THE FEDERAL POWER ACT.

The states in which are situate the public lands, containing abundant water and potential water power, had for many years prior to the World War urged the privilege of fuller development on these lands of hydro-electric power and storage facilities for irrigation, to serve the industrial and agricultural welfare of such states. The shortage of coal supply and the needs of industry and agriculture, during the war, caused a recognition that the hydro-electric development within the United States was below that of other industrial nations. The above facts, together with the desire of Congress for national control, resulted in the Act of Congress, approved June 10, 1920,[1] known as the Federal Power Act, being endorsed as an administration measure during President Wilson's term.

Certain legislative history of the Act is well stated as follows:

"This Act is the fruit of two independent bills introduced in the Congress more than five years ago. One of them, called the Navigable Water Bill, was designed for the construction of dams and reservoirs in navigable waters, for the double purpose of improving navigation and the harnessing of the surplus water in rocky and shoaly courses, where it was deemed best by Congress under the plan to improve the navigability by the slack-water method; the other, called the Public Land Bill, had for its main purposes the devotion of flowing streams to power uses and for the impounding of water on the government domain or reservation for irrigation in furtherance of farm development.

"The two bills had one element in common—the development of power. The first sought to confer jurisdiction or administration upon the Secretary of War; the other conferred like power on the Secretary of Interior and the Secretary of Agriculture. These measures never became laws because the Senate and the House of Representatives could not agree upon the forms and all the provisions. Finally the two pieces of proposed legislation were in material respects combined into the one now called the Federal Water Power Act." [2]

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[1] 41 Stat. at L. 1063.

[2] Alabama Power Co. v. Gulf Power Co., 283 Fed. 606, 609.

The Federal Power Act creates a Commission consisting of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture, which is given full authority to administer the provisions of the Act. The Commission is authorized to make investigations and collect data concerning the utilization of water resources of any region subject to development and the relation of the water power industry to other industries and to interstate and foreign commerce; and to make public the data thus secured. The Commission has the power to hold hearings and take testimony pertaining to matters which it is directed to control. Also, the Commission is empowered to issue licenses, for a period not greater than fifty years, for any physical structure necessary or convenient for a water power development, or for the utilization of water power (whether or not for the improvement of navigation), if the development, transmission and utilization of power be across, from or in any navigable waters or upon any part of the public lands. The Act provides for the Commission's control over the licensee, the licensee's development and business, and for the re-capture of complete units of water power developments.

The requirements of the Act for Federal permits, or licenses, to protect or improve navigation on the navigable waters of the United States, or for the physical use of public lands, or Government dams, demand no discussion, being beyond question a matter within Federal authority. However, the provisions of the Act which apparently assume control over all water power developments and the business administration thereof, if any part of the project is across, along, from or in navigable waters, or on public lands, or benefits by or uses a Government dam or structure, raises an issue with fundamental principles established by our national Constitution. And our purpose is to consider herein the clauses of the Act which appear to be based upon an assumption at variance with the basic law of the land. A resumé of the clauses or parts of the Act which present the issue under discussion may be stated as follows:

A. The Commission is authorized to issue licenses to citizens of the United States or to any State or municipality

thereof for constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works:

(1) For the development and improvement of navigation; and

(2) For the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or

(3) Upon any part of the public lands of the United States, or

(4) For the purpose of utilizing the surplus water or water power from any Government dam.[3]

B. All applicants for a license must submit to the Commission all plans and estimates of costs, which when approved by the Commission shall be a part of the license; and except in emergency no change or addition of plan shall be made without the consent of the Commission.[4]

C. After the first twenty years of operation, out of the surplus earned thereafter, the licensee shall establish and maintain amortization reserves, as specified in the license.[5]

D. The licensee shall pay the United States reasonable annual charges for reimbursing the United States:

(1) for the cost of administration of the Act;

(2) for the use of its lands; and

(3) for the ex-propriation to the Government of excessive profits, until the respective states shall make provision for preventing excessive profits.[6]

E. Whenever any licensee is benefited by the construction made by another licensee, or by the United States, of a storage reservoir or other headwater improvement, the licensee so benefited shall pay such annual charges thereon

