WATER-POWER BILL.

SATURDAY, DECEMBER 19, 1914.

UNITED STATES SENATE,
COMMITTEE ON PUBLIC LANDS,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Henry L. Myers (chairman) presiding.

Present: Senators Thomas, Robinson, Chamberlain, Smoot, Clark, Works, Norris, and Sterling.

The CHAIRMAN. Mr. Fisher, we will be glad to hear from you if you are ready to proceed now.

STATEMENT OF HON. WALTER L. FISHER, OF CHICAGO, ILL., EX-SECRETARY OF THE INTERIOR.

Mr. FISHER. Mr. Chairman, perhaps I might say at the outset that the principal reason I have come on to this hearing, in addition to a desire to present to this committee, if it will be of any service to it, any information I have, is the very strong feeling I have that it would be something in the nature of a public calamity to the country as a whole, and especially to the West, if this opportunity to pass a fair and reasonable water-power bill should fail either through the unwillingness of certain of the power interests to accept what seems to be not only right but inevitable provisions in the public interest, or through any failure of the Senate or the House to understand, at least, the view of those of us who have been attempting, as best we could, to advocate that sort of public protection.

I am very much impressed with the fact that through a very considerable period of time during which I have had to do with this question, it has been made apparent to me that there is a radical difference in the ranks of those who are actively engaged in developing water power. I have observed now, for a good many years, that, broadly speaking, there are among those who are interested in water-power development two quite distinct classes. There are some men who are impressed with the private side of this question so strongly that I think they fail entirely to realize the public side of it and, either through their interest or through natural human inability to put themselves in the place of the other fellow, they are opposing what I think are the real interests of the very men who wish to be engaged in these enterprises from the point of view of financial profit and the general promotion of industry and development in this country.

On the other hand, there are a good many men in the water-power business who are quite broad minded, who realize that there are

certain things that must be conceded and that ought to be conceded in the public interest even though those things do, to some extent, embarrass them in raising money and in promoting their various enterprises.

I am sure that both of these classes of men naturally influence Congress, both the Senate and the House, and I should say not improperly. I mean those members of the Senate and of the House especially who have in their respective States either a considerable existing water-power development or the possibility of having a very considerable water-power development. They naturally come in contact with men who are pushing those enterprises and they naturally listen to their views, as they should, and they are naturally and inevitably influenced by the statements which these gentlemen make as to their difficulties and as to the difficulties that will arise if legislation of a certain kind is enacted. All of them, of course, in both of these classes of men, are thoroughly dissatisfied with the existing law and have been for a great many years. They are no more dissatisfied with it, however, than are the men who have had to do with the official administration of the law, or the men who have actively interested themselves in trying to promote proper legislation unofficially.

But when it comes to the question as to what you are going to substitute for the existing law, a difference of opinion at once arises. If you suggest to certain of the power people that there ought to be such and such a provision inserted in a statute, in the public interest, instantly you find that a number of them, estimable gentlemen and largely interested in development, throw up their hands and say right away that it will create such and such a difficulty in their plans; that it will make it hard for them to raise money; that it will retard development. Others among them see these same difficilties. They see that any restriction of any kind that is put upon power development will necessarily be, to some extent, an obstacle to raising money, but they also see that certain restrictions are not only reasonable but really necessary and they are ready to acquiesce in them.

But the difficulty is that you find in these hearings before you, just as I found in hearings before me as Secretary of the Interior, that the more reasonable men among the developers of power are restrained from expressing themselves as fully publicly as they are willing to express themselves privately. And that is due to two things: It is due, first, to the active intervention of their more radical associates in power development who insist that the broader minded people, as I conceive them to be, are interfering with the general class interest that to some extent is involved and that if they will just keep still and keep in the background, legislation can be obtained that will be more favorable to the private interests than would be obtained if these gentlemen say frankly what they think.

Senator SMOOT. Mr. Fisher, I do not believe that the members of this committee are so much worried over the question of regulation as they are over the question as to who shall regulate?

Mr. FISHER. Yes.

Senator SMOOT. I do not believe there is a member of the committee but who recognizes the fact that there should be some control. I do not believe there is a member of the committee but who believes that we can all arrive at what would be a proper control.

But the great question in this is not the details in the bill as to the amount that should be charged or that should not be charged, but it is the question as to who has the right to regulate and whether this bill does not establish a precedent that the Government of the United States can charge for the use of the waters of a State. That is more vital, I think, than the mere fact of whether the power man wants control or whether he does not want it. And, as far as I am concerned, I am not going to take that into consideration. There is a deeper question in my mind, as I have suggested, and I would like to have you address your remarks to that point— the question of whether the Government of the United States has a right to control the waters within a State.

Mr. FISHER. Senator, I am very glad to hear you say what you do.

Senator WORKS. Mr. Fisher, there is another matter that might be suggested, I think; that is, so far as I know the desire of this committee, so far as it affects the Western States in which irrigation prevails, that there should be the most effective regulation and control of the operations of these companies. But one of the vital questions is not only the question of jurisdiction, but the question as to whether Federal control and regulation would be as effective as State control where we have— for instance, as in California— all of the machinery already prepared by law to regulate these corporations, I think, fully and effectively.

Mr. FISHER. That question also seems to me very important and very interesting. However, I have said what I have thus far said because since I arrived here yesterday I have gone through the record of the committee at this hearing and I have found in that record quite a considerable discussion of some of these matters which seem to me fundamental. I am quite impressed with the fact that the committee is not unanimously of the opinion expressed by Senator Smoot, but I note that there seems to be some discussion of some of those matters that seem to me fundamental, whether the State or the Federal Government regulates, and there seems to be quite a difference of opinion on those subjects. I find certain of the witnesses who have appeared here, representing the power development side, I mean from the private point of view—and I do not say that at all in criticism; I think they should be here and say frankly what they do think—but I find some of those witnesses seem to be discussing the very fundamental question of any regulation, whether by the State or Federal Government, and such questions, for instance, as compensation. I find a discussion as to whether the granting power, whether the State or the Federal Government, should as a matter of fact exact any compensation at all.

SENATOR SMOOT. As I remember, most of the witnesses have— especially those who have come from California, and everyone, as I remember—stated that the utilities commission or the railroad commission of California was very satisfactory to them.

Mr. FISHER. Oh, yes; but that still does not meet the points I have mentioned.

Senator CLARK. Mr. Fisher, did not the point you mention, as to whether the Government shall exact compensation for the use of the waters, at the same time take into account the question of the proper authority to control?

Mr. FISHER. No; there is that question, Senator Clark, but in addition to that, you must recall considerable discussion in this record as to whether or not the imposition of compensation of any kind, whether by State or Federal Government, was not an indirect tax on the consumer.

Senator CLARK. Oh, yes.

Mr. FISHER. There are a lot of fundamental questions of that kind which do not touch the question of whether the State or Federal Government shall do it, but do touch the question of what should be done if either the State or the Federal Government regulates.

Senator CLARK. That is true.

Mr. FISHER. Considerable emphasis has been placed upon those things and I thought it might be helpful just to refer briefly to two or three matters that seem to me to throw some light upon it.

My method of approaching this thing, Senator, would be this: I should consider first what ought to be done in the public interest, by any governmental agency, no matter whether State or Federal—I do not mean the minute details, but what ought to be in any permit whether granted by the State or Federal Government—but, having ascertained those things, then I would inquire which agency, State or Federal Government, was the most appropriate agency to do it, whether there were any legal questions involved and whether there were any questions of policy and, above and beyond all else, whether the most effective way of accomplishing those things, both in the interest of the power developer and the public, was not to have the State and the Federal Government cooperate in producing the desired results.

However, the first thing in any intelligent discussion of the matter, it seems to me, is to determine what is the result to be desired, and it was with that purpose that I was starting to discuss some of those fundamental questions, and I will try to be as brief as I can.

A number of years ago I was appointed a member of the so-called committee of twenty-one, or commission of twenty-one, appointed by the National Civic Federation. It made what at that time was undoubtedly the most extensive study of public utilities that had been made anywhere. A considerable fund of money was raised for the purpose of providing that commission with expert advice, engineers, and accountants. That commission took illustrative cases in the United States of the various public utilities in connection with electric light, street railways, water, and things of that sort, and also took illustrative cases in Europe, particularly in Great Britain, taking, upon the one hand, an illustrative case of the public ownership and operation of such a utility, and, on the other hand, the private ownership and operation of such a utility, and checked them up generally and then put engineers at work on the plants and equipments and put accountants to work on the financial records with a view to comparing the two.

Now on that commission were representatives of the different interests, like Melville E. Ingalls, president of the Big Four railroad, who was chairman, and it embraced in its membership such men as Mr. Clark, who represented the General Electric Co.; Mr. Edgar, who represented the Boston electric light and power development—I forget whether it is called the New England Edison Co. or the Boston Edison Co.; Mr. Walton Clark, of Philadelphia, who represented the U. G. I.; and

a number of other people. And there were a number of men who might be said to represent the radical side, like Parsons, of Boston, and Bemis, of Cleveland—men of that type.

Now, the remarkable thing about it was this, that when we got down to the final preparation of the report we were able to get an absolutely unanimous report upon the various conditions which it was conceded, as a result of our investigation, ought to be required of any privately owned and operated public utility, with the single exception of Mr. Walton Clark, of Philadelphia, who dissented. Mr. Clark, who represented the General Electric (I have forgotten his full name, I think it was W. J.) and Mr. Edgar who represented the Boston Electric Light people noted a difference of opinion as to the method of expressing one or two things in the report, but concurred otherwise. Mr. Clark, of Philadelphia, concurred in nothing and disagreed with everything there was in the report and even where there was something where he did not disagree as to the substance of it, he wanted to state it in some other way.

Senator CLARK. I suppose that runs in the blood. [Laughter.]

Mr. FISHER. I think so. It was possibly a natural condition due to the individual and due to his point of view.

I have called attention to that because you will find that that report unanimously, with the exceptions I have mentioned, agrees that certain things ought to be done in the public interest, such as the provision for a term grant, the reservation of the power to take over, the provision for compensation, the provision for the regulation of rates, and things of that sort that in those days were not so clear as they are now.

And if you take the report of your International Waterways Commission, unanimously made to the Senate; if you will look at that report you will find it signed unanimously by men of the greatest difference in point of view, certainly many of them who could not be accused of radicalism or undue neglect of the proper protection of private investment. Those men unanimously agree on certain things which seem to be in dispute between members of your committee. That commission unanimously recommends certain things which seem to be still subject to dispute here.

Now I had before me, as Secretary of the Interior, quite an extensive conference with the power people to which I invited those gentlemen to discuss the question of what regulations ought to be adopted by the Secretary of the Interior to carry out the existing law and make it as effective as possible in both the public and private interest; and the same differences of opinion developed there that have developed here. For instance, I have been very much interested in the testimony given to you by Mr. Cooper. Mr. Cooper complained of few of those things that were complained of by others. If you will take his testimony, as I took and read it last night, you will find that he has very little complaint in regard to many of those things which seem to bother many of the other gentlemen very much.

Senator SMOOT. Mr. Cooper's plant was built on a navigable stream and not a nonnavigable one. I think Mr. Cooper went so far as to say that he believed that the water belonged to a State in a nonnavigable stream and the regulation of water within a State was quite different from the regulation of waters within a navigable stream.

Mr. FISHER. In certain respects, but not in regard to any of these matters which I am now discussing. You will find, of course, he said there was a difference, and there is a difference, but not as to any of these matters that I am discussing. These relate to the question of what the State should exact if it were to grant the power, quite as much as to what the Federal Government should exact if it were to grant the power. You find a lot of these gentlemen insisting that neither the State nor the Federal Government should exact certain things, and their opposition does not depend upon who grants the permit, but it relates to what kind of a permit either the State or the Federal Government should grant.

Senator WORKS. Mr. Fisher, that only involves a question of dollars and cents. At least, that is a question of whether it does not add that much of a burden on the consumers. I do not think the power developers are very much interested in that question, myself.

Mr. FISHER. They seem to be, Senator.

As Secretary of the Interior I had a hearing and discussion at which there were a number of gentlemen representing that side of the question, and I noted that the chief anxiety about the protection of the consumer and about the question as to whether the State ought not to run these things is almost invariably voiced by the representatives of the power developers.

Senator WORKS. Well, they may use that as a means of defeating objectionable legislation, but what I am talking about is the practical effect of it. When you put the law in force, certainly any sum of money paid by the developing corporation will be charged up against the consumers as a part of the operation expenses and eventually the consumer will have to pay it. It may amount to a very small matter, probably will; but I am talking about the principle and practical effect of it.

Mr. FISHER. There is a differecne between the principle and the practical effect of it. The difficulty is this, that because in certain aspects the exaction of compensation by the granting power theoretically may possibly have an effect upon the price paid by the consumer, that theoretical possibility is used as an objection to a very practical provision which, in my judgment, will have precisely the opposite effect. I think you brought it out, Senator, in the question you asked certain of the witnesses. I think your very questions put yesterday indicate that in your opinion, those things will have no practical effect of increasing the price to the consumer, for you make it clear that what you are doing is emphasizing the purely theoretical side of it and concede, by the very form of your questions, that it will not have any practical effect.

Senator WORKS. No, I do not think it is a matter of theory, Mr. Fisher. It is a legal proposition that I am presenting. Legally speaking, of course, the charge is made against the consumer. There is not any question about that. But what the practical effect of it will be as to the additional amount that the consumer will have to pay, that is another matter.

Mr. FISHER. Well, it is of little consequence to the consumer if it does not have any effect upon what he has to pay.

Senator WORKS. Certainly.

Mr. FISHER. If the State or the Federal Government, whichever grants the permit, exacts compensation and by that requirement is enabled to make its regulation effective—and it can make it effective in no other way so well—and that regulation or that exaction of compensation does not affect the price to the consumer, there would seem to be no valid public objection to it. Experience justifies us in the conclusion that upon the contrary we get certain very distinct public advantages by exacting compensation. And that, it seems to me, disposes of the matter and disposes of it in favor of reserving the compensation. But it is not true that, even as a matter of theory, the exacting of compensation from any hydroelectric development does increase or does affect the price to the consumer. There never has been any successful attempt to answer the proposition put forward by the Commissioner of Corporations, in his report some years ago on water power and repeated by a great many others, among them myself, that, as a matter of fact, there are very few communities in which hydroelectric power furnishes or is able to supply the entire market. A large portion, varying in different places, is always furnished by steam-generated power. If the steam-generated power costs more to produce than the water-generated power, it is perfectly apparent that no regulation by either State or Federal public utility can reach the situation so as to protect the consumer. You can not discriminate, in regulating the price of power to the consumer in a given community, between the sources from which it is derived. You can only regulate the price of electric current as it is delivered to the consumer, and that for several reasons.

