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## Western Water Rights, the Federal Navigation Servitude, and Salmon Restoration

by

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## I. Introduction

This memo will show that a long-standing doctrine, the federal navigation servitude, could aid salmon preservation and restoration efforts in the Columbia and Snake River basins. It first traces the history of the federal navigation servitude from the turn of the twentieth century to the present and shows that the federal government and the courts have expanded the list of traditional uses of the doctrine (to protect and preserve navigation) to include the following activities: (1) diverting water flow through channels to improve navigation in harbors; (2) building obstructions such as lighthouses or jetties in navigable waters to alter flow of water; (3) controlling the flow of vessels through channels; (4) destroying private mill operations; (5) destroying private access rights to navigable waters; (6) "deepen[ing] the water over such lands or . . . us[ing] them for any structure which the interest of navigation . . . may require";<sup>1</sup> (7) constructing dams and altering harbor boundaries; (8) removing obstructions in river beds; (9) forbidding the use of a river by a riparian owner that the government believes is injurious to navigation; (10) cutting a riparian owner from direct access to deep water; and (11) altering and regulating stream levels. The federal navigation servitude operates as a no-compensation rule, that is, when the federal government acts to protect or improve navigation, it may not have to compensate parties that are injured as a result.

This memo then discusses specific judicial and congressional uses of the federal navigation servitude that could further salmon preservation and restoration efforts, such as making salmon a primary or secondary focus of the federal navigation servitude, and argues for amending existing legislation or creating new legislation to incorporate salmon interests under the federal navigation servitude.

## II. The U.S. Congress Severs Nonnavigable Waters from Western Federal Public Lands

### A. *The Mining Act of 1866 and Its 1870 Amendments*

Two major frameworks exist for defining a particular party's rights to water: riparian rights and rights by appropriation.

The riparian water rights framework predominates in the eastern United States, where British common law formed the early colonial legal roots. *Black's Law Dictionary* describes riparian rights as those "of the owners of lands on the banks of water courses, relating to the water, its use, ownership of soil under the stream, accretions, etc."<sup>2</sup> *Black's* further explains that a general definition of water rights includes the "right which every person through whose land a natural watercourse runs has to benefit of stream as it passes through his land for all useful purposes to which it may be applied . . . such as hunting, fishing, boating, sailing, irrigating, and growing and harvesting wild rice. . . ."<sup>3</sup>

In contrast, the prior appropriation water rights framework predominates in the western states, where the frontier spirit and expansion motives carved the frontier's legal building blocks. *Black's Law Dictionary* describes prior appropriation rights as follows: "An

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<sup>1</sup> *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 88 (1913).

<sup>2</sup> *BLACK'S LAW DICTIONARY* 1327 (6th ed. 1990).

<sup>3</sup> *Id.*

appropriation of water flowing on the public domain consists in the capture, impounding, or diversion of it from its natural course or channel and its actual application to some beneficial use private or personal to the appropriator, to the entire exclusion . . . of all other persons."<sup>4</sup> Furthermore, *Black's* states that prior appropriation water rights follow "water to its original source whether through surface or subterranean streams or through percolation and [entitle] appropriator to continuing right to use water to extent of appropriation, but not beyond that reasonably required and actually used."<sup>5</sup>

The U.S. Congress first recognized that waters on federal lands were subject to private prior appropriation with the Mining Act of 1866:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected . . . and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed. . . .<sup>6</sup>

The Act officially had prevented Congress from selling western water rights to pay Civil War debts. Western legislators feared that Congress would ignore the westerners' existing prior appropriation water rights and the Act was passed to assuage their anxieties.

The "local customs" language of the Act explicitly left the procedure for acquiring water rights to the states. However, grantees and patentees of federal lands under the 1866 Act were unsure whether their riparian water rights were subject to preexisting prior appropriation water rights claims made by other parties. The 1870 Amendments to the Act resolved this question in favor of preexisting prior appropriators by making all homesteads and patents on federal land "subject to any vested and accrued water rights."<sup>7</sup>

The 1866 Mining Act and its 1870 Amendments still impact modern water rights. The United States Ninth Circuit Court of Appeals held in Hunter v. United States that a user must demonstrate three elements to establish a right to water by prior appropriation: (1) the user has the intent to take water; (2) the user shows an open physical demonstration of intent to take water (for example, by building a pipe or other water conveyance); and (3) the user takes the water for some "valuable use" (for example, using water to operate a shoreside mill).<sup>8</sup> The Hunter court refused to disturb a cattle farmer's prior appropriation right to nonnavigable stream water and spring water when the federal government reserved the surrounding land as the Death Valley National Monument. The cattle farmer's right to the water took precedence over the federal government's right to the same water.

In Paug-Vik, Inc. v. Ward's Cove Packing Co., the Alaska Supreme Court followed the U.S. Supreme Court and Ninth Circuit Hunter precedent by stating that prior appropriation

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<sup>4</sup> *Id.* at 102.

<sup>5</sup> *Id.* (citation omitted).

<sup>6</sup> 43 U.S.C. § 661 (1994).

<sup>7</sup> *Id.*

<sup>8</sup> Hunter v. United States, 388 F.2d 148, 153 (9th Cir. 1967).

rights can be viewed in three principal ways: (1) as an "interest in real property"; (2) as "private property"; and (3) as an "unequivocal grant" by the federal government under the 1866 Mining Act that was "good even against the federal government [itself]."<sup>9</sup>

#### B. *The Desert Lands Act of 1877*

Congress continued to encourage the use of the prior appropriation water rights scheme by passing the Desert Lands Act in 1877, eleven years after passing the Mining Act. The Desert Lands Act allowed "any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such'" to appropriate water rights to nonnavigable waters on federal public lands.<sup>10</sup> The federal government delegated water rights management to state governance.

The states governed by the Act were called the "desert lands" and originally included California, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North Dakota, and South Dakota; Colorado was added in 1891.<sup>11</sup>

Congress specified two main conditions: (1) water appropriated under the Desert Lands Act was to be used for irrigation, reclamation mining, and manufacturing; and (2) new claimants took water rights "subject to [pre-]existing rights."<sup>12</sup>

The Desert Lands Act left two questions unresolved: (1) Did it apply to only "desert lands," or to all public lands in the named states? and (2) Did it separate or "sever" water rights from the corresponding public lands, or did it permit some water rights to be passed on with a federal patent?<sup>13</sup>

#### C. *The Roles of States and the Federal Government under the Desert Lands Act and Beyond*

In California Oregon Power Co. v. Beaver Portland Cement Co., the Supreme Court of the United States resolved these questions by interpreting the language of the Desert Lands Act to mean the severing of all waters on the "public domain" from the land:

[A] patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.<sup>14</sup>

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<sup>9</sup> *Paug-Vik, Inc. v. Wards Cove Packing Co.*, 633 P.2d 1015, 1020 (Alaska 1981).

<sup>10</sup> 43 U.S.C. § 321 (1994).

<sup>11</sup> *Id.* § 323.

<sup>12</sup> *Id.* § 321.

<sup>13</sup> *Black's Law Dictionary* describes a patent, in general, as "[a] grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals." More specifically, a patent can be an "instrument by which a state or government grants public lands to an individual." *BLACK'S LAW DICTIONARY*, *supra* note 2, at 1125.

<sup>14</sup> *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935).

