proceeding by the United States to acquire flowage easements abutting the Lake of the Woods in Minnesota.
mention of the servitude. It denied the existence of the necessary “reasonable possibility” that the owner could use his land for reservoir purposes. But it did so not because riparian owners are prevented, as against the United States, from storing water and thus interfering with the navigable capacity of the stream. Rather, the Court found that “the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with” made it impossible for the petitioners to acquire all the lands or easements necessary. Under these facts, therefore, there was “no element of value belonging to petitioners that legitimately could be attributed to use and adaptability of their lands for reservoir purposes.”

The Court took up the problem once more in United States v. Twin City Power Co. By that time, it had decided the Kansas City case, ascribing to the United States “power to improve its navigable waters without liability . . . within the bed of the navigable stream.” The “ordinary high-water mark” in turn was designated as having “been accepted as the limit of the bed of the stream.” Private property beyond the bed of the stream was therefore entitled to compensation. “Beyond the bed of the stream” might mean abutting the navigable stream. It might also mean abutting a non-navigable tributary.

The land involved in Twin City was situated along either side of the navigable Savannah River. It had been acquired as a prospective reservoir site. However, several federal licenses for dam construction, issued between 1901 and 1919, had been left to expire and the site was finally included in the Clark Hill project adopted by Congress in 1941. Condemnation proceedings had been brought as part of the procedure for the completion of the project and at issue, inter alia, was the compensability of the dam site value.

There was no doubt that the land was compensable. It was unburdened with the servitude long before Kansas City limited the servitude to the ordinary high-

282. Ibid. There is a more theoretical than real possibility that the Court considered the servitude totally inapplicable because the congressional authorization of the condemnation spoke in terms of carrying into effect a treaty with Canada. But treaty obligations also played a part in Chandler-Dunbar. That fulfillment of such obligations partly motivates appropriation of the stream flow does therefore not automatically preclude the applicability of the servitude. Hence it would seem the Court would have said that it considered the servitude inapplicable because of the treaty obligations had that indeed been the reason for its failure to deal with the servitude.

283. Id. at 260. The area involved 1035 miles of shoreline and approximately 850 parcels owned by more than 775 people, excluding mortgagees.

284. Id. at 261.


287. Id. at 804. (Emphasis added.)

288. Id. at 805.

289. The value of the land as a potential power site was approximately $267 per acre as opposed to a value of $37 per acre if treated as agricultural land only. See footnote 9 of the dissenting opinion, 350 U.S. at 237.
water mark.\footnote{290} That limit, in any event, also spelled the limit to governmental immunity from compensation. There was therefore no reason why the full measure of "just compensation" should not contain all elements giving value to the condemned property. The "lock and canal" award of the Chandler-Dunbar decision supported this still further.\footnote{291} Twin City's claim seemed to follow from the implications of Kansas City and was indistinguishable from the second ruling in Chandler-Dunbar. Nor was it likely to stumble over the requirement of "reasonable possibility" of use that was the undoing of the petitioners in Olson \textit{v. United States}.\footnote{292} For apparently the potential use of the land for a dam site was more than speculative.\footnote{293}

On the other hand, any reliance on the "lock and canal" award was overshadowed by its basic inconsistency with the rejection of any right to the flow or power potential of the water. And Kansas City was in ill favor with some members of the Court, although for a different reason.\footnote{294} Perhaps it is not surprising then that Mr. Justice Douglas, writing for the majority in Twin City Power Co. (as he had written for the dissenters in Kansas City) rejected the claim and at the same time threw doubt on the viability of the Kansas City rule. To deny compensation for the site value of the uplands meant to deal with the argument that their location "above and beyond the high-water mark" established their immunity against the servitude. The "flaw in that reasoning," as the Court saw it, was that

the landowner here seeks a value \textit{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. \textit{That special location value is due to the flow of the stream}. . . \footnote{295}

The equation of site value and water flow made the first ruling in the Chandler-Dunbar case directly controlling. The now completely untenable "lock and canal award" was relegated to a footnote together with a half-hearted

\footnote{290. There had never been any doubt regarding the right to \textit{some} compensation for such land, at least in the case of flooding. See Pumpelly\textit{ v. Green Bay Co.}, 80 U.S. (13 Wall.) 166 (1871) and note 238 \textit{ supra}.} \footnote{291. \textit{i.e.}, that portion of the award including in the valuation of the lands an item for their "adaptability for lock and canal purposes." 229 U.S. 53, 79 (1913).} \footnote{292. 292 U.S. 246 (1914). The question might have become important if the Court either evaluated the claim on eminent domain principles exclusively or if there was indeed a connection between "immediate versus conjectural" and the servitude.} \footnote{293. 350 U.S. 222, 237 (1956) (dissenting opinion).} \footnote{294. Namely that it made a senseless distinction between tributary and mainstream riparians.} \footnote{295. 350 U.S. 222, 225-26 (1956). (Former emphasis, the Court's; latter emphasis added.)}
attempt at distinction. That aspect of the Chandler-Dunbar case must be thought of as having, sub silentio, joined the past history of the navigation servitude.

The identification of the value of the water flow with the value it adds to the abutting land did two things. It solved the Chandler-Dunbar (internal) dilemma in a common sense manner. It also bypassed the Kansas City rule requiring compensation for property "beyond the bed of the stream." The Court distinguished Kansas City on that basis. Aside from the distinction, though, Mr. Justice Douglas may have meant to do more to Kansas City. In discussing Chandler-Dunbar, he pointed out that some of the land there involved lay in the stream bed, some above high-water mark.

"But the location of the land was not determinative."

On their face, the words are limited to their immediate context, namely that the location was irrelevant because at issue were claims to the stream itself. Nevertheless they are susceptible of a different, more significant interpretation. For one, the Kansas City rule turns the compensation question on the location of the property involved; for another (and corollary of the first), the location of the property determines whether title is or is not burdened with the servitude; finally, the words "But the location of the land was not determinative" come from the same Justice who looked upon the solution of Kansas City as an undesirable way to shirk the real problem—"to accommodate congressional power and the rights of adjacent landowners."

For these reasons the statement about the irrelevance of location might have been meaningful beyond its immediate setting. What it could have signified, is easy to conjecture: that Kansas City, decided by a divided (and different) Court might not withstand re-examination. But aside from implications for its future fate, the Kansas City rule had suffered a present qualification. Common sense may indeed have required equal treatment for "water flow" and "availability" values. But it seems to matter little whether both were categorized as claiming interests in the stream or interests appended to the adjacent (and under Kansas City unburdened) land because of the stream, so long as both were categorized together. Thus the Twin City formulation avoided the Kansas City rule only verbally. For all practical purposes, Twin City "extended" the servitude (or more accurately, the range of non-compensable losses) to the uplands in this

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296. Id. at 226.
297. See also Note, The Supreme Court, 1955 Term, 70 Harv. L. Rev. 83, 131 (1956), for the suggestion that Twin City overrules the "lock award."
298. 350 U.S. 222, 225.
299. Id. at 227.
sense, but in this sense only: the ordinary high-water mark still bounded the
servitude. Land beyond it was compensable. But in determining that compensa-
tion, no value could be derived from the flow of the navigable river it
abutted. 301

