APPALACHIAN FOREST BILL DEAD

RECEIVES ITS KNOCK-OUT IN THE HOUSE JUDICIARY COMMITTEE—COMPLEXION OF HOUSE OF REPRESENTATIVES MUST CHANGE BEFORE IT HAS ANY CHANCE—THE FULL REPORT OF THE COMMITTEE.

Washington, April 20.—The Appalachian and White Mountain National Forests bill is dead, for this session, at least.

It received its knock-out blow on Friday when the House Judiciary Committee, to which the question of its constitutionality was referred, reported that the appropriation contemplated was unconstitutional, and the bill will not be considered at this session at all. Whether or not it will be brought up at the next Congress depends a great deal upon the outcome of the Congressional elections, but little hope is entertained for it now in a Republican House.

Judge Jenkins, Chairman of the Committee, in reporting on the bill, took a shot at some of the states to be benefited, saying they were wonderfully quiet on the question of states' rights, and Federal trespass, when it was to their interest to be so.

The report of the committee which is in the nature of a legal opinion setting forth why the bill is unconstitutional, is as follows:

Report of Judiciary Committee.

No money can be constitutionally appropriated from the Federal treasury except for the accomplishment of a Federal purpose, the proper discharge or exercise of a Federal function. It has long been settled that the Federal government is a government of granted, enumerated powers, under which only such undefined powers can be exercised as are "appropriate and plainly adapted" to the effective practical exercise of the granted, enumerated powers. (Kansas vs. Colorado, 206 U. S., 88.)

When a project is suggested as the subject-matter of a Federal appropriation, the only question to be determined is, does the project come fairly within the scope of these granted enumerated powers or the undefined powers "appropriate and plainly adapted to" their effective practical exercise? If it does not, then the Federal government has no constitutional power to appropriate the public money to accomplish such a purpose. The mere size of a project, the fact that it involves immense values, affects millions of people, is distributed throughout the whole geographical area of the United States, leading the unintelligent and uninformed for those reasons to describe it as national, does not even remotely tend to establish the fact that it is included within any granted enumerated power or an undefined power "appropriate and plainly adapted to" its effective and practical exercise.

Bigness no doubt appeals to the imagination and engenders a desire for Federal control, but this consideration has no place in determining a result which depends upon the exercise of the determining faculties. The fact that the project is large or small, unimportant or important, does not reach the threshhold of the discussion in determining whether it is included in a granted power. Nor is it a question as to whether certain powers could be more advantageously and effectively exercised by the Federal government, and therefore ought to have been granted. It is not a question as to what ought or might have been granted; the only question is what is the power that was granted. It is claimed and it is true that the preservation of the forests by the application of scientific methods of conservation is essential to the maintenance of an adequate supply of timber, lumber, and fuel, etc., and means the preservation of natural resources of almost incalculable value. It is also claimed, and we think correctly, that the preservation of the forests is of very great importance in the development, maintenance and conservation of water powers along the streams that have their rise in the watersheds covered by the forests. Our attention has not been called to, and we have not been able to find, any power granted to the Federal government to which either directly or by reasonable implication or necessary inference either of these purposes may with any propriety be referred.

Can the Government Acquire the Property?

Moreover, it seems clear that the government can only constitutionally acquire property for a constitutional Federal purpose, which clearly constitutes a public use, and therefore what it can constitutionally acquire by purchase it also has the right to acquire by the exercise of eminent domain. Certainly eminent domain cannot be exercised except for a public use. Measured by this standard the purpose disclosed in the bills referred to in the resolution (H. R. 10456, H. R. 10457—they are identical in terms) is clearly not a Federal purpose and does not justify any appropriation. The purpose upon which they are predicated is, section 1, "To acquire *for national forest purposes*" and in section 3, "Shall have consented to the acquisition of such land by the United States *for national forest purposes.*" We are unable to find, and our attention has not been called to any grant of power in the Federal government which includes even indirectly these purposes. (206 U. S., 46.) It is, however, claimed that although these bills do not proceed upon that hypothesis, that the appropriation can be justified on the ground of the relation of the forests on the watershed, to the navigability of the streams that have their sources in such watersheds.