The Supreme Court also held in this case that state procedures were the sole method for acquiring water rights on all public lands in desert states.<sup>15</sup> Finally, the Court affirmed an Oregon prior appropriation scheme eliminating federal riparian rights.<sup>16</sup>

The U.S. Supreme Court affirmed the California Oregon Power Co. holding (that rights to water from nonnavigable sources are severed from rights to land in federal public lands and that this rule applies only to "desert land" states) as recently as 1977 in its California v. United States holding. In California v. United States, the Court held that the federal Bureau of Reclamation had to distribute water according to the state system of water rights and abide by the state's conditions on water use.<sup>17</sup> Thus, the federal government's delegation of water rights administration to the states in the Desert Lands Act withstood subsequent federal attacks.

The federal government also retains water rights allocations through its "federal reservation" power. Judicial interpretation of the Property Clause of the United States Constitution<sup>18</sup> forms the foundation of this doctrine, which the courts have summarized as the federal government's power to set aside public lands for specific purposes, such as Indian reservations,<sup>19</sup> "national forests, national parks, national monuments, public springs and water holes, and public mineral hot springs."<sup>20</sup>

The United States Supreme Court has held many times that the federal government retains water rights attached to these "reserved lands" from the time the land is reserved onward. However, the federal government must satisfy three requirements. First, it must recognize all prior appropriation water rights in existence before it "reserved" the particular parcel(s) of public land(s).<sup>21</sup> Second, the federal government may lay claim to water rights for the reserved land only if Congress intended that water was required to satisfy the purposes of the reservation.<sup>22</sup> Third, if water is required to satisfy the purposes of the reservation, the federal government may reserve only the amount of water necessary to effectuate those congressional purposes.<sup>23</sup>

The courts tend to interpret the purposes of federal reservations very narrowly. For instance, the United States Supreme Court held that Congress did intend to reserve water rights for arid lands reserved as an Indian reservation in Montana in a 1908 case.<sup>24</sup> The Court showed the close relationship between the water rights claimed and the purpose of the reservation:

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<sup>15</sup> *Id.* at 169.

<sup>16</sup> *Id.* at 172-173.

<sup>17</sup> *California v. United States*, 438 U.S. 645 (1978).

<sup>18</sup> *See United States v. Denver*, 656 P.2d 1, 17 (Colo. 1982).

<sup>19</sup> *See Winters v. United States*, 207 U.S. 564, 565 (1908).

<sup>20</sup> *United States v. Denver*, 656 P.2d at 5.

<sup>21</sup> *See United States v. Denver*, 656 P.2d 1 (Colo. 1982).

<sup>22</sup> *See United States v. New Mexico*, 438 U.S. 696, 700-702 (1978).

<sup>23</sup> *See id.* at 702.

<sup>24</sup> *Winters v. United States*, 207 U.S. 564 (1908).

[I]t would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.<sup>25</sup>

Next, the Colorado Supreme Court held in 1982 that the “United States does not have an instream flow claim for reserved water rights in the national forests.”<sup>26</sup> Finally, Justice Rehnquist, writing for the United States Supreme Court in 1978, held that Congress did not intend to include “minimum instream flows for aesthetic, recreational, and fish-preservation” among the purposes of national forests.<sup>27</sup> If the federal government wanted to further these purposes on national forest lands through reservation of water rights, it would have to “acquire water in the same manner as any other public or private appropriator.”<sup>28</sup> The partial dissent in this 1978 case (written by Justice Powell and joined by Brennan, White, and Marshall) provides a shred of hope for the future: “[I]f the United States proves, in this case or others, that the reservation of instream flows is necessary to fulfill the purposes [of the particular reservation] discerned by the Court, I find nothing in the Court’s opinion that bars it from asserting this right.”<sup>29</sup> In other words, if a skillfully crafted argument persuaded the justices that instream flow preservation did effectuate the purposes of the congressional reservation, then water rights could be reserved also.

The federal government also retains water allocation rights through the federal navigation servitude. The federal navigation servitude allows the federal government to improve navigation through its right to regulate interstate commerce under the Commerce Clause of the United States Constitution.<sup>30</sup> While the federal government traditionally uses the servitude for clearly commercial purposes, the servitude has the potential to be used for additional, far-reaching purposes. The next section shows the historical development and overall expansion of the federal navigation servitude.

### III. The Federal Navigation Servitude

The sanctity and strength of real property<sup>31</sup> ownership forms a core value in the United States’ culture that many citizens take for granted. In fact, the Fifth Amendment Takings Clause entitles a citizen whose property has been “taken” by the government to be

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<sup>25</sup> *Id.* at 577.

<sup>26</sup> *United States v. Denver*, 656 P.2d at 23.

<sup>27</sup> *United States v. New Mexico*, 438 U.S. at 705.

<sup>28</sup> *Id.* at 702.

<sup>29</sup> *Id.* at 724.

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>31</sup> *Black’s Law Dictionary* includes as real property “land, and generally whatever is erected or growing upon or affixed to land.” BLACK’S LAW DICTIONARY, *supra* note 2, at 1218. By contrast, personal property is “everything that is the subject of ownership, not coming under denomination of real estate” such as money, goods, or chattels. *Id.* at 1217.

compensated for the value of that property.<sup>32</sup> In the past, courts, following English models, stated that "equity abhors a forfeiture" and tended to decide these "takings" cases to provide compensation to the "victim" of the government's "taking."<sup>33</sup> Despite this strong property rights background, the federal navigation servitude operates as a no-compensation rule: the federal government does *not* have to compensate property owners when it acts in the name of the federal navigation servitude.

The definition of the federal navigation servitude has broadened and could continue to do so, as this memo advocates. Courts have struggled to define both the servitude's operation as a no-compensation rule and its geographical scope. As debates move into the regulatory area, administrative law and government agency procedures further complicate federal navigation servitude issues.

#### A. *The Servitude's Operation As a No-Compensation Rule*

The federal government has two primary tools for regulating navigable water bodies in the United States: (1) the navigation power (derived from the Commerce Clause of the United States Constitution) and (2) the federal navigation servitude.<sup>34</sup> Justifying its actions under the broad power granted through the Commerce Clause of the United States Constitution, the federal government uses the navigation power to "use, develop, or obstruct water-ways, as well as regulate or prohibit the development of or interference with waterways by other parties."<sup>35</sup>

The federal navigation servitude, however, is a subtly different concept. Whereas the federal government first invoked the navigation power, it was the courts that first articulated the federal navigation servitude doctrine.<sup>36</sup> It is generally explained as a legal offshoot of the navigation power: "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope."<sup>37</sup> The federal navigation servitude is the rule "that *certain* private property may be taken [by the federal government] in exercise of the navigation power without the payment of compensation."<sup>38</sup>

A popular summary of the federal navigation servitude as a no-compensation rule comes from the U.S. Supreme Court's 1941 United States v. Chicago decision:

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

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<sup>32</sup> Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

<sup>33</sup> See Bean v. Walker, 95 A.D.2d 70, 464 N.Y.S.2d 895 (N.Y. App. Div. 1983) (showing the government's refusal to honor forfeiture provisions in installment land contracts); Looney v. Farmers Home Administration, 794 F.2d 310 (7th Cir. 1986); and David H. Simmons, *The Agreement for Deed As a Creative Financing Technique*, 55 FLA. B.J. 395, 396 (1981).

<sup>34</sup> 4 WATERS AND WATER RIGHTS § 35.02(c) (Robert E. Beck ed., 1996).

<sup>35</sup> *Id.*

<sup>36</sup> Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 21 (1963).

<sup>37</sup> United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).

