

1981

J.J.N.P Company v. State of Utah By And Through The Division of Wildlife Resources : Appellant's Brief

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

J. J. N. P. COMPANY, :
 :
Plaintiff- : Supreme Court
Appellant, : No. 17183
 :
vs. :
 :
STATE OF UTAH by and :
through the Division of :
Wildlife Resources, :
 :
Defendant- :
Respondent. :

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court,
Salt Lake County, Honorable David B. Dee, Judge

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 Title 23-15-10, U.C.A., 1953 as amended.
 Title 23-20-14, U.C.A., 1953 as amended.
 Title 65-1-14, U.C.A., 1953 as amended.
 Title 73-1-1, U.C.A., 1953 as amended.

Rule 15, Utah Rules of Civil Procedure

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Baker v. Matheson, (1979, Utah) 607 P.2d 233

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J. J. N. P. COMPANY,

Plaintiff-
Appellant,

Supreme Court
No. 17183

vs.

STATE OF UTAH by and
through the Division of
Wildlife Resources,

Defendant-
Respondent.

APPELLANT'S BRIEF

NATURE OF THE CASE

This action was brought by the plaintiff to test the constitutionality of a section of the Aquatic Wildlife Act of Utah, 23-15-10, Utah Code Annotated 1953 as amended by the session laws of 1971. The defendant counterclaimed and sought to have the court determine whether or not all waters within the State of Utah are subject to an easement for recreational purposes.

DISPOSITION IN LOWER COURT

The lower court rules that §23-15-10, Utah Code Annotated 1953 as amended by the session laws of 1971 was constitutional and that further a certain road was a public

road.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the judgment and the entry of a judgment in favor of plaintiff and against the defendant.

STATEMENT OF FACTS

Plaintiff is a Utah limited partnership which owns a large tract of real property utilized for a cattle ranching operation in Duchesne County, Utah in an area commonly known as Lake Canyon. (R-299)

Situated in Lake Canyon is a natural lake known as Lake Canyon Lake.

Lake Canyon Lake is approximately 700 yards long and approximately 180 yards wide and is at an elevation of 6,698 feet above sea level and approximately 20 feet deep at its greatest depth. (R-51) The lake is fed by natural springs in the bed of the lake and by a small stream which has its head waters approximately six miles above the lake on a quarter section of land owned by the State of Utah. The stream after flowing out of the state lands enters the plaintiff's property and flows into the lake. The lake has an intermittent stream which flows out of the lake during high water in the spring of the year and flows for approximately 200 or 300 yards where it then disappears into the ground. The stream which flows into the lake is approximately

2 or 3 inches deep and approximately 24 to 36 inches in width during its full course from where it originates from springs on the state land until it enters Lake Canyon Lake. The water flowing from this spring comprises approximately 25% of the water flowing into the lake.(R-311) The rest being from springs either under or along the lake itself. The stream leaving the lake is again of the approximate same size.

The plaintiff owns all of the land surrounding the lake and for several miles below the lake and approximately 6 or 7 miles upwards from the lake.

The plaintiff claims that it has appropriated all waters within the lake either through diligence claims arising prior to 1903,(R-341) through its predecessors in interest or through filing with the State Engineer's Office.(Ex. 14)

A class B county road runs from the Strawberry River up Lake Canyon and past the lake and into Indian Reservation and U.S. forest lands at the canyon's head.

Plaintiff contended that the road was a private road and that it had, in the past, placed a gate across the road and locked the same.(R-320) Upon demand of Duchesne County the plaintiff removed the lock that left the gates in tact.
(R-324)

The plaintiff's predecessor in interest to the land surrounding Lake Canyon Lake had entered into a contract with the State Division of Wildlife Resources in May of 1973 whereby the State agreed to stock the lake with fish and the public was allowed to fish on the lake for a period of five years

during the winter season by means of "ice fishing". (R-42, 43, 322) The state normally had its fishing season fixed for Lake Canyon Lake during the months of January and February. This contract ran for five years and expired in May of 1978. (R-321)

After the plaintiff acquired the lands surrounding Lake Canyon Lake and the expiration of the agreement with the Utah State Division of Wildlife Resources, the plaintiff declined to enter into a new agreement with the state and applied for the certificate of registration from the Division of Wildlife Resources to create a private fish installation on Lake Canyon Lake. (R-329-332)

The State Division of Wildlife Resources rejected the plaintiffs application based upon its regulations that it had drafted pursuant to the Utah Administrative Procedures Act and pursuant to 23-15-10, Utah Code Annotated 1953 as amended by the session laws of 1971 wherein it provides, inter alia:

"...and no such installation shall be developed on natural lakes or natural flowing streams, or reservoirs constructed on natural stream channels."

