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Eminent Domain - Valuation - Navigational Servitude - Effect on Evaluation of Port Site Property - United States v. Rands

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EMINENT DOMAIN—Valuation—Navigational Servitude—Effect on Evaluation of Port Site Property. United States v. Rands, 88 S.Ct. 265 (1967).

R. B. Rands owned land along the Columbia River, about six miles upstream from the present John Day Dam. In 1962 the land was leased to the State of Oregon with an option to purchase, "it apparently being contemplated that the state would use the land as an industrial park, part of which would function as a port."[1] Most of the land was priced, under the option, at $150 per acre; the balance, designated "port side property" in the agreement, was priced at $400 per acre. The option was never exercised, for the United States condemned the property in 1963 for a river development project.

In the condemnation action, the trial court determined that the compensable value of the land taken was limited to its value for sand, gravel, and agriculture purposes and that its special value as a port site was not compensable under the Fifth Amendment. This decision was subsequently reversed by the United States Court of Appeals for the Ninth Circuit by distinguishing between "power site" and "port site," the former and not the latter falling within the navigational servitude doctrine.[2]

The United States Supreme Court granted certiorari because the Ninth Circuit decision seemed to be in conflict with *United States v. Twin City Power Co.*[3] In reversing the Ninth Circuit decision, Justice White stated that "as was true in *Twin City,* if an owner of the fast lands can demand port site value as part of his compensation, 'he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. To require the United States to pay for this value would be to create private claims in the public domain.' "[4] Thus, in a decision based on the logic of habit rather than reason, the Supreme Court once again held that in the area of navigable waters, exceptions are made to the requirement that just compensation be made for public interference with private property.

1. United States v. Rands, 88 S. Ct. 265, 266 (1967).
2. Rands v. United States, 367 F.2d 186, 191 (9th Cir. 1966).
3. United States v. Twin City Power Co., 350 U.S. 222 (1956).
4. United States v. Rands, *supra* note 1, at 268. The logic behind this statement is based on the concept "that the running water in a navigable stream is capable of private ownership is inconceivable." United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913).

The power of the United States to regulate and control navigable waters arises from the Commerce Clause of the Constitution.[5] Under this clause, the government interest in navigable waters supersedes the property rights of the individual landowner, and in effect, makes the general rule applied in condemnation proceedings under the fifth amendment inapplicable to this type of condemnation.[6] However, this rule was not followed in the first condemnation case to reach the court, in which the United States was required to pay for the value of a toll-collecting franchise in the Monogahela River.[7] Under the Commerce Clause the United States was said to have had the power to appropriate the owner's locks and dam, but the power was "subject to the limitations imposed by the fifth amendment, that private property shall not be taken for public uses without just compensation . . . ."[8] Although the Ninth Circuit Court held that the principles of *Monogahela* were applicable,[9] the court has generally followed the Supreme Court's contention that the case does not fall within the no-compensation rule because the court decided the case on estoppel principles.[10]

The more predominant group of cases, however, follow the navigational servitude doctrine as discussed in *United States v. Chandler-Dunbar Water Power Co.*[11] when ascertaining the compensable value of fast lands.[12] In that case the United States sought to condemn the land of four power companies for the expansion of the Sault Sainte Marie ship canals. The Supreme Court held that the riparian[13] owner has no right to compensation for the value of its fast lands attributable to its suitability for use as a power site. To justify the opinion, the court said that "the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as uplands. The Government had dominion over the water power of the rapids and falls

5. U.S. CONST. art. 1, § 8.
6. United States v. Chicago, M., St. P.&P.R.Co., 312 U.S. 592, 597 (1941).
7. Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).
8. *Id.* at 345.
9. Rands v. United States, *supra* note 2, at 192.
10. Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251, 264 (1915); Omnia Commercial Co. Inc. v. United States, 261 U.S. 502, 513-14 (1923).
11. United States v. Chandler-Dunbar Water Power Co., *supra* note 4.
12. Fast land is land above the high-water mark.
13. This article will use the word riparian only as reference to the relationship of land to water, that is, it will be used to describe land that is adjacent to water.

and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use."[14] This has been the controlling principle in the evaluation of riparian fast land since the case was decided in 1913.