<sup>38</sup> Morreale, *supra* note 36, at 2.

mark. The exercise 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>39</sup>

Similarly, the Supreme Court added in United States v. Virginia Electric and Power Co. that "[t]his navigation servitude . . . is the privilege to appropriate without compensation which attaches to the exercise of the 'power of the government to control and regulate navigable waters in the interest of commerce.'"<sup>40</sup>

Courts and scholars alike have failed to determine a precise justification for the development of the federal navigation servitude and its "no-compensation" attribute.<sup>41</sup> However, the concept becomes more understandable when examined from the perspective of the public's right to conduct business by navigating rivers: historical recognition and protection of the public's rights to navigation puts nonfederal water users on notice that they may not impede navigation along a river.<sup>42</sup> It is as if the government has an underlying claim or right to manage (which is "superior" to all other claims) certain submersible and submerged lands near navigable rivers to preserve the navigability of these rivers for citizens' use.<sup>43</sup>

As demonstrated by the Gibson<sup>44</sup> and Scranton<sup>45</sup> cases, the Supreme Court's strict adherence to the federal navigation servitude with its no-compensation attribute has produced harsh results: some landowners endure limited or impaired water access with no compensation benefits.<sup>46</sup> The Gibson and Scranton cases, decided at the turn of the twentieth century, shared the same basic issue, namely, whether or not the federal government must compensate a private party when the government destroys that party's access rights to navigable waters for the "improvement of a navigable highway, for the public good."<sup>47</sup> These cases were two of the earliest to begin broadening what the federal government could do to protect "navigation." They established that permissible federal activities under the federal navigation servitude include: (1) diverting water flow through channels to improve navigation in harbors; (2) building obstructions such as lighthouses or jetties in navigable waters to alter flow of water; (3) controlling the flow of vessels through channels; (4) destroying private mill operations; and (5) destroying private access rights to navigable waters.

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<sup>39</sup> United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 596-597 (1941), *modified*, 313 U.S. 543 (1941).

<sup>40</sup> United States v. Virginia Electric & Power Co., 365 U.S. 624, 627-628 (1961).

<sup>41</sup> Morreale, *supra* note 36, at 22.

<sup>42</sup> *Id.* at 23.

<sup>43</sup> *Id.* at 21.

<sup>44</sup> Gibson v. United States, 166 U.S. 269 (1897).

<sup>45</sup> Scranton v. Wheeler, 179 U.S. 141 (1900).

<sup>46</sup> *See* United States v. Commodore Park, Inc., 324 U.S. 386 (1945).

<sup>47</sup> Gibson v. United States, 166 U.S. at 276.

This broadening of what the federal government could do to protect "navigation" continued with the Lewis Blue Point Oyster case.<sup>48</sup> In Lewis Blue, the federal government dredged the channel and destroyed the plaintiff's oyster beds to improve the nearby bay's navigability. The U.S. Supreme Court held that the government did not have to compensate the plaintiff for the destroyed oyster bed and articulated language that can be traced in subsequent judicial opinions through 1987:

If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is *in aid of navigation*.<sup>49</sup>

So, the Lewis Blue holding of the case adds a sixth activity to the list of permissible federal navigation servitude activities, namely, the federal government's ability to "deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgement, may require."<sup>50</sup> Courts also interpreted the federal navigation servitude as precluding any balancing or consideration of private interests or losses.<sup>51</sup>

#### B. *The Servitude's Geographical Scope*

Defining the phrase "navigable waters" gives water law students and scholars alike headaches beyond measure. Legislators and courts have defined navigability in many ways, depending on the context and the situation. On the one hand, "navigable waters" may mean only those waters subject to tidal influence. On the other hand, the phrase may mean any waters that have been used at any time for some sort of commercial transportation venture. The precise definition of navigable waters is crucial: the federal navigation servitude *always* applies to navigable waters, but only in certain circumstances does it apply to nonnavigable waters.

Under several modern holdings, waters that are subject to the tidal ebb and flow are considered navigable and subject to the servitude, even if they are not actually navigable in

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<sup>48</sup> Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).

<sup>49</sup> *Id.* at 87 (emphasis added). The "in aid of navigation" language was used in the dissent in Kaiser Aetna v. United States, 444 U.S. 164 (1979), to emphasize the validity of the federal navigation servitude. The "in aid of navigation" language was also used in United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987), to make tribal water interests and rights subject to the federal navigation servitude.

<sup>50</sup> 229 U.S. at 88. Similarly, the Supreme Court decided two cases about five years after the Lewis Blue Point Oyster case that support the trend of expanding the scope of permissible federal activities under "navigation" and under the federal navigation servitude: Willink and Temple. The Court held in Willink that the federal government could avoid compensating the plaintiff when it cut off riparian land owned by the plaintiff to improve navigability of the river. The federal government ruined the plaintiff's vessel repair business. Willink v. United States, 240 U.S. 572 (1916). The Court held in Temple that the federal government avoided compensation for lost land when it dredged the creek in front of the plaintiff's property to improve navigation. Temple v. United States, 248 U.S. 121 (1918).

<sup>51</sup> United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987).

fact.<sup>52</sup> The Supreme Court began building a concrete definition of navigability with its famous 1870 The Daniel Ball holding:

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 are 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.<sup>53</sup>

The Supreme Court later expanded the definition to include rivers that had been navigable in the past but were no longer navigable in the present.<sup>54</sup> A river was navigable “even though it be not at present used for such commerce, and be incapable of such use . . . by reason of changed conditions.”<sup>55</sup> Thus, the federal navigation servitude always applies to waters satisfying the judicial definition of navigability. But under what circumstances does the federal navigation servitude and its no-compensation rule apply to nonnavigable waters as well?

The Supreme Court addressed this issue in the Grand River Dam Authority case. The flow of a nonnavigable stream is subject to the servitude if the federal government interferes with such flow to “protect the ‘navigable capacity’” of a navigable stream.<sup>56</sup> The Court further held that “[w]hen the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one.”<sup>57</sup> In applying these rules to the facts of the Grand River Dam Authority case, the federal government did not have to compensate flood victims on a tributary when the government’s dam on that tributary caused the flooding, as long as the government built the dam to protect the navigability of a downstream river.<sup>58</sup> The government may interfere with the flow of nonnavigable tributaries without compensating for losses that citizens incur, if its purpose is to improve the navigability of the downstream waters.

In the Rands decision, however, the United States Supreme Court reminded the federal government that the federal navigation servitude does not apply to lands above the normal high water mark.<sup>59</sup> In reaction to the Rands decision, Congress passed Section 111 of the Rivers and Harbors Act of 1970, which compensates parties for lost port and power production

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<sup>52</sup> See United States v. Lamastus & Assocs., 785 F.2d 1349 (5th Cir. 1986); United States v. DeFelice, 641 F.2d 1169 (5th Cir. 1981), *cert. denied sub nom*; DeFelice v. United States, 454 U.S. 940 (1981) and United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

<sup>53</sup> The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (emphasis added).

<sup>54</sup> Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).

<sup>55</sup> *Id.* at 123.

<sup>56</sup> United States v. Grand River Dam Authority, 363 U.S. 229, 232 (1960).

<sup>57</sup> *Id.* at 233.

<sup>58</sup> *Id.*

<sup>59</sup> United States v. Rands, 389 U.S. 121, 123 (1967).

capabilities,<sup>60</sup> and Congress has since then passed other legislation that provides compensation for injured parties even though the federal navigation servitude operates traditionally as a no-compensation rule.

