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In an attempt to unravel the complexities, implications, and ramifications surrounding the mystic of the navigation servitude doctrine, Professor Munro has undertaken an exhaustive analysis of the economic, legal, and political forces associated with this doctrine. After first examining the historical background of the doctrine, in connection with previous judicial clarifications, a comparison and criticism of current legal commentators analysis from the viewpoint of western water law is offered. The author concludes that the navigation servitude is a valid and viable concept basic to the federal system.

THE NAVIGATION SERVITUDE AND THE SEVERANCE DOCTRINE

*James Munro**

The reality that is absolute and unconditioned may exist, but man must know it, if at all, through its manifestations in the conditioned and the relative. Pragmatism is at least a working rule by which truth is to be tested, and its attainment known.

Cardozo, Growth of the Law.

One fascinating aspect of the study of Supreme Court decisions is the frequency with which one can observe close-up and first-hand the major stresses and strains on government. These are no dry-as-dust state papers, no devious, ghost-written television talks to the nation, no tortuous, if not tortured, administrative regulations produced in the murky depths of a sprawling bureau. On the contrary, they are the product of highly visible, very human and frequently very able men. Cliche or not, their voice is the voice of the Constitution—not the only one by any means, and not by any means always the final one.

It is proposed to explore an aspect of federalism—the dimensions of the federal cognizance over navigable streams,

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specifically the navigation servitude, as it may be related to a fairly new doctrine of federalism as it applies to water law. This doctrine, derived from the opinion in the *Pelton Dam* case, asserts on the part of the federal government, an overriding claim to the waters of streams to which the United States may be riparian.[1] This doctrine, though deplored by western legislators and many writers, has continued to hold its own. It has in fact extended its domain by the sweeping decision in the latest (and perhaps final) Colorado River adjudication.[2] Presumably, through all the reaches of the Colorado and its tributaries, the doctrine is dominant, a threat to vested confrontation with state authorities in several states, resulting, in some instances, in the canceling out of water rights long vested in private or municipal hands.

It will not be the purpose here to dwell on the indefensible basis of *Pelton.* That has been done.[3] Suffice to say that the Court misread history, misinterpreted (or rather ignored) the express and repeated prohibitions placed in congressional enactments, and, worst of all, launched on the body politic a putative federal cognizance over water for which no federal bureaucracy has been set up and in which no federal bureaucracy could function even if it were.

To make matters worse, two propositions have been advanced by publicists: (1) the proposition that the navigation servitude, when appropriated by the United States under the commerce power, should be paid for; and (2) the proposition that the *Pelton* doctrine can be justified on the analogy of the navigation servitude. Thus, strangely enough, these publicists profess to find support for Pelton in a doctrine they deem pernicious. It will be the burden of this effort to demonstrate, hopefully with some finality: (1) that the navigation servitude is sound historically, constitutionally and practically; and (2) that eqally sound arguments refute the dominance of any putative federal system of water rights over the estab-

1. Federal Power Comm. v. Oregon, 349 U.S. 435 (1955), commonly known as the Pelton Case. Munro, *The Pelton Decision, a New Riparianism?* 36 ORE. L. REV. 221 (1957).

2. Arizona v. California, 373 U.S. 546 (1963).

3. Trelease, *Arizona v. California,* 1963 SUP. CT. REV. 158. *See also* Munro *supra* note 1.

lished systems of the states in which a system of appropriation prevails.[4]

THE NORTHWEST ORDINANCE

> The river Mississippi and the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.
>
> —Northwest Ordinance (1787)

There is no question that the provisions of the Ordinance placed limitations on the states later to be carved from the Northwest Territory. The waters, as well as the "carrying places" between them were to remain open and free for commerce, without any restriction in the form of a tax or impost. Later in that same year, at Philadelphia, the Convention adopted a proposed Constitution according to the Congress the power "To regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."[5]

One need not linger over the profound implications of the Commerce Clause. Significant for present purposes, taking the Ordinance and the Clause together, are (1) the broad policy implications in the former, and (2) the pervasive sweep of the consequences of the latter. Note that the Ordinance does not define navigability. Thus if Wisconsin and Oregon found their rivers useful, as they did, for the flotation of logs to the mill, they could adopt as their test of navigability this particular capacity. Minnesota ("land of 10,000 lakes") early took the view that the use of any stream or lake by traders and voyageurs in 1858, the year of its admission, *ipso facto* constituted such water resources as "navigable." Later, this concept was extended to include recreational as well as commercial uses, with no requirement that the 1858 situation be controlling.[6] By contrast the Atlantic seaboard states

