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No. 78-738

In the Supreme Court of the United States

OCTOBER TERM, 1978

KAISER AETNA; BERNICE P. BISHOP ESTATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 584 F.2d 378. The opinion of the district court (Pet. App. 13a-34a) is reported at 408 F. Supp. 42.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1978. The petition for a writ of cer-

tiorari was filed on November 2, 1978, and granted on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a former "fishpond" in Hawaii which has been deepened and opened to Maunalua Bay and the Pacific Ocean for the purpose of navigation is a navigable water of the United States subject to a public right of navigation.

STATEMENT

For hundreds of years prior to 1961, Kuapa Pond, on the Island of Oahu in Hawaii, was used to cultivate mullet. Separated from Maunalua Bay and the Pacific Ocean by a narrow barrier beach reinforced with a stone wall, the pond was fully enclosed and no more than two feet deep. Mullet were seeded in the pond, grown and harvested. During high tides, sea water from the bay and ocean entered the pond through sluice gates in the barrier, which allowed small fish to enter but not large fish to escape, thus flushing the pond and enriching the crop (Pet. App. 15a-16a). Such "fishponds" are characteristic features in Hawaii and have provided an important source of food (*id.* at 3a).

On April 27, 1961, the trustees under the will of the estate of Bernice Pauahi Bishop, the owners of the bed of Kuapa Pond and the surrounding land, entered into a development agreement with Kaiser Aetna (A. 6-7, 11-12, 31; R. 46).[1] The agreement gave

[1] "R." refers to the record in the court of appeals.

Kaiser Aetna the right to develop a 6000-acre area known as "Hawaii Kai" (A. 31) and contemplated that Kaiser Aetna would improve and eventually lease Kuapa Pond from the trustees, who retained the fee interest (A. 17, 31; R. 266). On July 24, 1962, the trustees extended to the lessees of each marina lot a nonexclusive right to navigate Kuapa Pond (Def. Exh. 13), reserving to the trustees the right to license anyone else, including operators of commercial vessels (*ibid.*).[2]

Shortly after the 1961 agreement, all fishpond operations in Kuapa Pond were terminated and its transformation into a navigable waterway and marina began. Kuapa Pond was dredged to lower the bed and thereby deepen the water for navigation. At this time, the Army Corps of Engineers advised Kaiser Aetna that no permit would be required under 33 U.S.C. 403 for the dredging in Kuapa Pond itself (A. 60).

In 1966, however, Kaiser Aetna decided to open Kuapa Pond to Maunalua Bay for navigation. On March 28, 1966, Kaiser Aetna's project engineer delivered to the District Engineer of the Corps of Engineers plans for dredging a channel 200 feet wide and nine feet deep and invited the District Engineer to comment on the plans so that any necessary revisions could be made and a permit issued under 33 U.S.C. 403

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[2] On October 17, 1967, the trustees leased Kuapa Pond to Hawaii-Kai Community Services Company (A. 25), which, in turn, assigned the lease to Kaiser Hawaii-Kai Development Company, effective January 1, 1971 (R. 22-23; Def. Exh. 11-12).

(A. 66-67).[3] On April 5, 1966, the Corps replied that the plans might cause erosion of the beach and that a jetty might be necessary (A. 56). Neither letter mentioned any denial of public access to the waterway. On April 26, 1966, the project engineer sent a letter to the Corps which stated, among other things, that "[i]t is our understanding that no separate federal permit will be required for this construction [on the Kuapa Pond side of the barrier beach] and that there will no requirement for public use of any waters on the Kuapa Pond side of the bridge" (A. 58).[4] Although the federal permit was issued to allow Kuapa Pond to be opened to the Bay, petitioners never received, so far as the record discloses, any confirmation from the Corps of the assertion that the public could be excluded from Kuapa Pond.[5]

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[3] The plans also called for raising the existing bridge, part of the highway built earlier on the barrier beach, to provide a clearance for vessels of 13.5 feet above mean high tide (A. 66).

[4] This letter (A. 58) was addressed only to the "Corps of Engineers" and was not addressed to the attention of the author of the Corps' letter of April 5, 1966. Nor did it refer to the Corps' "reference number" for the Hawaii-Kai project, which appeared on the Corps' letter of April 5.

[5] Contrary to petitioners' statement (Br. for Pet. 7), the record does not show that, at the time the channel was dredged and the bridge raised, it was "understood by the Corps of Engineers * * * that the marina was private, and that no permits were necessary for work in Kuapa Pond." The materials cited do not support this claim. Defendants' Exhibit 15 (A. 58) is

Once Kuapa Pond was connected to the Bay and the Pacific Ocean, the Corps required a permit for any further work or structures in Kuapa Pond. In 1971 the Corps issued a permit authorizing Kaiser Aetna to build a fueling facility in or near Kuapa Pond (A. 40). In applying for this permit, Kaiser Aetna stated that it felt Kuapa Pond was not a navigable water of the United States, that a federal permit was unnecessary for work done in Kuapa Pond itself and that it sought a federal permit without conceding it was required (A. 43). On January 11, 1972, in response to Kaiser Aetna's position, the District Engineer wrote Kaiser Aetna that "[b]y virtue of this water being connected through improved channels to navigable waters, this pond is considered to be an integral element of the navigable waters of the United States. As such, permits under 33 U.S.C. 403 and within the meaning of the Rivers and Harbors Act of 1899 are required to work in Kuapa Pond"

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the letter of April 26, 1966, written by Kaiser Aetna, not the Corps, asserting that the waters were "private" (A. 58). Defendants' Exhibit 16 is an excerpt from a report of the District Engineer prepared in 1964 (before the opening of Kuapa Pond to the Bay) stating that the development at Hawaii-Kai is "private." The excerpt does not discuss whether permits are required for work in Kuapa Pond or whether the public may be denied access thereto. Similarly, Defendants' Exhibit 36 (A. 59) is an affidavit of one of petitioners' employees stating that, prior to the time Kuapa Pond was opened to Maunalua Bay, the Corps advised him that no permit was required for work in Kuapa Pond because it was "private." Once it was opened to the Bay, the Corps took the position that Kuapa Pond was a navigable water of the United States.