At this point a recent Supreme Court decision must be examined which in
one sense constitutes a sequel to *Twin City*. *United States v. Virginia Elec.
& Power Co.* 302 involved the compensability of a flowage easement, acquired
by respondent's predecessor in title and extending over 1540 acres. For purposes
of a dam and reservoir project, 303 the United States obtained, by condemnation,
a flowage easement over 1840 acres. That acreage included the 1540 acres bur-
dened with the respondent's easement. Pursuant to an agreement with the fee
owner, the United States had deposited one dollar as the "full amount of the
award of just compensation." 304 Upon his intervention, the respondent received a
judgment which measured the value of the easement by the fair market value
of the property. The judgment was affirmed by the Court of Appeals for the
Fourth Circuit on the basis of its decision in the *Twin City* case. 305 That deci-
sion having been reversed, 306 the Supreme Court *per curiam* vacated the judg-
ment here and remanded the case for consideration in the light of its *Twin City*
ruling. 307 On remand, the district court excluded "'any element of value aris-
ing from the availability of the land for water power purposes due to its being
situate on a navigable stream.'" 308 Nevertheless, it arrived at an evaluation
of $65,520 and rendered judgment for that amount. 309 The case was returned

301. The dissenting Justices (Burton, Frankfurter, Minton and Harlan) considered
the lock and canal award of *Chandler-Dunbar* controlling. Their attempt, however, to
explain the "water flow" ruling in that case on the basis that the "rejected values were
not part of the fair market value of the land . . . due to the speculative nature of the
proposed use" is unconvincing. There is nothing in the *Chandler-Dunbar* opinion indi-
cating that the Court ever considered that question in that context, let alone allowed it
to be decisive. For a discussion of the role *Kansas City* plays in the valuation of uplands
abutting non-navigable streams, see infra.

302. 365 U.S. 624 (1961) (Mr. Justice Stewart writing for the Court with Mr. Justice
Douglas concurring separately, and Mr. Justice Whittaker, with whom the Chief Justice
and Mr. Justice Black joined, dissenting).

303. Authorized by Congress in 1944, to be located on the Roanoke River in Virginia
and North Carolina. The flowage easement extended over fast lands adjacent to the
Dan River, a navigable tributary of the Roanoke. *Id.* at 624-25.

304. The owner agreed to the nominal award because the lake to be created would
enhance the value of the remaining estate as a wild game reserve. *Id.* at 625, n.1.


the explicit directions given the Commissioners by the district court.

309. *Id.* at 627. The court of appeals again affirmed, *United States v. 2979.72 Acres
of Land*, 270 F.2d 707 (4th Cir. 1959), and the Supreme Court granted certiorari, 362 U.S.
947 (1960).
to the Supreme Court on the government's claim that the easement "'had no compensable value when appropriated by the United States.'"310 The Court disagreed, holding that the easement had value disconnected from the stream flow and was to that extent compensable.

One point of the opinion in particular bears on the preceding discussion of Twin City Power Co. The Court reaffirmed that the navigation servitude "affects" the measure of damages when land beyond the high-water mark of the stream is taken. That measure must therefore exclude a site value which "is attributable in the end to the flow of the stream."

As has been pointed out, viewing the claim for dam site value as a claim attributable to the flow of the stream is a device which avoids an express qualification of the Kansas City rule regarding the supposedly unburdened uplands. But however that qualification was verbalized, by now it seems to have gained the support of the entire Court and United States v. Twin City Power Co. to have become a unanimously adopted rule six years after its pronouncement.312

The actual analysis of the government's claim is more a struggle over its exact formulation than over the applicable rules. The decision that the flowage easement is compensable does not alter or modify established principles of the navigation servitude. Some discussion of it may nevertheless be warranted.

As already mentioned, the United States contended for the non-compensability of the easement. It did so on the theory that its only value was in conjunction with water power development. The easement was alleged to depend, in other words, on the flow of the stream. The respondent agreed to the exclusion of any "availability value." However, he claimed compensation for any "other value" inherent in the easement and not dependent on the stream-flow. The issue so joined was "whether the respondent's easement might be found to have value other than in connection with the flow of the stream."313

The Court found that such a value existed, "attributable not to water power, but to the depreciative impact of the easement upon the nonriparian uses of the

311. Id. at 629. In view of the history of the case, the respondent had acknowledged that the courts below were correct in excluding any "availability" value.
312. The Court had been unanimous when it remanded the first judgment for consideration in light of Twin City. See United States v. Virginia Elec. & Power Co., 350 U. S. 956 (1956). More significantly, none of the Justices here (365 U. S. 624) take exception to the reiteration of the Twin City principles. A second point worth noting is that Mr. Justice Stewart described the servitude in the language of the Kansas City decision. If there is method in this manner, quaere whether Kansas City has thereby gained new respectability and support. And quaere whether the possibility of so reading Mr. Justice Stewart's opinion explains Mr. Justice Douglas's separate concurrence which seems merely to repeat the Court's reasons, albeit far more clearly.
Consequently, it concluded that the government must compensate the easement owner, just as it would have to compensate the landowner for any value not stemming from the flow of the stream, but from nonriparian uses of the property. Or, as Mr. Justice Douglas stated more explicitly:

The owner (of the easement) stands in the shoes of his predecessor in title. The owner of the easement is entitled . . . to no water-power value . . . to nothing that gains value from the flow of the stream, from any head of water, or from the strategic location of his land for hydroelectric development of the river. But the owner of the easement and the owner of the subservient fee have all the other parts of the bundle of rights that represent 'property' within the meaning of the Fifth Amendment.

The dissenting Justices disputed that the easement owner's "bundle of rights" contained any parts other than a claim to the use of the waters.

"The sole and only right the power company ever had in these lands was the right to dam and back the river's waters upon them."

Consequently, the easement had no value at the time the government took it. Its exercise had always, under the Federal Power Act, been contingent on the issuance of a federal license, authorizing the private damming of the river. Moreover, authorization of the dam and reservoir project "appropriated the entire flow of the river for the declared public purpose." Last, when the United States took the easement there existed "no possibility that the power company could ever dam and back the river's waters upon these lands." Both Twin City and Chandler-Dunbar therefore "clearly" required the conclusion that the easement was valueless.

314. Id. at 630. (Emphasis added.) The Court cites to numerous eminent domain authorities for the proposition that "the valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth."

315. Ibid. Thus the only question left was the method of determining the amount of compensation. The district court had treated the subservient fee as being without value and had awarded the respondent the entire value of what the government had appropriated in the 1540 acres at issue, excluding any "site value." The Court disapproved the apportionment and developed instead this formula: "The value of the easement is the non-riparian value of the servient land discounted by the improbability of the easement's exercise." Id. at 635. The judgment was vacated and the case remanded with directions.

316. Id. at 637-38 (concurring opinion).

317. Id. at 638-39 (dissenting opinion). (Emphasis added.)

318. Id. at 639 (dissenting opinion), citing from United States v. Twin City Power Co. 350 U.S. 222, 225 (1956).


320. Id. at 642 (dissenting opinion).
Both definitions of the respondent's right have merit. But on balance, the
dissent seems the more persuasive—all the more so vis-à-vis Mr. Justice Stewart's
characterization of the value claimed in *Twin City* as being "attributable in the end
to the flow of the stream, over which the Government has exclusive dominion."^{321} It seems that a flowage easement acquired for the purpose of ulti-
mately constructing a dam across the navigable river "in the end" derives its
value from that river.^{322}

2. The property is located on a non-navigable stream

Only two cases dealing with the evaluation of property abutting a non-
navigable stream will be discussed here. The third, *United States v. Grand
River Dam Authority*^{323} will be treated in the following section.