The plaintiff had posted its property to prohibit fishing on Lake Canyon Lake pursuant to 23-20-14, since it acquired the lands in question. (R-320)

The plaintiff then commenced an action to determine the constitutionality of 23-15-10, and the state counterclaimed claiming that all waters within the State of Utah are subject to an easement for recreational purposes.

At the time of trial there was one other natural lake on Lake Canyon Lake located in what is known as the Rabbit Gulch Quadrangle (R-301) which lake was in fact a private fish hatchery. This lake is commonly known as "Lower Lake" and is approximately 3 miles down canyon from Lake Canyon Lake. The justification given by the state witnesses for allowing Lower Lake to be utilized as a private fish hatchery was that it had become one prior to the adoption of the Aquatic Wildlife Act in 1971. The state's witnesses further testified that improvements and enlargement of the facility had been permitted from time to time. (R-421-423)

Mr. Don Andriano, Chief of the Fishery Section of the Division of Wildlife Resources testified that he had personally drafted 23-15-10 which was adopted by the State Legislature in 1971 and that the purpose and reasoning behind the drafting and adoption of 23-15-10 was that public water should be used for public enjoyment and that land ownership, per se, should not be the governing factor whether or not public waters should be used by the public or access to them should not be denied. That due to the perceived increase in population of the state it was required that the natural waters be preserved for the public. (R-423)

The witness further testified that the problem of trash fish getting into the natural water courses and other waters of the state were not considered in the drafting of 23-15-10. (R-430) The witness further testified that he was

well aware that many lakes in the state were totally surrounded by private lands at the time that he drafted 23-15-10.

The court heard testimony that the lake was susceptible to fishing and that small boats could be launched in it, however, there was no provision or launching ramp for doing so.

The matter having been submitted to the court for its determination the court made its memorandum decision on June 2, 1980 (R 164-165) wherein the court found that Lake Canyon Lake is a natural lake and that it has been used by the general public for recreation for a long time and is completely surrounded by property owned by the plaintiff. The court then found that §23-15-10 was not unconstitutional and that the denial of plaintiffs application was a lawful denial by the State Division of Wildlife Resources. The court furthermore went on and held that the road beginning at the mouth of Lake Canyon and acceding up the canyon to the national forest boundary was private road.

The court in its findings of fact and conclusions of law went further than the actual decree and held that all waters in the State of Utah in natural water courses are public waters subject to public uses as the waters are reasonably susceptible including fishing and other recreational uses provided, however, that such public rights are exercised without impairing existing water rights and without trespassing on adjoining private property. (R 180)

The court went on and held that waters in the State of Utah are subject to a public servitude for fishing and other recreational purposes. (R 181)

From the court's judgment plaintiff filed its appeal on the 8th day of July 1980.

ARGUMENT

POINT I

23-15-10, U.C.A. 1953 AS AMENDED, IS UNCONSTITUTIONAL AS IT VIOLATES THE PLAINTIFF'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

Section 23-15-10, U.C.A. 1953 as amended by the session laws of 1971 provides:

"23-15-10. Private fish installation. -- It is unlawful for any person to develop or operate private fish installation without first securing a certificate of registration from the Division of Wildlife Resources and payment of fees as specified by the Wildlife Board. This private fish installation must be operated upon the rules and regulations specified by the Wildlife Board, and no such installation shall be developed on natural lakes or natural flowing streams, or reservoirs constructed on natural stream channels."

Plaintiff contends that this particular provision of the statute is unconstitutional in that the provision that "no such installation shall be developed on natural lakes or natural flowing streams, or reservoirs constructed on natural stream channels.", is violative of the equal protection clauses of the Utah and United States Constitution (14th Amendment) in that it creates an invidious discrimination between persons owning real property and operating a private fish installation on streams or lakes not located on natural lakes or natural flowing streams and those who would attempt to construct private installations on natural lake and natural flowing streams.

