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Determining the Parameters of the Navigation Servitude Doctrine

I. INTRODUCTION

The broad federal power over navigation may be exercised either through the regulatory power of Congress or through the imposition of the navigation servitude doctrine. Traditionally, the navigation servitude has been predicated on a finding of navigability under one of the various judicially developed tests.¹ The navigation servitude doctrine has traditionally embodied two principles. First, it assumes that navigable waters may be appropriated for public use.² Second, it allows the taking of such property without compensation.³

Recently, the Supreme Court redefined the test of navigability for purposes of the servitude by indicating that, absent compensation, the doctrine may not be invoked to open to public access waters whose navigability resulted from private expenditures.⁴ The purposes of this Recent Development are to explore the divergence

1. See, e.g., *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871); *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825).

2. See *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1866).

3. See *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

4. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). A recent Case Note on *Kaiser Aetna* appears in 18 *IND. L. REV.* 819 (1980) and discusses the regulatory power and appropriation for public use as characteristics of the servitude. The taking without compensation aspect of the servitude, however, is discussed in terms of the fifth amendment's requirement of compensation. *Kaiser Aetna*, the Case Note argues, resolved a conflict between the fifth amendment and the navigation servitude in favor of the compensation requirement.

This Recent Development focuses on the historical development of the navigational servitude, reviews traditional tests for its applicability, and discusses taking without compensation as an inherent element of the servitude. Under this analysis, emphasis is placed on the *Kaiser Aetna* Court's redefinition of the ancient navigation servitude doctrine by altering the tests of navigability and replacing the noncompensation element of the doctrine with a requirement that compensation be paid. Thus, this Recent Development asserts that, apart from resolution of any fifth amendment conflicts, *Kaiser Aetna* is significant because of the Court's alteration of the elements of the ancient navigation servitude doctrine and because of the resulting attendant problems that courts must confront when applying the servitude doctrine. See also 7 *W. ST. U.L. REV.* 253 (1980). For an argument in favor of the *Kaiser Aetna* opinion, see Note, *Navigation Servitude and the Right to Just Compensation: Kaiser Aetna v. United States*, 1980 *D&T. C.L.* 915.

of the Supreme Court's decision from precedential and historical precepts concerning the navigation servitude, to discuss problems facing future courts that seek to apply the revised doctrine, and to suggest proposals for accommodating traditional policies with the modern concerns expressed in the Court's opinion. This Recent Development urges that the optimal application of the revised navigation servitude doctrine would be one that gives partial protection to private individuals but continues to regard as paramount the public's right of access upon navigable waters. Specifically, the Recent Development suggests a scheme of limited compensation under which the government would be free to exercise the servitude and appropriate navigable waterways to public use if partial recompense were paid to private individuals for their expenditures in rendering those waterways navigable.

II. FEDERAL POWER OVER NAVIGABLE WATERS

A. *Source of the Federal Power*

Article one of the United States Constitution, which confers upon Congress the right "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"⁵ is the principal basis of federal power over navigation.⁶ The Supreme Court in *Gibbons v. Ogden*⁷ brought navigation clearly within the scope of the Commerce Clause by holding that the term "commerce" encompasses navigation.⁸ Federal power to control navigation may be exercised either through Congress' regulatory power or through application of the navigation servitude doctrine.⁹

Congress' regulatory power over navigation is extremely broad; it does not depend upon navigability, but rather extends to non-navigable waters.¹⁰ In describing the breadth of this regulatory

5. U.S. CONST. art. 1, § 8, cl. 3.

6. Constitutional support for the federal power over navigation can also be derived from the treaty clause, *id.* art. 2, § 2, the war powers clause, *id.* art. 1, § 8, the general welfare clause, *id.*, and the public property clause, *id.* art. 4, § 3. See *FPC v. Oregon*, 349 U.S. 435 (1955); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Ashwander v. TVA*, 297 U.S. 288 (1936); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925).

7. 22 U.S. (9 Wheat.) 1 (1824).

8. *Id.* at 189.

9. Terms frequently used interchangeably with the phrase "navigation servitude" include the following: "superior navigation easement," *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736 (1950); "qualified title," *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913); "dominant servitude," *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954).

10. *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960); *Oklahoma v. Atkin-*

power, the Supreme Court in *United States v. Appalachian Power Co.*¹¹ declared that "the constitutional power of the United States over its waters is [not] limited to control for navigation. . . . Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control."¹² The power to remove any obstructions to navigation that either are located in navigable waters or affect navigability also falls within the regulatory power.¹³

In contrast to the regulatory power, the navigation servitude comes into play only upon a finding of navigability. In addition, the consequences of an exercise of the servitude are different in scope from those that arise from use of the regulatory power. The following sections explore various tests used to ascertain whether navigability exists and to examine the effects of applying the servitude.