4. The following states have statutes providing for the appropriation of water: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming.
5. U. S. CONST. Art I, § 8.
6. Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893).

adopted the "salt-water" test, under which navigability extended upstream to the limit of tide-water, in many cases a substantial distance and, historically, the geographical limit of early settlement.[7]

Thus states could determine navigability for themselves, always provided such definition did not impinge on the national control over commerce. Conflict here must be viewed from two aspects: (1) the effect of the creation of new states from the public domain; and (2) the exercise by Congress of its control over interstate commerce. Typically, on the admission of a new state, the constitution of the latter would become operative and state government would commence to function, it being stipulated in the various enabling acts that such admission was on an "equal footing" with all other states. This of course speaks of political consequences. Land was something else. Here, typically, the Congress would convey to the infant state a fairly sizeable area of public lands for use in supporting a university, public schools, a seat of government and other purposes. All other land was retained by the United States subject to disposition under various laws, especially the Homestead Act of 1862. Later, as the issue of conservation became dominant in the last decade of the century, great portions of the public domain were withdrawn from entry under homestead laws and set aside for national parks, national forests, national monuments, wildlife reserves, historical sites and many other purposes. Finally, in 1934, almost all remaining public land, except those in Alaska, were withdrawn under the Taylor Grazing Act.[8]

On the creation of a state, the beds of navigable lakes and streams became vested in the states; those non-navigable remained in federal ownership. This situation could provoke questions based on assertions of title by patentees of riparian lands. For example, if A received a patent to land bordering a certain river considered navigable under federal standards, A might find that he owned the bed of the stream to the midpoint of the channel or he might discover that the bed-ownership remained in state X. The Supreme Court has held that

7. Kanneberg, *Wisconsin Law of Waters*, 1946 WISC. L. REV. 345, 349.
8. 48 Stat. 1269 (1934), *as amended*, 43 U.S.C. §§ 315-3159, 3151—315m, 315m—315p (1964). *See* CLAWSON AND HELD, THE FEDERAL LANDS (1957).

this determination is for the state to make.[9] Bed ownership may be said to be of minor importance, but it can assume significance as, for example, where the bed dries up and may be the source of valuable minerals.[10]

While the states were thus accorded the privilege of defining navigability as an aspect of local law, the Supreme Court quite logically made it clear that insofar as the control over commerce was concerned, more specifically the Commerce Clause, plenary power remained in Congress.[11] So it was that rivers, not previously regarded as navigable, could be considered such if they could be made navigable.[12] Implicit in this thinking was a residual control in Congress of the smallest river or pond.[13] All of which is good doctrine, traceable directly to the constitutional pediments erected by Chief Justice Marshall.[14]

THE NAVIGATION SERVITUDE AND PRE-PELTON WATER LAW

Fierce controversy has raged in and out of the Supreme Court over the payment of compensation for land taken in connection with a hydro-electric project. The issue could be stated in these terms: since the navigation servitude is owned by the federal government, any use of the government, or its licensee, need not be compensated, for the obvious reason that the government should not be compelled to pay for what it already owns. Does this mean in practice that all values dependent on or connected with the servitude can be disregarded?

Chief Justice Marshall laid down the broad outlines of the commerce power in *Gibbons v. Ogden.*[15] As early as 1865, the Court explicitly ruled that navigable waters are public property of the nation, and subject to all direct legislation by Congress.[16] Since this was property interest, any interference with navigable waters would be subject to Congressional regulation, e.g. building of bridges, dams, locks. In modern

9. Barney v. Keokuk, 94 U.S. 324 (1876).
10. Lamprey v. Metcalf, *supra* note 6.
11. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).
12. *Id.*
13. United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).
14. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
15. *Id.*
16. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866).

terms the issue was first squarely put in *United States v. Chandler-Dunbar Water Power Co.*[17] The government there condemned properties riparian to the St. Mary's River in Upper Michigan. The Court was admirably explicit in denying compensation for land to be used as a factory site for companies using the power to be generated by the hydro dam. "The government," said Justice Burton, "had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use."[18] On the other hand, this jurat was, at least in the minds of many commentators, weakened by the allowance of compensation for another plot of land suitable for a lock and canal. It was "the only land available for the purpose" and

> Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public . . . it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.[19]