In the case of Cannon vs. Oviatt (1974, Utah) 520 P 2d 883, the Supreme Court observed:

"Furthermore, the equal protection clause does not compel the state to attack every aspect of a problem or to refrain from any action at all; it is sufficient that the state action be rationally based and free from invidious discrimination."

Surprisingly, this section of Utah law was not adopted for the protection of aquatic wildlife within the state. The sole reason for its adoption was to provide the public with places to fish.

At the same time that the legislature was adopting §23-15-10 under the guise that it needed to provide the public with places to fish it also passed §23-20-14 which denied the public the right of access to these same waters that it was claiming necessary to preserve for the public in 23-15-10.

23-20-14, U.C.A. 1953 as amended by the session laws of 1971 prohibits anyone from entering onto lands posted by the property owner as not open for hunting or fishing. Further the legislature made it a class B misdemeanor to enter onto such posted lands. Subsection (2) of 23-20-14 reads:

"(2) Property shall be deemed posted properly when 'No Trespassing' signs are displayed at approximately 1/4 mile intervals along the exterior boundaries and at all corners and at all fishing streams that cross property lines and along all roads and trails, and rights-of-way entering such land."

Under subsection (5) of 23-20-14 it is provided:

"The restriction pertaining to trespassing shall be made a part of all hunting and fishing proclamations issued by the Wildlife Board."

The legislature even went further in 23-10-15 and adopted a law which provides:

"It is unlawful for any person, without consent of the owner or person in charge of any privately owned land, to tear down, mutilate, or destroy any sign, sign board, or other notice which regulates trespassing for purposes of hunting, trapping or fishing on this land;"

Mr. Andriano at the time that he drafted 23-14-10 knew that many lakes in the State of Utah were totally surrounded by private property and in spite of this and in spite of the fact that trespassing across such private property was specifically outlawed under 23-20-14 still, he asserted that the sole reason for the adoption of '23-15-10 was to provide the public with the right to fish the natural lakes of this state.

It is easily seen that this is a paradox which results in the invidious discrimination which makes 23-15-10 unconstitutional.

The classification of not allowing a private fish hatchery on the natural lake but permitting one on a man-made lake creates a classification which rests on grounds wholly irrelevant to the achievement of the state's objectives, which was the allowing of the public the free access and right to fish waters in natural lakes.

The Supreme Court of the United States had an occasion to pass upon this question in the case of Lindsey vs. Normet, (1972) 405 U.S. 56, 31 L.Ed 2d 36, 92 S.Ct. 862 wherein the court stated:

"The statute potentially applied to all tenants, rich and poor, commercial and non-commercial; it cannot be faulted for overexcessiveness or underexcessiveness. And classifying tenants of real

property differently from other tenants for purposes of possessory actions will offend the equal protections safeguard 'only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.' " (Citing cases.)

The state has the burden of demonstrating that a statute which is attacked on the grounds of equal protection, is necessary to promote a compelling government interest and the statute will be closely scrutinized in light of its asserted purposes. Dunn vs Blumstein, (1972) 405 U.S. 330, 31 L.Ed. 2d 274, 92 S.Ct. 995.

In restating the general principles of law laid down with respect to equal protection cases, the Supreme Court of the United States in the case of Eisenstadt vs. Baird, (1972) 405 U.S. 438 31 L.Ed. 2d 349, 92 S.Ct. 1029 stated:

"The basic principles governing application of the equal protection laws of the Fourteenth Amendment are familiar. As the chief justice only recently explained in Reed vs. Reed, 404 U.S. 71, 78-76, 30 L.Ed. 2d 225, 229, 92 S.Ct. 251 (1971): 'In applying that clause this court has consistently recognized that the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways.'" (Citing authority)

"The equal protection clause of that amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute in different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference, have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (Citing cases.)

The question that now must be determined by this court is whether there is some grounds of difference that rationally

explains the different treatment accorded those who desire to operate a private fish installation to be constructed on a natural water course as opposed to those who wish to construct a private fish installation on a man-made or non-natural water course.

