1981

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

J. J. N. P. COMPANY, a Utah limited partnership,

Plaintiff-Appellant,

v.

STATE OF UTAH, by and through the DIVISION OF WILDLIFE RESOURCES,

Defendant-Respondent.

Case No. 17183

BRIEF OF RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, HONORABLE DAVID B. DEE, JUDGE

RICHARD L. DEWSNUP
Assistant Attorney General

DALLIN W. JENSEN
Assistant Attorney General

MICHAEL M. QUEALY
Assistant Attorney General

301 Empire Building
231 East Fourth South
Salt Lake City, UT 84111

ATTORNEYS FOR RESPONDENT

PAUL N. COTRO-MANES
430 Judge Building
Salt Lake City, UT 84111

ATTORNEY FOR APPELLANT

January 26, 1981

IN THE SUPREME COURT OF THE STATE OF UTAH

J. J. N. P. COMPANY, a Utah limited partnership, Plaintiff-Appellant, v. STATE OF UTAH, by and through the DIVISION OF WILDLIFE RESOURCES, Defendant-Respondent.	)	Case No. 17183

BRIEF OF RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, HONORABLE DAVID B. DEE, JUDGE

RICHARD L. DEWSNUP
Assistant Attorney General

DALLIN W. JENSEN
Assistant Attorney General

MICHAEL M. QUEALY
Assistant Attorney General

301 Empire Building
231 East Fourth South
Salt Lake City, UT 84111

ATTORNEYS FOR RESPONDENT

PAUL N. COTRO-MANES
430 Judge Building
Salt Lake City, UT 84111

ATTORNEY FOR APPELLANT

January 28, 1981

TABLE OF CONTENTS

TABLE OF AUTHORITIES

II. STATUTES CITED:

III. MISCELLANEOUS AUTHORITIES CITED:

IV. FIGURES

Richard L. Dewsnup
Dallin W. Jensen
Michael M. Quealy
Assistants Attorney General
Attorneys for Defendant-Respondent
State of Utah
301 Empire Building
231 East 400 South
Salt Lake City, UT 84111

IN THE SUPREME COURT OF THE STATE OF UTAH

J. J. N. P. COMPANY, a Utah limited partnership, Plaintiff-Appellant, v. STATE OF UTAH, by and through the DIVISION OF WILDLIFE RESOURCES, Defendant-Respondent.	RESPONDENT'S BRIEF Case No. 17183

NATURE OF THE CASE

The action was originally brought by Plaintiff-Appellant challenging the constitutionality of Section 23-15-10, Utah Code Annotated 1953, as amended, which prohibits the maintenance of private fish installations on any of the natural waters of the state. The State of Utah counterclaimed for a declaratory judgment to the effect that the statute in question was valid as an effort to protect public recreational rights in the natural waters of the state.

DISPOSITION IN THE LOWER COURT

The lower court ruled that Section 23-15-10, Utah Code

Annotated 1953, as amended, was fully constitutional and that the state's denial of Appellant's private fish installation permit was necessary and proper. The court also found that the road up to Lake Canyon was a public road.

RELIEF SOUGHT ON APPEAL

Respondent State of Utah seeks a complete affirmance of the lower court's judgment.

STATEMENT OF FACTS

Appellant is a limited partnership created under the laws of the State of Utah which owns a large tract of land in Duchesne County.

Lake Canyon Lake is a natural lake located in Duchesne County, approximately ten (10) miles up from the mouth of Lake Canyon. The lake is approximately 800 yards long and 200 yards wide, with a mean depth of 17 feet and a maximum depth of 33 feet (R. 40, 51, 106-107, 178).

The State of Utah has managed Lake Canyon Lake as a public fishery, and the general public has used the lake as a public fishery, for nearly half a century. The state's management program has included eradication measures to eliminate trash fish, stocking game fish (trout), setting seasons and creel limits, law enforcement inspection and control, and similar measures (R. 376-377, 391-392, 394, 178). The evidence does not reveal when the general public first began to use the lake for recreational purposes, but David Thomas, a lifelong resident of Duchesne County,

Figure 1. Ice Fishing—Lake Canyon Lake

Figure 2. Ice Fishing—Lake Canyon Lake

testified that he began fishing the lake in the early 1930's and that the general public has fished there since then (R. 375-376). The lake has attracted sportsmen not only from the Uinta Basin but from many parts of the state, including Carbon County and areas along the Wasatch Front, and these sportsmen have included organized groups, such as Boy Scouts (R. 392-393). Public fishing activities have included winter ice fishing (R. 392-393). The lake, because of its size and depth, is capable of sustaining various forms of water-based recreation other than fishing, such as boating and waterfowl hunting. The evidence was uncontroverted that the Division of Wildlife Resources used a 16-foot boat with a 25 horsepower engine to poison the lake for trash fish in 1973 (R. 377-378). There was even evidence that during the winter a small plane had actually landed on the frozen surface of the lake and later took off (R. 394-395). For the convenience of the Court, several pictures showing the lake, its surrounding area and ice fishing and stocking activities which are in evidence (R. 44-47) have been photocopied and appear in this brief as Figures 1 through 6 at pages 2a, 4a, and 6a.