B. *The Navigation Servitude*

"Navigation servitude" is a shorthand expression embodying the principle that the federal government possesses a dominant power over navigable waters, and that the proper exercise of this power includes appropriation of those waters for public use without compensation.¹⁴ Although historical antecedents of this doctrine can also be traced to Roman, French, and Spanish law, English law is the main source of the American version of the servitude.¹⁵ English common law viewed navigable waters as incapable of being privately owned, and dominion over such waterways vested in the Crown. Central to that power of the sovereign was protection of a public right of free passage. In this country the people were deemed tantamount to the sovereign after the Revolution. Power over navigable waters therefore shifted to them, and control over such waters is now considered to be exercised by the federal

son Co., 313 U.S. 508, 523 (1941); *United States v. Utah*, 283 U.S. 64, 90 (1931); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703, 706, 708 (1899).

11. 311 U.S. 377 (1940).

12. *Id.* at 426.

13. *Wyandotte Transp. Co., v. United States*, 389 U.S. 191 (1967); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *Union Bridge Co., v. United States*, 204 U.S. 364 (1907); *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973).

14. Morreale, *Federal Power in Western Waters: The Navigation Power and The Rule of No Compensation*, 3 NAT. RES. J. 1, 9, 20 (1963).

15. See MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 511 (1975).

government as trustee for the people.¹⁶ Inherent in the American navigation servitude is the principle that the federal government possesses an overriding claim to and control over navigable waters of the nation.¹⁷ States, in the exercise of their power to regulate navigable waterways within their boundaries, must yield to the paramount federal interest.¹⁸ Private property rights are also subordinated to the servitude, so that its exercise traditionally has entailed uncompensated taking of such waters and free public passage thereon.¹⁹

1. The Public's Right of Navigation upon Navigable Waters

As the Supreme Court stated in *Gilman v. Philadelphia*,²⁰ navigable waters of the United States are deemed to be the "public property of the nation."²¹ It follows that the public has a right of free access to such waters, and that denial of public passage upon the public's own waters would be inconsistent with traditional notions of property rights.²² The navigation servitude arises from and is designed to protect that superior public right of free passage.²³ Private property owners have contended that they enjoy a right of access and enjoyment distinct from the public's right. Courts, however, have refused to recognize such a separate interest.²⁴ Private property interests associated with navigable waters, such as capacity for wharfage and freedom from trespass, have consistently been

16. *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Den v. Jersey Co.*, 56 U.S. (15 How.) 426 (1853); *Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842).

17. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961) (the overriding navigational servitude takes precedence over private rights); *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956) (the dominant servitude is superior over any conflicting interest); *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249-52 (1954) (private property rights are inferior to the federal servitude); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) (the federal servitude excludes competing interests); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 725 (1866) (the federal government has paramount authority to regulate and maintain navigable waters).

18. *United States v. Rands*, 389 U.S. 121, 127 (1967); *Suhmerged Lands Act*, § 6, 43 U.S.C. § 1314 (1976).

19. *Morreale*, *supra* note 14, at 9, 20.

20. 70 U.S. (3 Wall.) 713 (1866).

21. *Id.* at 724-25.

22. The desire that navigable waters be kept open for public passage was expressed as early as the Northwest Ordinance, which declared that the Mississippi and St. Lawrence Rivers and their tributaries "shall be common highways, and forever free." Act of August 7, 1789, ch. 8, 1 Stat. 50, 51 n(a).

23. *Rivers and Harbors Appropriation Act of 1899* § 10, 33 U.S.C. § 403 (1976).

24. *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390 (1945); *Scranton v. Wheeler*, 179 U.S. 141, 159-60 (1900); *Stockton v. Baltimore & N.Y. R.R.*, 32 F. 9, 20 (C.C.D.N.J. 1887).

forced to yield to the public's superior right of navigation.²⁵ Owners of land adjacent to navigable waters possess that property subject to the public right of passage upon those waters.²⁶ States' rights to regulate navigable waterways within their boundaries are also subservient to the federally protected right of public passage.²⁷

Courts construe the public's right of navigation to encompass all activities normally connected with navigation. A California court summarized the existing rule in several jurisdictions as providing "that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes."²⁸ At least one state has added to this list of activities the enjoyment of scenic beauty and prohibits private construction upon navigable streams if it interferes with that public interest.²⁹ Several states have incorporated in their statutes and constitutions the notion of a public right to navigation upon and connected uses of navigable waters.³⁰

2. Taking of Property Without Compensation

The fifth amendment requires that Congress pay just compensation upon the taking of private property for public use.³¹ The navigation servitude, however, permits the federal government to take or impair some private interests in navigable waters without compensation. Thus, federal taking of property through the navigation servitude, such as changing the course of a river,³² destroying a landowner's access to navigable water,³³ or appropriating a

25. *Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974), *aff'd*, 534 F.2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929 (1976); *Forestier v. Johnson*, 164 Cal. 24, 127 P. 156 (1912); *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115 (1926).

26. *Trustees of Freeholders & Commonality of Southampton v. Heilner*, 375 N.Y.S.2d 761, 770, 84 Misc. 2d 318, 327 (Sup. Ct. 1975).

27. *Morreale*, *supra* note 14, at 30.

