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## Eminent Domain--Just Compensation for Fast Land

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**Eminent Domain—Just Compensation for Fast Land**

The respondent owned riparian land which he had leased to the state, giving the state an option to purchase, since it was contemplated that the state would locate a port facility on the land. The United States Government, however, condemned the land in conjunction with a congressionally authorized lock and dam project and subsequently conveyed the land to the state at a price considerably less than the option price. The compensable value of the land determined by the judge in the condemnation action was limited to its value for sand, gravel, and agricultural purposes; the special value of the land as a port site was not considered, and as a result, the ultimate award to the respondent was approximately one-fifth of the claimed value of the land as a port site. The Court of Appeals for the Ninth Circuit reversed the decision, holding that port site value is compensable under the fifth amendment. Subsequently, the United States Supreme Court granted certiorari. *Held*, reversed. The port site value is not considered inherent in the land itself and therefore need not be considered when determining just compensation for the land. *United States v. Rands*, 389 U.S. 121 (1967).

The *Rands* decision follows the principles presented in *United States v. Twin City Power Co.*<sup>1</sup> and serves to reaffirm the Court's position with respect to the compensable value of fast land<sup>2</sup> taken by the government in eminent domain proceedings. In future condemnation actions these two cases will undoubtedly be relied upon by the government in attempting to avoid compensation for special value due to the riparian location of condemned land.

The authority of the government to exercise control over the navigable waters of the United States derives from the commerce clause<sup>3</sup> and, as public property of the citizenry, these waters are subject to legislation by Congress.<sup>4</sup> Thus, lands adjacent to and beneath navigable waters have become subject to a public easement, vesting in the government a "dominant servitude" or "superior navigational easement." This power of the government has been described generally as a privilege of noncompensatory appropriation incident to

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<sup>1</sup> 350 U.S. 222 (1956).

<sup>2</sup> "High water mark bounds the bed of the river. Lands above it are fast lands . . ." *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945).

<sup>3</sup> U.S. CONST. art. I, § 8.

<sup>4</sup> *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865).

governmental control over navigable waters essential to the flow of commerce.<sup>5</sup>

In accordance with the fifth amendment, the damages awarded to any property owner whose land is condemned must constitute just compensation; however, until recently the guidelines of the Court as to what constitutes just compensation have been vague when applied to condemnation proceedings concerned with fast lands.<sup>6</sup> The *Rands* and *Twin City* cases solidly affirm that when the government appropriates fast lands in the interest of navigation, just compensation does not include the value of the land as a site for port facilities or hydro-electric power operations. In *Twin City*, the Court said that the landowner was seeking "a value in the flow of the stream, a value that inheres in the Government's servitude"<sup>7</sup> and that the location of the property was "due to the flow of the stream; and if the United States were required to pay the judgments below it would be compensating the landowners for the increment of value added to the fast lands if the flow of the stream were taken into account."<sup>8</sup> In the *Rands* case, the Court resolved the same issue and commented, "All this was made unmistakably clear in *United States v. Twin City Power Co.*"<sup>9</sup>

Before the *Twin City* and *Rands* decisions, the Court did not consistently deny the possibility of a riparian landowner being compensated for the added property value attributable to location on a navigable river. In *United States v. Virginia Electric and Power Co.*,<sup>10</sup> the Court was confronted with the problem of determining just compensation for a flowage easement over fast land which was condemned by the government and held that there could be no recovery for rights that would be valuable only if the government chose to cause flooding. However, the Court also observed that "[t]he guiding principle of just compensation is reimbursement to the owner for the property interest taken. In many cases this principle can readily be

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<sup>5</sup> *United States v. Virginia Elec. and Power Co.*, 365 U.S. 624 (1960).

<sup>6</sup> In *United States v. Virginia Elec. and Power Co.*, 365 U.S. 624, 629 (1960), the Court observed that property above the high-water mark of a stream is not subject to the navigational servitude in favor of the government, but "the privilege does affect the measure of damages when such land is taken."

<sup>7</sup> *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956) (emphasis added).

<sup>8</sup> *Id.* at 226.

<sup>9</sup> 389 U.S. 121, 124 (1967).

<sup>10</sup> 365 U.S. 624 (1960).

served by the ascertainment of fair market value."<sup>11</sup> In spite of this language, which seemingly indicates that fair market value is a key factor in determining just compensation, the Court held that "the nonriparian value of the servient land"<sup>12</sup> was the appropriate general standard to be referred to in valuing the particular interest in question. Other cases have held that the fair market value includes the highest and most profitable use of the land,<sup>13</sup> special value,<sup>14</sup> and loss to the owner,<sup>15</sup> nevertheless, the final authority is in *Twin City* and *Rands* where the Court held that any specially added value of riparian land because of its close proximity to a flowing stream will not be considered in determining fair market value after condemnation.

The problem of just compensation was also treated in *United States v. Chandler-Dunbar Water Power Co.*,<sup>16</sup> however, the result in this case was somewhat confusing. The government had condemned two pieces of riparian property, one of which was to be used as a power site, and the other for a lock and canal area. In awarding compensation no special value was attached to the power site property due to its close proximity to flowing water.

