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Navigation Servitude - The Shifting Rule of No Compensation

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COMMENTS

NAVIGATION SERVITUDE — THE SHIFTING RULE OF NO COMPENSATION*

I. THE SETTING

Water, like other natural resources, generally derives its value from the uses to which it can be put. The value can come from the use of the water itself, such as irrigation, or from an increased use of land that abuts a body of water, such as a port site. In either case, part of the land's value, and perhaps its sole value, is due to the use of or access to the water. At times, however, the individual water user may find that the federal government has decided to assert a superior right over the water, ultimately impairing use of the water and decreasing the land's value. Although this superior right may take many forms,[1] one form frequently employed is the navigation servitude.

> The navigation servitude rests on the principle that any property right dependent for its exercise or value on the presence of navigable waters is subject to a defect of title, called a servitude, and the federal government exercising both its superior power over navigable waters and the servitude may take, destroy or impair the property without payment of compensation.[2]

The rule,[3] therefore, consists of two concepts: first, that the federal government has a superior power[4] over the control of

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1. For example, the Government may assert superior rights in the water through the infamous reservation doctrine or the Reclamation Act. *See* TRELEASE, FEDERAL-STATE RELATIONS IN THE LAW OF WATER RIGHTS (National Water Comm. PB 203600 1971).
2. *Id.* at 175. Professor Morreale was even more succinct when she styled the navigation servitude as a "rule that in the exercise of the navigation power certain private property may be taken without compensation." Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 19 (1963).
3. The reader should not be deceived by what may appear to be a simple rule. Nonetheless, its basic treatment at this point should suffice. For very thorough treatments of the navigation servitude see Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963); Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1 (1968); Munro, *The Navigation Servitude and the Severance Doctrine*, 6 LAND & WATER L. REV. 491 (1971).
4. The nature and extent of this so-called *power* has itself become the subject of considerable debate. On the one hand, it is said that the power is derived

navigable waters; second, that no compensation will be paid for injury to property when the right is exercised.[5] The first concept is generally thought necessary to the proper development of water resources.[6] "[T]he historic right of the public to passage on navigable waters, free from obstruction or monopolization of owners of the beds or riparian lands"[7] is more than adequate justification for giving the federal government a navigation servitude over certain waters. The no compensation concept, however, has evoked extensive criticism as being inherently unjust and economically unsound.[8]

As originally formulated, the no compensation rule may have appeared to be the reasonable consequence of the Government's limited right over navigable waters. For one thing, it seemed evident that the navigation servitude would apply only to those waters deemed publicly navigable, a term originally defined quite narrowly.[9] In addition, the rule of the navigation servitude had its historical basis in a public right to a free and unhindered passage in navigable waters.[10] Therefore, the rule implicitly indicated that it applied only to those

from the commerce clause. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Morreale, *supra* note 3, at 3. On the other hand, some writers have argued that

> [t]he incidents of the federal interest have been developed to the point where its proprietary character is quite clear and that, therefore, the continued attempts to deal with it solely under the commerce clause are both unnecessary and misleading. The interest should be recognized for what it is and be dealt with in the context of the property clause of the Constitution.

Bartke, *supra* note 3, at 2. *See also* Munro, *supra* note 3.

5. The no compensation rule is not unique to federal water law, nor to the treatment of governmental powers over natural resources in general. Consider, for example, the no compensation rule employed when the Government deprives an individual of his water right under the reservation doctrine, or the fact that no compensation will be paid when the Government revokes a grazing permit under the Taylor Grazing Act. TRELEASE, *supra* note 1, at 104-74; Ragsdale, *Section 3 Rights Under the Taylor Grazing Act*, 4 LAND & WATER L. REV. 399 (1969).
6. Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626 (1957).
7. TRELEASE, *supra* note 1, at 274.
8. *See generally* Morreale, *supra* note 3; TRELEASE, *supra* note 1, at 181-85; Note, *The Public Right of Navigation and the Rule of No Compensation*, 44 NOTRE DAME LAW. 236 (1968). *But see* Bartke, *supra* note 3; Munro, *supra* note 3.
9. For example, in 1870 the Supreme Court said: "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 susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).
10. Morreale, *supra* note 3, at 25-31.

Government projects directly aimed at furthering this free and unhindered passage. The cases arising at this time factually lent credence to these principles. For example, *Gibson v. United States,*[11] an 1896 Supreme Court case, involved a Government-built dike in the Ohio River. The purpose of the dike was to concentrate the water's flow so as to improve the river's navigability. The dike, however, caused an island farm to be cut off from the flow of the river. The owner of the island claimed a loss in value to the land caused by its inaccessibility to the water. The Court rejected the claim, stating that "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard."[12] It should be noted, however, that evidence had been introduced to show that the landowner still had access to the water by wagon. It could be argued, therefore, that the landowner had suffered no more than inconvenience, while the public as a whole gained a more navigable waterway. In addition, the Ohio River dike was not touching the island, nor did it cause any water to flow on the land. Finally, the dike was obviously intended to aid in the navigability of a navigable river.

From these limited beginnings, the navigation servitude has experienced considerable growth, carrying with it the rule of no compensation. Those waters deemed navigable came to conceivably encompass most of the waters in the United States,[13] including those waters that are (1) navigable in fact;[14] (2) were navigable at one time;[15] (3) could be made navigable

11. 166 U.S. 269 (1896).

12. *Id.* at 276.

13. As laconically stated by one writer: "It has been suggested that the contemporary test [of navigability] may be whether a stream is navigable enough to float a Supreme Court opinion." Corker, *The Western Water Rights Settlement Bill of 1957*, in LEGAL PROBLEMS IN WATER RESOURCES 48 (Grahm ed. 1957). For more extensive discussions of the judicial criteria of navigability see Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 398-432 (1970); Morreale, *supra* note 3, at 2-8; Silverstein, *The Legal Concept of Navigability v. Navigability in Fact*, 19 ROCKY MT. L. REV. 49 (1946).

14. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

15. *See* Economy Power & Light Co. v. United States, 256 U.S. 113 (1921) in which the Court found waters to be navigable on the basis of commercial use for early American fur trading.

by reasonable improvements;[16] or (4) are non-navigable streams that may have an impact on a navigable waterway.[17]

There was also considerable weakening of the idea that the navigation servitude applied only to those projects aimed at promoting the public's right to a free and unhindered passage on navigable waters. It has been established that improvements of navigation can be found in such diverse projects as dams for flood control or watershed development,[18] power generation,[19] or even the use of riparian lands for profitable commercial ventures.[20] Furthermore, the improvement of navigation need not be the main objective of a governmental project.[21] These much diminished requirements for the operation of the navigation servitude led one writer to conclude:

> The rule that evolves . . . 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.[22]

Finally, the decisions indicate that a determination of navigability or whether a project is motivated by improvements to navigation is a matter for Congress to determine.

16. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).
17. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).
18. United States v. Appalachian Power Co., *supra* note 16.
19. United States v. Twin City Power Co., 350 U.S. 222 (1956).
20. United States v. Rands, 389 U.S. 121 (1967). The land involved in this case was a port site, taken from its owner at a reduced value and ultimately leased to Boeing Aircraft for commercial use. It should be pointed out, however, that the taking involved a larger flood control project on the Columbia River. Hence, an exercise of the dominant navigation servitude solely for the benefit of private interests may not be an appropriate exercise of the power. Prior to the *Rands* decision, the Supreme Court had stated: "We need not ponder whether by virtue of a highly fictional navigational 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." United States v. Gerlach Livestock Co., 339 U.S. 725, 737 (1950). Despite this language, the *Rands* decision seems to indicate that private interests may indeed benefit from the exercise of the power of navigation servitude. *See* TRELEASE, *supra* note 1, at 186.
21. Oklahoma *ex rel*, Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).
22. Morreale, *supra* note 3, at 11.

In *United States v. Twin City Power Co.*,[23] the Supreme Court stated:

> It is not for the 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.[24]

For all practical purposes, therefore, it would appear that Congress determines whether the power of the navigation servitude will be exercised.[25]

As the number of projects and types of streams covered by the servitude grew, so did the number of non-compensable losses. While there was little quarrel with the United States' superior power over navigable waters, it seemed illogical to conclude that every exercise of that power should go uncompensated. "[T]he Supreme Court seems to have confused or identified the national power over navigable waters with the non-compensability features of the servitude."[26]

The general theory of the no compensation rule appeared to be that private ownership of running water of a navigable stream is inconceivable, *i.e.*, one cannot be paid for something he does not own.[27] Hence, compensation was denied individuals for loss of their riparian access,[28] loss of the use of

23. 350 U.S. 222 (1956).

24. *Id.* at 224.

25. On one occasion, however, the Supreme Court did indicate that not all Governmental claims to its power of the navigation servitude would be upheld. In United States v. Gerlach Livestock Co., 339 U.S. 725 (1950), the Court held a Governmental project to come under the Reclamation Act, thereby requiring compensation for the taking of water rights. *See* note 20 *supra*. Note, however, that the declaration in *Twin City* occurred six years after the *Gerlach* decision.

