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Jodi Conatser, Kevin Conaster, Lacey Conatser, and
Nicole Mann vs. Wayne Johnson, Clark Sessions,
Shane E Matthews, Deputy Sherriff of Mongan
County, Duane Johnson, Randy Sessions, Michael
McMillan, Lynn Brown, Gerald STout, and John
and Jane Does 6-25 : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT FOR THE STATE OF UTAH

JODI CONATSER, KEVIN CONATSER,
LACEY CONATSER, and NICOLE
MANN,

Appellants/Plaintiffs,

BRIEF OF APPELLEES

Supreme Court No. 20060558

vs.

District Court No. 0030002

WAYNE JOHNSON, CLARK
SESSIONS, SHANE E. MATTHEWS,
Deputy Sheriff of Morgan County.

DUANE JOHNSON, RANDY SESSIONS,
MICHAEL McMILLAN, LYNN
BROWN, GERALD STOUT, and JOHN
AND JANIE DOES 6-25

Appellees/Defendants

((Oral argument requested))

APPEAL FROM THE RULING OF SECOND JUDICIAL DISTRICT COURT
IN AND FOR MORGAN COUNTY, STATE OF UTAH
THE HONORABLE MICHAEL D. LYON, PRESIDING

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to *Utah Code Ann.* § 78-2-2(3)(j) (2006).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue presented on appeal is whether the trial court correctly determined that where the use of the privately owned streambed of the Weber River is more than incidental to the right of floating thereon, such use would constitute a trespass.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, the trial court's conclusions of law are reviewed for “correctness.” *Laney v. Fairview City*, 2002 UT 79, ¶ 9, 57 P.3d 1007, 1011.

STATEMENT OF THE CASE

This appeal involves an issue of first impression in Utah. Jodi Conatser, Kevin Conatser, Lacey Conatser and Nicole Mann (collectively the “Conatsers”) sought a declaration from the trial court that the public has an easement to use the privately owned streambed and banks of the Weber River (the “River”), and not just a right of floatation upon the public waters constituting the River. On cross-motions for summary judgment, the trial court correctly concluded that the right of floating on

natural waters is recognized in Utah, but that such a right does not allow members of the public to walk on the privately owned riverbed or riverbanks, except to the extent that such contact is incidental to the right of floating.

In *J.J.N.P. Co. v. State Div. of Wildlife Resources*, 655 P.2d 1133, 1138, n.6 (Utah 1982), this Court adopted the majority view that because the public owns the water in natural streams, there is a corresponding right to float upon such waters. In doing so, the Court embraced the rationale and policy expressed by the Wyoming Supreme Court in *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), which held that the right of floating does not include a broader easement to walk on privately owned, subaqueous land for fishing, hunting or other purposes. Because that issue was not before the Court *J.J.N.P.*, however, it declined to reach the question. This case squarely presents the issue the Court appropriately declined to decide in *J.J.N.P.* and, despite the trial court's attempt to limit the applicability of its holding to the named parties, has potentially far-reaching implications for private property owners throughout the state of Utah.

STATEMENT OF FACTS

On or about June 4, 2000, the Conatsers put a small rubber raft in the Weber River at a public access point and proceeded to float down the

River to another public access point. [R. 00314.] Between the public access points, the River crosses over a number of parcels of private real property. [*Id.*]

While floating the River, the Conatsers touched the privately owned streambed in the following ways: (i) the raft in which they were riding touched or skidded along the bottom of the River in shallow areas, (ii) the paddles or oars touched the bottom on occasion, (iii) Kevin Conatser's fishing tackle came in contact with the bottom, and (iv) Kevin Conatser intentionally got out of the raft and walked along the streambed to facilitate his fishing and to manipulate fencing that had been strung over the River. [R. 00314.]

On two occasions prior to June 4, 2000, Kevin Conatser was informed by one or more of the Defendants that he was trespassing on private property. [*Id.*] On June 4, 2000, the Conatsers were again informed by two of the Defendants that they were trespassing and were asked to pick up their raft and walk out via a parallel railroad easement. [*Id.*] The Conatsers refused to walk out as requested and instead continued downstream to a public access point where a Deputy Sheriff from Morgan County was waiting. [R. 00315.] The Sheriff cited Kevin and Jodi Conatser for criminal trespass for which they were later found guilty by the Morgan County Justice Court. [*Id.*] On appeal of the

criminal conviction, the trespass charges were dismissed by the State in light of the perceived legal uncertainty regarding the Conatsers' status as trespassers. [*Id.*] While the criminal case was pending, the Conatsers filed a civil action in the Second District Court seeking a judicial determination that they, as members of the general public, not only have a right to float down the River but also a right to walk on the privately owned bed of the River [R. 0001-0005.]

SUMMARY OF ARGUMENT

Prior Utah Supreme Court decisions establish two concepts that are determinative of this appeal. First, whether a body of water is non-navigable, although admittedly irrelevant for determining whether the public has a right to be upon the water, is an indispensable finding in determining the extent of the public's interest in the water's underlying bed. When a body of water is non-navigable, the land underlying it is in private ownership. Here, the Conatsers have conceded that the River is non-navigable and that its bed therefore is in private ownership. Second, because the bed in question is in private ownership, the owners thereof retain the important right to prohibit others from making use of it in the manner urged by the Conatsers.

The trial court thus correctly concluded that the right of floating on natural waters is recognized in Utah, but that such right does not allow

members of the public to walk on the privately owned riverbed or riverbanks, except to the extent that such contact is incidental to the right of floating. The trial court's ruling is in harmony with prior Utah Supreme decisions, the influential and oft-cited Wyoming case of *Day v. Armstrong* which carefully balanced the correlative rights of landowners and recreationists to privately owned subaqueous land, and Utah statutes relating to the issue. The trial court should, therefore, be affirmed.

ARGUMENT

A. **BECAUSE IT IS UNDISPUTED THAT THE RIVER IS NON-NAVIGABLE, THE CONATSERS CANNOT ESTABLISH A RIGHT TO BE UPON THE PRIVATELY OWNED RIVERBED.**

The Conatsers have conceded that the River is non-navigable and that, as a result, its bed is in private ownership. Because the bed in question is in private ownership, the owners thereof have the constitutionally protected right to prohibit others from making use of it. Accordingly, the trial court correctly concluded that the right of the public to float on natural waters is recognized in Utah, but that such a right does not allow members of the public to walk on the privately owned riverbed or riverbanks, except to the extent that such contact is incidental to the right of floating.

1. Prior Utah Supreme Court decisions support the trial court's ruling that the public's right to make use of the River's bed is limited to contact that is incidental to the right to float upon the water.

This Court has previously recognized the importance of the respective rights held by both the public and the private property owners in waterways in Utah. In the *J.J.N.P. Co. v. State*, it stated:

As a corollary of the proposition that the public owns the water is the rule that there is a public easement **over the water** regardless of who owns the water beds beneath the water. Therefore, public waters do not trespass in areas where they are naturally appear, and the public does not trespass when **upon** such waters.

Id. at 1136-37 (citing with approval *Day v. Armstrong*, Wyo. 362 P.2d 137 (1961) and *Southern Idaho Fish and Game Assoc. v. Picabo Livestock, Inc.*, 528 P.2d 1295 (Idaho 1974)) (emphasis supplied). By providing for a limited easement **over** and **upon** the water and by further limiting that easement to include lawful activities that can be undertaken only after lawful access to the water is achieved, the Court unambiguously recognized the necessity of preserving the very property rights the Conatsers now seek to extinguish. Although the *J.J.N.P* decision expressly and appropriately refused to reach a determination of the issue here, its careful use of words comports with an earlier Utah case decided more than a half-century ago involving a landowner's right to exclude

others from land underlying another non-navigable body of water, Scipio Lake.

As noted by the Court in *Monroe v State*, 175 P.2d 759 (Utah 1946), the parties' respective rights hinged entirely on whether Scipio Lake was navigable. On the one hand, if the lake was navigable, the subaqueous land belonged to the State, and the defendant, who was seeking to use the land underlying the lake for grazing under a lease from the State, would be entitled to make use of the land. *Id.* at 760. If, on the other hand, the lake was non-navigable, the plaintiff, as a private landowner, would be allowed to exclude the defendant from making use of the lakebed. *Id.* After analyzing the facts before it, the Court determined that the lake was indeed non-navigable and title to the lakebed, therefore, was held by the plaintiff. *Id.* at 762. Because the plaintiff owned the bed of the lake, he had the right to exclude others, including the defendant, from making use of it. *Id.*

From *Monroe*, two concepts that are determinative of this matter are derived. First, whether a body of water is non-navigable, although irrelevant for determining whether the public has a right to be upon or over the water,¹ is an indispensable factor in determining the extent of

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¹ See *J.J.N.P.*, 655 P.2d 1137 ("Irrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful

the public's interest in the underlying bed. Quite simply, if the body of water in question is non-navigable, the land underlying it is in private ownership. The Conatsers have conceded that the River is non-navigable. [R.00536, Hearing Transcript, at pgs. 10, 39-40.] Necessarily, then, the portions of streambed at issue are in private ownership. Second, private ownership of subaqueous beds of non-navigable bodies of water includes with it the important right to exclude others from those beds – a right that has been repeatedly found to be “one of the most essential sticks in bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Consequently, the Conatsers cannot establish a right to be upon the bed of the River.

2. The *Day v. Armstrong* decision, which has been embraced by this Court, provides a well-reasoned and balanced approach to the issues at hand.

In *J.J.N.P.*, this Court based its decision that the public has the right to float on the naturally flowing waters on the well-reasoned decision of the Wyoming Supreme Court in *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961). *See J.J.N.P.* 655 P.2d 1136-37. The *Day* decision carefully balanced the competing interests of the public to be upon

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access to the body of water, has the right to . . . participate in any lawful activity when utilizing that water.”)

publicly owned water and the right of the private landowner to exclude others from the privately owned land underlying such waters.

Much like the instant case, the conflict in *Day* arose after a private rancher on the North Platte River attempted to prevent the passage of recreational floaters, including one *Day*, a recreationist. *Id.* at 141. The central dispute in *Day* centered on the rights of the public to make use of an non-navigable stream and, importantly, its privately owned bed. *Id.* at 139.

As with Utah, Wyoming law provides that all water is owned by the state and that land underlying navigable waters is also owned by the state, whereas land underlying non-navigable waters can be and often is privately owned. *Id.* at 146; *cf. Nephi Irr. Co. v. Bailey*, 181 P.2d 215, 216 (Utah 1947); *Monroe*, 175 P.2d at 760. To reach the issue of the public's right to make use of the river's bed, the *Day* court had to first determine whether the bed's title was in private or public ownership. A navigability determination was thus necessary. *See Day*, 632 P.2d at 144 (noting that though the "test of navigability does not determine other uses to which the State may put its waters . . . [it] would determine title to the land underlying them.") On this point, the Wyoming court stated:

Streams in their natural state, such as that described by the factual matter appearing in the record before us, although capable of intermittent floating of craft for recreational use and for small commercial use in the floating of ties, logs, and

timber, are nevertheless unsuited for navigation in interstate or international commerce and are not of such economic value for transportation as justifies their being classified as navigable waters, thereby taking from riparian proprietors the title and ownership of the bed and channel of the river where it flows by, through, over, across, or upon their lands. So we must hold the portion of the river here in question is nonnavigable and that its bed and channel are the property of the riparian owner.

Id. at 147.

Although it concluded that the river was non-navigable and the beds therefore in private ownership, the *Day* court held that “irrespective” of navigability, the public was entitled to make use of the water for floating provided the water was actually capable of supporting such use. *Id.* at 146 (“When waters are able to float craft, they may be so used.”); accord *J.J.N.P.*, 655 P.2d at 1137. It cautioned, however, that “in using the State’s waters for floating, the public is not privileged, except as incidental to such use, to violate the rights of riparian owners.”

Id. at 146. Moreover,

where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use of the bed or channel rather than floating use of the waters, such wading or walking is a trespass upon the lands belonging to the riparian owners and is unlawful. Such trespass cannot be made lawful either by legislative or judicial action.

Id.

While it is true that the State’s power to regulate the use of water does not depend on a designation of navigable or non-navigable, it does

not follow that the State can grant unlicensed use of the private land underlying or surrounding the non-navigable water, which, unlike the water, it neither owns nor holds in trust for the public.² Under such circumstances, the public should only be allowed use of the water for activities that are lawful, including the floating of craft when the water in question is so capable of being used. *See Day*, 362 P.2d at 147. But this does not, despite the Conatsers' urging, bestow upon the public the privilege of violating the rights of private land owners by authorizing activities such as walking and wading that are appropriately considered unlawful. *Id.* at 146. Such a contention was rejected in *Day* as an unjustified intrusion on private property rights, and should also be rejected here.

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² Extending the public's easement over the water to also include the right to make unfettered use of the privately owned subaqueous property results in a taking. "To say that an appropriation of a public easement across a landowner's premises does not constitute a taking of property but rather a mere restriction on use, is to use the words in a manner that deprives them of all their ordinary meaning." *Nollan v. California Coastal Comm.*, 483 U.S. 825, 830 (1987) (holding that if California wanted a public easement across private property, it could use its power of eminent domain, but it would constitute a taking that must be paid for) (internal citation omitted); *see also Kaiser Aetna*, 444 U.S. at 179-80 (concluding that if the government wanted to open a privately owned marina to the public it could do so, but the "right to exclude," so universally held to be a fundamental property right, is a type of interest that the Government cannot take without paying just compensation).

3. At a fundamental level, the question of navigability is inescapable.

Regardless of navigability, all waters in Utah, unless they have been lawfully appropriated, are held in trust by the state for the benefit of its citizens. See Utah Code Ann. § 73-1-1 (2006); see also *Adams v. Portage Irr. Reservoir & Power Co.*, 72 P.2d 648, 652-54 (Utah 1937). However, only if a body of water is navigable will its bed also be held in trust by the state and considered “public lands of the state.” See *State v. Rolio*, 262 P. 987, 993-94 (Utah 1927) (“It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity.”) (quoting *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926)). Because private entities are generally without authority to exclude others from public lands, see, e.g., *United States v. Buford*, 30 P. 433, 434 (Utah 1892) (finding that the private entity had “no right to exclude the public from the public lands at all, in any way whatever”), there can be little question that members of the public have a right to make use of the publicly owned land underlying navigable bodies of water.