*United States ex. rel. TVA v. Powelson*^{324} reached the Court for the first

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321. Id. at 629. (Emphasis added.)
322. See also Note, *The Supreme Court 1960 Term*, 75 Harv. L. Rev. 125-27 (1961),
agreeing that *Virginia Electric* "reaffirmed *Twin City*'s narrow holding" and that the
reaffirmance "suggests that *Twin City* will not be overruled." The editors agree further
that a different result could have been reached. Their analysis differs from the present
one, however. It proceeds from the premise that in *Twin City* "the Court relied on the fact
that the government's decision to undertake the river project destroyed the power-site
value of the condemned land." Id. at 126 (*quaere* whether this is a very fortunate formu-
lation of the basis for *Twin City*). Taking the effect of government intervention into
account here, the argument continues, would have rendered the easement almost value-
less, for absent a *private* power development plan it was saleable only to those who
would have wanted to obtain clear title to the underlying fee. But that is certainly one (if
not the only one) of the non-riparian uses the Court had in mind. "It [the easement] had
been acquired for a valuable consideration. It had a marketability roughly commensurate
with the marketability of the subservient fee. Only an adventurous purchaser would have
acquired the underlying fee interest ... for any purpose whatever, without also purchas-

Finally, the editors see in the Court's formula a demonstration of the inconsistency of
*Virginia Electric* with *Twin City* because by disregarding the government's intervention
in determining the "probability of the easement's exercise" (see note 315 * supra*) the
formula is said to take into account the possibilities of private use of the water. That is
not a convincing interpretation. The formula expressly provides for the disregard of all
riparian values. With that, the effect of the servitude is exhausted and rules of eminent
domain govern the determination of the non-riparian market value. Under those rules it
is clear that the effect of the government's special need may neither enhance nor diminish
the non-riparian market value. Theoretically therefore, the formula does not conflict with
*Twin City*. The practical difficulty is again to attribute to the easement any genuine non-
riparian use. (See also the dissenting opinion in *Virginia Electric.*)

But see *Borough of Ford City, Pennsylvania v. United States*, 213 F. Supp. 248 (W. D.
Penn. 1963) finding that the value of a sewer collection system was not attributable
"solely" to the flow of the Allegheny River and its riparian location. Hence compensa-
tion was due for damage resulting from permanently raising the stream above the ordi-
ary high-water mark. The opinion makes no attempt to state in what the "independent"
value lies.

324. 319 U. S. 266 (1943) (Justice Jackson, with whom Chief Justice Stone and Jus-
tices Roberts and Frankfurter joined, dissented).
time in 1942. Under *United States v. Cress*, private property within and along the non-navigable tributary which had been "unaffected by the flow of the rivers or their tributaries" prior to raising the navigable mainstream was not burdened by the servitude. Earlier, *United States v. Chandler-Dunbar Water Power Co.* had rejected any claim for the loss of the flow of a navigable stream; or, which is the same, it had rejected any claim for the value which the presence of the flow added to the adjacent land.

The government based its argument in the *Powelson* case on *Chandler-Dunbar*. It contended that no compensation was due for loss of water power value, albeit the stream in question was non-navigable. The Court, perhaps because of *United States v. Cress*, avoided the constitutional issue.

We do not stop to consider that question. For if we assume, without deciding, that rights in the "flow" of a non-navigable stream created by local law are property for which the United States must pay compensation . . . the water power value . . . sought . . . cannot be allowed.

The reason on which the Court based its decision was the "too remote and speculative" principle of the law of eminent domain.

Eventually the United States lost on its argument as to the non-compensability of water power value derived from the non-navigable stream. On remand, the court of appeals read the Supreme Court decision narrowly as "holding only that profits attributable to an enterprise which [the claimant] hoped to launch are inadmissible as evidence of the value of the lands which were taken." Consequently, the court directed that evidence be admitted showing additional value for the property based on "dam site availability". The Supreme Court denied certiorari—with whatever implications that follow from such a denial.

325. The case was remanded to the court of appeals and reached the Court a second time, when a writ of certiorari was sought. See *United States ex rel. TVA v. Powelson* 138 F. 2d 343 (4th Cir. 1943), *cert. denied*, 321 U. S. 773 (1944).


327. *Id.* at 327.

328. 229 U. S. 53 (1913).


330. Nor did Mr. Justice Jackson's dissenting opinion suggest the applicability of the servitude. Rather, the dissent disagreed with the treatment accorded the respondent's power of condemnation.

331. See 138 F. 2d 343, 344 (4th Cir. 1943) quoting from the Supreme Court opinion.

332. *Id.* at 346.

333. *United States ex rel. TVA v. Powelson*, 321 U. S. 773 (1944). The petition for the writ of certiorari argued that the Supreme Court had removed the entire question of water-power value from the case and that consequently the order below was contrary to the decision of the Court in *United States ex. rel. TVA v. Powelson*, 319 U. S. 266 (1943).
Grand River Dam Authority v. Grand Hydro\(^3\)\(^3\)\(^4\) again concerned the admissibility of evidence. The Authority contended that the Federal Power Act so far affected the use of value of the property as a power site as to make any testimony inadmissible that dealt with that value.\(^3\)\(^5\) The Court rejected the contention. But again it did so for reasons unrelated to the servitude. It found that the plaintiff-Authority had filed the condemnation proceeding in exercise of the eminent domain powers it possessed as a public utility under state law; it had not sought to act in exercise of the federal license it received after the institution of the proceeding, but prior to trial.\(^3\)\(^3\)\(^6\) Thus the question was to be decided by state, not federal law. The governing Oklahoma rules, however, admitted evidence of dam site value without a showing by the defendant that it had obtained authorization for the construction of the dam.

The Court expressly left open the effect that a different plaintiff might have had on the outcome of the decision.

If either the United States, or its licensee as such, were seeking to acquire this land, under the Federal Power Act, it might face different considerations. . . . [W]e express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act.\(^3\)\(^3\)\(^7\)

The decision was therefore limited to a condemnation proceeding brought under state law. Nevertheless, the dissenting Justices saw in it a grant to private parties of "an entrenched property interest in the public domain."\(^3\)\(^3\)\(^8\) The grant was unwarranted because of the Federal Power Act, through which the United States was claimed to have asserted "its exclusive dominion and control over this water power."\(^3\)\(^3\)\(^9\)

**FPC v. Niagara Mohawk Power Corp.**\(^3\)\(^4\)\(^0\) has since undermined the basis

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\(^3\)\(^3\)\(^4\) 334. 335 U. S. 359 (1948) (Justices Douglas, Black, Murphy and Rutledge dissented).

\(^3\)\(^5\) 335. The property was located along the Grand River, a non-navigable tributary of the navigable Arkansas.

\(^3\)\(^6\) 336. Since the FPC had found that the navigable stages of the Arkansas River would be affected by the project, a federal license was required, notwithstanding the proposed location on a non-navigable stream. 335 U. S. 359, 365-66 (1948).

\(^3\)\(^7\) 337. Id. at 373.

\(^3\)\(^8\) 338. Id. at 376 (dissenting opinion).

\(^3\)\(^9\) 339. Id. at 375 (dissenting opinion). The dissent read *United States v. Willow River Co. and Oklahoma v. Atkinson* as bringing non-navigable streams into the exclusive control of the United States over water power, established by Chandler-Dunbar and Appalachian Power. *Grand Hydro* was decided after *Willow River* had seemingly overruled *Cress* and before *Kansas City* re-established the rule of the latter. For the time being, therefore, it was indeed reasonable to assert that property within or along a non-navigable tributary, too, was burdened with the servitude.