(A. 38). The letter also stated: "This is to advise you that the requirements for permits for work in or discharge into the waters of Kuapa Pond will be strictly enforced" (*ibid.*). In October 1972, the Office of Counsel of the Corps of Engineers in Washington concurred in the District ~~Court~~ Engineers's determination that Kuapa Pond is a navigable water of the United States (A. 35).[6] Shortly thereafter, the United States Coast Guard also determined that Kuapa Pond is a navigable water of the United States calling it a "highway for interstate and foreign commerce" (A. 47-51).[6a] Kaiser Aetna, however, did not budge and refused to obtain federal permits for dredging and other work in Kuapa Pond (A. 13, 38, 39-40). Its patrol boats, moreover, intercepted "unlicensed" vessels entering Kuapa

[6] Petitioners state (Br. for Pet. 7) that "[a]lthough the Corps of Engineers was aware of the work in Kuapa Pond, it did not require permits until January 11, 1972." This is not so. A permit was issued in 1971 for a proposed fueling dock, as explained in the text. On May 4, 1971, petitioners' counsel objected to the Corps' statements that Kuapa Pond was "navigable waters of the United States" (A. 43). It was only because petitioners continued to refuse to apply for permits for dredging and maintenance in Kuapa Pond that the Corps explicitly warned Kaiser Aetna that Kuapa Pond was a navigable water of the United States and that the permit requirement would be strictly enforced (A. 38, 44).

[6a] The Coast Guard stated (A. 48, 50) that the "extensive use by recreational craft coupled with the navigational improvements made in the pond (channel dredging and establishment of aid to navigation system) indicate its capability for use by the public for purposes of transportation and commerce" and "[t]he waters of Kuapa Pond and the channel connecting it to the sea have been improved to the point where they constitute a highway for interstate and foreign commerce."

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Pond from Maunalua Bay and advised their operators that Kuapa Pond could be navigated only by Kaiser Aetna's licensees (A. 8, 11, 36, 63).

2. On July 6, 1973, the United States commenced this action against petitioners in the district court seeking a declaration that Kuapa Pond is a navigable water of the United States and an injunction against petitioners' performing any further work therein without a federal permit or attempting to exclude the public from Kuapa Pond. The case was tried without a jury in 1975. On February 6, 1976, the district court held that Kuapa Pond is a navigable water of the United States and that petitioners were required to obtain permits for all dredging, maintenance of sea walls, and other work in Kuapa Pond. The district court held, however, that petitioners could lawfully exclude the public from Kuapa Pond (Pet. App. 13a-34a).

The district court found that Kuapa Pond covered approximately 523 acres, extended approximately two miles inland from Maunalua Bay, had an average depth of six feet with a main channel of eight feet (*id.* at 15a, 18a). The bridge over the main channel has a maximum clearance of 13.5 feet over mean sea level (*id.* at 18a).[7] A commercial shopping center, the Koko Marina Shopping Center, and residences abut Kuapa Pond (*ibid.*).

Every marina-lot lessee is entitled to a nonexclusive license to navigate Kuapa Pond; there are ap-

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[7] For aerial photographs showing the size of Kuapa Pond and its relationship to Maunalua Bay, see Plaintiff's Exhibits 5-10.

proximately 1,500 such lots; 86 other residents in the development who do not abut the shoreline are licensed by the trustees to navigate Kuapa Pond, and at least 56 boat owners, who are nonresidents, are licensed to use Kuapa Pond (*id.* at 19a). Altogether 668 vessels have been licensed by petitioners to navigate Kuapa Pond (*id.* at 18a). The license fee in all cases is $72 annually (*id.* at 19a).

The trustees, as mentioned, reserved the right to license commercial vessels (Def. Exh. 13, ¶ 5(c)). For several years, they have permitted various commercial uses of the *Marina Queen*, a passenger vessel that can carry up to 25 persons (Pet. App. 18a-19a). During 1967-1972, Kaiser Aetna operated the *Marina Queen* primarily to show the development of prospective subdevelopers and purchasers of homesites. On Sundays the general public was invited to join the cruises (*ibid.*). During 1973, the merchants in the Koko Marina Shopping Center were licensed to operate the *Marina Queen* six or seven times daily for the purpose of attracting customers. The merchants sold excursion cruises on the *Marina Queen* and roundtrip bus rides between the marina and various points on Oahu to tourists and the general public for the package price of one and later two dollars (*id.* at 19a). During this period, 38,821 persons rode the *Marina Queen* (*ibid.*; A. 45-46).[8] When this promotion ended, petitioners made the *Marina Queen* available for other sales promotions (A. 22), and Kaiser Aetna used the

[8] Once transported by bus to the marine, passengers were entitled to the excursion cruise at no additional charge (A. 22).

Marina Queen on Kuapa Pond for the promotion of real estate sales (Pet. App. 19a). At the time of trial, the trustees had not yet decided whether they would license other commercial vessels (*id.* at 18a).[9]

The district court held that Kuapa Pond formed part of "the highways of commerce between different states or into foreign commerce" (*id.* at 29a-30a):

> Defendants did not restrict use of the marina just to residents of Hawaii-Kai as an exclusive appurtenant to their lot purchase agreements, to permit them to launch their private recreational crafts into the marina's private waters, and enter Maunalua Bay by means of an artificial channel from the marina to the bay. Rather, Kaiser-Aetna also sells licenses to nonresidents to use the facilities of the marina for launching and mooring their boats, as well as use the marina waters as a highway by which to gain the open sea through the channel. By so doing, defendants transformed what was apparently conceived as a private recreational area into a combination harbor and canal available to any boat owner who was willing to pay the fee, subject only to the total use-capacity of the marina. Thus the marina is in fact used in interstate commerce both to raise revenue for Kaiser-Aetna and to transport residents and nonresidents by waterway into and out of Maunalua Bay.

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[9] In 1970, Kaiser Aetna had plans, which were later abandoned, to utilize part of the marina for a boat-rental concession (R. 257; A. 23). In addition, petitioners operate patrol boats seven days a week on Kuapa Pond (A. 8, 11, 36, 63). Until prohibited by Kaiser Aetna, a boat operated by a commercial scuba diving school collected students at the Hawaii Kai pier (A. 23).

Accordingly, the court held that "the waters of the marina cannot now be considered to be private property in and upon which its owners may do as they please without any possible federal regulation. As used by the defendants, the marina has become the legal equivalent of a toll-charging canal or harbor and therefore subject to regulation by the Corps of Engineers under § 10 of the Rivers and Harbors Act" (*id.* at 30a-31a). That navigation on Kuapa Pond was possible chiefly through private effort did not matter. The court noted "[f]ederal admiralty jurisdiction has long been held to apply to artificial waterways that in fact form highways of commerce between different states or into foreign commerce, over which vessels actually pass * * *." The court therefore enjoined petitioners from dredging or otherwise performing work in Kuapa Pond without federal permits.