Senator SMOOT. Mr. Fisher, right there I wish to say that in relation to the production of electric power by steam in most cases it is done for the purpose of carrying over the peak loads. They do not run for the full 24 hours in every day.

Mr. FISHER. By steam?

Senator SMOOT. By steam. And one other thing in connection with steam power is this, that in many places they are compelled to have a power that is more reliable than the power upon a long transmission line that is affected by the winds and affected by the lightning and affected in an untold number of ways. I know companies that keep steam powers as reserves, and that only, and they are compelled to do it. Now, they are charged up as steam powers, but there is no necessity for them except in case of accident or safety.

I know of cases where there are steam powers that do not run over three or four hours of the 24 to carry the peak loads that come when the street cars are heavily loaded or some great power consumer requires extra power at a particular time of the day. Those things, I think, are the reasons why steam power is used in connection with electric power and why it is stated that there is not sufficient power to take care of the consumers.

I understand now, and it was so stated by one of the witnesses, that the amount of power produced in lower California is something like 25 per cent more than is wanted in the way of consumption. I suppose the time will never come when they will not have to have more produced than the consumer really needs, because the trade is growing so rapidly.

Mr. FISHER. Senator, I am fairly familiar with the use of auxiliary steam power in connection with hydroelectric power. That is not

what I was talking about. While it is quite true that auxiliary steam power is used and required in many cases to supplement the requirements of a hydroelectirc company, it is also true that in many cases the steam power is generated entirely outside of that and in competition with the hydroelectric company. I am discussing conditions of that character and not of the other character.

I am also aware of the fact it is contended by certain people that steam power, as a matter of fact, can be developed for less than hydroelectric power and it possibly can in some instances. But, in those instances what I am now discussing has no application. Nevertheless, there does remain a considerable field in which the principle to which I have just called attention applies directly and in which it is apparent that the theory of regulation can not reach the case.

In addition to that we all know, from our own experience—those of us who have had to do with public utility commissions—that the regulation of the price is, as a matter of fact, seldom if ever affected by the amount of compensation exacted by the State or local community. We find that what happens, in many instances, is that where taxation increases or where compensation is exacted, the net returns upon the stock of the corporation, and the dividends nevertheless increase and that, as a matter of fact, this theory that because you have exacted compensation to be paid the Government, the price paid by the consumer must be affected never has and never does work out in practice.

Senator SMOOT. Take the California Railroad Commission.

Mr. FISHER. Yes.

Senator SMOOT. They first find out what the physical value of the property is, the actual value of it. Then they take into consideration the expense of maintaining it and operating it, and due allowance for depreciation. Then they make the rate based on that valuation?

Mr. FISHER. Yes.

Senator SMOOT. Now that power is taxed by the Government or by the State. That is taken into consideration and the rate made accordingly.

Mr. FISHER. Yes.

Senator SMOOT. And how can you say that the consumer does not pay the charge in a case like that?

Mr. FISHER. In a case like that, where the tax is put in as a part of the cost and has any appreciable effect upon the price, of course the consumer does pay that, Senator.

Senator SMOOT. That will be the case in every State that has a utility commission that amounts to anything.

Mr. FISHER. Unfortunately not. It has not worked out so in the past, and one of the experiences we had, while I was Secretary of the Interior, was with reference to this very same California commission. I called in my office this conference with representatives of the power people, inviting all those I knew to be at all active in this matter; and a very considerable number of them came. I see here in the room a number of those who were there. And, among other things, I invited the members of the California commission, and Mr. Eshelman, who I understand was chairman of that commission, was present. He is a man who is exceedingly popular, and I think has just been elected lieutenant governor.

Senator WORKS. Yes.

Mr. FISHER. He is a very efficient man, and he was present, and there were also representatives of some of the same California interests which have appeared before your committee. And they expressed a great deal of anxiety about the Federal Government slopping over onto the functions of the State of California and spoke about how effectively they were being regulated by the State commission. I expressed then the same sentiment or opinion that I have expressed here, namely, that it was very singular to me that that anxiety was always expressed by the representatives of power development, and I asked Mr. Eshelman how he felt about it. Mr. Eshelman had no hesitation whatever in saying, very definitely, that he had no apprehensions about the Federal Government in any way impinging upon any of the functions of the State of California or of his commission; but, on the contrary, he and his commission welcomed it and thought it was wise public policy.

Now, we put it up to Mr. Eshelman, and he had another representative of the commission present with him, Mr. Marks, I think, of the water commission. Mr. Eshelman, I think, was representing the railway commission and Mr. Marks the water commission, so we had the two interests there, and we asked them how they felt about it. We put before them all of these various suggestions involving compensation, involving regulation, and involving all of those things that are in this Ferris bill, and they said they not only had no objection to them, but they said they welcomed them, that they thought them wise things from a public point of view.

Now I happen to have here a transcript of the proceeding, and Mr. Eshelman said:

> I would say that I agree absolutely that there should be not only coordination of the work, but where there is any doubt or there will be any overlapping of jurisdiction or authority, in any regard, I think that it should be taken care of both by the Federal and the State Governments.

Now, I do not know just how you could get a more authoritative declaration from the point of view of a State utilities commission as to the question of overlapping on State authority, to which I find in your hearings the most attention is given.

Senator SMOOT. This bill does not provide for any cooperation between the Federal Government and State commissions.

Mr. FISHER. I think it does just that, if you will pardon me.

Senator SMOOT. Of course, I should put it this way, that in my opinion it does not.

Mr. FISHER. You are right in saying it does not in terms provide any coordination or cooperation, and it does not provide any machinery for cooperation, but the very effect of the bill is necessarily in that direction. The bill does contain, as you will remember, a provision that the Federal Government is to exercise its regulatory functions only where the State government does not provide an adequate commission, and the bill does provide for compensation.

Now, the compensation feature is a very essential provision for effective cooperation. It is only in that way——

Senator SMOOT. The bill provides, of course, for compensation to the Government; but it does not say anything in relation to compensation to the State at all.

Mr. FISHER. Oh, I understand that; but it does provide—I am now speaking to the cooperative features—for compensation to the Federal Government, and this bill provides that one-half of the money so derived shall go first to the irrigation fund, and, second, that it shall go to the State. Now, that is very practical cooperation. It may not be as effective as some other means of cooperation.

Senator CLARK. Mr. Secretary, that is not exactly cooperation, but that is a sharing in the profits.

Mr. FISHER. Yes.

Senator CLARK. Now, where in this bill is the State granted any cooperation in the question of site, in the question of operation, or in the question of anything except that which you have mentioned?

Mr. FISHER. I have mentioned, I think, Senator, that which seems to me to be of most vital interest to the citizens of the State, namely, the regulation of service and charge. I assume that the people of the State of California are more concerned in the question as to the service they get and the price they pay for it than in anything else, and that very thing is provided for in this bill, that the Federal Government shall exercise jurisdiction over that and over the regulation of securities issued by those companies or grantees until such time and only until such time as the State provides an agency to accomplish that.

Senator CLARK. Just where is that stated in the bill in clear and unequivocable form, Mr. Secretary? In section 9?

Mr. FISHER. I think you will find it in section 9. Section 9 reads:

> That in case of the development, generation, transmission, or use of power or energy under a lease given under this act in a State which has not provided a commission or other authority having power to regulate the rates and service of electrical energy, and the issuance of stock and bonds by public utility corporations engaged in power development, transmission, and distribution, the control of service and of charges of service to consumers and stock and bond issues shall be vested in the Secretary of the Interior or committed to such body as may be authorized by Federal statute until such time as the State shall provide a commission or other authority for such regulation and control.

Senator CLARK. Now, Mr. Secretary, what would you infer that to mean, for instance taking the California laws to which reference has been made, that in California, the Federal Government, under this bill, would not have any power to regulate rates or service for electrical energy and the issuance of stock and bonds by public utilities corporations?

Mr. FISHER. I should think so.

Senator CLARK. That, so far as California is concerned, in that State, where they have a public utilities commission, this bill is futile and that there is no power conferred upon the Federal Government in those respects?

Mr. FISHER. So far as intrastate business is concerned.

Senator CLARK. Right in connection with that, I want to read you section 3, which says:

> In case of the development, generation, transmission, and use of power or energy under such a lease in a Territory, or in two or more States, the regulation and control of service and of charges for service to consumers and of the issuance of stock and bonds by the lessee is hereby conferred upon the Secretary of the Interior or committed to such body as may be provided by Federal statute.

Now, nearly every plant has an interstate business and under this the intrastate business would be controlled by the Federal Government.

Mr. FISHER. The control of interstate business, of course, I assume was what was intended to be covered by section 3; and the entire matter as to how far the control of interstate business would affect interstate business I also assume would be entirely under the control of Congress to the extent, and to that extent only, that it was a proper part of the regulation of the interstate business. The same questions have arisen in connection with railroad matters. The fact, Senator, that the transmission of hydroelectric energy over long distances has now progressed to such a point that this business is tied up and has become largely interstate in character is a fact which can not be changed by any legislation. It can only be recognized and dealt with by legislation. It is exactly the same as the situation has been in the railroad world. You are facing an inevitable economic development, and you have to deal with it just as you had to deal with it in the case of the railroads. You will find the demand that you deal with interstate transmission of electric power just as emphatic and just as irresistible as has been true of the railroad work, and you will find that same demand made by the power developers themselves, just as it has been and is being made by the railroads.

In my opinion the interests of an investor in and developer of hydroelectric energy are identical with the extension of Federal authority over these interstate concerns in the same way and to the same extent and no further than is true in the case of the railroads.

Senator CLARK. Taking that practical possible condition, as far as a corporation was organized under the laws of the State of California, whose initial purpose was simply to transmit energy within the State, in that event, according to your notion, the Government would have nothing to say in regard to the amount, character, or price at which securities should be issued.

In the course of their business it might develop, as the railroads have developed from the start, that their business eventually crosses State lines into Arizona or elsewhere. Now, it is not to be assumed, I suppose, that any of the securities which theretofore had been issued would be under the control of the General Government, but only those that were thereafter issued?

Mr. FISHER. I should assume so.

Senator CLARK. You think that would be the legal effect, as the bill stands?

Mr. FISHER. That would be my judgment. That, I think, is a true statement as to the railroad securities, is it not?

Senator CLARK. I think so. I just wanted to get your notion on that.

Mr. FISHER. I think so.

Senator NORRIS. I would like to ask you, right along that same line: Suppose this bill was enacted as it stands now and some corporation under it develops water power in California, where they have a commission, and they extend their lines across the line into Oregon, where they likewise have a State commission, is it your idea that the service and the rates in California, in such a case, would be fixed by the California commission, and that the service and the rates in Oregon would be fixed by the Federal authority?

Mr. FISHER. I assume that in the first instance that would necessarily be so, Senator.

Senator NORRIS. Would it be different from any other instance of that kind where that is the case now?

Mr. FISHER. I should think that probably would be the result, modified only by the same considerations that modify the same situation in the railroad world, as shown by the Minnesota case, or the Texas case.

Senator NORRIS. In the particular case I have put, the stocks and bonds of this corporation would be under the control of the Secretary, would they not?

Mr. FISHER. I think along the line that Senator Clark has suggested, those subsequently issued would probably be under the control of the Secretary.

Senator NORRIS. Originally?

Mr. FISHER. You are speaking of a concern that starts with this interstate business?

Senator NORRIS. Yes.

Mr. FISHER. I suppose they would be.

Senator NORRIS. The stocks and bonds of the corporation in California, in that case, would be under the control of the Secretary of the Interior too, but the service and the rates in California would be under the control of the California commission?

Mr. FISHER. Well, subject to the conditions that I have referred to. I assume that there is constantly increasing, and inevitably will increase, whether we like it or not, a necessity for recognizing the effect upon interstate business of the business strictly confined within the limits of a State.

Senator NORRIS. I do not see any modification that could come there. The stocks and bonds, of course—the money derived from the sale of stocks and bonds—would be used to develop the plant in California and also in Oregon?

Mr. FISHER. Yes.

Senator NORRIS. Of course it is conceded, I think, under the bill, that if they did not cross the line into Oregon then the Secretary would not have anything to do either with rates or service or stocks or bonds?

Mr. FISHER. Yes.

Senator NORRIS. But I am putting a case where they start with the avowed intention, carried out, to develop energy in California and sell it both in California and Oregon, and the stocks and bonds for that concern could not be differentiated as to what part should be used in one State and what in the other. In that case the Secretary would control the issue of those securities?

Mr. FISHER. He would.

Senator NORRIS. Continually and all the time?

Mr. FISHER. I assume so. What is the alternative? They must either be controlled by the State of California alone, it being, as I understand in your case, the State where the incorporation occurs——

Senator NORRIS. Yes.

Mr. FISHER (continuing). With the consequent complaint that might come from Oregon, the other State, that its interests were not being properly looked after, or the State of Oregon would have to intervene and by appropriate laws covering the transmission of electric energy within its boundaries, compel the corporation to reincorporate in the State of Oregon, which is the case with the rail-

roads, thus leading to the very difficulties that have arisen, for instance, in the case of the Milwaukee & St. Paul extension, and to great complaint on the part of power developers and investors.

Senator NORRIS. I have felt, individually, that that was really not the intention of the bill. It is my idea that is what the bill ought to do, but I have had some doubt as to whether there was not a conflict between section 3 and section 9 in that kind of a case that I have put, and whether it would not raise some legal difficulty if there were not some change made in the bill.

Mr. FISHER. I have assumed that the bill had the intention you speak of and I have not thought that there was any conflict. But I have not examined the bill for the purpose of seeing that the precise language in any one section fitted in with the precise language in another section. I have been more concerned with the general features of the bill than with the specific language.

Senator STERLING. Did I understand you to say, in answer to Senator Norris, that you thought that the public utilities commission in Oregon, to which State the power was transmitted from California, would have the power there to fix the rates?

Mr. FISHER. No; I assume not. If the power was transmitted from California into Oregon, I assume it would be interstate in character and that the Secretary of the Interior would have the power, under this bill, to make regulations.

Senator STERLING. Notwithstanding a public utilities commission existed in the State of Oregon?

Mr. FISHER. Quite so. Now an interesting thing in that connection is that those two States which you happen to take by way of illustration, are two of the States in which the theory of practical Federal cooperation has been recognized by the State commissions as well as the Federal Government. The State of Oregon has had no difficulty with the Federal Government in getting into effective cooperation, and there has been no complaint from the State of Oregon of any intrusion upon its powers on the part of the Federal Government. On the contrary, the activity of the Federal Government has been welcomed.