How does the federal navigation servitude analysis change when water bodies are rendered "artificially" navigable through human interventions, such as dredging activities, river widening projects, or water flow management? In Kaiser Aetna v. United States, the Supreme Court held that the Corps of Engineers could not use the federal navigation servitude to secure a public right of access to a private lagoon made navigable when a citizen opened a private channel to the ocean.<sup>61</sup> Similarly, the court applied the Kaiser reasoning to rule that a series of canals connecting the Gulf of Mexico to an inland waterway were not subject to the servitude.<sup>62</sup> The Lamastus case, however, does suggest that the federal government retains some interest in such waters because the Coast Guard has jurisdiction over them.<sup>63</sup>

### *C. Federal (Army Corps of Engineers) Regulatory Implementation of the Servitude*

Under the federal statutes, the Army Corps of Engineers holds wide regulatory authority to invoke and implement the federal navigation servitude. The Corps regulates everything from building piers to dumping garbage in navigable waters.

The Corps applies the navigation servitude primarily through Section 10 of the Rivers and Harbors Act. The Act provides:

The creation of any obstruction . . . to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build . . . structures in any . . . water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.<sup>64</sup>

The Corps' regulations define "navigable waters of the United States" as "those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to

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<sup>60</sup> 33 U.S.C. § 595a (1994). The statute, passed in 1970, provides compensation at the fair market value of the "highest and best use."

<sup>61</sup> Kaiser Aetna v. United States, 444 U.S. 164 (1979).

<sup>62</sup> See Vaughn v. Vermilion Corp., 444 U.S. 206 (1979).

<sup>63</sup> 33 U.S.C. § 1344 (1994). See United States v. Lamastus & Assocs., 785 F.2d 1349 (5th Cir. 1986).

<sup>64</sup> 33 U.S.C. § 403 (1994).

transport interstate or foreign commerce.”<sup>65</sup> The regulations also define and provide examples of what constitutes a “structure” within the meaning of the regulation.<sup>66</sup>

For decades, the Corp only considered factors affecting navigation when granting or denying Section 10 permits. The Fifth Circuit, in *Zabel v. Tabb*, held that the Corps should take a more comprehensive view and required it to consider all relevant environmental factors in making the Section 10 permit decision.<sup>67</sup> Over the years, the review has evolved to relate primarily to the “public interest” rather than any specific list of factors.<sup>68</sup>

Although a water right may or may not actually be “property” in an absolute sense, citizens have nevertheless defended these rights vigorously. Two of the most controversial issues have been the extension of the servitude to nonnavigable streams and the erosion of the no-compensation rule.

#### IV. The Servitude and Western Water Rights

##### A. *Downstream Navigation Limits Diversions and Dams on Nonnavigable Tributaries*

The first case to reach the Supreme Court of the United States on the extension of the servitude to affect water rights on nonnavigable tributaries came from the arid Southwest in 1898. The Rio Grande Dam and Irrigation Company (the Dam Company) proposed to dam the Rio Grande at Elephant Butte, in the territory of New Mexico. Following construction, a British company, the Rio Grand Irrigation and Land Company, Limited (the Irrigation Company), would irrigate the arid land with the stored water. The Rio Grande is navigable to Roma, Texas, but is not navigable into New Mexico. In a suit to enjoin the construction of the dam, the United States argued that the dam’s diverted water would largely evaporate in the irrigation process. Consequently, little water would return to replenish the river’s water supply and downstream navigation would be seriously impaired.<sup>69</sup>

The Mexican government pressured the U.S. government to end construction because the Elephant Butte Dam would further impair Mexico’s already compromised rights to Rio Grande waters.<sup>70</sup> In fact, damming the Rio Grande at Elephant Butte would not leave much water for a proposed international dam downstream at El Paso, Texas, which would have enabled the citizens of Ciudad Juarez in Mexico to finally collect Mexico’s share of the Rio Grande. The federal government was embarrassed by the Mexican demand, as it had inadvertently granted

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<sup>65</sup> 33 C.F.R. § 322.2 (1996).

<sup>66</sup> See *id.* § 322.2(b). Fine tuning the definition of “structures” is an ongoing process as demonstrated in the Ninth Circuit case, *United States v. Boyden*, 696 F.2d 685, 689 (9th Cir. 1983) (establishing the validity of 33 C.F.R. § 322.2(b) but remanding to the district court to determine if houseboats are “navigable” and are “permanently moored floating vessels” within the meaning of the regulation).

<sup>67</sup> *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

<sup>68</sup> See 33 C.F.R. § 320.4(a) (1996).

<sup>69</sup> *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899).

<sup>70</sup> James Simsarian, *The Diversion of Waters Affecting the United States and Mexico*, 17 TEX. L. REV. 27, 35-36 (1938-39).

the Dam Company a license to begin construction through the United States General Land Office.<sup>71</sup>

The trial court found that the Rio Grande was nonnavigable at Elephant Butte but granted summary judgement for the Dam Company,<sup>72</sup> perhaps in recognition that the dam already had been licensed. The Supreme Court of the territory of New Mexico affirmed the trial court,<sup>73</sup> and the United States pursued the issue to the Supreme Court of the United States.<sup>74</sup>

The Supreme Court reversed the lower courts, finding that "a State cannot, by its legislation, destroy the right of the United States . . . to the continued flow of its waters" and that "it is limited by the superior power of the general government to secure uninterrupted navigability of all navigable streams within the limits of the United States."<sup>75</sup> Thus, the United States could permanently enjoin the construction of the dam if it proved, on remand, that such a dam would "substantially diminish the navigability of that stream within the limits of present navigability."<sup>76</sup>

Relying on dicta for support, the Rio Grande Court held that state appropriation systems were the sole source of water rights, outside those explicitly reserved by the federal government.<sup>77</sup> The Rio Grande decision states that "the obvious purpose of Congress was to give its assent . . . to any system . . . which permitted the appropriation of those waters for legitimate industries."<sup>78</sup>

The Supreme Court examined the Rio Grande decision in its California v. United States decision.<sup>79</sup> The California v. United States Court again emphasized the breadth of state power over water resources: "The Court [in Rio Grande], however, was careful to emphasize . . . that, except where the reserved rights or navigation servitude of the United States are invoked, the State has the total authority over its internal waters."<sup>80</sup> So, even while the Court carefully backed away from a broad interpretation of federal interests in water rights, it did, with equal care, leave the navigation servitude in tact.

The Court affirmed, in United States v. Grand River Dam Authority, discussed above, the right of the federal government to take some water rights without compensation. The United States began building the Ft. Gibson Dam in 1946, condemning the land and flowage rights and

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<sup>71</sup> *Id.* at 36.

<sup>72</sup> 174 U.S. at 696.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 695.

<sup>75</sup> *Id.* at 703.

<sup>76</sup> *Id.* at 710.

<sup>77</sup> See California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 159 (1935).

<sup>78</sup> 174 U.S. at 706.

<sup>79</sup> California v. United States, 438 U.S. 645, 662 (1978).

<sup>80</sup> *Id.*

relocating power lines on land owned by a state entity, the Grand River Dam Authority (the Authority).<sup>81</sup> The Authority claimed \$10 million in compensation for the taking of its waterpower rights on the nonnavigable Grand River, and it initially won in the Court of Claims.<sup>82</sup> The federal government appealed to the Supreme Court, arguing that "the navigation servitude of the United States extends also to nonnavigable waters, pre-empting state-created property rights in such waters, at least when asserted against the Government."<sup>83</sup> The U.S. Supreme Court overturned the Court of Claims, holding that "[w]hen the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one."<sup>84</sup>

### *B. Lost Irrigation Access Not Compensated*

The Ninth Circuit Weatherford v. United States holding demonstrates that the no-compensation rule extends to the federal government's taking of irrigation access.<sup>85</sup> The Weatherfords, the plaintiffs in the case, owned an easement to irrigate their property about eleven miles from the Columbia River, but they had never actually used the easement.