[3] Sec. 4-d.
[4] Sec. 9-a.
[5] Sec. 10-d.
[6] Sec. 10-e.

to the owner of such construction as the Commission may determine.[7]

F. Upon not less than two years' notice in writing from the Commission the United States shall have the right, upon or after the expiration of any license, to take over and thereafter to maintain and operate any project or projects as defined in Section 3 and covered in whole or in part by the license, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages to property of the licensee caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project so taken it is provided shall not include, *inter alia,* good will, going value, prospective values; also values allowed for water rights, rights of way, lands or interest therein shall not exceed actual reasonable cost at the time licensee acquired same.[8]

G. If the United States does not, at the expiration of the original license, take over the project, the Commission may issue a new license to the old or to a new licensee.[9]

H. The Commission (as a condition of the license) shall regulate and control the development, transmission and public service made or rendered by any licensee, provided, however, that the Commission shall have no jurisdiction when the State shall have a commission, or other authority, for the regulation or control of the specific matter involved.[10]

I. When said power or any part thereof shall enter into interstate or foreign commerce, whenever any of the states directly concerned has not provided a Commission, or

[7] Sec. 10-f.
[8] Sec. 14.
[9] Sec. 15.
[10] Sec. 19.

other authority, to supervise rates or service or issues of securities, or the states are unable to agree through their authorities on service, or rates, or issues of securities, the Commission shall have jurisdiction to determine the same.[11]

If Federal authority exists for the broad and specific powers directed by these clauses to be exercised by the Federal Power Commission, then it necessarily follows that the franchise, giving control and regulation of all water power development, included under the Act, is vested in the United States and not in the respective States.

Fundamental laws of our dual system of government control the issue under discussion. The basic principles involved are those which determine jurisdiction over the waters within the United States and over the business and property of citizens, natural and corporate. It may aid our purpose to recall at this time the clauses of the Constitution and decisions of the Supreme Court germane to the provisions of the Act under consideration:

Sovereignty and Jurisdiction Over Waters.

When the American Revolution took place the people of each state became themselves sovereign with absolute title to the soil, streams and water of their respective States as against any other state or nation. After the formation of the United States each state continued to be vested with the sovereignty of its soil and waters, subject only to rights surrendered to the United States under the Constitution adopted.[12] Under the commerce clause of the Constitution [13] all navigable waters used, or susceptible of being used, for interstate and foreign commerce, are subject to regulations of the United States for the protection of such commerce. As jurisdiction or powers over all other navigable and all non-navigable waters were "not delegated to the United States by the Constitution nor prohibited by it to the

[11] Sec. 20.
[12] Martin v. Waddell, 16 Pet. 367.
[13] Art. 1, sec. 8.

States," such waters are, under the Tenth Amendment, reserved unto the absolute jurisdiction and control of the respective states or to the people.[14]

A state may make its classification of navigable waters, in order to determine its rules of property, or riparian rights;[15] however, under the Constitution of the United States, navigable waters must be navigable in fact, that is, used or susceptible of being used in their natural state for interstate or foreign commerce by the usual modes of transportation by water. The test of what are navigable waters under the Constitution is whether the same are used, or natural to be used, as highways of interstate or foreign commerce; it matters not whether the stream so used is broken by rapids or falls.

The first case, defining navigable waters under the Constitution, to add the phrase "or susceptible of being used" in interstate or foreign commerce was *The Daniel Ball.*[16] The significance of the words "susceptible of being used" was the fact that many navigable streams were not used to carry interstate and foreign commerce because the country had not been sufficiently developed to create any commerce. The shores, the soil under all waters in the state, and the water itself remain vested in the state, subject only to the jurisdiction of the United States to regulate interstate or foreign commerce on the navigable waters.[17] Thus, the United States has no control or jurisdiction of streams or parts of streams not used, and not susceptible of being used, in their natural state for interstate or foreign commerce; the control, or jurisdiction thereof being reserved to the state, or its people, under the Tenth Amendment. Likewise, the non-navigable headwaters of a navigable stream are solely under the sovereignty of the state wherein situate. This does not mean, however, that the waters of the non-navigable headwaters could

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[14] McCulloch v. Maryland, 4 Wheaton 316, 406; The Daniel Ball, 10 Wall. 557; The Montello, 11 Wall. 411; Oklahoma v. Texas, 258 U. S. 574; U. S. v. Rio Grande, *etc.*, Co., 174 U. S. 690; Leovy v. U. S., 177 U. S. 621; Kansas v. Colorado, 206 U. S. 46.