In the 1950's, with power demands rising everywhere and fortunes to be made in the generation and distribution of electric power, the Supreme Court found itself deciding a whole series of condemnation cases. In this period, the Court tried to deal with the various volatile elements of power policy, particularly the legacy, one might say the clouded legacy of *Chandler-Dunbar*. The one prime example of the effect of various forces was the 1956 case, *United States v. Twin City Power Co.*[20], in which a five man minority based its holdings directly on *Chandler-Dunbar*. Justice Burton, speaking for the dissenters, referred to the ambiguity of *Chandler-Dunbar* and to a more recent holding—*United States v. Kansas City Life Insurance Co.*[21] as denying compensation for "upland" i.e. above high water mark, values.

If one might venture a speculation on Supreme Court method, there would appear to be considerable validity to

17. 229 U.S. 53 (1913).
18. *Id.*, at 76.
19. *Id.*, at 77.
20. 350 U.S. 222 (1956).
21. 339 U.S. 799 (1950).

the argument that the Court attempts to avoid a purely "administrative" role in handling recurring cases raising complex issues. The Court appears to be looking with one eye on the case at hand, and with the other to the future. To achieve a degree of consistency and yet permit a degree of flexibility and growth, it will find itself under pressure from those who would advocate an "absolute" standard at the same moment as other pressures would demand a less static approach. Some would question whether judicial "absolutes" should ever be erected.[22]

Certainly it would appear that if they have a place, it might be in the realm of major constitutional protections such as freedom of speech and of religion. Arguably, though, the economic sphere is one in which a high degree of certainty is desirable. The urgency may be especially strong in the administration of the Federal Power Act for the reason that, since the hydro-electric features may be built either by the government or by a licensee, there is quite naturally sound business inducement to acquire power sites as a preliminary to making formal application for a license. The rub comes, in the humble view of this critic, when a person (usually a corporate entity or someone acting for such an entity) acquires riparian lands at considerable cost with the bona fide intention of securing a license to build a dam. Such a venturesome entrepreneur knows, or should know, that the government may, in due time, decide to construct the dam itself, or to build a much larger structure at or near the site.

The company can be assured that whatever interests it may have or claim in the bed or banks of the stream below ordinary high water mark are completely non-compensable.[23] Above that mark the matter becomes difficult. Case analysis, here, as elsewhere, may be inadequate to identify the obvious, much less to clarify the obscure. It should be obvious, on the one hand, that land or interests in land must be compensated, but that such compensation must include no element of value (or of incremental value) existing only by virture of the situs being useful for hydro-electric purposes. On the other hand,

22. *See*, Griswold, *Absolute is in the Dark—a discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963).
23. United States v. Willow River Power Co., 324 U.S. 499 (1945).

it can be decidedly obscure to work out a formula which will fairly compensate the landowner without paying him for interests whose value is somehow dependent on the navigation servitude.

Another ground for discontent is the apparent extension of the concept of "navigability" in the federal sense. Thus, it had been assumed for at least a century that navigable waters within the purview of the Commerce Clause were those which were navigable in fact, that is, waters which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[24] But this concept has been upgraded. Navigable waters now include those "which either in their natural or improved condition" are used or suitable for use in commerce.[25] Indeed, the pervasive nature of the commerce power is such as to reach to non-navigable streams as well.[26]

So much by way of brief background to *Twin City*.[27] A focal point in the continuing controversy over the real meaning of *Chandler-Dunbar,* it has a fitting breadth and sweep, The term "Twin City" refers to two corporations with that name, the Georgian component being owned by the South Carolina. As early as 1901, Twin City began acquiring the necessary land and rights looking to the construction of a dam on the Savannah River, dividing the two states. From 1901 to 1919, it was authorized to build dams by no less than six acts of Congress. In 1926, the Federal Power Commission tendered a preliminary permit for a dam at Price's Island. Later, the Savannah River Electric Company held a permit to construct a project at Clark Hill, a larger undertaking which would have necessitated taking over the Twin City holdings. No construction was initiated and, in 1944, Congress formally authorized Clark Hill, a major federal plan for a multi-purpose storage reservoir, to provide flood control, pro-

24. The Daniel Ball 77 U.S. (10 Wall.) 557, 563 (1870).
25. United States v. Appalachian Power Co., 311 U.S. 377 (1940); 16 U.S.C. § 796 (8) (1954).
26. Oklahoma v. Atkinson, 313 U.S. 508 (1941); Kansas v. Colorado, 206 U.S. 46 (1907).
27. United States v. Twin City Power Co., *supra* note 20.

mote navigation and generate power. Proceedings were had to condemn lands in both states and, as the case came before the Supreme Court, the focal point was the compensation to be paid for 4,700 acres, a small but extremely important part of the entire property complex to be needed. In round figures, the land would be valued, without regard to its potential as a site for hydro-electric power, at $150,000. Taking the power potential into consideration, it would be $1,257,000.

