

Case Note

Navigational Servitude—TAKING OF PROPERTY UNDER THE FIFTH AMENDMENT—Grant of public access to a body of water made navigable by artificial means held to be a taking of private property for public use requiring just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

*A navigable river is "any river with enough water in it to float a Supreme Court opinion."*¹

At common law, the public right of access to navigable waters was two-fold: the public right of navigation in waters that were navigable in fact and the public right of fishing in waters that were subject to the ebb and flow of the tide.² Dominion over bodies of water in the United States was unsettled until 1842 when the Supreme Court in *Martin v. Waddell*³ declared that navigable waters and the land under them were held prior to the American Revolution by the King as a public trust and that after the Revolution the people of each state held "the absolute right to all their navigable waters and the soils under them for their own common use."⁴ This doctrine of sovereign dominion precluded private ownership of navigable waters and the submerged beds under them and gave title to the individual states.⁵

Federal power over navigable waters depends entirely upon congressional authority under the commerce clause and not upon federal title to the water or the land below. *Gibbons v. Ogden*⁶ first established that navigation is a part of interstate commerce.⁷ Subsequent cases confirmed that congressional control over navigable waters is as broad as the commerce clause⁸ and that no private prop-

¹C. MEYERS & A. TARLOCK, WATER RESOURCES MANAGEMENT 240 (1941), quoted in *United States v. Kaiser Aetna*, 408 F. Supp. 42, 49 (D. Hawaii 1976), *rev'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979).

²*Reece v. Miller*, 8 Q.B.D. 626 (1882); *Murphy v. Ryan*, 2 Ir. C.L.R. 143 (1868). 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. 513, 584-87 (1975).

³41 U.S. (16 Pet.) 366 (1842).

⁴*Id.* at 410.

⁵Congress ratified this judicial construction in 1953 by passage of the Submerged Lands Act, which gave to the respective states unqualified title to lands beneath navigable waters. Pub. L. No. 31, 67 Stat. 30 (codified at 43 U.S.C. § 1311 (1976)).

⁶22 U.S. (9 Wheat.) 1 (1824).

⁷*Id.* at 190.

⁸*United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956); *United States v.*

erty rights exist in the waters themselves.⁹ In *United States v. Twin City Power Co.*,¹⁰ the Supreme Court summarized federal power over property rights in these broad terms:

The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called "a dominant servitude." . . .

. . . .

It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute "private property" within the meaning of the Fifth Amendment.¹¹

Contrary to the apparently well-established principle stated in *Twin City Power* that federal power over navigation is exclusive, the Supreme Court has recently recognized for the first time a private property interest in a navigable body of water. In *Kaiser Aetna v. United States*,¹² the public right of access amounted to a taking of property requiring reasonable compensation under the fifth amendment.¹³

Kaiser Aetna involved a body of water, Kuapa Pond, that became navigable by virtue of man-made development.¹⁴ Although waters made navigable by artificial means have long been included in the sweep of federal power over navigation,¹⁵ the fact that a

Appalachian Elec. Power Co., 311 U.S. 377, 426 (1940); *Zabel v. Tabb*, 430 F.2d 199, 203 (5th Cir. 1970). See *City of Tacoma v. Taxpayers*, 357 U.S. 320, 334 (1958); *City of Eufaula v. United States*, 313 F.2d 745, 747 (5th Cir. 1963).

⁹*United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). Holding that riparian owners have no property right in the water power inherent in the river, the Court stated: "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable." *Id.* at 69.

¹⁰350 U.S. 222 (1956).

¹¹*Id.* at 224-25.

¹²444 U.S. 164 (1979).

¹³*Id.* at 180.

¹⁴There was evidence that the pond in *Kaiser Aetna* was navigable before improvement. The district court had found that "the Pacific tides ebb and flowed over Kuapa Pond in its pre-marina state." *United States v. Kaiser Aetna*, 408 F. Supp. 42, 50 (D. Hawaii 1976), subsequent history quoted in *Kaiser Aetna v. United States*, 444 U.S. at 181-82 n.1 (Blackmun, J., dissenting). That tidal ebb and flow is a valid test of navigability is in dispute. See note 49 *infra*.