26. TRELEASE, *supra* note 1, at 176. *See also* Morreale, *supra* note 3, at 21.

27. In *United States v. Chandler-Dunbar Water Power Co.* the Court said: "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." 229 U.S. 53, 69 (1915). In a somewhat more articulate manner, one writer phrased the theory this way: "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." Munro, *supra* note 3, at 495.

28. Gibson v. United States, *supra* note 11; United States v. Commodore Park, Inc., 324 U.S. 386 (1944).

stream beds,[29] and the loss of obstructing structures.[30] All these losses, however, were restricted to the water itself, thereby giving the impressions that the navigation servitude does not extend beyond the bed of a navigable stream.[31]

What result would obtain, then, if the Government uses the navigation servitude to deny compensation for a taking of property having a special value in the use of or access to navigable water?[32] For example, will land ideally suited as a boat launch on a navigable stream be valued with or without its special use when taken under the United States' exercise of the navigation servitude? Clearly any property *taken* will be compensable within the meaning of the fifth amendment.[33] The issue is the valuation of that property taken. Strictly speaking, therefore, the navigation servitude in this context involves lessened compensation rather than no compensation.

Although the issue of compensation for property dependent for its value on navigable water was raised as early as 1893,[34] it was not settled until 1956. In *United States v. Twin City Power Co.*,[35] a hydroelectric company desired to generate power through the use of the navigable Savannah River. In order to effectuate this project, the power company purchased land on both sides of the river in an area particularly suitable for constructing a hydroelectric dam. Permission was given by the United States for the power company to proceed with the project. However, prior to actual con-

29. Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913). This paricular case involved the denial of compensation for the destruction of oyster beds by the United States. While destruction of oyster beds is now made compensable by virtue of 28 U.S.C. § 1497 (1970), the power of the United States over the bed of navigable waters remains intact. *See* United States v. Chandler-Dunbar Water Power Co., *supra* note 27.

30. Union Bridge Co. v. United States, 204 U.S. 364 (1907); Louisville Bridge Co. v. United States, 242 U.S. 409 (1916).

31. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950.) Technically it is still true that the navigation servitude is confined to the bed of a stream. Nonetheless, it is quite clear that the servitude affects lands surrounding the stream as well, since the servitude determines the amount of compensation that will be paid for the lands if taken in an exercise of the power. *See* United States v. Rands, 389 U.S. 121 (1967).

32. "Navigable water" is used loosely here to include the non-navigable tributaries of navigable streams. For reasons to be developed later, the distinction may be important.

33. *See* Olson v. United States, 292 U.S. 246 (1934).

34. Mongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

35. 350 U.S. 222 (1956).

struction of the project, the United States decided to take the power company's land as part of a larger water project. In determining the amount of compensation due, the United States discounted any value of the land as a site for hydroelectric power operations. The power company was offered about one hundred and fifty thousand dollars as compensation for the land based on its use for timber and farming. The power company had shown, however, that the land's worth as a power project site was about $1.25 million. The Supreme Court upheld the Government's method of valuation, stating: "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."[36]

Several years later the issue again came before the Supreme Court. In *United States v. Rands*,[37] the land taken bordered on the navigable Columbia River in Oregon. Although the land had some value for its agricultural uses and sand and gravel deposits, its chief worth was as a port site. In fact, the state of Oregon had an option to purchase the land as a port site. When a federal dam flooded part of the land, the United States condemned the entire parcel. The landowner sought the option price as compensation for the taking. The Court, however, awarded compensation based on the land's non-riparian value, an amount equal to about one-fifth of its port site worth. In so holding, the Court reiterated its position taken in *Twin City*[38] that there will be no compensation for a value dependent upon the presence of water. The *Rands* decision, therefore, dashed the hopes of those who might have felt that *Twin City* was a decision limited to its facts.

Not all formulations of the no compensation rule took place in the Supreme Court. In 1918, Congress passed a law which formulated its own version: when a partial taking of land occurs and some property remains adjacent to the stream, any special benefits accruing to the property because

36. *Id.* at 225.
37. 389 U.S. 121 (1967).
38. 350 U.S. 222 (1956).

of its access to or use of the waterway will be deducted from the compensation paid.[39] The following example is illustrative of this congressional rule. A has a 40 acre tract of land bordering on a navigable stream. That portion of the tract bordering on the water, 20 acres, is valuable as an industrial port site. The United States condemns the one-half of A's tract that borders the stream in order to construct a dam and submerge the land. A non-riparian 20 acre tract has a fair market value of $10,000, while the fair market value of a riparian industrial port site is worth $20,000. Under the no compensation rule, A will receive $10,000 for the 20 acres taken since the additional $10,000 results from a value in the water. However, the 20 acres not condemned that was formerly non-riparian will become riparian once the project is completed, thereby gaining access to the water by virtue of the project and once again becoming valuable as an industrial port site. Therefore, the project has caused A's remaining 20 acres to gain an additional $10,000 in value to be deducted from the original $10,000 compensation, leaving A with one-half of the land he originally owned and no compensation for the land taken. Although the illustration may appear extreme, one need only look at the *Rands* decision to realize the very real possibility of its occurrence.[40]

From the courts and Congress, therefore, the navigation servitude had become a formidable means of allowing the United States to escape payment of compensation. The rule, however, had its detractors,[41] and the manifest injustice of the *Rands* decision made it increasingly apparent that changes would have to be made.

II. THE SHIFTING RULE OF NO COMPENSATION

The no compensation aspect of the navigation servitude has never been completely immune from change. At one time or another, all three branches of the federal government have made modifications of the servitude's noncompensable fea-

39. 33 U.S.C. § 595 (1970).
40. United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).
41. *See generally* Morreale, *supra* note 3.

tures.[42] However, there had never been any sweeping reforms in the law until 1970.

On December 31, 1970, Congress quietly passed into law Section 111 of the Rivers and Harbors and Flood Control Act of 1970.[43] Despite the lack of fanfare, Section 111 has created a significant shift in the navigation servitude's rule of no compensation. It is the intent of this comment to examine the nature and extent of that change.

In pertinent part, Section 111 provides:

> In all cases where real property shall be taken by the United States for the public use in connection with any improvements of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.
>
> In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken.

This analysis of Section 111 will be in four parts: (A) the legislative history of Section 111; (B) an analysis of Section 111 from the standpoint of legislative materials; (C) a discussion of the terminology of Section 111; (D) an analysis of case law which might now be altered by Section 111.

42. TRELEASE, *supra* note 1, at 186-89.

43. Section 111 is now codified in 33 U.S.C. § 595(a) (1970).

A. Legislative History of Section 111

The first bill[44] concerning compensation for the taking of land abutting navigable waters was introduced on June 24, 1969, in the House of Representatives.[45] The bill quickly died in the House Public Works Committee. Almost a year later, May 6, 1970, identical bills were introduced into the House and the Senate. Both bills[46] were sent to committees on public works. After hearings,[47] the bills died in their respective committees.

The bill that was ultimately to become Section 111 was introduced into the House of Representatives on December 3, 1970.[48] There were no hearings on the bill, although there was some brief discussion of it in a House Public Works Committee Report.[49] On December 7, 1970, the bill was passed by the House and sent to the Senate.

44. This was not the first proposal for legislative change. As early as 1967, the American Bar Association's Committee on Real Property, Probate and Trust Law had recommended changes in the navigation servitude as it affects landfill areas that border on navigable waters. ABA SUBCOMM. ON NAVIGATION SERVITUDE, *The Navigation Servitude*, 2 REAL PROP., PROBATE & TRUST J. 597 (1967). The ABA's efforts, however, were never really directed at a law such as section 111. In fact, it is the opinion of the ABA Subcommittee on Navigation Servitude that section 111 is an inadequate reformation of the navigation servitude. ABA SPECIAL COMM. ON NAVIGATION SERVITUDE, *Federal Navigation Servitude*, 6 REAL PROP., PROBATE & TRUST J. 132-33 (1971). As the Subcommittee's chairman, Eugene Morris, indicated in a recent law review article: "Although the servitude has been repeatedly sustained by the United States Supreme Court—indeed even expanded by the Court in some of its recent decisions—this does not alter the fact that there is a pressing need for reexamination of that doctrine in light of its debilitating effect upon the utilization of our waterfront areas in a manner which is consistent with the existing requirements of our modern urban society." Morris *The Federal Navigation Servitude: Impediment to the Development of the Waterfront*, 45 ST. JOHNS L. REV. 189, 199 (1970). It is very likely, therefore, that the ABA will continue to press for additional change of the navigation servitude. For additional comments by the ABA on this matter see ABA REPORT OF THE COMM. ON PUBLIC REGULATION OF LAND USE, 3 REAL PROP., PROBATE & TRUST J. 256 (1968); ABA COMM. ON PUBLIC REGULATION OF LAND USE, *Federal Navigation Servitude*, 4 REAL PROP., PROBATE & TRUST J. 38E (1969).