Justices Douglas and Burton both relied largely on *Chandler- Dunbar.* The former emphasized on theme: the appropriation by the United States of the entire flow of the river. It is useless to argue that upland should be compensated for if the value in question depends on the flow of the stream.[28] Justice Burton phrased the issue in these terms: "the determination of the amount of compensation to be paid for privately owned fast land adjoining a navigable stream when such land is taken . . . for public use."[29] In general, Burton stuck to the theme, reiterated and without noticeable variations, that the navigation servitude, properly described, concerned only lands and interests below high water mark. It is suggested that Justice Burton, by meeting Douglas on his own ground, achieved a sweeping polarization which, however, useful as grist for commentators, marked a lost opportunity to discriminate between different aspects of the land taken. For example, a good part of the 4,700 acres was plainly needed for the reservoir itself. Indeed, Twin City had a flowage easement for 188 acres. Burton did say: "The latter are significant because a market for flowage rights is a recognition of a special value of the land for that use."[30]

In the sequel to *Twin City,* the Court, this time with a special concurrence by Douglas, conceded that compensation should be allowed for the taking of a flowage easement.[31] Professor Bartke, among others, has subjected the decision to critical analysis. The company, known as Vepco, had acquired a flowage easement covering 1540 acres (of the 1,840 total flowage easements necessary for the project). The govern-

28. *Id.,* at 225.
29. *Id.,* at 229.
30. *Id.,* at 232.
31. United States v. Virginia Elec. and Power Co., 365 U.S. 624 (1961).

ment paid the fee owner one dollar and then brought condemnation proceedings against Vepco. Ultimately, a Supreme Court majority upheld compensation under this formula: "The value of the land for all purposes, other than for hydroelectric development, discounted by the probability of the exercise of the easement by the power company." Three dissenters would deny all relief on the ground that the decision to build the dam by the government eliminated all value the easement had. Douglas, concurring with the majority, would permit compensation because the fee owner (and his grantee) has no property rights dependent on the flow of the stream, or from the strategic location on it, but they did have Fifth Amendment rights.

Professor Bartke submits that since the easement (Vepco's) was exclusive, the Government had to acquire it. Decision should have been rested on that ground. Without acquiring the right to flood the fast lands, the government would have been a tortfeasor. If the easement were non-exclusive, both government and Vepco could have flooded the lands.

> What would have prevented the power company from exercising the rights granted to it by the easement would have been the failure of the government to grant it a license to construct a dam. But the government's failure to grant a license is not compensable. The error of both the majority and the dissent lies in concentrating on the navigation servitude in a case which does not fall within its ambit at all.[32]

While *Vepco* seemingly pointed the way to amelioration of the rigors of the *Twin City* doctrine, any faint hopes along these lines were dashed in *United States v. Rands.*[33] Of that

32. Bartke, *The Navigation Servitude and Trust Compensation—Struggle For A Doctrine*, 48 ORE. L. REV. 1, 19 (1968); A different analysis appears in: *Compensable Values in Federal "Taking" of Damsites*, 14 STAN. L. REV. 800 (1962).
The essence of the *Twin City Doctrine* was likewise not affected by United States v. Grand River Dam Authority, 363 U.S. 229 (1960). The State (acting through the Authority) had originally planned three projects on the non-navigable Grand River. Ultimately the State built two and the Federal Government constructed the Ft. Gibson unit, the farthest downstream. In addition to items for which compensation was paid (*e.g.* a 70 acre tract at the damsite and flowage rights over the Authority's lands) the State claimed, but was denied, compensation for the "taking" of water power rights at Ft. Gibson. Congress may, in its judgment, decide to "treat the watersheds [of non-navigable streams] as a key to flood control on navigable streams and their tributaries". Oklahoma v. Atkinson 313 U.S. 508, 525 (1941).
33. 389 U.S. 121 (1967).

pronouncement more later, but first a bit of back-tracking to the other main branch of post-war water law—that dealing with federal pretensions to an overriding cognizance (which may not be the apt word) over waters from streams and lakes to which the federal government is riparian.