By comparison, when, as in this case, a body of water is non-navigable, a private landowner may hold title to the underlying bed and is to be accorded rights consistent with the traditional notions of private property ownership, including the hallmark of all such private property

rights – the right to exclude others. See *B.A.M. Dev., L.L.C. v. Salt Lake County*, 2004 UT App 34, ¶ 57, 87 P.3d 710, 729 (noting that the right to exclude others is one of the most essential sticks in the bundle of rights commonly characterized as property) (citing *Nollan*, 483 U.S. at 830); see also *Monroe*, 175 P.2d 759.

The fact that the bed of a non-navigable body of water belongs to the riparian owner in no way alters the statutory edict that the water belongs to the public, nor does it “defeat the State’s power to regulate the use of the water or defeat the right the public has to be on the water.” *J.J.N.P.*, 655 P.2d at 1137. However, neither the State’s power to regulate nor the public’s right to be upon the water defeats the rights, including the right to exclude others, that appropriately belong to the owners of the land underlying those waters. Accordingly, if private property rights are to be respected and preserved, a navigability determination cannot merely be overlooked, but is instead inescapable.

B. UTAH STATUTORILY RECOGNIZES THE IMPORTANT PROPERTY RIGHTS BELONGING TO OWNERS OF STREAMBEDS.

Utah statutorily protects the important property rights belonging to owners of streambeds. Utah Code Ann. § 23-20-14, which deals with entry on private land by hunters and fishermen, requires that for private property to be properly posted “No Trespassing” signs or a minimum of 100 square inches of bright yellow, bright orange or fluorescent paint are

displayed at all corners, **fishing streams** crossing property lines, roads, gates and rights-of-way entering the land.” Utah Code Ann. § 23-20-14(1)(d) (2005) (emphasis supplied). A person engaged in taking wildlife or wildlife related activities may not “without the permission of the owner or person in charge, enter upon privately owned land that is cultivated or properly posted.” *Id.* at § 23-20-14(2)(a). A violation of subsection 2(a) is considered a class B misdemeanor. *Id.* at § 23-20-14(6).

By allowing “fishing streams” to be properly posted, the legislature has expressly recognized the private landowner’s right to exclude others from privately owned streambeds in this state. If, as the Conatsers assert, a public easement exists to wade and walk in all streams in the state, the legislature’s inclusion of “fishing streams” in the statute would be rendered meaningless. *See Trail Mtn. Coal Company v. The Utah Div. of State Lands and Forestry*, 921 P.2d 1365, 1372 (Utah 1996) (refusing to construe a statute so as to render terms meaningless).

The rule that is most consonant with the decisions of this Court in *J.J.N.P., Monroe* and the Utah statutes pertaining to the issue is that set forth in *Day v. Armstrong* and adopted by the trial court. In other words, where use of a privately owned streambed is more than incidental to the right of floating thereon, such use constitutes a trespass. [R. 00319.] In addition to providing a practical, workable solution to the issue at hand,

such a rule promotes harmony between the constitutionally protected private property rights belonging to the Defendants and all other landowners in the state of Utah with the interests of the public to be upon the waters of this State.

C. WYOMING'S RULE, WHICH REPRESENTS THE BETTER-REASONED APPROACH WHEN COMPARED TO THE APPROACHES TAKEN BY OTHER WESTERN STATES, INCLUDING COLORADO AND WYOMING, SHOULD BE ADOPTED IN UTAH.

Western States have taken a variety of approaches in resolving conflicts over water use between the public and private landowners. At the extremes are Montana and Colorado, reflecting the most “liberal” and “restrictive” positions, respectively. *Compare* Stephen D. Osborne, *et al.*, *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 ENV'T'L. L. 399, 445 (2003) (asserting that Montana's access laws are the most liberal among the Northwestern states of Idaho, Washington, and Oregon), *and* Lori Potter *et al.*, *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER L. REV. 457, 498 (2002) (suggesting that Colorado's access laws are the most restrictive among the states of Wyoming, New Mexico, Utah, Montana, Idaho, and California). A review of the seminal cases from Montana and Colorado relating to the issue at bar further supports the conclusion that the “middle of the road” rule adopted by the Wyoming Supreme Court in *Day v. Armstrong* is the

better-reasoned and more appropriate approach to resolving the instant dispute.

1. Colorado's approach is currently unworkable in Utah.

The Colorado Supreme Court in *People v. Emmert*, 597 P.2d 1025 (Colo. 1979), narrowly defined the public's right to use streams flowing through private land without the owner's consent. *Emmert* and the other defendants had floated and fished from rafts over private property on the Colorado River and had touched the riverbed as they crossed the property. *Id.* at 1026. At the landowner's request, the sheriff arrested *Emmert* and the other defendants. The defendants were convicted of violating a trespass statute that provided: "[a] person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises." *See id.* at 1026. *Emmert* appealed his conviction to the Colorado Supreme Court.

On appeal, the court noted the general rule of property law in Colorado states "that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands." *Id.* at 1027 (citing *More v. Johnson*, 568 P.2d 437, 439 (Colo. 1977); *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905); *Hanlon v. Hobson*, 51 P. 433, 435 (Colo. 1897)). The parties had stipulated that the Colorado River was non-navigable, and no challenge was made to the

adjacent landowner's ownership of the riverbed. *Emmert*, 597 P.2d at 1026-27.

Applying the common law rule “*cujus est solum, ejus est usque ad coelum*,” which means that “he who owns the surface of the ground has the exclusive right to everything which is above it,” the court held that “the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations.” *Id.* at 1027. Accordingly, one who intruded upon that space without the permission of the owner, regardless of the recreational purpose, committed a trespass. *Id.*

Emmert raised the defense that Article XVI, section 5 of the Colorado Constitution³ established a public right to recreational use of all waters in the state. *Id.* at 1027-28. Relying on an earlier case, *Hartman v. Tresise*, *supra*, the Colorado Supreme Court disagreed, concluding that the constitutional provision applied to appropriation of water for beneficial use. *Id.* at 1028. In other words, Article XVI, section

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³ This section provides: “the water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.” Colo. Const. art. XVI, § 5.

5 applied only to the right to make appropriations and not to the use of the state's water for recreation or fishing.

In 1977, after the defendants' convictions in *Emmert* and while their appeal was pending, the Colorado General Assembly passed Colo. Rev. Stat. § 18-4-504.5, *id.* at 1029, which defined "premises" for purposes of criminal trespass as "real property, buildings, and other improvements thereon, and the stream banks and beds of any non-navigable fresh water streams flowing through such real property." Colo. Rev. Stat. § 18-4-504.5 (Lexis 2006). Section 18-4-504.5 thus imposes criminal trespass liability on anyone who touches the stream banks or beds of rivers running through private property. *Id.* at § 18-4-504.5

Although spawning a fair amount of criticism, throughout the past two decades the Colorado Supreme Court has repeatedly acknowledged the continued validity of *Emmert*. *See, e.g., Bd. of County Comm'rs of County of Park v. Park County Sportsmen's Ranch*, 45 P.3d 693, 710 (Colo. 2002) (citing *Emmert*); *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 185 (Colo. 1991) (citing *Emmert*). That Colorado's approach to the issue is not currently in accord with Utah law is borne out by the *J.J.N.P.* decision, but it nevertheless remains the law in Colorado.

2. Montana's attempt to deal with the public's rights to stream beds has resulted in considerable uncertainty.

In contrast to Colorado, the Montana cases cited by the Appellants demonstrate, to a degree, a slightly more liberal resolution of the conflict, although the current state of the public's right to make use of privately owned subaqueous land in Montana is less-than clear.

The first of the four cases cited by the Conatsers, *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984) ("*Curran*"), dealt with whether the public had the right to use the streambed of the Dearborn River, a river the court found to be navigable. *Id.* at 166. As a result of being designated navigable, ownership of both the water its bed was held by the State of Montana and not by the individual landowners who were attempting to restrict the public's use of the rivers. *Id.* In light of the fact that the navigability determination should have been dispositive of the case, the Montana Supreme Court's sweeping and unnecessary declaration that "under the Public Trust Doctrine and the 1972 Montana Constitution, any waters that are capable of recreational use may so be used by the public without regard to streambed ownership or navigability for non-recreational purposes," *id.* at 171, is seemingly perplexing. See *Galt v. State*, 731 P.2d 912, 922 (1987) (describing the perplexing nature of the majority decision in *Curran*) (Sheehy J., dissenting).

If the facts presented in *Curran* were at issue here, there would be no question under Utah law as to the proper outcome. Like Montana, in Utah both the navigable body of water and land underlying it are owned by the State. A private party, therefore, could not lawfully prohibit the public's use of either the water or the bed.

Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984) ("*Hildreth*"), decided a little more than a month after *Curran* by a divided Montana Supreme Court, involved a similar conflict to *Curran*, this time on the Beaverhead River. *Id.* at 1091. Relying heavily on the questionable reasoning and language of the *Curran* decision, the court in *Hildreth* went out of its way to avoid the navigability issue altogether, ruling instead that it was immaterial. *See id.* at 1092. The *Hildreth* court concluded that regardless of navigability the public had a "right to access for fishing and navigational purposes to the point of the high water mark" and a "right to portage in the least intrusive manner possible, avoiding damage to the adjacent owner's property and his rights." *Id.* at 1091.

On the heels of the *Curran* and *Hildreth* decisions, Montana's legislative leaders met to develop what became known as Montana's Stream Access Law ("SAL"), codified at Montana Code Annotated §§ 23-2-301, *et seq.*, in an attempt to define terms left unclear by *Curran* and

Hildreth and to allay the fears of landowners over the scope of those rulings. See Brian Morris, *When Rivers Run Dry Under a Big Sky: Balancing Agricultural and Recreational Claims to Scarce Water Resources in Montana and the American West*, 11 STAN. ENV'L L. J. 259, 273 (1992). The final SAL legislation was signed into law in 1985. Due to the great pains taken by the legislature to comply with earlier court decisions, the bill was expected to survive inevitable court challenges. *Id.* To the surprise of many, however, the Montana Supreme Court narrowed the holdings of *Curran* and *Hildreth* in case brought to challenge the SAL shortly after its enactment. *Id.*

Galt v. Montana involved a constitutional challenge to the SAL and its provisions regarding the types of permissible uses on streambeds and banks. See 731 P. 2d 912. Although a divided Montana Supreme Court found several of the provisions of the SAL to be unconstitutional, including provisions of the statute that conferred public rights to overnight camping, construction of duck blinds, big game hunting, and requirements of private owners to compensate for the cost of portage routes, it concluded ultimately that the balance of the statutory scheme accorded with the Montana Constitution. *Id.* at 916. Even then, the *Galt* court reduced the public's ownership and use of surface water to an easement and although it conceded that the "public has a right of use up

to the high water mark” it restricted that right to “only such use as is necessary to utilization of the water itself.” *Id.* at 915. It further evinced concern for private landowners when it “reaffirm[ed] well-established constitutional principles protecting property interests from confiscation,” by ruling that the public’s rights to the waterways “must be narrowly confined so that impact to beds and banks owned by private individuals is minimal.” *Id.* at 916. As noted in a concurring opinion by Justice Gulbranson,

[W]here the State has title to the streambed, it may legislate, within the limits of declared public policy, the use of the streambed. Where title to the streambed is privately owned, the State has no legal authority to legislate use of the bed and banks of that stream without paying just compensation through lawful eminent domain proceedings.

Id. at 917. In light of the *Galt* decision, to say that Montana law allows for the type of unlicensed use of privately owned streambeds sought herein by the Conatsers is simply inscrutable.

While not explicitly reversing *Curran* and *Hildreth*, the *Galt* decision can be seen as a significant departure from those decisions by clearly favoring property owners with a decision that substantially protected private interests.⁴ In light of the about-face of the Montana Supreme

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⁴ Notably, the majorities in both *Curran* and *Galt* relied on the *Day v. Armstrong* decision for support. *Galt*’s limitation on incidental use to “such use as is necessary to a utilization of the water itself,” 731 P.2d at 915, is similar in effect to the language in *Day* declaring, “when so

Court in *Galt*, “one can only conclude that the law respecting the correlative rights of landowners and the recreational water users in Montana is adrift in a sea of confusion.” *Galt*, 731 P.2d at 920 (Sheehy J., dissenting).

The most recent case involving Montana’s SAL, *Madison v. Graham*, 126 F. Supp. 2d 1320 (D. Mont. 2001), involved a constitutional challenge to Montana’s SAL on both due process and void for vagueness grounds. *Id.* at 1324. The district court dismissed both claims, holding that due process claim was barred by *res judicata* and that the void for vagueness claim was without merit. *Id.* at 1327-28. The district court also dismissed what it construed as a takings claim,⁵ but not before

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floating craft, as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft.” *Day*, 362 P.2d at 145-46. In addition, like *Day*, the *Galt* court recognized that the State was unable to legislate use of the privately owned property, unless, of course, compensation was made to the landowners for such use.

⁵ *Madison* subsequently appealed the district court’s dismissal of the complaint. *See Madison v. Graham*, 316 F.3d 867, 870 (9th Cir. 2002). The appellants had alleged in their complaint that enforcement of the Montana SAL violated their substantive due process rights by infringing upon their liberty interests and fundamental rights, and they strenuously protested the construction of their complaint as a takings claim. *Id.* at 870. Nonetheless, the Ninth Circuit found that the actual harm alleged by the plaintiffs was their inability, due to the statute, to exclude others from their property. Because the right of landowners to exclude others is an essential private property right, the Court found that the alleged harms were addressed by the Takings Clause and that plaintiffs’ claim was appropriately regarded as a takings claim. *Id.* at 870-71. The court also rejected the plaintiffs’ argument that because they sought only declaratory and injunctive relief, not damages or compensation, their complaint could not be interpreted as a takings

suggesting that “the touching of a streambed by a wader is *de minimis* and causes no more interference with private property rights than does a floater.” *Id.* at 1324.