The court held, however, that the public had no right to navigate Kuapa Pond. The court recognized that, even prior to its transformation, Kuapa Pond was subject to tidal fluctuations (see A. 55) and was therefore a navigable water of the United States under the ebb-and-flow test (Pet. App. 24a-25a).[10] It also held that the mere fact that petitioners dredged

[10] The government also contended that Kuapa Pond was a navigable water of the United States, even prior to the Hawaii-Kai development, because it was susceptible, through reasonable improvements, to use as a channel for interstate commerce under the test of *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940). The court did not reach this issue in view of its determination that the ebb-and-flow test was satisfied (Pet. App. 21a-24a).

Kuapa Pond at their expense would not convert public waters into a private marina (*id.* at 22a). Nevertheless, the public right of navigation normally applicable to navigable waters of the United States was superseded, in the court's view, by "the unique legal status of Hawaiian fishponds such as Kuapa Pond as strictly private property" (*id.* at 24a).

Under pre-territorial Hawaii law, the court noted, fishponds were regarded as private property (*id.* at 16a-17a, 25a). When Hawaii became a territory, the court stated, Section 95 of the Hawaii Organic Act of 1900, ch. 339, 31 Stat. 160, recognized fishponds as private property.[11] After statehood, state law continued to recognize fishponds as private property (Pet. App. 26a). The court held that when a state is admitted or a territory is annexed, private property may not be destroyed without compensation (*id.* at 27a).

The fact that the fishpond had been transformed into a navigable waterway did not, held the court, change its status as private property (*id.* at 31a-33a). Although the waterway was subject to "regulation" as a navigable water of the United States, the district court held that it was the equivalent of fast lands for purposes of public use and enjoyment. Only by condemning Kuapa Pond and paying compensation for petitioners' investment could the

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[11] The cited provision stated:

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the seawaters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States * * *.

United States require that the public be admitted (*id.* at 32a).[12]

3. Both sides appealed. On the petitioners' appeal, the Ninth Circuit affirmed the injunction prohibiting any further work in Kuapa Pond without a federal permit (Pet. App. 9a). On the government's appeal, the Ninth Circuit held that the public right of navigation is co-extensive with the navigable waters of the United States, that Kuapa Pond is a navigable water of the United States, and that the public has a right to navigate it.

In the Ninth Circuit's view, it was immaterial whether Hawaii law recognized fishponds as private property. First, the court reasoned that "[e]ven fast land appurtenant to a waterway can by excavation be submerged and rendered a part of the waterway and should this occur the land loses its character as fast land and takes on the character of submerged land" (Pet. App. 10a). When the "fast lands" of Kuapa Pond were dredged and transformed into a marina, Kuapa Pond "took on the character of a waterway" (*id.* at 11a). Second, the Ninth Circuit observed that the federal power to regulate and the public right of navigation cannot be separated, for "[i]t is the public right of navigational use that renders regulatory control necessary in the public interest" (*ibid.*). Therefore, once the district court found that Kuapa Pond was a navigable

[12] The district court also held that the Corps was not estopped by its earlier "seeming indifference to the creation" of Kuapa Pond as a navigable waterway to assert the full extent of public rights and regulation (*id.* at 33a).

water of the United States and could be regulated in the public interest, it was error to exclude the public from the waterway. Third, the court held the federal navigational servitude is not imposed by the government in the nature of a seizure, but exists as a characteristic of all navigable waters of the United States (*ibid.*). Therefore, there is no need to pay petitioners "compensation" because there was no "taking" (*ibid.*). The Ninth Circuit reversed the judgment of the district court on this point and remanded for entry of judgment in favor of the United States (*id.* at 12a).

SUMMARY OF ARGUMENT

The public enjoys a federally protected right of navigation over the navigable waters of the United States. All parties to this litigation accept this principle. What is in dispute is whether Kuapa Pond is a navigable water of the United States. The traditional definition of "navigable waters of the United States" includes those waterways (i) which are in fact navigable or could be made so with reasonable improvements or which ebb and flow with the tide, and (ii) which by directly or indirectly connecting with other navigable waters form a continuous highway for navigation among the states. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940).

Kuapa Pond meets these tests. It ebbs and flows with the tide. It is quite large, opens directly to Maunalua Bay, is navigable in fact, used by at least 668 vessels, is more than capable of sustaining com-

merce and in fact does so. For example, the trustees have licensed local merchants to sell excursion cruises to the public on Kuapa Pond. Petitioners have expressly reserved the "right" to license still more commercial vessels in Kuapa Pond. As the district court found, moreover, petitioners operate a commercial harbor within Kuapa Pond. Kuapa Pond is, therefore, a navigable water of the United States.

Petitioners insist that the navigability of Kuapa Pond must be determined by looking to its characteristics *before* it was made an integral part of Maunalua Bay. They claim that, in those days, Kuapa Pond was not navigable. They then argue that as a matter of law, it did not become navigable, merely because petitioners deepened it and opened it to the sea "at extraordinary private expense." Petitioners' argument, however, stumbles on both points. Even before its transformation, Kuapa Pond was a navigable water of the United States. It was subject to tidal fluctuations. It was also susceptible to use as a highway of navigation and commerce through reasonable improvements. Its actual improvement for navigation is proof enough of that. In any event, even if it was not navigable before, it certainly is today. The fact that the conversion was accomplished at private expense does not exempt Kuapa Pond from the navigable waters of the United States. To allow landowners to dredge their fast lands and reshape the navigable waters of the United States to more conveniently serve their land, and then to exclude the public from the navigable portions flowing over the site of the former fastlands, would unduly burden

navigation and commerce. The states lack the power under the Commerce Clause to sanction any such form of private property, as we have explained in more detail in our brief as amicus curiae in the companion case, *Vaughn* v. *Vermilion Corp.*, No. 77-1819.

The reach of the public navigational servitude is a federal question and cannot be controlled by state law. Petitioners argue that in Section 95 of the Hawaii Organic Act, ch. 339, 31 Stat. 160, Congress effectively exempted fishponds and artificial enclosures used for fisheries in Hawaii from the public navigational servitude. There is, however, no basis for so reading the Act.