28. *People v. Mack*, 19 Cal. App. 3d 1040, 1045, 97 Cal. Rptr. 448, 451 (1971). *See also* *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139 (1893); *Roberts v. Taylor*, 47 N.D. 146, 181 N.W. 622 (1921); *Coleman v. Schaeffer*, 163 Ohio St. 202, 126 N.E.2d 444 (1955); *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937); *Munninghoff v. Wisconsin Conservation Comm'n*, 255 Wis. 252, 38 N.W.2d 712 (1949); *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914); *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1898).

29. *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 508, 53 N.W.2d 514, 521, *aff'd on rehearing*, 261 Wis. 515c, 55 N.W.2d 40 (1952).

30. *See, e.g.*, IDAHO CONST. art. 15, § 1; IDAHO CODE §§ 36-901, -907, 42-101 (1980); WIS. STAT. ANN. § 31.06(3) (West 1972).

31. U.S. CONST. amend. V.

32. *South Carolina v. Georgia*, 93 U.S. 4 (1876).

33. *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Gibson v. United States*, 166 U.S. 269 (1897).

head of water used to generate power,³⁴ is noncompensable.

Courts have advanced two main justifications for this result. First, navigable waters have historically been viewed as public rather than private property. Therefore, a private individual's use of navigable waters is a convenience or privilege granted by the public, and any special value attributable to that use cannot be deemed the individual's "property."³⁵ Under this theory, to allow compensation would be to reject the traditional notion that "the flow of the stream is in no sense private property."³⁶

A second argument advanced to justify taking without compensation through the navigation servitude is the so-called "notice theory." Under this theory, characterization of navigable waters as public property and the doctrine of the navigation servitude are ancient principles of which individuals may fairly be charged with notice. Because of the paramount nature of the public interest, a fee owner whose property is connected with navigable waters takes only limited rights.³⁷ The Supreme Court in *United States v. Kansas City Life Insurance Co.*³⁸ summarized the "notice" argument by stating that the failure to compensate property owners is not unfair because "[t]here . . . has been ample notice over the years that such property is subject to a dominant public interest."³⁹

C. Tests of Navigability

Courts have applied several tests of navigability in determining the applicability of the servitude. The oldest of these is the "ebb and flow" test adopted from English law, which defines as navigable all waters affected by tidal fluctuations.⁴⁰ Although this

34. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956).

35. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) (loss of agricultural value of riparian land deemed noncompensable); *United States v. Willow River Power Co.*, 324 U.S. 499, 510-11 (1945) (denial of compensation for reduction in generating power); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 260 (1915) (destruction of a private wharf without compensation); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 87-88 (1913) (government's dredging of bay, which destroyed plaintiff's oyster bed, deemed proper); *Union Bridge Co. v. United States*, 204 U.S. 364, 400 (1907) (removal of privately constructed bridge without compensation).

36. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 66 (1913) (use of a head of water on a navigable river by a power company).

37. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Gibson v. United States*, 166 U.S. 269, 271-72 (1897); *Coastal Petroleum Co. v. United States*, 525 F.2d 1206, 1209 (Ct. Cl. 1976).

38. 339 U.S. 799 (1950).

39. *Id.* at 808.

40. *People v. Jessup*, 160 N.Y. 249, 260, 54 N.E. 682, 685-86 (1899); *People v. Tibbetts*, 19 N.Y. 523, 526 (1859).

test proved workable in an island country like England where all major waterways exhibit tidal variations, the question whether the ebb and flow test has been rejected altogether by American courts or merely restricted to coastal waters is a subject of current debate.⁴¹

A second test of navigability, developed by the Supreme Court in *The Daniel Ball*,⁴² defines as navigable those waters that are "navigable in fact"⁴³ in that they are used or are susceptible of use in their ordinary condition as highways for commerce.⁴⁴ Courts have held that a waterway's capacity in its natural state to accommodate commercial commodities such as logs, or small motor or oar propelled pleasure craft, constitutes navigability in fact.⁴⁵ Elaborating upon the criteria of navigability in fact, the Supreme Court in *United States v. Appalachian Power Co.*⁴⁶ held that navigability should also be determined "in the light of the effect of reasonable improvements."⁴⁷ Such improvements need not be underway or even contemplated, but must be reasonable in light of expense and need.⁴⁸ Thus, the absence of commercial traffic on a waterway does not render it nonnavigable if reasonable artificial aids could make it navigable. Later courts have stressed capacity for use by commercial traffic, rather than actual use, as the true

41. Cases applying the ebb and flow test include *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 605-06, 610 (3d Cir. 1974); *United States v. Cannon*, 363 F. Supp. 1045, 1049-51 (D. Del. 1973); *United States v. Lewis*, 355 F. Supp. 1132, 1136-37 (S.D. Ga. 1973). Decisions seemingly rejecting the doctrine include *Packer v. Bird*, 137 U.S. 661, 666-67 (1891); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-58 (1851); *United States v. American Cyanamid Co.*, 354 F. Supp. 1202, 1203-04 (S.D.N.Y. 1973).

42. 77 U.S. (10 Wall.) 557 (1871).