¹⁵See notes 52-54 *infra* and accompanying text.

private party had engaged in costly and extensive development may have been a crucial factor in the decision.¹⁶ The history of the pond, summarized below, is essential to an understanding of the *Kaiser Aetna* opinion.

I. THE HISTORY OF KUAPA POND

Kuapa Pond was a 523 acre lagoon in Oahu, Hawaii, adjacent to Maunalua Bay, a navigable body of water, and separated from the bay by a sand bar formed by natural accretions. Prior to 1961, it was used exclusively as a fishpond. Under the Hawaiian feudal system in existence until 1848, tribal chiefs who owned the fishponds allocated fishing rights to subchiefs, land agents, and vassals, subject always to the will of the chief. No public right to fish was recognized. During this period, the Hawaiians reinforced the sand bar separating Kuapa Pond from the bay with stone walls, into which they built sluice gates in order to use the tidal action for raising and catching fish.

Title to Kuapa Pond, presently vested in Bishop Estate, can be traced back to 1848 when, as part of a national land division known as the Great Mahele, King Kamehameha III distributed land and water units called "ahupuaas" to his subjects. In 1961, Kaiser Aetna leased the Kuapa Pond area from Bishop Estate for the purpose of building a housing development and constructing a marina. In addition to dredging and filling parts of the pond and erecting retaining walls and bridges, Kaiser Aetna also dredged an eight foot channel between Kuapa Pond and Maunalua Bay to allow boats from the marina access to the bay. Both residents and nonresidents of the Kaiser Aetna subdivision pay seventy-two dollars annually for the right to moor their boats in the marina and travel across Kuapa Pond into the bay.

Kaiser Aetna notified the Corps of Engineers of its plans in 1961, and again when it contemplated dredging a channel to the bay. The Corps at all times acquiesced. A letter from Kaiser Aetna stating that "[i]t is our understanding that no separate federal permit will be required for this construction, and that there will be no requirement for public use or control of any waters on the Kuapa Pond side of the bridge" was unanswered.¹⁷

In 1972 the Corps of Engineers declared Kuapa Pond to be navigable. Subsequently, the Corps petitioned the District Court of Hawaii for a declaratory judgment that Kaiser Aetna must obtain

¹⁶The Court noted that petitioners had invested millions of dollars in the improvement. 444 U.S. at 169.

¹⁷United States v. Kaiser Aetna, 408 F. Supp. at 47 n.4.

permission pursuant to section 10 of the Rivers and Harbors Act¹⁸ for any future construction in the marina and that the public has a right of public access to Kuapa Pond since it is now a navigable water of the United States.

In its defense, Kaiser Aetna denied that the pond was navigable and contended that a declaration of public navigability violated the fifth amendment prohibition against the taking of private property without compensation. The district court held that although Kuapa Pond had become navigable waters, the United States could not appropriate the pond for public use without compensation.¹⁹ The Court of Appeals for the Ninth Circuit reversed, holding that the public had the right of navigational use of the waters.²⁰ The Supreme Court reversed the decision of the court of appeals and held that the imposition of navigational servitude upon Kuapa Pond required the invocation of eminent domain power and the payment of just compensation.²¹

Two significant facts emerge from the history of Kuapa Pond: The pond has always been private property under Hawaiian law,²² and the pond was not navigable before its development into a marina.²³ These facts undoubtedly influenced the Court to recognize a compensable interest in navigable waters by restricting the ap-

¹⁸33 U.S.C. § 403 (1976). Section 10 provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, 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 port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel 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 same.

¹⁹United States v. Kaiser Aetna, 408 F. Supp. at 54.

²⁰United States v. Kaiser Aetna, 584 F.2d 378, 384 (9th Cir. 1978).

²¹444 U.S. at 180.