45. H.R. 12383, 91st Cong., 1st Sess. (1969). The full text of the bill is reprinted in Appendix A.

46. S. 3815, 91st Cong., 2d Sess. (1970); H.R. 17505, 91st Cong., 2d Sess. (1970). The bill is reprinted in Appendix B.

47. *Hearings on S. 3815 Before the Subcomm. on Flood Control—Rivers and Harbors of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 677-711 (1970) [hereinafter cited as *Senate Hearings*]; *Hearings on H.R. 17505 Before the Subcomm, on Rivers and Harbors and the Subcomm. on Flood Control of the House Comm. on Public Works*, 91st Cong., 2d Sess. 153-73, 210-218 (1970) [hereinafter cited as *House Hearings*]. For a closely related discussion see *Senate Hearings* 187-205.

48. H.R. 19877, 91st Cong., 2d Sess. (1970).

49. H.R.REP. No. 91-1665, 91st Cong., 2d Sess. 30-31 (1970).

The Senate, however, rejected the House Bill and substituted its own version of a method to change the navigation servitude.[50] As in the House, only a committee report accompanied the Senate Bill.[51] The Senate approved their version of the law on December 9, 1970.

Since the House and Senate bills differed, the matter went into conference. On December 17, 1970, a Conference Report was presented to the House,[52] with the original House Bill once again replacing the Senate version. No reason was given for this change. Finally, on December 31, 1970, the bill was passed and became what is now Section 111.

B. Legislative Analysis of Section 111

From a legislative history viewpoint, three methods of analysis should provide some insight into the scope and meaning of Section 111: (1) congressional hearings; (2) committee reports; (3) comparison and contrast of Section 111 and the bills which preceded it.

1. *Hearings*

Testimony and prepared statements presented before the congressional comimttees do not contribute much to an understanding of Section 111.[53] Most information given at the hearings did not come from the legislators themselves but from interested outside parties. The two individuals who gave lengthy statements in favor of changing the no compensation rule were also representing parties who had lost or stood to lose significant amounts of money under the old law.[54] This is not to impute any prejudice on their part, but it is certainly

50. S. 4572, 91st Cong., 2d Sess. § 109 (1970). The full text of this bill is reprinted in Appendix C.
51. S. REP. No. 91-1422, 91st Cong., 2d Sess. 58 (1970).
52. H.R. REP. No. 91-1782, 91st Cong., 2d Sess. 23 (1970).
53. *See Senate Hearings* and *House Hearings, supra* note 47.
54. These individuals were Harold R. DeMoss Jr., an attorney from Houston, representing a group of people whose land was condemned by a federal flood control project, and Robert Sylvia, a Boston attorney, whose law firm had represented an individual who fell victim to the navigation servitude's no compensation rule. The testimony and prepared statements of Mr. DeMoss are in *House Hearings, supra* note 47, at 153-57; *Senate Hearings, supra* note 47, at 677-99. Mr. Sylvia's comments and a prepared statement are in *Senate Hearings, supra* note 47, at 699-707.

a factor to be aware of in considering their statements. The only individual who testified against any changes in the laws of navigation servitude did so on behalf of the Department of the Army, the governmental branch that benefits the most from paying reduced prices for riparian land.[55]

It should also be noted that these hearings related to proposed bills which were somewhat different than Section 111. There were never any hearings on Section 111. While the precise differences between these bills and Section 111 will be discussed in detail later, the reader should be aware now that the hearings were not directed at Section 111 as enacted.[56]

Nevertheless, the hearings in both the House and the Senate did make several points worth noting. First, it was indicated several times that the Government's paramount right to take land and structures below the normal high water mark would not be affected by the proposed changes in the law.[57] Although this same point is expressly stated in Section 111, its repetition in the hearings serves as emphasis on the limits of the new law. Basically this means that the changes brought about by Section 111 only affect the amount of compensation to be paid, not the navigation servitude itself or the rule of no compensation as it applies to a stream or its bed.

One of the dominant feelings expressed at these hearings was that *United States v. Rands*[58] was inherently unjust and must be legislatively overruled. This was the thrust of most comments made before the committees. As Loney Hart of the Department of the Army phrased it: "The apparent objective of this bill (H.R. 17505) is to overcome the Supreme Court decision in *United States v. Rands.*"[59] Senator John Tower of Texas, a sponsor of a predecessor to Section 111, expressed much this same idea.[60] On the basis of this testimony on similar bills, one might argue that Section 111 has a

55. The individual testifying was Loney W. Hart, Real Estate Directorate Office, Chief of Engineers, Dep't of the Army. Mr. Hart's testimony is in *House Hearings, supra* note 47, at 213-16.

56. The bills under consideration in the hearings are set out in Appendix B.

57. *E.g., Senate Hearings, supra* note 47, at 680; *House Hearings, supra* note 47, at 163.

58. 389 U.S. 121 (1967).

59. *House Hearings, supra* note 47, at 213.

60. *Senate Hearings, supra* note 47, at 707.

very limited application, changing only those cases very similar to the *Rands* decision. For example, it was said in the hearings that *United States v. Twin City Power Co.*[61] would not be changed by any of the proposed bills. *Twin City* was said to stand only for the exercise of the navigation servitude over a private property interest in water.[62] However, it would seem a mistake to construe Section 111 so narrowly. The language of Section 111 reads much broader than that interpretation. It is arguable, therefore, that those who testified before the committees failed to see that the *Rands* decision is merely an extreme illustration of a previously settled rule of law. For example, four years before *Rands,* one writer, citing the *Twin City* decision, stated: "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."[63] Clearly this interpretation of the *Twin City* case makes it indistinguishable from *Rands.*

The better conclusion, therefore, would be that while the *Rands* decision might have been the dominant topic of the hearings, the proposed bills should not be limited solely to that type of case. However, the great concern with *Rands* in the hearings should still be heeded as a warning to those who might attempt to stretch Section 111 very far beyond the facts of that case.[64]

61. 350 U.S. 222 (1956).

62. This very distinction was made in the Senate Hearings. *Senate Hearings, supra* note 47, at 692. There has also been a distinction made between *Twin City* and *Rands* on the basis that in *Twin City* the power project was contingent on a permit from the Federal Power Commission. Therefore, unlike *Rands,* the value of the land depended on a permit, not the water. Corker, *Federal-State Relations in Water Rights—Administration and Adjudication,,* 17 ROCKY MT. MINERAL L. INST. .... (1971). To this writer, the distinction is invalid. The Twin City Power Company's land was especially adaptable for hydroelectric power production. The site value remained whether the permit was obtained or not. Furthermore, the granting of a permit is only authorization to go ahead with the project; it does nothing to enhance the suitability of land for a project. It is difficult to see the comparison between a governmental permit and the right to take land without complete compensation. One aspect would not seem to justify the other. Finally, while the reasoning behind the distinction seems plausible enough, it was not the reasoning followed by the Supreme Court in the *Twin City* decision. The Court's own logic in that case was very easily carried over to the *Rands* decision, indicating that they saw little difference between that case and *Twin City.*

63. Morreale, *supra* note 3, at 62.

64. While it is still far too early for significant case law on this matter, one decision did use Section 111 to allow full compensation for fixed improve-

Another possible indication of the intended scope of Section 111 can be seen in the concern expressed in the House Hearings over the partial takings of property under the no compensation rule. As previously pointed out,[65] the pre-Section 111 rule had been that when only a part of riparian land was taken, there was no compensation paid for the riparian value of the land, and any accretion in value to the remaining land was deducted from the compensation paid. Minority counsel for the House Public Works Committee stated that this rule was "like having your cake and eating it too."[66]

The concern over the partial taking aspect of the no compensation rule could be construed two ways. First, one might argue from a narrow standpoint that Section 111 was intended to cure only this particular aspect of the law of navigation servitude. Therefore, complete takings of property that fall within the old rule would not be altered by Section 111. A second, and probably more accurate interpretation, would be that the concern over the partial taking rule was merely part of a broad policy to rectify injustice in the law of compensation. The idea of giving a person less than adequate value for his land and then deducting benefits to the remainder of the land probably serves more as an illustration of the unreasonableness of certain aspects of the navigation servitude than as a method of construing Section 111.

Finally, two additional items brought out in the hearings serve to indicate the intent and purpose of Section 111. First, in identical statements to both the House and the Senate Public Works Committees, Harold DeMoss, an attorney from Texas, pointed out that under existing rules of compensation the Government is put in the position of being a condemnation broker. The prime example of this was in the *Rands* decision,

> [w]here the State of Oregon first took an option from the landowner at a price using port site value,

ments whose value was dependent on access to navigable water, a fact very much different than those in Rands. United States v. 967,905 Acres of Land, 447 F.2d 764 (8th Cir. 1971).

65. See pp. 507-08 *supra*.

66. *House Hearings, supra* note 47, at 215.

> the Federal Government then condemned the property disregarding port site value, and the Federal Government then conveyed the property to the State of Oregon who leased it to a private corporation for use as a port site.[67]

Secondly, it was brought out that recognizing no value for a land's worth because it has access to or utilizes water is a form of governmental immunity which has no counterpart in other areas of condemnation law, *i.e.,* generally a state cannot exercise power over property without paying full compensation, nor can the federal government pay less than full compensation for non-navigation projects.[68] It is argued, therefore, that the compensation rules in the area of navigation servitude are a throwback to a different era, and since governmental immunity is dying, so should these rules. The significance of these two points is that they indicate a desire for uniformity and fairness in compensation laws and may serve as an argument for a broad application of Section 111.