The writer has referred to the decision in the famous *Pelton* case[34] as enumerating a "new riparianism" and as casting doubt on western water rights and indeed on the whole system of appropriation as practiced in the seventeen western "reclamation" states.[35] It was the burden of that article that the federal government, in asserting (and having that assertion confirmed by the Court) the right to utilize the waters of streams, navigable or non-navigable, passing through or along federal enclaves, or more specifically "reserved" lands of the United States, had opened the door to confusion and conflict in federal-state relations, and, more ominously, to a general clouding of water rights long recognized as appurtenant to land in those states. It is not proposed here to recapitulate that thesis. It is proposed to deal with the attempts by some scholars to intrepret both lines of decision, the condemnation cases on the one hand, and Pelton and its progeny on the other, in terms of a perfectly valid and reasonable aspect of federal power.

PROFESSOR MORREALE'S CONTENTION

Pelton, predictably, raised hackles. Its opponents, no doubt unintentionally, drew return fire—and from quite respectable sources. It is not surprising that these writers should link the condemnation cases and the *Pelton* and *pre-Pelton* decisions, although the Court itself would in ordinary course refrain. Professor Morreale appears as the leader of a new school of thought that simultaneously: (a) deplores the extension (or perhaps even the retention) of the navigation servitude; and (b) welcomes the demise, or threatened demise, of the system of western water rights.[36]

34. Munro, *The Pelton Decision: A New Riparianism?, supra* note 1.
35. *Id.*, at 222.
36. Morreale, *Federal Power in Western Waters*, 3 NATURAL RESOURCES J. 1 (1963). A later article by the same author dealing with various bills designed to ward off the effects of *Pelton* will not be discussed here. *See,* Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts Over Western Waters,* 23 RUTGERS L. REV. 33 (1968).

In capsule form, she submits that the Court has been wrong in *Twin City*—indeed wrong in adhering to the concept of a navigation servitude in any form—but right in *Pelton* and in the latest edition (1963) of *Arizona v. California*.[37] In the course of this exercise, Professor Morreale has given currency to some basic misconceptions of western water law, in its historical, economic and political context. On the other prong, she has raised disturbing questions as the utility of the navigation servitude under any circumstances. As the Court is still engaged in attempts to reconcile past inconsistencies in both fields and to find out of the wilderness, it may be useful to discuss her arguments not, it is hoped, in doctrinaire terms, but with due regards to constituent factors of non-legal as well as legal significance.

THE NAVIGATION SERVITUDE

The concept of the navigation servitude is derived, so Professor Morreale states, from the commerce power. It is a power to regulate, but in the exercise of other powers to regulate, Congress must compensate for property taken.[38] "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."[39] Quite so, provided her assumption that this is the exercise of a regulatory power can stand up. But now square that assumption with the words of Justice Lurton:

> [W]hen Congress determined, as it did by the Act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its etire length, was "necessary for the purposes of navigation of said waters and the waters connected therewith," that determination was conclusive.[40]

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37. 373 U.S. 546 (1963).

38. For a similar position *See*, Corker, *Water Rights and Federalism*, 45 CALIF. L. REV. 604, 618 (1957).

39. Morreale, *Federal Power in Western Waters*, *supra* note 36 at 20.

40. *Supra* note 17 at 65.

This is a far cry from a mere regulatory power. It is in effect ownership of the entire stream-flow. Thus the navigation servitude is regarded as a property right under the administration of the Congress. If that property right is appropriated by others, it makes little sense to insist that the government should pay to reclaim its own property. The term "navigation servitude" is in no sense a "shorthand expression for the rule that in the exercise of the navigation power certain private property may be taken with out compensation."[41] If anything it is shorthand for "navigation servitude".