Although heavily relied on by Conatsers here, the Montana trial court’s suggestion that walking on private property causes no more interference than not walking on the same property is simply illogical. As clearly borne out by *Day*, one activity constitutes an unlawful trespass while the other does not. *Day*, 362 P.2d at 146 (“[S]uch wading or walking is a trespass upon the lands belonging to the riparian owners and is unlawful. Such trespass cannot be made lawful either by legislative or judicial action.”).

Moreover, to suggest that intentionally walking along the bed of a river comports with the Montana Supreme Court’s declaration that the public’s utilization of the streambeds must be “narrowly confined so that impact to beds and banks owned by private individuals is minimal,” is to eviscerate the meaning of the word “minimal.” *See Galt*, 731 P.2d at 916. Minimal is generally defined as the “smallest or least possible.” *See Webster’s New Universal Unabridged Dictionary* 1145 (2d Ed. 1983).

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claim, stating that landowners are allowed to seek such equitable relief in order to resist takings that threaten to violate the Constitution. *Id.* The court affirmed dismissal of the complaint but did not consider the merits of a takings claim, presumably because the plaintiffs did not plead and specifically denied making such a claim.

Walking and wading on privately owned streambeds is not the “least possible” use of those streambeds. Rather, the least possible and only acceptable use of the privately owned streambeds, as held by the trial court in this action, the *Day* decision, and the most recent decision out of the Montana Supreme Court, is that contact which is merely incidental to floating upon the waters situated above those beds. Anything more is not minimal or incidental but instead a trespass.

Although the four Montana cases are interesting, it must be noted that the earlier two were superseded when Montana’s legislature enacted the SAL, and the more recent two involved challenges to the SAL. Importantly, other than Utah Code Ann. § 23-20-14, the Utah legislature has made no declaration regarding the public’s right to make use of beds underlying non-navigable bodies of water. In addition, the scope of Montana’ SAL, which governs the rights of the public to be upon water in Montana, has been called into considerable question by the most recent decision out of Montana’ highest court, leaving Montana law, at least as it applies the correlative rights of landowners and recreationists, “adrift in a sea of confusion.” *Galt*, 731 P.2d at 920 (J. Sheehy, dissenting).

D. USE OF THE STREAMBED IN THE MANNER ADVOCED BY THE CONATSEERS IS CLEARLY MORE THAN INCIDENTAL TO THE RIGHT TO BE UPON THE WATER AND ALLOWING SUCH WOULD RESULT IN AN OUTCOME THAT IS FOR ALL PRACTICAL PURPOSES UNMANAGEMABLE.

The Conatsers contend that the public's easement to be upon the River necessarily includes the right to walk on its bed under the guise that "the owner of the easement is said to have all of the rights incident or necessary to its proper enjoyment." [Appellants' Brief at p.18.] Though the concept of incidental rights is applicable to the case at hand, it cannot be employed so as to enlarge the public's easement to burden the servient subaqueous estate in the manner sought. *See Nielson v. Sandberg*, 141 P.2d 696, 701 (Utah 1943) ("The right cannot be enlarged to place a greater burden or servitude on the property."); *see also* 25 Am. Jur. 2d Easements and Licenses in Real Property § 81 (2006) (An easement holder "has the privilege to do such acts as are necessary to make effective his or her enjoyment of the easement, unless the burden on the servient tenement is thereby increased."). Moreover, the concept of incidental rights is already accounted for in the trial court's holding which expressly allows for contact with the streambeds, provided such contact is incidental to the public's right of floatation on the River. Anything more than incidental contact, therefore, exceeds the scope of the easement to be upon the water and is considered a trespass. This is

in accordance with the Conatsers' own authorities. *See, e.g., U.P.C. v. R.O.A. Gen., Inc.*, 1999 UT App 303, ¶ 41, n.5, 990 P.2d 945 (“The owner of an easement is said to have all rights incident or necessary to its proper enjoyment, but nothing more. . . . If the easement owner exceeds his rights . . . he becomes a trespasser . . . .”) (quoting 25 Am. Jur. 2d Easements § 81 (1996)).

As justification for imposing the additional burden of allowing the public to trespass on the privately owned streambed, the Conatsers contend that streambeds in question are already burdened by a variety of existing federal and state laws. [Appellants' Brief at p. 23.] Virtually all privately owned land is to some extent burdened by laws proscribing or prohibiting what can and cannot be done thereon. *See, e.g., Am. Bush v. City of S. Salt Lake*, 2006 UT 40, 140 P.3d 1235 (recognizing that cities have the power to regulate the types of activities that can be undertaken at certain locations); *Johnson v. Hermes Assocs.*, 2005 UT 82, 128 P.3d 1151 (recognizing that land ownership does not allow one to disregard county zoning ordinances); *Anderson v. Provo City Corp.*, 2005 UT 5, 108 P.3d 701 (upholding a zoning ordinance relating to the leasing of owner-occupied property). But the fact that certain real property is already burdened by legal restrictions in one form or another, whether subaqueous or not, cannot serve as a justification for imposing

additional burdens on the property. This is particularly the case when the burden being imposed will necessarily result in a confiscation of the most valuable right in the bundle or rights referred to as property – the right to exclude others. *See Kaiser Aetna*, 444 U.S. at 176.

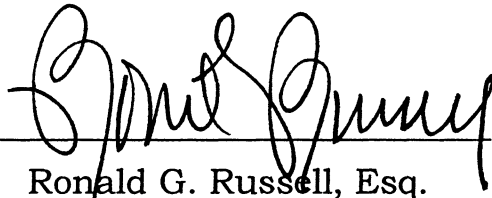
Under the Conatsers' theory, every streambed in the state of Utah, regardless of its size and usefulness for floating, would be subject to a public easement for walking and wading. As a necessary corollary to such an easement would be the restriction on the ability of all private landowners to exclude others from making use of their property, should that property unfortunately be in the form of a streambed. Because the state of Utah is literally crisscrossed by thousands of natural streams, creeks and rivers, some hardly worthy of being designated as such, all owners of property where one of these bodies is located would be subject to a public easement for anyone to walk across their property. In essence, every streambed in Utah will become a public thoroughfare. Such a result is not only unwise but, as a practical matter, unmanageable. The better-reasoned and more appropriate rule, as correctly determined by the trial court, is to allow the public to be upon the waters of this state when such waters are capable of being so used and to allow no more than incidental use of the streambeds underlying those waters.

CONCLUSION

For the foregoing reasons, the Appellees respectfully submit that this Court should affirm the trial court's judgment determining that where the use of the privately owned streambed of the River is more than incidental to the right of floating thereon, such use constitutes a trespass. Appellees further request an award of their costs pursuant to Rule 34 of the *Utah Rules of Appellate Procedure*.

DATED this 13th day of February, 2007.

PARR WADDOUPS BROWN GEE & LOVELESS

By: 

Ronald G. Russell, Esq.
Royce B. Covington, Esq.
Attorneys for Appellees

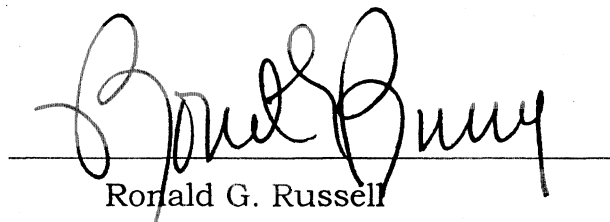
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2007, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEES, to each of the following:

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Ronald G. Russell

SECOND DISTRICT
MORGAN COUNTY
06 MAY 10 AM 10:59

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IN THE SECOND JUDICIAL DISTRICT COURT FOR MORGAN COUNTY

STATE OF UTAH

JODI CONATSER; KEVIN CONATSER;
LACEY CONATSER; and NICOLE
MANN,

Plaintiffs,

vs.

WAYNE JOHNSON; CLARK SESSIONS;
SHANE E. MATTHEWS, Deputy Sheriff
of Morgan County; DUANE JOHNSON;
RANDY SESSIONS; MICHAEL
McMILLAN; LYNN BROWN; GERALD
STOUT; and JOHN AND JANE DOES,
6-25,

Defendants.

JUDGMENT

Civil No. 000500092PR

The court having issued its Findings of Fact and Conclusions of Law and for the reasons
set forth therein,

00309

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiffs, as members of the public, if they can gain lawful access to the Weber River, have the right to float leisure craft and participate in any lawful activity when upon the water.
2. The defendants have no legal right to prevent plaintiffs from making use of the public's easement to float down the Weber River.
3. The defendants have no legal right to erect fences to prevent plaintiffs from utilizing the public's easement to float down the river.
4. When floating upon the river, defendants may scrape or touch the river's bed by grounding of craft as a necessary incident to the use of the public's easement to float upon the river and do not commit a trespass thereby.
5. The right to disembark and pull, push, or carry over shoals, rapids, or obstacles accompanies the right of floatation upon natural waters, which plaintiffs enjoy as members of the public.
6. Plaintiffs may walk along the banks of the river to bypass a fence, obstacle, or danger in order to continue floating and so long as plaintiffs' actions are as minimally intrusive as possible of the private owners' land, there is no trespass.
7. Where the use of the streambed is more than incidental to the right of floating on natural waters, such use would constitute a trespass.
8. Wading or walking along the river, where such conduct is not incidental to the right of floatation upon natural waters, would constitute a trespass of private property rights.

9. Plaintiffs have the right to make use of the river provided they stay within the bounds of the holding of J.J.N.P. Co. v. State Div. of Wildlife Res., 655 P.2d 1133 (Utah 1982) and this Judgment.

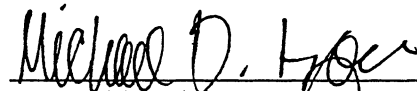
10. This declaratory Judgment is binding only on the parties to this action.

11. Except as to the declaratory relief provided by this Judgment, all claims and causes of action herein are dismissed and this Judgment constitutes a final Judgment for all purposes.

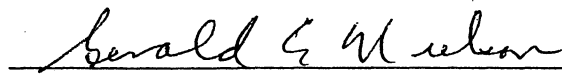
12. The parties shall bear their own costs.

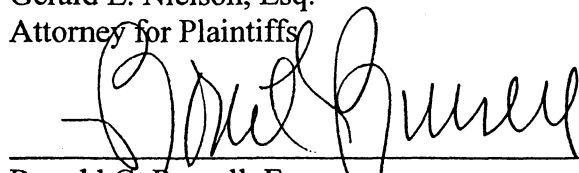
DATED this 25 day of Apr., 2006.

BY THE COURT:


_____
Honorable Michael D. Lyon
District Court Judge

APPROVED AS TO FORM:


_____
Gerald E. Nielson, Esq.
Attorney for Plaintiffs


_____
Ronald G. Russell, Esq.
Royce B. Covington, Esq. of
PARR WADDOUNS BROWN GEE & LOVELESS
Attorneys for Defendants Lynn Brown,
Duane Johnson, Wayne Johnson,
Michael McMillan, and Randy Sessions

CERTIFICATE OF SERVICE

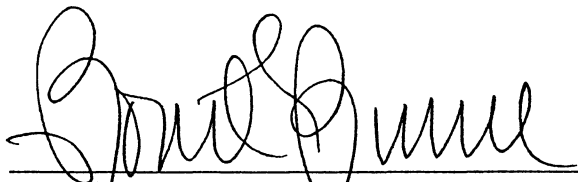
I hereby certify that on the 18th day of April, 2006 a true and correct copy of the foregoing JUDGMENT was mailed, postage prepaid, to:

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Salt Lake City, Utah 84106

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Morgan, Utah 84050


_____
Ronald G. Russell, Esq.

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH, MORGAN DEPARTMENT

JODI CONATSER, et al,	:	Case No. 000500092PR
	:	
Plaintiff,	:	Appellate Case No. 20060558-SC
	:	
v	:	
	:	
WAYNE JOHNSON, et al.,	:	
	:	
Defendant.	:	Keyword Index Included

ORAL ARGUMENTS SEPTEMBER 30, 2005

BEFORE

JUDGE MICHAEL D. LYON

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

00536

APPEARANCES

For the Plaintiff:

GERALD E. NIELSON
Attorney at Law

For the Defendant:

RONALD G. RUSSELL
Attorney at Law

* * *

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ORAL ARGUMENT

Mr. Nielson

Mr. Russell

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1 through and he reads the important part of, or recites the
2 important part of Wyoming decision, which is irrespective of
3 the ownership [inaudible] channel of waters and irrespective
4 of their navigability the public has the right to use public
5 waters of this State for floating useable craft - and I think
6 that's the rule in Utah - and that use may not be interfered
7 with or curtailed by any landowner. It's also the right of
8 the public while so lawfully floating in the State's waters
9 to lawfully hunt or fish or do any other things which are not
10 otherwise made unlawful, and then it goes on to say that when
11 waters aren't able to float craft they may be so used when so
12 floating craft is a necessary incident to that use of the bed
13 or channel the waters may be unavoidably scraped or touched.

14 But again, on the other hand, where the use of a
15 bed or channel is more than incidental to the right of
16 floating use of the waters and the primary use is of the bed
17 or channel rather than the floating, such wading or walking
18 is a trespass upon lands belonging to riparian owner and is
19 unlawful.