The land surrounding Lake Canyon Lake is in private ownership and is now owned by Appellant (R. 302). From 1969 through 1978 an agreement existed between the State of Utah and the owner of the land surrounding the lake (Appellant's predecessor in interest), whereby, inter alia, the landowner allowed public access on and across lands adjacent to the lake in order to fish the lake, and the state confined the fishing season to the winter

months (ice fishing) so that fishermen would not disturb the landowner's summer grazing of livestock (Defendant's Exhibit 20, found at R. 42-43, R. 379-381, 400-401, 178).

Over the years appellant has acquired legal or equitable ownership of approximately 1,200 acres of land in or near Lake Canyon, and in 1978 acquired the land surrounding Lake Canyon Lake (R. 302). Shortly after such acquisition, Appellant filed an application with the Respondent Division of Wildlife Resources for a permit to operate a private fish installation on Lake Canyon Lake for the propagation of fish for the private control and use of Plaintiff. Such permit was denied by the Division pursuant to Section 23-15-10, Utah Code Annotated 1953, as amended, for the reason that Lake Canyon Lake was a natural lake, and the statute prohibits the maintenance of a private fish installation on any natural lake or stream.

The Appellant has filed three diligence water rights on Lake Canyon Lake for stockwatering purposes, but has no rights to actually divert water from the lake (R. 341-342). However, since the use of Lake Canyon Lake for recreational purposes would not require any diversion of water from the lake, such uses could not interfere with any existing water rights on, above or below the lake (R. 179).

There is a lower pond or lake in Lake Canyon, approximately seven miles below Lake Canyon Lake, which is also a natural lake (R. 301). Donald Andriano, Chief of Fisheries for the Division of Wildlife Resources, testified that a permit for a private

Figure 3. Game Warden Checking Fishing License—Lake Canyon Lake

Figure 4. Stocking Trout—Lake Canyon Lake

fish installation had been issued for this lower lake some time prior to 1971, when Section 23-15-10 was amended to provide for the first time that private fish installations could not be authorized on any natural watercourse, and that the permit has been renewed annually, even after the 1971 amendment. Mr. Andriano said that such annual renewals had been issued because the owner of the permit had made substantial and expensive installations prior to 1971, in reliance on continued private pond statutes for the lower lake. Mr. Andriano said that he did not know of any legal opinion as to whether the 1971 statute contemplated any "grandfather" rights for continuation of pre-1971 permits on natural watercourses, but said that until there was such a legal determination, such permits probably would be renewed by the Division as a matter of equity because of the pre-1971 expenditures. He said he did not know how many permits were in that category, but his estimate would be no more than half a dozen (R. 421-424).

Mr. Andriano also testified that the reason behind Section 23-15-10, Utah Code Annotated 1953, as amended, was to protect private individuals from converting public bodies of water to their own private use, even though public access to surrounding land could be denied (R. 423).

Finally, Appellant attempted to show that the public did not have access up the Lake Canyon Road because it was a private road. However, the evidence showed that Duchesne County has for more than ten years graded and maintained this road as a

public road for public use from the mouth of the canyon to the forest boundary above the lake. The road has been used as a public road by members of the public for nearly fifty years for various recreational and other purposes, including access to the National Forest (R. 356-359, 363-364, 395-396). There was no evidence of any interruption or interference with this public use other than the testimony of Mr. R. J. Pinder to the effect that he had tried to restrict access in 1978 by placing locks on a gate across the road, but that county officials or others promptly removed the locks in each instance within a period of not more than 24 hours and that after about two weeks of such futile efforts, he gave up trying to restrict access (R. 335-336, 395-396).

After a trial and arguments, the lower court issued its Memorandum Decision (R. 164-165) and Findings of Fact, Conclusions of Law and Decree (R. 177-184). The Court held that Section 23-15 was not unconstitutional, because it was a valid legislative attempt to protect public recreational rights in the natural waters of the state. The Court further held that the Division of Wildlife Resources had properly denied Appellant's application for a private fish installation permit (R. 180-181).

ARGUMENT

POINT I

SECTION 23-15-10 U.C.A. IS VALID AND PROPER AS AN ATTEMPT BY THE LEGISLATURE TO PROTECT PUBLIC RIGHTS IN THE WATERS OF THE STATE.