\(^3\)\(^4\)\(^0\) 340. 347 U. S. 239 (1954) (Justices Reed and Jackson took no part in the decision; Justices Douglas, Black and Minton dissented).
of the dissenting opinion by holding that the Federal Power Act has not abolished private proprietary rights, existing under state law, to use the waters of navigable streams for power purposes. Nor could the Federal Power Act under that interpretation be said to have abolished such rights in non-navigable streams.

At least incidentally, *Niagara Mohawk* has also answered the question expressly left open in *Grand Hydro*. If the Federal Power Act has not destroyed state-created rights to the use of water, then presumably it has not destroyed the values which the existence of that water adds to the abutting land. Therefore where the United States or its licensee proceeds under the Federal Power Act, "the appropriate measure of value" would seem to be the same that it was in *Grand Hydro*.

With that, the obvious question is left—that of the "appropriate measure of value" outside the Federal Power Act.

3. *United States v. Grand River Dam Authority*  

It may be well to recount briefly the situation that existed regarding non-navigable streams when *Grand River Dam* reached the Court in 1960.

By that time, *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.* had, at least arguably, recognized a constitutional power to "'treat the watersheds as a key to flood control on navigable streams and their [non-navigable] tributaries.'" But there had been no complaint "that any property owner will not receive just compensation. . . ."

On that issue, *United States v. Kansas City Life Ins. Co.* had since attempted to bound the servitude along the ordinary high-water mark of navigable streams. Compensation was therefore due for any taking beyond the area so limited, e.g., of property interests in the flow of the non-navigable tributary or in abutting land. At least that was so if the exercise of federal power was by its terms limited to the navigable mainstream.

But for navigable streams, *United States v. Twin City Power Co.* had
qualified the rule. It had equated site value with water flow value. It had thereby extended the range of non-compensable losses to include site value. At least that was so where the United States or its licensee had not proceeded under the Federal Power Act. For in 1954, FPC v. Niagara Mohawk Power Corp. had construed that act as not abolishing private property rights to the use of water and thus, by implication, as not abolishing site value where recognized by state law.

United States v. Grand River Dam Authority posed the question left open: assuming Congress attempted to exercise its alleged power over the non-navigable tributary (Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.) and assuming it did so expressly rather than incidentally. i.e., when dealing with the navigable mainstream (United States v. Kansas City Life Ins. Co.)—how well would the rights of the tributary-riparian fare?

The rights involved were water power rights, to be used for the development of electric power on the non-navigable Grand River under an exclusive state franchise. They were destroyed when the United States erected the Fort Gibson dam, built under a 1941 Act of Congress 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"—here the Grand River.

Clearly these rights were non-compensable if the stream were navigable. Clearly they were also non-compensable if the servitude extended to non-navigable waters, as the United States sought to argue. And clearly they were compensable if Kansas City controlled the situation.353

The Supreme Court unanimously concluded:

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.354

350. See also the discussion of Grand River Dam Authority v. Grand Hydro, 335 U.S. 359 (1948), text at note 334 supra.
351. The necessary federal license for the construction of three dams, to be located on the non-navigable Grand River, had been obtained.
353. Kansas City specifically involved only the agricultural value of abutting land. But beyond that, Kansas City imposed on the United States liability for effects in the non-navigable tributary of changing the navigable mainstream—the property in the non-navigable tributary entitled to compensation being all that was “unaffected by the flow of the rivers” prior to raising the navigable mainstream (including, in other words, water power rights).
The superior power which the United States was exercising, however, was not a power that extended to non-navigable streams per se; rather, it was the protection of the navigable capacity of the mainstream which thus enabled the United States to appropriate with immunity the flow of non-navigable tributaries affecting that capacity.

State-created rights to the use of the flow of non-navigable streams were thus as vulnerable as state-created rights to the use of navigable streams.

_United States v. Twin City Power Co._, furthermore, had treated the claim for special site value as but another way of claiming the flow of the river. The claim to the (there navigable) stream-flow being impermissible, so was the claim for the special site value. It follows that wherever the claim to the non-navigable stream-flow is impermissible, so is the claim for any special site value.

Thus the question that was not decided in _United States ex. rel. TVA v. Powelson_ seems answered: land abutting non-navigable streams the flow of which has been appropriated by the United States may not be compensated on the basis of its dam site value.

That, however, completes the "qualification" or perhaps more aptly, the "hedging-in process" of the _Kansas City_ rule. The servitude may still be bounded by the ordinary high-water mark. But it "affects" (to use Mr. Justice Stewart's word) one, the uplands abutting the navigable stream in that their site value is non-compensable; two, rights to the flow of the non-navigable tributary and three, site value of uplands abutting the non-navigable tributary. All are non-compensable if, and only if, the United States has _expressly_ exercised its power to protect the navigable capacity of the mainstream.

**E. Summary**

The many pages dealing with the consequences inflicted by the servitude on private property lead to these conclusions:

1. The navigation servitude extends to the ordinary high-water mark of navigable streams and may be maintained at that level by artificial means.
2. Within that boundary line, title to all private property is defeasible without compensation as against the exercise of the navigation power by the United States. Such property includes title to the stream bed, title to structures, and title to realty.

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355. 319 U. S. 266 (1943).
357. _Id._ at 629.
tures within the stream, access to the stream, title to abutting land up to the ordinary high-water mark and rights to the stream flow.

(3) Beyond the boundaries set by the ordinary high-water mark, the servitude affects abutting uplands in that value attributable to their location near a navigable stream is non-compensable.

(4) Injury to private property within or abutting non-navigable streams is compensable if inflicted in the course of an exercise of the navigation power limited to the navigable mainstream.

(5) In the event Congress expressly exercises the navigation power over the non-navigable tributary in order to protect the navigable capacity of the mainstream,

(a) title to private property within the boundaries set by the ordinary high-water mark of the non-navigable tributary is defeasible without compensation;

(b) beyond these boundaries, the servitude affects abutting uplands in that value attributable to their location is non-compensable.

(6) Neither prior state nor congressional sanction of the right in question, nor prior congressional inaction, cause the sovereign to be estopped. A congressional recognition of the right as compensable would be effective.

PART III

CONSUMPTIVE WATER RIGHTS

COMPENSABILITY OF CONSUMPTIVE WATER RIGHTS

A. Introduction

At the very outset of the present investigation a number of questions were

360. E.g., the bridge cases: Louisville Bridge Co. v. United States, 242 U.S. 409 (1917); Union Bridge Co. v. United States, 204 U.S. 364 (1907); the power plant in United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).


367. Ibid.


posed, for which answers shall now be attempted in light of the conclusions reached. To restate the questions:

(1) Is the owner of a state-created consumptive water right on a navigable stream entitled to compensation if a federal dam causes its destruction or impairment?
(2) Assuming no compensation is due, does a claim to compensation arise if the United States, in distributing project water among intra-state users, ignores state-created priorities in the subsequent distribution of impounded waters?
(3) Do the results change if the right in question is that to the use of the non-navigable tributary of a navigable mainstream?

Finally, brief consideration will be given to the valuation of desert uplands.

