

1996

## Testing The Limits Of The Federal Navigational Servitude

Genevieve Pisarski

Follow this and additional works at: <http://digitalcommons.maine.maine.edu/oclj>

---

### Recommended Citation

Genevieve Pisarski, *Testing The Limits Of The Federal Navigational Servitude*, 2 Ocean & Coastal L.J. (1996).  
Available at: <http://digitalcommons.maine.maine.edu/oclj/vol2/iss2/8>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

# TESTING THE LIMITS OF THE FEDERAL NAVIGATIONAL SERVITUDE

*Genevieve Pisarski\**

## I. INTRODUCTION

Under its constitutional power over foreign and interstate commerce,<sup>1</sup> the United States has authority over control and improvement of navigation.<sup>2</sup> This authority has been interpreted as conferring on the United States the navigational servitude,<sup>3</sup> a dominant servitude on land within the boundaries of navigable waters that entitles the United States to use the land for purposes related to navigation and commerce, regardless of ownership and without compensation.<sup>4</sup>

The Aquatic Resources Division of the Washington State Department of Natural Resources, manager of the state's aquatic public lands, recently completed a study of the nature and scope of state and federal rights in aquatic lands, including the federal navigational servitude. The purpose of the study was to develop a set of guidelines to apply at specific sites. The study disclosed a set of factors that appear to define the substantive and procedural legitimacy of actions taken under the federal navigational servitude and revealed how the factors coalesce into a six-part test to determine the validity of these government activities.

---

\* J.D. December 1996, Seattle University School of Law. Policy Analyst for the Aquatic Resources Division, Washington Department of Natural Resources.

1. U.S. CONST. art. I, § 8, cl. 3.

2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *United States v. Rands*, 389 U.S. 121 (1967).

3. See 3 AMERICAN LAW OF PROPERTY § 12.27 (A. James Casner, ed. 1952); and James M. McElfish, Jr., *Property Rights and Wetlands Regulation*, SA83 ALI-ABA 439, 453-55 (May 1996) for a definition of the navigational servitude and a list of acts that qualify for protection under the servitude.

4. See 3 AMERICAN LAW OF PROPERTY, *supra* note 3, § 12.31; *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 246-48 (1954).

This Comment grew out of the study and its findings. Part II of the Comment reviews the basis and nature of the navigational servitude. Part III examines the factors that define the scope of the servitude. Part IV describes how these factors coalesce into a six-part test to decide if government activities are protected under the navigational servitude. Part V concludes that while the navigational servitude is used in conjunction with the Takings Clause,<sup>5</sup> there is a separate and discernible process that is due when the United States attempts to take the use of property located within navigable waters. The United States must demonstrate that it is taking only property originally located within navigable waters and absent a congressional waiver, the government must have a Commerce Clause purpose of furthering navigation. Furthermore, in addition to meeting the requirements of the six-part test, governmental actions taken under the navigational servitude must be reasonable and afford property owners fundamental due process rights.

## II. THE BASIS AND NATURE OF THE NAVIGATIONAL SERVITUDE

The navigational servitude, interpreted as an incident of the historical public right of navigation,<sup>6</sup> has become a doctrine of federal power under the Commerce Clause.<sup>7</sup> The navigational servitude, under that name, is a relatively modern doctrine developed by the Supreme Court.<sup>8</sup> It was first described as a power and later categorized as a servitude. In *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*,<sup>9</sup> the Court described the servitude in these terms:

The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise

---

5. U.S. CONST. amend. V.

6. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592 (1941); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1912).

7. *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249, (1954). A concurrent state servitude has been recognized. See *Wernberg v. State*, 516 P.2d 1191 (Alaska 1973); Daniel J. Morgan & David G. Lewis, *The State Navigation Servitude*, 4 LAND & WATER L. REV. 521, 522-23 (1969).

8. William J. Powell, *Just Compensation and the Navigation Power*, 31 WASH. L. REV. 271 (1956).

9. 312 U.S. 592 (1941).

of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.<sup>10</sup>

In *United States v. Kansas City Life Insurance Co.*,<sup>11</sup> the Court characterized the power more precisely as a servitude incidental to the federal commerce power:

It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. . . . There thus has been ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream. . . . Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude but to award compensation where his title is not so burdened.<sup>12</sup>

The nature of the interest that the federal government holds in connection with the navigational servitude is generally described, either explicitly or impliedly, as an easement. The nature of this property right falls short of fee title.<sup>13</sup> In fact, the U.S. Supreme Court has ruled that the federal government has no need for title to aquatic lands because "the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed."<sup>14</sup>

10. *Id.* at 596-97 (footnote omitted).

11. 339 U.S. 799 (1950).

12. *Id.* at 808.

13. *James v. Dravo Contracting Co.*, 302 U.S. 134, 141 (1937).

14. *Montana v. United States*, 450 U.S. 544, 555, (1981). *See also Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (indicating that the federal government had all it was concerned with in its *navigational easement* via the constitutional power over commerce)

Thus, any interest in real property, if it is subject to the public right of navigation and to federal regulation, is burdened by the navigational servitude. It is a dominant interest,<sup>15</sup> and any other property interests are servient. Whether the state or a private individual owns the bed of a stream or has other interests in navigable waterways legally protected under state law is evidently immaterial.<sup>16</sup>

The federal navigational servitude is paramount to all other interests in navigable waters. The courts have found alteration or destruction of structures, interference with right of access, and interference with fee simple title all within the scope of the servitude. For example, when the federal government took over a ferry terminal it considered an obstruction, the court found it immaterial whether there was alteration or destruction of the impediment.<sup>17</sup> Likewise, *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.* held that no compensation was due for injury to structures located between high and low water marks caused by raising the water level for improvement of navigation, because any structure so situated is placed at risk, regardless of whether the structure itself has any relation to or effect on navigation.<sup>18</sup> Similarly, where access was blocked by construction of a government pier, the court found that the:

primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no

---

(emphasis added).

