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judgment in allowing unconstitutional legislation to be quickly and effectively contested before irretrievable loss has occurred. It is submitted that the Supreme Court could properly allow the declaratory judgment a more liberal application in federal constitutional litigation, consonant with its status and intended use, without being forced to decide any hypothetical cases based on insufficient facts.[37]

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Eminent Domain—Hydroelectric Adaptability as Element of Just Compensation—Effect of Federal Power Act

The Constitutional provisions[1] for payment of "just compensation" for land taken by means of eminent domain proceedings have generally been regarded as securing to the owner the market value of the land considering its best possible future use, *i.e.*, the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy.[2] This general rule is applied where dam sites are condemned,[3] but a complicating factor arises when the owner claims the special adaptability of his land for hydroelectric development as an element of value. This special adaptability has generally been allowed as a factor to be considered where a reasonable possibility of connection with the other required tracts has caused purchasers in the open market to take hydroelectric possibilities into account, quite apart from the needs of the condemnor.[4] The tendency has been in the direction of a more strict application of this rule so as to eliminate any consideration of dam site adaptability where it appears that combination of the tracts by open market purchases is not reasonably probable.[5]

[37] "If the remedy through a declaratory judgment does not at least in part fill the gap between law and equity there would be little purpose in enacting the statutes providing for such procedure." Schaefer v. First Nat. Bank of Findlay, 134 Ohio St. 511, 518, 18 N. E. 2d 263, 267 (1938).

[1] U. S. CONST. AMEND. V; AMEND. XIV requires the states to provide just compensation for private property taken. Most state constitutions have such a provision. Lenhoff, *Development of the Concept of Eminent Domain*, 42 COL. L. REV. 596 (1942); McKean, *Constitutional Limitations Upon the Power of Eminent Domain*, 6 ROCKY MT. L. REV. 16 (1933); Recent Cases, 7 U. OF CHI. L. REV. 166 (1939).

[2] BAUER, ESSENTIALS OF THE LAW OF DAMAGES 427 (1919); FIELD, THE LAW OF DAMAGES §846 (1876); II LEWIS, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES §478 (2d ed. 1900); III SEDGWICK, DAMAGES §1171 (9th ed. 1920); IV SUTHERLAND, THE LAW OF DAMAGES §1064 (4th ed. 1916).

[3] See Note, 106 A. L. R. 955 (1937).

[4] McCandless v. United States, 298 U. S. 342 (1936), *reversing* 74 F. 2d 596 (C. C. A. 9th 1935); Ford Hydroelectric Co. v. Neely, 13 F. 2d 361 (C. C. A. 7th 1926), *cert. denied*, 273 U. S. 723 (1926); *accord*, Mississippi and Rum River Boom Co. v. Patterson, 98 U. S. 403 (1878). See Notes, 124 A. L. R. 910 (1940), 106 A. L. R. 955 (1937); Note, 2 WASH. L. REV. 192 (1927).

[5] Olson v. United States, 292 U. S. 246 (1934), *affirming* 67 F. 2d 24 (C. C. A. 8th 1933); *accord*, North Kansas City Development Co. v. Chicago B. & Q. R. Co., 147 F. 2d 161 (C. C. A. 8th 1945), *cert. denied*, 325 U. S. 867 (1945);

For compensation to be allowed for the land's special adaptability for hydroelectric development, the use of the property for power purposes must have been reasonably probable without the use of eminent domain to obtain the other tracts necessary for the dam and reservoir.[6] This last rule has limited the possibility of considering such special adaptability in assessing just compensation, since the typical situation is one where many tracts must be acquired for such a project, the result being that the special adaptability is of no value to a hypothetical market that has no power of eminent domain in order to effect such combination.[7] If the condemnor is the United States and the likelihood of combining the land of the condemnee with necessary land of others by purchase is too remote to affect market value, the fact that the condemnee actually has the power of eminent domain from a state and might thereby acquire the other tracts will not be considered in determining whether there is a reasonable possibility of the condemnee's land being combined with other tracts necessary for a power development.[8]

In the case which established this refinement, it was stipulated that the stream concerned was non-navigable. Where the stream is navigable, the effect of the commerce clause of the United States Constitution must be considered if the United States is the condemnor. Resting on the argument that a private riparian owner has no property right in the water power of a navigable stream, the rule seems well established that the United States need not pay compensation for dam site adaptabil-

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Baetjer v. United States, 143 F. 2d 391 (C. C. A. 1st 1944), *cert. denied*, 323 U. S. 772 (1944); United States v. Boston, C. C. and N. Y. Canal Co., 271 Fed. 877 (C. C. A. 1st 1921). Dolan, *Present Day Court Practice in Condemnation Suits*, 31 VA. L. REV. 9 (1944); Note, 35 HARV. L. REV. 76 (1921); Comment, 26 TEX. L. REV. 199 (1947).