Figure 5. Stocking Trout—Lake Canyon Lake

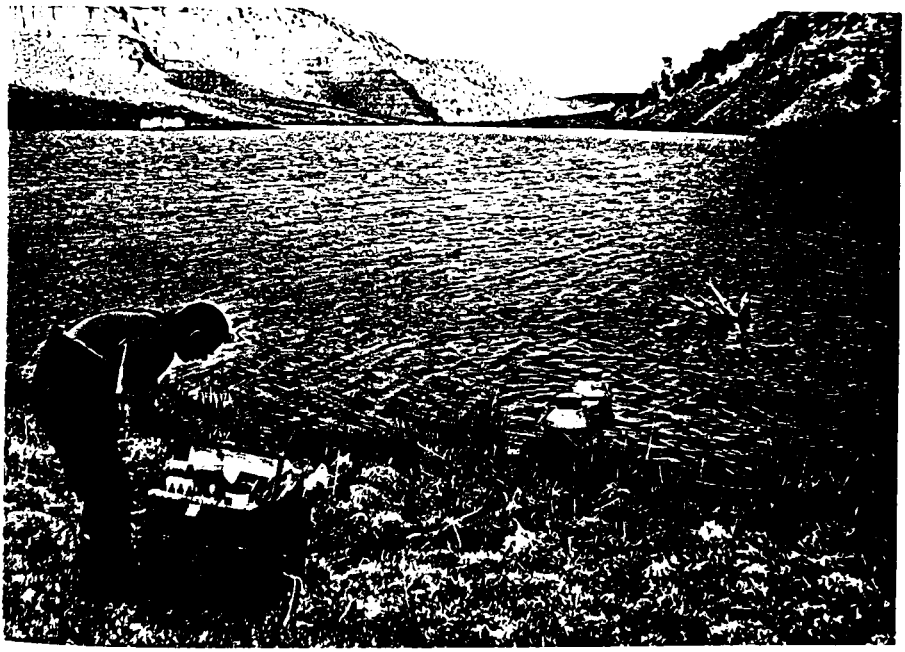

Figure 6. Lake Canyon Lake—Looking Northeast

A. Introduction

At this juncture, it would be helpful to briefly review the issues of the case. The basic relief sought by Appellant is for a declaratory judgment that Section 23-15-10, Utah Code Annotated 1953, as amended violates the Equal Protection Clause of the United States Constitution in that it prohibits the maintenance of private fish installations on natural lakes and streams while allowing such installations on off-stream, artificial impoundments. Appellant claims that the distinction set forth in the statute is arbitrary and unreasonable.

The statute was passed primarily to protect the rights of the public to use the natural waters of the state for recreational and other purposes (R. 423). Thus, the statute was passed to protect against the exact situation which Appellant seeks to bring about on Lake Canyon Lake.

While the courts of Utah have clearly recognized public rights in natural watercourses, they have not been called upon to define the dimensions of the rights of the public to utilize the natural waters of the state for recreational purposes. The Legislature has also recognized such public rights and has been more explicit than the courts, and the statute in question is simply one example of legislative protection of such public rights.

The public rights in the natural waters of the state exist regardless of who owns or controls the lands surrounding these waters. Therefore, issues as to whether the road up Lake Canyon is a public right-of-way, and whether Appellant controls the

access to Lake Canyon Lake, have no legal relevance to the publ... recreational servitude on the lake itself. Nevertheless, it will be seen that the road is a public road, but that Appellant does control access to the lake.

Appellant would have the Court believe that Section 23-15-1... unconstitutionally denies it the right to use Lake Canyon Lake as a private fish farm; a right it claims by virtue of its ownership of the surrounding real property. But to the contrary, Appellant in fact is seeking to convert a public lake into a private fish farm for its own use, and to extinguish the inherent rights of the public to use the natural waters of the state for recreational purposes. This is the exact result the challenged statute seeks to avoid and the very reason the statute was enacte...

The statute in question is clearly constitutional. The sta... holds all waters in trust for the people, and, while the water is in its natural state as a lake or stream, the public in common has a right to utilize the water in its natural state for recreational or other purposes. Such waters in their natural state are not subject to private ownership. The subject statute merely prohibits private ownership and use of natural watercourses to protect public rights that have existed since statehood—and before.

B. The Equal Protection Clause Does Not Prevent a State From Classifying Its Police Powers So Long as There Is a Rational Basis for Such Classification.

It is recognized that the Equal Protection Clause, which the Appellant claims Section 23-15-10 is violative of, does not prevent the state from classifying pursuant to its police powers

except where such classification is done without any rational basis or is purely arbitrary discrimination. Williams v. Lee Optical, 348 U.S. 483 (1955), and Leavy v. Louisiana, 391 U.S. 68 (1968).

Justice Wolfe, speaking for the Utah Supreme Court in State v. Mason, 78 P.2d 920, 923 (Utah, 1938), stated:

> The discrimination must be unreasonable or arbitrary. 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 matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.

See also Child v. City of Spanish Fork, 538 P.2d 184 (Utah, 1975).

The intent of the Legislature to protect the public's rights in the natural waters of the state provides a rational and proper basis for distinguishing between fish installations on natural versus artificial bodies of water. Moreover, it is fundamental that the Court will sustain the constitutionality of a statute whenever there is a rational basis for doing so. Williams v. Lee Optical, 348 U.S. 483 (1955); Barr v. Matteo, 355 U.S. 171 (1958); State v. Mason, 78 P.2d 920, 923 (Utah, 1938); Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964); and Child v. City of Spanish Fork, 538 P.2d 184 (Utah, 1975).

There certainly is a rational basis for sustaining the statute in this case, particularly where, as will be shown below, not one iota of Appellant's property rights are infringed in any way.

C. The Legislature Has Recognized the Public's Right to Use the Waters of the State for Recreational Purposes

The courts of this state have clearly recognized the public's rights in the waters of the state, but as yet have not been called upon to define the dimensions thereof. The Legislature has clearly recognized and provided protection for such public rights in several respects. The public's right to use the waters of the state in natural lakes and streams for recreational purposes is a fundamental part of the public trust in such waters. There may well be other public uses and interests in said waters.