I happen to have here a copy of the report of Messrs. Henshaw-Lewis and McCaustland on the cooperation of the Federal Government with the State government of Oregon in the development of the Deschutes River, and I note, on page 142 of that report, this statement:

> There appears to be no very secure foundation for the theory of State control of waters on the public domain. Neither the act of 1866 nor the desert land act of 1877 can be considered as an irrevocable grant to the State. The first act merely confirms rights which have become vested by appropriation and use under the local laws and customs, and the act of 1877 strengthens this view of the former act and, in addition, enacts that all surplus water, together with all other sources of water supply upon the public lands and not navigable, shall be held free for appropriation and use for three purposes—first, irrigation; second, mining; and third, manufacturing. This is merely an offer and does not bind the United States until the offer is accepted and the water diverted and used for one of these purposes.
>
> Concerning this question of State control of waters on Federal lands, the Supreme Court of the United States held in the case of the United States *v.* Rio Grande Dam and Irrigation Co. (174 U. S., 690,703) that:
>
> "Although this power of changing the common law rules as to streams within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State can not by its legislation destroy the right of the United States, as the owner of lands, bordering on

a stream, to the continued flow or its water, so far at least as may be necessary for the beneficial use of the Government's property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

Kinney comments as follows:

"In other words, the court holds that the jurisdiction of the United States over the natural water course (upon the public domain) is superior and paramount to the jurisdiction of any State; and that all needed measures may be taken by the Government to preserve the water courses of the country for at least the two purposes named above, even against the action of any State in authorizing, under its laws appropriations to be made. The court, especially in the Kansas-Colorado and Rio Grande cases, clearly intimates, to say the least, that the Government might also make other claims to the water than for its use for navigation or as a riparian owner. Whether it will do so time alone can tell."

And so on.

Senator SMOOT. Who expressed this?

Mr. FISHER. Kinney.

Senator SMOOT. Representing whom?

Mr. FISHER. He is the text writer.

Senator ROBINSON. He represents the State Utilities Commission of Oregon, does he not?

Mr. FISHER. I do not know whether he does or not, but this is a quotation from this report.

Senator SMOOT. I wanted to know in what case Kinney expressed the opinion just read?

Senator THOMAS. It is the Rio Grande Dam Case.

Mr. FISHER. It is in his work on irrigation and water rights, second edition, page 1096. That is where that particular quotation is from.

Senator ROBINSON. And it is quoted, with approval, in this report which you read?

Mr. FISHER. Yes; it is quoted in the report which I have just read.

Senator ROBINSON. What report is that?

Mr. FISHER. That is the report made by F. F. Henshaw, John H. Lewis, and E. J. McCaustland to the United States Geological Survey and prepared in cooperation with the State of Oregon, John H. Lewis being the State engineer.

Senator ROBINSON. He is the State engineer of Oregon making that statement and which is quoted by Kinney with approval and which is impliedly approved by all three of that commission?

Mr. FISHER. Yes; I assume so, as it is taken from a report made jointly by them.

Mr. SMITH. This part, however, is by the State engineer.

Mr. FISHER. Parts of this report seem to have been prepared by one man and parts by another, and this part was prepared by the State engineer.

Senator CLARK. I am sorry Senator Chamberlain is not here this morning. I am not familiar with the terms of the organic act or with the terms of the State constitution of Oregon. But do you think that the statement which you have just quoted would apply in its broadest sense to waters in those States where both by the organic act and by the constitution ratified and accepted by the Congress of the United States, the ownership of the water passes to the State?

Mr. FISHER. I do not think that the water passes to the State in the sense in which it has been frequently claimed.

Senator CLARK. I wanted to get your view on it.

Mr. FISHER. It is one of those things as to which I think it impossible for any lawyer who wishes to express himself guardedly

and carefully to speak with entire confidence. All that can be said is that it certainly is not clear that the Federal Government has lost entire interest in the matter. And that, I think, is as far as can be gone by a lawyer whose word may be of any consequence. I do not conceive there is anything, however, in the Ferris bill or in any properly drafted water-power bill passed by Congress that in any way conflicts with anything that the State has in mind, or which is not with a view to promoting the best interests of its own citizens.

Senator CLARK. The only difficulty it would make is that the States generally might differ as to the proper way to protect the interests of the State.

Mr. FISHER. There is, in my opinion, so little likelihood of that in any instance where there has not been, palpably, an attempt to use a local situation for strictly local advantage, that I think it would be a distinct advantage to the entire community if the Federal Government retained its power.

Senator CLARK. There might not be any doubt but what the Federal Government might do a great deal better than the State government and still the State government might consider it had rights of which it was sufficiently jealous that it wanted to exercise them in its own way?

Mr. FISHER. Yes.

Senator CLARK. Now, Senator Works could undoubtedly bring up my children a great deal better than I could. [Laughter.]

Senator WORKS. Thank you.

Senator CLARK. At the same time I might prefer to bring up my children in the way I desired.

Senator THOMAS. Perhaps the time may come when the Federal Government will appoint Senator Works in your stead. [Laughter.]

Mr. FISHER. That does not quite fit this case, though, because you could part with your power to control your children and turn them over to Senator Works, but in this case if the Federal Government does not have power to impinge on what it deems to be the functions of the State, it can not get power by any legislation Congress could enact.

Senator CLARK. The popular idea at present is, and it is in this bill, that if the State Government fails to exercise the right itself, then the Federal Government could step in and operate the service.

Mr. FISHER. I think they can do so and I do not think there is anything in the Constitution that will prevent that. In the first place, the parent will have no complaint. He will merely use Senator Works to raise his children until he gets ready to exercise that function himself. If he does not see fit to educate them the State steps in and concludes to do it. The State can continue until the Federal Government itself acts. And under this act the Federal Government says——

Senator CLARK. Of course, that is a matter of opinion.

Mr. FISHER. No, I am talking about the bill.

Senator CLARK. I know, but you are interpreting the bill.

Mr. FISHER. Oh, yes.

Senator CLARK. I could interpret it that if the State did not want to act to-day, not as conceding the right to the Government to act, but that it has come to the conclusion that the time was not ripe for the State to act, and when the proper time came it would act.

Senator NORRIS. In other words, the theory of the Senator would be he did not want his children raised at all. [Laughter].

Mr. FISHER. He might prefer to let them run wild and not have them under any control at all.

Senator CLARK. The State might think I ought to send them to school when they were one year of age and I might not want to send them to school until they were eight years old, and I think I ought to have that right.

Mr. FISHER. I think in the present state of civilization, Senator, the State does now recognize its authority over and its interest in the education of children, and I think that is true with regard to the development of water powers when they are used for public utilities, or when they are used by a private grantee for private profit.

Senator CLARK. Then right along that line there is a question I would like also to hear you discuss, I ask for my own information, and not in the way of argument at all, Mr. Secretary, and that is this: The laws in our various States that have legislated on the subject at all give preference to the use of water; for instance, a preferred use for irrigation, and then for power, and then for something else. Now, this bill deals only with power rights.

Mr. FISHER. Yes.

Senator CLARK. Now, in case the State has given a preference right for irrigation purpose, is there not a conflict likely to arise and create a good deal of difficulty under a bill of this sort?

Mr. FISHER. I do not think so. It is another one of those cases where it might seem, as a matter of pure theory, that there might be difficulties of that kind arise. As a matter of fact, from such experience and observation as I have had, the only cases in which such conflicts have arisen, are cases in which any disinterested observer who has studied the situation, will, I think, reach the conclusion that the irrigation use that was proposed was purely a cover. I do not know of any instance in my own experience as an official or in examining the records of previous Secretaries, where the uniform practice of the department has not been to recognize irrigation as the superior use, and wherever there was a bona fide demand for any substantial use of water for irrigation, it has been given that preference. Nor can I see any possible objection to putting into this bill a properly guarded declaration of such a preference, provided you do not say that in every instance where water is to be used for irrigation it must be so used, because then its use on 5 acres of land for irrigation would prevent the development of 5,000 horsepower or 50,000 horsepower for power purposes. You must not put it in such shape that the Secretary of the Interior could not exercise any discretion in the matter, because you would defeat the very purpose you have in mind, which is, as I understand it, to protect bona fide irrigation, but not colorable irrigation. As the law now stands it gives much broader rights to a grant for irrigation purposes than it does for one for water power.

I had a number of instances of gentlemen making a great show of a desire to use certain water for irrigation, but on investigation, and especially the investigation of the experts of the Geological Survey, it was demonstrated that the use for irrigation was a mere cover. They simply were trying to get a power right under the more favorable conditions of the irrigation law. You do not want to create that situation.

Senator CLARK. Let me ask you a question right there, and I am not speaking from any knowledge that I have, or from any illustration, but you are speaking of this discretion. Would it not naturally be that where an application is made for a permit the Geological Survey, or whatever bureau would be charged with the examination, would naturally determine, in the first place, as to what was the best use of that power?

Mr. FISHER. Yes; its highest use.

Senator CLARK. Its highest use, yes. And would they not then almost naturally recommend that it be devoted to that purpose and not to any subordinate purpose?

Mr. FISHER. What they do as a matter of practice, in my experience, Senator, is this: They are quite apt to report, and they should report, and if you were Secretary of the Interior you would want them to report, what the highest use of the water is. But they do not stop there. I think the Geological Survey is just as keenly alive to, and just as sensitive to, the fundamental reasons, from the standpoint of public policy, for preferring irrigation to power, as anybody else, as members of the United States Senate, or a Member of the Cabinet, and it has gone on, in all instances of which I have knowledge, to point out that where the proposed use in a given case is a substantial irrigation use, and that while it will not bring the same development that might be produced if it was devoted to power uses, they nevertheless say that the irrigation use is substantial, and they recommend that a permit be given to the irrigation applicant. But there are cases of exactly the opposite kind, where there are persistent applications for irrigation, and where I am sure you would agree at once it was clearly an attempt to get a power permit under the irrigation law, and the Survey should report to that effect, and the Secretary should deny the application.

Senator WORKS. I have suggested here two or three times the question of the advisability of granting these permits or leases for the exclusive purpose of developing power. In that way, of course, you necessarily take away from the State any right or authority to compel the water to be used for both power and irrigation.

Now, do you not think it would be wise to include some provision in the bill that would authorize the joint use of the water, stored, for example, in some reservoir, as it can be, and frequently is, used for two purposes?

Mr. FISHER. If a provision of that sort could be carefully drafted I would see no objection to it. However, as the law now stands preference is given for irrigation purposes. At least that is true in my experience. Under the present law applying to irrigation permits they have the right to develop incidental power. If it is really an irrigation project they come in and make application under the irrigation law. If incidental power is developed, that does not defeat the application and it is granted.

Senator WORKS. No; but this bill only authorizes the granting of a lease for a specific purpose.

Mr. FISHER. Yes.

Senator WORKS. For an exclusive purpose?

Mr. FISHER. Yes.

Senator WORKS. Now, I do not know of any way under any of the laws of that kind in which you can compel the use of this plant or the site for the purpose of furnishing water for irrigation.

Mr. FISHER. I can see no objection to a provision in this bill that the Secretary could grant permits under this act for a combined use for irrigation and power if, in his judgment, the case was one in which it was proper to do so. I do not see any objection to that. I think that is the effect of having the two statutes on the two subjects now, but if it would remove any doubt I can see no objection to a properly worded provision in this bill which would authorize the Secretary to grant permits for joint use.

Senator WORKS. I do not see very well how you could take that position where, under this proposed statute, the grant would be exclusive.

Mr. FISHER. Well, you see this act would not have any effect at all upon that matter, Senator, except where this permit was one for a storage reservoir. The operators under the permit get no right to use the water except for power, under this statute. Now the water, after it has passed through the wheel, is available to anybody, and it can be used for irrigation.

Senator WORKS. Oh, yes; the water would be turned back into the stream and it would not interfere at all with the use of the water for irrigation purposes below, but I am talking about the use of the site itself, which may include the reservoir site used for the storage of water.

Mr. FISHER. There might be a case where a reservoir site would be involved, and if the application was not made under the present law applicable to irrigation permits I assume there could be some such provision as you speak of.

Senator WORKS. Going back to the law of California, we have now what is called the water commission, and that commission has a right to determine the uses to which the water should be put, and can be or should be used for any given purpose, and certainly a law of this kind would interfere with that power very materially.

Mr. FISHER. I do not think it would work out so, but if you have any apprehension about it, some such provision as you suggest could be put in the bill. I certainly agree with you in the policy. I think, in the first place, irrigation is the highest use, and, in the second place, if you can use the same water for power purposes it should be so used.

Senator ROBINSON. You would have great difficulty in preparing a provision of that kind unless you leave it in the discretion of the Secretary.

Senator WORKS. That may be, but it certainly seems to me that something ought to be done that will prevent its being used exclusively for one purpose.

Mr. FISHER. I want to say that the only thing which the men connected with water power, who have seemed to me to be most far-sighted about this thing—and certainly they represent very large interests—say about it is that there should be flexibility in any statute and the Secretary should have wide discretion; that is, from their point of view, because they point out that in the present state of the art and with the widely varying conditions applicable to the water-power situation over the country that a general rule must work hardship one way or the other. It must fail to protect the

public or it must be unduly harsh on the power interests. They have always insisted that the one thing they wanted, on the whole, was liberal discretion in the Secretary.

Senator ROBINSON. Mr. Secretary, one of the primary objections to the bill that has been urged in this hearing is that it vests too much discretion in the Secretary of the Interior, that the bill is not specific enough. I remember distinctly a number of the witnesses have urged that as the reason why they would be unable to finance operations under this bill, that it invests too much discretion in the Secretary. I am not expressing my own individual opinion, you understand, but that was the reason I asked the question, because a large number of witnesses who have appeared during this hearing have urged that objection and have urged it persistently.

Mr. FISHER. I suppose that the most important power development for which provision has been made in the United States in the last few years is the project for the electrification of 400 miles of the Chicago, Milwaukee & St. Paul Railway.

The permit for the Milwaukee development was issued by me. It is one of those electrifications that have been mentioned here. I was assured at the time that they could not turn a wheel toward its development unless I did give them a permit; that they were absolutely unwilling to make a contract between the power company and the railroad unless I gave them a permit.

The president of that company, Mr. Ryan, who is connected with the Amalgamated Power Co. and certainly in a position to protect himself, stated, not only privately but publicly, that nothing had been asked of him by the permit issued by the department that was not right. He wrote me letters and he came to see me, and he told me that he thought it was the most important step that had been taken toward water-power development and that it was along right lines.

Senator THOMAS. I think it is now contended, Mr. Secretary, that this bill is essential, and some of the amendments as suggested are essential, to make that particular project available and sufficiently productive to interest capital.