Admittedly, most of the above discussion on the hearings involves a certain amount of interpretation and speculation. Nevertheless, the hearings at least seem to indicate a general feeling that injustice was being perpetrated by certain applications of the no compensation rule. As Senator Tower stated:

> The riparian landowner should have the full true value of his property reimbursed by the Federal Government, for our Constitution states: "... Nor shall private property be taken for public use, without just compensation."
>
> I recommend this measure to the subcommittee in order to implement the mandate of the Constitution in regard to riparian lands taken for public use.[69]

2. *Committee Reports*

Clear insights into the nature and meaning of Section 111 are extremely limited in the various committee reports. The

67. *Senate Hearings*, supra note 47, at 685; *House Hearings, supra* note 47, at 162.
68. *Id.*
69. *Senate Hearings, supra* note 47, at 708.

Senate Committee Report[70] related only to the substituted version of Section 111 that was dropped when the legislation went into conference. Since the Senate Bill only authorized a study of the ways in which the no compensation rule might be changed,[71] the Committee Report is of little use in interpreting the substantive law now contained in Section 111.

The House Report[72] on Section 111 did contain one important statement:

> Under existing law, when riparian property adjacent to a navigable waterway is acquired by the United States for a water resource development project, the valuation of the property taken does not include any use of that property associated with access to and use of the waterway. However, when only a partial taking occurs, and some property remains adjacent to the waterway, there is deducted from the just compensation that would otherwise be paid the value of special benefits accuring [*sic*] to the remaining real property because of its access to or use of the waterway.
>
> The Committee feels that this is an inequitable situation. The section [111] accordingly provides for the valuation of real property taken based upon its access to or use of the navigable waterway when, in fact, the use to which such property may reasonably be put is dependent upon such access to or utilization of the navigable water. This section makes no change in the existing law with respect to the offsetting of special benefits to remaining real property against the just compensation that would otherwise be paid for the real property taken and for damages to remaining real property resulting [from] the taking the purpose for which the real property is taken.[73]

The House Report would seem to make it quite clear that the price to be paid for a partial taking of property will include values resulting from access to and utilization of the water. However, any benefits which accrue to the remaining land by virtue of the taking will still be deducted from the compen-

70. S. REP. No. 91-1422, *supra* note 51.
71. The full text of the Senate Bill is set out in Appendix C.
72. H.R. REP. No. 91-1665, *supra* note 49.
73. *Id.* at 31.

sation paid.[74] Using the same example previously employed to illustrate the working of the old law,[75] Section 111 provides the following results. A owns a 40 acre tract of land bordering on a navigable stream. The land is particularly valuable as an industrial port site. The Government condemns one-half of A's tract for the purpose of constructing a dam and submerging the land. A non-riparian 20 acre tract has a fair market value of $10,000. A's tract, because of its special value, is worth $20,000. Under Section 111, A will be paid for the $20,000 value of his land. However, the 20 acres not condemned that was formerly non-riparian will now become riparian land and, by virtue of the Government project, valuable as an industrial port site. Hence, from the $20,000 paid to A, there will still be deducted the increase in value which accrues to that portion of his land which was formerly non-riparian land, *i.e.,* $10,000. A, therefore, will be compensated $10,000 for the 20 acres of land taken from him, and he will retain possession of 20 acres of land now worth $20,000. This would clearly seem to be an equitable result for A should not be compensated for a value in land created solely by a Government project. Section 111, therefore, has actually worked to turn the highly unjust partial taking law into a reasonable result.

The House Report,[76] also very sparse, made one important point:

> The Conferees wish to stress for the purposes of clarification that any decrease or increase in the fair market value of the real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.[77]

74. This feature of the law is amply illustrated by the fact that Section 111 was codified as Section 595(a) under Title 33 of the United States Code. Section 595 is the old law providing for deductions from compensation of accretions in value to land.
75. *See* p. 508 *supra.*
76. H.R. REP. No. 91-1782, *supra* note 52.
77. *Id.*

Essentially, this is an elaboration of the House Committee Report. Perhaps two illustrations will provide some meaning to the House Conference statement. First, A is a non-riparian owner of land worth $10,000. B's land is contiguous with A's and abuts a navigable stream. The Government condemns B's land to build a dam. Because of the dam, A's land will become riparian and much more valuable on the open market. If the Government should then decide to condemn A's land for recreational facilities, the compensation paid A will not include the increase in the land's value, that is, it will be valued as non-riparian land.[78]

Second, A owns a tract of land riparian to a navigable stream. The land is valuable as an industrial port site. The Government proposes to build a dam, the waters of which will inundate one-half of A's land. Because of the proposed project, the remaining land loses value, the location of the dam destroying any possible port site use. If the Government should then decide to condemn A's remaining land, it will still be valued as industrial port site property. However, even if A remains in possession of the remaining one-half of his land, he cannot claim as part of his compensation the decrease in value to that land caused by the Government project.

While the committee reports do provide some small insights into how the congressional committees felt Section 111 should operate, their usefulness is of limited value. It would seem to be a better proposition that when legislation of potential impact such as Section 111 is before Congress, the meaning and limitations of the new law be expressed before passage, rather than leaving its construction up to the imagination of the courts.

3. *Comparison and Contrast of Bills Preceding Section 111*

It has already been indicated[79] that prior to the passage of Section 111, there had been several similar pieces of legislation introduced into Congress. Despite the similarities,

78. For a case with a very similar fact situation *see* United States v. Reynolds, 397 U.S. 14 (1970).
79. *See* pp. 510-11 *supra.*

Section 111 and its predecessors do differ in certain respects. Therefore, a comparison and contrast of Section 111 and the bills which preceded it would seem relevant to any thorough analysis of Section 111.

Perhaps one of the more obvious differences between prior bills and Section 111 is that Section 111 does not contain a specific rejection of the navigation servitude. Two of the bills[80] that predate Section 111 clearly stated that in determining compensation for the taking of land, the navigation servitude will be disregarded.[81] Section 111 contains no similar language. However, a close reading of Section 111 and its predecessors would seem to indicate that what the early bills said explicitly about disregarding the navigation servitude, Section 111 says implicitly. Section 111 states:

> In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.

The clear import of this language would seem to be that the navigation servitude will be disregarded in the taking of riparian uplands.

Furthermore, Section 111 may not expressly reject the navigation servitude because to do so would be inaccurate and misleading. Actually, neither Section 111 nor the earlier bills do much to change the navigation servitude itself. The basic feature of the navigation servitude is that it allows the United States to exercise a paramount right over navigable

80. H.R. 12383, 91st Cong., 1st Sess (1969) (the full text of the bill is reprinted in Appendix A); S. 3815, 91st Cong., 2d Sess. (1969) (the full text of the bill is reprinted in Appendix B).

81. *See* Appendices A and B.

waters. Clearly, neither Section 111 nor its predecessors do anything to change this part of the navigation servitude. All that Section 111 and the earlier bills alter is the rule of no compensation as it applies to takings above the high water mark of navigable waters. Therefore, when one looks at the navigation servitude as a whole, Section 111 has not brought about any great changes. Hence, to put language in Section 111 that explicitly says the navigation servitude is to be disregarded would have been a confusing inaccuracy.

Two of the bills[82] introduced into Congress prior to Section 111 clearly stated that a potential future use of land due to its riparian location will be compensable.[83] Section 111 contains no such language, and a landowner claiming value due to a possible future use could meet with some difficulty. However, the language of Section 111 would not seem to justify such a strict interpretation. Section 111, in reference to the amount of compensation to be paid, states: "[T]he fair market value of such real property [will be] based upon all uses to which such real property may reasonably be put, including its highest and best use." The use of the words "may" and "highest and best use" would seem to indicate that Section 111 also contemplates payment for future uses to which the real property may be put.

Perhaps one of the most notable differences between Section 111 and previous bills is that Section 111 lacks any mention of its application to riparian land. An early House Bill[84] limited its application to "riparian property located on a navigable water."[85] Subsequent bills[86] referred to compensation for "riparian use"[87] of navigable waters. The predecessors of Section 111, therefore, would indicate that their application was limited only to situations which involved riparian land on navigable waters. But, Section 111 discusses compen-

82. S. 3815, 91st Cong., 2d Sess. (1970); H.R. 17505, 91st Cong., 2 Sess. (1970). *See* Appendix B.
83. *See* Appendix B.
84. H.R. 12383, 91st Cong., 1st Sess. (1969). The full text of the bill is reprinted in Appendix A.
85. *See* Appendix A.
86. S. 3815, 91st Cong., 2d Sess. (1970); H.R. 17505, 91st Cong., 2d Sess (1970). *See* Appendix B.
87. *See* Appendix B.

sation in terms of "access to or utilization of" navigable waters, "compensations to be paid for real property taken by the United States above the normal high water mark of navigable waters," and "real property . . . taken by the United States for public use in connection with any improvement of rivers, harbors, canals, or waterways."