43. *Id.* at 563. The navigability in fact criterion can be traced to Roman law, which divided waterways into public and private ones. The public waters, or "fleum publicum," were those navigable in fact. Morreale, *supra* note 14, at 25 n.132.

44. 77 U.S. (10 Wall.) at 563. *See also* *The Montello*, 78 U.S. (11 Wall.) 411 (1871); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

45. *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Bohn v. Albertson*, 107 Cal. App. 2d 738, 238 P.2d 128 (1951); *Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974); *Munninghoff v. Wisconsin Conservation Comm'n*, 255 Wis. 252, 38 N.W.2d 712 (1949); *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914); *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1898).

46. 311 U.S. 377 (1940). *See also* *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921) (partial bars to actual navigation, such as natural obstructions and seasonal effects, do not render a waterway nonnavigable); *Davis v. United States*, 185 F.2d 938 (9th Cir.), *cert. denied*, 340 U.S. 932 (1950) (a waterway's availability for navigation, as well as its natural condition, is important in determining navigability).

47. 311 U.S. at 406.

48. *Id.* at 407-08.

test of navigability.⁴⁹

A final definition of navigability suggests that a waterway, once navigable under one of the other tests, remains so indefinitely. In *Economy Light & Power Co. v. United States*⁵⁰ the Supreme Court held that the federal servitude is not lost or abandoned when a formerly navigable waterway is no longer used for commerce or even has become incapable of such use.⁵¹ Neither changes in geographic conditions nor changes in commercial techniques will render a once navigable waterway nonnavigable.⁵² As evidence of the broadening of the definition of navigability, one commentator notes that no case has been decided against the United States government on the navigability issue since the 1940 decision in *Appalachian Power Co.*⁵³

D. *The Estoppel Argument Against Exercise of the Navigation Servitude*

In many cases private property owners subjected to a non-compensable taking under the navigation servitude have alleged estoppel of the government as a bar to exercise of the servitude. In nearly every case such arguments are based upon the early Supreme Court decision of *Monongahela Navigation Co. v. United States*.⁵⁴ In *Monongahela* plaintiffs constructed a lock and dam with the urging and express authorization of Congress, but the government subsequently attempted to assume control of plaintiffs' property and their toll collection franchise. Stressing the unusual facts involved, the Court directed that the government compensate plaintiffs for the taking.⁵⁵

Later cases, however, indicate an extreme reluctance to hold that the government is estopped from exercising the navigation servitude, and the *Monongahela* holding appears limited in scope to the unique facts of that case. In *United States v. California*⁵⁶ federal officials for many years had fostered a mistaken belief that

49. *Weiszmann v. Corps of Eng'rs*, 526 F.2d 1302 (5th Cir. 1976); *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973).

50. 256 U.S. 113 (1921).

51. *Id.* at 123.

52. *United States v. Appalachian Power Co.*, 311 U.S. 377, 408 (1940); *Arizona v. California*, 283 U.S. 423, 453-54 (1931); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1920).

53. *Morreale*, *supra* note 14, at 5.

54. 148 U.S. 312 (1893).

55. *Id.* at 344-45.

56. 332 U.S. 19 (1947).

the state owned certain navigable waters off the California coast. California argued that representations of federal officials and California's reliance thereon estopped the federal government from exercising its dominant navigation servitude. Rejecting this argument, the Supreme Court stated that the state of California could not take advantage of ordinary court rules designed for private disputes over individually owned pieces of property. The Court noted that the federal government holds its interests in trust for all the people, and it concluded that "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."⁵⁷

In *United States v. Stoeco Homes, Inc.*⁵⁸ a federal district court also rejected the estoppel defense. A developer, relying upon inaction of the Corps of Engineers, had expended private funds to develop navigable waters. When the government attempted to take the developer's property under the navigation servitude, the developer asserted an estoppel argument against the government. The court held that the government could not be barred from use of its navigation power because of estoppel, laches, or private expenditures.⁵⁹

III. CREATION OF A NEW TEST OF NAVIGABILITY FOR THE NAVIGATION SERVITUDE: *Kaiser Aetna*

In *Kaiser Aetna v. United States*⁶⁰ the Supreme Court held that the federal government may not, without compensation, exercise the navigation servitude to open a navigable waterway to public access if navigability was created by private funds.⁶¹ The dispute in *Kaiser Aetna* centered around Kuapa Pond, a Hawaiian fishpond partly separated from open water by a barrier beach and treated under Hawaiian law as private property. Kaiser Aetna informed the Corps of Engineers of plans to connect Kuapa Pond with a bay—which, in turn, connected with the Pacific Ocean—in order to provide residents of the Kaiser Aetna housing development with a passageway for their boats. The only response of the Corps was a statement that no permit was required. After Kaiser Aetna expended millions of dollars dredging the pond and con-

57. *Id.* at 40.

58. 359 F. Supp. 672 (D.N.J. 1973).

59. *Id.* at 677-78.

60. 444 U.S. 164 (1979).