B. Compensation For State-created Consumptive Water Rights On Navigable Streams

1. Compensation for the loss of the right itself

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.\(^{370}\) Congress, of course, has often been solicitous of state-created Western water rights.\(^{371}\) The construction of Section 8 of the Reclamation Act as a congressional agreement to pay for water rights acquired under state law has been an important source of protection for Western water right owners.\(^{372}\) A good many federal projects in the West are reclamation projects.\(^{373}\) At the same time, the West is the area where irrigation water rights are not only most important, but also most numerous. The combination of these various factors may be one reason for the dearth of decisions dealing with the compensability of irrigation water rights vis-à-vis the navigation servitude.\(^{374}\)

But while there is no case subjecting irrigation water rights to the rule of no compensation nothing on the other hand suggests their compensability. The analysis of navigation cases has many facets: the kind of stream involved, the purposes a given project is to serve, the ascertainment of congressional intent, the

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370. The term "consumptive water right" is here used interchangeably with "irrigation water right" although the latter is the narrower concept.
371. See for example section 8 of the Reclamation Act, supra note 80.
372. See United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). For the proposition that this agreement was "voluntary", i.e., that Congress was not under the Constitution required to pay for these rights, see the concurring part of Mr. Justice Douglas's opinion in Gerlach. Such owners are therefore protected where owners in non-Reclamation Act states most likely are not. See also Note, The Supreme Court 1949 Term, 64 Harv. L. Rev. 114, 137 (1950) which justifies the preferential treatment on the basis of the "unique significance of water rights in the West."
373. See for instance the Central Valley Project described in Gerlach Live Stock Co.
374. And see section 27 of the Federal Power Act, likewise requiring compliance with state law, thus contributing to the lack of decisions.
physical boundaries of the servitude. But the particular manner in which the use of the stream is sought to be maintained against the superior federal right seems irrelevant to the analysis. Only in one context does the precise content of the compensation claim become important, namely in the evaluation of the “uplands.” Even here the claim fails once it is shown to derive “in the end” from the presence of the stream flow. And again it makes no difference just how the right underlying such a claim would be exercised in its particulars.

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. There a right was claimed to the construction and continued maintenance in the river of certain structures, provided only those structures did not impede navigation. But having foreclosed itself from an independent judicial inquiry into the latter question, the Court concluded:

[E]very such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in the navigation of the river.

It hardly seems important that the Chandler-Dunbar structures were to serve the particular purpose of facilitating the commercial exploitation of the river for power development. A different result in favor of structures serving the particular purpose of facilitating the exploitation of the river for irrigation would call for a distinction based on, in this context, immaterial facts.

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 it to be in the other. Nor would the “owner” of the water right in question be per-

375. 229 U.S. 53 (1913). Such works would have to be licensed under the Rivers and Harbors Act.
376. Id. at 70.
377. Id. at 69. See Trelease, Government Ownership and Trusteeship of Water, 45 Calif. L. Rev. 638 (1957) on the semantic problems regarding the use of the word property in connection with water and water rights.
mitted 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.

2. Compensation for loss of priority in the intrastate distribution of project water

The question briefly to be examined is the power of the United States to disregard state distribution laws in the intrastate distribution of so-called “project water.” More particularly, if the United States does disregard state-created priorities among intrastate project users, has it taken compensable private property? The question must be answered by reference to previously established propositions. The United States may appropriate the entire flow of a navigable stream; the congressional judgment that the entire stream flow is required for navigation and that the protection of navigation should take preference over all other uses of the stream is legislative and, in the absence of arbitrary congressional dealings, non-reviewable; the exercise of the federal power ousts the concurrent jurisdiction of the states; no state-created private property rights to the use of the water are good against the superior federal navigation power and their total or partial destruction is thus non-compensable.

It would seem to negate these propositions, clearly supported in the decisions,\(^\text{378}\) to conclude that the distribution of project water must take place in accord with state law—or that, in other words, the United States loses its immunity against compensation claims if it distributes project water in accord with its own plans. \(A\), the owner of a private, state-created consumptive water right on a navigable stream cannot claim compensation for its destruction or impairment. Neither can he claim compensation if in the distribution of project water \(B\) is given a ratable share, even though under state law \(A\)’s prior right would preclude \(B\) or entitle \(B\) only to a lesser amount. Once the navigation power has been exercised, \(A\) has \textit{no right} to the water of the navigable stream and thus to project water. Hence he cannot have a \textit{prior right} to such water. To allow compensation for the loss of priority is to assert that there may be private property in navigable streams good against the United States. At this point in the history of navigation power and navigation servitude such a proposition seems

\(^{378}\) See the conclusions arrived at in the preceding investigation, set forth in the summaries under Parts I, II.
impossible to maintain—at least under the assumption that a congressional decision to disregard state-created priorities in the distribution of project water would be based on a sound and reasonable policy judgment as to the best use of the resource. 379

The rule of no compensation therefore extends to the loss of state-created priorities.

C. Estoppel In Favor Of Consumptive Water Rights

1. Estoppel through federal inaction or federal license

As will be recalled, in every decision after Monongahela Nav. Co. v. United States 380 estoppel has failed to prevent the loss of private water rights without compensation upon the exercise of the navigation power. Prolonged congressional inaction was said not to “prohibit future exertion of federal control.” 381 The principle seems too firmly established and, for that matter, too reasonable to be abandoned merely because consumptive water rights are involved.

Nor did the possession of a federal license lead to estoppel. In Chandler-Dunbar, 382 the Secretary of the Army had licensed water power works under provisions of the Rivers and Harbors Act. The licensee acquired no “right to maintain these constructions . . . longer than the government should continue the license.” 383

But if the license gave no vested right to the maintenance of the plant, it could hardly have given a vested right to the use of the water. The fate of water

379. The reasoning here employed may evoke uncomfortable associations with “unconstitutional conditions,” i.e., with the doctrine which says that because a state may withhold a privilege altogether, it is not necessarily permitted to condition its grant on the surrender of constitutional rights. But aside from the quite different circumstances typically surrounding the unconstitutional condition problem, two points bear on the present discussion. One, as Hale points out: “it is not the law that the exertion of a power is always unconstitutional when its purpose is to induce the foregoing of constitutional rights. The Supreme Court has sustained many such exertions of power even after announcing the broad doctrine that would invalidate them.” Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321, 322 (1935). Two, there is even less doubt as to the state’s conditioning power where it exerts its interest to conserve highways and improve traffic conditions. See Hale, supra at 349 citing to such cases as Stephenson v. Binford, 287 U.S. 251 (1932) (Texas statute required surrender of right of private contract carrier to fix its own rates). Under the assumption made in the text (a reasonable policy judgment leading to the disregard of state priorities) it is hard to believe that the Court would upset the congressional judgment by a strained use of the doctrine of unconstitutional conditions. But it may be that “reasonableness” here would be the subject of greater Court scrutiny than is the case with other aspects of the congressional exercise of the navigation power, discussed previously.

380. 148 U.S. 312 (1893).
382. 229 U.S. 53 (1913).
383. Id. at 68.
use and plant are so inextricably interwoven\textsuperscript{384} that whatever would maintain the one (and be it on the basis of estoppel) would seem to maintain the other. If therefore a license under the Rivers and Harbors Act does not protect the diversion works against the later exercise of the navigation power and the effects of the navigation servitude, then it does not protect the consumptive use of water, which alone makes the presence of the works necessary in the first place.