20 Counsel for purposes of our case here has conceded
21 that this is not, this is a non-navigable river. If it were
22 navigable, the point of all that discussion in our memo is
23 that navigability is important for distinguishing rights. If
24 it's a class one navigable river, which we only have maybe
25 the Green River and Colorado River in the federal standards

1 in Utah and Utah Lake and Great Salt Lake, maybe Bear Lake
2 naturally occurring navigable streams where those rights are
3 recognized and the State owns the bottom, that was the, the
4 equal footing doctrine when all of the western states came
5 into union as part of that the state took the charters and
6 enabled legislation passed by Congress gave the State's title
7 to the riverbeds so that pioneers coming through into the
8 west - and this shows you sort of your eastern mentality of
9 what things were like here, the pioneers coming out west
10 could use these corridors of transportation for commerce to
11 be on equal footing with the State's in the east and, you
12 know, that is I think a huge issue if there is a claim that
13 the Weber River meets that standard because we believe that
14 it clearly does not and is something that the Court can take
15 judicial notice of. But since we have that concession I
16 don't think we need to go there. If the Court's going to
17 address the merits, then the merits would be based on the
18 fact that this is a non-navigable river. We submit that the
19 standard that was stated by the Day Court is applicable, that
20 the landowners here do have the right to utilize their
21 property in a way that they can exclude people from having
22 access to the river over their land. But they can't exclude
23 people from floating on the river or if there's incidental
24 contact related to that, that's I think permissible. But
25 walking around, stopping, getting out, fishing, walking up on

CERTIFICATE

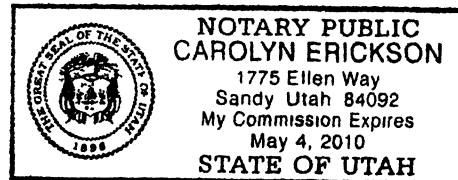
I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearings was held before Judge Michael Lyon was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 25th day of July, 2006 in Sandy, Utah.



Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2010



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On September 17, 2002, plaintiffs moved for partial summary judgment. On May 17, 2005, defendants, excepting Shane E. Matthews, cross-moved for summary judgment. The court heard oral argument on both motions September 30, 2005. Plaintiffs were represented by Gerald E. Nielson. Defendants were represented by Ronald G. Russell. After full consideration of the

motions, the memoranda of points and legal authorities filed therewith, the Affidavit of Kevin Conatser, and all other memoranda, pleadings, and papers on file with the court, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about June 4, 2000, plaintiffs put a rubber raft in the Weber River at a public access point and proceeded to float down the river to another public access point.

2. Between the public access points, the river crosses parcels of private property.

3. While floating the river, the plaintiffs touched the streambed in the following ways: (i) the raft in which they were riding touched or skidded along the bottom of the river in shallow areas, (ii) the paddles or oars touched the bottom on occasion, (iii) Kevin Conatser's fishing tackle came in contact with the bottom, and (iv) Kevin Conatser intentionally got out of the raft and walked along the streambed to facilitate his fishing and to manipulate fencing that had been strung over the river.

4. On at least two occasions prior to June 4, 2000, the defendants informed the plaintiffs that they were trespassing. On one occasion, defendant Michael McMillan confronted Kevin Conatser and ordered him off the river. On another occasion, Kevin Conatser was ordered off the river by Clark Sessions.

5. On June 4, 2000, defendants Duane Johnson and Wayne Johnson confronted the plaintiffs and ordered them off the river. Defendants Duane Johnson and Wayne Johnson told the plaintiffs to pick up their raft out of the river and walk out via a parallel railroad easement.

6. The plaintiffs continued downstream to a public access point where the defendants Duane Johnson and Wayne Johnson and a Morgan County Deputy Sheriff were waiting.

7. The deputy sheriff cited plaintiffs for criminal trespass.

8. The Morgan County Justice Court later found plaintiffs guilty of criminal trespass.

9. The plaintiffs appealed the justice court's findings.

10. After appeal, the county moved to dismiss the trespass charges in light of the uncertainty regarding the Conatsers' status as trespassers.

11. There is a longstanding and continuing uncertainty between the plaintiffs and defendants regarding the plaintiffs' rights to use the river.

12. Both the plaintiffs and defendants have actively sought to assert the rights each side believes the law provides to them. Their dispute comes not from a disregard of the law, but a genuine uncertainty as to their respective rights.

13. The parties' dispute regarding use of the river has not ceased but has been placed on hold out of respect for the role of the courts.

14. The parties have provided the court with no evidence of whether the river has been used for commerce or of the river's capability to be so used.

CONCLUSIONS OF LAW

1. Utah's Declaratory Judgment Act authorizes the court to declare the respective rights or status between parties.

2. The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.

3. The Declaratory Judgment Act is intended to be remedial without requiring parties to get in serious trouble first and it is to be liberally administered.

4. The following four requirements must be met before the court can issue a declaratory judgment: (i) there must be a justiciable controversy, (ii) parties whose interests are diverse, (iii) a legally protectible interest residing with the party seeking relief, and (iv) issues ripe for judicial determination.

5. The Declaratory Judgment Act allows for a wide interpretation of what constitutes a justiciable controversy. This case presents a justiciable controversy, ripe for judicial determination, between private citizens whose interests are adverse, and have been so over time, regarding the rights and limitations of the plaintiffs when floating the river abutting and running over defendants' property.

6. A justiciable controversy is present in this case. Because the plaintiffs' interests to the river are in direct conflict with the defendants' attempts to prevent the plaintiffs' use of the river, the parties are adverse.

7. The issue here is ripe for determination. The plaintiffs have had clashes with the defendants presenting a concrete set of facts regarding the plaintiffs' actual use of the river. This case does not present an academic controversy and it is not an effort by plaintiffs to obtain an advisory opinion.

8. The plaintiffs have a legally protectible interest in the controversy. The river belongs to the public and plaintiffs, as members of the public, have a legally protectible interest in the public easement over these natural waters free of defendants' interference. Plaintiffs have

repeatedly used a portion of the river. The defendants have interfered with the plaintiffs' use of the river. Plaintiffs Kevin Conatser and Jodi Conatser were arrested and convicted of criminal trespass, although the charges were later dismissed.

9. The plaintiffs' interest is apart from the general public. The plaintiffs have repeatedly used a particular portion of the river, intend to continue doing so, and have suffered a particularized injury of interference. The defendants have individually interfered with the plaintiffs' use of the river on multiple occasions.

10. A legally protectible interest does not require a property interest.

11. A declaratory judgment will end the uncertainty and therewith the instant controversy.

12. The plaintiffs have requested a broad declaration of plaintiffs' and the public's rights to use the river and waters located in Utah; however, a declaratory judgment only settles the legal rights between the parties to the proceeding. The court's judgment will not exceed the plaintiffs' interests or prejudice any persons who have not been made a party to the proceeding. For this reason, the court cannot consider the broad relief requested by the plaintiffs.

13. The court can only declare the rights to use of the river as between the plaintiffs and defendants.

14. A fair determination as to the respective rights between the defendants and plaintiffs on claims arising from their own behavior will not prejudice any person not made a party to this case. Therefore, the State of Utah and the record owners of the property in question are not necessary parties.

15. The court denies plaintiffs' request for a declaration that the public has a right to walk along the beds of streams and rivers. Such a declaration would require the weighing of competing interests and is a matter better left for the legislature.

16. A declaratory judgment will end the present controversy. This case is ideally situated to the stated purpose of the Declaratory Judgment Act. This case is properly before the court and a declaration of the respective rights between the plaintiffs and defendants is appropriate.

17. The declaration made by the court in this case is binding only on those made parties hereto and no one else.

18. The court exercises its discretion to grant a declaratory judgment in this case because it feels that it is the place of a court to obviate future potential confrontations between the parties and to facilitate a peaceful co-existence. Otherwise, people resort to self-help and anarchy.

19. This case does not require either a determination of bed ownership or navigability.

20. All waters in the state are the property of the public. Individuals, therefore, have no ownership interest in natural waters.

21. The public does not trespass when upon natural waters, regardless of who owns the bed beneath the water.

22. Irrespective of the ownership of the bed and irrespective of the navigability of the water, the public, if it can gain lawful access to a body of water, has the right to float leisure craft and participate in any lawful activity when upon the water.

23. The right to be on public waters applies to the section of the river at issue in this case.

24. The defendants have no legal right to prevent plaintiffs from making use of the public's easement to float down the river.

25. The defendants have no legal right to erect fences to prevent the plaintiffs from utilizing the public's easement to float down the river.

26. When floating down the river, a person may scrape or touch the river's bed by grounding of craft. These are necessary incidents to the use of the easement and do not constitute trespass.

27. The right to disembark and pull, push, or carry over shoals, rapids, or obstacles accompanies the right of floatation on natural waters.

28. A person may walk along the banks in order to bypass a fence, obstacle, or danger in order to continue floating.

29. Provided a person is as minimally intrusive of the private owners' land as possible there is no trespass.

30. Where the use of the streambed is more than incidental to the right of floating on natural waters, such use constitutes a trespass.

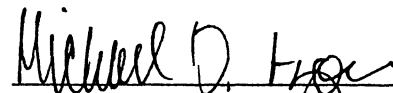
31. Plaintiffs have the right to make use of the river provided they stay within the bounds of the holding of J.J.N.P. Co. v. State Div. of Wildlife Res., 655 P.2d 1133 (Utah 1982) and this decision.

32. This decision is binding only on the parties hereto.

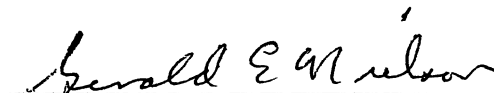
33. The court will enter a declaratory judgment consistent with the foregoing conclusions.

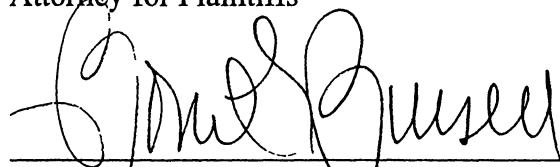
DATED this 25 day of Apr., 2006.

BY THE COURT:


_____
Honorable Michael D. Lyon
District Court Judge

APPROVED AS TO FORM:


_____
Gerald E. Nielson, Esq.
Attorney for Plaintiffs


_____
Ronald G. Russell, Esq.
Royce B. Covington, Esq. of
PARR WADDOUPS BROWN GEE & LOVELESS
Attorneys for Defendants Lynn Brown,
Duane Johnson, Wayne Johnson,
Michael McMillan, and Randy Sessions

CERTIFICATE OF SERVICE

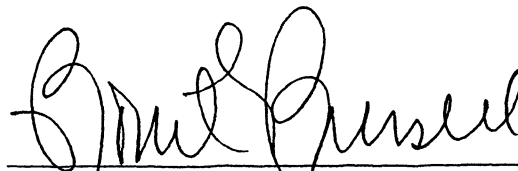
I hereby certify that on the 18th day of April, 2006 a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed, postage prepaid, to:

Gerald E. Nielson, Esq.
3737 Honeycut Road
Salt Lake City, Utah 84106

Parker M. Nielson, Esq.
655 South 200 East
Salt Lake City, Utah 84111

Kelly W. Wright, Esq.
Post Office Box 886
48 West Young Street
Morgan, Utah 84050

Brent A. Bohman, Esq.
157 North Commercial Street, Suite 3
Post Office Box 120
Morgan, Utah 84050

A handwritten signature in black ink, appearing to read "Ronald G. Russell", written over a horizontal line.

Ronald G. Russell, Esq.

SECOND DISTRICT
MORGAN COUNTY

01 JUL 30 AM 9:32

Brent A. Bohman (#4275)
157 North Commercial Street, Suite 3
P.O. Box 120
Morgan, Utah 84050

Attorney for Wayne Johnson, Clark Sessions,
Duane Johnson, Randy Session, Michael McMillan
and Lynn Brown

IN THE SECOND JUDICIAL DISTRICT COURT
IN THE FOR MORGAN COUNTY, UTAH

JODI CONATSER, KEVIN CONATSER,)
LACEY CONATSER, and NICOLE MANN,)

Plaintiffs,)

vs.)

WAYNE JOHNSON, CLARK SESSION,)
SHANE E. MATTHEWS, Deputy Sheriff of)
Morgan County, DUANE JOHNSON,)
RANDY SESSION, MICHAEL McMILLAN,)
LYNN BROWN, GERALD STOUT, JOHN)
and JANE DOES, 6-25,)

Defendants.)

**AFFIDAVIT OF
RANDY SESSIONS**

Civil No.: 500092

Judge W. Brent West

STATE OF UTAH)
COUNTY OF Morgan) : ss.

I, Randy Sessions, being first duly sworn, do hereby state as follows:

1. I am a defendant in the above captioned lawsuit wherein Plaintiffs seek a declaratory order determining the right of the public in and to the bed of the Weber River.

00042

2. Contrary to the allegations of the Complaint, however, I do not personally own or claim to own any interest in any lands which constitute the bed of the Weber River.

3. Further Affiant sayeth not.

DATED this 25 day of July, 2001.

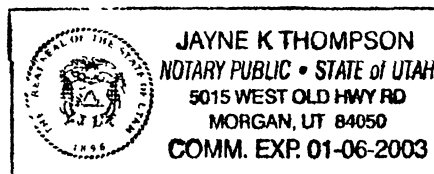
Randy Sessions
Randy Sessions

SUBSCRIBED AND SWORN to before me, RANDY SESSIONS, on this 25th day of July, 2001.

Jayne K. Thompson
Notary Public

My Commission Expires:

_____



CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2001, I caused a true and correct copy of the foregoing **Affidavit of Randy Sessions** be mailed, postage prepaid, to the following:

Gerald E. Nielson
3737 Honeycut Road
Salt Lake City, UT 84106

Brent A. Botman

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
MORGAN COUNTY, STATE OF UTAH**

JODI CONATSER, KEVIN CONATSER,
LACEY CONATSER, and NICOLE
MANN,

Plaintiffs,

vs.

WAYNE JOHNSON, CLARK
SESSIONS, SHANE E. MATTHEWS,
Deputy Sheriff of Morgan County,
DUANE JOHNSON, RANDY
SESSIONS, MICHAEL McMILLAN,
LYNN BROWN, GERALD STOUT,
JOHN and JANE DOES 6-25.

Defendants.