61. *Id.* at 179-80.

structing a passageway,⁶² the federal government brought suit, alleging that Kaiser Aetna must open Kuapa Pond to public access because the improvements had rendered it a navigable waterway of the United States subject to the navigation servitude.⁶³

The district court held that Kaiser Aetna need not open the pond to public navigation because Kuapa Pond was not navigable in its natural condition.⁶⁴ Although admitting that Kuapa Pond was now navigable under the traditional tests, the court developed a new test, which looked to the source of the improvements creating navigability. Applying this new criterion, the district court concluded that Kaiser Aetna's expenditure of private funds prevented exercise of the navigation servitude without compensation.⁶⁵ The Court of Appeals reversed, holding that private expenditures have no relevance to the applicability of the navigation servitude. According to the appellate court, once Kuapa Pond was deemed navigable under the traditional tests, the servitude attached and entailed opening of the pond to public access without compensation.⁶⁶

The Supreme Court reversed the Court of Appeals and granted Kaiser Aetna the right to exclude the public from access to Kuapa Pond.⁶⁷ The Court began its analysis by conceding that the federal regulatory power over navigation is broad enough to permit the opening of such a pond to public access. The Court, however, reasoned that the regulatory power is not coextensive with the navigation servitude and that navigability for purposes of regulation may not equal navigability for purposes of the servitude.⁶⁸ Although noting that traditionally the servitude has permitted taking without compensation,⁶⁹ the Court concluded that opening Kuapa Pond to public access was a taking requiring compensation.⁷⁰

Tracing the history of the navigation servitude, the Court stated that the doctrine conceives of navigable waters as public property and seeks to ensure that such waterways remain open.⁷¹ Finding that the servitude could not be applied to the waterway

62. *Id.* at 167.

63. *Id.* at 168.

64. 408 F. Supp. 42, 49 (D. Hawaii 1976).

65. *Id.* at 54.

66. 584 F.2d 378, 383 (9th Cir. 1978).

67. 444 U.S. at 180.

68. *Id.* at 172-73.

69. *Id.* at 175.

70. *Id.* at 180.

71. *Id.* at 177.

after Kaiser Aetna's improvements,⁷² the Court stressed that Kaiser Aetna had expended millions of dollars in creating navigability.⁷³ The Court found that this expenditure had created certain "expectancies" in the developers' minds regarding the status of Kuapa Pond, and the tacit consent of the Corps of Engineers to the project had bolstered those expectations. The Court also noted Hawaii's characterization of fishponds, such as Kuapa Pond in its unimproved state, as private property.⁷⁴

The *Kaiser Aetna* dissent disagreed with four principal parts of the Court's opinion. The dissent questioned the majority's assumption that Kuapa Pond became navigable only after improvement; in the dissent's view, the issue of private improvements could have been avoided because the inquiry into navigability should have begun with an examination of Kuapa Pond's natural state. Applying the traditional ebb and flow test, the dissent concluded that the pond was a navigable waterway in its natural state.⁷⁵ The dissent rejected Kaiser Aetna's assertion that the ebb and flow test has been abandoned by American courts, and it noted that the criticisms of the doctrine have appeared in cases involving inland waterways. The dissent reasoned that the ebb and flow test, which has proved useful in island countries for decades, remains viable for determining navigability of waters in coastal areas.⁷⁶

The dissent directed its second criticism toward the majority's holding that the navigation servitude does not extend to admittedly navigable waters when navigability results from private expenditures. In response to the majority's suggestion that different tests of navigability may be appropriate for purposes of the servitude and the broader federal regulatory power, the dissent noted that decisions defining tests of navigability have never indicated an intent to limit a given test to a particular federal power.⁷⁷ Reasoning that the servitude arose from a dominant federal interest in navigation and a desire to maintain navigable waters as open highways, the dissent concluded that the servitude embodies a governmental responsibility to ensure public access to those waters. The dissent found support for this conclusion in many past Supreme

72. *Id.* at 179-80.

73. *Id.* at 169.

74. *Id.* at 179.

75. *Id.* at 181-83 (Blackmun, J., dissenting).

76. *Id.* at 182-83 (Blackmun, J., dissenting).

77. *Id.* at 184-85 (Blackmun, J., dissenting).

Court decisions that held navigable waters to be public rather than private property.⁷⁸ The dissent further reasoned that in order for the servitude to serve its historical purpose, its applicability must depend upon the existence of navigability and not upon the manner in which navigability was created.⁷⁹

The dissent next considered the propriety of compensating Kaiser Aetna before opening Kuapa Pond to the public. Noting that such a determination requires a balancing of public and private interests, and reviewing numerous decisions holding that no compensation is required under the navigation servitude, the dissent concluded that damage to a property owner's use of or access to navigable waters is noncompensable because such waters are public property.⁸⁰ The dissent pointed out that Kaiser Aetna, under the notice theory, had acted at its own risk in improving the pond, and that the main value of Kuapa Pond lay in its accessibility to the bay and ocean. For these reasons, the dissent concluded that Kaiser Aetna was not entitled to compensation.⁸¹