It is said that the deforesting of the watersheds precipitates into the streams soil and silt that is carried downstream until it accumulates in such quantities as to substantially obstruct navigation, and make it necessary to remove such obstruction in order to preserve their navigability; and that the watershed when properly covered with forest retains the rainfall, so that it is gradually distributed throughout the year, and thus increases the flow in navigable portions of the river, so as to preserve their navigability when otherwise they would be unnavigable during the dry portions of the year, and that for the purpose of thus protecting and preserving the navigability of the navigable portions of the river, Congress can make these appropriations for the acquisition and control of the forests on the watersheds. The control of the navigable waters of the United States has been recognized as within the Federal jurisdiction and subject to all necessary appropriate legislation in a long line of decisions, from (not to go farther back) Gilman vs. Philadelphia (3 Wall., 724), in which the 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 rivers 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 these open and free from any obstruction to their navigation interposed by the states, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they deem proper, against the occurrence of the evil and for the punishment of the offenders—

to Kansas vs. Colorado (*supra*), where the court denied the petition of the United States to intervene to protect its alleged interests in the irrigation of arid lands, holding that the United States had no constitutional power to provide for the irrigation of lands other than its own, the court expressly stating that such denial was—

> without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. (117.)

Government and the Rivers.

The power of the Federal government to remove obstructions from navigable rivers, either by dredging, removal of rocks and ledges, and compelling necessary changes in the construction of bridges, is repeatedly exercised and universally conceded. That the exercise of this power is not confined to the portion of the stream that is within the navigable limits, but extends to obstructions in existence or contemplated, above the point of navigability, is settled by the case of United States vs. Rio Grande Irrigation Company. (174 U. S., 690.) This was a case where the United States, by the Attorney-General, filed a bill in equity to restrain the defendants from constructing a dam across the Rio Grande River in the Territory of New Mexico, and it was conceded that the Rio Grande River in the limits of New Mexico was not navigable.

The court below denied the prayer and dismissed the bill and this decision was reversed and the case sent back, with instructions to the court below:

> to order an inquiry into the question as to whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability and if so, to issue a decree restraining these acts to the extent that they will so diminish.

In the course of the opinion by Mr. Justice Brewer, which was unanimous, the court, after referring to the fact that the city of New York had appropriated the waters of the Croton River, a non-navigable river and a tributary of the Hudson River, and stating that it could do so without question "unless thereby the navigability of the Hudson should be disturbed," used as a significant illustration of the power of Congress the following language: "On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of water which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned." (709.)

In United States vs. Lynah (188 U. S., 445), it appeared that the United States for the purpose of improving the navigability of the Savannah River, constructed certain dams, locking walls and other obstructions, which it was claimed flooded the lands belonging to Lynah so "as to substantially destroy their value." The question in the case was whether "the government in the exercise of its powers of eminent domain and regulation of commerce" had taken the property of the plaintiff below and should make compensation therefor. It is obvious that if the Congress had no constitutional power to improve the navigability of the river by holding back its flow by the dam, its acts would have been tortious and not the legal basis for the exercise of the right of eminent domain. The case was elaborately argued and there was a vigorous dissenting opinion by some of the ablest members of the court, the majority holding, however, "that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefor." There is no intimation in either the arguments or the opinions that there was any question as to the right of the government to erect and maintain the dam for the purposes indicated and the case must have proceeded upon the theory that exercise of such a right was a constitutional exercise of power. Indeed, the minority opinion in substance declares that the damage was "caused by the lawful exercise of the United States of its power to improve navigation," but insists that it was "damnum absque injuriae."

Rivers and Property of Private Individuals.

We may therefore consider it settled that the United States may constitutionally expend money in damming the waters of a river to improve its navigability. As the government has the right to take the land of a private individual at one point in a river for the purpose of the right of eminent domain, for the purpose of improving its navigability, it is difficult to see why it cannot acquire the land of other individuals, at any other point on the river from its source to its mouth, by purchase or eminent domain (involuntary sale by the owner), for the same purpose and accomplish the same result, notwithstanding the fact that it is held that the construction of a dam may be restrained, if it impairs the navigability of the river, though it may be located above the navigable point in a non-navigable part of the river. The particular means used cannot determine the constitutionality of the exercise of the power. If the means are appropriate the result accomplished is the test. If an artificial reservoir may be created and maintained at one point, no reason is perceived why a natural reservoir may not be restored and maintained at another point, if the purpose and result be the same. The government has undoubted power to remove obstructions from the navigable part of the river, to prevent obstructions from being placed therein or over the same, to prevent obstructions in the non-navigable portions that impair its navigability. It would seem to follow that if reforesting the watershed at its source was an appropriate means to "plainly adapted to that end" of preventing the depositing in the river of accumulations that would obstruct its navigable portion, that Congress would have the right to acquire and control them for that purpose.