In contrast to this, the Court said that the other property, which was to be used as a lock and canal area, had special value apart from the flow of the stream. This was because the locks and canal would aid navigation and because this particular piece of land was the only acceptable site in the vicinity. In neither the *Twin City* case nor the *Rands* case does the Court thoroughly explain this value distinction.<sup>17</sup> However, the Court in *Rands* does indicate that if *Chandler-*

<sup>11</sup> *United States v. Virginia Elec. and Power Co.*, 365 U.S. 624, 633 (1960). In *United States v. Miller*, 317 U.S. 369, 374 (1943), the Court described fair market value as "what a willing buyer would pay in cash to a willing seller." The Court in *Olson v. United States*, 292 U.S. 246, 255 (1934), citing *Minnesota Rate Cases*, 230 U.S. 352, 354 (1913), maintains that a property owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken."

<sup>12</sup> *United States v. Virginia Elec. and Power Co.*, 365 U.S. 624, 635 (1960).

<sup>13</sup> *McCandless v. United States*, 298 U.S. 342 (1936).

<sup>14</sup> *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403 (1879).

<sup>15</sup> *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

<sup>16</sup> 229 U.S. 53 (1913).

<sup>17</sup> In *United States v. Twin City Power Co.*, 350 U.S. 222, 226 (1956), Mr. Justice Douglas refers to this value distinction only briefly. "It may be that the Court was influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation. Whatever may be said for that phase of the case, it affords no support for the respondent, since water-power value . . . was ruled to be noncompensable in the *Chandler-Dunbar* case."

*Dunbar* "is to any extent inconsistent with *Twin City*, it is only the latter which survives."<sup>18</sup>

Actual condemnation or appropriation of land is not always necessary for these valuation rules to become applicable. In *United States v. Commodore Park Inc.*,<sup>19</sup> the government deposited dredged materials into a navigable creek rendering it un-navigable; consequently, the owner of the property contiguous to the creek asked the government for compensation since the fast lands adjacent to the creek were substantially decreased in market value. But, the court held that "whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the Government's 'absolute power', in the interests of commerce, to make necessary changes in a stream."<sup>20</sup>

In *United States v. River Rouge Improvement Co.*,<sup>21</sup> the Court held that when government improvements to appropriated riparian land increase the value of other land held by the former owner, the value of the improvements shall be subtracted from the compensation due the former owner for the condemned land. Arguments have been made stressing that if increased property value due to riparian location can be used as a factor to a landowner's disadvantage when determining just compensation, consistency demands that the increased value factor also be recognized when it works to the landowner's advantage. The *Rands* decision, however, asserted that there is no inconsistency or inequity in the *River Rouge* holding which merely insured that private landowners do not receive a windfall at the expense of the public.

In the *Twin City* case the Court affirmed that just compensation for fast lands condemned by the government for navigational purposes does not include any specially added value attributable to the location of the land and its potential as a power site. "If the owner of fast lands can demand water-power value as a part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses."<sup>22</sup> It is to be noted, however, this case was a five to four decision, and the dissent strongly urged the application of fair market value in com-

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<sup>18</sup> *United States v. Rands*, 389 U.S. 121, 126 (1967).

<sup>19</sup> 324 U.S. 386 (1945).

<sup>20</sup> *Id.* at 391 citing *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865).

<sup>21</sup> 269 U.S. 411 (1926).

<sup>22</sup> 350 U.S. at 228.

pensating the landowner. Consequently, it was not until the *Rands* decision in 1967 that the Court's position was made concrete. The two cases make it evident that the Court will strictly support the right of the Government to limit just compensaion by excluding from fair market value certain property values that are inurements derived from the flow of the river. The dominant servitude of the government is thus extended into the flow of the river, and value imported to riparian property by the flow is not an asset of private ownership in the view of the Court.

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### Guardian and Ward—Jurisdiction to Award Custody

Carmella Falco was the sole survivor of an automobile accident which occurred in Virginia, in which her parents, who were New York residents, were killed. The child was hospitalized in Virginia for six weeks. Wallace Grills, an uncle from Tennessee, petitioned a Virginia court to award him custody of the child. Another uncle, Frank Falco of New York, filed a petition to intervene in the proceedings, alleging that he had been appointed guardian of Carmella by a New York court. The Virginia court awarded custody of the child to Grills and the decision was appealed to the Supreme Court of Appeals of Virginia. Held, *affirmed*. The Virginia court has jurisdiction to award the custody of the child and is not required to give full faith and credit to the *ex parte* decree of the New York court which had appointed Falco to be the child's guardian. *Falco v. Grills*, 161 S.E.2d 713 (Va. 1968).

In order for the court in *Falco* to award custody of Carmella, it was first necessary to deal with the prior New York decree. Accordingly, the court first considered the effect of not enforcing the New York decree without violating the full faith and credit clause of the United States Constitution. This was ultimately accomplished by determining that the full faith and credit clause did not apply to custody cases. In so holding, Virginia joined several other states which have reached a similar result.<sup>1</sup>

Having determined that full faith and credit was inapplicable, the court in *Falco* then considered whether it had jurisdiction to award

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<sup>1</sup> *Eg.*, *Bachman v. Mejias*, 1 N.Y.2d 575, 580, 136 N.E.2d 866, 868 (1956); *In re Burns*, 194 Wash. 293, 304, 77 P.2d 1025, 1029 (1938); *Metz v. Morley*, 289 N.Y.S.2d 364, 367 (1968).