The obvious question then becomes whether Section 111 applies to more than just land that abuts navigable water. The fact that Section 111 makes no use of the word "riparian" tends to indicate that it has a broader coverage than previous bills. Clearly this seems to be the case since Section 111 applies to partial as well as complete takings of property. To illustrate this, A owns non-riparian land with a flowage easement on B's land. B's land is riparian to a navigable river. The Government condemns B's land to build a dam and destroys A's flowage easement. A would be compensated for the taking of the easement[88] and, under Section 111, would be compensated for the full value of his loss.[89]

Finally, there is the total disparity between Section 111 as passed by the House and the substituted version of Section 111 passed by the Senate.[90] The Senate Bill provided that the Department of the Army was to undertake a study of "the basis of determining the amount of compensation to be paid the owners of riparian lands on navigable waters when acquired by the United States."[91] The Senate Bill is surprising in that both the House and the Senate Public Works Committees heard very similar condemnations of the navigation servitude's no compensation rule. Yet, the House decided to adopt an immediate cure, while the Senate opted for the more conservative approach of authorizing a study. The Senate Committee Report provided some answer to this shift in attitude when it stated:

> The Committee feels that before general legislation providing for a system of relief from the diffi-

88. 2 SACKMAN & VANBRUNT, NICHOLS ON EMINENT DOMAIN § 5.72 (rev. 3d ed. 1970).
89. For a somewhat similar fact situation, see United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).
90. S. 4572, 91st Cong., 2d Sess. § 109 (1970). The full text of the bill is reprinted in Appendix C.
91. *See* Appendix C.

> culties associated with the navigation servitude is adopted, there should be a thorough study made of the need for such legislation and of the form of relief which should be provided.[92]

On the basis of the Senate Bill, one might argue that Section 111 was passed only for a limited purpose—to overturn *United States v. Rands.* Two points can be made against this argument. First, the Senate Bill did not necessarily indicate Congressional reluctance to dispose of the rule of no compensation; rather it only indicated a desire for legislation which will effectively deal with the problem. Section 111, therefore, might be more of a temporary stopgap, pending even more comprehensive legislation.[93] Second, and most obvious, is that the Senate Bill, whatever it may have meant, was not enacted, while Section 111 was.

Admittedly, discussing the differences between Section 111 and its predecessors may seem a little like academic hair-splitting. Nevertheless, legislation which dies in committee can often reveal much about the current state of the law. From all indications, the scope of Section 111 should not be limited by the bills that preceded it. The language of prior bills may not have been exactly the same as that of Section 111, but there seems little reason to believe that they do not express essentially the same policy. The most significant aspect of the prior bills and Section 111 would seem to be the general desire on the part of Congress to conclusively eliminate the application of the no compensation rule from certain takings of property.

C. Definitions

While the legislative analysis of Section 111 deals in generalities, there is much to be learned from examining the specific terminology of Section 111. The following are definitions of some of the more important terms used in Section 111. The reader should take note, however, that most of these definitions are based upon meanings commonly given to these

92. S. REP. NO. 91-1422, *supra* note 51, at 59.
93. Somewhat the same feeling was expressed in a ABA SPECIAL COMM. ON NAVIGATION SERVITUDE, *Federal Navigation Servitude*, 6 REAL PROP., PROBATE & TRUST J. 132 (1971).

terms by the courts and writers. Hence, it can only be assumed that Section 111 uses the terms in the same manner.

1. *Real Property*

Section 111 speaks in terms of real property taken by the United States. Any complete definition of real property is necessarily quite involved and complicated.[94] However, it should be sufficient for the purposes of this comment to define real property as the surface of land, its emblements, easements[95] and those things placed on the land with the intention of permanently improving the freehold.[96]

Furthermore, a "right to the flow and use of water . . . is real property."[97] The Supreme Court has said that a "riparian right is property and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired."[98] However, while the definition of real property includes rights in water, Section 111 is limited to only those takings above the "normal high water mark." Therefore, it seems fairly evident that the taking of water itself is not compensable under Section 111. Absent any taking of land, an individual will not be compensated merely because the Government has exercised its right of navigation servitude over water and deprived the landowner of that water. Real property, therefore, would seem to be restricted to two things under Section 111: (1) the land and the structures; and (2) the access to and use that can be made of the water, but not the water itself or the right to it.

2. *Taken*

Section 111 limits its application to those instances in which real property is "taken by the United States." Gen-

94. *See generally* 2 SACKMAN & VANBRUNT, *supra* note 88, at § 5.
95. *Id.* at § 2.1.
96. BURBY, REAL PROPERTY §§ 8-11 (3d ed. 1965). This definition has no bearing on the type of interest owned in a particular piece of real property, e.g., leaseholds, reversionary interests, etc. Such interests generally fall within the broader term "property" as used by the fifth amendment.
97. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 28 (1942).
98. Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 504 (1870).

erally, questions as to whether there has been a taking have arisen under the meaning of that term as used in the fifth amendment. In that setting, the term has been given a broad meaning to include "[a]ny limitation on the free use and enjoyment of property."[99]

The Supreme Court has found a taking to exist even when the owner of property is not directly deprived of his title.[100] Hence, the test of a taking would seem to be whether the land has been interfered with in its use or value.[101] It should be kept in mind, however, that the discussion above of real property probably limits Section 111 to an actual physical taking of some property.

3. *Public Use*

That real property may only be taken for the "public use" is a traditional limitation on the power of eminent domain.[102] Giving meaning to that term, however, is often a more difficult matter. An extended analysis of the public use is beyond the scope of this paper[103] and can be simply defined as

> anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a [nation] . . . [or] manifestly contributes to the general welfare and the prosperity of the whole community.[104]

99. 2 SACKMAN & VANBRUNT, *supra* note 88, at § 6.1[1].

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

101. In *United States v. Cress*, the Supreme Court said:

> Where the government by the construction of a dam or other public works so floods land belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is little consequence in whom the fee may be vested.

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

102. 1 SACKMAN & VANBRUNT, *supra* note 88, at § 1.11.

103. *See* 2A SACKMAN & VANBRUNT, NICHOLS ON EMINENT DOMAIN § 7 (rev. ed. 1970).

104. *Id.* at § 7.2[2].

4. *Improvement*

Use of the word "improvement" in Section 111 is particularly troublesome. Section 111 can only come into play when the taking by the United States is for the "improvement of rivers, harbors, canals, or waterways." On the basis of that language, it could be argued that the word "improvement" means only those projects in furtherance of navigation.[105] If such a narrow definition should become the accepted test of an improvement, it is obvious that a great many takings of real property will not fall within the scope of Section 111.

It is suggested that to confine Section 111 to only those improvements in aid of navigation would be incorrect. The legislative history of Section 111 clearly indicates that it was intended to cover takings of riparian uplands pursuant to the navigation servitude, regardless of the project involved. Furthermore, it has already been shown that the test of whether a project falls within the navigation servitude is very broad and almost totally dependent upon congressional determination.[106] It would seem highly unjust, therefore, to allow Congress to choose when the power of navigation servitude (and the rule of no compensation) will be exercised, yet make the meaning of "improvement" narrower than that power. The test of what constitutes an improvement should be satisfied as soon as it is determined that Congress is acting under the navigation servitude.

If one case can serve as any guide, it appears that a broad definition of "improvement" will be followed by the courts. In *United States v. 967,905 Acres of Land,*[107] apparently the only reported case to deal with Section 111, the Government was exercising its power of eminent domain to make a wilderness area free of commercial business. The land involved in the suit bordered on a large navigable lake within the designated wilderness area. The landowner operated a sports fishing and hunting resort which made extensive use of the

105. This definition of improvement has been suggested by one writer. Corker, *supra*, note 62.

106. *See* pp. 504-06 *supra*.

107. 447 F.2d 764 (8th Cir. 1971).

lake. When the question of valuation came before the court, the Government contended that both the land and the fixtures should be valued by the *Rands* rule. Section 111, it was argued, did not apply because no improvement of the lake was to result from the takings. Section 111, said the Government, is "limited to 'conventional' improvements such as the construction of locks and dams and projects for bank stabilization or for the stabilization or deepening of the channels of navigable stream."[108]

The Eighth Circuit Court of Appeals, however, saw the test of an improvement to be whether the Government project served the public interest:

> Regardless of the limitations to which the Government's powers with respect to navigable waters may be subject, it is clear that those powers are broad, and that the public interests which those powers are designed to serve are also broad.
>
> Those interests are not limited to the promotion and fostering of trade and commerce along and upon our waterways or to the control or prevention of destructive floods. They include, in our estimation, those interests which are aesthetic, ecological, and environmental as well as those which are economic and commercial.
>
> . . . .
>
> [W]hen the Government commands civilization and business to retreat from a given area so that it may be preserved in its natural state for the enjoyment and refreshment of all of us, it may fairly be said that the Government is acting to "improve" the area and the waterways therein. We so hold.[109]

Clearly this would seem the better definition of an improvement. Section 111 was intended as relief to landowners whose property was taken and paid for at prices less than its full worth. It would be inequitable, therefore, to allow any construction of the word "improvement" to defeat that intent.