[6] McCORMICK, LAW OF DAMAGES §129 (1935); *Developments in the Law—Damages*, 61 HARV. L. REV. 113 (1947).

[7] New York v. Sage, 239 U. S. 57 (1915), *reversing* In re Bensel, 206 Fed. 369 (C. C. A. 2d 1913); McGovern v. New York, 229 U. S. 363 (1913); Medina Valley Irr. Co. v. Seekatz, 237 Fed. 805 (C. C. A. 5th 1916); Note, 44 YALE L. J. 1095 (1935). N. C. follows these principles regarding special adaptability value. Nantahala Power and Light Co. v. Moss, 220 N. C. 200, 17 S. E. 2d 10 (1941).

[8] United States *ex rel.* and for the Use of Tennessee Valley Authority v. Powelson, 319 U. S. 266 (1943), *reversing* 118 F. 2d 79 (C. C. A. 4th 1941), *modifying* T. V. A. v. Southern States Power Co., 33 F. Supp. 519 (W. D. N. C. 1940), *mandate conformed to*, 138 F. 2d 343 (C. C. A. 4th 1943), *cert. denied*, 321 U. S. 773 (1944). This case extends the rule that dam site value need not be compensated for (1) where the likelihood of combining the necessary tracts is too remote to affect market value, or (2) it could only be done by one armed with a power of eminent domain. Simply stated, the extension is that even though the condemnee has a power of eminent domain granted by a state, this will not be considered as bearing on the matter of reasonable possibility of combining the necessary tracts where the land is taken through the exercise of Federal eminent domain powers. It is significant, however, that Parker, J., refused to allow the condemnee's land to be valued solely on the basis of small separated tracts of wild mountain land in conforming to the higher Court's mandate. Notes, 38 ILL. L. REV. 218 (1943), 18 TENN. L. REV. 300 (1944).

ity value,[9] the rights and relations being fixed by the adoption of the Constitution.[10]

Grand River Dam Authority v. Grand-Hydro[11] presented for the first time the question of whether a licensee of the Federal Power Commission acquired by reason of its license any of the Federal Government's immunity from liability for the payment of compensation based on hydroelectric adaptability when condemning a dam site on a navigable stream. Grand-Hydro, a private corporation, had been granted a franchise and eminent domain powers by the State of Oklahoma for development of hydroelectric power on the Grand River. Several years later, the state legislature created the Grand River Dam Authority, a conservation and reclamation district, for hydroelectric development of the Grand River Basin.[12] Grand-Hydro owned the land constituting the Pensacola dam site which GRDA condemned in an action brought in the state courts. GRDA maintained that no evidence of value as a dam site should be admitted for several reasons based on local law, but all these were decided against GRDA. The contention that since GRDA had a license from the Federal Power Commission and Grand-Hydro did not, GRDA was the only agency which could legally build a dam at the site concerned and should not have to pay Grand-Hydro for a value the latter could not legally enjoy was also rejected.[13] On appeal,

[9] United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913); Washington Water Power Co. v. United States, 135 F. 2d 541 (C. C. A. 9th 1943), *modifying* 41 F. Supp. 119 (E. D. Wash. 1941), *cert. denied*, 320 U. S. 747 (1943); Continental Land Co. v. United States, 88 F. 2d 104 (C. C. A. 9th 1937), *cert. denied*, 302 U. S. 715 (1937); United States v. West Virginia Power Co., 56 F. Supp. 298 (S. D. W. Va. 1944); *accord*, United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940), *reversing*, 107 F. 2d 769 (C. C. A. 4th 1939).

[10] Continental Land Co. v. United States, 88 F. 2d 104 (C. C. A. 9th 1937), *cert. denied*, 302 U. S. 715 (1937).

[11] 69 Sup. Ct. 114 (1948), *affirming*, 201 P. 2d 225 (Okla. 1947).