To build the John Day Dam, the federal government relocated Highway 30, which entailed condemning some of the Weatherfords' land. The federal government failed to condemn the irrigation easement, and the Weatherfords brought a quiet title action claiming that their due compensation equalled the difference between the value of their land as irrigated farmland and the value of their land as nonirrigated land.<sup>86</sup>

Although the district court ruled that the United States must compensate the Weatherfords for the loss of their unused easement, it awarded only \$550 in damages for the nominal value of the easement. Furthermore, the district court refused to compensate the Weatherfords for the difference between the property's value as irrigated land and as nonirrigated land on the theory that the property was taken under the federal navigation servitude.<sup>87</sup>

The Weatherfords appealed, but the Ninth Circuit affirmed the district court. The Ninth Circuit found that the "taking was substantially related to the United States exercise of its powers over navigation and that the doctrine of the navigational servitude does apply."<sup>88</sup> Since the irrigation right was dependent on the flow of the stream, the Weatherfords were not entitled to compensation, as they would have been under Section 111 of the Rivers and Harbors Act, had they been owners of the right to generate power or develop port facilities.

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<sup>81</sup> United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

<sup>82</sup> *Id.* at 231.

<sup>83</sup> *Id.* at 232.

<sup>84</sup> *Id.* at 233.

<sup>85</sup> Weatherford v. United States, 606 F.2d 851 (9th Cir. 1979).

<sup>86</sup> *Id.* at 852.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 853.

C. *Other Losses Not Compensated: Broadening the Scope of Permissible Federal Government Activities under the Purpose of "Navigation"*

Recall from the discussion above that the Gibson, Scranton, and Lewis Blue Point Oyster Courts began broadening what the federal government could do in the name of "navigation" under the federal navigation servitude. By 1913, the list of permissible activities included: (1) diverting water flow through channels to improve navigation in harbors; (2) building obstructions such as lighthouses or jetties in navigable waters to alter flow of water; (3) controlling the flow of vessels through channels; (4) destroying private mill operations; (5) destroying private access rights to navigable waters; and (6) "deepen[ing] the water over such lands or . . . us[ing] them for any structure which the interest of navigation . . . may require."<sup>89</sup>

In Stimson (decided in 1912), the U.S. Supreme Court continued this trend to expand the permissible activities.<sup>90</sup> While constructing a dam across the Ohio River and adjusting the harbor boundary lines, the federal government improved the navigability in the harbor of Pittsburgh and completely submerged the plaintiff's land. The Court held that since the federal government built the dam "in the interest of navigation," it did not have to compensate the plaintiff for his losses when his land was flooded.<sup>91</sup> The Court added a seventh element to the list of permissible federal navigation servitude activities: constructing dams and altering harbor boundaries.

The Ninth Circuit and the United States Supreme Court decided a group of cases in the mid-1900s that further broadened the scope of permissible federal government activities under the purpose of "navigation."

The first case, Continental Land Co., involved the Grand Coulee Dam project on the Columbia River.<sup>92</sup> The first unit, a diversion dam, would flood private, public, tribal, and allotted lands. After taking judicial notice that the Columbia River "is a navigable stream in fact as well as in law"<sup>93</sup> and acknowledging that the dam's primary purpose would be to improve navigation,<sup>94</sup> the Court added three new activities that the federal government may perform under its power to improve navigation without compensating injured parties:

The government has the power to cause the removal of obstructions in the river bed, and to forbid the use of the river by the riparian owner which it believes injurious to navigation. It has the right to cut the riparian owner from direct access to deep water.<sup>95</sup>

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<sup>89</sup> Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 88 (1913).

<sup>90</sup> Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

<sup>91</sup> *Id.* at 627.

<sup>92</sup> Continental Land Co. v. United States, 88 F.2d 104 (9th Cir. 1937), *cert. denied*, 302 U.S. 715 (1937).

<sup>93</sup> *Id.* at 108.

<sup>94</sup> *Id.* at 105-106, 109.

<sup>95</sup> *Id.* at 109.

The Ninth Circuit decisively concluded that “[t]he riparian owner has no property right to the use of the water or the power inherent therein, or the fall and flow of the water for commercial purposes, or any purpose, as against the United States.”<sup>96</sup>

In 1941, the United States Supreme Court addressed the federal government’s ability to raise and lower stream levels in the name of navigation in United States v. Chicago, M., St. P. & P.R. Co.<sup>97</sup> In this case, the riparian landowner’s buildings, which were situated between the high and low water marks of a navigable stream, were damaged when the federal government used dams and locks to raise and lower stream levels. The Court held that the federal government may alter the levels of navigable streams under its “dominant power . . . of navigation” and does not have to compensate parties who incur damages as a result.<sup>98</sup> So, an eleventh activity was added: the ability to alter and regulate stream levels.<sup>99</sup>

Thus, since the turn of the twentieth century, courts have broadened the scope of permissible federal government activities under the purpose of “navigation.” The relevance of this broadening to salmon recovery will be addressed in Section V below.

#### *D. Congressionally Mandated Compensation for Federally Built or Approved Projects*

Although the courts have broadened the scope of permissible federal government activities under the purpose of “navigation,” Congress could chose to legislatively override the no-compensation rule by enacting laws to provide compensation to injured parties. A few exceptions to the federal navigation servitude’s no-compensation rule do exist and are described below.

##### **1. Reclamation Act Requires Compensation**

In the 1930s and 1940s, the federal government initiated the massive Central Valley Project to maximize water use in California. The Friant Dam, constructed through the Central Valley Project, controlled flooding downstream and deprived riparian farmers of the seasonal overflow they used to irrigate their crops.<sup>100</sup> The farmers sued the federal government for compensation and eventually argued the case to the U.S. Supreme Court.

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<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592 (1941), *modified*, 313 U.S. 543 (1941).

<sup>98</sup> *Id.* at 596.

<sup>99</sup> Around the same time that *United States v. Chicago, M., St. P. & P.R. Co.* was decided, the District Court for the Northern District of California decided *United States v. 412.715 Acres of Land*, summarizing many of the permissible activities the federal government may engage in to improve navigation without having to compensate resultant damages: “Unquestionably, it [the federal government] may deepen channels, widen streams, erect lighthouses, build bridges, construct dams, and make similar improvements without compensating the owners of the land subject to the navigation servitude.” Interestingly, this court also noted that “[i]n controlling, improving and regulating the navigability of waters, the Government traditionally acts for the benefit of the navigating public.” *United States v. 412.715 Acres of Land*, 53 F. Supp. 143 (N.D. Cal. 1943).

<sup>100</sup> *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-730 (1950).

The case's principal issue focused on whether the government took its water rights under the federal navigation servitude or under the Reclamation Act of 1902.<sup>101</sup> Under the federal navigation servitude, the farmers would receive no compensation. The Reclamation Act, however, provides that

[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.<sup>102</sup>

In other words, when the federal government takes water rights pursuant to the Reclamation Act, it must compensate the holders of those rights.