Mr. FISHER. That could hardly be. We made it a condition of the grant or permit that the contract should be made between the railroad company and the power people, and it is made, and unless one or the other is going to give up some advantage under it I do not just exactly see how it is going to be modified.

Senator THOMAS. I do not mean that the contention has been made before this committee, but I have heard the statement several times in connection with this bill.

Mr. FISHER. I doubt if there is anything in it at all. I do not know. I think Mr. Mitchell has some connection with that matter.

Senator ROBINSON. The statement has been made here by a number of gentlemen that investors would insist upon specific provisions of law and not regulations fixed at the discretion of the Secretary of the Interior concerning those matters; and that if that were not done investments would not be made in these operations, and there would be no development of them. I recall that statement; I recall the names of a number of witnesses who have stated that, and stated it repeatedly during the course of this hearing. But, on the other hand, it was disclosed that some restrictions were placed in

laws made by neighboring governments, by the Canadian Government, under the same circumstances; and there was a difference of opinion as to whether development had proceeded rapidly under it or not; but some say it has.

Mr. FISHER. I wish you would get the facts. You have had Mr. Challies here, and that ought to have been gone into. He certainly could furnish you that information.

Senator ROBINSON. It was gone into.

Mr. FISHER. I suppose there has not been in the entire world an electric development, from a public point of view, that is comparable to the electric development in the Province of Ontario.

Senator ROBINSON. I do not mean there was any doubt in Mr. Challies's mind that there had been development, because he said there had been development as rapid as the demand would warrant.

Senator SMOOT The Province of Ontario has nothing in common, as to its laws concerning water power, with us

Mr FISHER I think it has, Senator

Senator SMOOT. The Dominion has no power over the water powers in Ontario.

Mr. FISHER. Certainly not; but the general principles that we are talking about here are in the Canadian and the provincial laws and regulations.

Senator WORKS. Ontario has developed her water powers and her lands just as California would develop hers.

Senator SMOOT. Or as Utah would develop hers.

Senator WORKS. Without any supervision by the general Government.

Mr. FISHER. But, Senator, with the solitary exception of this one question as to the supposed different interests of the State and Federal Governments, all those principles are exactly the same. A water-power permit is issued there by Ontario, or the Dominion, as it is by the State of California or the Federal Government in this country.

Senator WORKS. Certainly; that is true.

Mr. FISHER. Those are the principles or provisions these men are pointing out as retarding development. Their complaint is of those things that they say ought not to be in the grant or permit, and not that it comes from the State or Federal Government.

I do not like to prophesy, but I am going to undertake it in this instance, and I predict that in the history of this development you will have exactly the same experience you have had in regard to railroads. You will find, as you did in the case of the railroads, that there will be people who will complain that the Federal Government is injuring these enterprises by interfering with the States, and then it will only be a little while until you will find these same gentlemen piling into this chamber here, into the Capitol at Washington, pointing out that the only way they can be saved is for the Federal Government to exercise its jurisdiction to the fullest possible extent.

I served, as you know, as one of the Railway Securities Commission, of which President Hadley was chairman, and we consulted many of the leading railroad men and principal investors in this country, and they were practically unanimous upon the proposition. They all felt that it was not a question of theory, but that it was a condition that confronted us, and there was only one question, namely, How are you going to effectively regulate a condition of that kind, first, in

the public interest and, second, in the private interest, which is identical with the public interest in the long run, in so far as it is a legitimate private interest? They said, "You can not get two States to agree. Theoretically you ought to be able to get two States to sit down together and agree upon a common policy, but practically you can not do it." You know what the situation is in Nebraska. Take the development of water in Nebraska as between Nebraska and Wyoming. That has only been carried along because of the fact that Senator Warren has been reasonable in his demands on the one side, and the Senators from Nebraska have been reasonable in their demands on the other side, that they have been able to work out an adjustment of their water difficulties. There is a case where the State of Wyoming, if it controls all the waters within its borders and if it wanted to do so, could take the waters out of the river to the absolute destruction of all the projects lower down in Nebraska.

We have exactly that situation in Colorado, where the Federal Government itself, in an adjustment of an international difficulty with Mexico, made an appropriation of a million dollars to carry out a project in the State of Texas, where there were no public lands, and the State of Colorado, looking at its local interests, insisted that it can not be deprived of the water necessary for that project.

Senator THOMAS. We have been deprived of it just the same.

Mr. FISHER. Certainly you have; and I was one of those instrumental in depriving you of it, Senator.

Senator THOMAS. There is no doubt of it, and every Secretary before you has contributed to it.

Mr. FISHER. But, Senator——

Senator THOMAS (interposing). And in direct violation of our rights as a State under our constitution.

Mr. FISHER. The only decision you were able to get from the courts is against that contention.

Senator THOMAS. On the contrary, we have been denied an appeal to the courts of appeals by your predecessors.

Mr. FISHER. Oh, no.

Senator THOMAS. Yes. I know what I am talking about there.

Mr. FISHER. The State would like to have the Federal Government go into court in a way that would put the Federal Government at a disadvantage in the litigation.

Senator THOMAS. We have asked the Federal Government to fix its own terms.

I want to say that if this bill passes with my consent it will contain some provision whereby we can secure at least the right to take our claims in that particular matter into court, or I will be carried out feet foremost.

Mr. FISHER. I have no quarrel with the State of Colorado. This is the situation, and it illustrates what will happen, and it bears directly on this bill: The Rio Grande River is an interstate stream. Now, the Federal Government, in adjusting an international dispute with Mexico, did, as a matter of fact——

Senator THOMAS (interposing). There was no dispute. The Attorney General of the United States declared in his opinion, in presenting it to the Secretary of State, that there was no dispute absolutely, and that opinion has been ignored by the Government of the United States from the very hour that it was pronounced up

to this day, and the dispute was recognized notwithstanding that fact, and your international treaty followed, all at the expense of the people of my State.

Mr. FISHER. Let us assume that was all true. The Attorney General thought there was not a dispute; Congress thought there was, and ratified an international agreement with the Government of Mexico and, as a result of that, it provided for an irrigation project in Texas, and since that irrigation depends on getting water out of the Rio Grande River, a part of which water originates in the State of Colorado——

Senator THOMAS (interposing). Yes, and that enterprise is now being conducted and has been ever since its inception as a reclamation project, and the reclamation funds of the Government are being used for the purpose of reclaiming 13,000 and some odd acres of the public land and something like 170,000 acres of private land, all at the expense of $10,000,000 of the reclamation funds for the ostensible purpose of enabling the Government to give to the citizens of Mexico annually 60,000 acre-feet of water, and by which we are deprived of the right to use in our State the waters of the Rio Grande River and its tributaries, notwithstanding the grant from the Government. That is the situation.

Mr. FISHER. I do not intend to controvert that statement in any way, but that was not involved.

Senator THOMAS. I did not intend to mention it until you mentioned it yourself; then I wanted to develop it a little further.

Mr. FISHER. Assuming that is true, Congress has acted, and a million dollars was appropriated out of the national funds and the project started before my time; but even if that be true, the fact remains that we can not get Texas and Colorado together, and we must settle this matter.

Senator THOMAS. I have been trying to get them together ever since I have been here. I am the only one who has manifested any such disposition, however. [Laughter.]

Mr. FISHER. I suggested that the President of the United States and the governors of Colorado and Texas together appoint a commission to find out whether there was not water enough for all. If there was, we would not have any quarrel. But I could not bring about any agreement.

Senator THOMAS. The President was perfectly willing to arbitrate it provided he could appoint the arbitrators.

Mr. FISHER. That may be the reason no practical method has been adopted to get rid of that matter amicably. The States have not been able to get together; the State represented by Senator Thomas has not been able to get together with Texas or with the Federal Government to settle their difficulties, and I only cite such matters here because it illustrates the fact that in interstate matters we can not rely upon voluntary adjustment of those matters between the States. When you have in fact got something of an interstate character, no matter whether it is the transmission of hydroelectric energy or whatnot, in the general public interest, including the interest of the particular States concerned, it is vital that the Federal Government shall retain all of the control it has and leave the wisdom and expediency of its exercise and the manner in which it shall be exercised to be determined in the particular case. That is one of the

reasons why I think it would be a great mistake to abandon in any way what authority the Federal Government has.

In that connection, let me refer just a moment again to this same report of the State engineer of Oregon, from which I was reading a little while ago. I read from page 156:

It is believed that the construction of both irrigation and power projects on a large scale can be brought about more quickly through such a plan of cooperation than by each State acting apart from the Federal Government. It is believed that by this plan of cooperation the friction which now exists between those favoring State control and those favoring national control will soon die out.

Now, that is the expression of opinion of a man who is actually engaged in the business of handling this particular matter, and the particular phase of it which relates to the supposed conflict between State and Nation.

Now I want to, if I may, refer back just a moment to what I said about the ability to get the private and public interests together, when you can get them to sit down and consider the matter dispassionately and really express their views. And I want to call your attention, in that connection, to a report which was made before the National Conservation Congress on water power, if I can put my hands on it.

At the session of the National Conservation Congress, held in this city on November 18, 19, and 20, 1913, the water-power question was given a great deal of attention, as some of you know, and a very considerable committee was appointed on that subject, which devoted a great deal of time prior to the meeting of the congress, to preparing a report. There were two reports prepared. There was a difference on the one side and the other on the question of the character of the report, the extreme advocates on the one side being lined up on the one hand, and the other disagreeing. But the committee got together and agreed upon a unanimous report upon certain things as to which they were, in fact, unanimous. It is not my intention at all to enter into the controverted phases of the matter. I do not care to discuss the minority report nor the majority report. But it does seem to me it is worth while to call your attention to a report which was agreed upon by such men as George F. Swain, of Boston, who, as you know, is a man of high standing and entirely friendly and in sympathy with and acquainted with the point of view of the large developers of power—Mr. Gifford Pinchot; Hon. Henry L. Stimson; Louis B. Stillwell, also largely interested in power development; Charles R. Van Hise; M. O. Leighton, formerly connected with the Geological Survey, but serving now as consulting engineer in these matters; Mr. E. S. Webster, and Mr. B. M. Hall. Those gentlemen agreed upon a report, in which they said:

We recommend that the following principles should govern the granting of a privilege to use a water power:

(*a*) For a definite period, sufficient to be financially attractive to investors, the privilege should be irrevocable except for cause, reviewable by the courts.

(*b*) Thereafter the privilege should continue subject to revocation in the absolute discretion of the Government exercised through its administrative board or officer upon giving reasonable notice and upon payment of the value of the physical property and improvements of the grantee as below provided under (*h*).

(*c*) After the expiration of the period provided for in (*a*) above, at recurring intervals of not more than 10 years, the amount of compensation to be paid to the Government for the privilege and all the terms and conditions of the grant during the next succeeding period of not more than 10 years shall automatically come up for determination by the granting officer of the Government.

(*d*) The privilege shall be unassignable except with the approval of the Government in order to safeguard the interests of the Government against speculation in water powers and against appropriation without prompt development.

(*e*) The privilege shall be granted only on condition of development of the whole capacity of the water site as rapidly as the granting officer may from time to time require, giving due consideration to reasonable market demands and conditions and also on condition of continuous operation, subject to such demands and conditions.

(*f*) The right to receive compensation for the value of the privilege varying according to the proper conditions of each case shall be reserved to the Government, State or Federal, from whom the privilege comes. We believe that the reservation of such a right to compensation is a vital essential toward the end of proper regulation. It is not sufficient to trust that the public will always receive its proper share by means of regulation of rates alone. Local authorities may neglect or may be unable, under conflict of jurisdiction, or for other reasons, to exact in the interest of the public the full value of the public's right. The value of a water power may in the course of time increase far beyond the power of regulation to adequately distribute its benefits. At the same time, the method of exacting compensation must be carefully safeguarded so that in case full compensation by rate regulation is exacted by local authorities, an additional burden shall not be imposed. We believe that in normal cases the best method is for the Government to share increasingly in the net profits of the enterprise, provided, those profits exceed a certain reasonable percentage, the right of the Government being recognized otherwise merely by the imposition of a small annual fee or its equivalent.

(*g*) The Government shall have the right to prescribe uniform methods of accounting for the grantee and to inspect its books and records.

(*h*) Upon revocation of a privilege by the Government the grantee shall be paid a compensation equivalent to the fair valuation of its property, exclusive of franchise and consequental damages; this compensation shall include such appurtenances as are necessary for the operation of the water power and the transmission of electricity therefrom but shall not include such properties as railroads, lighting systems, factories, etc., which are of themselves separate industries.

In such transfer all contracts for the sale or delivery of power made in good faith previous to such notice of transfer should be assumed by the transferee so that the said grantee may operate and maintain the power business during his occupancy of the property under such stable guarantees as may beget confidence therein by prospective long term contractors, provided, that the Government or said transferee shall not assume any contracts made at a price or under conditions which shall be determined by the proper administrative officer of the Government to be unreasonable or confiscatory.

Now, that is a declaration of principles applicable to any grant, signed by the advocates on both sides. That is to say, it was signed by men like Mr. Gifford Pinchot, we will say, upon the one hand, who has been an ardent advocate of the conservation theories, as they have been called, and by men like Mr. Stillwell and others, who are directly concerned in the private development of these very water powers, and I commend it to your consideration as the sort of thing that the power people will agree to as appropriate when you can get them to consider the matter in a dispassionate manner, where they are not attempting to get legislation, and that legislation as favorable to them as they possibly can persuade Congress to make it. Of course they have a perfect right to urge their side of these matters with a view of having them just as favorable as they can.

But the thing you want to know is what they really think down in their hearts are the proper things to provide in the public interest and in their own interest, and you learn that out of such documents as this better than you will from testimony during a controversial consideration of the matter.

In that connection I commend to your consideration the testimony of Mr. Newcomb before the National Waterways Commission, and the testimony of Mr. Cooper before your committee here. Those are things which I think should be given great weight.

Now, I want to call your attention to one other matter in connection with this exaction of compensation. Of course it is perfectly clear that if the right to a power site is granted to a grantee who uses that power for his own manufacturing purposes, or who sells it solely to some subsidiary company or companies, public regulation does not touch it at all. Regulation, whether it is State or Federal, touches absolutely nothing that is not in the nature of a public utility. If the grantee himself uses the power leased to him and is thereby enabled to manufacture his product, whatever it may be, whether nitrates, to which reference has been made before you, or whatever it may be, the price that he puts on the nitrates or other product will be controlled solely by his own enlightened selfishness. In the first place his effort will be, so long as he can not combine with other people to control prices, to cut under his competitor just enough to get the business. He may go further than that; he may lower his price in order to increase his sales with the idea in mind that the increased sales will more than make up for the diminution in price. His action, however, will have nothing to do with the question of compensation. It will have nothing to do with the value of the water power, to him or the public. He will use it to his own profit. The price of his commodity will be regulated and controlled solely by a consideration of the money he can make out of it.