²²United States v. Kaiser Aetna, 408 F. Supp. at 46. The district court noted that the Organic Act of 1900, ch. 339, § 95, 31 Stat. 160 (codified at 48 U.S.C. § 506 (1976)), had given the public free access to sea water fisheries, but that the Supreme Court had also recognized a property right in these fisheries. 408 F. Supp. at 51 (citing *Damon v. Hawaii*, 194 U.S. 154 (1904)). Fishponds are still subject to private ownership. 408 F. Supp. at 51. The court did not discuss whether navigable fishponds are susceptible to private property rights under Hawaiian law.

²³*But see* United States v. Kaiser Aetna, 408 F. Supp. at 47; note 14 *supra*.

plication of the doctrine of navigational servitude, the doctrine which gives the government an absolute right of public access to navigable waters. In this decision, the Court has significantly altered the traditional concepts of navigational servitude, navigability, and taking, all of which prescribe congressional powers over American waters.

II. NAVIGATIONAL SERVITUDE AND THE COMMERCE CLAUSE

The nature of federal authority under the commerce clause was first described by Justice Marshall in *Gibbons v. Ogden*:²⁴ "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."²⁵ This recognition of plenary power in Congress, even in areas where Congress has not acted, helped to shape a national policy of fostering an environment for the free development of national trade and transportation unrestricted by state or private interests. As the country expanded and grew increasingly industrial, congressional power under the commerce clause seemed limitless.²⁶

From the beginning, navigation has been subject to broad federal control. In *Gibbons v. Ogden*, Justice Marshall explained that navigation is central to the commerce clause power:

All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense; and the attempt to restrict it comes too late.²⁷

The regulation of navigable waters as part of the federal control of interstate transportation has expanded to include watershed

²⁴22 U.S. (9 Wheat.) 1 (1824).

²⁵*Id.* at 195.

²⁶See, e.g., *Scarborough v. United States*, 431 U.S. 563 (1977); *United States v. Sullivan*, 332 U.S. 689 (1948); *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942).

²⁷22 U.S. (9 Wheat.) at 190.

development, flood control, and the production of electric power.²⁸ For the exercise of federal authority, there need only be navigability,²⁹ and some link, however tenuous, to interstate commerce.³⁰

Navigational servitude is a dominant federal easement over all navigable waters of the United States.³¹ Similar to the common law right of public access to navigable waters, this right arose in the United States under the commerce clause as a national policy of maintaining navigable streams as "common highways . . . forever free."³² During the judicial expansion of activities subject to regulation under the commerce clause, the term navigational servitude never lost its historic definition: the power to control navigation.

Although no one owns the water of a navigable stream, federal dominant servitude is a concept of property law. Prior to *Kaiser Aetna*, no taking could result when the servitude was exercised.

It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.³³

In *Kaiser Aetna*, the government contended that Kuapa Pond was a navigable water over which the public has a "federally protected right of navigation."³⁴ Although the Court conceded that Kuapa Pond was navigable, it refused to find a noncompensable

²⁸The authority of the government over navigation is "as broad as the needs of commerce." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940). See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

²⁹See text accompanying notes 48-57 *infra*.

³⁰Recreational use by out-of-state visitors of Lake Wawasee, an intrastate lake, was a sufficient link to interstate commerce in *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (wetlands contiguous to lake subject to regulation as navigable waters under the commerce clause).

³¹*United States v. Grand River Dam Auth.*, 363 U.S. 229, 231 (1960); *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956) (citing *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736 (1950)); *Sherrill v. United States*, 381 F.2d 744 (Ct. Cl. 1967). See *Gibson v. United States*, 166 U.S. 269, 271 (1897); Trelease, *Federal Limitations on State Water Law*, 10 BUFF. L. REV. 399, 407-08 (1961).

³²Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, at 51 n.(a) (Act providing for the governing of the Northwest Territory), quoted in *Kaiser Aetna v. United States*, 444 U.S. at 186 (Blackmun, J., dissenting).

³³*United States v. Kansas City Ins. Co.*, 339 U.S. 799, 808 (1950). See generally Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 ORE. L. REV. 1 (1968); Powell, *Just Compensation and the Navigation Power*, 31 WASH. L. REV. 271 (1956).