108. *Id.* at 771.
109. *Id.* at 771.

5. *Condemnation Proceedings*

Section 111 speaks of both "takings" by the United States and "condemnation proceedings." It would appear that the use of the two terms was for reasons of accuracy. A condemnation proceeding, while pending, does not interfere with the owner's possession of his property. Technically, then, a condemnation proceeding does not constitute a taking of property.[110] Therefore, the language of Section 111 covers two events: (1) where a *de facto* taking of property is involved; and (2) where the taking is being accomplished by a judicial proceeding.

Nevertheless, the use of both "taken" and "condemnation proceeding" in Section 111 is troublesome. Takings in Section 111 are used in reference to real property, while condemnation proceeding is used in connection with acquisitions of land and easements. To this writer, the use of the two terms in separate contexts is confusing, unexplainable, and a source of potential problems in the future.[111]

6. *Normal High Water Mark*

"Normal high water mark" is one of the most significant terms in Section 111 in that it draws the line between the compensable and the non-compensable workings of the navigation servitude. Nonetheless, it is an easy term to define. Simply stated, the normal high water mark is "the highest level at which the river or other body of water stands during normal conditions, excluding the extremes of flood stages during the winter and spring and low-water stages during summer droughts."[112]

7. *Navigable Waters*

Section 111 speaks of "compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States." There

110. 2 SACKMAN & VANBRUNT, *supra* note 88, at § 6.13[3].
111. For a brief discusion of this see TRELEASE, *supra* note 1, at 193.
112. *Senate Hearings*, *supra* note 47, at 686. For a somewhat different definition see 2 SACKMAN & VANBRUNT, *supra* note 88, at § 5.7913[4].

is nothing in the legislative history of Section 111 to indicate what Congress may have intended to mean by the term "navigable waters." Once again,[113] therefore, it is necessary to ponder what is meant by that term and the illusive concepts that accompany it.

Despite its unknown nature, the meaning of navigable waters is probably the most important term to an understanding of Section 111. However broad navigable waters is defined is also how broad Section 111 may be. To illustrate this, the Government decides to build a dam on a navigable river. A's land abuts a non-navigable tributary of that river. Because of the dam, water is backed up the tributary and partially floods A's land. Can A be compensated for the riparian value of his land under Section 111? The answer to the question would ultimately turn on the definition given "navigable waters."

It might be argued that navigable waters, as the term is used in Section 111, means just what it says—navigable in fact. However, authorities in the field of the navigation servitude would probably reject such a narrow construction of the term. In fact, navigable waters may very well include any water that the Government declares to be navigable. One writer on the subject has stated:

> Any stream-system in the nation could . . . 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. Theoretically at least, there are no waters in the United States immune from the navigation power.[114]

The issue would appear to remain, however, whether those waters subject to the navigation power and those waters that can be called "navigable" mean the same thing. The answer can be critical to the use of Section 111. It will be seen later in this comment that defining navigable waters so broadly

113. *See* pp. 501-04 *supra.*

114. Morreale, *supra* note 8, at 8-9.

as to include non-navigable tributaries could have some surprising results to the landowner.

8. *Fair Market Value*

To an extent, fair market value is defined by the language of Section 111 when it states that

> the compensation to be paid for real property . . . shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.

A prepared statement in the Congressional hearings supplemented to this definition by stating that the words "fair market value" are "the normal and ordinary tests used in condemnation cases for determining compensation due the landowner, and would include the concepts of 'willing buyer-willing seller.' "[115]

D. *Section 111 and Past Case Law*

While the foregoing analysis provides some insight into Section 111 in the abstract, the true test of any law comes from its application to particular fact situations. However, since Section 111 is a new law, there has been no factual application. Nevertheless, pre-Section 111 cases do provide ample fact situations that can be useful in defining the meaning of Section 111.

The method of analysis here will divide the fact situations into roughly three categories: (1) the United States condemns land and the owner claims compensation for its special location or site value, where (a) the property is located on a navigable stream, or (b) the property is located on a non-navigable stream; (2) the United States prevents or burdens the use of a navigable river, its flow or its bed; (3) the United States raises the level of the navigable mainstream,

115. *Senate Hearings, supra* note 47, at 686; *House Hearings, supra* note 47, at 163. For use of the term in a Section 111 case see United States v. 967,905 Acres of Land, 447 F.2d 764, 711 (8th Cir. 1971).

damaging private property, where (a) the property is situated along a navigable mainstream, or (b) the property is situated along a non-navigable mainstream.[116]

1. *Special location or Site Value*

a. *Property Located on a Navigable Stream*

This class of cases includes the *Rands* decision and is, therefore, the easiest to place within the intended scope of Section 111. Indeed, one of the earlier decisions in this area hinted at a Section 111-type holding. In *Olson v. United States,*[117] land that bordered on a navigable lake was condemned by the Government for the storage of water. As part of the compensation, the landowner claimed that his property had a special use as a reservoir site. The offered proof of this special value was that electric power companies had been competing for the right to dam the water in the lake, and any such project had to involve the purchase of the landowner's property. The Government denied that any special use could be made of the land, contending instead that it should be valued as a farm. The Court accepted the Government's theory of valuation but apparently not on the basis of the navigation servitude. Instead, the Court held that the claimed special value of the land was an impossibility due to the circumstances.

> When regard is had to the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with, it is clear that there is no foundation for opinion evidence to the effect that it was practicable for private parties to acquire the flowage easements in question.[118]

The Court did not say that ability to use the water as a power dam site was a non-compensable use of the land.

Therefore, the *Olson* decision would seem to have held nothing contrary to Section 111. Section 111 also denies compensation for speculative or impossible uses of land when it

116. The method of dividing up the case law was adopted from Morreale, *supra* note 3, at 31-63.

117. 292 U.S. 246 (1934).

118. *Id.* at 260.

speaks of "compensation . . . for . . . all uses to which such real property may *reasonably* be put." If anything, the *Olson* decision may aid in future interpretations of Section 111 by establishing the test of reasonableness as depending on (1) physical adaptability and (2) physical possibility.

> The use of shore lands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. But physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract together with the other shore lands for reservoir purposes or that another could acquire all lands or easements necessary for that use.[119]

In effect, then, Section 111 would seem to be doing little more than codifying the *Olson* case.

The first Supreme Court decision to clearly hold that a value in land due to the flow of the water is non-compensable was *United States v. Twin City Power Co.*[120] On the facts of that case,[121] it would appear that Section 111 has overruled *Twin City.*[122] As one writer on the subject described it, "*Rands* was so directly based on *Twin City* that any shot aimed at it must hit *Twin City.*"[123]

Nevertheless, it should not be presumed that the *Twin City* decision is going to be given up without a fight. It seems certain that the Government will have a formidable argument against Section 111 overruling *Twin City* if they press for a distinction between a value in water and a value in land. *Twin City,* it could argue, involved a value in water, while Section 111 applies only to values in land. The Government's authority for such a distinction could be the *Twin City* case itself.

However, the logic and language of Section 111 would not seem to substantiate such an argument. In the first place,

119. *Id.* at 256-57.
120. 350 U.S. 222 (1956).
121. *See* pp. 506-07 *supra.*
122. For some doubts and this writer's feelings on those doubts see Corker, *supra* note 62.
123. TRELEASE, *supra* note 1, at 192.

it is questionable if anyone really knows the difference between a value in the flow of a stream and a value in land. On the basis of one decision, it would appear that the Supreme Court has a difficult time in distinguishing the difference itself. In *United States v. Chandler-Dunbar Water Power Co.*,[124] the Court found lock and canal uses of land to be valuable but denied any value for hydroelectric uses since it was a value in the flow of the stream. To this writer it is hard to find any rational distinction between the two uses. Furthermore, there may be reason to argue that Section 111 destroys whatever distinction might have once existed between a value in the land and a value in water. Section 111 speaks in terms of the "highest and best use" and "utilization" of the water, making no distinction between non-compensable values in water and compensable values in land. Finally, to split hairs on values in land and water would seem to violate the broad congressional policy of Section 111 to eliminate unjust rules of compensation.

One final point should be made with respect to the effect of Section 111 on the *Twin City* case. Justice Douglas, writing for the majority in *Twin City,* seemed to destroy the previously established distinction between high and low water marks. At least two previous decisions[125] determined compensation on the basis of whether the land taken was above or below a high water mark. Justice Douglas, however, stated that "the location of the land [is] not determinative."[126] Section 111, by expressly distinguishing between land above and below the high water mark, would seem to repudiate Justice Douglas' remark. One certainly could argue that since Section 111 only discusses compensation above the normal high water mark, by implication it is denying compensation below that mark.