The very statute which Appellant challenges as having no rational reason for distinguishing between natural waters and private off-channel impoundments was passed for the very purpose of protecting the public rights in the natural waters of the state which would be impaired or destroyed if private individuals were allowed to turn natural lakes or streams into private fish installations where they could raise and harvest their own fish.

The state's ownership of the waters of the state in trust for the people is unquestioned and is similar to the state's trust ownership of wildlife. In Adams v. Portage Irr. Co., 95 Utah 1, 72 P.2d 648 (1937), the Utah Supreme Court stated at pages 652-653:

> Waters in this state are of two classes, public waters and private waters. The latter class is not only subject to exclusive control and ownership, but may be used, sold, or wasted. It consists of such waters only as have been reduced to actual, physical possession of an individual by being taken into his vessels or storage receptacles. It is private property and may be the subject of larceny. Public waters, on the other hand, are not the

> subject of larceny. The title thereto is in the public; all are equal owners; that is, have co-equal rights therein, and one cannot obtain the exclusive control thereof. These waters are the gift of Providence; they belong to all as nature placed them or made them available. They are the waters flowing in natural channels or ponded in natural lakes and reservoirs. The title thereto is not subject to private acquisition and barter, even by the federal government or the state itself . . . no title to the corpus of the water itself has been or can be granted, while it is naturally flowing, any more than it can to the air or the wind or the sunshine. "Such water" said Blackstone, "is . . . like wild birds on the wing." (Emphasis added).

See also Deseret Livestock v. Sharp, 123 Utah 353, 259 P.2d 607 (1953).

Appellant asserts that since it owns the land surrounding and under the lake, it has the exclusive right to use the waters of the lake for its own private purposes. Such is not the law. To use an example, assume that a rancher owned a huge tract of land and there was a herd of deer which essentially stayed on that land all year round. Certainly the rancher could deny access to persons wishing to hunt the deer and therefore totally deny the public access to the deer; but just because he controls access would not allow him to kill all the deer himself, or convert them to his own private property. The same reasoning applies to Lake Canyon Lake.

The Legislature has expressly recognized and sought to protect the public's right to utilize the natural waters of the state for recreational purposes. The following are examples of instances where the Legislature, for one reason or another, has recognized and sought to protect public recreational rights in

the waters of the state. Section 73-3-8, Utah Code Annotated 1953, as amended, provides that the State Engineer, in approving new water applications, must consider the possible affect the application would have on public recreation:

> . . . where the state engineer . . . has reason to believe that an application to appropriate water will . . . unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it shall be his duty to withhold his approval or rejection of the application until he shall have investigated the matter. If an application does not meet the requirements of this Section, it shall be rejected.

Section 73-3-29, Utah Code Annotated 1953, as amended, provides that any person wishing to alter, change or relocate the channel of a natural stream must, under certain circumstances, obtain a permit from the State Engineer. Subsection 3 of that statute provides:

> (3) The state engineer shall, without undue delay, conduct investigations as may be reasonably necessary to determine whether the proposed relocation, alteration or change will impair vested water rights, or will unreasonably affect any recreational use or the natural stream environment, or will endanger aquatic wildlife. If the proposed relocation, alteration or change will not impair vested water rights or will not unreasonably or unnecessarily adversely affect any public recreational use or the natural stream environment, or endanger the aquatic wildlife, the application shall be approved. Otherwise, the application shall be rejected. Provided, however, the state engineer may approve the application, in whole or in part, or upon any reasonable terms and recommendation that will protect vested water rights and/or any public recreational use, the natural stream environment and the aquatic wildlife. (Emphasis added).

Section 73-14-1, Utah Code Annotated 1953, as amended, sets forth the public policy of the state relative to water pollution:

> Whereas the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas such pollution is contrary to the best interests of the state and its policy for the conservation of the water resources of the state, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational, and other legitimate beneficial uses. (Emphasis added).

The above-cited statutes clearly show that the Legislature has, in various contexts, recognized and protected public recreational rights in the natural waters of the state.

The very statute in question, Section 23-15-10, Utah Code Annotated 1953, as amended, was enacted to protect the same public rights that Appellant is now attempting to convert to its private use and ownership. Don Andriano, Chief of Fisheries for the Division of Wildlife Resources, testified that he personally drafted the statute prohibiting private fish installations on natural lakes and streams. He further testified that the primary reason the statute was drafted was that numerous people were seeking permits to place private fish installations on natural waters, and the Division felt the public's rights in those waters needed to be protected (R. 422-425). The Legislature obviously agreed, and the statute was passed. Since the public has inherent rights in the natural waters of the state, a statute providing protection for those rights is clearly a valid and constitutional exercise of legislative authority.

The evidence in this case also makes clear that public recreational use of Lake Canyon Lake is not merely conjectural or theoretical. Numerous witnesses testified that the public from many parts of the state have used the lake for fishing, boating and other recreational purposes ever since the 1930's (R. 375). Further, the Division of Wildlife Resources has for many years exercised its jurisdiction to manage Lake Canyon Lake as a trout fishery through stocking, eradication of trash fish, and issuance of citations when violations occurred (R. 44-47, 376-377, 391-392, 394). The evidence is clear that Lake Canyon Lake is truly a valuable recreational resource for the people of the State of Utah, regardless of the present lack of access.