Senator NORRIS. With him it is a question only of profit to himself?

Mr. FISHER. Of course. It must be so.

Senator NORRIS. Certainly.

Mr. FISHER. That is what will control, and the question of whether there is Federal regulation or State regulation will have no application to it whatever.

Senator THOMAS. Will it not have some application in the event of excessive capitalization?

Mr. FISHER. Unless you change your laws, it will not. We have no laws now which adequately cover excessive capitalization of manufacturing companies. There may be a development in the future which will regulate capitalization of all companies, whatever their nature. There may be, of course, a provision that they shall not capitalize for more than they have got. But there is nothing in the law which will prevent that capitalization increasing. You grant a power site to-day, and in the course of time it is worth double what it is to-day.

Senator THOMAS. There is such a thing as capitalization of the future.

Mr. FISHER. They will either have an appraisal and have a stock dividend, or they will sell it to one company or another, and that company will get the value of the property into an increased capitalization; and under our present laws, in many instances they try to add something they should not.

Senator THOMAS. That condition of things, I think, will inevitably be regulated so as not in the least degree to affect the price of the commodity.

Mr. FISHER. Whenever we are ready to go into regulation by the Government of all commodities——

Senator THOMAS (interposing). Oh, no, I do not mean that at all.

Mr. FISHER (continuing). I do not think it would.

Senator THOMAS. The idea I wanted to convey was that the excessive capitalization can find the hope of reward of profit only in doing a business sufficiently large or by the imposition of prices sufficiently large to produce a profit first upon the actual capital and second upon the water.

Mr. FISHER. Oh, yes.

Senator THOMAS. A condition which is being followed in my State, for instance, to-day by the beet-sugar company.

Mr. FISHER. Those influences are at work, undoubtedly. But they would not apply to a power grant in any effective way that I can see. When you grant a power site to a private grantee, and he pays nothing, and it is worth a million dollars, let us say, by way of illustration—whatever it may be worth—that will not reduce his prices beyond the point that it is to his own selfish interest to reduce them for other considerations. Your State public service commissions will not touch it, because it is not a public utility.

Senator NORRIS. In this bill, of course, there would be some regulation in regard to the charge.

Mr. FISHER. Oh, yes; if you pass this bill.

Senator NORRIS. The Secretary of the Interior would regulate it by the price he would fix.

Mr. FISHER. True. But there is another consideration aside from the regulation by the Federal Government. It is a fact that there are very few potential or developed water powers in the United States to-day, in the West, at least, that the Federal Government is not called upon to make very substantial expenditures to protect and develop; and it ought to be so called upon. The truth of the matter is that more and more all of the States are looking to the Federal Government to protect and develop water, both for power and all other purposes. The provisions of the appropriation bills show it, and no matter what reforms may be introduced in them, the probabilities are that the uses of water for all purposes will be one of those things for which the Federal Government will expend Federal moneys and will be called upon increasingly by the local representatives of the States to do so.

Senator THOMAS. I think that is true as to every department of life; that States are more and more dependent upon, or calling upon the Federal Government for it.

Mr. FISHER. It is particularly true of water power, because so many of those water powers fit into things over which the Federal Government has control. Take your Appalachian bill, for instance, It is frequently asked, Why should not the Western States be treated like the Eastern States? The Eastern States did not have any public land at all. Take the Middle States, however, like my own State of Illinois. I want to assure you that my State, Illinois, is exceedingly regretful that this sort of a bill was not passed before. We are engaged in very active litigation between the State and some gentlemen who have acquired most valuable power properties, and the result of the decisions has been that the private interest has gotten in and gotten in in such a shape that it will probably affect our ability to finance our portion of the lakes and gulf waterway in the way we had planned, which was to pay for it out of the water power. I might say that in the course of a few years we would have gotten back the initial investment and have had a great revenue pro-

ducing asset in the end. We have lost it. We are sorry Congress had not interfered. We would not have complained that we were deprived of anything. We regret that we were not deprived of the right to give it away.

Senator THOMAS. It was given away by the Federal authority, was it not, under the Federal law?

Mr. FISHER. No; it was given away by both. Somewhere in that twilight zone between the State and Nation we lost it.

Senator THOMAS. The loss of nearly all of the rest of the natural resources of the public land States has been through the agency of Federal law and Federal administration.

Mr. FISHER. This was not public land.

Senator THOMAS. It may not have been public land, and I do not say so, but the Government of the United States could have prevented it.

Mr. FISHER. I will tell you how it did it, as I understand it.

A private company acquired riparian rights on the banks of a stream as to which navigation was questionable. When it got down to the proof of that fact, at this period of time and under the present application of the law to it, the lower court, and finally the Supreme Court of the United States, held that it was not in fact navigable, and therefore the Federal Government had no authority, and when under our law the riparian owner acquired the banks of the stream and actually put in a dam he acquired control over it, so that we can not touch him at all. We want to go in and develop that stream by the expenditure of public money. We want to expend millions of dollars building a waterway on which the riparian owner will reap a profit. The citizen who owns that right says, "You can go ahead and develop it, and when you develop it and increase our water power many times we are going to reap the benefit of it."

Senator THOMAS. When you say that public moneys will be expended, what do you mean—State moneys?

Mr. FISHER. The State.

Senator THOMAS. What is to prevent the State from exercising the power of eminent domain?

Mr. FISHER. It can, but it will have to pay a very large sum. It will have to pay for this unearned increment which this Ferris bill is intended to make impossible.

Senator THOMAS. Of course you are aware of the fact that the courts have held in recent years that the Government has no title in navigable streams for any other than purposes of navigation?

Mr. FISHER. I am not so sure about that. Of course the active assertion of the control has only become important since the development of hydroelectric power was introduced. But the Supreme Court in the Chandler-Dunbar suit has settled that question forever.

Senator THOMAS. They have gone to the extreme. I will not say that either, for they can go another step.

Senator SMOOT. Have you a copy of the Chandler-Dunbar decision?

Mr. FISHER. Yes, sir.

Senator SMOOT. I wish you would read that part that you say forever sets the question at rest.

Mr. FISHER. I would be glad to do so.

Senator SMOOT After reading that part, I would like to have the whole decision put in, because I believe there is a dispute as to what that decision really is.

Mr. FISHER. If anybody on the other side of this question can get any comfort out of the Chandler-Dunbar case he is welcome to it.

Senator THOMAS. You mean anybody who questions the extent to which it goes?

Senator SMOOT. When you say "the other side" of course I do not know what you mean by that.

Mr. FISHER. I mean the side that insists that where a private owner has acquired land on the edge of a navigable stream he thereby acquires a vested right to develop a water power of which the public can not deprive him.

Senator THOMAS. I think the case goes almost as far, but not quite as far as you contend. At the same time, I regard it as a reversal of the hitherto accepted doctrine, as far as the ownership of the sovereignty in water is concerned.

Mr. FISHER. There is a difference of opinion in that. I have always been of the opposite opinion.

Senator THOMAS. I merely state my conclusion upon previous decisions of the Supreme Court of the United States and the common law which we inherited from Great Britain.

Mr. FISHER. I do not believe in saying, "I told you so," or anything of that sort, and lawyers of eminence disagreed about it.

Senator THOMAS. I confess, at the age of 65, I am rapidly reaching the conclusion that all of my previous conceptions of the law have been overthrown, not only as to this question, but as to a great many others. I have recently been able to find authorities in support of both sides and every side of every conceivable human controversy that has come within my experience.

Mr. FISHER. Senator Smoot, this is the part of the decision to which I referred:

The technical title of the Chandler-Dunbar Co., therefore, includes the bed of the river opposite its upland on the bank to the middle thread of the stream, being the boundary line at that point between the United States and the Dominion of Canada. Over this bed flows about two-thirds of the volume of water constituting the falls and rapids of the St. Marys River. By reason of that fact and the ownership of the shore the company's claim is that it is the owner of the river and of the inherent power in the falls and rapids, subject only to the public right of navigation. While not denying that this right of navigation is the dominating right, yet the claim is that the United States in the exercise of the power to regulate commerce may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future.

That is the claim of the private owner

This claim of a proprietary right in the bed of the stream and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below is the taking from it of a property right or interest of great value, for which, under the fifth amendment, compensation must be made.

This is the view which was entertained by Circuit Judge Dennison in the court below, and is supported by most careful findings of fact and law and an elaborate and able opinion. The question is, therefore, one which from every standpoint deserves careful consideration.

This title of the owner of fast land upon the shore of a navigable river to the bed of the river is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passes with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation, and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution are admissible. If, on the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. So, also, it may forbid the construction and maintenance of tunnels, etc.

Now I will omit a lot of the decisions.

Senator SMOOT. It seems to me, from what you have read so far, that they do not say that they can assert any right that is not granted to the Government under the Constitution.

Mr. FISHER. No; but they do say what that right is.

Senator SMOOT. And I do not think there is any question about that. I do not see that that covers the question you have discussed before.

Mr. FISHER (reading):

So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the stream.

Senator THOMAS. As a matter of fact, under that decision, do you not think that the Government, for the apparent purpose of improving navigation, can improve the current of the stream and go into the business of manufacturing and selling power?

Mr. FISHER. It is expressly held that the Government, as you say could go into the business of manufacturing power.

Senator THOMAS. Yes; that the Government, assuming ostensibly to improve the stream for the purposes of navigation can really improve it for the purpose of hydroelectric energy and go into the business of manufacturing and selling power. I do not see that that is not only a logical but a necessary sequence of the decision.

Mr. FISHER. This is what the court said on that matter:

It is said that the twelfth section of the act of 1909 authorizes the Secretary of War to lease, upon terms agreed upon, any excess of water power which results from the conservation of the flow of the river and the works which the Government may construct. This, it is said, is a taking of private property for commercial uses and not for the improvement of navigation. But, aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is "primarily for the benefit of navigation and incidentally for the purpose of having the water power developed, either for the direct use of the United States or by lease * * * through the Secretary of War."

If the primary purpose is legitimate, we can see no sound objections to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by the State governments.

Senator THOMAS. Precisely. All that the Government has to do is assert its primary purpose to be one thing when it is in fact another, and go right ahead with the business of manufacturing power.

Mr. FISHER. Certainly; and no court can review it; and it is not obnoxious to the Constitution.

Senator THOMAS. That is the logical deduction I make from that decision.

Mr. FISHER. I think you are right, and I do not think it would be possible to have it any more clearly enunciated than it is.

Senator THOMAS. That is what I said, that the Government go one step further than that position and under the pretext of improving a river for the purpose of navigation, they could go into the electric business.

Mr. FISHER. That is, that it has the constitutional right to do so.

Senator THOMAS. Yes.

Mr. FISHER. So I conclude, but whether it should do so is a question to be determined under the particular facts and circumstances. The Canadian Government, or the Ontario Government, as you know, regard this as an almost incalculable public advantage, because they generate their power where they can, and they buy it where they can not generate it. I think they buy most of it. Then they build transmission lines, and they sell that power to municipalities and private consumers in the municipalities throughout the Dominion, with the result of reducing the cost of power, and, in their opinion, greatly benefiting the public. Now, we have got to choose. There is in the West the sentiment that some of these things interfere with development. And sometimes people in the West, I think with the best and most disinterested intentions, feel that because you are interfering with the financial profits of the people who take over these power projects, that that is hindering development. I think those people fail to recognize how much more important it is that the people of those States should get cheap power. Nothing can have more effect, in my judgment, upon the whole industrial and sociological development of the entire country, including the people of the West, than to be able to deliver to the individual consumer power at the lowest possible rate. And nothing will better enable the smaller manufacturer to compete with the larger manufacturer. By cooperation in the purchase of materials and in the sale of the manufactured products there are many lines of manufacture that could be carried on in an exceedingly profitable way by a very small manufacturer, provided you can carry the power necessary to operate his tools or machine right into his house or little shop. And I think that will be of far greater advantage to the communities of the West than any possible advantage that may come from large profits that will accrue to a very few people by the establishing of a great enterprise.

Senator NORRIS. Before you leave this subject, I would like to inquire of the chairman whether the whole opinion in the Chandler-Dunbar case is going to be put into the record.

The CHAIRMAN. Yes; let it go in.

(The opinion referred to is as follows:)

SUPREME COURT OF THE UNITED STATES.

Nos. 783, 784, 785, and 786.—October term, 1912.

783. The United States, plaintiff in error, *v.* The Chandler-Dunbar Water Power Co. et al.
784. The Chandler-Dunbar Water Power Co., plaintiff in error, *v.* The United States.
785. St. Marys Power Co., plaintiff in error, *v.* The United States.
786. Clarence M. Brown, sole receiver of the Michigan Lake Superior Power Co., plaintiff in error, *v.* The United States.

In error to the District Court of the United States for the Western District of Michigan

[May 26, 1913.]

These writs of error are for the purpose of reviewing a judgment in a condemnation proceeding instituted by the United States under the eleventh section of an act of Congress of March 3, 1909, being chapter 264, 35 Statutes, pages 815, 820. The section referred to is set out in the margin.[1]

[1] SEC. 11. That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.

The Secretary of War is hereby directed to take proceedings immediately for the acquisition, by condemnation or otherwise, of all of said lands and property of every kind and description in fee simple absolute. He shall proceed in such taking by filing in the office of the register of deeds of Chippewa County, in the State of Michigan, a writing, stating the purposes for which the same is taken under the provisions of this section, and giving a full description of all the lands and property of every kind and description thus to be taken. After the filing of said writing, and ten days after publication thereof in one or more newspapers in the city of Sault Sainte Marie, in the State of Michigan, the United States shall be entitled to and shall take immediate possession of the property described, and may at once proceed with such public works thereon as have been authorized by Congress for the uses of navigation.

The Circuit Court of the United States for the Western District of Michigan is hereby given exclusive jurisdiction to hear condemnation proceedings and to determine what compensation shall be awarded for property taken under authority of this section. After the taking of any property by the Government of the United States, as herein provided for, the United States, by its proper officials, shall begin condemnation proceedings in the aforesaid court, and the practice shall be in accordance with the practice in the courts of the State of Michigan for the condemnation of lands by the State so far as the same may be followed without conflicting with the provisions hereof. Possession may be taken by the United States prior to a determination by a court of any necessity of taking and prior to any determination of the amount of compensation.

Any money payable by the Government under the provisions of this section shall be payable out of any money heretofore authorized or appropriated for the purpose of improving Saint Marys River at the falls, Michigan.