15. The Court explained the navigational servitude as "[t]he power is a privilege which we have called 'a dominant servitude' or 'a superior navigation easement.'" *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956) (citations omitted) (quoting *United States v. Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 729 (1950)).

16. *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945). See also Powell, *supra* note 8, at 274.

17. *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1238, 1241 (9th Cir. 1982).

18. 312 U.S. 592, 599 (1941).

direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.<sup>19</sup>

The servitude was also held to supersede fee simple title, where deepening the channel across a navigable bay destroyed oysters belonging to the lessee of an owner in fee.

This right to control, improve and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. . . .

By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require.<sup>20</sup>

Where the owner is a state rather than a private party, the result would probably be the same. The Court has ruled that "whether, under local law, the title to the bed of the stream is retained by the State or . . . the riparian owner . . . , the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation."<sup>21</sup>

Although the navigational servitude gives the federal government a dominant easement over private property interests, it appears that public rights in navigable waters, place the navigational servitude outside the scope of the Takings Clause.<sup>22</sup>

Since private property rights cannot arise, either by prescription, estoppel or express grant, in derogation of the Constitution or the common law customary servitudes of the *public at large*, they

19. *Scranton v. Wheeler*, 179 U.S. 141, 163-64 (1900).

20. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 87-88 (1913). 28 U.S.C. § 1497 (1994) subsequently provided for compensation in this situation. See Powell, *supra* note 8, at 276 n.31.

21. *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. at 596. See also *Montana v. United States*, 450 U.S. 544, 555 (1981); *United States v. 422,978 Square Feet of Land*, 445 F.2d 1180, 1186 (9th Cir. 1971).

22. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

may be curtailed without compensation at any time such curtailment is required for the protection of these paramount public interests.<sup>23</sup>

The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.<sup>24</sup>

The U.S. Supreme Court has also refused to view the navigational servitude as a power subject to balancing tests. In *United States v. Cherokee Nation of Oklahoma*,<sup>25</sup> a unanimous Court reversed a lower court's attempt to balance public and private interests to determine if the servitude was sufficient to preclude compensation.<sup>26</sup> The Court ruled that an Indian tribe's fee simple title to a riverbed, pursuant to treaties with the United States, was subject to the navigational servitude.<sup>27</sup> The Tribe claimed that compensation was due for damage to sand and gravel deposits resulting from construction of a channel to improve navigation of the Arkansas River.<sup>28</sup> The Tenth Circuit Court of Appeals concluded that the servitude superseded only ownership rights related to navigation.<sup>29</sup> Although the Cherokee Nation could not interfere with the exercise of the servitude, it could claim compensation for interests unrelated to navigation.<sup>30</sup> The lower court reasoned that "[w]hen the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due."<sup>31</sup>

The U.S. Supreme Court, however, held that a balancing test could not be applied in this case, because there was no invasion of any private

---

23. AMERICAN LAW OF PROPERTY, *supra* note 3, at § 28.59 (emphasis added).

24. *United States v. Rands*, 389 U.S. 121, 123 (1967) (citing *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. at 596-97; *Gibson v. United States*, 166 U.S. 269, 275-76 (1897)).

25. 480 U.S. 700 (1987).

26. *Id.* at 704-05.

27. *Id.* at 706-08.

28. *Cherokee Nation of Okla. v. United States*, 782 F.2d 871 (10th Cir. 1986).

29. *Id.* at 875-76.

30. *Id.* at 879.

31. *Id.* at 877.

property right.<sup>32</sup> The navigational servitude dominated any riverbed interests regardless of how acquired or who held title.<sup>33</sup>

In *Cherokee Nation*, the Tenth Circuit apparently attempted to establish its balancing test based on the U.S. Supreme Court's decision in *Kaiser Aetna v. United States*. In the case, the Court held that even though a private marina fell within the definition of navigable waters (after it was connected to the Pacific Ocean) and was subject to regulation by the Corps of Engineers, its owners could not be required to open it to the public without compensation.<sup>34</sup> The Court found that:

all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket. . . . "[A]ny reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case."<sup>35</sup>

The *Kaiser Aetna* marina became a navigable water body when the owners of a shallow pond—private property under Hawaiian law—dredged it and connected it to an adjoining bay. The Court did not question that Commerce Clause power over navigable waters was broad enough to authorize regulation of the marina<sup>36</sup> or to assure public access.<sup>37</sup> However, the Court did not believe that the navigational servitude was broad enough to *require* public access without compensation. Addressing the nature and scope of the servitude, the Court drew a distinction between the scope of the commerce power and the reach of the servitude's exception to the Takings Clause by finding: "[T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation."<sup>38</sup> The government's attempt to create a public right of access went far beyond ordinary regulation and improvement for

---

32. *Id.*

33. *Id.* at 705-06.

34. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

35. *Id.* at 170-71 (quoting *United States v. Kaiser Aetna*, 408 F. Supp. 42, 48-49 (D. Haw. 1976)).

36. *Id.* at 174.

37. *Id.*

38. *Id.* at 172.



navigation.<sup>39</sup> Likewise, the water body in question was not considered to be a highway of commerce. It was "not the sort of 'great navigable stream' . . . recognized as being '[incapable] of private ownership'"<sup>40</sup> and had been considered private property under state law. The property interest of the owners was "similar to that of owners of fast land adjacent to navigable water."<sup>41</sup> Under these circumstances, the navigational servitude would not supersede private ownership rights in furtherance of a regulatory power but would simply be an invasion of private property requiring compensation.<sup>42</sup>

The Tenth Circuit in *Cherokee Nation*, interpreted the *Kaiser Aetna* decision to mean that the type of navigational purpose being served had to be weighed against the type of property located within navigable waters and affected by the navigational purpose. However, while the U.S. Supreme Court in *Cherokee Nation* indicated that the navigational servitude is an exception to the Takings Clause, the exception appears not to depend upon balancing navigation-related interests but rather, upon a determination that the private property interests are legitimately subject to the navigational servitude. If not, they are compensable.