Conceivably, the diversion of the water itself could be the subject of the license rather than the construction to be undertaken and the structures to be placed in the river.\textsuperscript{385} However, even if that were the contents of the license, it would still fall under the principles laid down in \textit{Chandler-Dunbar}. Congressional authority to deal with the stream would remain the same as if no such license had ever been granted.

Specific congressional authorization finally proved equally inefficacious as a basis for estoppel. In \textit{Louisville Bridge Co. v. United States}\textsuperscript{386} congressional authorization for the construction of claimant’s bridge did not create any “vested rights.” That Congress was motivated by its urgent need arising from the Civil War to encourage private bridge construction was immaterial.

Of course, the Court has never precluded estoppel against the exercise of the navigation power as a doctrinally inapplicable principle.\textsuperscript{387} Given the “right case” therefore it could distinguish both \textit{Chandler-Dunbar} and \textit{Louisville Bridge Co}.\textsuperscript{388}

Many will undoubtedly see the “right case” to lie in the mere fact that irrigation water rights are involved. A number of arguments can be made in support of that position. One is the crucial importance of these rights in the arid and semi-arid states of the West. Another is the substantial investments that would be destroyed without compensation were the United States (for instance) to appropriate the entire flow of a major stream-system. A third is the fact that

\textsuperscript{384} See the Court’s reasoning in \textit{Chandler-Dunbar} when dealing with the “raw water” claim for the falls and rapids; the company being prohibited from placing in the river structures needed for the exploitation of the water power, had no claim to any element of value constituted by the presence of such water power.

\textsuperscript{385} The \textit{Republic Steel} case suggests that diversion might be a proper subject for a license under the Rivers and Harbors Act. \textit{United States v. Republic Steel Corp.}, 362 U.S. 482 (1960) (Justices Harlan, Frankfurter, Whittaker and Stewart dissented). It held that the discharge of water containing suspended minute particles of industrial waste solids created an “obstruction” of the navigable capacity of the Calumet River within the meaning of the first, general clause of section 10. For a discussion of some of the problems raised by the facts of the \textit{Steel} case, see Note, \textit{Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case}, 59 Colum. L. Rev. 1065 (1959).

\textsuperscript{386} 242 U.S. 409 (1917).

\textsuperscript{387} See the Court’s language in the above case, “We do not go so far as to say that Congress could not in any case, . . . by . . . estoppel, prevent itself . . .” \textit{Id.} at 417.

\textsuperscript{388} Just as the latter distinguished \textit{Monongahela} as involving a “clear taking over” of property.
many of these investments were made before "navigation" comprehended the construction of basin-wide, multi-purpose, multi-million-dollar dam and reservoir projects. For these investments, at least, there was no meaningful "notice" of the paramount federal right. Certain federal legislation supports the argument: legislation which sought to encourage the settlement of arid areas.\(^{389}\) legislation recognizing and protecting state-created rights.\(^{389}\) Both fostered the expectation of continued congressional deference to unique Western water problems. There is finally Monongahela Nav. Co. v. United States\(^{390}\) repeatedly distinguished but never overruled. Thus there is precedent, however weak, for the proposition that Congress may be estopped to take without compensation that which has come into existence by its "instance and implied invitation."\(^{392}\)

All of these arguments add up to a showing of reasonable expectations and of grounds on which Congress could be estopped. Probability indeed speaks against it. All of the considerations set forth above presumably were before Congress when it decided in the given instance to exercise the full sweep of its power. Its decision to take without compensation therefore implies a negative judgment regarding the desirability of a preferential treatment of consumptive rights. The Court has repeatedly and emphatically spoken of the "legislative" and "conclusive" character of congressional dealings with the nation's waterways. It has indicated little willingness to examine what is "for Congress and Congress alone to evaluate."\(^{388}\) It is not very probable that the Court will enter such a re-examination in the name of "estoppel."

Nor would it be desirable for the Court to do so. All irrigation water rights are not automatically of greater importance to the welfare of the community (and hence worthier of protection) than all franchises for power development. Nor are the expectations of an irrigation water right owner automatically more reasonable than those of a franchise holder. Finally, the investment of the former may or may not be more substantial than that of the latter. A judicially evolved rule working merely in favor of consumptive rights is therefore unjustified. If Western water rights as a class indeed deserve more protection than the rights of other water users, Congress can, after all, provide for compensation in the authorization of any project affecting such rights.

2. Estoppel through federal participation

The question to be examined here is the likelihood of estoppel where the

\(^{389}\) Such as the Homestead Act and the Desert Land Act, for example.

\(^{390}\) See Section 8 of the Reclamation Act, section 18 of the Boulder Canyon Project Act.

\(^{391}\) 148 U.S. 312 (1893).

\(^{392}\) Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 89 (1913).

\(^{393}\) Mr. Justice Douglas for the Court in United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).
United States has actively participated in the creation of the right involved. One such situation arises under the Reclamation Act. Inter alia, it empowers the United States to divert, store and distribute water. Since Ickes v. Fox however it has been clear that the complete control thus exercised does not result in vesting "ownership" of the water or the water rights in the United States. Rather, "by the terms of the law" appropriations are made for the use of the landowners and "water-rights [become their] . . . property . . . wholly distinct from the property right of the government in the irrigation works." It has been suggested that these property rights are vested rights which may not be taken without the payment of compensation. The reasons given are that the right arises under the act and that the act makes no distinction between navigable and non-navigable waters. Given therefore a diversion made directly by the federal government under this particular legislation, a subsequently attempted exercise of the navigation power would lose its immunity as against any "federally created," vested rights to the use of navigable waters.

It is indeed logical to argue that the United States may not take, or at least may not take without compensation, a right it itself has bestowed upon the potential claimant. However, it is equally logical to follow a different line of reasoning: there can be no doubt that the United States could, under the navigation power, appropriate the entire flow of any navigable stream. No obligation would rest upon it to compensate for private rights destroyed in the course of such appropriation. Nor is there any basis for an obligation on the part of the United States to create vested rights in landowners to whom impounded water is distributed. The repeated emphasis in Ickes v. Fox that the water rights became the property of the landowners "under the Reclamation Act" and "by the terms of the law" implies that but for "the terms of the law" water and water rights would have been as much "property" of the United States as were the irrigation works. If Congress nevertheless, that is without any constitutional obligation to do so, creates vested rights in individual landowners, then clearly it may condition the exercise of its bounty. That principle admits of no doubt where the condition is express (as well as reasonable) as for instance the so-called 160-acre limitation contained in Section 5 of the Reclamation Act and upheld in Ivanhoe

394. Whatever water rights it has to acquire to carry out the construction of the project are, of course, compensable. See United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).
395. 300 U.S. 82 (1937).
396. Id. at 95.
397. Ibid.
398. Note, Federal-State Conflicts over the Control of Western Waters, 60 Colum. L. Rev. 967 (1960).
399. Id. at 998, n. 193.
There could be just as little doubt regarding the constitutionality of an express prior provision subjecting such “vested rights” as were involved in *Ickes v. Fox* to the navigation power, if and when changed conditions make its subsequent exercise necessary or desirable.