All that part of "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March second, nineteen hundred and seven, beginning with the words "and all lands and waters north of the present Saint Marys Falls Ship Canal throughout its length," and ending with the words "to comply with the provisions of the river and harbor act of nineteen hundred and two, but such lands, if so acquired, shall be obtained without expense to the United States," is hereby repealed.

Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company, the Edison-Sault Light and Power Company, the Edison-Sault Electric Company, or the Saint Marys Power Company, shall cease and determine and become null and void on January first, nineteen hundred and eleven, and the Secretary of War is hereby authorized and instructed to revoke, cancel, and annul every such permit, license, or authority, to take effect on January first, nineteen hundred and eleven.

The Secretary of War may, in his discretion, permit the Chandler-Dunbar Water Power Company and the Edison-Sault Electric Company to maintain their present works and utilize the water power in said river at said rapids, in so far as the same does not interfere with navigation or retard the construction of Government works in said river, under such rules or regulations as have been or hereafter shall be imposed by the Secretary of War, until they shall be paid the compensation awarded by the court for their property condemned under the provisions of this section: but said permit shall not extend beyond January first, nineteen hundred and eleven.

The President of the United States is respectfully requested to open negotiations with the Government of Great Britain for the purpose of effectually providing, by suitable treaty with said Government, for maintaining ample water levels for the uses of navigation in the Great Lakes and the waters connected therewith, by the construction of such controlling and remedial works in the connecting rivers and channels of such lakes as may be agreed upon by the said Governments under the provisions of said treaty.

The Secretary of War is further authorized and instructed to cause to be made a preliminary examination and survey to ascertain and determine a proper plan and the probable expense for constructing in the rapids of the Saint Marys River a filling or forebay, from which the ship locks shall be filled: *Provided*, That such survey shall in no way delay or interfere with the plans for construction already under way.

The notice of condemnation required by the statute was duly given by the Secretary of War, and this proceeding was instituted against all the corporations and persons supposed to have any interest in the property sought to be condemned. A jury was waived and the evidence submitted to the court, which, at the request of all the parties, made specific findings of fact and law.

By an agreement, the property of the International Bridge Co. required by the Government was acquired by deed, and later in the progress of the case the property of the Edison-Sault Electric Co. involved in the proceeding was acquired by stipulation. This eliminates from the cases every question except those arising in respect of the compensation to be awarded to the Chandler-Dunbar Water Power Co., the St. Marys Power Co., and Clarence M. Brown, receiver of the Michigan Lake Superior Power Co. The final judgment of the court was:

1. That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls Ship Canal, throughout its entire length and lying between the said ship canal and the international line at Sault St. Marie, in the State of Michigan, was necessary for the purposes of navigation of said waters and the waters connected therewith as declared by the act of March 3, 1909.

The compensation awarded was as follows:

(*a*) To the Chandler-Dunbar Co., $652,332. Of this $550,000 was the estimated value of the water power.

(*b*) To the St. Marys Falls Power Co., $21,000.

(*c*) To the Edison-Sault Electric Co., $300,000, which has, however, been settled by stipulation.

(*d*) To the Michigan Lake Superior Power Co., nothing.

From these awards the Government, the Chandler-Dunbar Co., the St. Marys Falls Power Co., and the Michigan Lake Superior Power Co. have sued out writs of error.

The errors assigned by the United States challenge the allowance of any compensation whatever on account of any water-power right claimed by any of the owners of the condemned upland, and also the principles adopted by the district court for the valuation of the upland taken. The several corporations who have sued out writs of error complain of the inadequacy of the award on account of water power claimed to have been taken, and also the of valuation placed upon the several parcels of upland condemned.

The errors assigned by the United States deny that any water power in which the defendants below had any private property right has been taken, and also deny the claim that riparian owners must be compensated for exclusion from the use of the water power inherent in the falls and rapids of the St. Marys River, whether the flow of the river be larger than the needs of navigation or not. The award of $550,000 on account of the claim of the Chandler-Dunbar Co. to the undeveloped water power of the river at the St. Marys Rapids in excess of the supposed requirements of navigation constitutes the prime question in the case, and its importance is increased by the contention of that company that the assessment of damages on that account is grossly inadequate and should have been $3,450,000.

Each of the several plaintiffs in error also challenge the awards made on account of the several parcels of upland taken—the Government insisting that the awards are excessive, and the owners, that they are inadequate.

(Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court:)

From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Co. has any private property in the water-power capacity of the rapids and falls of the St. Marys River which has been "taken," and for which compensation must be made under the fifth amendment to the Constitution; and, second, if so, what is the extent of its water-power right and how shall the compensation be measured?

That compensation must be made for the upland taken is not disputable. The measure of compensation may in a degree turn upon the relation of that species of property to the alleged water-power rights claimed by the Chandler-Dunbar Co. We therefore pass for the present the errors assigned which concern the awards made for such upland.

The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. (Shively *v.* Bowlby, 152 U. S., 1, 31; Philadelphia Co. *v.* Stimson, 223 U. S., 605, 624, 632; Scott *v.* Lattig, 227 U. S., 229.) Upon the admission of the State of Michigan into the Union the bed of the St. Marys River passed to the State, and under the law of that State the conveyance of a tract of land upon a navigable river carries the title to the middle thread. (Webber *v.* The Pere Marquette, etc., 62 Mich., 626; Scranton *v.* Wheeler, 179 U. S., 141, 163; United States *v.* Chandler-Dunbar Water Power Co., 209 U. S., 447.)

The technical title of the Chandler-Dunbar Co., therefore, includes the bed of the river opposite its upland on the bank to the middle thread of the stream, being the

boundary line at that point between the United States and the Dominion of Canada. Over this bed flows about two-thirds of the volume of water constituting the falls and rapids of the St. Marys River. By reason of that fact and the ownership of the shore the company's claim is that it is the owner of the river and of the inherent power in the falls and rapids, subject only to the public right of navigation. While not denying that this right of navigation is the dominating right, yet the claim is that the United States, in the exercise of the power to regulate commerce, may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation, and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future. This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the fifth amendment, compensation must be made.

This is the view which was entertained by Circuit Judge Dennison in the court below and is supported by most careful findings of fact and law and an elaborate and able opinion. The question is, therefore, one which from every standpoint deserves careful consideration.

This title of the owner of fast land upon the shore of a navigable river to the bed of the river is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation, and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution are admissible. If, on the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be removed or altered as an obstruction to navigation. In Gilman *v.* Philadelphia (3 Wall., 713, 724) this court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the Nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

In Gibson *v.* United States (166 U. S., 269) it is said:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."

Thus in Scranton *v.* Wheeler, supra, the Government constructed a long dike or pier upon such submerged lands in the river here involved for the purpose of aiding its navigation. This cut the riparian owner off from direct access to deep water, and

he claimed that his rights had been invaded and his property taken without compensation. This court held that the Government had not "taken" any property which was not primarily subject to the very use to which it had been put, and therefore denied his claim. Touching the nature and character of a riparian owner in the submerged lands in front of his upland bounding upon a public navigable river such as the St. Marys, this court said:

"The primary use of the water and the lands under them is for the purpose of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use and infringes no right of the owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bounding on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the water flowing over them as may be consistent with or demanded by the public right of navigation."

So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

In Pennsylvania *v.* Wheeling Bridge Co. (18 How., 421, 430) this court, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an act of the State of Virginia, created an obstruction to navigation and was a nuisance which should be removed. Before the decree was executed Congress declared the bridge a lawful structure and not an obstruction. This court thereupon refused to issue a mandate for carrying into effect its own decree, saying:

"Although it may still be an obstruction in fact, it is not so in contemplation of law. We have already said, and the principle is undoubted, that the act of the Legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent power of both governments, State and Federal, which if not sufficient, certainly none can be found in our system of government."

In Philadelphia *v.* Stimson, supra, and in Union Bridge Co. *v.* United States (204 U. S., 364), many of the cases are cited and reviewed and we need add nothing more to the discussion.

The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was "necessary for the purposes of navigation of said waters and the waters connected therewith," that determination was conclusive.

So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same.

That Congress did not act arbitrarily in determining that "for the purposes of navigation of said waters and the waters connected therewith," the whole flow of the stream should be devoted exclusively to that end, is most evident when we consider the character of this stream and its relation to the whole problem of lake navigation. The river St. Marys is the only outlet for the waters of Lake Superior. The stretch of water called the falls and rapids of the river is about 3,000 feet long and from bank to bank has a width of about 4,000 feet. About two-thirds of the volume of the stream flows over the submerged lands of the Chandler-Dunbar Co., the rest over like lands on the Canadian side of the boundary. The fall in the rapids is about 18 feet. This turbulent water, substantially unnavigable without the artificial aid of canals around the stream, constitutes both a tremendous obstacle to navigation and an equally great source of water power if devoted to commercial purposes. That the wider needs of

navigation might not be hindered by the presence in the river of the construction works necessary to use it for the development of water power for commercial uses under private ownership was the judgment and determination of Congress. There was also present in the mind of Congress the necessity of controlling the overflow from Lake Superior, which averages some 64,000 cubic feet per second. That outflow has great influence both upon the water level of Lake Superior and also upon the level of the great system of lakes below which receive that outflow. A difference of a foot in the level of Lake Superior may influence adversely access to the harbors on that lake. The same fall in the water level of the lower lakes will perceptibly affect access to their ports. This was a matter of international consideration, for Canada, as well as the United States, was interested in the control and regulation of the lake water levels. And so we find in the act of 1909 a request that the President of the United States will open negotiations with the Government of Great Britain "for the purpose of effectually providing, by suitable treaty, for maintaining ample water levels for the uses of navigation in the Great Lakes and the waters connected therewith, by the construction of such controlling and remedial works in the connecting rivers and channels of such lakes as may be agreed upon by the said Governments under the provisions of said treaty."

The falls and rapids are at the exit of the river from the lake. Millions of public money have already been expended in the construction of canals and locks, by this Government upon the American side, and by the Canadian Government upon its own side of the rapids, as a means by which water craft may pass around the falls and rapids in the river. The commerce using these facilities has increased by leaps and bounds. The first canal had hardly been finished before it became inadequate. A second upon the American side was constructed parallel with the first. The two together are insufficient though the canal upon the Canadian side accommodates much of the commerce. The main purpose of the act of 1909 was to clear the way for generally widening and enlarging facilities for the ever-growing commerce of the Great Lakes. The act, therefore, looks to the construction of one or more canals and locks, paralleling those in use, and directs a survey "to ascertain and determine the proper plan * * * for constructing in the rapids * * * a filling basin or forebay from which the ship locks may be filled."

The upland belonging to the Chandler-Dunbar Co. consists of a strip of land some 2,500 feet long and from 50 to 150 feet wide. It borders upon the river on one side, and on the Government canal strip on the other. Under permits from the Secretary of War, revocable at will, it placed in the rapids, in connection with its upland facilities, the necessary dams, dikes, and forebays for the purpose of controlling the current and using its power for commercial purposes, and has been for some years engaged in using and selling water power. What it did was by the revocable permission of the Secretary of War, and every such permit or license was revoked by the act of 1909. (See act of Sept. 19, 1890, 26 Stat., pp. 426, 454, forbidding the construction of any dam, pier, or breakwater in any navigable river without permission of the Secretary of War, or the creation of any obstruction, not affirmatively authorized by law, "to the navigable capacity of such rivers." See also the later act of Mar. 3, 1899, 30 Stat., pp. 1151, 1155, and United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, construing and applying the act of 1890.) That it did not thereby acquire any right to maintain these constructions in the river longer than the Government should continue the license, needs no argument. They were placed in the river under a permit which the company knew was likely to be revoked at any time. There is nothing in the facts which savors of estoppel in law or equity. The suggestion by counsel that the act of 1909 contemplates that the owner should be compensated not only for its tangible property, movable or real, but for its loss and damage by the discontinuance of the company's license and its exclusion from the right to use the water power inherent in the falls and rapids, for commercial purposes, is without merit. The provisions of the act in respect of compensation apply only to compensation for such "property described" as shall be held private property taken for public uses. Unless, therefore, the water-power rights asserted by the Chandler-Dunbar Co. are determined to be private property the court below was not authorized to award compensation for such rights.

It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water the Government not only takes the land but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows, has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river is of no prime im-

portance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dikes, etc., essential to the utilization of the power of the stream for commercial purposes. We may put out of view altogether the class of cases which deal with the right of riparian owners upon a nonnavigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but if the effect was not injurious to the property of those above or to the equal rights of those below, none could complain, since no public interest would be affected. We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or nonnavigable streams as between each other. Nor need we consider cases cited which deal with the rights of riparian owners under State laws and private or public charters conferring rights. That riparian owners upon public navigable rivers have in addition to the rights common to the public certain rights to the use and enjoyment of the stream, which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in the navigation of the river. (Gibson *v.* United States, 166 U. S., 269; Transportation Co. *v.* Chicago, 99 U. S., 635. It is for Congress to decide what is and what is not an obstruction to navigation; Pennsylvania *v.* Wheeling Bridge Co., 18 How., 421; Union Bridge Co. *v.* United States, 204 U. S., 364; Philadelphia Co. *v.* Stimson, 223 U. S., 605.)

To utilize the rapids and fall of the river which flows by the upland of the Chandler-Dunbar Co., it has been and will be necessary to construct and maintain in the river the structures necessary to control and direct the flow so that it may be used for commercial purposes. The thirty-fourth finding of fact includes this:

"For about 20 years the Chandler-Dunbar Co., or its predecessors or some one claiming under it, has been developing power at this part of the rapids. This was accomplished by a short transverse dam near the lower boundary of its land extending out a short distance into the stream and then extending up along the bed of the stream (substantially) parallel to the bank up to the head of the rapids. This dam or wall toward its upper end diverged out into the stream the better to divert water into the headrace and into the fore bay formed by its lower part. Earlier structures of this character were replaced about 1901 by those more extensive ones which existed when this condemnation was made. While considerable in extent and cost, they are inconsiderable as compared with the structures now proposed to utilize the whole power, and they were, comparatively speaking, along the bank rather than across the stream."

The seventy-first finding of fact was in these words:

"All the development works ever constructed upon the Chandler-Dunbar submerged lands by anyone have been constructed after obtaining from the Secretary of War a permit therefor, and each such permit has been expressly revocable by right of revocation reserved on its face, to be exercised with or without cause. Each such permit was revoked before the commencement of this proceeding."