In summary, property rights within navigable waters are inferior to the government's paramount power and dominant interest which render other interests servient. Additionally, the navigational servitude's historical basis in the public right of navigation places it outside the scope of the Takings Clause. The navigational servitude has been interpreted broadly by the courts and applied expansively by the federal government. Yet the doctrine has its limits. It is not a "blanket exception to the Takings Clause."<sup>43</sup> Rather, courts have considered five factors to help them shape the scope of the navigational servitude.

---

39. *Id.* at 172-73 (reasoning that the fact that the body of water was subject to regulation by the Corps of Engineers under the Rivers and Harbors Appropriation Act did not make it subject to a public right of access).

40. *Kaiser Aetna v. United States*, 444 U.S. 179 (citing *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913); *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956)) (alteration in original).

41. *Id.*

42. The Court found that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* at 180. For a discussion of the *Kaiser Aetna* decision and its affect on takings law, see Maureen Straub Kordesh, "I Will Build My House with Sticks": *The Splintering of Property Interests Under the Fifth Amendment May be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 430 (1996).

43. *Kaiser Aetna v. United States*, 444 U.S. at 172.

### III. FIVE FACTORS THAT DEFINE THE SCOPE OF THE NAVIGATIONAL SERVITUDE

In holding that a power company did not have a compensable interest in the water power capacity of a navigable river, the U.S. Supreme Court, in *United States v. Chandler-Dunbar Water Power Co.*,<sup>44</sup> described the (yet unnamed) navigational servitude as:

[The] power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation.<sup>45</sup>

Discernible in the Court's description of the government's dominant easement are the five factors further developed in subsequent case law: congressional authorization, congressional discretion, Commerce Clause purpose, location within navigable waters, and navigational purpose or effect.

#### A. Congressional Authorization

The United States Constitution in Article 1, Section 8, Clause 3 delegates to Congress the authority to regulate commerce. In *Gibbons v. Ogden*,<sup>46</sup> the Supreme Court established that commerce power encom-

---

44. 229 U.S. 53 (1913).

45. *Id.* at 62.

46. 22 U.S. (9 Wheat.) 1 (1824).

passes navigation. Power over navigation means control over navigable waters.

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all of the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress.<sup>47</sup>

As holder of the power over commerce, the legislative branch maintains controlling power over navigable waters. Thus, Congress could declare a bridge lawful after the Supreme Court found it to be an obstruction to navigation.<sup>48</sup> Consistent with exclusive congressional power, even the U.S. Supreme Court discusses the navigational servitude in terms of Congress as the actor and an authorizing act of Congress.<sup>49</sup>

*United States v. Chandler-Dunbar Water Power Co.*,<sup>50</sup> the universally cited authority for the broad scope and expansive power of the navigational servitude, consistently names "Congress" as the actor and not "government," "federal government," or "United States."<sup>51</sup> Admittedly, the *Chandler-Dunbar* Court appeared to be concerned with establishing the demarcation between congressional and judicial roles in relation to the servitude. Making the congressional-judicial distinction probably accounts for the Court's emphatic references to Congress and legislative functions. The obvious message, nevertheless, is that some kind of appropriate congressional authorization must ultimately back any exercise of the servitude. "For these purposes, Congress possesses all the powers which existed in the States . . . . It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanc-

---

47. *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

48. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433-34 (1855).

49. *See, e.g., United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 701-02 (1987).

50. 229 U.S. 53 (1913).

51. *Id.* The case is also cited for the judicial deference that the courts grant to Congressional determinations.

tions which shall be provided.”<sup>52</sup> Questions relating to navigation are “legislative in character.”<sup>53</sup>

### *B. Congressional Discretion*

Once Congress determines that a project improves or protects navigation, the navigational servitude is available for accomplishing the project.<sup>54</sup> It is the navigational purpose of Congress, rather than the express language of a statute, that establishes the availability of the servitude.<sup>55</sup> Thus, the broad power of Congress includes the discretion to waive the servitude. Consequently, courts must determine whether Congress acted under a power other than that of the Commerce Clause, to declare a purpose other than aid of navigation, or whether to offer compensation or damages when plaintiffs challenge governmental actions under the navigational servitude. To overcome the servitude, congressional waiver must be explicit.<sup>56</sup> This is not to say that only Congress itself may waive the servitude; a duly authorized agent of Congress can effect the waiver.<sup>57</sup>

To fall under the navigational servitude, an appropriation must be made pursuant to Commerce Clause power.<sup>58</sup> If an act taken under the navigational servitude does not further commerce, the act may result in a compensable taking. For example, under the Federal Power Act of 1920,<sup>59</sup> a federal licensee was able to build a dam in outright violation of

52. *Id.* at 63 (quoting *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 725 (1865)).

53. *Id.* at 65.

54. *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1239 (9th Cir. 1982).

55. *United States v. Commodore Park, Inc.*, 324 U.S. 386, 392 (1945).

56. *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1119 (Fed. Cir. 1992) (Nies, C.J., concurring), (quoting *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987)).

57. For example, the Secretary of the Army, as a result of authorization to file condemnation cases, can compromise exercise of the navigational servitude, without the express consent of Congress. See *United States v. 119.67 Acres of Land*, 663 F.2d 1328, 1335 (5th Cir. 1981) (quoting *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3d Cir. 1974)) (recognizing that a congressional act, “by its plain language contemplates congressional consent to some encroachments on the navigational servitude, and delegates to the Army Corps of Engineers and the Secretary of the Army authority to grant such consent on its behalf.”).

58. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739-41 (1950) (compensation authorized for riparian rights taken under the Reclamation Act).

59. 16 U.S.C. §§ 791-825 (1994).

state law but to be entitled to compensation.<sup>60</sup> Thus, the dominance of the navigational servitude depends on the intent of Congress to further commerce.