³⁴444 U.S. at 170 (quoting Brief for the United States at 13).

public right of access based upon navigational servitude, preferring to rest its decision upon "more traditional Commerce Clause analysis."³⁵ Because any activity affecting commerce may be regulated under the commerce clause, the Court stated that governmental authority over water does not depend upon navigability.³⁶ In support, the Court quoted the following language from *United States v. Appalachian Power Co.*:³⁷ "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole."³⁸ The Court in *Appalachian Power* did not, however, assert that congressional power over navigation can be exercised in the absence of navigability. The Court merely stated that federal authority over waters is not limited to navigation; it may encompass a number of other activities, such as flood control and watershed development.³⁹

Having thus stated that regulatory power is broader than, and not coextensive with, navigational servitude, the Court in *Kaiser Aetna* held that although the government may freely regulate Kuapa Pond in the interests of navigation or commerce,⁴⁰ the grant of a public right of access amounted to a taking.⁴¹ The Court's conception of navigational servitude is a radical change from prior cases. Although the parameters of the servitude have never been explicitly defined,⁴² the aspect of the servitude that has distinguished it from other powers under the commerce clause is that it may be exercised without compensation. Nevertheless, the Court stated that it "has never held that the navigational servitude creates a blanket exception to the Takings Clause."⁴³ Because

³⁵444 U.S. at 174.

³⁶*Id.*

³⁷311 U.S. 377 (1940).

³⁸*Id.* at 426-27, quoted in *Kaiser Aetna v. United States*, 444 U.S. at 173.

³⁹*Id.*

⁴⁰444 U.S. at 174.

⁴¹*Id.* at 179-80.

⁴²In *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960), the government argued that the servitude extends also to nonnavigable waters. The Court did not reach that issue. *Id.* at 232. In his dissenting opinion in *Kaiser Aetna*, Justice Blackmun made the following statement regarding the limits of the servitude: "To sustain its holding . . . I believe that the Court must prove that the navigational servitude does not extend to waters that are clearly navigable and fully subject to use as a highway for interstate commerce." 444 U.S. at 185 (Blackmun, J., dissenting).

One commentator has noted that since the decision in *Appalachian Power* the government has won every case on the issue of navigability. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 5 (1963). The author has discovered no cases since 1963 in which the government has lost on that issue.

⁴³444 U.S. at 172.

navigational servitude has been by definition a taking without compensation, there seems to be no logical support for this statement.⁴⁴

The Court did not, in fact, impose navigational servitude upon Kuapa Pond. Redefining the servitude to include only waters that are navigable in fact in their natural state, the Court held that creation of a right of public access was a regulation that amounted to a taking.⁴⁵ In summary, the Court said that waters may be regulated under the commerce clause regardless of navigability, but that a noncompensable public right of navigation only arises when the waters are, in fact, already public highways of commerce.

This retreat from previously firm ground seems to have been influenced by two factors in the case: That public access would result in a severe deprivation of Kaiser Aetna's economic rights,⁴⁶ and that the pond was made navigable by privately-funded investment.⁴⁷ In this respect, the decision is representative of the Court's renewed interest in the protection of economic and property rights. In any case, a definition of navigability, at least for purposes of navigational servitude, must now include a consideration of the extent of artificial improvements.

III. NAVIGABILITY

The Supreme Court first defined navigable waters in *The Daniel Ball*.⁴⁸ Rejecting the common law doctrine that navigable waters are those subject to the ebb and flow of the tide,⁴⁹ the court formulated a new definition:

⁴⁴The dissent concluded that the navigational servitude extends to privately enhanced waters such as Kuapa Pond, but it treated the matter of compensation as a separate question. *Id.* at 187 (Blackmun, J., dissenting). Compensation would never be required when the right being valued is access to the waters. *Id.* at 189-90. Both the majority and the dissenters occasionally use the term to mean something other than a right of access without compensation. After *Kaiser Aetna*, navigational servitude is open to various interpretations, including simply a right of government regulation.

⁴⁵444 U.S. at 178.