Upon what principle can it be said that in requiring the removal of the development works which were in the river upon sufferance Congress has taken private property for public use without compensation? In deciding that a necessity existed for absolute control of the river at the rapids, Congress has of course excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of navigation. The qualified title to the bed of the river affords no ground for any claim of a right to construct and maintain therein any structure which Congress has by the act of 1909 decided in effect to be an obstruction to navigation and a hindrance to its plans for improvement. That title is absolutely subordinate to the right of navigation, and no right of private property would have been invaded if such submerged lands were occupied by structures in aid of navigation or kept free from such

obstructions in the interest of navigation. (Scranton *v.* Wheeler, supra; Hawkins Light House Cases, 39 Fed., 83.) We need not consider whether the entire flow of the river is necessary for the purposes of navigation, or whether there is a surplus which is to be paid for, if the Chandler-Dunbar Co. is to be excluded from the commercial use of that surplus. The answer is found in the fact that Congress has determined that the stream from the upland taken to the international boundary is necessary for the purposes of navigation. That determination operates to exclude from the river forever the structures necessary for the commercial use of the water power. That it does not deprive the Chandler-Dunbar Co. of private property rights follows from the considerations before stated.

It is said that the twelfth section of the act of 1909 authorizes the Secretary of War to lease, upon terms agreed upon, any excess of water power which results from the conservation of the flow of the river, and the works which the Government may construct. This, it is said, is a taking of private property for commercial uses and not for the improvement of navigation. But, aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is "primarily for the benefit of navigation and incidentally for the purpose of having the water power developed, either for the direct use of the United States or by lease * * * through the Secretary of War."

If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments. In Kaukauna Co. *v.* Green Bay, etc., Canal (142 U. S., 254, 273), respecting a Wisconsin act to which this objection was made, the court said:

"But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands in order to preserve at all times a sufficient supply for the purpose of navigation. If the riparian owners were allowed to tap the pond at different places and draw off the water for their own use, serious consequences might arise not only in connection with the public demand for the purposes of navigation but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties and thus reimburse itself for the expenses of the improvement."

It is, at best, not clear how the Chandler-Dunbar Co. can be heard to object to the selling of any excess of water power which may result from the construction of such controlling or remedial works as shall be found advisable for the improvement of navigation, inasmuch as it had no property right in the river which had been "taken." It has, therefore, no interest whether the Government permit the excess of power to go to waste or make it the means of producing some return upon the great expenditure.

The conclusion, therefore, is that the court below erred in awarding $550,000, or any other sum, for the value of what is called "raw water," that is the present money value of the rapids and falls to the Chandler-Dunbar Co. as riparian owners of the shore and appurtenant submerged land.

Coming now to the award for the upland taken:

The court below awarded to the Chandler-Dunbar Co. on this account—

(*a*) For the narrow strip of upland bordering on the river, having an area of something more than 8 acres, excluding the small parcels described in the pleadings and judgment as claims 95 and 96, $65,000, less 7 per cent of that sum on account of Portage Street, which the court later found belonged to the United States and not to that company	$60,450
(*b*) For the small parcels covered by claims 95 and 96	25,000
(*c*) For a half interest in lot on bridge property	338

These awards include certain sums for special values. The value of the upland strip, fixed at $60,450, was arrived at in this manner:

(*a*) For its value, including railroad sidetracks, buildings, and cable terminal, including also its use "wholly disconnected with power development or public improvement—that is to say, for all general purposes, like residences or hotels, factory sites, disconnected with water power, etc., $20,000."

(*b*) For use as factory site "in connection with the development of 6,500 horsepower, either as a single site or for several factories to use the surplus of 6,500 horsepower not now used in the city, an additional value of $20,000."

(c) For use for canal and lock purposes, an additional value of $25,000.

The small parcels constituting claims 95 and 96 were valued at $25,000.

These two parcels seem to have been connected by a costly fill. They fronted upon deep water above the head of the rapids. They had therefore a special value for wharves, docks, etc., and had been so used. The gross sum awarded included the following elements:

(a) For general wharfage, dock, and warehouse purposes, disconnected with devel opment of power in the rapids, $10,000.

(b) For its special value for canal and lock purposes, an additional sum of $10,000.

(c) In connection with the canal along the rapids, if used as a part of the development of 4,500 (6,500) horsepower, an additional value of $5,000.

The United States excepted to the additional value allowed in consequence of the availability of these parcels in connection with the water power supposed to be the property of the Chandler-Dunbar Co., and supposed to have been taken by the Government in this case. It also excepted to so much of the awards as constituted an additional value by reason of availability for lock and canal purposes.

These exceptions, so far as they complain of the additional value to be attached to these parcels for use as factory sites in connection with the development of horsepower by the Chandler-Dunbar Co., must be sustained. These "additional" values were based upon the erroneous hypothesis that that company had a private property interest in the water power of the river, not possibly needed now or in the future for purposes of navigation, and that that excess or surplus water was capable, by some extension of their works already in the river, of producing 6,500 horsepower.

Having decided that the Chandler-Dunbar Co. as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river, the Government can not be justly required to pay for an element of value which did not inhere in these parcels as upland. The Government had dominion over the water power of the rapids and falls and can not be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss and there would be no justice in paying for a loss suffered by no one in fact.

"The requirement of the fifth amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained." (Boston Chamber of Commerce *v.* Boston, 217 U. S., 189, 194, 195.)

Neither can consideration be given to probable advancement in the value of such riparian property by reason of the works to be constructed in the river by the Government, or the use to which the flow of the stream might be directed by the Government. The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it was taken. (Kerr *v.* Park Commissioners, 117 U. S., 379, 387; Shoemaker *v.* United States, 147 U. S., 282, 304, 305.)

The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose. (Lewis on Eminent Domain, sec. 707; Patterson *v.* Boom Co., 98 U. S., 403, 408; Shoemaker *v.* United States, 147 U. S., 282; Young *v.* Harrison, 17 Ga., 30; Alloway *v.* Nashville, 88 Tenn., 510; Sargent *v.* Merrimac, 196 Mass., 171.) Patterson *v.* Boom Co. was this: A boom company sought to condemn three small islands in the Mississippi River so situated with reference to each other and the river bank as to be peculiarly adapted to form a boom a mile in length. The question in the case was whether their adaptability for that purpose gave the property a special value which might be considered. This court held that the adaptability of the land for the purposes of a boom was an element which should be considered in estimating the value of the lands condemned. The court said, touching the rule for estimating damages in such cases:

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances

will modify the most carefully guarded rule, but as a general thing we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future."

In Shoemaker *v.* United States, supra, lands were condemned for park purposes. In the court below the commissioners were instructed to estimate each piece of land at its market value and that—

"The market value of the land includes its value for any use to which it may be put and all the uses to which it is adapted, and not merely the condition in which it is at the present time and the use to which it is now applied by the owner; * * * that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement, or its intrinsic character, it is peculiarly adapted to some particular use—e. g., to the use of a public park—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation."

The court approved this instruction.

The Chandler-Dunbar Co. has also assigned as error the denial of any award on account of a portion of Portage Street to which it claimed title. The title to that parcel has never passed out of the United States. It was part of a street laid off by a survey made of the village of Sault Ste. Marie, a town which had grown up on public land of the United States. But that survey was never carried into a patent, and the village never accepted this part of the street. Thus abandoned, it was occupied for a time by the Chandler-Dunbar Co., but not long enough to acquire title. The court did not err in holding that the company had acquired no title and that title was already in the United States.

The award to the St. Marys Power Co. as owner of island No. 5 is excepted to. The value of that island was fixed at $21,000. That amount was reached, as shown by the seventieth finding of fact, in this manner:

(*a*) As a base value, for general purposes, as for a cottage or fishing station....	$1,000
(*b*) As a strategic value, growing out of the extent to which it may control or block the most available development by upstream owners.....	15,000
(*c*) As an additional value, by reason of its special suitability for lock or canal purposes.....	5,000

This island No. 5, otherwise known as Oshawano Island, is on the American edge of the rapids and below the Chandler-Dunbar property and opposite that part of the shore belonging to the United States. It has an area of about one-third of an acre. The court found that it had no appreciable water power which was in any sense appurtenant, and so no allowance was made on that account. Because none was made the St. Marys Power Co. sued out a writ of error. The reasons which have induced us to deny such an allowance in respect of upland upon the bank of the river require the assignment referred to to be held bad. The court below held, however, that the island had value in other ways, being those mentioned above. In respect to the allowance of $15,000 as its "strategic value" the court below in its opinion said:

"Owing to its location this property had, and always has had, a strategic value with reference to any general scheme of water development in the river and because it must be included as a tailrace site, if not otherwise, in any completely efficient plant of development by any owner, private or public. This value is denied because it is, as Government counsel say, of the 'hold up' character. It should not be permitted to assume the latter character, nor should the fair strategic value be denied because there might be an attempt at exaggeration or abuse. I fix this so-called strategic value at $10,000 (afterwards raised to $15,000), and it should be awarded under the circumstances of this case to whomsoever the owner may be."

This allowance has no solid basis upon which it may stand. That the property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive. It is not proper to attribute to it any part of the value which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. The principle applied in Boston Chamber of Commerce *v.* Boston (217 U. S., 189) is applicable. In that case it appeared that one person owned the land condemned subject to servitudes to others. It was sought to have damages assessed upon a bill in which all of the interests joined for the purpose of having a lump sum awarded, to be divided as the parties might or had agreed. If this could be done, it was agreed that the estate, considered as the sole unencumbered estate of a single person, was worth many times more than if the damage should be assessed according to the condition of the title at the time. This court held that the requirement of compensation when land is taken for

a public purpose "does not require a disregard of the mode of ownership. It does not require a parcel of land to be valued as an unemcumbered whole."

The "strategic value" for which $15,000 has been allowed is altogether speculative. It is based not upon the actual market value for all reasonable uses and demands but the possible worth of the property to the Government.

A "strategic value" might be realized by a price fixed by the necessities of one person buying from another, free to sell, or refuse, as the price suited. But in a condemnation proceeding the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes. (Lewis, Eminent Domain, 3d ed., sec. 706; Moulton *v.* Newbury Water Co., 137 Mass., 163, 167; United States *v.* Seufert Bros. Co., 78 Fed., 520; Alloway *v.* Nashville, 88 Tenn., 510, 514; United States *v.* Honolulu Co., 122 Fed., 581.)

The exception must be sustained.

One other assignment by the St. Marys Power Co needs to be specially noticed. The title to Oshawano Island is in litigation between the United States and the St. Marys Power Co. For this reason the award to that company was ordered to remain in the registry of the court until that litigation was ended. The St. Marys Power Co. contends that when the United States sought the condemnation of the property in this proceeding it thereby conceded the title to be in it. But the pleadings show that no such concession was made. The state of the title and of the pending litigation was set up and we think all rights were thereby reserved.

The assignments of error by the Michigan Lake Superior Power Co. must be overruled. No property, real or hypothetical, has been taken from it.

Other assignments of error by one or another of the several plaintiffs in error need not be specifically noticed. They are all overruled as either covered by the views we have expressed or as having no merit.

The judgment of the court below must be reversed and the cases remanded with direction to enter a judgment in accordance with this opinion.

True copy.

Test:

_____.

Clerk Supreme Court United States.

Senator THOMAS. I would like to ask, before we adjourn, whether it would not be more likely to be effective—that is, cheap power and cheap light—by the Government's following up the nature of the deductions from that decision, instead of leasing or otherwise disposing of these power sites, improve them under the assumption that it is improving navigation, and manufacture this electric energy and let the people have it at cost.

Mr. FISHER. Senator Thomas, that is a pretty far step.

Senator THOMAS. If it be true—and I quite agree with you—that cheap electricity, cheap power, and cheap light, etc., is the most desirable advantage that can be secured from the development of these now latent powers, I think it is only logical to assume that the Government would be able to furnish it far more cheaply than anybody else; therefore, it should, upon the assumption that it is improving navigation, go into the business of developing energy, and let the people have it at cost.

Mr. FISHER. You would not get into any quarrel with me over that.

My idea about a matter of that sort is this, that the wisest development in things of that kind is evolutionary development, proceeding progressively, and very carefully, proceeding first with those steps most clear and most justified. I think this bill is drawn along that line. You notice it has no charge at all to a municipality.

Senator THOMAS. I will not quarrel either if you will substitute the State for the United States as the authority to manufacture and to distribute the power.

Mr. FISHER. Well, I stated in my annual report, I think, the last year I was Secretary, that in my judgment that was probably the way

it ought to be done, but we cross no bridges in that regard in this act. We have not committed the Federal Government to anything. We have merely reserved something as to what the Federal Government shall do in taking over these properties at the end of any leases that may be granted now. Nothing will be done without an act of Congress. You merely have reserved an option; you have kept the door open in that regard.

You may then decide that instead of the Federal Government doing it it will turn over all the powers to any State which is ready to take them over and develop them itself. That may be the wisest decision. But if you wait now to take up with your colleagues in the Senate and the House the question of whether they are prepared to go so far as to turn these powers over to the States for development, and whether the States are now prepared to do that, you are going to leave power development in the unfortunate condition it has been in for many years. One thing you must get rid of is this revocable permit. It is wrong in every way; it is wrong in principle and in practice.

Senator THOMAS. There is no quarrel between us on that either.

Mr. FISHER. But I believe you want to go just as far as you can in getting things in your permit to protect the public interests. Then when you come to fixing compensation, I think that the benefit of the doubt should be given to the private interests. I think you should make it to their interest to develop. I think this enterprise should be held up as attractive to the developer and investor, but we ought not to lose sight of the restrictions and limitations that should be put upon them for the benefit of the public. The wiser manufacturers and power developers are perfectly willing that you should do it, and they will have no difficulty in financing their enterprises with those things in the permit. But if you give them away once then the die is cast; it is too late then; you can not call them back.

Senator NORRIS. If you are through with that particular point, I wanted to get your judgment on another feature of the bill.

Under the bill all hydroelectric energy that goes into interstate use will be under control both as to service and as to charges of the Secretary of the Interior. Now, would the bill be improved if that important function, which I think you will concede is a very important one, were left to some board either in existence or some body that may be provided by this bill similar, for instance, to the Interstate Commerce Commission?

Mr. FISHER. Senator Norris, I believe that you will have an administrative commission. It may be that this trades commission which has been created will be used as the agency, and I personally believe that a commission of that kind, high grade, paid an adequate salary and given adequate dignity and responsibility, is a better agency than any single individual with the administrative duties that necessarily fall upon a member of the Cabinet. But I think it would be a great mistake to delay the passage of this bill for the working out of any such method of control. This bill says you may do that. It says the power to regulate shall be in the Secretary of the Interior or any board or commission that may be appointed.

Senator NORRIS. My question was as to whether it would be advisable to provide for that in this bill.