[12] OKLA. STAT. ANNOTATED, tit. 82 §§861-881. The statutory grant of power to exercise a power of eminent domain read as follows: "To acquire by condemnation any and all property of any kind, real, personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation." OKLA. STAT. ANNOTATED, tit. 82 §862(f) (Supp. 1948). The general law referred to is OKLA. STAT. ANNOTATED, tit. 66 §§51-63 (1937). In North Carolina, N. C. GEN. STAT. §§56-1 to 56-10 (1943) grants eminent domain powers to power companies with the proceedings for condemnation to be as set out in N. C. GEN. STAT. §§40-11 to 40-29 (1943). Apparently, the general condemnation procedure in both states was designed originally for railroads.

[13] Grand-Hydro v. Grand River Dam Authority, 192 Okla. 693, 139 P. 2d 798 (1943) reversed the lower court which had excluded evidence of dam site value. That the Oklahoma Court did not reach this decision without considerable difficulty is attested to by a decision affirming the judgment which was subsequently withdrawn: 130 P. 2d 311 (advance sheets only, as decision withdrawn before bound volume 130 P. 2d published). The second trial resulted in a judgment in favor of Grand-Hydro for full dam-site value and was affirmed by the state court. Grand River Dam Authority v. Grand-Hydro, 201 P. 2d 225 (Okla. 1947), *cert.*

the United States Supreme Court affirmed 5-4 without deciding this vital federal question.

The Court was content to let the Oklahoma decision stand that such a federal license was not necessary on the part of Grand-Hydro in order for the evidence of dam site value to be considered.[14] This result was based on the following: (1) the petition for condemnation made no reference to the Federal Power Act or rights claimed thereunder; and (2) the Federal Power Act had merely attached conditions to the use of the land for a power site rather than rendering the site valueless to an owner for that purpose. The state law as to measure of compensation, consequently, was held to be unaffected by the Act.

The first point is narrow for a decision of such public significance. The second seems contrary to the plain language of the Federal Power Act,[15] for it certainly seems to have rendered a power site valueless for power uses insofar as a non-licensee owner is concerned.[16] The issue of whether a licensee of the FPC has the rights of the United States in the waters of the flowing stream under the commerce clause is not decided.

The history of the Federal Power Act and the earlier Federal Water Power Act is one of an attempt to preserve the water power in a navigable stream for the public, rejecting the idea of private ownership of the power in a navigable stream.[17] There is authority that such water

denied, 332 U. S. 841 (1947), *cert. granted*, 333 U. S. 852 (1948), *aff'd*, 69 Sup. Ct. 114 (1948).

In July, 1939, the Federal Power Commission had granted a license to GRDA on the basis of a finding that the proposed construction would affect interstate commerce because of its effect on the Arkansas River, a navigable stream.

[14] The assumption that there could be two valid outstanding FPC licenses to different parties covering the same site has no foundation in the Federal Power Act.

[15] 41 STAT. 1063, as amended, 49 STAT. 838, 16 U. S. C. §§791a-825r (1946).

[16] Since the condemning party already has a license, the present owner is powerless to get one. Should he or any grantee other than the licensee attempt to develop the site, it seems that 16 U. S. C. §817 (1941) would be violated: "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a . . . license granted pursuant to this chapter."

Though the Oklahoma Court relied to some extent on the fact that the Federal Power Commission found that the GRDA came under the Act because the Grand River dam affected interstate commerce rather than because it was a navigable stream, the United States Supreme Court decision does not rest on this distinction. Apparently, federal regulation and control apply equally in the two situations. *See* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U. S. 508, 525 (1941); Gatchell, *The Role of the Federal Power Commission in Regional Development*, 32 IOWA L. REV. 283 (1947).

[17] Fly, *The Role of the Federal Government in the Conservation of Water Resources*, 86 U. PA. L. REV. 274 (1938); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9 (1945); Scott, *Is Federal Control of Water Power Development Inconsistent With State Interests*, 9 GEO. WASH. L. REV. 631 (1941); Comment, 39 MICH. L. REV. 976 (1941). For

in a navigable stream is not property at all, but if anyone has a property interest it would seem to be the public for public uses.[18] Thus, it does *not* follow that a private owner of land bordering a stream coming within federal control should be paid for the water power potentialities; to do so would reimburse him for something not owned by him, or, as Justice Douglas expresses it in the dissent, "give private parties an entrenched property interest in the public domain, which the Federal Power Act was designed to defeat."[19] The policy expressed in this argument and in prior cases[20] dealing with the effect of the commerce clause on dam site condemnation appears to have been rejected mainly because the licensee here had brought the condemnation suit in a state court, relying primarily on eminent domain powers granted by the state. The Court intimates that were the licensee seeking to condemn the dam site by virtue of its federal license, value due to dam site adaptability would not be an element of compensation.