Section 95 did not surrender the public navigational servitude with respect to fishponds dredged and opened to the sea for the purpose of navigation. At most, the provision was meant to protect private licenses, recognized under state law, to take fish from enclosed fishponds used in Hawaii's unique form of aquaculture. It was never intended to regulate navigation on waterways that were integral parts of the navigable waters of the United States.

There is likewise no merit to the claim that the exercise of the public navigational servitude constitutes a taking of property without just compensation. The essence of the servitude is that it supersedes any state-created property interest in the navigable waters of the United States. A proper exercise of a superior right, such as the public right of navigation, does not require compensation for subordinate rights.

It is true that the servitude does not extend to fast lands. But, even if Kuapa Pond once qualified as fast lands, it lost that status when its owners voluntarily dredged the area and reshaped the navigable waters of the United States to better suit their land. With this change, the public acquired an interest in maintaining the navigable waters of the United States, including the former fishpond, as a continuous highway for navigation and in avoiding the burdens to navigation that are created by petitioners' attempt to reserve the waterway to themselves. If owners of fast lands do "not wish to submit themselves to such interference, they should not * * * clothe[] the public with an interest in their concerns." *Munn* v. *Illinois*, 94 U.S. 113, 133 (1876). Having dedicated their property to a use that implicates the public interest, petitioners may not complain that the accompanying servitude constitutes a taking.

ARGUMENT

I. The Public Enjoys A Federally Protected Right Of Navigation Over The Navigable Waters Of The United States

It has been common ground among the parties to this suit (and the courts below) that the public enjoys a federally protected right of navigation over the navigable waters of the United States. (See Br. for Pet. 11, 14, 28, 32-38.) The sources of this right are explained in our brief as amicus curiae in *Vaughn* v. *Vermilion Corporation*, No. 77-1819, at

10-27.[13] In short, the public navigational servitude on all navigable waters was adopted by the Colonies as part of their common law. When the Constitution was adopted, the states, by agreeing to the Commerce Clause, surrendered their power to eliminate the servitude by conferring on private monopolies the right to navigate such waterways. Were the rule otherwise, navigation would be severely impeded. Vessels would be, or could be, required to obtain licenses from every "owner" of the surface use of navigable waters recognized under local law.[14] The same principles apply to later-admitted states by virtue of the equal-footing doctrine. Petitioners accept this basic principle.

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[13] We are serving petitioners with a copy of our brief in *Vaughn*.

[14] In addition to the authorities cited in our brief in *Vaughn*, see *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 436, 452-460 (1892), holding that the State of Illinois lacked the power to convey title to the bed of navigable waters within its jurisdiction save for the purpose of erecting aids to navigation. The Court invalidated an attempt by Illinois to convey certain tidelands to the railroad because such lands were held in public trust for the benefit of navigation and in the interest of "commerce." *Id.* at 452. "The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it." *Id.* at 458 (citing with approval *People* v. *New York & Staten Island Ferry Co.*, 68 N.Y. 71, 77 (1877)). See also *Morris* v. *United States*, 174 U.S. 196 (1899); *United States* v. *Mission Rock Co.*, 189 U.S. 391, 406 (1903); *West Chicago R.R.* v. *Chicago*, 201 U.S. 506, 524 (1906); *Pigeon River Co.* v. *Cox*, 291 U.S. 138 (1934).

II. Kuapa Pond Is A Navigable Water Of The United States

As explained at pages 27-28 of our brief in *Vaughn*, "navigable waters" are those (i) which are in fact navigable or could be made so with reasonable improvements or (ii) which ebb and flow with the tide. "Navigable waters of the United States," as opposed to those of the states, are navigable waters which directly or indirectly connect with navigable waters over which commerce is or could be carried on with other states or foreign nations. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940).

Kuapa Pond fully meets these tests. It ebbs and flows with the tide (A. 53). It is navigable in fact. Used by at least 668 vessels, it is more than capable of sustaining commerce,[15] and in fact does so. The trustees have licensed local merchants to sell excursion cruises to thousands of passengers drawn from the general public and have specifically reserved the right to license other commercial vessels. Petitioners, moreover, operate a commercial "harbor" within Kuapa Pond "available to any boat owner who [is] willing to pay the fee * * *" (Pet. App. 29a). Although it lies wholly within a single state, Kuapa Pond physically connects with waters leading to other states and for-

[15] As mentioned at page 7, *supra*, Kuapa Pond extends two miles inland at an average depth of six feet, is connected to Maunalua Bay by a channel 200 feet wide and eight feet deep. Use is not limited to local residents. At least 56 nonresidents are "licensed" to use Kuapa Pond. Altogether, at least 668 vessels are licensed to navigate Kuapa Pond.

eign nations and constitutes, as the Coast Guard observed, "a highway for interstate and foreign commerce" (A. 50). These characteristics satisfy every traditional definition of a navigable water of the United States.

Petitioners do not dispute our conclusion that Kuapa Pond meets the traditional definition of the navigable waters of the United States. Petitioners instead essentially argue (a) that prior to its transformation, Kuapa Pond was not a navigable water of the United States, and (b) that it did not become a navigable water of the United States by virtue of their "extraordinary private effort." At all times, therefore, petitioners conclude that Kuapa Pond has been the equivalent of fast lands. We now consider these points in turn.

A. *Prior To Its Conversion To A Harbor And Canal, Kuapa Pond Was A Navigable Water Of The United States*

The district court found that, even prior to its transformation, Kuapa Pond satisfied the ebb-and-flow test for navigability and therefore, but for "unique" local law making fishponds private, would have been subject to public navigation (Pet. App. 24a-25a). Although we disagree that state property law may determine the extent of the federal right to navigate, see *United States* v. *Oregon*, 295 U.S. 1, 14 (1935), we endorse the district court's holding that even before its transformation Kuapa Pond was part of the navigable waters of the United States.