⁴⁶*Id.* at 178-79.

⁴⁷*Id.* The Court's test for navigability did not include tidal ebb and flow. *See* note 14 *supra*. *See also* text accompanying notes 92-95 *infra*.

⁴⁸77 U.S. (10 Wall.) 557 (1870).

⁴⁹The Court rejected the ebb and flow test as unsuitable for rivers, noting that the doctrine arose in England, an island country. *Id.* at 563. Justice Blackmun made this distinction in his dissenting opinion in *Kaiser Aetna*. 444 U.S. at 182-83 (Blackmun, J., dissenting). The definition that prescribes the jurisdiction of the Corps of Engineers includes the ebb and flow standard:

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign

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.⁵⁰

This definition has often been cited, and considerably expanded, in commerce clause, admiralty, and federal title cases.⁵¹ In *United States v. Appalachian Power Co.*,⁵² the Court construed the phrase "susceptible of being used" to mean available for navigational use in its improved as well as its natural state.⁵³ Congress may assert its power under the commerce clause even if the improvements are not complete but merely contemplated or possible.⁵⁴ Furthermore, a stream made nonnavigable in fact by an artificial obstruction is still navigable in law.⁵⁵ A landlocked body of water may also be navigable for purposes of commerce clause regulation⁵⁶ but not for admiralty jurisdiction.⁵⁷

After *Kaiser Aetna*, the power of Congress to regulate waters that are navigable in fact is a separate issue from the imposition of navigational servitude. Although the Court conceded that Kuapa Pond is navigable, it is navigable only for purposes of regulation and not for purposes of navigational servitude because it was, in its natural state, "incapable of being used as a continuous highway for the purpose of navigation in interstate commerce."⁵⁸ Navigability thus depends, according to the Court, upon the purpose for which

commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

33 C.F.R. § 329.4 (1979).

⁵⁰77 U.S. (10 Wall.) at 563. See *The Monticello*, 87 U.S. (20 Wall.) 430, 439 (1874).

⁵¹According to the *Kaiser Aetna* opinion, the definition of navigability depends upon the purpose of the definition. 444 U.S. at 171. The navigability concept arises in three types of cases: Those arising under admiralty jurisdiction, those arising under the commerce clause, and cases concerning title to submerged beds. For a comprehensive overview of the various definitions of navigability and their historical and modern application, see MacGrady, *supra* note 2. See generally Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8.

⁵²311 U.S. 377 (1940).

⁵³*Id.* at 407. Cf. *Ex parte Boyer*, 109 U.S. 629 (1884) (wholly artificial canal subject to federal admiralty jurisdiction).

⁵⁴311 U.S. at 407.

⁵⁵*Economy Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921).

⁵⁶*United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979). See note 30 *supra*.

⁵⁷*The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *Oseredzuk v. Warner Co.*, 354 F. Supp. 453 (E.D. Pa. 1972); *Shogry v. Lewis*, 225 F. Supp. 741 (W.D. Pa. 1964).

⁵⁸444 U.S. at 178. But see *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

the term is used,⁵⁹ and not upon the actual condition, or current use, of the waters. In this instance, however, the Court does not directly address the purpose for which the definition is invoked, but rather the circumstances under which navigability arose, that is, substantial private investment that converted the pond into an interstate seaway.⁶⁰

In his dissent, Justice Blackmun defined the purpose of the servitude as protection of navigation in interstate commerce:

The Court [has previously] recognized that what is at issue is a matter of power, not of property. The servitude, in order to safeguard the Federal Government's paramount control over waters used in interstate commerce, limits the power of the States to create conflicting interests based on local law. That control does not depend on the form of the water body or the manner in which it was created, but on the fact of navigability and the corresponding commercial significance the waterway attains. Wherever that commerce can occur, be it Kuapa Pond or Honolulu Harbor, the navigational servitude must extend.⁶¹

Significantly, Justice Blackmun did not entirely reject the notion that imposition of the servitude may include the right to compensation. Applying a balancing test of public and private interests, Justice Blackmun concluded that whenever the value to the private party is access to, or use of, navigable waters, the value is non-compensable.⁶² This view closely conforms to the original purpose of government control over waters—protection of freedom of movement over interstate waters.