[15] St. Anthony Falls Co. v. St. Paul Commissioners, 168 U. S. 349.

[16] The Daniel Ball, *supra*, note 14.

[17] Pollard's Lessees v. Hagan, 3 How. 212.

be diverted to the extent of lessening the navigability of water below used in interstate or foreign commerce.[18]

The Constitution grants no power to the Federal Government whereby Congress may authorize the utilization, or the control of the utilization, of the waters of a state for water power or otherwise. The states reserved the regulating, franchise-giving or licensing authority over all waters, navigable or non-navigable, within their boundaries. Only for the protection of interstate and foreign commerce has the Federal Government any jurisdiction, and that, as to the physical phase of the stream or water, is limited, practically, to the requirement that any structure upon, on or over a navigable stream must be approved by the national Government as not interfering with commerce.

Police Powers, Manufacturing and Commerce.

Further, the sovereignty of the state over its citizens, including corporate citizens, was not granted or surrendered to the United States except as expressly or necessarily implied under the Constitution. All business, manufacturing and otherwise, of its citizens, not of an interstate or foreign commerce character (or subject to the Eighteenth Amendment), is subject only to the laws and sovereignty of the states, except as affected by taxation, or, the remote case which might arise under the right of eminent domain. Otherwise, Congress has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit or restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property or the appurtenances thereof shall be sold by the owner or owners thereof, whether a corporation or an individual.[19]

The power to regulate commerce does not include the right to destroy or impair the limitations or reservations or guaranties

[18] Kansas v. Colorado, *supra*, note 14; U. S. v. Rio Grande, *supra*, note 14.

[19] In re Greene, 52 Fed. 104; Weeds v. U. S., 255 U. S. 109; Kidd v. Pearson, 128 U. S. 1, 20; International Paper Co. v. Mass., 246 U. S. 135; Bailey v. Drexel Furniture Co., (Child Labor Tax Case) 259 U. S. 20.

placed in the Constitution and its amendments. Congress has the power absolutely to control, regulate and dispose of the public lands, but under the guise of terms of control or disposal no new power can thereby be vested in the United States, or the rights reserved unto the states, or their people, be destroyed.[20] No act of Congress can amend the Constitution. No agreement by the United States with a natural or corporate citizen of a state can oust or limit the state's sovereignty.

CONSTITUTIONAL LIMITATIONS OF THE FEDERAL POWER ACT.

The history and terms of the Federal Power Act disclose that it deals primarily with water power development (not limited to governmental purposes) on the navigable waters and public lands rather than with navigation. The verbiage of the Act indicates that those who drafted its clauses were governed more by a purpose to express certain objects they desired than by a recognition of the necessity to conform to the Constitutional powers and limitations of the United States. The Act, at least, has many expressions broad enough, of themselves, to include powers never granted to the United States, either explicitly or as incidental to powers granted. Nevertheless, the general purpose of the Act and the formation of another bureau thereby, compel recognition of the Act's present and future importance.

As previously stated, any structure on, over or in navigable waters has always been subject to the permit, or approval, of the United States, and its further control to compel future changes or removal as far as necessary for the protection and improvement of navigation.[21] Congress may direct a commission, board or officers to exercise its discretion. Likewise, as to leasing, controlling, using or disposing of public lands, or Government dams, the term or terms of such permits, in accordance with law, are for Congress to declare.

However, the Federal Power Act does not limit the control or license for the improvement or protection of navigation, but

[20] McCulloch v. Maryland, 4 Wheaton 316, 423; U. S. v. Joint Traffic Asso., 171 U. S. 505.