**MEMORANDUM DECISION
GRANTING DECLARATORY
JUDGMENT**

050500092
Civil No. ~~050701817~~
Judge Michael D. Lyon

This action for a declaratory judgment arises out of a dispute between these parties regarding the Plaintiffs' rights to use a portion of the Weber River. The Plaintiffs moved for summary judgment on September 17, 2002. The Court previously granted a motion to dismiss Defendant Shane E. Matthews. On September 30, 2005, the remaining Defendants moved for summary judgment to dismiss the Defendants' claims. The Court heard oral argument on September 30, 2005. Following the hearing, both parties submitted supplemental briefs on the issue of Plaintiffs' standing. Having now carefully considered the parties' briefs and having heard argument, the Court denies the Defendants' motion in part and gives a declaratory judgment.

Background

The relevant facts are not in dispute. On or about June 4, 2000, Plaintiffs put a rubber raft in the Weber River at a public access point and proceeded to float down the river to another public access point where they exited the river. Between the public access points, the river crosses parcels of property that are in private ownership. Plaintiffs touched the streambed in the following ways: (1) the raft in which they rode touched or skidded along the bottom in shallow areas, (2) their paddles or oars touched the bottom on occasion, (3) Plaintiff Kevin Conatser's fishing tackle came in contact with the bottom, (4) Kevin Conatser intentionally got out of the raft, and walked along the bottom of the river to facilitate his fishing and to manipulate fencing that had been strung over the river by the property owners.

On two occasions prior to June 4, 2000, the Defendants told the Plaintiffs that they were trespassing. On June 4, 2000, Defendants Duane Johnson and Wayne Johnson confronted the Plaintiffs and ordered Plaintiffs off of the river. Specifically, Duane and Wayne Johnson told the Plaintiffs to pick up their raft and walk out via a parallel railroad easement. The Plaintiffs refused to walk out and continued downstream to a public access point, where the Johnsons and the Morgan County Deputy Sheriff were waiting for them. The Deputy Sheriff cited Mr. and Mrs. Conatser for criminal trespass. The Morgan County Justice Court found the Plaintiffs guilty. After Plaintiff's appeal to the district court, the county moved to dismiss the charges because of the uncertainty regarding the Conatsers' status as trespassers.

Analysis

A. Plaintiffs Meet the Requirements to Seek a Declaratory Judgment

Utah's Declaratory Judgment Act authorizes the Court to declare the respective rights or status between parties. Utah Code Ann. § 78-33-1. The purpose of the Declaratory Judgment Act is to "settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" and it is to be liberally administered. *Id.* at § 78-33-12; *Salt Lake County v. Salt Lake City*, 570 P.2d 119, 121 (Utah 1977) (stating that courts "will be indulgent in entertaining actions to achieve [the Act's] objective). Nevertheless, four requirements must be met before the Court can give a declaratory judgment: "(1) there must be a justiciable controversy, (2) parties whose interests are adverse, (3) a legally protectible interest residing with the party seeking relief, and (4) issues ripe for judicial determination." *Miller v Weaver*, 66 P.3d 592, 597 (Utah 2003) (citing *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983)).

The Declaratory Judgment Act "allows for a wide interpretation of what constitutes a justiciable controversy." *Salt Lake Co. Comm'n v. Short*, 985 P.2d 899, 903 (Utah 1999). It is sufficient that the parties are adverse, the plaintiff asserts a bona fide claim, and the issues are ripe for adjudication. *Id.* In this case, the parties are adverse as the Plaintiffs' interests to be on the river are directly in conflict with the Defendants' attempts to prevent the Plaintiffs' use.

An issue is ripe for determination when it has "sharpened into an actual or imminent clash of rights" and where the issue presents a concrete set of facts. *Pett v. Autoliv ASP, Inc*, 106 P.3d 705, 706 (stating that a mere difference of opinion regarding a hypothetical application of the law to a situation in which the parties might one day find

themselves is unripe). The Plaintiffs have had actual clashes with the Defendants on several occasions. This case presents a concrete set of facts regarding the Plaintiffs' actual use of this portion of the Weber River. This case does not present an academic controversy or require an advisory opinion.

The Plaintiffs must also have a legally protectible interest in the controversy. A legally protectible interest is "one that the substantive law recognizes as belonging to or being owned by the party." *Alternative Options and Services for Children v. Chapman*, 106 P.3d 744, 750 (Utah Ct. App. 2004) (quoting *In re Marriage of Gonzalez*, 1 P.3d 1074 (Utah 2000)). This requires that the plaintiff have an interest that is distinct from that shared by the general public. *Jenkins*, 675 P.2d at 1148-50 (holding that the airing of generalized grievances and the vindication of public rights are properly addressed to the legislature). In *Jenkins*, the plaintiff sought a declaratory judgment stating that public schools could not hire state legislators. *Id.* at 1148. The court held that plaintiff's reliance on his status as a taxpayer and citizen "d[id] nothing to distinguish himself from any member of the public at large," and that the plaintiff did not claim any particularized injury. *Id.* at 1151 (stating that plaintiff lacked the harm that persons living in the affected school districts or legislative districts would have).

In this case, the Plaintiffs have repeatedly used a portion of the Weber River. The Defendants have individually interfered with Plaintiffs' use of the river on multiple occasions. Plaintiffs Kevin Conatser and Jodi Conatser were arrested and convicted, although dismissed on de novo appeal, of criminal trespass in the justice court. Although the Plaintiffs share an interest in using Utah's natural waters with the general public, the Plaintiffs have also repeatedly used a particular portion of the Weber River, intend to

continue doing so, and have suffered particularized injury of interference, which sets them apart from the general public.

A legally protectible interest requires that Plaintiffs' interest be protectible. *Miller v. Weaver*, 66 P.3d 592, 597 (Utah 2003). Once given, a declaratory judgment must be able to provide specific relief. *Id.* In *Miller*, the plaintiffs sought a declaration that a teacher's classroom conduct was unconstitutional. *Id.* The court refused to give a declaratory judgment because its declaration would not terminate the uncertainty or end the controversy. *Id.* The court noted that a declaratory judgment would not serve a useful purpose as the teacher would remain employed, students would continue to be placed in her class, and the school board would still have the discretion to refuse action on the plaintiffs' complaints. *Id.* The Defendants argue that a legally protectible interest requires some property interest. The Court disagrees. Here, the Plaintiffs seek a declaration of the respective rights between themselves and these Defendants. The Court finds that there is a longstanding and continuing uncertainty between these parties regarding Plaintiffs' rights to use this portion of the river. Both the Plaintiffs and the Defendants have actively sought to assert the rights each side believes the law provides to them. Their dispute comes not from a disregard of the law, but a genuine uncertainty as to their respective rights. A declaratory judgment will end this uncertainty and therewith the controversy.

The Plaintiffs have requested a broad declaration of the public's rights to rivers and waters in Utah. A declaratory judgment only settles the legal rights between the parties to the proceeding. Utah Code Ann. § 78-33-11. The Court's judgment will not exceed the Plaintiffs' interests or prejudice any persons not made parties to the

proceeding. For this reason, the Court cannot consider the broad relief requested by the Plaintiffs. The Court will only declare the Plaintiffs' rights to use the river with respect to these Defendants. Similarly, the Defendants argued that the State of Utah and the record owners of the property in question are necessary parties. However, a fair determination as to the respective rights between these particular parties on claims arising from their own behavior will not prejudice any person not made a party to this case.

The Plaintiffs have asked the Court to declare as a matter of law that the public has the right to walk along the beds of streams and rivers. Plaintiffs cite to Montana law, which has recognized this right. *See* Montana Code Ann. § 23-2-301 *et seq.* Declaring such a right would require the weighing of competing interests that is better left for the legislature. The Court, therefore, denies this relief.

The purpose of the Declaratory Judgment Act is to resolve controversies and uncertainty. Utah Code Ann. § 78-33-12. The act is intended to be remedial without requiring parties to get in serious trouble first. *Alternative Options and Services for Children*, 106 P.3d at 749. Prior to June 4, 2000, Defendant Michael McMillan confronted Kevin Conatser and ordered him off the river. Kevin Conatser's Aff. at ¶ 3. On another occasion prior to June 4, 2000, Clark Sessions acting for Randy Sessions ordered Kevin Conatser off of the river. *Id.* at ¶ 4. There have been threats of violence between these parties. Verified Complaint at ¶ 11. The Conatser's were arrested and convicted of criminal trespass. The Court finds that there has been a continuing controversy between these parties for years. The Defendants argue that because the hostilities and use of the river have ceased, a declaratory judgment is inappropriate. However, the Court finds that the parties' dispute has not ceased, but has been placed on

hold out of respect for the role of the courts. A declaratory judgment will end this controversy. This case is ideally suited to the stated purpose of the Declaratory Judgment Act. The Court, therefore, concludes that this case is properly before the Court and that a declaration of the respective rights between these parties is appropriate.

B. Plaintiffs' Use of the Public Easement to Float on Natural Waters Does Not Constitute a Trespass

The parties urge the Court to make a determination of the navigability of the Weber River. The parties have provided the Court with no evidence of whether the Weber River has ever been used for commerce or of the river's capability to be so used. The Court, therefore, will not address navigability on this motion. However, as discussed below, this case does not require either a determination of bed ownership or navigability.

"All waters" in this state are the property of the public. Utah Code Ann. § 73-1-1. Individuals, therefore, have no ownership interest in natural waters. The Utah Supreme Court has recognized a public easement over natural waters. *J.J.N.P. Co. v. State Div. of Wildlife Res.*, 655 P.2d 1133 (Utah 1982). The public does not trespass when upon natural waters, regardless of who owns the bed beneath the water. *Id.* "Irrespective of the ownership of the bed and irrespective of navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water." *Id.* (citing *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961)). This right to be on public waters applies to the section of the Weber River at issue in this case. The Defendants have no legal right to prevent the Plaintiffs from making use of the public's easement to float down the Weber River. The

Defendants have no legal right to erect fences to prevent the Plaintiffs from utilizing the public's easement to float down the river.

When floating on natural waters, a person may scrape the river bed or touch the bed by the grounding of craft. *Day*, 362 P.2d at 146. These are necessary incidents to the use of that easement and do not constitute a trespass. *Id.* at 145-46. Even the "right to disembark and pull, push, or carry over shoals, rapids, or obstacles accompany the right of flotation" on natural waters. *Id.* at 146. A person may walk along the banks in order to bypass an obstacle or danger in order to continue floating. *Id.* As long as the person is as minimally intrusive on the private owner's land as possible there is no trespass. *Id.*

However, where the use of the stream bed is more than incidental to the right of floating on natural waters, the use constitutes a trespass. *Id.* This would include wading or walking along the river. In this case, the Plaintiffs, with the exception of Kevin Conatser, never left their raft and, therefore, did not trespass on the property in question. When Kevin Conatser got back in his raft he was no longer trespassing. Walking out along the parallel railroad easement was unnecessary. These rights are both already recognized in Utah and in line with the clear majority of western states.

Conclusion

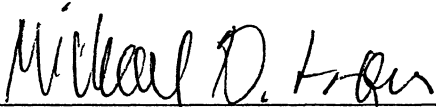
This case presents a justiciable controversy, ripe for judicial determination, between private citizens whose interests are adverse, and have been so over time, regarding the rights and limitations of the Plaintiffs when floating the Weber River abutting the Defendants' property. The Weber River belongs to the public, and the Defendants, as members of the public, have a legally protectible interest in the public

easement over these natural waters, free of Defendants' interference, provided they stay within the bounds of the holding of *J.J.N.P. Co.*

In granting the circumscribed relief found in this decision, the Court settles the longstanding and continuing uncertainty and insecurity concerning the parties' rights to the river. In doing so, it declares the rights of the parties only, no one else. The Court exercises its discretion to grant a declaratory judgment because it feels that it is the place of a court to obviate future potential confrontations between the parties and to facilitate a peaceful co-existence. If courts do not act in these situations in society, people resort to self-help and anarchy.

The Court requests that Mr. Russell prepare the appropriate findings of fact, conclusions of law, and judgment.

Dated this 15 day of December, 2005.


_____
Michael D. Lyon, Judge

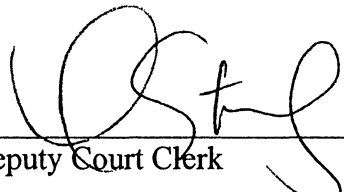
CERTIFICATE OF MAILING

I hereby certify that on the 14 day of December, 2005, I sent a true and correct copy of the foregoing memorandum decision to counsel as follows:

Gerald E. Nielson
Counsel for Plaintiffs
3737 Honeycut Road
Salt Lake City, Utah 84106

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Counsel for Plaintiffs
655 South 200 East
Salt Lake City, Utah 84111

Ronald G. Russell
Royce B. Covington
Counsel for Defendants (excepting Shane Matthews)
185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1537


_____
Deputy Court Clerk

C

J.J.N.P. Co. v. State, By and Through Div. of
 Wildlife Resources Utah, 1982.

Supreme Court of Utah.

J.J.N.P. COMPANY, a Utah corporation, Plaintiff
 and Appellant,

v.

STATE of Utah, By and Through its DIVISION OF
 WILDLIFE RESOURCES, Defendant and

Respondent.

No. 17183.

Sept. 22, 1982.

Owner of land surrounding lake appealed from a judgment of the Third District Court, Salt Lake County, David B. Dee, J., upholding the Division of Wildlife Resources' denial of a permit to establish a private fish installation, entering a declaratory judgment that the public had recreational rights in the waters of the lake even though it was entirely surrounded by landowners' property, and ruling that a dirt road crossing the property was a public road. The Supreme Court, Stewart, J., held that: (1) the public had recreational rights in the waters of the lake even though it was entirely surrounded by landowners' property; (2) the statute prohibiting private fish installations on natural watercourses, but allowing them on man-made watercourses, did not deny equal protection; and (3) where the issue of the dirt road was not raised in the pleadings, but was tried by mutual consent, there was no error in deciding that issue.

Affirmed.

Hall, C.J., filed a dissenting opinion.
 West Headnotes

[1] Navigable Waters 270 4

270 Navigable Waters

270I Rights of Public

270k4 k. Ownership of Waters. Most Cited Cases

Though navigability is standard used to determine title to water beds, it does not establish extent of state's interest in waters of state.