The majority opinion introduces into the area of navigation cases what Justice Blackmun termed "new legal uncertainty."⁶³ Whenever the government wishes to acquire public access to waters in the future, it must now consider whether the water was naturally navigable, to what extent artificial improvements aided in its navigability, and, possibly, whether the size of private investment requires that the government interference be considered a taking.

⁵⁹444 U.S. at 170-71.

⁶⁰This fact was deplored by Justice Blackmun in the dissenting opinion: "The Court's opinion also embraces, distressingly for me, an implication that the *amount* of the private investment somehow influences the legal result. . . . I would think that the consequences would be the same whether the developer invested \$100 or, as the Court stresses, . . . 'millions of dollars.'" *Id.* at 183-84 n.2 (Blackmun, J., dissenting).

⁶¹*Id.* at 187.

⁶²*Id.* at 190.

⁶³*Id.* at 191.

IV. THE TAKING ISSUE IN *KAISER AETNA*

Prior to *Kaiser Aetna*, the Supreme Court had never recognized a compensable property interest in navigable waters. In *United States v. Chandler-Dunbar Water Power Co.*,⁶⁴ the Court denied compensation for the water power inherent in the flow of a stream, stating that "[t]he requirement of the fifth amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained."⁶⁵ Title to the riverbed as well as the bank gave the owner no ownership rights in the river.⁶⁶ Having no title to the waters themselves, the owner had lost nothing. Again in *United States v. Appalachian Electric Power Co.*,⁶⁷ the Court reiterated that there are no private property rights in a navigable stream, stating that the flow of a stream has no "assessable value to the riparian owner."⁶⁸

In cases involving condemnation of fast lands, the standard for compensable damages is generally the same standard announced in *Chandler-Dunbar*. The owner must be paid for what he has lost, but he cannot be paid for a property interest he never had. As the Court explained in *United States v. Rands*,⁶⁹ navigational servitude stops at the high-water mark. Therefore, the riparian owner has no compensable interest in access to a navigable stream or in its location as a port site or a power site.⁷⁰ Although the government is required to pay the fair market value for condemned fast lands, it has never been required to pay for those benefits that accrue by reason of the land's proximity to a navigable stream.⁷¹

The facts of *Kaiser Aetna* are, as the Court noted, quite different from riparian condemnation cases,⁷² yet the Court awarded damages according to the standard used in these cases—compensation for what the owner has lost. The difference is that in *Kaiser*

⁶⁴229 U.S. 53 (1913).

⁶⁵*Id.* at 76 (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 194-95 (1909)).

⁶⁶229 U.S. at 69.

⁶⁷311 U.S. 377 (1940).

⁶⁸*Id.* at 424. The Court rejected the petitioner's constitutional challenge to section 14 of the Water Power Act of 1920, ch. 285, 41 Stat. 1071, as amended by Public Utility Holding Company Act of 1935, ch. 687, § 207, 49 Stat. 844 (current version at 16 U.S.C. § 807(a) (1976)), which provides that at the expiration of the license, the government may acquire and operate the project by paying the licensee's net investment. The Court stated that the provision was not a taking of property without due process. 311 U.S. at 427-28.

⁶⁹389 U.S. 121 (1967).

⁷⁰*Id.* at 123.

⁷¹*Id.* at 123-24 (citing *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 629 (1961); *United States v. Twin City Power Co.*, 350 U.S. 222, 226 (1956)).

⁷²444 U.S. at 176.