[21] Pennsylvania v. Wheeling Bridge Co., 18 How. 421.

additional authority or jurisdiction is assumed over water, water power developments and the owners thereof. Likewise, as to public lands, the Act does not limit the power of the Commission to declare whether or not the use is a proper one to be made of public lands, and the incident terms of rent, duration of lease or actual disposal thereof at a price. The Act assumes ownership of the water and an authority over citizens, corporations, municipalities and states in the development of any project of water powers, if any part of the project is across, along, from or in navigable waters or on public lands, which is opposed to the principle so often reiterated by the Supreme Court of the United States, that the state is absolute sovereign of all shores, beds of streams and waters within its boundary, subject only to the regulation necessary or advisable for interstate and foreign commerce.

The most comprehensive provision of the Act is that if any part (minor or major) of a water power development requires a Federal permit or license, then the Commission shall have control of the entire project, its plan of development, and its business administration. To illustrate: If a primary transmission line crossed navigable waters of the United States, public lands, or a Government dam, and a Federal permit or license was granted therefor, the Commission would, under the terms of the Act, assume control of the entire project, its present and future development, its service, rates and business, although no other part of the project (except said transmission line) required the consent or approval of the United States. There is no authority under the Constitution upon which to base such an assumed power and it could not exist unless the United States were granted the franchise-giving control and regulation of the water power resources which are vested in the states, having been reserved under the Tenth Amendment.

That the United States could secure such additional jurisdiction by writing its authority therefor into a permit or license (for another and separate purpose over which it has jurisdiction) needs only to be stated to show its legal fallacy. The powers

reserved to the states cannot be transferred to the United States by direction of Congress.

Also, the Act does not limit the Commission's control to excess of water power primarily generated for Governmental purposes, but includes "utilizing the surplus water" from a dam, which assumes Federal ownership in the water.

If a water power development upon navigable waters be made by the state, or those it authorizes, provided the project works be such, and so placed, that interstate and foreign commerce regulations of the United States are complied with, all other powers over such development are vested in the state. The system of accounting, future developments and maintenance of the project, rates, costs, ex-propriation of profits, issues of securities, and payment to owners of developments on headwaters in the same streams because of benefit to the lower owner, are all matters solely under the sovereignty of the state as to which the United States has no jurisdiction whatsoever. Even if a citizen, natural or corporate, or a municipality applied for and accepted a license from the United States containing all the proposed items of the Act and "such further conditions not inconsistent with the provisions of this Act as the Commission may require," such a license or agreement could not oust the state's sovereignty or add to the jurisdiction of the United States.

The provisions that rates and charge of payments therefor, or the amount or character of securities issued, shall be under the Commission,—provided the state has not authorized and empowered an agency to regulate and control such services,—is anomalous. The state has the sole authority in such matters. If the state, for its own reasons, does not create any such commission or agency, that is clearly its privilege. That its failure to do, in its own affairs, what Congress considers it should do, *ipso facto* vests jurisdiction in the United States over such matters, by an agreement with a licensee or otherwise, is absolutely without Constitutional basis.

If the requirement of the Act that all plans of development of water power must be submitted to and be approved by the Commission were limited, on navigable waters, to regulating

interstate and foreign commerce, or on public lands, to a proper use of and reimbursement for the use of the land, it would be clearly within the authority of the United States. However, the purport of the terms of the Act is to require the approval by the Commission of water power developments, purely as utilization of the water resources of the state, which is not included within the delegated powers of the United States. Regulation of commerce does not require and never has included an appropriation, or confiscation, of the rights of a state in its natural resources; whether or not a plan for a water power development is a proper use of the water resources of the state is solely a matter of the state's concern.

If improvements on waters made by an upper owner of riparian rights are incidentally of benefit to the improvements of a lower owner on the same waters, whether or not the lower owner shall be compelled to pay tribute to such upper owner, is a matter controlled absolutely by the statutes of the state and not by the Federal Power Act or any act of Congress. The United States itself as an owner of public lands is subject to the riparian laws of the state where its lands are situate.[22] Acts of Congress cannot create or limit riparian rights of the state or its citizens; they are reserved under the Tenth Amendment.[23]

The re-capture clause, while not specified to be in all licenses, may be included if the Commission so decides. Under the re-capture clause, if any portion of the physical structures of a project (including transmission lines) be situate in, over or on navigable waters or public lands, then at the end of the license period, upon a basis of valuation set forth in the Act, the United States may become the owner of the entire project or projects. In other words, in addition to regulating when and in what manner the structures may be constructed, the proper use of and reimbursement for use of public lands, the Act directs that the United States may control and finally may own the entire project, solely because it is a water power development.