Turning to a final area of disagreement with the majority opinion, the dissent considered the effect of Hawaiian property law on the servitude. The dissent argued that past cases had held that private owners of land abutting or beneath navigable waters take subject to a public right of navigation embodied in the navigation servitude. The dissent reasoned that by similar logic a state could not create an interest superior to the paramount federal servitude.⁸²

IV. ANALYSIS

The *Kaiser Aetna* decision rejects the historical and precedential bases of the doctrines of navigability and the navigation servitude by abandoning traditional tests of navigability and developing new criteria for determining applicability of the servitude. After *Kaiser Aetna*, the servitude now turns on the source of improvements rendering the waterway navigable. Factors that influenced the adoption of this new test included the alleged inequity of the no-compensation and notice doctrines, the possibility of estoppel

78. *Id.* at 186-87 (Blackmun, J., dissenting); See also *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Scranton v. Wheeler*, 179 U.S. 141 (1900).

79. 444 U.S. at 185-86 (Blackmun, J., dissenting).

80. *Id.* at 189-90 (Blackmun, J., dissenting).

81. *Id.* at 190 (Blackmun, J., dissenting).

82. *Id.* at 191-92 (Blackmun, J., dissenting).

as a bar to the servitude, and the conflict between state law interests and the federal power.

A. *Failure to Apply Traditional Tests of Navigability*

The Court began its analysis by examining the question whether Kaiser Aetna's improvements had subjected Kuapa Pond to the navigation servitude, but the Court failed to analyze this issue within the framework of the traditional tests of navigability. Undisputed evidence proving Kuapa Pond's susceptibility to tidal fluctuations satisfied the ebb and flow test, which many still consider a valid standard of navigability in tidal areas.⁸³ The *Appalachian Power* test—"navigable with reasonable improvements"⁸⁴—was also arguably met because Kaiser Aetna was able to render the pond navigable by its improvements.⁸⁵ Once designated as navigable under either of these tests, Kuapa Pond would have remained navigable, despite any changes in its condition, under the "once navigable, always navigable" principle.

The Supreme Court's analysis of navigability creates confusion concerning the approach to be followed by future courts. In many cases, a waterway could be held navigable in its natural condition. *Kaiser Aetna*, however, implies that courts should focus on the waterway in its improved state. This difference in starting points is important because of the majority's holding that navigability created by private improvements does not lead to imposition of the navigation servitude.⁸⁶ If future courts begin their inquiry into navigability by assessing the waterway in its improved state, they cannot avoid addressing the issue whether private expenditures bar exercise of the servitude.

The Supreme Court held in *Kaiser Aetna* that the tests of navigability for federal regulatory and for navigation servitude purposes may differ. Neither policy nor precedent dictates such a distinction. Historically, a distinction has been made between navigable and nonnavigable waters because of the tremendous utility and importance of the former as common national highways that must remain open for such uses as commerce, defense, and recreation.⁸⁷ Both the federal regulatory power over navigation and the

83. *Id.* at 181-83 (Blackmun, J., dissenting); 408 F. Supp. 42, 50 (D. Hawaii 1976).

84. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940).

85. 444 U.S. at 181 (Blackmun, J., dissenting).

86. *Id.* at 178-79.

87. *See United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945) (safeguarding recreation); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 60, 62, 68, 72

navigation servitude seek to protect these public interests. In the dissent's words, the navigation servitude embodies the principle that "[t]he National Government is guardian of a public right of access to navigable waters of the United States."⁸⁸ By developing a test that bars the exercise of the servitude when private outlays have created navigability, the Supreme Court has not adhered to this underlying principle.

Both the government's interest and the public's proprietary interest in keeping navigable waterways open to serve the public welfare are subordinated to private property interests by *Kaiser Aetna*. Traditional tests of navigability have sought to deal equitably with both public and private interests by distinguishing between waters that have actual or potential significance as national highways and those that do not. For example, landlocked waters or those incapable of use as navigable passages even with improvements are deemed private property, whereas waters that are or could be made navigable are deemed public property. The *Kaiser Aetna* criteria make no such distinction. As the dissent noted, a private developer, by expending private funds to enhance navigability, might convert navigable waters of the nation into private property. Such individuals could obstruct navigation upon a waterway that connected with a major commercial artery by demanding payment for ingress and egress or by denying access altogether.⁸⁹

Future courts must engage in a series of inquiries in applying the new test for applicability of the servitude. First, one or more of the traditional tests must be utilized to determine whether navigability exists. In order to determine whether the navigation servitude applies, it must next be ascertained whether the navigability of the waterway arose from private expenditures. It is unclear how much private money must be expended, whether navigability must result solely from private efforts, or whether interaction of public work, natural forces, and private funds is sufficient to prevent application of the servitude. As the *Kaiser Aetna* dissent noted, the majority opinion implies that larger expenditures will more likely lead to a holding that the waterway is private property.⁹⁰ Thus, future courts apparently must determine whether private expendi-

(1913) (aiding transportation and commerce); *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (protecting commerce); *Trustees of Freeholders & Commonalty of Southampton v. Heilner*, 84 Misc. 2d 318, 375 N.Y.S.2d 761 (Sup. Ct. 1975) (protecting transportation).