Thus, the natural waters of the state are owned by the state and held in trust for the people, regardless of who owns the surrounding land. The public ownership of the waters of the state includes, among other things, the right to use those waters for recreational purposes, and the Legislature in this instance has merely recognized and provided protection for those recreational rights.

D. Public Recreational Rights in Natural Waters Have Long Been Recognized By the Courts.

While the Utah Legislature has recognized and sought to protect public recreational rights in the natural waters of the state, the courts of this state have not been called upon to directly recognize and define the dimensions of such rights. However, many other states, including most of the states in the west, have recognized and upheld such recreational rights on

two somewhat different theories. The older theory bases such public rights on a test of "recreational navigability" or the so-called "pleasure boat test." This theory is based on a broader test of navigability than the strict federal test of commercial navigability. This test would allow recreational uses of any waters capable of being floated by recreation craft such as canoes, etc.

The other test, and the one we feel is more in keeping with established Utah law on public waters, is the test adopted by the Wyoming Courts in Day v. Armstrong, 362 P.2d 137 (Wyo., 1961). Under this theory, the state owns all natural watercourses for whatever lawful uses the public wishes to make of the water, including recreation. Under this theory, navigability is totally irrelevant.

Turning to the older theory, it has been recognized that the public has rights in natural bodies of water for recreational use, even where such bodies of water are not deemed navigable under the well-known federal test of commercial navigability.

The federal test of "navigability-in-fact" for commercial use of waterways is totally irrelevant to any issue in this case. It is relevant only for two purposes. One such purpose is to determine ownership of the beds of watercourses, and the "federal question" arises under the Equal Footing Doctrine, which holds that each state owns title to the beds of all navigable waters within its borders as a matter of constitutional "equal footing" among the states. The other purpose of the federal test is to determine whether there is federal regulatory authority under

the Commerce Clause of the United States constitutes. See The Daniel Ball, 77 U.S. 557 (1871), United States v. Utah, 293 U.S. 64 (1931), and The Montello, 11 Wall. 411 (1870); on rehearing, 20 Wall. 430 (1874). Thus, the federal test of navigability is plainly inappropriate as a guide to aid in the disposition of this case.

However, it might be noted in passing that the federal test was formulated in an age in which waterborne commerce was the only economically important use of inland waters. With the passage of time, commerce by barge and steamboat became less and less important. At the same time, with the growth of society, water-based recreation greatly grew in popularity, and with it grew recognition of the strong state interest in protecting the rights of citizens to recreation uses of "non-navigable" waters; "non-navigable" meaning non-navigable under the federal test.[1]

For these reasons, the majority of state jurisdictions have found a public right to recreation in public waters, even where the waters are non-navigable and the subaqueous land is privately owned. Of those states west of the Mississippi which have considered the matter, twelve have so held: California, People v. Mack, 97 Cal. Rptr. 448 (Cal. App. 197), People v. Sweetzer, 140 Cal. Rptr. 82 (Cal. App. 1977); Idaho, Southern Idaho Fish and Game Assoc. v. Picabo Livestock, Inc., 528 P.2d 1295 (1974);

---

[1] Again, it should be noted, to avoid confusion, that public rights in natural waters need not be based on any concept of navigability, as will be seen below.

Minnesota, Johnson v. Seifert, 100 N.W. 2d 689 (1960); Missouri, Elder v. Delcour, 269 S.W. 2d 17 (1954); New Mexico, State v. Red River Valley Company, 182 P.2d 421 (1945); North Dakota, Roberts v. Taylor, 181 N.W. 622 (1921); Oklahoma, Curry v. Hill, 460 P.2d 933 (1969); Oregon, Luscher v. Reynolds, 56 P.2d 1158 (1936); South Dakota, Hillebrand v. Knapp, 274 N.W. 821 (1937); Washington, Snively v. Jaber, 296 P.2d 1015 (1956), Kemp v. Putnam, 288 P.2d 837 (1955); Wyoming, Day v. Armstrong, 362 P.2d 137 (1961); and Texas, Taylor Fishing Club v. Hammett, 88 S.W. 2d 127 (Tex. Civ. App. 1937).

One of the earliest cases upholding the public right of recreation on "non-navigable" (non-navigable under the federal test) waters was made by the Minnesota Supreme Court in Lamprey v. State, 53 N.W. 1139 (1893). The court there applied the so-called "pleasure-boat test" of navigability, explaining that there is a public easement for recreational navigation on any body of water capable of floating small pleasure craft to which there is lawful access, and that a physical capacity of the waters for commercial navigation was not required:

> Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these

> lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be even now anticipated. 53 N.W. at 1143 (Emphasis added).

It should be noted that if a private installation permit ha been granted to the Appellant, it would have had the effect of turning over one of the state's natural lakes to private owners and control.