Aetna what the owner had lost was a state-created, private interest in an aquatic development: "[A]s previously noted, Kuapa Pond has always been considered to be private property under Hawaiian law. Thus, the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water."⁷³

The Supreme Court has never formulated specific standards for what constitutes a taking requiring compensation under the fifth amendment. In *Penn Central Transportation Co. v. New York City*,⁷⁴ the Court surveyed prior cases that had addressed the taking issue, characterizing these cases as "essentially ad hoc, factual inquiries" dependent upon the circumstances in each case.⁷⁵ The inquiry is a balancing test, balancing the character and purpose of the government action against the extent and nature of the interference with private property rights.⁷⁶ In measuring the extent of governmental interference, the Court will consider the economic impact upon the property, particularly if there is a frustration of "distinct, investment-backed expectations."⁷⁷ If the government action serves a "substantial public purpose," however, there is likely to be no taking despite severe diminution or even destruction of property values.⁷⁸ On the other hand, actual physical invasion of private property is generally held to be a taking.⁷⁹

In order to find a taking, the Court must find a property interest that has been interfered with. The Court in *Penn Central* stated that the interest must be "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."⁸⁰ In support of this statement, the Court cited *United States v. Willow River Power Co.*⁸¹ and *United*

⁷³*Id.* at 179. The striking similarity that the Court finds between an interest in fast lands and Kaiser Aetna's interest in the marina is apparently based upon traditional Hawaiian property law. *See id.* at 191-92 (Blackmun, J., dissenting); text accompanying notes 84-86 *infra*.

⁷⁴438 U.S. 104 (1978).

⁷⁵*Id.* at 124.

⁷⁶*Id.* at 130-31.

⁷⁷*Id.* at 124 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

⁷⁸*Id.* at 125-27.

⁷⁹*Id.* at 128 (citing *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *United States v. Cress*, 243 U.S. 316 (1917)).

⁸⁰438 U.S. at 125. The Court rejected the owner's argument that denial of the right to build a multi-story office building on top of Grand Central Terminal destroyed a valuable property interest—the right to profitable use of the airspace above the terminal. Balancing the interest that the owner retained, the right to use the terminal as a terminal, against the governmental interest, promotion of the general welfare, the Court concluded that no taking had occurred. *Id.* at 138.

⁸¹324 U.S. 499 (1945).

*States v. Chandler-Dunbar Water Power Co.*⁸² for the proposition that no property interests exist in navigable waters.⁸³

To reach the contrary result in *Kaiser Aetna*, the Court took into account several factors that it had not heretofore considered relevant to a definition of property interests. For the first time, the Court looked to state law. Noting that Kuapa Pond had always been private property under state law, the Court held that the pond was a private marina, the ownership interest of which was comparable to an interest in fast lands riparian to navigable waters.⁸⁴ In this respect, the Court may have been influenced by the district court's emphasis upon traditional private property rights in fishponds and seawater fisheries, rights which existed long before the annexation of Hawaii. The district court noted, for example, that the Supreme Court had previously recognized private ownership rights in Hawaiian sea fisheries.⁸⁵ The district court also distinguished between land obtained from foreign countries that recognized public rights in navigable waters, and lands in which, prior to annexation, the government had recognized private interests in certain waters:

There is nothing inconsistent between the Hawaiian law of private ownership of fishponds and the federal power over navigation because the latter was merely a surrender of jurisdiction by the states of powers inherited from the Crown . . . — only to the extent the states had jurisdiction over waters to surrender.⁸⁶

Regarding the private property issue, the precedential value of *Kaiser Aetna* depends upon subsequent interpretation. If the opinion was based upon a recognition of what the district court described as "peculiar rights arising out of Hawaii's unique feudal system of property rights,"⁸⁷ the decision is of limited applicability. If, on the other hand, the decision is an acknowledgment that federal navigational servitude is secondary to state-recognized property interests,⁸⁸ it is an obvious change in judicial recognition of ownership rights in navigable waters, affecting those owners who have title to lands adjacent to, or submerged beneath, bodies of water.

The Court also found that the owner's private rights were enhanced by the acquiescence of the Corps of Engineers in the dredging and improvement of the pond, leading to "a number of expectan-

⁸²229 U.S. 53 (1913).

⁸³438 U.S. at 125.

⁸⁴444 U.S. at 179.

⁸⁵408 F. Supp. at 51 (citing *Damon v. Hawaii*, 194 U.S. 154 (1904)).

⁸⁶*Id.* at 52 n.24.