### C. Commerce Clause Purpose

The Court has consistently interpreted congressional power over navigable waters as broadly as congressional power over commerce generally.

In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control . . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government.<sup>61</sup>

The Court has also stated: "[A]s repeatedly recognized by this Court . . . the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce."<sup>62</sup> Thus, while courts have required actions under the navigational servitude to have an underlying Commerce Clause purpose, the act itself does not necessarily have to *improve* navigation.

In *Coastal Petroleum Co. v. United States*,<sup>63</sup> the Court of Claims upheld the use of the navigational servitude for removal of limestone from the bottom of a navigable lake for use in a levee project.

---

60. *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946). See also Powell, *supra* note 8, at 275, 284-86.

61. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (footnote omitted).

62. *Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U.S. 508, 526 (1941) (citations omitted). See also *United States v. Grand River Dam Auth.*, 363 U.S. 229, 232-33 (1960); *Conservation Council of N.C. v. Froehlke*, 435 F. Supp. 775, 787 (M.D.N.C. 1977).

63. 524 F.2d 1206 (Ct. Cl. 1976).

The statute under which many flood control undertakings . . . are authorized states that the projects are "for the benefit of navigation and the control of destructive floodwaters and other purposes." Such a declaration has consistently been held conclusive to determine the navigation purpose of a project . . . . We hold, therefore, that the project involved here is entitled to the benefits of the navigation servitude.<sup>64</sup>

#### *D. Property Must be Located within Navigable Waters*

The location of property within navigable waters, rather than the type of property interest or type of navigational use, determines the reach of the navigational servitude. For instance, property located under, over, or within navigable waters is subject to the servitude. This included an oyster plantation on the bottom of a navigable bay,<sup>65</sup> as well as any structure, whether actually obstructing navigation or merely located within navigable waters.<sup>66</sup> The servitude constructively burdens uplands to the extent that any of the lands' value is derived from a property interest in the use or the flow of adjacent navigable waters.<sup>67</sup>

#### *E. There Must be a Navigational Effect or Purpose*

Although it appears sufficient for the relationship between navigation and commerce to be quite general or even incidental, the servitude is available for every government activity that occurs within navigable waters. There must be some actual, if not necessarily major or direct, positive relationship to navigation within the scope of commerce.<sup>68</sup> The Court described the navigational purpose requirement as:

---

64. *Id.* at 1210 (quoting Act of June 30, 1948, ch. 771, § 203, 62 Stat. 1175) (citations omitted).

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

66. *See Bedford v. United States*, 192 U.S. 217 (1904); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *Willink v. United States*, 240 U.S. 572 (1916); *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917); *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945).

67. *See United States v. Rands*, 389 U.S. 121 (1967).

68. *See, e.g., James M. McElfish, Jr., Property Rights and Wetlands Regulation*, SA83 ALI-ABA 439 (May 1996) (discussing actions that meet the positive requirement under the navigational servitude).

The right of the United States in the navigable waters within the several States is, however, "limited to the control thereof for the purposes of navigation." *Port of Seattle v. Oregon Railroad*, 255 U.S. 56, 63 [(1921)]. And, while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States v. Chandler-Dunbar Co.*, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.<sup>69</sup>

The purpose of a project does not have to be navigational<sup>70</sup> if the act has some positive effect on navigation.<sup>71</sup> Likewise, even though a project may have an effect that appears unrelated to navigation or commerce (such as taking limestone from the bottom of a lake), if the overall purpose is appropriate (the levees built with the limestone improve the navigable channel), it qualifies.

#### IV. THE FIVE FACTORS COALESCE INTO A SIX-PART TEST TO DETERMINE THE VALIDITY OF ACTS UNDER THE NAVIGATIONAL SERVITUDE

The nature of the navigational servitude and the factors that define the servitude (Authority, Purpose, Intent, Location, Relationship to Navigation) form a six-part test taken from the body of case law, for determining whether a proposed exercise of the navigational servitude is legitimate and noncompensable.

##### *A. Authority*

Inquiry regarding authority is actually a two-part examination: (1) The authorization prong asks if a relevant act of Congress exists. The act must be under its Commerce Clause power, not under some other power, and

---

69. *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926) (citation omitted).

70. For example, as previously mentioned, the Court in *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) accepted flood control as a valid commerce power action.

71. *Id.*

the act cannot expressly waive exercise of the servitude. (2) The delegation prong tests whether specific congressional delegation of authority to act is required. This prong also analyzes the level of discretion afforded to government agencies as well as the level of judicial review provided by the enabling statute.

Although the requisite congressional authorization to support a navigational servitude may be implied from the navigational purpose of a statute, such authorization does not eliminate the need for actual delegation of statutory authority to an authorized agent for a particular project. For example, *United States v. Arizona*<sup>72</sup> held that a lack of express congressional consent for a dam construction project, as required by the Rivers and Harbors Authorization Act of 1899,<sup>73</sup> prohibited action by government officers, even though other acts of Congress applicable to the project supported exercise of the navigational servitude.<sup>74</sup>

In a recent case,<sup>75</sup> a federal court ruled that U.S. Army Corps of Engineers authority to order relocation of pipelines at the owner's expense is reviewable under the River and Harbors Appropriation Act of 1899.<sup>76</sup> The project was authorized under the Flood Control Act of 1965,<sup>77</sup> and the pipelines were permitted under Section 10 of the Rivers and Harbors Act.<sup>78</sup> However, the Corps attempted to claim authority to require the owner to relocate the pipeline as a general navigational purpose. The Corps' authority under the Rivers and Harbors Act was subject to judicial review under the Administrative Procedure Act.<sup>79</sup> The court found that the Corps' authority conferred by the Flood Control Act did not negate the accountability required by the Rivers and Harbors Act and the Administrative Procedure Act.<sup>80</sup>

72. 295 U.S. 174 (1935).

73. 33 U.S.C. § 401 (1994).