88. 444 U.S. at 186 (Blackmun, J., dissenting).

89. *Id.* at 190-91 (Blackmun, J., dissenting).

90. *Id.* at 183 n.2 (Blackmun, J., dissenting).

tures are sufficient to defeat the servitude and remove a waterway from the realm of public property.

B. Designation of "Persuasive" Factors in Applying the New Test

One factor that the *Kaiser Aetna* Court deemed persuasive in applying the new test for applicability of the servitude was the alleged inequity of the traditional no-compensation rule and the notice theory justifying it.⁹¹ Courts have repeatedly denied compensation for the exercise of the navigation servitude by relying upon the argument that any value arising from use of or access to navigable waters is not a private property right.⁹² This theory is so well established that courts have traditionally charged individuals with notice of its existence.⁹³ Kuapa Pond's value to *Kaiser Aetna* consisted of its utility as a passageway for residents' boats to the bay and the Pacific Ocean. *Kaiser Aetna*, like any private property owner deriving benefit from a navigable waterway, should have been charged with notice that its benefit was not a compensable property right. By refusing to charge *Kaiser Aetna* with notice, and by declaring that compensation must be given for exercise of the servitude, the Supreme Court has created confusion concerning the status of the no-compensation rule. A narrow reading of the case indicates that compensation is required only when private expenditures have rendered waterways navigable. The Court's apparent rejection of the notice theory,⁹⁴ however, could be read as suggesting a rejection of the no-compensation rule in all applications of the navigation servitude. Either result places a large financial burden on the federal government and thereby hinders its ability to promote navigation.

Two other factors considered persuasive in the Court's application of the new test were the availability of estoppel as a bar to the servitude and the conflicting interest created by state law. As

91. *Id.* at 179-80.

92. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Chicago, M., St. P. & P. R.R.*, 312 U.S. 592 (1941); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913).

93. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *Coastal Petroleum Co. v. United States*, 524 F.2d 1206 (Ct. Cl. 1976).

94. The *Kaiser Aetna* Court stated that *Kaiser Aetna* had developed Kuapa Pond with the expectancy that the waterway would remain private property, and that this belief was one factor militating against exercise of the navigation servitude. 444 U.S. at 179.

the dissent pointed out, courts have consistently refused to apply the estoppel argument to prevent exercise of the navigation servitude.⁹⁵ Thus, the majority's reliance on the availability of an estoppel defense may provide private parties with little actual protection. Another factor militating against application of the servitude, in the majority's view, was the fact that Hawaiian law considered fish ponds such as Kuapa Pond to be private property. Reliance upon this factor is a clear departure from the historical and precedential bases of the servitude. The federal navigation servitude has always been regarded as a paramount interest to which both state and private rights must yield.⁹⁶ Because of the foregoing consideration, the weight that future courts should give to the estoppel factor and state law in applying the new test is unclear. It is also uncertain whether these factors apply when navigability has not resulted from private expenditures.

C. Possible Approaches After *Kaiser Aetna*

In the future, an effort should be made to accommodate both the policies underlying the traditional navigation servitude and the private property interests protected by the Supreme Court in *Kaiser Aetna*. The *Kaiser Aetna* dissent suggested one possible solution. Through its power to regulate activities involving nonnavigable waters that affect navigable waterways, the Corps of Engineers could grant permission for private development of navigability, conditioned upon the developer's agreement to open the improved waterway to public access.⁹⁷ Thus, the result desired by application of the navigation servitude would be accomplished without imposition of the servitude, and the *Kaiser Aetna* Court's concern about creation of "expectancies" in the minds of developers would be accommodated. Such a system would not impose financial hardship on the government because compensation would not be required to open the waterway to public access. Difficulties, however, might arise because the Corps of Engineers would have to determine, before authorizing private development of a waterway, whether public access upon it would later be appropriate. Failure to demand such access when granting permission for development might estop the government from raising its claim after a waterway

95. *Id.* at 188-89 (Blackmun, J., dissenting); *United States v. Kaiser Aetna*, 408 F. Supp. 42, 54 (D. Hawaii 1976).

96. See text accompanying notes 54-59 *supra*.

97. 444 U.S. at 191 (Blackmun, J., dissenting).

became navigable, especially in view of *Kaiser Aetna's* apparent revival of the estoppel doctrine. A second drawback of this proposal is that courts might invalidate such a system on the ground that it ignored private developers' claims for compensation. Such claims were considered important by the *Kaiser Aetna* majority.