Mr. FISHER. I think it will be a mistake. I think you will get into a discussion, and a lot of questions will be raised which will delay this bill. The bill does not question the right of the State to control where there is already a State commission. The Federal Government and the Secretary of the Interior shall not have to bother with that. He will be only too glad to serve only as an additional agency, upon whom the people can call.

SENATOR NORRIS. There are several reasons why, the Secretary of the Interior being a member of the Cabinet, and an appointee, and, as past experience has shown, they change very often as administrations change, and even in an administration Cabinet officers change, but if you assume that we will always have good Secretaries of the Interior, like we have now, for instance, a man in whom I think we all have confidence, at the same time he necessarily can not become so well posted and can not become an expert in the business like he would if he were appointed for a long term, like the Interstate Commerce Commission, until he understood all of the details, and could not be deceived like he could under conditions where he is liable to be changed. Even though we will assume he wants to do the best thing possible, lots of times he would find it difficult to do it. He would not know what to do. He would have to depend upon the advice of his subordinates.

Mr. FISHER. I agree with you that it would be much better to have a commission regulate such things as this instead of leaving it to the Secretary of the Interior. But I am also very decidedly of the opinion that if you should take this bill, which has already passed the House, in which I myself would suggest some changes, if it were a matter of first impression, I think it would be a big mistake, in as important a subject as this, when you have a bill of this kind, to make any important changes of that kind, attempting to create a commission for that purpose, thereby perhaps defeating the passage of legislation which I think is greatly needed.

Senator NORRIS. There is no doubt but what it is needed. At least I think it is. But it seems to me it is quite important in the beginning of new legislation like this that we do not make a mis-step the first one we take. I think it is conceded in all these commissions, State commissions and Federal commissions that regulate rates and that have power to regulate service, that a long tenure of office is almost necessary to make it successful. It ought to be relieved from politics; and the Secretary of the Interior is an appointee, and the appointment is made often from political or partisan considerations.

Mr. FISHER. I do not know that I can add anything to what I have said. I think it is desirable to have it under the control of a commission rather than under the control of an individual, especially where the individual has a large amount of work, and important work, such as a member of the Cabinet has. But at the same time I would regard it as a mistake to retard the passage of this bill for the purpose of working out provisions with regard to such a commission.

The CHAIRMAN. Mr. Fisher, what would you think of an amendment to the bill to provide that where less than 5 per cent of the land occupied by a power plant was Government land, the provisions of this bill shall not apply to it except that the corporation shall pay a reasonable rental for the small quantity of land for 50 years or such length of time as the lease runs?

Mr. FISHER. I think, Senator, that that would be a very grave mistake, if not a fatal error. The whole purpose of these provisions that are inserted in this bill in the public interest in no way depends upon the quantity of interest which the Government owns, except as a technical basis for the exercise of the authority. But, irrespective of the quantity of land which the Federal Government had. I think that any fractional interest, I do not care how small, which the Government has, which would give the United States authority to make provisions which are clearly in the public interest, should be taken advantage of. I think you will find in many cases, and certainly you will find in the Montana power case, the interest was comparatively small as compared with the great development of water at Great Falls, and the value of the transmission line, in fact exceedingly small, relatively, nevertheless we put all those provisions in the permit. We put the very things we are talking about here in that permit, and the grantee accepted it and stated publicly that he thought they were wise provisions in the public interest.

The president of the railroad publicly stated that he was greatly gratified with the permit, and no complaint was made. I think that is true everywhere. Of course the private owner or private grantee would like to make just as much as he can out of it. He does not like to give up anything, although it is in the public interest. If he thinks he has 95 per cent of what he needs, yet has to come here and ask for another 5 per cent that, to him, is clearly a case which he regards as a misfortnue. If he were asking for 100 per cent he would accede to these things without question. The charge, however, might not be any greater in one case than in the other. I assume, as a matter of fact, that the function of this compensation which the Government is going to exact is such that it would not depend at all on the matter of the Government land being 5 per cent or 100 per cent. I can conceive of permits which would be granted where the compensation for 100 per cent, if it were on public lands, would not be any more than if it was 5 per cent, because the purpose of the compensation is chiefly as a basis for regulation.

The CHAIRMAN. Even in an extreme case where only 1 per cent of the land is Government land, do you think, that land being used for overflow purposes, for example, that ought to come under this bill?

Mr FISHER. Yes, sir; I think so.

The CHAIRMAN. You would not make any distinction there?

Mr. FISHER. No. I think the only thing to determine is whether the Government has a legal right to exact these things which it is really in the public interest to exact.

The CHAIRMAN. Mr. Fisher, we thank you.

Mr. FISHER. Mr. Chairman, referring to the question about the 5 per cent, I assume that you mean 5 per cent in value and not in area.

The CHAIRMAN. In area.

Mr. FISHER. The area of course would not have any bearing on it, because it might be the dam site. I can conceive of a fraction of 1 per cent being largely the essence of the whole thing.

The CHAIRMAN. It might be simply a use of the public land for overflow purposes or for right of way.

Mr. FISHER. You can see, of course, that superficial area would not be a proper test anyway, because it might be worth 99 per cent of the whole thing, although it is only 5 per cent of the area.

The CHAIRMAN. It has hardly seemed to me where a very small percentage of the area used belongs to the United States Government, and this was some incidental use that the party making the application ought to be subjected to a great many rules and regulations to which a party acquiring land by a private grant would not be subjected, where it is all privately acquired.

Mr. FISHER. Can that possibly be the proper point of view of a representative of the Government? Is not the point of view of a representative of the Government properly first what ought to be done in the public interest if you have the power; second, have you the power? If you decide first that certain things are in the public interest and ought to be done and you find you have no power you can only regret it; but if you find you have the power, ought you not to exercise it in the public interest? Can you possibly justify not exercising the power by saying, "While it is true we have the power, yet the land from which we derive our power is simply a small part of the larger thing?"

The CHAIRMAN. There are many cases where the Government has no power.

Mr. FISHER. Then it can not act. It can only regret.

The CHAIRMAN. Then it can not act.

Mr. FISHER. I am assuming that it is 1 per cent, as you say; but that 1 per cent is essential, and it is perfectly proper for the Government to say, "If you can get along without it, then get along, but if you come to us asking for it we will insert all these things in the grant which are for the public interest."

The CHAIRMAN. Well, it would only be applicable as far as financing the enterprise is concerned—whether or not itwould prevent any obstacle to financing it. That is one of the great questions that have been introduced here by everybody, namely, whether or not the regulations or law enacted would prevent the financing of these enterprises.

Mr. FISHER. Senator, in my judgment, this law, if enacted and accepted by the power people, as it will be, in good faith and administered, as it will be, in good faith, will be of incalculable financial advantage to them, and will permit development and investment. You may depend upon it if these things are really in the public interest and are not inserted in the law there is going to be public dissatisfaction and unrest until they are put in. If you pass a law that does not adequately protect the public interest you can depend upon it that every means will be used by the representatives of the public in one way or another to repair that mistake.

The assurance of stability in these enterprises, on a fair basis, is of far more importance to the investor than any of these reservations in this bill. I have had power people tell me that again and again. They say that is the one thing they want. If they will turn their attention to such things, if they will cease to oppose those things which are in the public interest, and direct the attention of the public to such things as the importance of obsolescence, how these investments are required to be replaced, and the uncertainty of the market, and matters of that kind, all of which affect the question of compensation

to be exacted, all of which affect the question of how far the rates should be lowered by regulation, I think they will protect their own interests far better than they will by raising questions about matters which, on correct theory, ought to be in the grant.

To-day the public is thinking about whether there is a power trust, whether we are in danger of having these great natural resources absorbed by a few people for their own benefit; whether they are going to wake up 30 or 40 or 50 years from now and find that a great mistake has been made by your failure to reserve some of these things.

As soon as these things are settled and settled right, and the power people begin to talk about how much return they ought to be allowed to make, how much they should be allowed to set aside for depreciation, including obsolescence, and what is necessary in the way of a return on their property, I think that you will find their real interest will be promoted.

It is in this case just like it was in the case of the railroad commission a few years ago. Who would have thought that the Interstate Commerce Commission could be induced to acquiesce in a horizontal increase asked not by one railroad but by all railroads, practically, all coming in and saying, "We want a horizontal increase of 5 per cent in our rates?" Yet when we get through some of these things about which the railroads quarreled, the same sort of things you have here, in the beginning of the Interstate Commerce Commission—you have just the same things here that they had to contend with—but after you get through with all of it and the jurisdiction and policy of the Interstate Commerce Commission was established, you began to see the railroad men rising and saying, "On the whole we think we are better off under this Interstate Commerce Commission than otherwise."

The CHAIRMAN. We will have to close. We thank you, Mr. Fisher.

Mr. MITCHELL. I think Mr. Fisher has touched upon one of the most important things in this whole discussion, and that is if we can not get the money all of the things we are talking about are of no avail. The most important thing is to get the money; the next is that it shall be cheap and available when wanted. It is my business to get money for people to develop power, not only new ones but to get money to provide for the growth of the old ones. And to get money, I say to you, I have found very many times that stability is of very much more importance than the yield. It seems to me Mr. Fisher has touched the vital spot when he suggests that we write stability into the law, when it is passed, in terms under which the people will feel that the Government has some solicitude not as to how much you will get on the par value of the securities, but on the cash that goes into the property. With this cloak of governmental solicitude thrown around it you will give the people confidence in it, and then you can get the money easier and at a much lower rate.

I was going to ask Secretary Fisher if that had not been his observation in Chicago, where the city in effect put the cloak of governmental solicitude and protection around the cash invested in consolidating and modernizing the street railway system? Has it not given confidence in the securities, and has it not been effective?

Mr. FISHER. It undoubtedly has, Mr. Mitchell. The law under which we acted in Illinois is, of course, if anything, much more drastic than this law; and the statute, when it is passed, must, to

anybody who is sitting down looking with apprehension, have in it things which will seem to the investor questionable, because every time you reserve the right to do something in the way of restraint on private freedom of action it is a restraint, but the important thing is how the act is administered. Our Illinois statute is broad enough and has enough bristles sticking out to apparently frighten the investor, but when the statute was administered we put into our street railway ordinances I think all of the provisions you have here. Certainly the compensation was sufficient to pay the city of Chicago something in excess of $2,000,000 a year, and there are all sorts of regulations, but the securities of those companies have been stable as they never were stable before in their entire history, and their dividends are, I think, about 9 or 10 per cent.

Mr. MITCHELL. In Chicago you started out by making an appraisal, and then you started off with that as a basis plus the book record on new money?

Mr. FISHER. Yes, sir.

Mr. MITCHELL. Consequently you made a new start?

Mr. FISHER. Yes.

Mr. MITCHELL. The law ought to be so designed, in the first place, that the investor would be perfectly safe in knowing that nobody is going to confiscate the investment at the time of taking it over.

Mr. FISHER. Is not that taken care of in this statute?

Mr. MITCHELL. I do not know that it is. The point I want to bring out is that you ought to have it so clear that there can be no question about it. You ought to throw every possible safeguard around it, so that the investor will be certain to get back his principal unimpaired by obsolescence and other charges against the property which can not within the time be amortized.

Mr. FISHER. I think so.

Mr. MITCHELL. Because in this bill you say you will take it over at a fair value, as to one part, and the other at its actual cost. There is a good deal of question as to whether, if he were not able to amortize the investment and obsolescence the last four or five years he might not get his money back.

Mr. FISHER. It seems to me that is possible.

Mr. MITCHELL. I wanted to know what you did in Chicago, to know what the fact was. I wanted to check my views about it by getting your views as to how important it is to investors to know that they will get their principal back at the end of the term.

Mr. FISHER. I think that is of first importance. In Chicago we have it absolutely stipulated that the city of Chicago, at the end of six months, should have the right to take over the property. When that was first suggested the street railway men threw up their hands and said it was impossible to do anything; but in the end they had no difficulty in raising somewhere between $50,000,000 and $70,000,000, and the company pays 5 per cent interest on its bonds, and they have been usually a little above par, and the stocks have paid good dividends based upon any proper theory of investment.

Senator NORRIS. On the question directed to you by Mr. Mitchell, and your answer to him as to the practice in the city of Chicago, did it develop that when the street car companies paid the city of Chicago $2,000,000 that they increased their fares and the charges to the consumer?

Mr. FISHER. They certainly did not. On the contrary they have extended the zone in which they give universal transfers.

Senator NORRIS. So as a matter of fact the license fee they paid made no difference to the consumer?

Mr. FISHER. No; it did not. But it is fair to say that these ordinances were based upon a fixed 5-cent fare.

Senator NORRIS. They charged a 5-cent fare before you had the ordinance?

Mr. FISHER. We felt that the 5-cent fare was the better plan, but we did extend the application of the universal transfer.

Mr. MITCHELL. In case they take it over at any time the purchaser should assume the outstanding bonds?

Mr. FISHER. Yes; and so it ought to be here.

Mr. MITCHELL. There is nothing of that sort in this bill.

Mr. FISHER. If the issuance of the securities is made subject to the approval of the Secretary or subject to this board, if one is created, of course they would have to be taken over subject to the bonds.

Mr. MITCHELL. Of course the clearer the security of the investment is made the cheaper you can get your money.

(At 12.30 o'clock p. m. the committee took a recess to 2 o'clock p. m.)

AFTER RECESS.

The committee reconvened pursuant to the taking of recess.

The CHAIRMAN. All right, Mr. Wells; we will hear you now.

STATEMENT OF MR. PHILIP P. WELLS, OF WASHINGTON, D. C.

Mr. WELLS. Mr. Chairman, I may properly begin with a brief statement of my experience and viewpoint. I have been exceedingly interested in this question for the past eight years, and have given a very large part of my time to it. Most of that time has been given as an administrative officer in the Government service, both in the Forest Service and in the office of the Secretary of the Interior, and I am therefore one of those minor officials, or I was during that time, against whom criticism has perhaps been hinted at in this committee.

I am very anxious that the long period of doubt about water-power development should be ended and that this bill should pass. I am now engaged in the practice of law in the city here, giving special attention to irrigation and water-power matters.

The essential principle that underlies this bill is one that I have been contending for, to the extent of my ability, for all these years, and that is that this should be a matter of bargain between private interests and the public, and not a gratuity from the public to private interests. That was expressed in a certain outline of water-power policy which I prepared, as counsel for the National Conservation Association, in the interval between my two public employments that I have mentioned and which you will find in the record of the House hearings as Exhibit K at page 629.

I only refer to it here as showing the things we were then contending for, which, in our judgment, this bill now embodies, to wit, the principle of a bargain between private interests and the public. The private interests can not, for one reason or another, develop and carry