The question neither *Ickes v. Fox* nor *Ivanhoe Irrigation Dist. v. McCracken* nor, of course, the Reclamation Act answer is whether such a prior condition may be implied on the basis of a presumed congressional intent not to surrender its navigation power at the time of the creation of “vested rights” in navigable streams. An affirmative answer would logically be as plausible as a negative one. Policy considerations rather than logic would have to furnish the basis for deciding the conflict. The role played by the United States in the creation of these “vested rights” may exert a strong pull in the direction of estoppel. There is a difference between active federal participation and assistance on one hand and passive tolerance of stream uses on the other, whether carried out under state sanction or under a “mere” federal license. The difference may be, but need not be decisive. Of necessity, the case for estoppel weakens as the federal activity allegedly providing its basis moves away from the “creation” of vested rights and toward the “passive” end of the spectrum of federal involvement. Hence such federal assistance as was received by some California appropriators of navigable waters in making their appropriations may estop the federal government from now asserting the navigation servitude—but again, need not do so, as has been argued on behalf of these appropriators in the present *Arizona v. California* controversy.

In general, therefore, the conclusions reached earlier as to the non-compensability of consumptive water rights on navigable streams remain unchanged. Estoppel in favor of state-created rights from congressional inaction or federal license is most improbable. Estoppel in favor of “federally-derived” rights, or in favor of rights clearly created under state law but with active federal assistance is a conceivable but by no means an inevitable consequence.

### 3. Estoppel through the Desert Land Act

The Desert Land Act was signed into law on March 3, 1877. Its primary objective was the facilitation of desert land reclamation on the public domain

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400. 357 U.S. 275 (1958). Section 5 prescribes that “No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner...”

401. See note 399 supra.

in the West. It therefore gave certain entrymen the right to appropriate water sufficient for the irrigation of 640 acres. In addition Section 1 contained this proviso:

and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public. . . .

Complex problems have arisen from the Desert Land Act and particularly from the language set forth. They consist of conflicting assertions regarding the power of disposition over Western waters generally, and of federal proprietary claims to the unappropriated waters of non-navigable streams in the Desert Land Act states.

403. But note that Kansas, Nebraska, Oklahoma and Texas, generally included in references to the "arid and semi-arid Western states" are not (and never have been) subject to the Desert Land Act. (Inasmuch as Texas was admitted through annexation of the Republic of Texas, it retained title to the public lands within its borders.)

404. The language of Section 1 is unchanged, except for the limitation to 320 acres. See 43 U.S.C. § 321 (1958). (Emphasis added.) In the present Arizona v. California controversy, Arizona has argued that the express limitation to non-navigable waters prevented, by implication, valid appropriations from navigable waters. The sparse legislative history of the Desert Land Act contains absolutely nothing to support that contention. The words "and not navigable" were added by a conference committee. No reason was given for the addition. See 5 Cong. Rec. 2156 (1877). Furthermore, dominion over navigable waters is an incident of sovereignty. It is deemed to pass with the transfer of sovereignty from the United States to the states. See United States v. Oregon, 295 U.S. 1, 4 (1935). There are no indications anywhere that the United States ever meant to withhold such control from the states. On the other hand, transfer of sovereignty alone would not have been sufficient to pass control over non-navigable streams. These rules may well explain the limitation of the Desert Land Act to non-navigable waters. Finally, it has been clear since United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899) that the Desert Land Act did not operate as a self-imposed, statutory limitation on Congress of its control over navigable waterways. But the fact that Congress fully maintained its prerogative to exercise the navigation power over navigable streams does not mean that no valid rights exist between users of such streams inter sese.

405. For an exhaustive analysis of the different theories and the entire problem of federal-state relations see 60 Colum. L. Rev. supra note 398. For an early treatment of the same questions see Bannister, The Question of Federal Disposition of State Waters in the Priority States, 28 Harv. L. Rev. 270 (1914).

406. See the "Pelton Dam" case, FPC v. Oregon, 349 U.S. 435 (1955) upholding federal authority to license a project on the non-navigable Deschutes River, although in violation of Oregon law. The Deschutes flows through reserved federal lands (on which the dam was to be built), withdrawn from entry in 1910. It has been asserted that the case can be explained only on the basis of an existing proprietary right of the United States in the unappropriated waters of non-navigable streams, at least in the Desert Land Act states. See 60 Colum. L. Rev. supra note 398. Corker, Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957, 45 Calif. L. Rev. 604 (1957) reads the case as impliedly at least recognizing riparian rights in federal lands. He fears as an extreme consequence that federal condemnation of private riparian land in a priority state will bring into existence riparian rights to surplus water in the United States. On the
For the present inquiry, however, it suffices that the Court in *California Oregon Power Co. v. Beaver Portland Cement Co.* viewed the Desert Land Act as having severed the waters of the public domain from the public lands, and as permitting each state to determine its own rule of water law. The United States thus shared its control over the non-navigable waters in the Desert Land Act states. The question to be answered is whether the disposition made in the Desert Land Act estops the United States from destroying private rights to the use of these waters under the navigation power. It seems that the United States is not estopped. No real argument can be made out that the United States, by exercising its superior power, would be taking what it itself gave. That argument is possible under the *Ickes v. Fox* construction of the Reclamation Act. The Desert Land Act, however, did not "by its terms" vest ownership of the waters in the individual user. It merely shared control over these waters with the designated states. The rights that would be destroyed by a later exercise

other hand, it has been argued that the case is merely an instance of federal immunity from state regulation and does not subject present appropriative rights to latent riparian rights of reserved land. See Sato, *Water Resources—Comments Upon the Federal-State Relationship*, 48 Calif. L. Rev. 43 (1960).


408. The Court thus followed that part of the so-called "Oregon Doctrine" which (starting from the premise of a federal proprietary right in waters on the public domain) regarded the Desert Land Act as effecting a severance of the waters from the public domain. Hence, post-1877 federal patents to riparian land do not convey any water rights in appropriation states. See 60 Colum. L. Rev. *supra* note 398 at 973-74. But the Court did not adopt that part of the Oregon Doctrine which held that the Desert Land Act established the rule of appropriation as the uniform rule in the Desert Land Act states.

409. In a state following an appropriation system, therefore, private rights vest only to the extent of actual appropriations, thus presumably leaving the United States free to reserve the rest. 60 Colum. L. Rev. *supra* note 398 at 988 et seq., pointing out further that under this theory, a state by adopting a riparian system could deprive the United States of all claims to water except to the extent that it still owned riparian land. *Id.* at 993.

410. The Desert Land Act deals only with non-navigable waters. However, the teaching of *Grand River Dam Authority* is that private rights in non-navigable waters may be affected by the navigation servitude and hence be non-compensable if destroyed in the express exercise of the navigation power on the non-navigable tributary in order to protect the navigable capacity of the mainstream. Also, of course, streams "non-navigable" in 1877 may well be "navigable" in 1962.

411. Nor was the Desert Land Act a (voluntary) statutory limitation on the exercise of the navigation power. That contention was rejected by the Court in United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899). Referring to the acts of 1866 and 1877, Mr. Justice Brewer wrote: "To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what ... must be held to have been the intent of Congress." *Id.* at 706-07.

412. See discussion in text at note 395 *supra*.

413. At most this might be said about the water appropriated to irrigate the 640 (or 320 respectively) acres allowed entrymen under the Act.
of the navigation power are clearly state-created rights. Furthermore, they are created with no more federal participation than the passive approval expressed in the Desert Land Act.\textsuperscript{414}

The argument could next be advanced that the Desert Land Act was designed to encourage settlement of the desert states. Investments were therefore made with the reasonable expectation of the continued protection of crucial water rights. The argument has merits. But so have the arguments that can be made out for all Western consumptive water rights. The same objections to their automatic preferential treatment by judicial fiat hold here as held above.\textsuperscript{415} That the definition of "navigable stream" has changed and that therefore the navigation power as well as the navigation servitude affect waters that were non-navigable in 1877 is not unique to the Desert Land Act states. Yet the Court has never examined whether the non-compensable destruction of private property on navigable streams was justified because the stream was "navigable" at the time the property in question was created.