[2] Waters and Water Courses 405 130

405 Waters and Water Courses

405VI Appropriation and Prescription

405k130 k. Waters and Rights Subject to Appropriation. Most Cited Cases
 Individuals have no ownership interest as such in natural waters, but only right to put water to certain uses.

[3] Waters and Water Courses 405 133

405 Waters and Water Courses

405VI Appropriation and Prescription

405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases

Waters and Water Courses 405 142

405 Waters and Water Courses

405VI Appropriation and Prescription

405k141 Nature and Extent of Rights Acquired

405k142 k. In General. Most Cited Cases

Right to beneficial use of water may be acquired only by compliance with legal procedures for appropriation of given right, but appropriation does not confer ownership interest in water itself.

[4] Waters and Water Courses 405 127

405 Waters and Water Courses

405VI Appropriation and Prescription

405k127 k. Appropriation and Prescription in General. Most Cited Cases

State regulates use of water, in effect, as trustee for benefit of people.

[5] Waters and Water Courses 405 127

405 Waters and Water Courses

405VI Appropriation and Prescription

405k127 k. Appropriation and Prescription in General. Most Cited Cases

Public ownership of water is founded on principle that water, a scarce and essential resource in this area of the country, is indispensable to welfare of all people and state must therefore assume responsibility of allocating use of water for benefit of welfare of people of state as a whole.

[6] Waters and Water Courses 405 127

405 Waters and Water Courses

405VI Appropriation and Prescription

405k127 k. Appropriation and Prescription in General. Most Cited Cases

Doctrine of public ownership of water is basis upon which state regulates use of water for benefit and well-being of people.

[7] Navigable Waters 270 16

270 Navigable Waters

270I Rights of Public

270k15 Navigation

270k16 k. In General. Most Cited Cases

Navigable Waters 270 36(5)

270 Navigable Waters

270II Lands Under Water

270k36 Ownership and Control in General

270k36(5) k. Trespass to Submerged Lands, and Actions Therefor. Most Cited Cases

Corollary of proposition that public owns water is rule that there is public easement over water regardless of who owns water beds beneath water and therefore, public waters do not trespass in areas where they naturally appear, and public does not trespass when upon such waters.

[8] Navigable Waters 270 16

270 Navigable Waters

270I Rights of Public

270k15 Navigation

270k16 k. In General. Most Cited Cases

Navigable Waters 270 29

270 Navigable Waters

270I Rights of Public

270k28 Public Uses Other Than Navigation

270k29 k. In General. Most Cited Cases

Irrespective of ownership of land and navigability of water, public, if it can obtain lawful access to body of water, has right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water.

[9] Waters and Water Courses 405 109

405 Waters and Water Courses

405IV Natural Lakes and Ponds

405k109 k. Nature and Extent of Riparian Rights in General. Most Cited Cases

Ownership of all lands surrounding lake did not

confer ownership of water on landowner.

[10] Waters and Water Courses 405 36

405 Waters and Water Courses

405II Natural Water Courses

405II(A) Riparian Rights in General

405k36 k. Power to Control and Regulate Water Courses. Most Cited Cases

State need not show compelling state interest to justify discrimination between natural and unnatural watercourses.

[11] Constitutional Law 92 213.1(2)

92 Constitutional Law

92XI Equal Protection of Laws

92k213.1 Bases for Discrimination Affected in General

92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest. Most Cited Cases

Compelling state interest need be demonstrated only when discrimination affects fundamental rights or when suspect classifications are involved.

[12] Constitutional Law 92 213.1(2)

92 Constitutional Law

92XI Equal Protection of Laws

92k213.1 Bases for Discrimination Affected in General

92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest. Most Cited Cases

When neither fundamental right nor suspect classification is involved, equal protection requires that statutory classifications bear reasonable relation to purpose sought to be accomplished and that there be reasonable basis for distinction between classes and classifications are not unreasonable or arbitrary as long as similarly situated people are dealt with in similar manner and people situated differently are not treated as if their circumstances were the same.

[13] Constitutional Law 92 208(1)

92 Constitutional Law

92X Class Legislation

92k208 Class Legislation

92k208(1) k. In General. Most Cited Cases
Legislative classifications need not be applied with mathematical exactness.

[14] Constitutional Law 92 ➡ 208(1)

92 Constitutional Law

92X Class Legislation

92k208 Class Legislation

92k208(1) k. In General. Most Cited Cases

Classification may be reasonable even though some inequality results.

[15] Constitutional Law 92 ➡ 213.1(2)

92 Constitutional Law

92XI Equal Protection of Laws

92k213.1 Bases for Discrimination Affected in General

92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest.

Most Cited Cases

Discrimination is invalid only if there is no reasonable basis for classification.

[16] Constitutional Law 92 ➡ 48(6)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(4) Application to Particular Legislation or Action or to Particular Constitutional Questions

92k48(6) k. Classification, Uniformity and Discrimination; Special or Local Laws. Most Cited Cases

Presumption of constitutionality is extended to statutes not affecting fundamental rights or based on suspect classifications, and that presumption is sufficient to sustain constitutionality of classification created by statute unless classification creates invidious discrimination or bears no rational relationship to legitimate state purpose.

[17] Constitutional Law 92 ➡ 236

92 Constitutional Law

92XI Equal Protection of Laws

92k236 k. Game and Fish Laws. Most Cited Cases

Fish 176 ➡ 9

176 Fish

176k9 k. Constitutional and Statutory Provisions.

Most Cited Cases

Statute prohibiting operation of private fish installations on natural waters or on reservoirs constructed on natural stream channels, but allowing such installations on man-made watercourses, did not deny equal protection, notwithstanding fact that State allowed such private fish installations where installations were constructed prior to effective date of statute. U.C.A.1953, 23-15-10.

[18] Appeal and Error 30 ➡ 889(3)

30 Appeal and Error

30XVI Review

30XVI(D) Amendments

30k889 Amendments Regarded as Made

30k889(3) k. To Conform to Evidence or Correspond with Verdict or Judgment. Most Cited Cases

There was no error in deciding issue tried by mutual consent though it was not raised in pleadings.

*1135 Paul N. Cotro-Manes, Salt Lake City, for plaintiff and appellant.

Robert B. Hansen, Richard Dewsnup, Dallin W. Jensen, Michael M. Quealy, Salt Lake City, for defendant and respondent.

STEWART, Justice:

J.J.N.P. Co. brought this action challenging, on equal protection grounds, the constitutionality of U.C.A., 1953, § 23-15-10,^{FN1} which prohibits the operation of private fish installations on natural waters or on reservoirs constructed on natural stream channels. The plaintiff also challenges the Division of Wildlife Resources' denial of a permit to establish a private fish installation and the trial court's adjudication of the State's claim that a dirt road crossing plaintiff's property is a public road. The State of Utah counterclaimed for a declaratory judgment that the public has recreational rights in the waters of a natural lake even though it is entirely surrounded by plaintiff's land. The trial court ruled in favor of the State on all issues. We affirm.

FN1. U.C.A., 1953, § 23-15-10, in full text states:

It is unlawful for any person to develop or operate a 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 under 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.

J.J.N.P., a limited partnership created under the laws of Utah, owns approximately 1200 acres in Lake Canyon, Duchesne County. Lake Canyon Lake is a natural lake surrounded on all sides by property owned by J.J.N.P. 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. The lake is fed by natural springs in its bed and a small stream approximately 24 to 36 inches wide and 3 inches deep at full course, with headwaters approximately six miles above the lake on State land. A stream of similar size flows intermittently out of the lake during high water levels for approximately 300 yards before it disappears into the ground.

Prior to 1978, the State had an agreement with J.J.N.P.'s predecessors in interest allowing public access to the lake across their land.^{FN2} The State managed the lake, eliminated trash fish, stocked trout, and set and enforced fishing seasons and limits. When this agreement expired, J.J.N.P. filed an application with the Division of Wildlife Resources for a permit for a private fish installation. The Division denied the application pursuant to § 23-15-10, which provides in part that "no such [private fish] installation shall be developed on natural waters or natural flowing streams, or reservoirs constructed on natural stream channels."

FN2. The record does not include a copy of the lease executed between J.J.N.P.'s predecessor in interest and the State of Utah. Testimony at trial, however, indicated that under the terms of the lease, the State managed the waters and performed certain duties with the permission of the owners.

Seven miles below Lake Canyon Lake is another natural lake known as "Lower Lake" which sustains a private fish installation. At trial, Donald Andriano, Chief of Fisheries for the Division of Wildlife Resources, testified that the initial permit authorizing this fishery was issued before the Legislature enacted § 23-15-10 in 1971 and that the Division renewed the permits yearly because the owner had made substantial investments in the lake property. Andriano testified that fewer than six such permits

for private fisheries on natural lakes and streams are issued annually.

A gravel road extends from the mouth of Lake Canyon past Lake Canyon Lake to U.S. Forest Service lands. For more than ten years, Duchesne County graded and maintained the road for public use. J.J.N.P. attempted to restrict access to its *1136 lands, and necessarily the government lands beyond, by placing a gate across the gravel road. County officials and others removed the obstructions within 24 hours, and J.J.N.P. abandoned the effort.

I. RIGHTS IN PUBLIC WATERS

[1][2][3] The State in its counterclaim asserts that Lake Canyon Lake is navigable and therefore subject to a public servitude for recreational use. Although "navigability" is a standard used to determine title to waterbeds, *Monroe v. State*, 111 Utah 1, 175 P.2d 759 (1946), it does not establish the extent of the State's interest in the waters of the State. See Comment, *Basis for the Legal Establishment of a Public Right of Recreation in Utah's "Non-Navigable" Waters*, 5 J.Contemp.L. 95 (1978). Section 73-1-1 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." (Emphasis added.) Thus, individuals have no ownership interest as such in natural waters, only the right to put the water to certain uses.^{FN3} "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state," § 73-1-3, and the right to beneficial use may be acquired only by compliance with the legal procedures for appropriation of a given right. But appropriation does not confer an ownership interest in the water itself. *Daniels Irrigation Co. v. Daniel Summit Co.*, Utah, 571 P.2d 1323 (1977); *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 67 P. 672 (1902).

FN3. In *Adams v. Portage Irrigation, Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937), this Court stated:

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 coequal 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 winds or the sunshine. "Such water," says Blackstone, "is a movable, wandering thing," ... like wild birds on the wing. *Id.* at 11, 72 P.2d at 652-53. See also *Deseret Livestock v. Sharp*, 123 Utah 353, 259 P.2d 607 (1953).

[4][5][6] The State regulates the use of the water, in effect, as trustee for the benefit of the people. *Tanner v. Bacon*, 103 Utah 494, 516, 136 P.2d 957, 966-967 (1943) (Larson, J., concurring). Accord *Day v. Armstrong*, Wyo., 362 P.2d 137 (1961); see also *Ne-Bo-Shone Association v. Hogarth*, 7 F.Supp. 885 (W.D.Mich.1934), *aff'd*, 81 F.2d 70 (6th Cir.1936). Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole. The doctrine of public ownership is the basis upon which the State regulates the use of water for the benefit and well being of the people. *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971).

[7] A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water. Therefore, public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters. *Day v. Armstrong*, Wyo., 362 P.2d 137 (1961). Furthermore, state policy recognizes an interest of the public in the use of state waters for recreational purposes by requiring that recreational uses be considered by the State Engineer before he approves an application for appropriation, § 73-3-8, or permits the relocation of a stream, § 73-3-29.

*1137 [8] Private ownership of the land underlying natural lakes and streams does not defeat the State's power to regulate the use of the water or defeat whatever right the public has to be on the water. Irrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water. *Day v. Armstrong*, Wyo., 362 P.2d 137 (1961); *Southern Idaho Fish and Game Association v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974).
FN4

FN4. A number of state jurisdictions have found a public right to recreation in public waters: California, *People v. Sweetser*, 72 Cal.App.3d 278, 140 Cal.Rptr. 82 (1977); *People v. Mack*, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448 (1971); Idaho, *Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974); Minnesota, *Johnson v. Seifert*, 257 Minn. 159, 100 N.W.2d 689 (1960); Missouri, *Elder v. Delcours*, 364 Mo. 835, 269 S.W.2d 17 (1954); New Mexico, *State v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945); North Dakota, *Roberts v. Taylor*, 47 N.D. 146, 181 N.W. 622 (1921); Oklahoma, *Curry v. Hill*, 460 P.2d 933 (1969); Oregon, *Luscher v. Reynolds*, 153 Or. 625, 56 P.2d 1158 (1936); South Dakota, *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937); Washington, *Snively v. Jaber*, 48 Wash.2d 815, 296 P.2d 1015 (1956), *Kemp v. Putnam*, 47 Wash.2d 530, 288 P.2d 837 (1955); Wyoming, *Day v. Armstrong*, 362 P.2d 137 (1961).

[9] In effect J.J.N.P. claims rights in Lake Canyon Lake based solely on its ownership of the surrounding land. It has no right of appropriation granted by the State Engineer. To permit the acquisition of water rights in the manner claimed would violate the public ownership doctrine and the state statutes regulating appropriation. State water law excludes every means of appropriation except by application to the State Engineer. U.C.A., 1953, § 73-3-1.

II. EQUAL PROTECTION

J.J.N.P. attacks § 23-15-10 on equal protection grounds under the Fourteenth Amendment to the United States Constitution and Article I, § 24 of the Utah Constitution. The argument is that the statutory classification which prohibits private fish installations on natural watercourses, reservoirs on such watercourses, and lakes, but allows them on manmade watercourses, constitutes an unconstitutional discrimination. It is also contended that the State, in allowing a private fish installation on Lower Lake, a natural watercourse, discriminates against J.J.N.P. In addition, plaintiff argues that § 23-15-10, read in light of § 23-20-14, which empowers property owners to exclude hunters and fishermen from their property, is unreasonable and arbitrary.