The Supreme Court traced the history of the Central Valley Project back to the Federal Emergency Relief Appropriation Act, which provided that claimants "'shall be reimbursable in accordance with the reclamation laws.'"<sup>103</sup> The Court explained that in affirming the expenditure for the Friant Dam in 1937, Congress stated that "'the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control.'"<sup>104</sup> In interpreting the conflicting language, the Supreme Court wrote: "Even if we assume . . . that Friant Dam in fact bears some relation to control of navigation, we think nevertheless that Congress realistically elected to treat it as a reclamation project."<sup>105</sup> The Supreme Court ruled in favor of the farmers, affirming an award of compensation by the Court of Claims.<sup>106</sup>

## 2. Water Rights from Flood Control Dams

When the federal government constructs a dam for flood control purposes in the western states, it must respect state water rights in allocating water from that dam. Under the reclamation laws, the Corps of Engineers must follow state allocation procedures with this exception: If the dam project was built expressly for irrigation, then the Corps distributes water according to the preferences established by Congress in the authorizing legislation.<sup>107</sup> In a delegation of authority similar to that in the reclamation laws, Congress provided in the Flood Control Act of 1944 that

[t]he use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or

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<sup>101</sup> *Id.* at 739.

<sup>102</sup> 43 U.S.C. § 383 (1994).

<sup>103</sup> *United States v. Gerlach Live Stock Co.*, 339 U.S. at 732 (quoting Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844, 850 (1937) and Rivers and Harbors Act of 1940, ch. 895, 54 Stat. 1198, 1199-1200 (1940)).

<sup>104</sup> *Id.* at 731.

<sup>105</sup> *Id.* at 739.

<sup>106</sup> *Id.* at 755.

<sup>107</sup> 43 U.S.C. § 390 (1994).

partly west of the ninety-eighth meridian shall be only such as does not conflict with any beneficial consumptive use, present or future. . . .<sup>108</sup>

According to one commentator, this language, known as the O'Mahoney-Milliken Amendment, "subordinate[s] the navigation rights of the federal government to those rights for beneficial consumptive uses established under state law."<sup>109</sup>

### 3. Compensation under the Federal Power Act

The Federal Power Act (FPA) does include the no-compensation attribute of the federal navigation servitude.<sup>110</sup> In Federal Power Commission v. Niagara Mohawk Power Corp., the Supreme Court held that a power company was required to pay rental fees to water rights holders incidental to its operation of a Federal Power Commission (FPC)-licensed dam, and that those payments could be deducted from the power company's liability into an amortization fund.<sup>111</sup>

The Court concluded that "even though the respondent's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government has not exercised its power to abolish them."<sup>112</sup>

### 4. Summary

While the navigation servitude continues to act as a rule of no-compensation, Congress and the Courts have carved out significant exceptions for specific purposes. Foremost among these exceptions is that the government may not deprive, without compensation, water rights holders of their rights when it exercises its powers under the Reclamation Act or the FPA. The no-compensation rule remains, however, for those deprivations purely in aid of navigation or those not deriving from the Reclamation Act or the FPA.

## V. Potential Roles for the Navigation Servitude in Federally Supported River Basin and Watershed Restoration Efforts

The federal navigation servitude has the potential to play a major role in the policy and management of salmon and other anadromous fish. Taking a proactive approach to salmon recovery, Congress or federal agencies could expand the federal navigation servitude to serve as a primary tool for creating salmon management policies. In a less direct approach, Congress or federal agencies could use the federal navigation servitude as a secondary tool by connecting salmon management issues with navigation issues. In either scenario, case law and common sense indicate that making salmon a focus of the federal navigation servitude doctrine would provide a new method for aiding salmon recovery efforts while reducing the obligation to compensate for resultant losses.

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<sup>108</sup> 33 U.S.C. § 701-1(b) (1994).

<sup>109</sup> Gene Olson, *The O'Mahoney-Milliken Amendments: The West Sinks the Navigation Power*, 65 N.D. L. REV. 91, 95 (1989).

<sup>110</sup> 16 U.S.C. §§ 791a-828c (1994 & Supp. I 1995).

<sup>111</sup> *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954).

<sup>112</sup> *Id.* at 248.

A. *The Federal Navigation Servitude As a Primary Tool: Creating Salmon Management Policies*

A proactive Congress or federal agency could greatly revamp the federal navigation servitude to meet present and future needs for salmon preservation and restoration efforts by including salmon as a primary part of navigation.

Recall that the traditional interpretation of the federal navigation servitude doctrine allows the federal government to invoke the federal navigation servitude if and only if the activity in question pertains to navigation. An argument for incorporating salmon as part of navigation would flow as follows: (1) federal activities conducted as part of Columbia and Snake River dam management result in adverse impacts on salmon; (2) Congress or a federal government agency decides that salmon issues fall under the federal government's regulation of navigation; (3) therefore, the federal government can use the federal navigation servitude to mitigate adverse salmon impacts. Since the federal navigation servitude is a no-compensation rule, the federal government could avoid compensating injured individuals in these restoration efforts.<sup>113</sup>

As shown in the 1926 River Rouge decision, however, a counterargument exists. The federal government, under the authority of the Rivers and Harbors Act of 1917, condemned private riparian land to make improvements on the Rouge River in Michigan.<sup>114</sup> The federal government argued before the U.S. Supreme Court that it made the river improvements to improve navigation and, therefore, could avoid compensating private citizens for the condemned property by invoking the federal navigation servitude.<sup>115</sup> The U.S. Supreme Court disagreed and constricted the federal navigation servitude by holding that "[Congress] 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>116</sup> A party could reasonably argue that salmon issues have "no real or substantial relation to the control of navigation."

B. *The Federal Navigation Servitude As a Secondary Tool: Connecting Salmon Management Techniques and Restoration Efforts with Navigation Purposes*

Connecting salmon management and restoration efforts more closely with navigation purposes is a subtler (and possibly more solid) argument for invoking the federal navigation servitude. Five principal means of achieving this connection are as follows: (1) correlating salmon problems with water uses; (2) linking salmon to commerce; (3) the Rio Grande analysis; (4) the Grande River analysis; and (5) applying the judicially broadened scope of permissible federal government activities in the name of "navigation."

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<sup>113</sup> Although this memo does advocate use of the federal navigation servitude's no-compensation rule, Congress could legislate a compensation scheme for parties injured by its use of the federal navigation servitude.

<sup>114</sup> *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 412-413 (1926).

<sup>115</sup> *Id.* at 418.

<sup>116</sup> *Id.* at 419. *Accord* *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (emphasis added).

## 1. Correlating Salmon Problems with Water Uses

Perhaps the most straightforward (and most conservative) method for connecting salmon restoration efforts with navigation purposes is to correlate salmon problems with water usage and management. The analysis involves four steps: (1) identify an area in the Columbia or Snake River basins where severe adverse salmon impacts exist; (2) determine the precise management techniques or physical structures that create these adverse salmon impacts; (3) point out that these management techniques or physical structures obstruct navigation, including migration or navigation by salmon up and down the rivers; (4) request that the federal government alter or remove the techniques or structures that obstruct navigation without compensating losses by invoking the federal navigation servitude. Specific examples of management techniques or physical structures that could be targeted as causing adverse impacts include dams, pipes, river management techniques such as stream flow modifications, and appropriations of water for irrigation, mining, or municipal uses.

## 2. Linking Salmon to Commerce

The Commerce Clause<sup>117</sup> of the United States Constitution authorizes Congress to regulate interstate commerce. To perform this duty, the federal government also must regulate navigation. As explained above, anytime the federal government makes improvements in certain streams or rivers (such as the Columbia or Snake Rivers), it may invoke the federal navigation servitude to avoid compensating losses incurred as a result of these improvements.