To put it another way, effective application of the commerce power to navigable watercourses made it not desirable but mandatory that the rights of the government were supreme. This was the purport of Justice Lurton's statement.[42] It would be futile to try and compare this kind of overriding power, in effect *ownership* of the stream-flow, to the taking of private property as an incident of, say, the war power. Payment of compensation for private property acquired under that power would obviously be necessary.[43] That the government, in constructing a reclamation project under the general welfare provision of the Constitution, would be compelled to pay compensation for water rights which may be taken need not pose a serious problem.[44] There would, admittedly, be a problem and a serious one if the government's contention in that case (*Gerlach*) had prevailed, namely, that since this was a "navigation" project, or navigation was included as one of the Congressional purposes, no compensation need be paid. It bothers Professor Morreale, it would seem that depending on the label fixed to the project, compensation for water rights and no doubt other property may or may not be demanded. The difficulties, it is submitted, are more important than real. The Reclamation Act has 68 years of experience to go on, and there is nothing in that experience to suggest that Congress

41. Morreale, *Federal Power in Western Waters, supra* note 36 at 19.
42. Professor Bartke shows that as early as 1865, the Supreme Court emphasized "the proprietary nature of the national interests in navigable waters, in connection with the commerce clause. Commerce includes navigation . . . For this purpose they [navigable waters] are the *public property of the nation*, and subject to all direct legislation by congress." Quoting from Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-5 (1865). 48 ORE. L. REV. 1 at 4.
43. *Supra* note 17 at 65.
44. Professor Morreale cites International Paper Co. v. United States, 282 U.S. 399 (1931).

will seek by fundamental amending legislation, to force the reclamation features of water projects into a different mold. As Justice Jackson so aptly put it in *Gerlach*:

> [W]e need not ponder whether by virtue of a highly fictional navigation purpose, the government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it, and we need not here pass on any question of constitutional power; for we do not find that Congress has attempted to take or authorized the taking, without compensation, or any rights valid under State law.[45]

Jackson, it must be conceded, does not exclude the possibility of legislation depending on valid, not "fictional" exercise of the navigation power. Indeed, the post-war trend towards multi-purpose projects points up the immediacy of such development. But at least two persuasive reasons would prevent the uncompensated taking of existing water rights: (a) the historical background of western water and property law with its important bastion of the severance doctrine, whereby waters from non-navigable sources were considered as severed from the public domain and, as such, subject to recognition under whatever property law (riparian or appropriative) the various states had adopted, or would adopt;[46] (b) the insistence by Congress, beginning with the Reclamation Act of 1902 and continuing in the Water Power Act [1920] and other acts on the vested nature of state-created water rights. One could go back further and point out the "right of way" acts, beginning in 1891, as being fundamentally inconsistent with the reserved land doctrine announced in Pelton.

Professor Morreale would reject any supposed distinction[47] between the exercise of "power" by Congress or the

45. United States v. Gerlach Live Stock Co., 339 U.S. 725, 727 (1950).
46. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
47. The rights-of-way acts, beginning in 1891, specifically granted to canal and ditch companies rights of way "through the public lands *and reservations* of the United States." Act of March 3, 1891, 26 STAT. 1101 (1891), 43 U.S.C., § 946 (1954). A later act authorized the Secretary of the Interior, under general regulations to be promulgated by him, "to permit the use of rights of way through the public lands, . . . and . . . reservations of the United States . . . for water plants, dams, and reservoirs used to promote irrigation . . . of any other beneficial uses to the extent of the ground occupied

exercise of "superior power." She refers to *Niagara Mohawk* as being based on the proposition that Congress had not made it clear that it was asserting its superior power over navigation. Hence, the majority held, it was proper that in working out amortization payments. The federal licensee should be compensated for the payments made and to be made under contracts for the acquistion of the necessary water rights.[48] Such a distinction was inadmissible, since all "powers of the United States are superior." [p. 21] Quite so, and two years later, Justice Douglas, now speaking for the majority, established a far broader base for the extent to which the navigation servitude doctrine would deny compensation to upland property interests.[49]

Mention has been made of *United States v. Rands.*[50] Claimant had leased certain land to the state (Oregon) an option to the state to purchase. The state planned to use the land as an industrial park, part of which would function as a port. Before the option could be exercised, the federal government condemned the land in connection with the John Day hydroelectric dam project on the Columbia River. Later, the land was conveyed to the state at a figure much less than the option price. The Court of Appeals had referred to a 1926 decision which ruled that since incidental benefit to property not taken, i.e. benefit in the form of access to navigable water not previously available to such property, this benefit, or rather its value, should be deducted from the award.[51] By a parity of reasoning, if the availability of land as a port site is taken, there should be compensation. But the Supreme Court reversed, holding that rights such as access to navigation, while valuable *vis-a-vis* the state or other private parties, could not be asserted against the United States.

by such canals." 31 STAT. 790 (1901), 43 U.S.C., § 959 (1954). It remains a curious fact that of the many articles and comments dealing with *Pelton* and other cases following it, this writer can find no mention of these acts. Why should Congress, in 1891, hope to promote the economy of the west, by making water sources in the national forests available to irrigators, in legislation which, *sub silentio*, can now be said to contain a proviso that in these very areas, the United States was to retain full rights as riparian owner? This part of the *Pelton* holding made no sense fifteen years ago. It makes no sense now.