Because of an internal inconsistency[15] in the logic of the *Chandler-Dunbar* Court, noticeable inroads on the servitude concept were made in *FPC v. Niagara Mohawk Power Corp.*[16] and *United States v. Kansas City Life Ins. Co.*[17] Although neither case involved the evaluation of fast lands, the decisions are relevant in that the court refused to rely on the proprietary nature of the federal navigation power where the Government's act interfered with the property of individuals. In the *Niagara Power* case the court held that the Federal Power Act had not destroyed state recognized usufructuary rights in the flow of the river and the United States could be compelled to pay for these rights. The *Kansas City Life Ins.* case held that since the privilege of servitude only incompasses the exercise of the federal power with respect to the stream itself and the lands beneath and within its highwater mark, the Government must compensate for any taking of fast lands which result from the exercise of this power.

This departure from the strict servitude doctrine of the *Chandler-Dunbar* case is best illustrated by Justice Douglas' dissents in both opinions. In the *Niagara Power Corp.* case he stated that "the Federal Power Act should not be construed as requiring the United States to pay for something it already owns."[18] And in *Kansas City Life Ins. Co.* he commented that "it would be incongruous to deny compensation to owners adjacent to navigable rivers and require it for others bordering their tributaries for like injuries caused by the single act of lifting the river's mean level to the highwater mark."[19] Justice Douglas' opinion finally prevailed in a 5-4 decision in *United States v. Twin City Power Co.*[20]

14. United States v. Chandler-Dunbar Water Power Co., *supra* note 4, at 76.
15. The Court denied compensation for any additional value derived from the hydro-electrical potential of the fall of the river, yet the Government was required to pay for the availability of land for lock and canal purposes.
16. FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).
17. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).
18. FPC v. Niagara Mohawk Power Corp., *supra* note 16, at 259.
19. United States v. Kansas City Life Ins. Co., *supra* note 17, at 812.
20. United States v. Twin City Power Co., *supra* note 3, at 229.

In that case the United States condemned a promising site for a hydro-electric power plant and was held to be under no obligation to pay for any special value which the fast lands had for power generating purposes. Consequently, the servitude doctrine established by the *Chandler-Dunbar* Court was solidified by Justice Douglas when he distinguished *Kansas City Life Ins. Co.* and *Niagara Power Corp.* by stating:

> The flaw in that reasoning is that the landowner here seeks a *value in the flow of the stream,* a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses. It is no answer to say that payment is sought only for the location value of the fast lands. That special location value is due to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account.[21]

The Ninth Circuit Court attempted to avoid the *Twin City* holding by contending that power site value and port site value are distinguishable.[22] However, this is not true, for as was stated in the Supreme Court opinion, "in both cases, special value arises from access to, and use of, navigable waters. With regard to the Constitutional duty to compensate a riparian owner, no distinction can be drawn."[23] Although the Supreme Court's decision is correct from a traditional standpoint, the basic conceptual justification for the no-compensation rule is subject to question.

The court has generally permitted the government to take a riparian owner's land without compensation for one of two reasons: (1) To hold that no property right is being taken, but only a public right for which there is no compensation or (2) The government is exercising its paramount navigational power to which the riparian land has always been subject. It has been suggested that "the primary determination is one of property rights. It is self-evident that all property rights possessed by the United States cannot be private

21. *Id.* at 225-26.

22. Although there have been several "power site" cases, it is important to note that the *Rands* case was the first case to decide the question as to whether "port site" value was compensable under the fifth amendment.

23. United States v. Rands, *supra* note 1, at 268.

property, and that the exercise of these rights does not involve loss to any owner."[24] Consequently, in order to show a compensable injury, the riparian owner must possess property rights unburdened by the servitude, for rights that are burdened are not legally protected.[25] The Supreme Court in the *Rands* case evidently utilizes this logic when it states that "these rights and values . . . *are not property* within the meaning of the Fifth Amendment and need not be paid for when appropriated by the United States."[26] (Emphasis added). This analysis, however, does not indicate the basis for such property right in the United States. Consequently, this logic is questionable for as "no one would suggest that Congress has a latent property interest in all level ground such as would permit condemnation of land for a military airport without compensation, . . . it seems illogical to find that power to control navigation gives the government an inherent property interest in rivers."[27]