74. *United States v. Arizona*, 295 U.S. at 183-88.

75. *United Tex. Transmission Co. v. Army Corps of Eng'rs*, 7 F.3d 436 (5th Cir. 1993).

76. 33 U.S.C. § 403 (1994).

77. Pub. L. No. 89-298, 79 Stat. 1073 (Oct. 27, 1965) (codified at 42 U.S.C. § 1962d-5 (1988)).

78. *United Tex. Transmission Co. v. Army Corps of Eng'rs*, 7 F.3d at 438.

79. *Id.* at 445 & n.29 (citing *Bowles v. Army Corp of Eng'rs*, 841 F.2d 112, 116 (5th Cir. 1988); 5 U.S.C. § 706(2)(A) (1988)).

80. *Id.* at 446.



*B. Commerce Clause Purpose*

The Commerce Clause power is broadly construed, and a Commerce Clause purpose may be either express or implied. Generally, the courts will not question the judgment of Congress and its authorized agents about whether a particular public purpose falls under the Commerce Clause and hence qualifies for a navigational servitude. The courts will, however, examine whether Congress or its agents have proceeded in a way that moves outside the scope of the Commerce Clause power or have failed to act within the scope of the power.<sup>81</sup>

In *Blake v. United States*,<sup>82</sup> involving a suit for damages to oyster grounds overlapped by a Naval Mine Sweeping Practice Area, the court found no right of action against the United States. From the court's analysis, however, two questions emerged that appear to be generally applicable in determining a Commerce Clause purpose: (1) Despite an ostensible navigational purpose, has Congress, nevertheless, treated the project in a way that takes it out of the scope of the commerce power?; and (2) Where the government is acting primarily, or largely, for its own benefit, does the project also still serve the general interest of navigation?<sup>83</sup>

The *Blake* plaintiffs relied on an earlier case, *United States v. Gerlach Live Stock Company*,<sup>84</sup> where the Court ruled there had been no authority to regulate navigation despite an ostensible navigational purpose. The *Blake* court found that, despite a congressional declaration:

the purpose of the project [on the San Joaquin River in California] was to improve navigation, the entire legislative history of the enterprise showed that Congress had elected to treat the matter as a reclamation project and to take state created rights under its power of eminent domain. Since Congress itself in the exercise of its power to promote the general welfare, determined that the property owners were to be compensated the case was

---

81. *Blake v. United States*, 295 F.2d 91, 96 (4th Cir. 1961).

82. 295 F.2d 91 (4th Cir. 1961).

83. *Id.* at 96-97.

84. 339 U.S. 725 (1950).

taken out of the field in which Congress proceeds under its power to control navigation.<sup>85</sup>

The *Blake* court distinguished *Gerlach* by finding that serving the government's own purposes did not, by itself, take the project outside the scope of the Commerce Clause power, so long as the project also served the public and the general interests of navigation.<sup>86</sup>

In *United States v. Commodore Park, Inc.*,<sup>87</sup> the Court ruled that dredging a bay to operate large seaplanes and depositing the dredged material in a creek to make it part of a naval base, was a valid exercise of the servitude. Serving purposes in addition to navigation did not invalidate the servitude because the project affected navigable waters and was exercised by an agent (the War Department) duly authorized by Congress to alter navigable waters, and whose judgment the courts would not normally question.<sup>88</sup>

On the other hand, in *United States v. 412.715 Acres of Land*,<sup>89</sup> the court concluded that the government could not assert the navigational servitude where construction of navigation improvements was for the exclusive use of the Navy in connection with a naval fuel supply depot on San Francisco Bay.<sup>90</sup>

In controlling, improving and regulating the navigability of waters the Government traditionally acts for the benefit of the navigating public. Unquestionably, it may deepen channels, widen streams, erect lighthouses, build bridges, construct dams, and make similar improvements, without compensating the owners of land subject to the navigation servitude. . . . It does not follow, however, that the Government may assert its power over lands subject to this servitude to construct improvements for

---

85. *Blake v. United States*, 295 F.2d at 96 (citing *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950)).

86. *Id.* at 97-98.

87. 324 U.S. 386 (1945).

88. *Id.* at 390-93. See also *Arizona v. California*, 283 U.S. 423 (1931), *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915).

89. 53 F. Supp. 143 (N.D. Cal. 1943).

90. Since the government was, and intended to remain, in possession pursuant to court order, the court denied dismissal as of right and concluded that it had jurisdiction to consider whether the government was entitled to use the property without compensation under the navigational servitude. *United States v. 412.715 Acres of Land*, 53 F. Supp. at 148.

the exclusive use of one of its agencies; that it may appropriate land for the construction of a naval fuel supply base, exclude defendants and the general public from the use and benefit of the facility, and claim that it is acting for the benefit of the public under the navigation power.

. . . .

Where the public is excluded the Government is not acting under its power to improve navigation as a public utility, but under its constitutional power to maintain a navy.<sup>91</sup>

That the Navy used navigable waters and acted generally for the public good did not suffice to allow it to appropriate tidelands for its exclusive benefit.<sup>92</sup>

Determining whether governmental action, in fact, falls within the scope of the commerce power differs from determining whether there is congressional intent to exercise a navigational servitude. If an act is found to be outside the commerce power, congressional intent is irrelevant, because the applicability of the navigational servitude is eliminated entirely.

### C. Congressional Intent

Finding an express or an implied Commerce Clause purpose leads to a presumption that Congress intended to exercise the navigational servitude. However, courts extend their examination to whether Congress, in fact, intended to exercise "the full measure of its constitutional power," at least in cases where the government is not acting for a national purpose but is, instead, furthering a local project.<sup>93</sup> According to the Ninth Circuit, under some circumstances, congressional intent must be determined rather than presumed, and congressional intent to deny the servitude may be inferred from statutory provisions.<sup>94</sup>

In *Public Utility District No. 1 v. City of Seattle*,<sup>95</sup> the court decided the issue of whether a state licensee has the same sovereign power under

---

91. *Id.* at 148-49.