48. F.P.C. v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).
49. United States v. Twin City Power Co., 348 U.S. 910 (1956).
50. 389 U.S. 121 (1967).
51. United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

WESTERN WATER RIGHTS AND THE SEVERANCE DOCTRINE

Justice Burton, speaking for the Court in *Pelton,* recognized this doctrine as set forth in the *Beaver-Portland case.*[52] The vice of *Pelton* consisted in its announcement of the reserved lands doctrine and its direct refusal to comply with the mandate of the Federal Power Act with respect to securing state consent to the construction of a hydro project. The first was more disturbing since it appeared to open a Pandora's box of confusion.[53]

Since her general thesis asserts that if the navigation servitude can succeed in taking vested private rights without benefit of Fifth Amendment compensation, the immunity would likewise apply to irrigation projects in which "navigation" is posited as a basis for Congressional action. Professor Morreale supports at least *pro forma,* the argument advanced in *Beaver-Portland.*[54] She proceeds to argue that if the 160-acre limitation stands on the basis of the conditioning of the rights by this limitation, "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*[55] to the navigation power, if and "when changed conditions make its subsequent exercise necessary or desirable.'"[56]

The trouble with the Morreale thesis is that it proves too much. One could argue, with equal plausibility, that since every piece of land (except in Texas and the 13 original states) was at one time part of the public domain, and that since every such parcel is part of a water-shed whose surface waters, be they rivulets or Mississippi's, are, or could be, important to navigation, the government could reclaim all such lands. By a parity of reasoning, no doubt Congress could repeal the preemption and homestead legislation and declare that all lands in private hands under that legislation should be, as of a given

52. California Oregon Power Co. v. Beaver Portland Cement Co., *supra* note 46.
53. *See* Munro *supra* note 1 at 250 where possible difficulties are suggested. Some of these chickens have arrived back at the roost, as is mentioned in an article to appear soon in the Oregon Law Review.
54. Others have attacked Beaver Portland directly. Goldberg, *Interposition—Wild West Style,* 17 STAN. L. REV. 1, 16-18 (1964); Sax *Federalism in Reclamation Law,* 37 U. OF COLO. L. REV. 49, 62 (1964).
55. 300 U.S. 82 (1937).
56. Morreale, *Federal Power in Western Waters, supra* note 36. The Morreale view is also supported by Rossi, *The Public Right of Navigation and the Rule of No Compensation* 44 N.D.L. REV. 235 (1968).

date, revested in the federal government. Absurd as the suggestion is, Professor Morreale deals with property rights no less firmly settled. Intellectual arguments, no matter how stimulating or even persuasive, cannot readily dispose of the cold fact that "water rights have already vested in private persons for the irrigation of 18 million acres, and that the private property values dependent upon these vested rights are estimated at between 15 and 20 billions of dollars."[57]

As Martz recognizes, there must be a federal role in water resource development. He cites four reasons for the necessity of this role: (1) as trustees of our common welfare, the government has a responsibility for "leadership in the development of limited resources that bear so heavily upon the security and economic well-being of the entire country;" (2) the national government is ideally situated to exert this leadership; otherwise sectional rivalries would impair the effectiveness of programs; (3) the federal government can provide the capital not available at the local level; (4) engineering problems are common to all projects; central planning agency is necessary.[58] A factor militating against an effective federal role, Martz contends, is the "non-quantification" of water rights asserted by the government. Referring to the large, but seemingly open-end claims recognized in *Pelton* and *Arizon v. California*,[59] he observes:

> From the first water legislation in 1866, Congress recognized private rights in these waters to the extent they are vested under state laws. Substantially all of the available water has so vested and is critically needed for resource development. That development is deterred, and a valuable resource lost to present economic use, by title insecurity that flows from non-quantification of paramount federal claims."[60]

57. Martz, *The Role of the Government in State Water Law*, 5 KANS. L. REV. 626, 631 (1957).

58. *Id.*, at 627.

59. 373 U.S. 546 (1963).