As stated before, the legitimate State purpose of 23-15-10 was to allow the public access to the fishing waters of this state. However, this stated purpose is obviated by 23-20-14 which allows a property owner or property owners who own the land around a natural lake to prohibit the public from crossing their land to get to the lake for fishing purposes. Obviously, the stated purpose fails. The classification adopted by the state was not true. Vance v. Bradley (1979) 440 U.S. 93, 59 L.Ed 2d 171, 99 S.Ct. 939, and therefore such classification is a violation of equal protections.

The state in an affidavit filed with the court on July 23, 1979 (R-42) alluded to the fact that fish could migrate up the stream onto lands owned by the State and also the fish could migrate down stream from the lake. This was totally refuted by not only the testimony of the plaintiff's general partner but also by the defendant's witnesses themselves who stated that the water was only 2 to 3 inches deep and no fish could migrate either up stream (R-355, stipulation) nor down stream. The assertion of the State that the fish could in fact migrate in the earlier affidavit was an attempt to show that the intended purpose for which the section under attack was drafted was for the protection of the fishing waters of the

state so that trash fish or other undesirable fish could not migrate into other bodies of water. However, as protection of the waters of the State of Utah was not the reason for the adoption of the section of law in question, therefore this will not be further addressed.

Plaintiff contends that the classification of fish hatcheries being permitted on private lakes but not on natural lakes is not based on any reasonable basis and is essentially arbitrary.

The Utah Supreme Court in the case of Justice vs. Standard Gilsonite Company (1961) 12 U 2d 357, 366 P 2d 974 observed:

"We recognize as correct the rules stated in 12 Am Jur 216 and 217 §521 as follows:

'One who assails the classifications in a law must carry the burden of showing that it does not rest on any reasonable basis, that is essentially arbitrary...'"

"...Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched..."
(Citing Utah cases.)

In the case of Abrahamsen vs. Board of Review, Industrial Commission, 3 U.2d 289, 283 P 2d 213, the Supreme Court ruled:

"The standard to be followed in the determination of this question was set by the case of State vs. Mason, 94 U. 501, 78 P.2d 920, 923, 117 ALR 330:

'A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation

between classes or subject matter included as compared to those excluded from its operations, provided the differentiation bares a reasonable relation to the purposes to be accomplished by the act...'

"In order to see whether the excluded classes or transactions are on a different basis than those included, we must look at the purpose of the act. The objects and purposes of a law present the touchstone for determining proper or improper classification...

"It is only where some persons or transaction excluded from the operation of the law or as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional."

The legislature gave jurisdiction of the Division of Wildlife Resources over both public and private lands and waters. 23-14-2, U.C.A. 1953 as amended.

Why is there is distinction drawn between natural and non-natural or man-made lakes? What is the rational or reasonable basis for this distinction? It is submitted that there is none.

As stated in Crowder vs. Salt Lake County (1976, Utah)

552 P.2d 646:

"The constitutional safeguard of equal protection is offended only if the classification rests upon a ground not relative to the state's objective." This case then cites McGowan vs. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed 2d 393.

The avowed reason for the state to adopt this particular section was to allow access to the public to natural

lakes which it then denied the public that access by §23-20-1. There is no valid reason for this classification and because there is none the statute must fall. State vs. Twitchell, 8 U.2d 314, 333 P.2d 1075, State vs. Cassas, 97 U. 492, 94 P.2d 414, Baker v. Matheson (1979, Utah) 607 P.2d 233.

Section 23-15-10 in actuality is affecting real property and not the water which may rest upon that real property.

Section 73-1-1, U.C.A. 1953 as amended states:

"All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."

Section 23-14-10 states that "no such installation shall be developed on natural lakes or natural flowing streams or reservoirs constructed on natural stream channels," but says nothing with respect to the waters. Consequently, what the state in actuality is doing is regulating the use of real property. There is no question but what the stream bed, or lake bed belongs to the abutting land owner, unless it can be shown that the lake or stream is a navigable body of water. Monroe, et. al. vs. State et. al. (1946) 111 U. 1, 175 P.2d 759.

Section 65-1-14 U.C.A. 1953 as amended specifically states:

"Nothing herein contained shall be construed as a legislative declaration of ownership by the land of beds of non-navigable lakes, bays thereof, of of beds of non-navigable rivers or streams."