People fish for salmon for tribal cultural reasons, for recreation, to earn income, and to provide food. Thus, salmon are a part of commerce, and if the Army Corps of Engineers were to decide that a particular dam should be removed from a river or that stream flows in the Columbia and Snake Rivers should be increased to accommodate migrating salmon, it would not have to compensate losses covered by the federal navigation servitude.

Case law supports this analysis. In two early twentieth century cases (the Union Bridge Co. case<sup>118</sup> and the Monongahela Bridge Co. case<sup>119</sup>), the United States Supreme Court decided that the federal government could order the alteration of bridges constructed under state law because they interfered with commerce by "unreasonabl[y] obstruct[ing] . . . navigation."<sup>120</sup> As a result, the state or private parties bore the losses because the federal government invoked the federal navigation servitude to avoid paying compensation. The Monongahela Bridge Co. case emphasized that the bridge may not have been illegal or an "unreasonable obstruction to navigation" when it was built, but that

the bridge must be taken as having been constructed with knowledge, on the part of all, of the paramount power of *Congress to regulate commerce* among the states, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions. . . . <sup>121</sup>

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<sup>117</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>118</sup> Union Bridge Co. v. United States, 204 U.S. 364 (1907).

<sup>119</sup> Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910).

<sup>120</sup> *Id.* at 189.

<sup>121</sup> *Id.* at 193-194 (emphasis added).

Both courts stressed the link between the federal government's ability to regulate navigation and its power under the Commerce Clause.<sup>122</sup> Taking the argument one step further, the federal government could order the removal of any type of obstruction (for example, dams, irrigation diversion facilities, and pipes) for the benefit of salmon without compensating for the losses incurred.<sup>123</sup>

### 3. The Rio Grande Analysis

A third way to connect salmon restoration efforts with navigation purposes is to expand the types of physical or geographical areas to which the federal navigation servitude applies.

A broad reading of the 1899 United States Supreme Court United States v. Rio Grande<sup>124</sup> decision suggests that the federal navigation servitude also applies to nonnavigable tributaries that feed navigable bodies of water. In interpreting the 1870 Amendments to the Mining Act, the Court stated that

[t]o hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated.<sup>125</sup>

Salmon migrate through a variety of water bodies to spawn or to return to the ocean. If the federal navigation servitude applies to both navigable and nonnavigable water bodies, the federal government could control flow rates and avoid compensating the resultant losses (from reducing or eliminating irrigation appropriations, for example).

### 4. The Grand River Analysis

In Grand River, the Oklahoma state legislature created the plaintiff state agency to "develop hydroelectric power on the Grand River," a nonnavigable tributary of the Arkansas River.<sup>126</sup> The plaintiff state agency proposed dam projects on the Grand River, but the federal government, through the Army Corps of Engineers and the Flood Control Act of 1941,

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<sup>122</sup> U.S. CONST. art. I, § 8, cl. 3. The Court, in *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634 (1912) and *United States v. Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596 (1941), *modified*, 313 U.S. 543 (1941), made the same linkage between the Commerce Clause power and the power to regulate navigation.

<sup>123</sup> The federal government actually made this argument in *United States v. 412.715 Acres of Land*, 53 F. Supp. 143, 148 (N.D. Cal. 1943), when it sought to condemn submerged lands to build a naval fuel base and avoid compensating citizen owners by invoking the federal navigation servitude: "The Government argues that since the navy is essential to preserve commerce and navigation, an improvement which benefits the navy is in aid of navigation." The court found against the federal government primarily because the land was to be filled to allow construction of a building and the public was excluded.

<sup>124</sup> *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

<sup>125</sup> *Id.* at 706.

<sup>126</sup> *United States v. Grand River Dam Authority*, 363 U.S. 229, 233 (1960).

incorporated the state agency's plan into its own "comprehensive plan for the Arkansas River basin."<sup>127</sup> Although the state lost its rights to power production and river flow rate management, it still could apply to the Corps for licenses to operate other dam projects in the area. The federal government, however, eventually took over most of the dams on the river and condemned the land owned by the state to build another dam project.<sup>128</sup>

The state sued the "United States for \$10,000,000 for the 'taking' of its water power rights at Ft. Gibson and its franchise to develop electric power and energy at that site."<sup>129</sup> The Supreme Court held that the federal government did not have to compensate the state of Oklahoma for any potential economic losses that the state may have incurred as a result of the federal government's projects on the nonnavigable Grand River:

The Court of Claims [the lower court in this case] recognized that if the Grand River were a navigable stream the United States would not be liable for depriving another entrepreneur of the opportunity to utilize the flow of the water to produce power. Our cases hold that such an interest is not compensable because when the United States asserts its superior authority under the Commerce Clause, Const. art. 1, s. 8, cl. 3, to utilize or regulate the flow of the water of a navigable stream, there is no 'taking' of 'property' in the sense of the Fifth Amendment because the United States has a superior navigation easement which precludes private ownership of the water or its flow.<sup>130</sup>

In other words, the federal government may invoke the federal navigation servitude to avoid compensating a party for its lost business opportunities as a result of federal projects that protect navigation.

Furthermore, the federal government could regulate flow rates, remove dams, and reroute streams or rivers to aid salmon preservation and restoration efforts without having to compensate business losses. Once again, a broad reading of Grand River in connection with the Rio Grande decision suggests that these activities could be done on nonnavigable as well as navigable rivers, and on nonnavigable water bodies that feed navigable water bodies.

##### 5. Applying the Judicially Broadened Scope of Permissible Federal Government Activities in the Name of "Navigation"

As discussed above, the judicial trend over time has been to *broaden* the scope of what the federal government can do in the name of "navigation" while invoking the federal navigation servitude—a fortuitous trend for salmon restoration advocates. Since the turn of the twentieth century, federal court decisions have broadened the scope of permissible federal government activities that fall under the purpose of "navigation" to include: (1) diverting water flow through channels to improve navigation in harbors; (2) building obstructions such as lighthouses or jetties in navigable waters to alter flow of water; (3) controlling the flow of vessels through channels; (4) destroying private mill operations; (5) destroying private access rights to navigable waters; (6) "deepen[ing] the water over such lands or . . . us[ing] them for any structure which

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<sup>127</sup> *Id.* at 230.

<sup>128</sup> *Id.* at 230-232.

<sup>129</sup> *Id.* at 231.

<sup>130</sup> *Id.*

the interest of navigation . . . may require";<sup>131</sup> (7) constructing dams and altering harbor boundaries; (8) removing obstructions in river beds; (9) forbidding the use of a river by a riparian owner that the government believes is injurious to navigation; (10) cutting a riparian owner from direct access to deep water; and (11) altering and regulating stream levels.<sup>132</sup>

These factors can be specifically applied to promote salmon interests. For example, recall the Lewis Blue Point Oyster case. An expansive reading of the language in that case—specifically, "this dominant right must include the right to use the bed of the water for every purpose which is *in aid of navigation*"—has the potential to aid salmon preservation and restoration efforts. "[E]very purpose" could be read as including salmon interests as a part of navigation, and "in aid of" could mean any activity that helps navigation.

Stimson suggests that if the federal government can construct a dam in the interest of navigation, it should be able to tear down a dam in the interest of navigation, again resulting in enormous ramifications for salmon preservation and restoration efforts.