Under the Federal Power Act, a licensee is granted the power of eminent domain, and it is expressly provided that the power can be exercised in the state courts or federal district courts, the practice and procedure of the state where the land lies being followed as nearly as may be if the proceeding is in the federal district court.[21] This can hardly mean that the state court can ignore substantive rights based on federal statutes.[22] Since the licensee relies on a federal statute, the

another point of view see Le Boeuf, *An Industry Appraisal of Federal Regulation of Electric Utilities Under the Federal Power Act*, 14 GEO. WASH. L. REV. 174 (1945).

[18] Bennett, *Some Uncertainties in the Law of Water Rights*, 21 So. CALIF. L. REV. 344 (1948).

[19] *See* Grand River Dam Authority v. Grand-Hydro, 69 Sup. Ct. 114, 122 (1948) (dissenting opinion). To allow the private owner without a license to be compensated for the site taken on the basis of its value as a hydroelectric site is to allow the owner a benefit in terms of money which the Federal Power Act denies him as far as actual use is concerned. Is such a "loophole" consistent with the Act and the policy it represents?

[20] See note 9, *supra*.

[21] 41 STAT. 1074 (1920), 16 U. S. C. §814 (1946). Proposed Federal Rule of Civil Procedure No. 71A will provide a federal condemnation procedure superseding this provision if it is accepted. *Proposed Rule to Govern Condemnation Cases in the District Courts of the United States Prepared by the Advisory Committee on Rules for Civil Procedure*, 7 F. R. D. 503 (1948). There has been consideration of such a rule before. The proponents claim that "it is better to have a single procedure, even if it is not so good, than a lot of different procedures, which in themselves may be marvelous." Nichols, *The Federal Power of Eminent Domain*, 4 FED. B. A. J. 159 (1941). The order of the United States Supreme Court of December 29, 1948, authorizing the transmittal of new rules of civil procedure to the Attorney-General for reporting to the present session of Congress did not include proposed rule 71A. 93 L. Ed. 251 (1948).

[22] The question is not what happens in a federal district court proceeding where such practice and procedure is to be used, but rather concerns an action in a state court. Even if it has some significance in this case, recent decisions restrict the "practice and procedure of the state" provision to procedural matters only, the federal and not state law governing the basis and measure of damages since these matters arise under federal law. U. S. *ex rel.* and for Use of T. V. A.

Federal Power Act, it would seem that it would have to be considered since it is "the supreme law of the land."[23]

Probably the most equitable result would be to exclude any consideration of value based on dam site adaptability, but to reimburse the condemnee for expenditures made in good faith.[24] This principle would be limited considerably, however, if land owners and hydroelectric companies could be presumed to know the effect of the Federal Power Act on dam site value in condemnation proceedings and be required, therefore, to take it into account in transactions involving dam site lands. The difficulty in applying this principle is the uncertainty caused by the continually expanding definition of "navigable stream."[25] Actually, most private power companies do not pay large premiums for dam site adaptability in their condemnation of the land, so there seems no good reason to reimburse them on that basis.[26]

A decision that a federal licensee need not compensate for dam site value in a condemnation case would have the effect of stimulating private power companies to develop dam sites and accept FPC licenses where they have acquired the sites under state-granted eminent domain powers, but have delayed plans for proposed dams because of the conditions attached to the 50-year FPC license.[27] Otherwise, they would run the risk of a licensee taking the site under federal eminent domain powers, the site being valued as farm or mountain land only.