The result would be no different if private property were destroyed not because the stream is now "navigable" but because at stake is the navigable capacity of the mainstream. At a very early date, \textit{United States v. Rio Grande Dam & Irr. Co.}\textsuperscript{416} held that the protection of that capacity extended to non-navigable stretches of the mainstream. It was logical to assume even then that the rule would extend to non-navigable tributaries which affected the navigable capacity of the mainstream. But again, of course, the absence of any meaningful "notice" is not really decisive.

In fine, it is suggested that \textit{United States v. Grand River Dam Authority}\textsuperscript{417} would be decided no differently had the issue arisen in a Desert Land Act state.

\textbf{D. Consumptive Water Rights On Non-Navigable Streams}

There remains one other question posed at the outset: Do any of the above results change because the stream in question is the non-navigable tributary of a navigable mainstream? The answer is "no" where the United States, as in the \textit{Grand River Dam} case, expressly exercises its power over the non-navigable tributary in order to "protect the navigable capacity" of the mainstream. Such an express exercise of the federal power eliminates, in effect, all distinction between "navigable" and "non-navigable" for that stream. On the other hand, destruction or impairment of consumptive water rights incidental to an exercise of the

\textsuperscript{414} Again, there may be more than passive approval as to the waters appropriated for the irrigation of land acquired under the Desert Land Act. However, as to these water rights, the same arguments would hold that can be advanced against water rights acquired "by the terms" of the Reclamation Act. That is, estoppel is possible but not conclusive. See discussion in text at note 395 \textit{supra}.

\textsuperscript{415} See discussion in sections (1) and (2), under Part III, \textit{C supra}.

\textsuperscript{416} 174 U.S. 690 (1899).

\textsuperscript{417} 363 U.S. 229 (1960).
navigation power only on the mainstream should, under the rule of *United States v. Cress*[^418] and *United States v. Kansas City Life Ins. Co.*[^419] be as fully compensable as damage to the non-consumptive rights was in those cases.

**E. Valuation Of Desert Uplands**

Finally, brief consideration shall be given to a fear that has repeatedly been voiced, namely that the full application of navigation power and servitude principles will lead to the evaluation of desert uplands as *dry* land rather than as *irrigated* land when taken in connection with a navigation power project[^420]. As was shown earlier, the evaluation of uplands excludes any consideration of their adaptability as dam sites. That was so because the value thus added to the land derived "in the end" from the stream itself[^421]. It was, in other words, dependent on a right to the water which the United States could destroy without compensation. Similarly, of course, it could be said that such value as is added to desert land by irrigation is dependent on the consumptive use of water, a use which can be destroyed without compensation by the exercise of the navigation power. The non-compensable destruction of that which gave the land its additional value would thus lead to the non-compensable destruction of that additional value itself. On purely logical terms, therefore, the fears regarding the evaluation of irrigated desert land are justified.

**F. Summary**

These then are the conclusions regarding the compensability of consumptive water rights against a valid exercise of the navigation power:

1. No compensation is due where the United States destroys or impairs a state-created, consumptive water right on a navigable stream.
2. No compensation is due where the United States ignores state-created priorities in the distribution of project water among intrastate users.
3. Federal inaction or the issuance of a revocable federal license most probably will not lead to an estoppel of the United States in favor of consumptive water rights.
4. Federal participation in the creation of the consumptive water right could afford a basis for estoppel. However, this is not an inevitable or necessary consequence.

[^418]: 243 U.S. 316 (1917).
[^421]: See Mr. Justice Douglas in United States v. Twin City Power Co.: "That special location value is due to the flow of the stream..." 350 U.S. at 226.
The sharing of control over non-navigable waters in the Desert Land Act affords no special grounds on which to estop the United States.

Consumptive water rights on non-navigable tributaries are treated in all respects like consumptive water rights on the navigable mainstream. That is so where the United States expressly exercises its power over the non-navigable tributary in order to protect the navigable capacity of the mainstream.

Consumptive water rights on non-navigable tributaries are compensable if the exercise of the navigation power is limited to the mainstream.

There is support for the proposition that desert uplands will be valued as dry land rather than as irrigated land when taken in connection with a navigation power project.

CONCLUSION

The present investigation bears out a good many of the claims that are made regarding the almost complete power of Congress over the nation's waterways, at least over those waterways substantial enough to warrant their potential inclusion in basin-wide reservoir projects. Moreover, the limits of that power are largely self-determined and they are judicially unchecked save for limitations implied by the Court's reference to a "reasonable exercise" of the congressional power. But it may be well to keep in mind that much the same observations can be made with regard to congressional power in the general area of the commerce clause. Whatever is "unique" therefore about the navigation power seems a point of quantity rather than of quality.

But there is a "unique" or "anomalous" aspect to the navigation servitude. It is evidenced by those cases where the non-compensable taking of private property cannot be explained as an incident of non-compensable regulation in the exercise of a regulatory power. On the contrary, that same private property would be compensable if taken for a different public purpose in exercise of a different regulatory power. As a matter of public policy, the diverging results seem hard to justify.

But there is another reason which makes a reconsideration of the servitude appear desirable. As has been pointed out, the Court has never given a satisfactory explanation for the rule of no compensation. The analysis of the cases has often proved difficult for it, as is witnessed by the Cress, Willow River, Kansas City confusion, the inconsistent awards in Chandler-Dunbar and the attribution of non-riparian values to a flowage easement in Virginia Electric. At times the Court has indeed preferred mechanical rules, as in the mainstream-tributary riparian controversy, to the difficult task of a meaningful accommodation between public and private interests.

The thought occurs that a good deal of the difficulty lies in the manner in which the navigation servitude has been permitted to grow from a rule securing free and unhindered passage on navigable waterways to its present scope. The
process seems less the result of studied consideration than of confusion between the national power and non-compensability. The cases leave the impression that the Court treated the expansion of the navigation power and the expansion of the range of non-compensable losses as interchangeable questions. Yet that is by no means a necessary approach. The Court could have upheld the expansion of the navigation power (as it eventually upheld the expansion of the general commerce power) and still have limited the servitude to its historical meaning of a right of way. And it could have used general eminent domain principles to solve such questions as dam site value and compensation for water power franchises. Being on far more familiar ground, the Court could thus have devoted its attention to the accommodation process between conflicting interests—rather than seeking a solution in the somewhat mystical references to the “supreme,” “complete,” “dominant” power in the exercise of which the United States “is beholden to no one.” Furthermore, if the public interest is indeed the overriding consideration, that result can clearly be achieved under such eminent domain rules as “the value to the owner test.” But again, the basis of both analysis and result would be far clearer than they are now.

It may well be too late in the day for the Court to develop a set of meaningful tools for dealing with navigation cases. If so, then the question of compensation rests ultimately and finally with Congress. Perhaps political checks will thus assure that the cost of multi-million-dollar projects bearing little, if any, relation to navigation will be borne by the community as a whole—or, conversely, that all arteries of commerce will then be given the same preferential treatment now limited for historical reasons to waterways. In neither event, of course, is there any interference with the congressional power of (non-compensable) “regulation” of private property in the exercise of the congressional trust over the “navigable” waters of the nation in the interest of all the people of the Union.