92. *Id.* at 149. The court used the same analysis to reach the same decision in *United States v. Certain Parcels of Land*, 53 F.Supp. 150 (N.D. Cal. 1943).

93. *Pub. Utility Dist. No. 1 v. City of Seattle*, 382 F.2d 666, 670 (9th Cir. 1967).

94. *Id.*

95. *Id.*

a congressional enabling act to claim the navigational servitude as the United States. The court conceded that the United States itself could have exercised a navigational servitude to take lands belonging to the public utility district that were covered by navigable waters.<sup>96</sup> To draw its distinction between the situation of the City of Seattle as a licensee and that of the United States itself, the court analyzed the nature and the scope of the interests involved. First, the court distinguished the relative interests in property: an "easement of navigation" as opposed to the full bundle of private property rights.<sup>97</sup> "It is thus apparent that the navigational servitude, by its nature, does not destroy or exclude all property rights in the beds and banks of navigable streams. Such rights continue to exist but are held subject to the governmental power in the nature of an easement."<sup>98</sup>

Next, the court noted a lesser, and insufficient, public interest "to warrant the assertion of national power" where a licensee is acting on a local scale opposed to instances where the United States is acting in the national interest. The licensee's interests are "state-created property rights, often owned by the state itself" with some rate-based benefits to power consumers, power company shareholders, and manufacturers.<sup>99</sup> Consequently, because of the lesser nature and scope of the federal interests involved, Congress must decide not only to exercise its navigational servitude powers but also expressly bestow those powers on the licensee.

"[E]xercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization."

. . . The choice between the two groups of interests involves a value judgment essentially legislative in character. Unless the legislative intent is clear, courts should be slow to adopt a

---

96. Although the court focused on a licensee rather than the United States itself, it noted that § 7(b) of the Federal Power Act, 16 U.S.C. § 800(b) (1964), requires the Federal Power Commission to distinguish between projects that call for development by the United States and those that can be accomplished by a licensee. *Pub. Utility Dist. No. 1 v. City of Seattle*, 382 F.2d at 670 n.3. The operative distinction, then, appears not to be between a licensee and the United States itself, but, rather, between a local project, in nature and scope, as opposed to a national one.

97. *Pub. Utility Dist. No. 1 v. City of Seattle*, 382 F.2d at 669 (citing *United States v. Twin City Power Co.*, 350 U.S. 222 at 228).

98. *Id.* at 669.

99. *Id.* at 670.

construction the effect of which is a destruction of property rights . . . .<sup>100</sup>

The court conceded that the navigational servitude is available under such circumstances without any balancing of interests if the congressional act so states. However, the court does need to balance the interests to determine the threshold question of congressional intent to exercise the servitude.

Not only did the court find, under these circumstances, that examination to determine legislative intent is required, it concluded that the Federal Power Act must be interpreted as denying exercise of the servitude.<sup>101</sup> The court cited *United States v. Twin City Power Co.*,<sup>102</sup> for the proposition that "legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power . . . ."<sup>103</sup> According to *Federal Power Commission v. Niagara Mohawk Power Corp.*,<sup>104</sup> the Federal Power Act does not expressly abolish any existing proprietary rights nor make any express assertion of the paramount right of the Government; and, according to *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*,<sup>105</sup> sections 10(c) and 27 of the Federal Water Power Act require compensation for the taking of state-created property rights.

The court summarized by citing its own decision in *United States v. Central Stockholders' Corp.*<sup>106</sup>

The Supreme Court held in the Ford Case, in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the Government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the government so to do.<sup>107</sup>

---

100. *Id.* (quoting Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954)).

101. *Id.* at 670-71.

102. 350 U.S. 222 (1956).

103. Pub. Utility Dist. No. 1 v. City of Seattle, 382 F.2d at 671 (quoting *United States v. Twin City Power Co.*, 350 U.S. at 225).

104. 347 U.S. 239, 250 (1954).

105. 280 U.S. 369, 378-79 (1930).

106. 52 F.2d 322 (9th Cir. 1931).

107. Pub. Utility Dist. No. 1 v. City of Seattle, 382 F.2d at 671 (quoting *United States v. Cent. Stockholders' Corp.*, 52 F.2d 322, 332 (9th Cir. 1931)).

By failing to invest a licensee with its sovereign power, there is no presumption that Congress intended the navigational servitude be exercised. Lack of power to assert the navigational servitude means that any shorelands necessary to the licensee's projects must be taken by eminent domain condemnation with compensation.<sup>108</sup>

#### *D. Easement*

Case law demonstrates that the property interest acquired by a governmental act must be limited to an easement to be entitled to the navigational servitude. Governmental acts acquiring fee simple title appear to preclude the need to determine whether the government intended to exercise the servitude. For example, when the government, by condemnation took fee simple title in riparian tidelands, the court held that the government made an election to use its eminent domain powers, regardless of whether the intended use would have been a permissible exercise of the navigational servitude.<sup>109</sup> Because the United States had taken title rather than an easement, appellee's riparian rights had not been merely subjected to the government's dominant servitude, but had been permanently taken.<sup>110</sup>

In contrast, in *Continental Land Co. v. United States*,<sup>111</sup> no compensable interest was found in the potential use of riparian land as a dam site on the Columbia River, just as there was no compensable interest in the adjacent shorelands (owned by the State of Washington), when the United States undertook to develop the river for the purpose of improving navigation. Similarly, a property owner had no claim against the United States for the use of water or water power, both of which are held subject to the government's dominant servitude, just as the value of the land as a dam site would not be a proper element for determining just compensation.<sup>112</sup>

108. *Id.* at 672-73.

109. *United States v. 11.48 Acres of Land*, 212 F.2d 853 (5th Cir. 1954).