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[22] Kansas v. Colorado, *supra*, note 14.
[23] Hardin v. Jordan, 140 U. S. 371, 381.

If the Act were applicable only to waters of the District of Columbia and Territories the assumption of the United States of ownership and control of their respective water resources would be admitted. And further, if the re-capture clause provided only that such water powers should be acquired by the United States as are necessary or advisable for governmental purposes, no mere assumption of right without basis would exist; but there is no authority or power in the United States under the Constitution to acquire or take or control the business of water powers merely for the reason they are water power developments.

The terms provided under the Act upon which the United States may re-capture, or take over, a project are, in fact, an attempt to exercise eminent domain without the due process of law and just compensation provided by the Fifth Amendment of the Constitution. Congress may determine the public use but the United States, through its executive or legislative representatives, cannot fix the price if a property is "taken." Requiring, as a condition of a license, an "agreement" to determine the "just compensation" for the future taking of a property by the original cost thereof does not square with a free will bargain and it would not, in fact, be the "fair value" at the time of taking.

The words "due process of law" are intended to secure the individual from the exercise of governmental powers unrestrained by the established principles of private rights and distributive justice.[24] The right to take private property for public use can be exercised only upon the condition that just compensation for the property at the time of taking is paid.[25] If an Act of Congress could require a license and then enforce as a condition of the license that the compensation (in the event of the Government taking the property covered by the license) shall be otherwise than the fair value thereof at the time of taking, the result would be *pro tanto* to destroy the purport of the

[24] Bank of Columbia v. Okely, 4 Wheaton 235.

[25] Garrison v. New York, 21 Wall. 196; Great Falls Mfg. Co. v. Atty. General, 124 U. S. 581, 599.

Amendment. Determination of the fair value is a judicial, not a legislative procedure, under the Fifth Amendment.

If the structures are approved as not obstructing navigation, or if the use is approved as proper for public lands and a proper rent paid for such use, the question as to what consideration exists for the "agreement" would be very pertinent.

We recognize that if a plan for water power development includes using the physical structure of a government dam, then a contract charge therefor could not be questioned, as such would be for use of property of the United States. To provide, however, that the benefit of the storage of such dam could be charged for against a lower owner would be an unauthorized intrusion upon state sovereignty, being a charge for resources not owned by the United States, but subject only to the control or ownership of the state.

The right of a state, upon making public improvements upon a stream, to charge for the use of surplus water therefrom has been confused in the minds of some writers as establishing that the same right was vested in the national Government. The fact has been overlooked that, by the Tenth Amendment, the usufruct of the water was reserved unto the states and any claim therefor must thereby be under the state. Two cases have frequently been urged as authority for the right of the national Government to lease, or charge for, the usufruct of excess water incidentally due to improvements made for navigation, *Kaukauna Co. v. Green Bay Co.*, and *Green Bay Co. v. Patten*.[26] The cases are not in point. In the first case the question was not involved, it being an issue merely between a state and a riparian owner; and in the latter case the right of the Federal Government to the water was by virtue of a specific grant under an act of the legislature of the state concerned, including the title to the use of the water itself, which was conveyed to and became vested in the Federal Government. Therefore the right in the latter case was under the specific grant of the state concerned to the United

[26] Kaukauna Co. v. Green Bay Co., 142 U. S. 254; Green Bay Co. v. Patten, 172 U. S. 58.

States and not under the general authority of the commerce clause of the Constitution.

The provisions[27] that apply "when said power or any part thereof shall enter into interstate or foreign commerce" and those setting forth certain regulations, among others, that the administration of the section shall be analogous to the procedure and practice as to railroad companies as provided in the Act to Regulate Commerce of February 4, 1887, as amended, indicate a desire to cover a future possibility rather than to provide for any present status. Incidents of, or aids to, commerce are not necessarily commerce. All business has a relation to commerce, but all business is not commerce. Hydro-electric plants convert energy from falling water into electric current, and the operation of such plants is not commerce.[28] Transmission of current by a company from one state to another may or may not be interstate commerce subject to regulation by the United States. In *The Pipe Line Cases*,[29] where the Supreme Court of the United States probably reached the extreme of logic in declaring a new class of common carriers, the facts and circumstances which controlled the Court are in no wise pertinent to the transmission line of a hydro-electric plant passing from one state to another. The clear statements of the Supreme Court of the United States in the decisions referred to above, applying the Constitutional principles pertinent to the present subject, would appear not to justify any assumption of Federal jurisdiction over water power developments as such.