The "pleasure boat" test has also been applied in Californ People v. Mack, 97 Cal. Rptr. 448 (Cal. App. 1971), was an actio to abate the stringing of cables across a river, which hampered the floating of the river by rafts and canoes. The California court noted that while the river was probably not navigable under the federal test, that did not preclude a more liberal state tes of navigability for establishing a right of public passage where the stream was capable of floating small oar-propelled craft. I People v. Sweetzer, 140 Cal. Rptr. 82 (Cal. App. 1977), the cour stated:

> In this state the public has a right to use for boating, swimming, fishing, hunting and all other recreation purposes, any part of a river that can be navigated by small recreational or pleasure boats, even though the river bed is privately owned. (Emphasis added).

See also Bohn v. Albertson, 238 P.2d 128 (Cal. 1955); Forrester v. Johnson, 127 Pac. 156 (Cal. 1912); and Hitchings v. Del Rio Woods Recreation and Park District, 127 Cal. Rptr. 830 (Cal. App. 1976).

While the public rights in natural waters need be based sole on recreational navigability (use of watercraft), the evidence

is clear that Lake Canyon Lake is large enough to support and has supported recreational boating (R. 377-378, 394-395, 392-393).

Several of our neighboring states have based the public's recreational rights in the waters of those states on more inclusive grounds than the recreational navigability test. They adopt the concept that public recreational rights are merely one part of the general rights of the public growing out of the concept that the state holds title to all waters in trust for the benefit of the people. This is a better reasoned theory.

The courts of Wyoming in Day v. Armstrong, 362 P.2d 137 (Wyo. 1961), and New Mexico in State v. Red River Valley Co., 182 P.2d 421 (1945), while acknowledging the "navigability in fact" or pleasure boat test of navigability, have chosen to find a public easement for recreation based on the rationale that the state holds title to all waters in the state in trust for the benefit of the people, and the people have a right to use the waters while in natural watercourses of the state for recreational and other purposes.

Thus, in Day v. Armstrong, supra, the Wyoming Supreme Court held that the issue of navigability was irrelevant, because the public had a right to beneficially use the waters of the state in natural watercourses for transportation and recreational purposes, even though the water was located over or flowed across private property, and the public had an easement to float on the water over the privately owned bed of the stream. The court stated:

> Irrespective of the ownership of the bed of a stream or of land upon which there are waters

> or over which waters flow, the State's right to control and use its own waters as it sees fit is paramount . . . Thus, the right of every person over or through whose lands the waters belonging to the State are found or flow and whose title to waters does not antecede that of the State, is subject to the State's right to use and control its waters as it sees fit. (362 P.2d at 144). (Emphasis added).

The court went on to state:

> The title to waters within this State being in the State, in concomitance, it follows that there must be an easement in behalf of the State for a right of way through their natural channels for such waters upon and over lands submerged by them or across the bed and channels of streams or other collections of waters . . . The waters not being in trespass upon or over the lands where they naturally appear, they are available for such uses by the public of which they are capable. When waters are able to float craft, they may be so used. When so floating craft, as a necessary incident to use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft. Even a right to disembark and pull, push or carry over shoals, riffles, and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement. (362 P.2d at 145). (Emphasis added).

The Idaho Supreme Court developed a rationale supporting a public recreational easement which adopted elements of both the pleasure-boat test and the Wyoming—New Mexico theory based on public ownership of waters. Thus, in Southern Idaho Fish and Game Association v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho, 1974), the Plaintiff-Association sought a declaratory judgment that there existed a public right to float and fish in a creek flowing over the Defendant's land. This claim was made under an Idaho statute creating such a right of use in waters capable of floating a log in excess of six inches in diameter at high water

Idaho Code §36-901. See also Johnson v. Johnson, 95 Pac. 499 (Idaho, 1908).

The Idaho court found a public right to fish pursuant to the statute. But the court then went beyond the statute and judicially adopted the pleasure boat test contained in People v. Mack, supra. This rule, it was held, provided a public right of use for all lawful purposes, not merely fishing. Thus, the court said that in Idaho:

> Any stream, which, in its natural state will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable.

This holding was based on a recognition that the State of Idaho held title to all waters of the state in trust for the public, subject to rights of appropriation. Idaho Constit. Art. 15, §1. Thus, the court reasoned, there exists a public easement for a right-of-way through and upon natural water channels. The court stated that the issue of navigability is simply one of several tests to determine a body of water's suitability for public use:

> Appellant urges this Court to adhere to the test of navigability that is used in federal actions where title to stream beds is at issue. However, the question of title to the bed of Silver Creek is not at issue in this proceeding. This is not an action by the State of Idaho or respondent to quiet title to the bed of a navigable stream. It is an action to declare the rights of the public to use a navigable stream. The federal test of navigability involving as it does property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft. (528 P.2d at 1298).

For other cases where the courts have upheld the public's recreational rights in waters, see: Duval v. Thomas, 114 So. 2d 791 (Fla. 1959); Harris v. Brooks, 283 SW 2d 129 (Ark. 1955); Burt v. Meunger, 23 NW 2d 117 (Mich. 1946); Ne Bo Shone Ass'n v. State, 227 NW 2d 358 (Mich. App. 1975); Diana Shooting Club v. Hurling, 145 NW 816 (Wisc. 1914); and Branch v. Oconto County, 109 NW 2d 105 (Wisc. 1961). See also: R. L. Knuth, Public Rights of Recreation in Utah's Non-Navigable Waters, 5 Journal of Contemporary Law 95 (1978), and Johnson and Austin, Recreational Rights and Title to Beds on Western Lakes and Streams, 7 Natural Resources L.J. 1 (1967).