Petitioners contend the Court abandoned the ebb-and-flow test of navigability in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). We disagree. There, the Court observed that in England the common-law test of navigability was the ebb-and-flow test. This test was not, however, "any test at all" of the full extent of waters navigable in this country in view of the many inland rivers that are unaffected by the tide. The Court therefore held that the navigable waters of the United States also included waters that were navigable in fact. However, the Court did not hold that waters subject to tidal fluctuations were no longer navigable.[16]

In any event, Kuapa Pond in its natural state satisfied the navigable-in-fact test. In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 408-418 (1940), the Court held that the New River was a navigable water of the United States. The Corps of Engineers and the lower courts had concluded it was not navigable because of its swiftness, mountainous

[16] Pursuant to its mandate to regulate dredging, filling and other work in the navigable waters of the United States under 33 U.S.C. 403, the Corps of Engineers has asserted jurisdiction over tidelands solely under the ebb-and-flow test. See 33 C.F.R. 322.2, 42 Fed. Reg. 37139 (1977); *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *United States* v. *Cannon*, 363 F. Supp. 1045 (D. Del. 1973); *United States* v. *Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973); *United States* v. *Baker*, 2 E.R.C. 1849 (S.D. N.Y. 1971); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971); *Tatum* v. *Blackstock*, 319 F.2d 397 (5th Cir. 1963). See also Kramon, "*Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes*," 33 Md. L. Rev. 229 (1973).

bed, rapids, falls, and numerous other obstructions. *Id.* at 418. The Court reversed. "To appraise the evidence of navigability only on the natural condition of the waterway is erroneous," observed the Court, for "[a] waterway otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." *Id.* at 407. Therefore, in determining the navigable character of the river, it was proper, the Court held, to consider whether navigation on the river would be feasible after reasonable improvements. The Court stressed, however, that it was not "necessary that the improvements should be actually completed or even authorized." *Id.* at 407-408.

In its natural state, Kuapa Pond satisfied this test. Partial removal of the barrier beach and dredging of the bed would have opened Kuapa Pond to navigation from the sea. That petitioners have done this is evidence enough that it was practical to do so. It makes no difference that petitioners did it to benefit residents and local merchants. All government navigation projects largely benefit persons and businesses in their immediate vicinity.

Petitioners insist (Br. for Pet. 44) that there was no public "need" to open Kuapa Pond to the sea and that this defeats navigability. Not so. *Appalachian Power* makes it clear that the test is whether the water *could* be improved for public navigation, not whether it should be. (In fact, in *Appalachian Power*

the Corps had effectively determined that the New River should not be developed for public navigation.)[17]

We do not press the point, however. In this case it is unnecessary to resolve the question whether the public enjoyed a theoretical right to navigate in Kuapa Pond before its transformation. The present dispute relates only to public access after Kuapa Pond had ceased to be a shallow fish pond, effectively cut off from the sea, and had, by deepening and breaching of the seawall, become an obviously navigable body of water, fully accessible to Maunalua Bay and the ocean.

B. *Assuming Arguendo that Kuapa Pond was Not Previously Navigable, Its Conversion To A Marina And Channel To the Sea Made It A Navigable Water of the United States*

Assuming, for the sake of argument, that Kuapa Pond was not navigable before its transformation, it became navigable after it was deepened and opened to the sea. Petitioners do not deny that it is now

[17] Petitioners cite (Br. for Pet. 43-44) several decisions for the view that waters usable in their natural condition only by shallow-draft boats are not navigable. All but one of these decisions, however, were decided well before *Appalachian Power* made it clear that susceptibility of the stream to navigation must be considered, not merely based on the natural condition of the stream, but with reasonable improvements. The cited decision after *Appalachian Power* is not inconsistent with *Appalachian Power*. *Pitship Duck Club* v. *Town of Sequim*, 315 F. Supp. 309 (W.D. Wash. 1970), in holding that a lagoon was not navigable, found that it could not be reached from navigable waters "[m]ost of the time during each day," that there had never been commercial traffic over the lagoon, and that dredging the lagoon to admit such traffic would be "economically unfeasible." *Id.* at 310.

navigable and connects with other navigable waters of the United States. They contend that Kuapa Pond must be deemed non-navigable in law because it is an "artificial" extension of the navigable waters of the United States made navigable in fact solely through "extraordinary private effort." [18]

This argument is identical to the argument made by respondents in *Vaughn* and our response is no different. First, as we explained at pages 30-34 of our brief in *Vaughn*, it does not matter whether a navigable reach of the navigable waters of the United States is an "artificial" or a "natural" component. To permit such a distinction to determine public access would reintroduce the very evil that the navigational servitude is designed to avoid and would impose an intolerable burden on navigation. The navigable waters of the United States form a continuous highway of water. When a vessel approaches a "connecting" inlet, it is not always easy to tell whether it is natural or artificial or partly both. The public cannot be expected to know whether the inlet was once non-navigable (and therefore still is private, under petitioner's view) or has always been a natural

[18] Petitioners are correct (Br. for Pet. 28-43) that the scope of congressional power to regulate commerce is broader than the scope of the navigational servitude. The navigational servitude covers only the navigable waters of the United States. Regulatory power may extend beyond navigable waters to non-navigable waters or to fast lands. Our submission does not depend on "extending" the servitude beyond the navigable waters of the United States, as petitioners seem to assume. The servitude applies to Kuapa Pond because it is a navigable water of the United States.

inlet (open to the public), or is a stream rendered navigable through reasonable improvements (and therefore open to the public).

Similar problems are presented by the submersion of the barrier walls that fenced in fishponds. A fishpond of the *loko-kuapa* type was created along the beach by building a sea wall in the ocean in an arc shape. Natural accretion or erosion of the sea wall, however, may result in the complete submersion of the sea wall.[19] To the public, the waters will appear undisturbed. In such circumstances the public could not possibly be expected to know, under petitioners' theory, where the public right to navigate ends and the private monopoly begins. These practical obstacles to navigation are avoided by refusing to carve out an exception to the rule of free access to all waters that form part of the continuous highway of water connecting the states. If exceptional circumstances warrant a restriction on public access to any specific waterway, the Secretary of the Army is empowered to issue a regulation, after public hearing, just as the Corps has done in restricting access near or at military facilities.[20] See 33 U.S.C. 1 and 33 C.F.R. Part 207.[21]

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[19] See *In re Kamakana*, 58 Haw. 632, 634 n.2, 574 P.2d 1346, 1347 n.2 (1978); and page 28, *infra*.

[20] 33 U.S.C. 1 authorizes the Secretary of the Army to "prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property * * *."