110. The court chose not to reach the question of whether appropriate exercise of the servitude would have been legitimate. The appellee had, alternatively, argued that the government's purpose, storing a "moth ball fleet" of inactive naval vessels, was merely permanent storage and not entitled to exercise of the servitude over navigable waters. *Id.* at 855.

111. 88 F.2d 104 (9th Cir.), *cert. denied*, 302 U.S. 715 (1937).

112. *Id.* at 110-11.

Although the *Continental Land* court found no compensable interest, whereas the *11.48 Acres of Land* court determined that there was a compensable interest, the two are distinguishable. The difference lies in the nature of the interest taken: the former being an easement and the latter being the fee interest. Thus, these cases apparently refine the notion that ownership rights in aquatic lands are superseded by the navigational servitude by limiting the reach of the servitude to an easement. Once the government takes more than an easement, the navigational servitude no longer makes the taking noncompensable.

### *E. Governmental Act is within Navigable Waters*

The reach of the navigational servitude is confined to the boundaries of navigable waters.<sup>113</sup> To qualify for the navigational servitude, a project must be located within navigable waters at the time that it is proposed. It cannot be bootstrapped to provide use of the adjacent upland without compensation.<sup>114</sup>

Bootstrapping was struck down in *United Texas Transmission v. Army Corps of Engineers*.<sup>115</sup> The court rejected the Corps' attempt to exercise the servitude over land outside the original banks of a stream that it had widened.

The proposition that the navigational servitude extends beyond the original banks of the stream (outside the navigable waters of the United States) is insupportable—as is the “bootstrap” proposition that the very act of widening the bayou brings “within navigable waters” the land previously lying outside the original banks but affected by the widening, thereby making it subject to the servitude retroactively.<sup>116</sup>

The decision in *Kaiser Aetna* additionally rejected bootstrapping of property rights. In addition to disallowing exercise of the servitude in an area not originally located within navigable waters, the Court also struck

---

113. *Owen v. United States*, 851 F.2d 1404 (Fed. Cir. 1988), *remanded*, 20 Cl. Ct. 574 (1994).

114. *Id.* at 1412, 1417.

115. 7 F.3d 436 (5th Cir. 1993).

116. *Id.* at 443.

down the exercise of the servitude to obtain a right of public access to an area not originally open to public access.<sup>117</sup>

Citing *Kaiser Aetna, Dardar v. Lafourche Realty Co.*<sup>118</sup> stated that a navigational servitude ordinarily extends only to naturally navigable waters.<sup>119</sup> It is a "natural servitude," confined to navigable waters in their natural condition.<sup>120</sup> The *Dardar* court ruled that the servitude did not reach waters on private property made navigable by the property owners. It outlined the Supreme Court's four-factor test from *Kaiser Aetna* to negate the reach of the navigational servitude. The court found that the water body at issue: (1) had not been navigable in its natural state and was not like major natural water bodies; (2) was on private property under state law; (3) was converted to a navigable water body by private parties with private funds; and (4) the conversion was approved by the U.S. Army Corps of Engineers.<sup>121</sup>

#### *F. Positive Relationship Between the Governmental Activity and Navigation*

Where a positive relationship to navigation (either a purpose or an effect) is lacking, the courts have refused to uphold the exercise of the navigational servitude. In *United States v. Gerlach Live Stock Co.*, a dam reclamation case, the Court firmly stated: "this Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed."<sup>122</sup> The Court held that even though Congress included dams under its power to control navigation, the dam at issue was for reclamation and, therefore, the claimant's right to overflow of a navigable river was compensable.

Similarly, in *United States v. 50 Foot Right of Way*,<sup>123</sup> a court rejected a claim based on the navigational servitude for a pipeline, finding the pipeline did not aid navigation or have a positive relation to the control of

117. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

118. 985 F.2d 824 (5th Cir. 1993).

119. The Court stated that navigability as a result of any kind of erosion counts as natural. *Id.* at 833.

120. *United States v. Cress*, 243 U.S. 316, 325-26 (1917).

121. *Darbar v. Lafourche Realty Co.*, 985 F.2d at 832, 834 (citing *Kaiser Aetna v. United States*, 444 U.S. at 178-79).

122. 339 U.S. 725, 737 (1950).

123. 337 F.2d 956 (3d Cir. 1964).



navigation. Although it seems as though a pipeline might qualify under the commerce power (if a flood control dam can), it lacked a navigational aspect.<sup>124</sup>

In sum, the manner in which that courts have applied the factors that determine the basis and nature of the navigational servitude amounts to a six-part test to determine the legitimacy of the claim. Legitimate exercise of the federal navigational servitude appears, therefore, to require: (1) congressional authority in the form of both authorization and delegation; (2) an actual rather than merely nominal Commerce Clause purpose; (3) congressional intent to exercise the full extent of its commerce power; (4) exercise of no more than an easement; (5) that property be located originally within navigable waters; and (6) a navigational purpose or effect.

### *G. Additional Considerations*

In addition to the six-part test to determine legitimate exercise of the federal navigational servitude, additional issues such as burden of proof, due process and reasonable action, and concurrency must be considered by the courts in cases questioning the validity of acts taken under the navigational servitude.

#### *1. Burden of Proof*

The burden of proof generally falls on the proponent of an action. For example, the burden of proof rests upon the asserting party when the issue is the navigability of a body of water for purposes of federal jurisdiction.<sup>125</sup> By analogy, an argument can be made that the burden of proof should be on the federal government when the issue is the availability of the navigational servitude for purposes of the commerce power.

#### *2. Due Process and Reasonable Action*

It appears that both constitutional due process requirements and the doctrine of reasonable action are applicable to exercises of the navigational servitude.

---

124. *Id.* at 960.

125. *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991); *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579 (Ct. Cl. 1975).