60. Martz, *The Role of Government in Public Resources Management*, 15 ROCKY MT. MIN. L. INST. 1 (1969). *Cf.* Trelease on appropriation doctrine: Several features combine to make an appropriation a property right of a high order. An appropriation is always defined in terms of the right to take a specific quantity of water. This, coupled with the element of priority gives the western appropriator's rights a unique stability. Arizona v. California, 1963 SUP. CT. REV. 142, 186.

But Martz is hardly a defender of the *Pelton* and related cases asserting large, unmeasured federal rights in streams and rivers. Since 1920, and particularly since 1935, he writes, the United States has "whittled away at state and private rights to a point that the non-project appropriator has little security in the continued operation of his diversion facilities and little opportunity for independent development of new sources of supply." Where all else failed, the government has asserted property rights in all non-navigable waters flowing through or past government land.[61]

CONCLUSION

One can adhere to concepts of federal supremacy without thereby supporting decisions which tend to undermine the bases of property law, especially that aspect of property law dealing with water rights in the western states. The bugaboo of some commentators appears to be akin of parochialism rearing its ugly head to defeat broad federal programs having the national interest as their primary objective. The hard fact is that, through its control of the financing of projects, the federal government has found it quite practical to promote its programs of multi-purpose projects. At the same time it has found that it must respect property rights even where the government project supposedly promotes a greater good than is represented by those property rights.[62]

The navigation servitude, derived from the commerce power under the constitution, has been the recipient of special solicitude at the hands of the Supreme Court. Justifiably or not, the Court has adhered to the basic doctrines announced by Marshall and Taney to the effect that the highways of commerce must be kept open. Early enactment of the Northwest Ordinance under the Constitution reflected the strong motive of the founders that the streams, rivers and "carrying places" be kept open for the purpose of commerce. Federal tests of navigability did not necessarily coincide with state tests. Indeed, the interests of the state may have been influenced by local conditions (use by Indians in 1858 in Minnesota for tra-

61. 5 KANS. L. REV. 626, at 635.
62. Dugan v. Rann, 372 U.S. 609 (1963).

vel; the "saw-log" test in Wisconsin etc.) and, so long as no federal rights were violated, such local interpretations would be honored.

With the construction of huge hydro-dams as multi-purpose projects, embracing flood control, navigation, maintenance of stream flow, recreation, the federal concept of navigability expanded. This led to difficulty and controversy in the field of valuation, where lands were taken for power purposes. This developing controversy was resolved, though perhaps not finally, in *Twin City* and later in *Rands,* where the Court interpreted earlier cases as requiring that practically all elements of value in any way connected with the possible use of stream-flow should be non-compensable. It seems questionable that the Court should go so far as to deny compensation where upland is taken for flowage easement. In *Vepco,* such rights were held compensable, though not in *Twin City.* Finally, *Rands* announced that projected use by the state of upland as a port site and idustrial park could not be compensated despite doubts that the second use, at least, did not appear to be dependent on stream flow.[63]

The thesis of Professor Morreale that in some fashion the expanding concept of the navigation servitude could properly be applied in the case of irrigation projects, though arresting as an intellectual exercise, has little to commend it. With due apologies for repeated iteration, it must be acknowledged that, rightly or wrongly, the government decided to sever the water from the land in disposing of land in the arid west. Rightly or wrongly, Congress permitted—one might say encouraged—the states to establish their own systems covering the acquisition, maintenance and loss of water rights. Over the years federal agencies have respected these state-created rights, but in more recent years, efforts have been made to assert a claim to these waters. At one time, the claim was to be "unappropriated" waters in non-navigable streams. [*Nebraska v. Wyoming*] Later, with the surprising holding in Pelton in 1955, the federal agencies found themselves in the position of claiming the use of any and all waters passing along or through federal enclaves, i.e. *reserved* lands. But the joker in this pack

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

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turns out to be the fact that practically all federal lands are now "reserved" for one purpose or another.

In quick summary:

1. The navigation servitude is a valid concept basic to our federal system.

2. If the Supreme Court has expanded this concept beyond a defensible basis under the original idea of navigation servitude, the Court should modify its previous holdings.

3. The *Pelton* case (and *Arizona v. California*) have raised serious questions as to the validity of western water rights. They should be re-examined without reference to any current views on navigation.

4. Federal agencies should be encouraged to work with the states, recognizing state cognizance over the acquisition and enforcement of water rights. One bureaucracy, that of the state concerned, should handle this function.