The other reason most often given by the court in denying compensation for property taken from riparian owners is that "when the United States appropriates the flow either of 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."[28] The court also utilizes this argument in the instant case in denying any compensation for port site value. Justice White states that the exercise of the superior power of the United States is not an invasion of private property rights in the stream "for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject."[29] However, the fallacy in this argument is that all powers of the Federal

24. Powell, *Just Compensation And The Navigation Power*, 31 WASH. L. REV. 271 (1956).
25. *See* United States v. Chandler-Dunbar Water Power Co., *supra* note 4, at 76 in which the Court utilizes this logic by stating: "Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland."
26. United States v. Rands, *supra* note 1, at 268.
27. Lynch, *Constitutional Law—Eminent Domain—Condemnation of Riparian Lands Under The Commerce Power*, 55 MICH. L. REV. 272, 275 (1956).
28. United States v. Grand River Dam Authority, 363 U.S. 229, 233 (1960).
29. United States v. Rands, *supra* note 1, at 267.

Government are superior in that they are capable of pre-empting state legislation. Therefore, the states as well as the people are subject to the superior power of the United States. By the same reasoning, all titles to private property can be said to be qualified because all such titles can be subordinated to the superior federal power in areas where the National Government has the power to become active. From this logic, however, it does not follow that the owner of the potentially subordinate title is not entitled to compensation when it is taken by condemnation.[30] The fact of subordination of private water rights to the public right of navigation does not explain their non-compensability, for the very same right would be compensable if the Government destroyed them in the exercise of a different, but equally superior right.[31]

The court has traditionally justified the exercise of its navigational power by alluding to a "notice theory." Under this theory, "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."[32] The fallacy in this logic is that it fails to take into account two pertinent developments. "One is the constitutionally sanctioned increase in federal activity under the navigation power under its humble beginnings in *Gibbons v. Ogden*. The other is the expansion of the word 'navigable.' "[33]

From 1900 to 1940 the Government utilized the *Gibbons v. Ogden*[34] decision to expand the servitude doctrine into the areas of flood control,[35] hydro-electric power projects,[36] reclamation,[37] and navigation improvements.[38] And from the

30. Morreale, *Federal Power In Western Waters: The Navigation Power And The Rule Of No Compensation*, 3 NATURAL RESOURCES J. 1, 23 (1963).
31. *See* International Paper Co. v. United States, 282 U.S. 399 (1931). In this case the Court required the Government to compensate a power company for the taking of electrical power in the exercise of the Government's war power.
32. Morreale, *Federal Power In Western Waters: The Navigation Power And The Rule Of No Compensation*, 3 NATURAL RESOURCES J. 1, 23 (1963).
33. *Id.* at 24.
34. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
35. Jackson v. United States, 230 U.S. 1, 23 (1913).
36. United States v. Chandler-Dunbar Water Power Co., *supra* note 4, at 73. See also Arizona v. California, 283 U.S. 423, 456 (1931).
37. Burley v. United States, 179 F. 1, 11 (9th Cir 1910).
38. United States v. Appalacian Elec. Power Co., 311 U.S. 377, 407 (1940).

Chandler-Dunbar decision in 1913 until the *United States v. Grand River Dam Authority*[39] opinion in 1960, there has been a gradual expansion of the word "navigable" to a point where most any stream now is capable of falling within the servitude doctrine. Because of this expansion of the servitude power and the word navigable, one writer has suggested that: "When the court permits federal control over nonnavigable as well as navigable waters in the exercise of dominant servitude, and the Government is not required to pay for water power loss . . . it then becomes necessary to question the interpretation under which this result was achieved."[40]