In *United States v. 119.67 Acres of Land*,<sup>126</sup> the court held that the United States had "effectively surrendered or compromised away its navigational servitude."<sup>127</sup> Although the government did not make clear any intent to waive the servitude, the court found that Congress had delegated authority to the Secretary of the Army to "surrender" the servitude.<sup>128</sup> The Secretary began condemnation proceedings on the belief that the land in question was not subject to the servitude either because of the location of certain segments of the property or because of congressional appropriation of funds for land acquisition. The court found that the Secretary could not institute condemnation proceedings, negotiate a compensation agreement, and then vacate the agreement and rather attempt to assert the navigational servitude, if he had erroneously failed to exercise the power initially.<sup>129</sup> The court applied due process requirements to the navigational servitude on the basis that the commerce power generally was subject to the Fifth Amendment, citing *United States v. Stoeco Homes* as holding "though the Congressional power over the regulation of commerce is far reaching that power is limited by the due process and takings clauses of the Fifth Amendment."<sup>130</sup> The fact that the navigational servitude is an exception to the Takings Clause would not, apparently, necessarily mean that it is also an exception to due process requirements.

In addition to due process requirements, in *United States v. 5.96 Acres of Land*,<sup>131</sup> the Ninth Circuit ruled that governmental acts must be reasonable. The court affirmed that no compensation was due for damage to structures belonging to a lessee of the State of Washington aquatic lands. The court found that the United States has the "power to place reasonable conditions on private use of public waterways."<sup>132</sup> However, the court also noted that "[a]ny special relationship that exists between the United States and potential users of the nation's waterways is assured by the requirement that the United States must always act reasonably and in the public interest."<sup>133</sup>

---

126. 663 F.2d 1328 (5th Cir. 1981).

127. *Id.* at 1337.

128. *Id.*

129. *Id.* at 1337-38.

130. *Id.* (quoting *United States v. Stoeco Homes*, 498 F.2d 597, 611 (3d Cir. 1974)).

131. 593 F.2d 884 (9th Cir. 1979).

132. *Id.* at 890.

133. *Id.* at 890 n.8.

### 3. *Concurrency of State and Federal Interests*

Finally, the concurrent sovereignty of the United States and the states apparently requires the United States to show that a proposed action is legitimately within the sphere of federal constitutional powers. While a state, as an attribute of sovereignty, has original ownership of and resultant jurisdiction over its aquatic lands,<sup>134</sup> the federal government's powers in relation to these lands are limited by constitutional purposes.

[Territorial grants by Congress of public lands] do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.<sup>135</sup>

The rights of the federal government within the navigable waters of the states are limited to control of navigation under the Commerce Clause.<sup>136</sup> Federal power to control navigation in general does not confer or create any property rights.<sup>137</sup> States, however, can properly maintain or create property rights in tidelands.<sup>138</sup> Encounters between state-created property rights and the federal government's powers under the Commerce Clause have contributed to the development of navigational servitude doctrine.<sup>139</sup> Although property interests arise from state law, federal constitutional law determines whether the state-created interest arise to the level of property protected by the Fifth Amendment;<sup>140</sup> that is, whether a compensable taking has occurred, or whether appropriate exercise of the navigational servitude under the Commerce Clause power obviates compensation.<sup>141</sup>

---

134. See *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 198 (1937).

135. *Shively v. Bowlby*, 152 U.S. 1, 58 (1894).

136. See John Scott Obenour, Jr., *Water Boundaries, Tide and Shore Land Rights*, 23 WASH. L. REV. 235 (1948).

137. See *Port of Seattle v. Oregon & Washington R.R. Co.*, 255 U.S. 56, 63 (1921).

138. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

139. *Donnell v. United States*, 834 F. Supp. 19, 26-27 (D. Me. 1993).

140. *Id.* at 24 (citing *Hoffman v. Warwick*, 909 F.2d 608, 615 (1st Cir. 1990)).

141. *Id.* at 25-26.

## V. CONCLUSION

The federal navigational servitude appears to exist somewhere in the shadow of the Fifth Amendment. It is: an incident of federal Commerce Clause power, an easement rather than fee title, and by definition, noncompensable. It is clear that property rights within navigable waters are subservient to the government's paramount power and dominant interest. Furthermore, the navigational servitude has been interpreted broadly by the courts and applied expansively by the federal government. Yet the doctrine has its limits.

Courts have considered constitutional and factual factors that form a discernible six-part test to determine the legitimacy of the navigational servitude. Congress must intend and give authority to the government to act under the Commerce Clause power, and the act must make use of no more than an easement in navigable waters for a purpose related to navigation. Additionally, the exercise of the commerce power may be subject to due process, or at the very least, reasonable action, on the part of the government.

Still, the State of Washington has recently encountered new circumstances at the outer reaches of the scope of the navigational servitude. For example, is environmental monitoring or mitigation, legitimately within the scope of the navigational servitude?<sup>142</sup> Can the United States take a leasehold in a state-owned harbor area without paying rent?<sup>143</sup> Can a federal agency make its navigational servitude claim in a letter of intent without providing further notice or administrative procedure?<sup>144</sup> This Comment is an attempt to help answer these and other questions. It would appear that a constitutionally adequate determination of these questions

142. *Grays Harbor Mitigation Site*—The U.S. Army Corps of Engineers claimed a site to be under the navigational servitude for habitat restoration to mitigate the destruction of oyster resources as a result of channel dredging.

143. *Port of Seattle Harbor Area*—The United States Coast Guard took assignment from the Port of Seattle of a harbor area lease. Rents were overdue. Claiming use of the site under the navigational servitude, the Coast Guard has refused to pay any rent, past or future. At a nearby site, which the Coast Guard purchased, the seller sought to cancel the state lease of the adjacent harbor area, because the Coast Guard claimed the leased area under the navigational servitude. The Coast Guard was developing these sites as a support center.

144. *White River Monitoring Station*—The Corps of Engineers claimed a site under the navigational servitude in connection with flood control and water quality monitoring. The Corps communicated its intent by letter and maintained that nothing further was required.

requires an inquiry pursuant to the six-part test discussed here as well as considering due process and the reasonableness of the governmental acts.