[21] By explicit command of statute, moreover, private improvement of navigable waters opens them to toll-free pas-

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As mentioned, our argument on this issue parallels our argument in *Vaughn*. Just as the Louisiana fast lands used to build Vermilion's canals became subject to the navigational servitude when the canal system was opened to the navigable waters of the United States, so the Hawaii "fast lands" (assuming they ever were fast lands) became subject to the servitude when Kuapa Pond was dredged and opened to the sea.[22] To avoid this conclusion, petitioners ad-

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sage. Section 1 of the Rivers and Harbors Act of 1902, ch. 1079, 32 Stat. 371, 33 U.S.C. 565, provides that individuals or corporations may improve navigable streams at their "own expense and risk" upon the approval of the plans by the Corps of Engineers. The improvement, however, *"must not impede navigation, and no toll shall be imposed on account thereof, and said improvement shall at all times be under the control and supervision of the Secretary of the Army and Chief of Engineers"* (emphasis added). Section 565 was intended to allow local interests to improve navigable waters for the benefit of the public without having to wait for congressional appropriations. 35 Cong. Rec. 3141 (1902). In doing so, however, the public right of navigation was not to be abridged merely because the improvement was privately financed. Here, two waterways might be said to have been improved by petitioners' project. Kuapa Pond and the waters that run through it were improved. Maunalua Bay was also improved by extending access to Kuapa Pond. In either event, petitioners may not condition public navigation on payment of a toll, as they themselves admit they have been doing. (Br. for Pet. 56). (Section 565 was qualified slightly in the Water Resources Development Act of 1976, Pub. L. No. 94-587, Section 155, 90 Stat. 2917. Section 565 no longer applies to privately built wharves and piers in certain navigable waters wholly within a single state. See 33 U.S.C. 59(1).

[22] *Veazie* v. *Moor*, 55 U.S. (14 How.) 567 (1852), cited by petitioners, held only that there is no federal right to navigate local waters which are not part of the navigable waters of

vance two additional arguments. First, they assert that a "unique" combination of state and federal laws preclude any right of navigation on Kuapa Pond. Second, petitioners argue that the exercise of the public right of navigation on Kuapa Pond is an uncompensated "taking" of private property. As we now explain, neither point has merit.

III. Neither Federal Nor State Law Recognizes Any Private Right To Exclude The Public From Kuapa Pond

The reach of the public navigational servitude under the Commerce Clause is a federal question, not governed by local law. See *United States* v. *Oregon*, 295 U.S. 1, 14 (1935). In the exercise of its power to regulate navigation and declare that certain waters shall not be deemed to be navigable waters of the United States, Congress may withdraw the federal right of public navigation from those waters. See, *e.g.*, 33 U.S.C. 21-59(k). But, without congressional authorization, the states may not attempt to supersede the public right of navigation by conferring exclusive monopolies on navigation. Accordingly, petitioners contend (Br. for Pet. 45) that Section 95 of the Hawaii Organic Act, ch. 339, 31 Stat. 160, which organized Hawaii as a territory, constituted such a "surrender." Section 95 provided:

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the United States. *Veazie* did not hold that the servitude is inapplicable to artificial extensions of navigable waters of the United States. In *Veazie*, the river was entirely within the State of Maine and the reach of the river in question was separated from the Atlantic by four dams and impassable falls. It therefore did not form part of a continuous highway of commerce to other States. Nor was it subject to tidal fluctuations. *Id.* at 571.

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii *not included in any fish pond or artificial inclosure* shall be free to all citizens of the United States * * *. [Emphasis added.]

Petitioners argue that the italicized language prevented the attachment of any public right of navigation to fishponds and artificial enclosures. In our view, this contention is groundless for a number of reasons.

1. The basic premise of petitioners' Section 95 argument is that prior Hawaii law—allegedly confirmed by the Organic Act—recognized a right in the owners of fishponds to exclude public navigation. But no such state law rule has been shown.[23]

Petitioners devote considerable effort to establishing what we do not contest—that Hawaii law recognizes a private right of fishery in enclosed fishponds and generally treats fishponds as improvements appurtenant to the land. Petitioners, however, point to no state decisions holding or even suggesting that the public does not have a right to access to former fishponds opened to the sea for the purpose of navigation. We believe, for two reasons, that Hawaii law looks the other way.

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[23] We note that Section 95 is no longer federal law. Although the provision survives as Article X, Section 3, of the Hawaii Constitution, it was repealed as part of the laws of the United States by the Statehood Act of 1959, Pub. L. No. 86-3, Section 15, 73 Stat. 11.

First, the reason fishponds were treated as private property derived from their vital role as a peculiar form of Hawaiian aquaculture. In 1848, King Kamehameha III pronounced the Great Mahele, a national land distribution under which large land units (*ahupuaas*) were allotted to his chiefs (Pet. App. 3a-4a, 17a). An *ahupuaa* generally ran from the mountain to the sea and included any fishponds within its boundaries (*id.* at 17a). It afforded the chief and his people access to fisheries at the seaside as well as the products of the highlands, such as fuel, canoe timber, and mountain birds and game. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-241 (1879).

Fishing was a vital occupation for a chief and his people, and customs and laws regulated the allocation of fishing rights among the chief, the people, and the King. See *Carter* v. *Hawaii*, 14 Haw. 465, 470-473 (1902). Anyone was permitted (after 1839) to fish in the ocean outside the coral reefs (*id.* at 471), but only the landlord and the tenants could fish inside the reef or in fishponds within the *ahupuaa* (*ibid.*). Fishponds were of three types: (a) *loko wai* —inland fresh-water ponds normally at an elevation higher than sea level; (b) *loko kuapa*—shallow ponds formed by building a stone wall into the sea to create an artificial enclosure; and (c) *loko pu'u*—shallow ponds formed by a natural sand beach between the pond and the sea (Tr. 65-66).[24]

[24] "Tr." refers to the reporter's transcript of the proceedings in the district court on November 19, 1975.

Kuapa Pond, prior to its transformation into a marina and boating area, was essentially of the last type, though the use of a stone wall to reinforce its natural sand bar accounted for its name (Pet. App. 15a-16a & n.3; Tr. 67-69). Since mullet did not spawn in the fishpond, they were caught outside the pond and planted within it as seed (Tr. 70). The sluice gates allowed spawn to flow in and out of the pond but did not allow large fish to leave. Fish were harvested in the pond with the aid of shallow-draft canoes (Pet. App. 16a).

Fishponds thus contained cultivated crops, and it is understandable that Hawaii law recognized the exclusive right of the cultivators to reap their harvests by excluding the public from such ponds and treated fishponds as improvements appurtenant to the land, as petitioners observed. See *In re Kamakana*, 58 Haw. 632, 640, 574 P.2d 1346, 1351 (1978); *Harris* v. *Carter*, 6 Haw. 195 (1877). However, once a fishpond is no longer used to harvest fish, is transformed to a marina, and is joined with the sea, the reasons for excluding the public no longer apply. "The rule follows where its reason leads; where the reason stops, there stops the rule." K. Llewellyn, *The Bramble Bush* 157-158 (1960). Although there is no decision in point, Hawaii property law seems to hold that a pond remains private only so long as it remains completely enclosed. See *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915) ("[W]hen one captures fish in the public waters and confines them in a private pond, disconnected from the public waters, he acquires an absolute property in them * * *").