The trial court found as a matter of law that the lake bed in question did in fact belong to the plaintiff and with this plaintiff does not quarrel. What the plaintiff does quarrel with is a distinction asserted by the state for land which may have located on it a natural body of water as opposed to a man-made body of water.

It is difficult to rationalize or see what difference there may be between water which is situated on a natural lake but has been appropriated for use by the filing of applications for appropriation and the granting of those applications to water which may be situated in a man-made channel or in a man-made pond or lake but which has not been appropriated by the filing of appropriate applications or the granting of the same.

Appellant does not dispute that the state does have the right to manage its wildlife resources, however, in managing those wildlife resources the state may not indulge in discrimination. Baldwin vs. Montana Fish and Game Commission (1978) 436 U.S. 371 56 L.Ed 2d 354, 98 S.Ct. 1852.

The state's argument for maintaining the constitutionality of 23-15-10 seems to be based upon a mixing of apples and oranges, or the use of real property as opposed to use of unappropriated public waters, although in the present case, the waters of Lake Canyon Lake have in fact been either appropriated by the plaintiff through his diligence rights or he has a paramount right to the use thereof by reason of his pending application for appropriation.

The use of water within the State of Utah is controlled basically, by the State Engineer and the attempt of the State Division of Wildlife Resources to inject itself into the management of the water resources of this state is contrary to law.

It is respectfully submitted that there being no reasonable or rational basis for the distinction between man-made and natural waterways the statute in question, 23-15-10, must be held unconstitutional as violative of the equal protection provisions of the Utah and United States Constitutions.

POINT II

THE STATE WRONGFULLY DENIED PLAINTIFF A PERMIT TO CREATE AND MAINTAIN A PRIVATE FISHERY INSTALLATION ON LAKE CANYON LAKE.

The state denied the plaintiff's application for authority to construct a private fish installation based upon its rules and regulations which it had adopted pursuant to the provisions of 23-15-10. Copies of those rules and regulations are found at Record 6 through 10. As the section of law under which these regulations were implemented is unconstitutional, the regulations themselves must fail and therefore the plaintiff is entitled to a Writ of Mandate to compel the state to issue to him a permit to construct and maintain a private fish installation on Lake Canyon Lake.

POINT III

THE COURT ERRED IN RULING THAT THE ROAD BEGINNING AT THE MOUTH OF LAKE CANYON AND EXTENDING UP THE CANYON TO THE NATIONAL FOREST BOUNDARY WAS A PUBLIC ROAD.

The plaintiff in his complaint did not raise the issue of whether or not the road running from the Strawberry River up

Lake Canyon Lake to the forest lands was a public or private road. Likewise in the counterclaim of the defendant this issue was not raised. (R 14-16)

Nowhere in any of the pleadings is there any question raised with respect to this road and its status, that is whether it is a public or private way.

No motion was made under Rule 15, Utah Rules of Civil Procedure, to try this issue nor to conform the pleadings to the proof adduced.

It is respectfully submitted that the court's determination as to the status of this road is totally without the scope of the pleadings and therefore should be reversed. National Farmers Union Property vs. Thompson, 4 U 2d 7, 283 Prd 249. The question of whether the road was a public way was an entirely new cause of action and therefore should not have been tried.

CONCLUSION

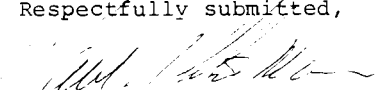
It is respectfully submitted that 23-15-10 of the Aquatic Wildlife Act of Utah, is unconstitutional and therefore should be struck down.

It is respectfully submitted that the court erred in ruling on a matter which was not properly before it, with respect to the status of the road running near the lake and that therefore the court's judgment should be reversed with respect thereto.

Matters raised in the findings of fact and conclusions of law with respect to whether or not there is a servitude of all of the waters of the State of Utah for an easement for public use for fishing and recreational purposes was not incorporated into the court's judgment and therefore plaintiff-appellant will not address these issues as they are not germane to the issues before the court based upon the court's judgment.

Further, questions with respect to the question of navigability of Lake Canyon Lake are also not addressed, the court not having entered a judgment and order with respect thereto, even though the court in its findings of fact and conclusions of law did address these matters.

Respectfully submitted,


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