Finally, what of the taking of an easement by the United States? In *United States v. Virginia Electric & Power Co.*,[127] the respondent owned a flowage easement over lands border-

124. 229 U.S. 53 (1915).
125. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Chicago, M. St. P. & Pac. P. R., 312 U.S. 592 (1941).
126. 350 U.S. 222, 277 (1956).
127. 365 U.S. 624 (1961).

ing on a navigable river. The easement was to be used by the respondent when it constructed a hydroelectric dam. The Government, for a separate dam and reservoir project, condemned some of the land for its own flowage easement. The Government's taking encompassed the respondent's property. The fee owner of the land agreed to a compensation of one dollar, and the respondent intervened, seeking additional compensation. The Court held that the respondent must be paid for the taking of the easement but the amount could not include a value that depended on the flow of a river.

Except for the involvement of an easement, this case would seem to be no differen than *Twin City*. Therefore, most of what has been said about that case would seem equally applicable here. It is worth mentioning, however, that, as in *Twin City,* the Court in this decision said that a use of land for hydroelectric power generation was a value in water, not land. Hence, as in the *Twin City* case, the Government will probably dispute the application of Section 111 to this fact situation.

b. *Property Located on a Non-Navigable Mainstream*

Within this particular area of the law, only one case should need discussion. In *United States v. Grand River Dam Authority,*[128] a power company was the owner of land abutting the Grand River, a non-navigable tributary of the Arkansas River. Prior to the taking involved in this suit, Congress had made the Grand River a part of the Arkansas River Basin Project. The power company had permission from the Government to develop the Grand River for the production of electricity. However, pursuant to the Arkansas River Project, the Government had constructed its own project on the Grand River, ultimately causing condemnation of 70 acres of land owned by the power company. The power company then sought compensation for loss of the water power rights. The Supreme Court saw no difference between the application of the navigation servitude to navigable or non-navigable waters and stated: "When the United States

128. 363 U.S. 229 (1960).

appropriates the flow either of a navigable or nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one."[129]

Since this decision involved an express exercise of power by Congress over a non-navigable tributary of a navigable river, it might be argued that the tributary could be categorized as navigable water.[130] If one can accept this argument, there is little reason to believe that Section 111 would not alter the rule in the *Grand River* case. The general purposes of Section 111 would seem to dictate that there be no difference between takings on a navigable stream or takings on its tributaries. Certainly logic cannot justify such a distinction.

However, to assure the application of Section 111, such a power company would now be wise to plead damages to the upland parcels in the taking instead of rights in the water. This type of pleading would appear to be commanded by the language of Section 111 when it speaks of takings of real property above the normal high water mark.

2. *Interference with the Use of a Navigable River, its Flow, or its Bed*

In this category of cases, the United States has not taken any private property; rather, it has deprived that property of some particular use of or access to water. Therefore, barring the more esoteric arguments, the taking and high water mark requirements would appear to preclude the application of Section 111 to most of these cases. Three examples should make this point clear.

First: A is a riparian landowner on a navigable stream. The Government, in the course of constructing a naval base, dredges out a bay located more than a mile from A's property. The dredged materials are placed in the stream on which A's property is located. A alleges that the dredging operations have destroyed the navigability of the stream and decreased

129. *Id.* at 233.

130. *See* notes 13-17, 113-14 *supra* and accompanying text.

the value of his upland parcels. No dredged materials were ever placed on A's land. *Held:* the constitutional power of the federal government to regulate commerce may be exercised to block navigation at one place in order to aid it in another without compensating for loss of use of the navigable stream.[131]

Second: B owns a bridge that spans a navigable river. The Secretary of War, in accordance with the law, declares the bridge to be an unreasonable interference with navigation and orders the bridge altered. *Held:*

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no *taking* of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.[132]

Third: C builds a wharf on navigable water within harbor lines established by the Government. The Government subsequently decides to improve navigation in these waters and changes the harbor line. By changing the harbor line, part of the wharf now extends into the navigable waters and is taken by the Government without compensation. *Held:* the Government can relocate a harbor line, and is not required to pay compensation for the improvements originally within the old harbor line.[133]

Clearly all of these examples fall outside the intended scope of Section 111, and their holdings remain valid rules of law today.

131. United States v. Commodore Park, Inc., 324 U.S. 386 (1944).

132. Union Bridge Co. v. United States, 204 U.S. 364, 397 (1907). Even if it would be arguable in the case that Section 111 should apply, *e.g.*, the foundations of the bridge are located on land above the normal high water mark, policy could dictate that it should not be applied. In the jargon of one writer, the bridge company would be classified as a spoiler, "the person who has deprived the public of its rights to a free navigation, though he may not have appropriated them to his own use." TRELEASE, *supra* note 1, at 184. It would seem just, therefore, that the spoiler not be paid when he has to remove or alter his obstruction.

133. Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915). That Section 111 does not apply to this type of case is made clear by the ABA's efforts to have legislation, enacted apart from Section 111, to cure the harbor lines situation. *See* note 44 *supra.*

There is one decision in this category that is arguably overruled by Section 111. In *United States v. Chandler-Dunbar Water Power Co.*,[134] a power company owned land bordering on a navigable river. In order to develop the river for production of water power, the company (with permission of the Secretary of War) constructed dams, dikes and forebays in the river. The Government then instituted a condemnation proceeding over the river in order to improve its navigability. The condemnation proceeding against the water company involved all of the structures in the river as well as some eight acres of upland. In denying compensation for the right to generate power, the Supreme Court held that

> every 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.[135]

Despite the broad language of this rule, the Supreme Court did allow compensation for the locks and canals but denied any payment for the taking of the water company's ability to generate power. Such an ambiguous holding has led many writers to conclude that there is no reconciling *Chandler-Dunbar* with any rational interpretation of the no compensation rule.[136]

The language of the *Chandler-Dunbar* decision was later used as a basis for the holding in *Twin City*. Therefore, it is certainly arguable that if Section 111 covers *Twin City*, it covers *Chandler-Dunbar* as well. However, if Section 111 is to be used, the claimed compensation would have to be based on the loss of ability to generate power as it affects the upland parcels. "Thus transformed, *Chandler-Dunbar* is squarely within the terms of Section 111."[137]

134. 229 U.S. 53 (1913).
135. *Id.* at 70.
136. For example, *see* Morreale, *supra* note 3, at 47-50.
137. TRELEASE, *supra* note 1, at 192.

3. *Damage Attributable to the Raised Level of a Navigable Mainstream*

a. *Property Situated Along a Navigable Mainstream*

In *United States v. Chicago, M., St. P. & P.R. Co.*,[138] the federal government had constructed a series of locks and dams on the upper reaches of the Mississippi River. The effect of the project was to raise the water level of the River several feet. The railroad was a riparian landowner on the river. The Government's project caused some of the railroad's land between the high and low water mark to be inundated. The railroad sought compensation for the land covered. As might be expected, the Supreme Court denied the railroad's claim.

> The dominant power of the federal Government . . . extends to the entire bed of a stream, which includes the lands below the ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the the United States must make compensation.[139]

Section 111 would clearly seem to fail in its application to this case. If anything, Section 111 would strengthen *Chicago* by expressly limiting itself to lands above the normal high water mark.[140]

138. 312 U.S. 592 (1941).

139. *Id.* at 596-97.

140. A claimant's only hope for getting a different ruling in such a situation would have to depend more on the facts of the case than on the application of Section 111. If the claimant could argue that the property flooded in such a case was above the normal high water mark, then Section 111 would apply. The Court's definition of the high water mark is essentially the same as adopted in this comment. *See* p. 527 *supra*. However, two writers have adopted a somewhat different definition of a high water mark, saying that it is a line on the bank of a river covered by water long enough to deprive it of vegetation. Morreale, *supra* note 3, at 39; 2 SACKMAN & VANBRUNT, *supra* note 88, at § 5.7913[4]. In *Chicago*, the Court stated that "[t]he lands . . . were lowlands which, prior to the improvement, were to a great extent covered with trees and scrub." United States v. Chicago, M., St. P. & P.R. Co. 312 U.S. 592, 595 (1941). Therefore, if such a claimant could successfully argue that lack of vegetation is the high water mark test, it could claim compensation under Section 111. Absent the argument, however, the claimant's situation would not be changed by Section 111.

b. *Property Situated Along a Non-Navigable Stream*

Within this category fall several decisions that may be altered by Section 111. In some cases, however, the alteration may limit compensation rather than expand it.

In *United States v. Cress,*[141] the Government had constructed a series of locks and dams on a navigable mainstream. The project caused the water level of the stream to rise to such an extent that private land on a tributary was affected. Two individual landowners on the tributary sought compensation from the Government for damages caused by the raised water level. One landowner claimed that the raised water caused frequent flooding on some seven acres of his land and destroyed a ford across the tributary. The second landowner claimed that the raised water level had destroyed the necessary water drop to run a mill. The Supreme Court allowed compensation to both claimants. Compensating the first landowner may not seem so unusual since there was an actual taking of property.[142] However, compensating the second landowner was strange, for clearly the Court was awarding a value in the flow of a stream. In reference to the second landowner, the Court said:

> The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land.[143]

United States v. Chicago, M., St. P. & P.R. Co.,[144] held that raising water levels artificially on a navigable mainstream is not a compensable taking. Yet, *Cress* holds that an artificial raising of the water on the *tributary* of a mainstream is a compensable taking. In regard to this apparent dichotomy, it has been suggested that

> no reasonable justification exists for the greater protection of the "tributary-riparian" as opposed to the "mainstream-riparian" in the face of the valid

141. 243 U.S. 316 (1917).
142. For the Courts' holding on this matter see note 10 *supra.*
143. United States v. Cress, *supra* note 141, at 330.
144. *Chicago* was decided 24 years after *Cress,* but did not expressly overrule it.