Second, Hawaii law clearly recognizes a public right of navigation on all navigable waters in Hawaii. *King* v. *Oahu Ry. & Land Co.*, 11 Haw. 717, 725 (1899); *McBryde Sugar Co.* v. *Robinson*, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973), cert. denied, 417 U.S. 976 (1974); *Bishop* v. *Mahiko*, 35 Haw. 608, 647 (1940); *Carter* v. *Hawaii*, 14 Haw. 465, 470 (1902). In light of this policy, it is doubtful that the Hawaii courts—if faced with the issue—would exclude the public from fishponds opened to the sea for the purpose of navigation.[25]

[25] Of the Hawaii cases cited by petitioners (Br. for Pet. 17-23) only two arguably bear on any aspect of ownership of unenclosed fishponds. *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915), supports our view that the exclusive right to fish in a fishpond exists only so long as the pond is "disconnected from the public waters." *In re Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978), held that a fishpond had been patented to the private landowners' predecessors and therefore title had not remained in the State. Although there are suggestions in the opinion that the fishpond is now in dilapidated condition and no longer used for aquaculture, as petitioners argue, the decision addresses only the issue of bed title, and does not consider whether or not such title is burdened with a servitude in favor of public navigation. We do not contend that title to the beds of fishponds is public property.

The only two state attorney general's opinions on the general subject are inconclusive. The 1939 opinion of the Attorney General of Hawaii cited by the district court (Pet. App. 25a n.2) states that "[t]he status of ancient fish ponds fronting on the sea various ahupuaas and ilis have [*sic*] not been decided as yet by our highest court." Hawaii Attorneys General Opinions No. 1689 at 461 (1939). The 1957 opinion of the Hawaii Attorney General, No. 57-159 (Pet. 8-9), does state that a breach in the sea wall of a fishpond would entitle vessels in distress to trespass in times of emergency, a point that need not be made if the

2. There is, in any event, no basis for concluding that the Congress of 1900 was adopting as federal law any local rule that restricted the normal scope of the public navigational servitude.

First, the intent of Congress in Section 95 was "to destroy, so far as it is its power to do so, all private rights of fishery and to throw open the fisheries to the people." *In re Fukunaga*, 16 Haw. 306, 308 (1904); *State* v. *Hawaiian Dredging Co.*, 48 Haw. 152, 187, 397 P.2d 593, 612 (1964). Congress intended to open all sea waters to the public with the limited exception of fishponds and other enclosed waters, since they were used for aquaculture. Once the cultivation of fish ceases and the enclosure is breached for connection to the sea, the reason for the exception vanishes and the reasons for the rule of universal access apply.

Second, "[t]he general purpose of [Section 95] and of the following sections, 96 and 97, [was] to put the fisheries of the Hawaiian Islands upon the same basis as those of the United States." H.R. Rep. No. 305, 56th Cong., 1st Sess. 24 (1900). This congressional statement (which is the only statement in the House or Senate Report regarding the relevant language) refutes the notion that Congress intended to treat Hawaiian fishery rights differently from

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waters are deemed public anyway. But neither opinion, and no previous case of which we are aware, holds that the public right of navigation does not apply to a fishpond that has been deliberately opened to the sea for navigation purposes, as in this case.

fishery rights in the rest of the United States. It suggests, on the contrary, an intention to establish in Hawaii the traditional public right to access to the navigable waters of the United States. Thus, once Kuapa Pond ceased to be used as a fishpond and was connected to the sea, it joined the system of navigable waters to which all the public have a right to access.

Third, Section 95 addressed only the right of fishery, not the public right of navigation. See Report of the Committee on Fisheries, appended to The Report of the Hawaiian Commission, S. Doc. No. 16, 55th Cong., 3d Sess. 93, 94 (1898); Investigation of the Fisheries and Fishing Laws of Hawaii, H.R. Doc. No. 249, 57th Cong., 1st Sess. 19, 23-24 (1902) (Report of the Commissioner of Fish and Fisheries pursuant to Section 94 of the Hawaii Organic Act). Insofar as Section 95 granted a public right of fishery, as in virtually all sea fisheries, it necessarily implied a right of access. The converse, however, is not true. Recognition of private rights of fishery in fishponds (and in some sea fisheries) did not necessarily exclude public navigation consistent with the right of fishery.

Finally, whether or not Congress conferred a private right of navigation as well as a private right of fishery, Congress limited the exclusive right to "artificial inclosures" and "fishponds," which, as we have seen, are artificially or naturally enclosed. This was no accident, for it was evident to Congress that the enclosed fisheries were essentially "farms" for the planting, cultivation, and harvesting of fish. It was

equally evident, as it is now, that once the enclosure is opened to the sea, fish will come and go. For the same reason that Hawaii law would, we suggest, not be extended beyond its purpose, the exception for "fishponds or artificial inclosures" in Section 95 should not be extended to unenclosed waters which are really part of the sea.[26]

IV. Exercise Of The Public Navigational Servitude Is Not An Unconstitutional Taking Of Property

There is no merit to petitioners' claim (Br. for Pet. 52-64) that the exercise of the public navigational servitude amounts to a taking of property without just compensation. Without question, state law normally defines the extent of property interests. See *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). The whole point of the federal servitude, however, is that it supersedes any state-created property right in the navigable waters of the United States. All such state interests are "subordinate to the public right of navigation." *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913); *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82, 87 (1913). *Gilman* v. *Philadel-*

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[26] Petitioners suggest *Damon* v. *Hawaii*, 194 U.S. 154 (1904), and *Carter* v. *Hawaii*, 200 U.S. 255 (1906), held that "unique" local laws may supersede the navigational servitude. These decisions merely held that a state license to take fish from a sea fishery, vested under pre-annexation law, could not be taken by the state under Sections 95 and 96 of the Organic Act without payment of compensation. They do not remotely address the public right of navigation across former fishponds transformed to marinas and joined with the sea.

phia, 70 U.S. (3 Wall.) 713, 724-725 (1865). The exercise of the servitude by the public or by Congress, within the confines of the navigable waters, is paramount to any state-created interest in the waters. Such an exercise, therefore, "takes" no property, even though it may adversely affect riparian owners.