[10][11] As part of its equal protection argument, J.J.N.P. contends that the State must show a compelling state interest to justify a discrimination between natural and unnatural watercourses. The argument is without merit. A compelling state interest need be demonstrated only when the discrimination affects fundamental rights or when suspect classifications are involved. Utah Public Employees' Association v. State, Utah, 610 P.2d 1272 (1980). The building or maintaining of a private fish installation on public water is not a fundamental right, and the restriction of such installations to manmade watercourses is not a suspect classification.

[12][13][14][15] When neither a fundamental right nor a suspect classification is involved, equal protection requires that statutory classifications bear a reasonable relation to the purpose sought to be accomplished and that there be a reasonable basis for the distinction between the classes. Classifications are not unreasonable or arbitrary as long as similarly situated people are dealt with in a similar manner and people situated differently are not treated as if their circumstances were the same. Abrahamsen v. Industrial Commission, 3 Utah 2d 289, 283 P.2d 213 (1955); State v. Mason, 94 Utah 501, 78 P.2d 920 (1938). Legislative classifications need not be applied with mathematical exactness. Baker v. Matheson, Utah, 607 P.2d 233 (1979). A classification may be reasonable even though some inequality results. Crowder v. Salt Lake County, Utah, 552 P.2d 646 (1976). Thus, *1138 the law holds a discrimination invalid only if there is no reasonable basis for the classification. Leetham v. McGinn, Utah, 524 P.2d 323 (1974); Justice v. Standard Gilsonite Co., 12 Utah 2d 357, 366 P.2d 974 (1961).

[16] A presumption of constitutionality is extended to statutes not affecting fundamental rights or based on suspect classifications, and that presumption is sufficient to sustain the constitutionality of the classification created by a statute unless the classification creates an invidious discrimination or bears no rational relationship to a legitimate state purpose. Baker v. Matheson, Utah, 607 P.2d 233 (1979); Purdie v. University of Utah, Utah, 584 P.2d 831 (1978); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

[17] In prohibiting private fish installations on natural watercourses, § 23-15-10 does not impose an invidious discrimination. The State has the right, as owner of all waters in the State, to prevent private citizens from using public waters for private uses, whether commercial or otherwise. The statute in question protects that right and serves to preserve natural waters for public use and enjoyment, regardless of who owns the bed or surrounding land. Furthermore, the State may lawfully prevent the placing of foreign objects in the water, such as would be necessary for a fishery, to preserve the natural beauty of lakes and to protect whatever native wildlife may make use of the water. Fisheries on appropriated waters in manmade channels do not interfere with any of the above purposes. We conclude that § 23-15-10 promotes legitimate state interests and that the classification between natural and manmade watercourses is reasonable. It follows that the statute is constitutional.

Furthermore, J.J.N.P. is in a different position than parties who operate private fish installations on unnatural watercourses. For water to reach unnatural watercourses it must be appropriated and diverted. Appropriated water is to be used for the purposes stated in the application. J.J.N.P. has limited water rights in the water,^{FN5} but it does not own the water in the lake even though the lake is surrounded by J.J.N.P. land.

FN5. J.J.N.P. does possess a diligence claim entitling it to use Lake Canyon Lake water for watering cattle. J.J.N.P. has applied to the State Engineer to appropriate water for irrigation of its land, but the record does not show that this application has been approved.

J.J.N.P.'s further contention that the fish installation on Lower Lake violates its right to equal protection is

also unpersuasive. Section 23-15-10 was enacted in 1971, after the Lower Lake installation was built. The statute contains no express grandfather provision for fish installations on natural watercourses existing at the time of passage of the act. However, the statute does differentiate between old and new fish installations. As to the latter, the statute prohibits the development of all new installations on natural waters. As to the former, fish installations that already existed in natural water at the time the act was passed could continue to operate under certification by the Division of Wildlife Resources. The Division, congruent with the act, has annually renewed the Lower Lake permit in recognition of the owner's financial investment in the then existing facilities.

J.J.N.P. also argues that § 23-15-10, in prohibiting private fisheries on natural watercourses, is inconsistent with a landowner's right to exclude sportsmen from his property pursuant to § 23-20-14. J.J.N.P. asserts that § 23-15-10's purpose is to provide the public with fishing areas and, because private landowners may restrict public access to natural waters, that purpose is unachievable in the instant case. That conclusion does not follow. The right to use public waters for pleasure purposes is no less a right just because some landowners, for reasons sufficient to themselves, prohibit public access over their land to reach those public waters.^{FN6} Clearly, J.J.N.P. *1139 could prohibit all overland access to Lake Canyon Lake. However, access to bodies or streams of water is not necessary to the securing of certain legitimate state interests, such as the protection of wildlife. Furthermore, remote bodies of water are now accessible by air.

^{FN6}. As to whether the public has an easement in the beds of streams and lakes, we express no opinion. For differing rules compare Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974), with Day v. Armstrong, Wyo., 362 P.2d 137 (1961).

The contention that the State wrongfully denied J.J.N.P.'s application for a permit is not supportable.

III. THE DIRT ROAD

[18] The trial court concluded that the dirt road through Lake Canyon was a public road. J.J.N.P. does not challenge the correctness of that conclusion,

but rather contends that the trial court should not have decided the issue since it was not raised on the pleadings. Although the issue was not properly pleaded, the record plainly indicates that both parties litigated the issue of the road. "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.... [F]ailure so to amend does not affect the result of the trial of these issues." Rule 15(b), U.R.Civ.P. Treating actually litigated issues as if they had been properly pleaded serves the ends of justice, whether the pleadings are actually amended or not. First Security Bank of Utah v. Colonial Ford, Utah, 597 P.2d 859 (1979). Since the issue was tried by mutual consent, there was no error in deciding the issue.

Affirmed. No costs.

OAKS, and HOWE, JJ., and J. HARLAN BURNS, District Judge, concur.

DURHAM, J., does not participate herein; BURNS, District Judge, sat.

HALL, Chief Justice (dissenting):

The majority opinion fails to delineate a legitimate state purpose for distinguishing natural lakes and streams from manmade watercourses and, indeed, it appears that there is none.

The controversy in this case arose when plaintiff decided not to continue the lease to the State by which its predecessors in interest granted access to the public across their land during the winter months for ice fishing. Since the public no longer had any access to the lake, the Division refused to stock the water with fish. Plaintiff then undertook to stock the lake, and applied to the Division for permission to do so. But because the lake is natural, only the Division has the right to stock the waters with fish. Pursuant to the provisions of U.C.A., 1953, 23-15-10, by prohibiting a private installation, the State has reserved to itself the exclusive right to engage in the fish hatchery business.

I am unable to determine that the statute promotes any public purpose. As acknowledged by Mr. Andriano in his testimony before the court, the sole reason for the statutory enactment was to afford the public a right to fish the natural lakes of this state. Notwithstanding the worthiness of that purpose, application of the statute in the instant case does not provide the public with a fishing site that would otherwise be unavailable. The public has a right to fish these waters, but the right is not absolute. The

public must first gain lawful access to the waters without trespassing upon the land in private ownership.

Plaintiff has asserted its common law right to keep its private property private, which it has every right to do. The right to private property is one of our oldest and most cherished rights, and is protected against unauthorized invasion by the State by the Fourteenth Amendment to the U.S. Constitution, and by Article I, Section 22, Constitution of Utah. But how does releasing fish into the waters by someone other than the State violate the public's interests in the water? The majority opinion's assertion that raising fish in the lake somehow *1140 converts the public waters to private waters seems to me a nonsequitur.^{FN1}

FN1. It might be asserted that such fish would continue to be the private property of plaintiff so that the public could not take the fish from the lake even if lawful access to the waters was gained. But see U.C.A., 1953, 23-13-8, where it is provided that wildlife which escapes from a private wildlife farm becomes the property of the State. Though we do not have a similar statute with respect to fish, reason would dictate that if plaintiff voluntarily releases fish into public waters it relinquishes control over its private property and the fish may thereafter be caught and taken by any member of the public.

There is no issue here concerning the possibility of polluting the public waters or of the introduction of trash fish into the waters. The Division has power to regulate all private fish installations under the statute and plaintiff does not contend that it would escape regulation because of its ownership of the land surrounding the lake.

The majority opinion initially acknowledges that the waters in question are the property of the public but thereafter erroneously asserts that the State is the owner of the waters and as owner the State has the right to prevent private citizens from using the public waters for private uses. The State is not the owner of public waters; the ownership is in the public itself. As members of the public, the owners of plaintiff corporation cannot be deprived of making use of the public waters, as long as such use does not interfere with prior rights to use such water.

I am of the view that the statute fails as it does not

promote any legitimate state purpose, and I would therefore reverse the district court's judgment.

Utah,1982.

J.J.N.P. Co. v. State, By and Through Div. of
Wildlife Resources
655 P.2d 1133

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C

DAY v. ARMSTRONG Wyo. 1961

Supreme Court of Wyoming.

Kenneth DAY and John Rouse, Appellants
 (Defendants below),

v.

J. Reuel ARMSTRONG, Appellee (Plaintiff below).

R. K. Stewart, Dee G. Johnson, Charles E. Piersall,
 C. K. 'Buddy' Faught, Dr. Will Schunk, William C.
 Jensen, Carroll Noble, John C. Borzea, Verg Teeters,
 Intervenor

R. K. STEWART, Dee G. Johnson, Charles E.
 Piersall, C. K. 'Buddy' Faught, Dr. Will Schunk,
 William C. Jensen, Carroll Noble, John C. Borzea,
 Verg Teeters, Appellants (Intervenor below),

v.

J. Reuel ARMSTRONG, Appellee (Plaintiff below),
 and

Kenneth Day and John Rouse, Appellees (Defendants
 below).

Nos. 2961, 2966.

May 23, 1961.

Action for declaratory judgment respecting rights of plaintiff and those of public to go upon specified river channel as it flows across the defendants' lands. The District Court, Carbon County, Glen G. Stanton, J., entered a judgment in favor of the plaintiff and the defendants appealed. The Supreme Court, Harnsberger, J., held that the public had a right to float upon stream regardless of whether it was navigable or nonnavigable and statute attempting to regulate streams upon which public might float was unconstitutional because of its vagueness and its attempt to punish things not made criminal.

Reversed in part and remanded with directions.
 West Headnotes

[1] Navigable Waters 270 ⚓39(2)270 Navigable Waters270III Riparian and Littoral Rights270k39 Nature and Extent270k39(2) k. Title and Rights in General.Most Cited Cases**Waters and Water Courses 405 ⚓5**405 Waters and Water Courses405I Appropriation of Rights in Public Lands405k5 k. Governmental Authority and Control.Most Cited Cases**Waters and Water Courses 405 ⚓40**405 Waters and Water Courses405II Natural Water Courses405II(A) Riparian Rights in General

405k40 k. Nature and Extent of Rights in
 General. Most Cited Cases

Legislature has recognized that navigable or nonnavigable streams are usable for transportation as well as irrigation, consumption, power or mining, and subject to statutory limitations of state or federal government, actual usability of waters is sole limit of public's right to enjoy them. W.S.1957, § § 41-3, 41-224, 41-527, 41-528.

[2] Navigable Waters 270 ⚓4270 Navigable Waters270I Rights of Public

270k4 k. Ownership of Waters. Most Cited
 Cases

States 360 ⚓9360 States360I Political Status and Relations360I(A) In General360k8 New States

360k9 k. Admission of Territory. Most
 Cited Cases

Waters and Water Courses 405 ⚓5405 Waters and Water Courses405I Appropriation of Rights in Public Lands405k5 k. Governmental Authority and Control.Most Cited Cases

There is nothing in State Constitution, Act of Congress admitting state to union or any subsequent Act which limits kind or type of use State may make of its waters. W.S.1957, § § 41-527, 41-528.

[3] Navigable Waters 270 ⚓1(3)270 Navigable Waters270I Rights of Public270k1 Navigability in General270k1(3) k. Test of Navigability in General.

Most Cited Cases

Waters and Water Courses 405 ⚓5

405 Waters and Water Courses

405I Appropriation of Rights in Public Lands

405k5 k. Governmental Authority and Control.

Most Cited Cases

“Navigability” in federal sense means capability or susceptibility of waters, in their natural condition, of being used for navigation in interstate or international commerce, and “navigability” in any other sense may mean one of variety of definitions given by either of the several states of union.

[4] Navigable Waters 270 ⚓2

270 Navigable Waters

270I Rights of Public

270k2 k. Power to Control and Regulate. Most Cited Cases

Superiority of federal “control of navigable waters” exists only when they may be used in interstate or international commerce, and otherwise exclusive control is vested in state.

[5] Navigable Waters 270 ⚓2

270 Navigable Waters

270I Rights of Public

270k2 k. Power to Control and Regulate. Most Cited Cases

Navigable Waters 270 ⚓36(.5)

270 Navigable Waters

270II Lands Under Water

270k36 Ownership and Control in General

270k36(.5) k. In General. Most Cited Cases
(Formerly 270k36)

Waters and Water Courses 405 ⚓3

405 Waters and Water Courses

405I Appropriation of Rights in Public Lands

405k3 k. Title to Waters and Water Rights in Lands of the States. Most Cited Cases

Waters and Water Courses 405 ⚓42

405 Waters and Water Courses

405II Natural Water Courses

405II(A) Riparian Rights in General

405k41 Extent of Right to Use of Water

405k42 k. In General. Most Cited Cases

State may lay down its own criteria for cataloging waters as navigable or nonnavigable and may decide ownership of submerged lands irrespective of navigable or nonnavigable character of waters above them.

[6] Navigable Waters 270 ⚓4

270 Navigable Waters

270I Rights of Public

270k4 k. Ownership of Waters. Most Cited Cases

Waters and Water Courses 405 ⚓3

405 Waters and Water Courses

405I Appropriation of Rights in Public Lands

405k3 k. Title to Waters and Water Rights in Lands of the States. Most Cited Cases

Waters and Water Courses 405 ⚓36

405 Waters and Water Courses

405II Natural Water Courses

405II(A) Riparian Rights in General

405k36 k. Power to Control and Regulate Water Courses. Most Cited Cases

Title to all waters of State is in public irrespective of ownership of bed of stream or land upon which there are waters or over which waters flow, and State's right to control waters is paramount except as it may be shown that federal title to such waters was encumbered when title passed from federal government to state upon its admission to union. W.S.1957, § 1-1049 to 1-1064.