The foresting of the watershed at the source of a river and the prevention of the accumulation of obstruction within its navigable limits, or the improvement of its navigability by increasing the flow of the water therein during the dry season must, in our judgment, be something more than theoretical, technical, fanciful, or negligible. It must be physical, tangible, actual, and substantial, demonstrable by satisfactory competent testimony, in order to justify an appropriation for that purpose. The protection or the improvement of the navigability of the river must also be the real, effective, sole, and not the incidental, purpose of the appropriation. It would not justify an appropriation when the real purpose is the conservation of the supply of the raw material for forestry products, or the development of water powers and the protection or improvement of the navigability of the river is only theoretical or incidental thereto. The improvement or conservation of the navigability of the river must be the only purpose for which the appropriation is made. In such case the fact, if it be a fact, that other useful purposes are also served, does not militate against the exercise of the power to accomplish the real purpose of the appropriation, as a matter of law. As a matter of law, such purposes cannot be a part of the purpose, although as a matter of fact they may be among the necessary incidentals of the result. In this connection what constitutes navigability should be stated. This is well settled.

In The Daniel Ball (10 Wall., 463) the court said:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in their ordinary condition for highways or commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water, and they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction of the navigable waters of the state, when they form in their ordinary conditions by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. . . .

And—

> It would be a narrow rule to hold that in this country unless a river was capable of being navigated by steam or sail vessels it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway—

the court said in *The Montello* (20 Wall., 441). These cases have been cited and approved in numerous cases which are collected in notes to United States Reports, vol. 7, p. 366, and vol. 8, p. 328. Whether the deforesting of the land described in the bill has any physical and tangible connection with the navigability of the rivers which have their sources in the respective watersheds, was a subject of controversy before our committee, and upon that question of fact we express no opinion, but upon the hypothe is above set forth we are of the opinion that for that specific purpose, and that purpose only, an appropriation can lawfully be made, and that the legislation therefor must in terms be confined to that purpose. It also follows that no land can lawfully be acquired in excess of what is necessary for the carrying out of that purpose, and the bills before us are not properly limited as to the amount that can be lawfully acquired for the one constitutional purpose for which the appropriation can be made.

Still Working on the Corpse.

Washington, April 23.—At this writing friends of the measure are trying to revive the corpse of the Southern Appalachian forest reserve bill, but already three reports on the constitutionality of the proposition have been prepared by as many different members of the House Committee on Judiciary. Chairman Jenkins has prepared a report holding the the Lever-Currier bill is unconstitutional. Representative Littlefield, of Maine, who was relied upon as one of the friends of the measure, has written a second report, in which the same conclusion is reached as by Jenkins, though via a different route. A third report has been prepared by Representative Brantley, of Georgia, in which the bill is held to be constitutional.

The committee has heard all three reports read. There is yet another to be heard and discussed. It will emanate from Representative Parker, of New Jersey, and will hold the bill is constitutional.

The committee has not yet passed officially upon the questions at issue. It is doubtful whether it will do so this week, owing to the absence of Representative Tirrell, of Massachusetts, a friend of the bill, who has been pressing it for consideration in the committee.

Chairman Jenkins says a majority of the committee will agree with him that the forest reserve bill is unconstitutional, and that only three members of the committee disagree with him. They are understood to be, according to Jenkins' view, Representatives Tirrell, Brantley and, either Clayton, of Alabama, or Webb, of North Carolina.

On the other hand, the friends of the bill claim a much larger number of votes for the Brantley report. They practically concede a majority of one or two in the committee against the bill in its present form, however. But they claim that a majority of the committee will regard the bill as constitutional if it is changed so as to specifically provide that the forest lands which it is proposed to purchase shall be necessary for the preservation of the navigability of navigable streams. Accordingly, the friends of the bill are bending every effort toward securing a semi-favorable report on the propositions before the committee, in which the committee may suggest the amendments it regards as necessary to make the measures constitutional.

The character of these amendments is indicated by several proposed amendments submitted in the Senate the other day by Senator Brandegee, of Connecticut, chairman of the Committee on Forest Reservations and the Protection of Game. Some time ago Brandegee favorably reported his bill for forest reserves in the Appalachian and White mountains. The amendments proposed by him this week provide specifically that the preservation of navigation shall be a prerequisite to the purchase of any forest lands, as contemplated in the Lever-Currier and Brandegee bills.