Thus, even though local property laws recognize a right of a riparian owner to consume water from the navigable stream, see *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950) (majority and concurring opinions); or confer a riparian right of navigational access to the stream, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); *Gibson* v. *United States*, 166 U.S. 269 (1897); or grant a right to unspoiled oysterbeds, *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82 (1913); or confer certain rights in the flow of a stream, see *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956), such state-created rights exist subject to the exercise of the federal navigational servitude, as the Court has observed in these and many other no-compensation cases. See pages 20-21 of our brief in *Vaughn*.[27]

It is true that compensation must be paid if non-navigable waters or fast lands are taken for public

[27] Of course, Congress may agree to pay compensation for the taking of state-created water rights. See *Henry Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930) (Section 27 of the Federal Water Power Act preserved state-created water rights); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (Section 8 of Reclamation Act of 1902 preserved state-created water rights).

use. This principle, of course, is wholly inapplicable here if, as we have argued, Kuapa Pond was a navigable water of the United States even before its transformation. See pages 19-22, *supra*. Nor is the prohibition against uncompensated taking of fast lands violated if we assume that Kuapa Pond was the legal equivalent of fast lands before its conversion. On that hypothesis, the Pond became part of the navigable waters of the United States, and subject to the public servitude, only after the owners—not the Government—undertook its transformation. Thus, the opening to public use was the consequence of the proprieters' action, not of any governmental "taking".

Fast lands are not "taken" when the owner voluntarily dredges them to allow the navigable waters of the United States to flow in. The Court has long held that when an owner of property uses it in a way that affects the public interest, it is subject to regulation and that such regulation, even if it interferes with the full enjoyment of the property, is not a "taking." *Munn* v. *Illinois*, 94 U.S. 113, 130-133 (1876). *Nebbia* v. *New York*, 291 U.S. 502, 531-536 (1934); *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 569-571 (1939); *Bowles* v. *Willingham*, 321 U.S. 503, 517-518 (1944); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 163-169 (1958); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258-261 (1964). As the Court observed in *Munn* v. *Illinois*, *supra*, 94 U.S. at 133, if the owners of such property do "not wish to submit themselves to such interference, they should

not * * * clothe[] the public with an interest in their concerns."

The public has an interest in maintaining the navigable waters of the United States as a continuous highway for commerce and navigation and in avoiding the uncertainties and burdens to navigation that would be posed a rule making "artificial" extensions of the navigable waters "off limits." As in *Munn*, the owners of fast lands are not required to dredge them and shape the navigable waters of the United States more conveniently about their land. But, if they do, they may not complain that the servitude accompanying those waters is a "taking" of their land. See also *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union* v. *Logan Valley Shopping Plaza*, 391 U.S. 308 (1968); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972).[28]

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[28] Petitioners' voluntary extension of the navigable waters of the United States over their land is also a complete answer to their theory that the United States is bound to honor preannexation titles to fishponds. See *Knight* v. *United States Land Association*, 142 U.S. 161, 182-185 (1891); *San Francisco* v. *Le Roy*, 138 U.S. 656, 670-672 (1891). Even if Kuapa Pond were, by virtue of its preannexation lineage, regarded as the legal equivalent of fast lands, the fact remains that fast lands may be voluntarily subjected to the navigable waters of the United States. *Knight* and *Le Roy* are not to the contrary. Those decisions merely held that private title to the beds of navigable waters remained private after annexation and did not pass to the United States. Those decisions did not address the right of public navigation. Nor did they in any way suggest that private fast lands remain private after they

Finally, petitioners' analogy to *Monongahela Navigation Company* v. *United States*, 148 U.S. 312 (1893), is not apt. There, "at the instance and implied invitation of Congress," a private company constructed a lock and dam on the Monongahela River and collected tolls for private profit under a state franchise. *Id.* at 334. When the United States later took control of the improvement, the Court held that the United States was not, by virtue of its invitation to construct the works, in a position to deny just compensation. In subsequent no-compensation decisions under the navigational servitude, the Court held that *Monongahela Navigation Company* rested on the principles of estoppel. See, *e.g.*, *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, *supra*, 229 U.S. at 89-90; *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251, 264 (1915); *United States* v. *Rands*, 389 U.S. 121, 126 (1967), see also *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 513-514 (1923). No analogous invitation to improve Kuapa Pond was ever issued here by the United States. Nor, the district court found, was there any estoppel (Pet. App. 33a). Al-

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are dredged so that the navigable waters of the United States may flow in.

Moreover, even assuming that pre-annexation Hawaii law recognized a right to exclude public navigation on enclosed fishponds, such a restriction would not survive annexation. Even enclosed fishponds, after annexation, would be subject to the public right of navigation so long as they were navigable waters of the United States. Cf. *United States* v. *Texas*, 339 U.S. 707, 712-713 (1950). *Knight* and *Le Roy* held only that pre-annexation titles must be respected after annexation, not that land titles may not be subjected to servitudes.

though petitioners stated their view in a letter to the Corps that the public could be excluded from Kuapa Pond, the United States at no time, so far as the record discloses, ever affirmatively confirmed this. See *Louisville Bridge Co.* v. *United States*, 242 U.S. 409 (1917); cf. *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973). At all events, 33 U.S.C. 565, enacted in 1902 after *Monongahela Navigation Company*, eliminates any possibility of an estoppel. It provides that private improvements to navigable streams must remain toll-free to the public and remain subject to the control and supervision of the Corps of Engineers. Petitioners claim (Br. for Pet. 56) that they "charge maintenance fees, similar to tolls," for use of Kuapa Pond. This is precisely what Section 565 forbids. See note 21, *supra*.[29]

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[29] As petitioners note (Br. for Pet. 30), a 1930 opinion of the Attorney General of the United States did state that Congress could not take over "complete control" of an "entirely artificial" canal without paying compensation. But the opinion also stated that one who makes improvements to navigable waterways "takes the chance that the United States may conclude to exercise its paramount authority under the Commerce Clause * * *," and that such improvements may be completely appropriated without compensation. 36 Op. Att'y Gen. 203, 213, 214 (1930). Kuapa Pond, of course, is not an artificial but a natural body of water (see Pet. App. 8a-9a). And whether or not the United States could appropriate the waterway to its exclusive use, all the United States has done by virtue of the court of appeals' decision here is prevent the obstruction of public navigation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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