These uncertainties ought to be settled. With hundreds of unlicensed

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v. Powelson, 319 U. S. 266 (1943); United States v. Miller, 317 U. S. 369 (1943); Kimball Laundry Co. v. United States, 166 F. 2d 856 (C. C. A. 8th 1948); State of Nebraska v. United States, 164 F. 2d 866 (C. C. A. 8th 1947); United States. v. 13,255.53 Acres of Land, 158 F. 2d 874 (C. C. A. 3rd 1946); United States v. Johns, 146 F. 2d 92 (C. C. A. 9th 1944); *accord,* United States v. Causby, 328 U. S. 256 (1946). *Contra:* Central Nebraska Public Power and Irr. District v. Harrison, 127 F. 2d 588 (C. C. A. 8th 1942). Dolan, *Present Day Court Practice in Condemnation Suits,* 31 VA. L. REV. 9 (1944) contains an excellent discussion on this point. Also see Hitching and Claxton, *Practice and Procedure in Eminent Domain Cases Under the T. V. A. Act,* 16 TENN. L. REV. 952 (1941); Fitts and Marquis, *Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements,* 16 TENN. L. REV. 801 (1941).

[23] U. S. CONST. Art. VI, §2.

[24] Hale, *Value to the Taker in Condemnation Case,* 31 COL. L. REV. 1 (1931); Steiner, *Eminent Domain Damages,* 6 Mo. L. REV. 166 (1941).

[25] Note, 19 N. C. L. REV. 379 (1941); Comment, 39 MICH. L. REV. 976 (1941). The use of the term "navigable" to determine whether a river comes within Federal control under the commerce clause has served its usefulness and should be discarded. It is a fiction now, for the Court no longer means "navigable" in the sense of navigation or transportation, but means that the river is too important to the commerce of the nation for any of a number of reasons to leave under state control.

[26] This is because such lands are typically owned by many small land owners when condemned and evidence of special adaptability for dam site development is not admissible in the usual case. See Note, 106 A. L. R. 955 (1937).

[27] Note, 19 N. C. L. REV. 379 n. 19 (1941).

plants apparently within the scope of federal control,[28] with many undeveloped power sites in private hands, with the absolute supremacy of the federal power of eminent domain over persons and states,[29] the vital question of whether compensation is to include dam site adaptability value should be decided.[30] If it is included, the public will have to pay for it either in rates[31] or on recapture after the end of fifty years.[32]

But the principal case has not helped at all for it indicates that the federal right involved may be recognized in a federal court but may be ignored in a state court. In a dissenting opinion written after the United States Supreme Court had affirmed the judgment of the Oklahoma Court, Chief Justice Hurst stated what must occur to all who crave simplicity in the law: "I see no reason why the rule should not be the same in both instances."[33]

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Evidence—Fornication and Adultery—Admissibility Under Statute of Extrajudicial Confessions for Corroboration

The statute declaring fornication and adultery a crime[1] concludes with the following proviso: *that the admissions or confessions of one* [participant] *shall not be received in evidence against the other.* The statute has remained on the books in that same language since 1854,[2] and the cases that have arisen under it are numerous. The interpretation given to the proviso had been regarded as well-settled—that it meant exactly what it says. Recently, however, the court went far toward emasculating ninety-four years of construction in the case of *State v. Davis.*[3] Defendant, superintendent of an orphanage, and Lola Mae Reeves, a fourteen-year-old girl in his charge, were indicted under the statute. After the State had accepted the *feme* defendant's plea of *nolo contendere,* she was placed upon the stand where she testified, over defendant's objection, that she had had intercourse with the defendant on at least six occasions during a certain three month's time. Marguerite

[28] Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920,* 14 GEO. WASH. L. REV. 42 (1945).

[29] Dolan, *supra,* note 22, at 10; Recent Cases, 44 HARV. L. REV. 305 (1930).

[30] That it is no trifling matter is demonstrated by the principal case where the difference in valuation of a little over 400 acres, with and without dam site adaptability being considered, meant nearly a million dollars to the jury.

[31] 41 STAT. 1073 (1920), 16 U. S. C. §§812, 813 (1946).

[32] 41 STAT. 1071 (1920), as amended, 49 STAT. 844 (1935), 16 U. S. C. §807 (1946). The Supreme Court expressly refused to recognize these two factors as having any bearing on the point.

[33] Grand River Dam Authority v. Grand-Hydro, 201 P. 2d 225, 235 (Okla. 1947) (dissenting opinion).

[1] N. C. GEN. STAT. §14-184 (1943).

[2] N. C. CODE c. 34, §45 (1854).

[3] 229 N. C. 386, 50 S. E. 2d 37 (1948).