Any discussion concerning the policy factor behind the rule must begin with the statement by the court in the *Monongohela Navigation Co.* case: "The question presented is not whether the United States has the power to condemn and appropriate this property . . . but how much it must pay as compensation therefor."[41] The policy of the court since 1913 seems to be that since the nation's waterways are the property of all the people, and they have been entrusted to Congress under the Commerce Clause, "Congress should be free to develop their potential for the benefit of all the people without having to 'pay private claims in the public domain.' "[42] This was possibly a valid policy consideration during the first half of this century. However, it is submitted that this policy is not appropriate today and that the Court should consider the proposition that when the public benefits, the public should pay. The control of government spending is one of the most effective methods of keeping the government under control. When government power is as broad as the navigational servitude power has become, political pressure on public spending is particularily important. Consequently, "the more of the cost of a new federal project which is placed on the many rather than the few, the more sensitive is political reaction, and the broader the effective base of political decision."[43]

39. United States v. Grand River Dam Authority, *supra* note 28, at 233. In this case the Court held that the Government could exercise its navigational servitude powers in nonnavigable as well as navigable streams.

40. Baldwin, *The Impact Of The Commerce Clause On The Riparian Rights Doctrine*, 16 U. FLA. L. REV. 370, 406-07 (1963).

41. Monongahela Navigation Co. v. United States, *supra* note 7, at 324.

42. *Compensable Values in Federal "Taking" of Damsites*, 14 STAN. L. REV. 800, 809 (1962). *See* also United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950).

43. *Id.* at 810.

According to a recent American Bar Association Committee on public regulation of land use, owners of riparian property were reluctant to develop their land because of an ever-present fear that their property would be lost through the Government's exercise of its navigational servitude power. Therefore, they recommended legislative action to restrict navigational servitude as a deterrent to the development of riparian lands.[44] To support this proposal the committee stated that:

> "Navigation servitude" has inhibited the development of waterfront areas over navigable waters by private enterprise, because the right of the sovereign to take in eminent domain without compensation creates a hazard to financing which makes the development of such projects difficult from a practical point of view. Title companies generally list this right as an exception in policies of title insurance which has the effect of rendering the property largely unmortgageable.[45]

Decisions such as the *Rands* case only serve to expand the doctrine of navigational servitude, which has the adverse effect of deterring private riparian development.

This is not to suggest that the servitude doctrine should be discarded and all cases which were spawned from the *Chandler-Dunbar* decision should be reversed. On the contrary, navigational servitude is a valid doctrine which should be retained. However, in recent years there has been a liberal trend in eminent domain law. Consequently, the policy of the Court has been to give aid to landowners by liberally applying the compensatory provisions of the constitutions and statutes.[46] By widening the navigational servitude doctrine, the court in the *Rands* case is acting inconsistently with this trend.

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44. *A.B.A. Comm. On Public Regulation Of Land Use, Report: A Model Land Use Code—The Navigation Servitude*, 2 ABA SECT. REAL PROP. L. 597, 597-600 (1967).

45. *Id.* at 597.

46. In recent years the court has allowed compensation to property owners in eminent domain proceedings by liberally construing the requirement of a "physical taking". *See* Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959). In this case the United States was required to pay just compensation for the taking of a flight easement. *See also* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). In this case the Supreme Court held that the Government must compensate the owner for the loss of his trade routes while the military was using his business facilities. This is particularly significant in that the owner received the compensation although the routes

Even if one accepts the Supreme Court's broad definition of the navigation power, compensation for port site value could be granted under an expanded inverse condemnation theory.[47] If this theory were used the court would not have to make a black-or-white choice between navigational servitude and eminent domain theories in reaching their conclusion. Such a choice requires complete denial or grant of compensation without regard to the particular exigencies of the case, which often results in either an undue windfall or an unjust compensation award for the taking of riparian land. Under an expanded inverse condemnation theory, compensation could be awarded in situations like the *Rands* case on the basis of the particular facts of the case. Such a policy would give the court the latitude of allowing the riparian owner compensation for taking his property under eminent domain principles, while maintaining the government's right to condemn the land by exercising navigational servitude concepts.

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were not formally "taken". The liberal trend is further illustrated by the new legal terms which the change in the court's attitude has spawned, *i.e.*, condemnation by nuisance. Stoebuck, *Condemnation By Nuisance: The Airport Cases In Retrospect And Prospect*, 71 DICK L. REV. 207 (1967).

47. "Inverse condemnation is the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the government defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." Thornburg v. Port of Portland, 233 Ore. 178, 180, 376 P.2d 100, 101 n.1 (1962).