It should be emphasized at this point that the State of Utah is not claiming that the public has a right to trespass on the Appellant's property in order to fish at Lake Canyon Lake, and the trial court correctly held that the public has no such rights. However, the day may come when the public, for whatever reason, may be provided with such access. If the State, through its Division of Wildlife Resources, were to grant Appellant the right to operate Lake Canyon Lake as a private fish installation, this would be impairing and violating its obligation to hold the natural water of the state in trust for the people, and its obligation to protect the public's recreation rights therein.

In short, public recreational rights in the natural lakes and streams of the western states have long been recognized, whether under the "pleasure boat" test or the public trust test. The Utah Legislature, through Section 23-15-10, Utah Code Annotated 1953, as amended, has sought to protect the natural waters of the

state from being converted to private fish farms to the detriment of the rights of the public. The challenged statute offers just that protection, and is thus a lawful exercise of state powers and is fully constitutional.

POINT II

THERE ARE A FEW MATTERS WHICH REQUIRE CLARIFICATION

A. Public Rights of Recreation and Private Water Rights Are Not In Conflict

It was explained and stipulated at the trial that there was absolutely no conflict between public recreational rights in natural watercourses and private water rights (R. 349). The public trust and public rights apply only to waters while they remain in natural lakes and streams. Adams v. Portage Irr. Co., 95 Utah 1, 72 P.2d 648 (1937). Private water rights are acquired under state law by diverting water from natural lakes and streams and applying it to beneficial uses. See, generally, Title 73, Chapter 3, Utah Code Annotated 1953, as amended. Thus, it was made abundantly clear that the potential conflict between public rights and private rights was in reality no conflict at all, and even if there were a conflict, the appropriator would prevail.

B. The Water in Lake Canyon Lake Is Not Appropriated by Appellant

At the trial and in Appellant's brief (page 15), much ado was made of the fact that Appellant had appropriated all of the waters in Lake Canyon Lake. But that is not the case! Appellant has a "diligence" water right which entitles it to allow livestock to water in Lake Canyon Lake, and has an unapproved application on file with the State Engineer to appropriate water from the stream flowing from the lake to irrigate lands below

the lake. But Appellant does not own any water in the lake and has not cited any evidence or authority whatsoever to support such a claim. Indeed, the Utah cases and statutes cited above uniformly preclude any such result. In any event, any recreational uses of the lake cannot and would not impair any vested water rights, and any argument along these lines is factually misconceived and legally irrelevant.

C. The Private Pond Permit on the "Lower Lake" Is Justifie

There was also much ado at the trial about issuance of a private pond permit for another natural lake in Lake Canyon several miles below Lake Canyon Lake. Appellant contended that the state was inconsistent in renewing a permit for the lower lake while denying its application. But Donald Andriano, Chief of Fisheries for the Division of Wildlife Resources, gave an entirely candid and uncontroverted explanation.

The permit for the lower lake was issued many years ago, before the Utah law was amended in 1971 to expressly prohibit such permits on natural watercourses. The permit has been renew annually, even though such renewal might have been in violation of Section 23-15-10 since its amendment in 1971. However, the holder of the permit had made substantial and expensive installations prior to 1971, in reliance on continued private pond status for the lower lake. Mr. Andriano said that he did not know whether the 1971 statute contemplated any "grandfather" rights for continuation of pre-1971 permits on natural watercourses, but until there was such a legal determination, such permits probably would be renewed because of the previous exper-

ditures. He said he did not know how many permits were in that category, but his estimate would be no more than half a dozen (R. 421-423).

The situation with respect to the lower lake is exceedingly simple. The existing private pond permit for the lake may or may not be legal. But that is not an issue in this case. It plainly would be a direct violation of Section 23-15-10 if the state were to issue a private pond permit to Appellant for Lake Canyon Lake, and no comparison with the lower lake can change that fact.

D. Appellant Is Not Being Denied Reasonable Use of Lake Canyon Lake or Its Real Property

It is important to point out that by denying an application for a permit to use Lake Canyon Lake for a private fish installation, the state is not denying or infringing upon any of Appellant's rights. Appellant will still have the right to deny public access from the public road to the shore of Lake Canyon Lake, and will therefore have exclusive access to fish the lake, subject, of course, to the license, season, and creel limit restrictions set forth in the state's general fishing proclamation. Appellant will still have full use of its land, may build its fishing lodge, and water its livestock pursuant to its Water User Claim. All that is being denied the Appellant is something that it clearly is not entitled to—that is, to convert a natural body of water, which is held by the state in trust for the public, to its own private, exclusive use as a private fish farm. Such is not an unreasonable, inequitable or unconstitutional result.

POINT III

THE ROAD UP LAKE CANYON IS A PUBLIC ROAD

Appellant contends that the trial court erred in ruling that the road up Lake Canyon is a public road. However, Appellant does not contend that the evidence was insufficient to support such a finding. Rather, Appellant claims that the issue of the nature of the road was simply not a valid issue as framed by the pleadings. While the public road issue may not have been specifically framed in the pleadings, it certainly became a hotly controverted issue of fact on which both parties offered evidence and on which the court requested evidence. No one was surprised by the issue.