⁸⁷*Id.* at 51.

⁸⁸See *Kaiser Aetna v. United States*, 444 U.S. at 192 (Blackmun, J., dissenting).

cies embodied in the concept of 'property.'"⁸⁹ This language bears a striking resemblance not only to the "reasonable expectations" mentioned in *Penn Central*, which were insufficient for claiming an interest in navigable waters,⁹⁰ but also to the "reasonable investment-backed expectancies" which the *Penn Central* Court considered a relevant factor in deciding whether governmental action constituted a taking. The extent of private investment, mentioned by the Court in *Penn Central* as a measure of government interference with property interests, is used here as a characteristic of ownership. A consideration of private investment in this context is more properly characterized by Justice Blackmun in his dissent as a "balance of interests on the question whether the exercise of the servitude in favor of public access requires compensation to private interests where private efforts are responsible for creating 'navigability in fact.'"⁹¹

Finally, the Court refused to apply the rule in *Chandler-Dunbar* that there can be no private ownership of a navigable body of water, stating that Kuapa Pond was not the sort of "great navigable stream" to which the rule applies.⁹² This conclusion rests upon the finding that the pond was nonnavigable in its natural state. Although the pond was subject to the ebb and flow of the tides, and thus subject to regulation by the Corps of Engineers,⁹³ the Court refused to apply this "mechanical" test for the purpose of invoking navigational servitude.⁹⁴ The Court did not decide whether the new test for imposition of the servitude—natural navigability in fact—would, by itself, be enough.⁹⁵

Having found that Kuapa Pond was private property, the Court easily resolved the taking issue. The creation of public access was not only a physical, governmental invasion of private property but also a deprivation of an essential incident of ownership—the right to exclude others.⁹⁶

V. CONCLUSION

Kaiser Aetna represents an attempt to reconcile two contradictory legal principles. The first is that navigational servitude is, by

⁸⁹444 U.S. at 179.

⁹⁰See text accompanying notes 80-83 *supra*.

⁹¹444 U.S. at 181 (Blackmun, J., dissenting).

⁹²*Id.* at 178-79.

⁹³See the Corps' definition of navigability at note 49 *supra*.

⁹⁴444 U.S. at 178-79 n.10.

⁹⁵See *id.* at 178 n.9.

⁹⁶*Id.* at 179-80. By contrast, Justice Blackmun concluded that *Kaiser Aetna* had been allowed to appropriate navigable waters for private use. *Id.* at 191 (Blackmun, J., dissenting).

definition, an absolute right of public access to navigable waters. The second is that the government may not take private property for public use without just compensation. The Court solved its dilemma by redefining navigability in terms of the purpose of the definition. For the purpose of invoking navigational servitude, the term "navigable" applies, after *Kaiser Aetna*, only to a body of water navigable in fact in its natural state. Public navigational and fishing rights do not automatically arise when water becomes navigable by artificial means. Thus, in *Vaughn v. Vermilion Corp.*,⁹⁷ a companion case to *Kaiser Aetna*, the Court denied a public right of access to a system of navigable canals that had been artificially created with private funds.⁹⁸

Regulatory authority over navigable waters is apparently unchanged by *Kaiser Aetna* and remains as broad as the needs of commerce.⁹⁹ Still undecided is the point at which the regulation becomes a taking. In the past, the Court has cited cases defining navigability without distinguishing between admiralty, federal title, and commerce clause cases, and, as one critic noted, often without realizing the difference.¹⁰⁰ The Court must now use the term with more precision so that cases involving navigation will not become, like the taking cases, a series of "ad hoc, factual inquiries."¹⁰¹

JOAN M. RUHTENBERG

⁹⁷444 U.S. 206 (1979).

⁹⁸*Id.* 208-10.

⁹⁹See note 28 *supra*.

¹⁰⁰MacGrady, *supra* note 2, at 587 n.401.

¹⁰¹*Penn Central Transp. Co. v. New York City*, 438 U.S. at 124, *cited in Kaiser Aetna v. United States*, 444 U.S. at 174-75.