The Federal Government as a riparian owner and otherwise as an owner of Public Lands, Government dams, and projects, may enter into contracts as to the use of its property, as may any other such owner; but such contracts must conform to the sovereignty and laws of the state wherein the property is situate. The United States for its governmental purposes may develop water power, but there is no Constitutional authority for the

[27] Sec. 20.

[28] Kidd v. Pearson, *supra*, note 19; Crescent Oil Co. v. Mississippi, 257 U. S. 129.

[29] 234 U. S. 548.

United States entering upon the business of water power development, as such; neither is there any Constitutional basis for the United States assuming the general control of rates, service and issue of securities of water power utilities, nor the right eventually to re-capture such water power projects.

Practically, it may be said, Federal control of navigation, public lands, and Government dams, would naturally result in a consideration of possible water power developments, even though advisory in character, in that the Federal officer (or commission) authorized to determine whether a proposed structure in, or over, navigable waters is proper for the protection of navigation, would undoubtedly advise any change of structure, or location, that would give the same results to navigation and secure greater water power development, although the jurisdiction of the United States extends only to the needs of navigation. Similarly, in granting the use of any part of the public lands for a water power project, if a greater maximum water power could be secured by a project different from the one proposed, such different project would be favored and urged. However, the fact of such practical co-relation would not create Federal jurisdiction, nor oust State sovereignty, over the utilization of the water power resources as is apparently assumed by the Federal Power Act.[30] [31]

John Franklin Shields.

Philadelphia, Pa.

[30] An interesting academic question of the constitutionality of the Federal Power Act, but not pertinent to the merits of the Act, is presented by these facts: The Federal Power Act was finally passed by Congress May 28, 1920, and presented to the President May 31, 1920. Congress adjourned June 5, 1920. The Power Act was signed, or approved, by the President on June 10, 1920, or five days after Congress adjourned. The procedure has always been to have the President sign all bills, or veto them, before Congress adjourns to eliminate the question of whether a bill signed after Congress had adjourned is valid. In *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, at p. 455, the Supreme Court decided that under the Constitution a bill duly presented during its session may be signed by the President during the recess which Congress has taken for a fixed period. However, the Court called attention to the fact that whether the President can sign a bill after final adjournment of Congress for the session is not decided nor considered in the case. U. S. v. Weil, 29 Court of Claims 523 (1894) and 20 Opinions Attorney General, 503, are germane to the general clause of the Constitution involved, *i. e.*, Section 7 of Article I.

[31] The Federal Power Act has not been subject to any decision of the Supreme Court of the United States. The State of New York filed an orig-

inal bill against certain officers of the United States (No. 22 Original, October Term, 1922), asserting various provisions of The Federal Power Act to be unconstitutional. However, during the summer of 1923, before the cause came to be heard, by conference between the New York State Water Commission and the Federal Power Commission, a working construction of all essential disputes was reached and the cause in the Supreme Court of the United States became an academic issue and thus disposed of.

A similar cause, State of New Jersey v. Certain Officers of the United States, is now pending in the Supreme Court of the United States (No. 22 Orignal, October Term, 1924). A motion to dismiss has been filed by the Solicitor General of the United States on the ground the original bill has not set forth a justiciable controversy.

The only reported decision, involving The Federal Power Act, up to this date (September, 1924) is Alabama Power Co. v. Gulf Power Co., 283 Fed. 606, in which Judge Clayton, of the U. S. Dist. Court, Northern and Middle Districts, Alabama, gives a very general discussion, and decides that the terms of the Federal Power Act, in reference to navigable waters, apply only where the proposed project works are primarily for navigation. Apparently no appeal from the decision was made.