> exercise of federal power to deal with and alter the level of the stream to any extent up to the ordinary high-water mark.[145]

Because of this ambiguity, it is a very real possibility that the Government could claim that Section 111 legislatively overrules *Cress*. If the Government could successfully contend that Section 111 applies to the non-navigable tributaries of a navigable mainstream,[146] then Section 111, with the high water mark requirement, would overrule what *Cress* said about payment for destruction of private property below that mark. Thus, it could be said that Section 111 has now erased the dichotomy between the *Chicago* and *Cress* decisions. Section 111 has made it clear that only property above the normal high water mark will be paid for, be it tributary-riparian or mainstream-riparian. Hence, the mill owner in *Cress,* unable to show an above water mark taking, would not be compensated at all.

Whether the Court would be willing to accept such an argument is debatable. Nevertheless, in view of the confused state of the law in this area, such an argument should be expected.

Regardless of Section 111, the *Cress* decision may now have only limited validity due to the decision in *United States v. Willow River Power Co.*[147] In that case, the Willow River was a non-navigable tributary of the St. Croix, a navigable river. A power company had altered the course of the Willow River and built a dam on it near its outlet into the St. Croix. By these alterations, the power company was able to construct a water drop of some 22 feet. The power company owned all of the land on which the dam was constructed. Some 30 miles downstream on the St. Croix, the Government constructed a dam, causing the river to rise some three feet above its normal high water mark. The raised water level seriously hampered the power company's ability to produce electricity,

145. Morreale, *supra* note 8, at 44. The justification, reasonable or otherwise, by the courts simply seems to be that navigable streams are subject to the servitude, while non-navigable tributaries are not. But, while the distinction may justify the power of navigation servitude, it does not explain non-compensability.

146. *See* notes 13-17, 113-14 *supra* and accompanying text.

147. 324 U.S. 499 (1945).

ultimately resulting in a suit for damages. The Court denied compensation, saying that the "claimant's interest or advantage in the high-water level of the St. Croix River as a run-off for tail waters to maintain its power head is not a right protected by law."[148] *Cress* was distinguished on the basis that there the level of the tributary was raised, while in *Willow River* the level of a navigable stream had been raised. Nevertheless, the claims in both cases were for damages to the use of a tributary. Hence, the dissent in *Willow River*[149] would seem to make the most sense when it said that *Cress* had either been disregarded or overruled.

The real holding in *Willow River* seems to be a denial of a right to water for power purposes. Using the *Chandler-Dunbar* decision as precedent, the Court stated that "a strategic position for the development of power does not give rise to [a] right to maintain it as against interference by the United States in aid of navigation."[150]

Whether Section 111 will alter this somewhat inarticulate holding is difficult to say. If the raised water level has in no manner touched such a power company's land, then it would be difficult to use Section 111. However, the Supreme Court indicated that at least some of the Willow River Power Company's land had been taken. The Court said that "the water level maintained by the Government in the St. Croix was approximately three feet above its ordinary high-water level at claimant's property."[151] But the Court found that the power company was seeking compensation for a loss of the drop used in generating power, not for loss of the land. "It is true that the water level was above high-water mark on the St. Croix River banks and on claimant's structures, but damage to land as land or to structures as such [was] not shown to be more than nominal and accounts for no part of the award."[152]

148. *Id.* at 511.
149. *Id.* at 511-515.
150. *Id.* at 509.
151. *Id.* at 501.
152. *Id.* at 501.

From all indications, if Section 111 is to change this case, the claimant would have to rephrase its claim. Instead of asserting a right in the natural level of the river, it should seek compensation for loss of use of the land for the production of power. Section 111 would seem to sanction such a claim. To make the claim legitimate, the claimant would have to convince the Court that (1) navigable waters are involved; (2) the claim is for a value in the land, not in water; and (3) there will be a taking of real property by the Government, even though there is no divesting of fee ownership. To prove that navigable waters are involved should not be too difficult if one keeps in mind that it was the St. Croix and not the Willow River which inundated the land. To prove the second element would require that the power company draw a distinction between what is a value in land and what is a value in the water or, in the alternative, show that Section 111 destroys any such distinction. Finally, the power company could use the *Cress* decision to prove that when Section 111 uses the word "taken", it does not mean only a taking of the fee ownership.[153]

The obvious conflict between the *Cress* and *Willow River* decisions was once again brought to light in *United States v. Kansas City Life Insurance Co.*[154] In that case the land involved was located some 1½ miles from the Mississippi River. The land bordered on a non-navigable tributary of the Mississippi. The Government constructed a lock and dam on the Mississippi, raising the water in the river and its tributary to the normal high water mark. The landowner sought compensation for damage to his land, claiming that the raised water level also raised the subsurface water table to a point where farming was no longer possible. This time the Court held that damages to private property not within the bed of a navigable mainstream were compensable. Therefore, as in Cress, Section 111 would not be used by a landowner if he sought to be compensated for all his losses. But, the Govern-

153. *See* p. 524 *supra.*

154. 339 U.S. 799 (1950).

ment could still argue that Section 111 has overruled *Kansas City Life.*[155]

There is obviously a substantial conflict between the *Kansas City Life* case and the decision in *Willow River.* One very plausible explanation of the conflict is that the "navigation servitude does not, without more, underlie non-navigable streams,"[156] *i.e.,* Congress must expressly exercise its authority over a tributary for it to be subject to the navigation servitude. In both *Cress* and *Kansas City Life,* there was no express exercise of authority over the tributary. In *Willow River,* however, the dominant concern of the Court was over the raising of the level of water in the navigable mainstream itself. If this distinction should hold true, then the best results under Section 111 would call for its application only to *Willow River,* leaving *Cress* and *Kansas City Life* untouched.[157]

III. CONCLUSION

After the above discussion, it is fairly evident that the navigation servitude's no compensation rule is changed by Section 111. The extent of that change, however, remains a mystery. All that can be said with reasonable certainty is that *United States v. Rands* is overruled. Any comment beyond that point involves a certain amount of speculation.

This comment has not attempted to cover all the problems that might arise under Section 111. The intent has been to bring out some of the more obvious solutions and questions created by that law. Definite answers can only be found in the courts. It is hoped that this comment has furnished some ideas in providing these answers.

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155. *See* pp. 538-39 *supra.*

156. Morreale, *supra* note 3, at 47.

157. This is so barring the government's success with the argument that *Cress* and *Kansas City Life* have been overruled by Section 111.

APPENDIX A

House of Representatives Bill Number 12383, 91st Congress, 1st Session, June 24, 1969

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That when riparian property located on a navigable water of the United States is acquired by the United States (through negotiation or by condemnation), the price to be paid for the property shall include any special value which may attach to the property by reason of its riparian location and for the purpose of determining such price, the United States shall not be deemed to own a navigational servitude.

APPENDIX B

House of Representatives Bill Number 17505 and Senate Bill Number 3815, 91st Congress, 2d Session, May 6, 1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 301 of the Land Acquisition Policy Act of 1960 (33 U.S.C. 596; 74 Stat. 480) is amended to read as follows:

"Sec. 301. It is declared to be the policy of Congress that owners and tenants whose property is acquired for public works projects of the United States of America shall be paid a just and reasonable consideration therefore. The just and reasonable consideration to be paid for property taken by the United States above the normal high water mark of navigable waters in the United States shall be the fair market value of such property, including the value of any riparian use which may exist at the time of taking of such property or for which such property would be suited with reasonable probability in the foreseeable future, and disregarding the exercise of any navigational servitude of the United States involved in the taking itself or any potential future exercise of such servitude. In order to facilitate the acquisition of land and interests therein by negotiation with property owners, to avoid litigation and to relieve congestion in the courts, the Secretary of the Army (or such other officers of

the Department of the Army as he may designate) is authorized in any negotiations for the purchase of such property to pay a purchase price which will take into consideration the policy set forth in the section."

APPENDIX C

Senate Bill Number 4572, Section 109, 91st Congress, 2d Session, December 8, 1970

Sec. 109. The Secretary of the Army, acting through the Chief of Engineers, is authorized, in cooperation with other Federal agencies and appropriate non-Federal public and private interests, to undertake a study of the effects of the navigation servitude of the United States with respect to (1) landfills and structures in navigable waters of the United States, and the need for and desirability of providing relief from such effects; (2) the basis of determining the amount of compensation to be paid the owners of riparian lands on navigable waters when acquired by the United States; and (3) the need for new procedures whereby the navigation servitude vested in the United States may be waived or otherwise modified in appropriate circumstances, including recommendations as to procedures to effectuate such waiver of modification giving full regard to the interests of the public and private property owners. The Secretary shall report to the Congress the results of such study together with his recommendations not later than two years after the date of the enactment of the Act.