Initially, the issue of the road was raised in the affidavit of Clair Huff in support of the state's Motion for Summary Judgment (R. 41). Mr. Huff stated that Lake Canyon Lake was accessible to the public by a public gravel road (R. 41). Appellant filed a counter-affidavit by Robert J. Pinder, in which Mr. Pinder alleged that the road was a private road.[2] Appellant then filed a memorandum in opposition to the state's Motion for Summary Judgment in which Appellant argued that there were many issues of controverted fact requiring evidence, including whether the road was public or private (R. 53).

On December 13, 1979 the court denied the state's Motion for Summary Judgment based, in part, on Appellant's assertion that

---

[2] See also the photo attached to Mr. Pinder's affidavit (R.

there existed controverted issues of fact. Among the matters on which the court wanted to hear evidence was "whether the road leading to the lake is a public right-of-way" (R. 119).

At the opening of the trial, the court again requested a list of the issues to be tried, and the following exchange took place:

> MR. QUEALY: Your Honor, I might say one thing at this point. When Mr. Cotro-Manes was summarizing the issues and the burden of going forward, I think he left out two important issues that we are prepared to go forward on and that is on our Counterclaim as to the recreational--the [susceptibility] of that lake as to recreational navigability, and we are prepared to go forward on that. The Court I believe in its Memorandum Decision, also, listed as one of the issues whether that was a public road going up there and we have witnesses and are prepared to proceed on that unless Mr. Cotro-Manes no longer thinks that's a controverted issue.
>
> MR. COTRO-MANES: I think we should go forward with that.
>
> THE COURT: And whose burden--
>
> MR. QUEALY: On that I think it's Mr. Cotro-Manes' claim that it was not a public road, so I think the burden there is on him.
>
> MR. COTRO-MANES: I think it's almost the burden of the person who claims it's public to prove it's public.
>
> THE COURT: Well, we will worry about that particular aspect as we move forward with the issues that were first identified as Mr. Cotro-Manes' position (R. 292-293) (Emphasis added).

Evidence was then given by witnesses for both sides as to the nature of the Lake Canyon Road. There can thus be no question that while the public nature of the road may not have been specifically framed as an issue in the early pleadings, it certainly became an issue as stated in the court's first memorandum

decision. Everybody knew this was an issue and proceeded accordingly. For Appellant to now claim that such adjudication is now invalid is ludicrous! Rule 15, Utah Rules of Civil Procedure, is clear enough:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. (Emphasis added).

Both sides offered evidence as to the nature of the road, and the court properly found that the road was public (R. 180-18

It should also be noted that, for purposes of determining public rights in natural watercourses, it is legally irrelevant whether the road up Lake Canyon is a public or private road. However, the evidence was overwhelming that the road was public. Duchesne County treated it as a public road and graded and maintained it at county expense (R. 356-360; 362-364). The general public has used the road as a public road for at least half a century (since before 1930) (R. 379; 386; 395-396).

In Utah, roads used by the public for ten years or more are conclusively deemed to be public roads by implied dedication. Section 27-12-89, Utah Code Annotated 1953, as amended. See also: Morris v. Blunt, 49 Utah 243, 161 Pac. 1127 (1916); Lindsa Land & Livestock v. Churnos, 75 Utah 384, 285 Pac. 646 (1930); a Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420 (1941). There ca be no doubt that the Lake Canyon Road is a public road, at leas to the Forest Service boundary.

CONCLUSION

The Appellant claims that the statute prohibiting the issuance of private fish installation permits on natural lakes or streams is unconstitutional because there is no reasonable basis for distinguishing between natural bodies of water and artificial facilities. The State contends that there are important and valid public policy reasons for prohibiting such installations on natural bodies of water, the foremost being that to allow such private facilities impairs the public's right to utilize the public waters of this state which are suitable for recreational purposes, and would violate the state's position as trustee for the water and wildlife resources of the State. To hand over the natural lakes and streams to private ownership would, in the words of the Minnesota Supreme Court in the Lamprey case, supra, "be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated." Section 23-15-10, Utah Code Annotated 1953, as amended, regulating the issuance of private fish installation permits on natural lakes and streams was passed to protect these public interests, is fully constitutional, and should be upheld.

DATED this 26th day of January, 1981.

RICHARD L. DEWSNUP
Assistant Attorney General

DALLIN W. JENSEN
Assistant Attorney General

MICHAEL M. QUEALY
Assistant Attorney General

ATTORNEYS FOR THE STATE OF UTAH
301 Empire Building
231 East Fourth South
Salt Lake City, UT 84111
Telephone: (801) 533-4446

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Respondent's Brief were mailed, first class postage prepaid, to Paul N. Cotro-Manes of Cotro-Manes, Warr, Frankhauser & Beasley, 430 Judge Building, Salt Lake City, Utah 84111, Attorney for Plaintiff-Appellant, this 29th day of January, 1981.

MICHAEL M. QUEALY
Assistant Attorney General