By far, the most notable broadening of the scope of permissible federal government activities in the name of "navigation" springs from the Ninth Circuit's 1982 United States v. Certain Parcels of Land decision.<sup>133</sup> Here, the federal government sought to build a "Coast Guard vessel traffic system and port safety station for Prince William Sound and Valdez"<sup>134</sup> in navigable waters (below the mean high water mark) in Alaska. The court formulated a test for whether or not the federal government could condemn the land necessary to build the facility without having to compensate the state (the owner of the land) below the mean high water mark: "Once Congress determines that an action will improve or protect navigation, the [federal] Government may rely on the navigation servitude to accomplish that action."<sup>135</sup> In this decision, the Ninth Circuit seems to grant an even broader, more general power to the federal government to perform activities under the federal navigation servitude: if Congress has determined that a particular action will improve or protect navigation, the federal government may "rely on the navigation servitude to accomplish that action."<sup>136</sup> This test could allow the federal government to manage rivers and build facilities to preserve or restore salmon under the federal navigation servitude.

The next section of this memo examines the judicial roles and potential congressional mandates (through amendments to existing legislation or enactment of new legislation) that

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<sup>131</sup> Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 88 (1913).

<sup>132</sup> In its Good decision, the United States Court of Federal Claims held that when the Army Corps of Engineers denied a private citizen's application to dredge and fill wetlands below the mean high water mark, it did not have to compensate the resulting losses under the federal navigation servitude: "This activity would fall within the navigational servitude held by the United States, and could likely be prohibited without compensation due to that predominant federal interest." Good v. United States, No. 94-442L, 1997 U.S. Claims LEXIS 179, at \*47 (Fed. Cl. 1997).

<sup>133</sup> United States v. Certain Parcels of Land, 666 F.2d 1236 (9th Cir. 1982).

<sup>134</sup> *Id.* at 1238.

<sup>135</sup> *Id.* at 1239.

<sup>136</sup> *Id.*

would allow further application of these eleven activities to promote salmon preservation and restoration.

## VI. Authority to Use the Federal Navigation Servitude for Salmon

### A. Judicial Roles

Several judicial decisions encourage Congress to clearly state a navigational purpose among the purposes of water management-related activities and laws:

We find in Congress' action a clear purpose to improve and protect navigation. That is all that is required to invoke the navigation power and bring the navigation servitude into play.<sup>137</sup>

Furthermore, courts have repeatedly held that decisions regarding the improvement and protection of a water body's navigability are legislative in nature and therefore under the sole regulation of Congress: (1) "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation."<sup>138</sup> (2) "The judgement of the Congress with relation to the navigability of the river and its development is conclusive."<sup>139</sup> and (3) "We [the court] may not second guess Congress' decision that the action will aid navigation."<sup>140</sup> Other commentators have reached the same conclusion: "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."<sup>141</sup>

Courts also could expansively read the "purpose" statements in dam authorizing legislation to include salmon management interests. For instance, the Rivers and Harbors Act of 1935 authorized federal construction of the Grand Coulee Dam "for the purpose of controlling floods, *improving navigation, regulating the flow of the streams of the United States*, providing for storage and for the delivery of the stored water thereof, for the reclamation of public lands, and Indian Reservations, and *other beneficial uses*, and for the generation of electric energy as a means of financially aiding and assisting such undertakings."<sup>142</sup>

Power generation seems second in priority to "improving navigation" (which would allow invocation of the federal navigation servitude), "regulating the flow of the streams of the United States" (for the benefit of salmon), and "other beneficial uses" (including preservation of the downstream and upstream navigation of salmon). This language in the Act provides a solid

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<sup>137</sup> *Id.* at 1239-1240.

<sup>138</sup> *Philadelphia Co. v. Stimson*, 223 U.S. 605, 635 (1912).

<sup>139</sup> *Continental Land Co. v. United States*, 88 F.2d 104, 109 (9th Cir. 1937), *cert. denied*, 302 U.S. 715 (1937).

<sup>140</sup> *United States v. Certain Parcels of Land*, 666 F.2d at 1239.

<sup>141</sup> Genevieve Pisarski, *Testing the Limits of the Federal Navigation Servitude*, 2 OCEAN & COASTAL L.J. 313, 328 (1997).

<sup>142</sup> Michael C. Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 227 (1981) (emphasis added).

foundation on which to argue that salmon interests should be included in the management of water flows and the construction of dams. The federal government could then invoke the federal navigation servitude to avoid compensating resultant losses.

Congress has broad authority to decide what is needed to protect and improve navigation, and it probably could expand the list of activities and issues that are included under navigation if the courts were willing to defer to Congress' judgement of what a clear navigational purpose is.

### *B. Potential Congressional Mandates*

Congress could amend current legislation (for example, dam authorization legislation such as the Flood Control Act) to specifically include salmon preservation and restoration efforts as part of navigation improvements for the Columbia and Snake River basins.<sup>143</sup> After all, it could be said that salmon, for part of their natural life cycle, "navigate" the Columbia and Snake Rivers. Through this kind of clear congressional statement of purpose, the federal government could invoke the federal navigation servitude to avoid compensating any losses that might result from salmon restoration efforts.

Congress also could enact new legislation that would explicitly link salmon management with navigation, thus allowing it to invoke the federal navigation servitude. The new legislation could be called The Coexistence of Humans and Anadromous Fish Act, and it could state that river management (including management of dams, irrigation, mining, municipal uses, and tribal uses) and salmon interests are closely linked. Protecting or improving the right of public navigation and the right of natural navigation (such as navigation of salmon) would allow Congress to invoke the federal navigation servitude. Therefore, anytime that federal agencies examined navigation issues on navigable rivers and nonnavigable tributaries, the agencies also would have to consider salmon issues. In addition, federal agencies could be authorized to change river basin management practices to benefit salmon without compensating injured parties based on the federal navigation servitude. This proposed use of the federal navigation servitude is analogous to the application of the federal public trust doctrine to benefit salmon.<sup>144</sup>

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<sup>143</sup> Congress already has attempted to address salmon restoration and recovery issues in the Columbia and Snake River basins by enacting the Pacific Northwest Electric Power Planning and Conservation Act, more commonly known as the Northwest Power Act, in 1980. 16 U.S.C. §§ 839-839h (1994 & Supp. I 1995). Congress enacted the law to "protect and restore Columbia Basin fish and wildlife" and to make Columbia Basin fish and wildlife "co-equal partner[s] with hydropower." See Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL L. 657, 660 (1991). As one commentator explained, the law failed to achieve these goals because, first, many programs instituted under the Act were ignored due to "ambiguously drafted enforcement provisions" and, second, the Northwest Power Planning Council failed to sufficiently defer to state agency and tribal expertise. *Id.* at 669-670 and 727-734.

<sup>144</sup> The United States Supreme Court first articulated the public trust doctrine in *Illinois Central Railroad Co. v. Illinois* in 1892: States hold title to the lands under the navigable waters and that title is "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties." 146 U.S. 387, 452 (1892).

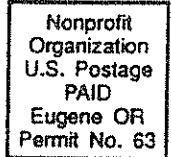
## VII. Conclusion

Over one hundred years of legislation and judicial decisions have shaped the mold of the federal navigation servitude. Up until the early nineteenth century, the federal government could invoke the federal navigation servitude only to protect the public right of navigation in navigable water bodies. Doctrinal and geographical expansion of the federal navigation servitude arguably now allows the federal government to apply it to nonnavigable water bodies and for a variety of purposes such as regulating stream flows, constructing dams, altering harbor boundaries, and removing obstructions in the beds of rivers. The federal government should tailor its use of the federal navigation servitude to meet today's conservation needs—in particular, the need to preserve and restore dwindling salmon and other anadromous fish populations. Under the federal navigation servitude, the federal government has the authority to employ salmon-friendly water management techniques in the Columbia and Snake River basins to promote salmon recovery without having to compensate resultant private or state losses.

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