Alternatively, one commentator has suggested that the risk and expense of developing navigability should be borne by the public sector; upon application by commercial and residential developers, the government would expend public funds to render a waterway navigable.⁹⁸ This approach seems logical for two reasons. First, because waters that would be navigable with reasonable improvements have traditionally been conceived as publicly owned, it seems fair to require that the public finance those improvements. Second, if the navigation servitude were exercised, the public would lose none of its investment but would enjoy the benefits of the improved waterway. One serious drawback to this proposal, however, would be the traditional antipathy of private business toward governmental "competition." The great financial burden imposed on the federal government would be another difficulty. This burden might be reduced by utilizing state as well as federal funds when development would substantially benefit a particular area. Similarly, a publicly funded insurance program could be created to ease the financial burden. Such a system would encourage development of navigability providing indemnification to private parties for the loss of a navigable waterway and for any funds expended in creating or enhancing navigability.⁹⁹ Although it would protect the private interests considered so important in *Kaiser Aetna*, such a system would in effect require the government to purchase at great expense what has traditionally been regarded as public property. Thus, financial constraints might force the government to leave waterways that are important for commerce or recreation in private hands.

This Recent Development contends that in light of *Kaiser Aetna* the optimal means of balancing these conflicting interests would be a system providing for exercise of the navigation servitude after payment of limited compensation. The government would be required to compensate private parties for funds ex-

98. Note, *Effect of the Navigation Servitude on Land Reclamation*, 2 COLUM. J. L. & SOC. PROB. 73, 81 (1966).

99. *Id.*

pending in developing navigability, but not for loss of use of the waterway nor for damages resulting from free public access. This proposal is supported both by precedent and by the historical underpinnings of the navigation servitude. By permitting exercise of the navigation servitude when navigability arose from private expenditures, this approach would recognize the traditional superiority of both the federal navigation servitude and the public's right of access. This system would be consistent with the policy that underlies the no-compensation cases, because it would not grant compensation for special value that arose from access to or use of public navigable waters. Such a plan would recognize the ancient rule that navigable waters are public property by denying compensation for the waterway itself. Requiring compensation for work done would simply prevent the government from receiving a windfall.

This proposal would ameliorate several difficulties presented by the *Kaiser Aetna* decision and the proposals discussed above. First, this proposal recognizes the traditional conceptions of the primacy of the public interest in navigable waters. Rather than subordinating public interests to private concerns, this system seeks to balance them. Second, this proposal would greatly reduce the government's financial burden. *Kaiser Aetna* imposes a huge financial burden on the government by requiring compensation both for loss of funds expended and for the waterway itself. The proposals for publicly funded development and insurance would also require large governmental expenditures. By contrast, a system requiring compensation only for funds used to develop navigability would not necessitate such enormous expenditures. Third, the proposed system of limited compensation would be easier to implement than the *Kaiser Aetna* scheme. A determination of the amount of private funds expended in creating navigability would be much easier to make than an assessment of the value of a navigable waterway to private developers. For example, the latter valuation would have to include such factors as future profits to be derived from use of the waterway and appreciation in the value of abutting land. Finally, unlike the approaches taken by the majority and dissent in *Kaiser Aetna* the limited compensation proposal would obviate the need for courts to entertain estoppel arguments against the government in order to prevent application of the navigation servitude. The navigation servitude could be exercised under the limited compensation system whenever the government deemed public access to a navigable waterway to be appropriate.

One possible approach that federal officials may consider to

avoid the difficulties associated with *Kaiser Aetna's* new test of navigability is reliance upon the federal regulatory power as a source of control over navigable waters.¹⁰⁰ Because of the recent expansion of the Commerce Clause,¹⁰¹ which underlies the regulatory power, the *Kaiser Aetna* majority suggested that this power might be used to open privately developed navigable waterways to public access. Such an exercise of the regulatory power, however, might not permit the uncompensated governmental appropriation characteristic of the traditional navigation servitude. As the *Kaiser Aetna* Court warned, the question whether assuring a public right of access to privately developed navigable waters would constitute a "taking" forbidden by the fifth amendment remains unanswered.¹⁰²

V. CONCLUSION

By abandoning traditional tests of navigability and defining new criteria for applicability of the navigation servitude, the Supreme Court has overlooked historical and precedential bases of the navigation servitude. The most important policy justifications for the doctrine are the need for federal dominance over waters with potential utility for recreation, defense, and commerce, and a desire to safeguard the public's right of access to commonly owned waterways. By considering factors such as the source of improvements upon a waterway and the possible inequity of the traditional noncompensation and notice theories, the Supreme Court has indicated a willingness to subrogate such public policies to the interests of private developers.

In addition, the *Kaiser Aetna* Court's formulation of the navigation servitude is more difficult to apply than the traditional definition because it requires that future courts engage in a bifurcated mode of analysis. First, courts must ascertain whether navigability exists by utilizing one of several tests. Second, because the navigation servitude no longer attaches automatically upon a finding of navigability, judges must weigh the relative impact of numerous factors heretofore considered irrelevant. To account for this change in the law courts should apply a uniform rule of limited compensation once it is determined that the servitude attaches. This scheme would facilitate application of the revised doctrine and ensure a

100. See text accompanying notes 10-13 *supra*.

101. U.S. CONST. art. I, § 8, cl. 2.

102. 444 U.S. at 179-80.

proper balance between traditional public interests and the needs of modern developers.

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