[7] Navigable Waters 270 ⚓1(3)

270 Navigable Waters

270I Rights of Public

270k1 Navigability in General

270k1(3) k. Test of Navigability in General. Most Cited Cases

Waters and Water Courses 405 ⚓5

405 Waters and Water Courses

405I Appropriation of Rights in Public Lands

405k5 k. Governmental Authority and Control.

Most Cited Cases

Test of navigability does not determine uses to which State may put its waters, even though navigability would determine title to land underlying them.

W.S.1957, § § 1-1049 to 1-1064.

[8] Navigable Waters 270 ☞16

270 Navigable Waters
270I Rights of Public
270k15 Navigation
270k16 k. In General. Most Cited Cases

Waters and Water Courses 405 ☞3

405 Waters and Water Courses
405I Appropriation of Rights in Public Lands
405k3 k. Title to Waters and Water Rights in Lands of the States. Most Cited Cases
Title to waters being in State, there is an easement on behalf of State for right-of-way through their natural channel. W.S.1957, § § 41-527, 41-528; Const. art. 8, § 1.

[9] Navigable Waters 270 ☞16

270 Navigable Waters
270I Rights of Public
270k15 Navigation
270k16 k. In General. Most Cited Cases

Waters and Water Courses 405 ☞3

405 Waters and Water Courses
405I Appropriation of Rights in Public Lands
405k3 k. Title to Waters and Water Rights in Lands of the States. Most Cited Cases
Waters within State are available for such use by public of which they are capable and when waters are able to float craft they may be so used, and right to disembark and pull, push or carry over shoals, riffles and rapids accompanies right of flotation as necessary incident to full enjoyment of public's easement. W.S.1957, § § 41-527, 41-528.

[10] Navigable Waters 270 ☞33

270 Navigable Waters
270I Rights of Public
270k28 Public Uses Other Than Navigation
270k33 k. Use of Shores or Banks. Most Cited Cases

Waters and Water Courses 405 ☞36

405 Waters and Water Courses
405II Natural Water Courses
405II(A) Riparian Rights in General

405k36 k. Power to Control and Regulate Water Courses. Most Cited Cases

Where use of bed or channel stream is more than incidental to right of flotation and primary use is that of bed or channel, wading or walking is trespass upon land belonging to riparian owner, and is unlawful act which cannot be made lawful either by legislative or judicial action. W.S.1957, § § 41-527, 41-528.

[11] Navigable Waters 270 ☞1(5)

270 Navigable Waters
270I Rights of Public
270k1 Navigability in General
270k1(5) k. Capacity for Floatage. Most Cited Cases

Streams which in their natural state are capable of intermittent floating of craft but which are unsuited for interstate or international navigation are not of such economic value as justifies their being classified as navigable waters.

[12] Navigable Waters 270 ☞1(5)

270 Navigable Waters
270I Rights of Public
270k1 Navigability in General
270k1(5) k. Capacity for Floatage. Most Cited Cases

Navigable Waters 270 ☞33

270 Navigable Waters
270I Rights of Public
270k28 Public Uses Other Than Navigation
270k33 k. Use of Shores or Banks. Most Cited Cases

Waters and Water Courses 405 ☞89

405 Waters and Water Courses
405II Natural Water Courses
405II(E) Bed and Banks of Stream
405k89 k. Rights to Bed. Most Cited Cases

River which was capable of intermittent floating of craft for recreational use was nonnavigable, and its bed and channel constituted property of riparian owners.

[13] Fish 176 ☞3

176 Fish
176k3 k. Fish in Public Waters. Most Cited Cases

Navigable Waters 270 ⚓33

270 Navigable Waters

270I Rights of Public

270k28 Public Uses Other Than Navigation

270k33 k. Use of Shores or Banks. Most

Cited Cases

Public while lawfully floating craft in State's waters may hunt, fish or do any of those other things which are not otherwise made unlawful.

[14] Navigable Waters 270 ⚓3

270 Navigable Waters

270I Rights of Public

270k3 k. Constitutional and Statutory Provisions. Most Cited Cases

Statutes 361 ⚓47

361 Statutes

361I Enactment, Requisites, and Validity in General

361k45 Validity and Sufficiency of Provisions

361k47 k. Certainty and Definiteness. Most

Cited Cases

Statute restricting public's right to float on streams of specified water volume is void for indefiniteness, and for attempting to punish that which is not unlawful or made criminal. W.S.1957, § § 41-527, 41-528.

[15] Constitutional Law 92 ⚓46(3)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k46 Necessity of Determination

92k46(3) k. Proceedings in Which Question Is Raised. Most Cited Cases

Declaratory Judgment 118A ⚓124.1

118A Declaratory Judgment

118AII Subjects of Declaratory Relief

118AII(E) Statutes

118Ak124 Statutes Relating to Particular Subjects

118Ak124.1 k. In General. Most Cited Cases

(Formerly 118Ak124)

Where plaintiff not only claimed right to float on river passing through defendants' land but was

prevented from doing so by acts of defendants, a real justiciable issue arose as to validity of statute attempting to regulate streams upon which public might float craft. W.S.1957, § § 41-527, 41-528.

*138 Bard Ferrall and John F. Lynch of Greenwood, Ferrall, Bloomfield, Osborn & Lynch, Cheyenne, for Kenneth Day and John Rouse.

Norman B. Gray, Atty. Gen., and George J. Argeris, Asst. Atty. Gen., appearing amicus curiae.

Byron Hirst, Cheyenne, for R. K. Stewart and others. J. Reuel Armstrong, Rawlins, pro se.

Before BLUME, C. J., and PARKER, HARNSBERGER, and MCINTYRE, JJ.

Mr. Justice HARNSBERGER delivered the opinion of the court.

Plaintiff in March, 1958, sought judgment declaring his rights and those of the *139 public, under applicable provisions of the Federal Constitution, the State Constitution, the laws of Wyoming, and judicial decisions, to go upon the channel, between its high water marks, and to float upon the waters of the North Platte River where it flows upon and across defendants' lands.

Defendants denied plaintiffs and the public's right to either use the channel or to float upon the waters of the river as they crossed their lands, but joined in asking a declaratory judgment.

The State of Wyoming by its Attorney General was allowed to appear as amicus curiae.

Other parties permitted to intervene likewise asked for declaratory judgment, but claimed for the public only the right to float upon or within the waters of the river as it flowed upon and across the lands of the defendants.

During the course of the action, the Thirty-Fifth State Legislature enacted Ch. 205, S.L. of Wyoming, 1959, § § 41-527, 41-528, W.S.1957 (1959 Supp.), the first section of which provides as follows:

'§ § 41-527. *Floating persons and property by boat, canoe or raft on streams.*-Persons and their property may only float by boat, canoe or raft for any lawful purpose down that part of any stream in the State of Wyoming where the records of the state engineer for the ten years preceding such floating show that part of the stream to have had an average flow of water for the month of July exceeding 1,000 cubic feet per second, and it shall be unlawful to obstruct or prevent such use of such stream, except only so far as may be

necessary for the protection of installations now existing or hereinafter ordered constructed by authority of the state board of control in furtherance of the beneficial uses of water; and providing further, that nothing herein shall be construed as preventing such fencing by those invested with property rights and the enjoyment thereof as shall not interfere with such floating. It shall be unlawful for any person floating any stream to go upon, shoot over or into, except with the permission of the owner of such property, or damage or litter property on either side of the waters of such stream. In enforcing this act [§ 41-527, 41-528], the records of the state engineer shall be conclusive in any trial in any court of the State of Wyoming in determining the flow of any stream. (Laws 1959, ch. 205, § 1.)'

After the passage of this legislation, the intervening parties filed their motion for summary judgment. This was denied by the court which granted the intervenors an exception. Thereafter the matter being submitted on stipulation of facts and arguments as to applicable law, the court found there was a justiciable controversy and a class action for a declaratory determination of the legal rights, duties and obligations of the parties; found generally for the plaintiff and intervenors and against the defendants; then declared:

'* * * that the Plaintiff, and all others similarly situated as a class and the Intervenor, have the public rights and privilege of using the bed, channel and water of the North Platte River as it flows through the lands of the Defendants for the following purposes, and that the Defendants shall not fence or use said bed and channel, or any part thereof, so as to interfere with any of the following public purposes to-wit:

'(a) The right to fish from a boat, or while wading or walking, so long as those exercising the right stay in and upon the river bed or well-defined channel, and have the proper license and permission of the State of Wyoming;

'(b) The right to walk for any lawful purpose in and upon said channel or bed;

'(c) The right to boat and float on the water in and upon said channel;

*140 '(d) The right to hunt in and upon said bed and channel when hunting is permitted by the State and within the licensed authority give by the State.

'It is, further ordered that said public rights of the Plaintiff, and others similarly situated, shall not embrace the right to camp within and upon said bed and channel or use the same for recreation other than enumerated above.

'It is, further, ordered, adjudged and decreed that any part or parts of Chapter 205 of the Session Laws of Wyoming, 1959, which limit or prohibit the exercise by the Plaintiff of the rights above mentioned is unconstitutional and, therefore, void and of no effect upon the public rights enumerated herein.'

From this judgment the intervenors appeal 'because Ch. 205, S.L. of Wyoming, 1959, is constitutional and determines the rights of the parties,' and because the order denying intervenors' motion for summary judgment was erroneous. The defendants also appeal, but from the whole of the judgment, and they designate the complete record and all the proceedings and evidence in the action for inclusion in the record on appeal. This embodies the pleadings of the parties, stipulations, the unchallenged representations of the intervenors' brief in support of their motion for summary judgment, uncontradicted affidavits submitted in connection therewith, and a brief filed by Wyoming Wool Growers Association and Wyoming Stock Growers Association as friends of the court.

The admitted facts as exhibited by the complaint are: Defendants own land through which the North Platte River flows; at intermittent periods the river can float canoes, rowboats, outboard motors and other floating craft capable of carrying as many as six people; in the month of August and until spring run-off, craft carrying people and drawing more than one foot of water cannot be floated, with minor exceptions, i. e., short stretches or reservoirs; craft drawing less than one foot of water can be floated carrying people until about the middle of October when freezing occurs; from early days until 1940, the river was used commercially for floating logs, ties and timber; plaintiff can enter the river by boat from lands of a national forest, by boat or wading, or from a point where the county road right of way crosses the channel, or by boat or wading from lands of other private owners, and the channel may sometimes be entered between high water marks by walking.

Plaintiff, for himself and the public, claims the right to use the bed and channel of the river and its waters to fish under license of the State, either from a boat floating upon the river waters, or while wading the waters, or walking within the well-defined channel of the stream; to walk in and upon the river's channel; to boat and float upon the waters of the river; to hunt under State license in and upon the channel of the river; and to camp within and upon the channel of the river and use it for recreation. Plaintiff also claims

neither of the defendants owns the bed of the river, but if they do hold title to the channel, that title is subject to the paramount right of the public to use the channel for the enumerated purposes, and defendants may not be legally fence the channel or otherwise obstruct it so as to prevent such uses by the public; that the water of the river is the property of the State and that the State has the duty to equally guard all interests in the use of the water as provided by Art. 1, § 31, and Art. 8, § 1, Constitution of Wyoming; that by virtue of the State's ownership of the water, plaintiff and others similarly situated have the right to use the water and the bed of the river for the public purposes enumerated; that defendants denied plaintiff and all other persons the right to use the bed or channel of the river; that defendants fenced the same and claimed they could expel and remove by force, if necessary, the plaintiff and others who attempted to use the bed and channel of the river without first obtaining defendants' consent; that defendants did not permit plaintiff to exercise his claimed *141 rights and will not permit plaintiff's exercise of the same unless restrained; that the question presented is one of great public interest and as such should be determined as provided by Ch. 3, Art. 58, W.C.S.1945 (now § § 1-1049 to 1-1064, W.S.1957, Uniform Declaratory Judgments Act); and that the Attorney General should intervene.

The defendants' answer in substance denies the river is navigable in fact, although defendants admit that certain small craft have floated and do float upon it, and denies the plaintiff has any of the rights or privileges alleged in the complaint.

Defendants allege that the use of small boats during part of the year upon the river does not constitute navigation of the river, nor does the floating of logs, ties and timber establish the river as being navigable; that they have the right to fence the river channel upon their own land and have the right to use the channel in their own business; that they have the right to deny plaintiff and others all uses, privileges and rights claimed by the plaintiff; and that they will not permit fishing, camping, boating, or other similar use of the river channel within their lands, nor will they permit the use of the surface of the river's water as it passes through and across their land except with their permission.

Defendants further allege they hold the fee title to their respective lands and that neither of them can profitably operate his ranch if plaintiff prevails; that other landowners upon rivers, lakes and reservoirs will be vitally affected by the outcome of the action;

and that they have always assumed and believed their properties were free from trespass by others.

The plaintiff and defendants stipulated that the complaint accurately and completely states the material facts; that the conclusions of law therein are not admitted; and that those conclusions of law constitute the issues in the case.

The intervenors' answer alleges that from time immemorial the waters of the North Platte River have been used continuously for transportation by shallow draft craft and of logs, etc.; that in 1869 the river was declared by law to be a public highway (repealed however by Ch. 42, Laws of Wyoming, 1901); that the water is now State property; that during the winter the river is dangerous to livestock because of freezing and thaw, and in the spring the river is dangerous to livestock because of floating trees, logs, etc.; that many ranchers fence along the river margins; that from early summer to about September 1, the water volume permits boating, but after September 1, the water diminishes, boating is not feasible, and cattle may venture into the river with safety; that some ranchers fence across the river to prevent cattle straying, but some fences are destroyed in the winter by ice and are washed out in the spring by high water; that one defendant in 1957 erected a barrier across the river not connected with any fence controlling livestock, and declared he intended to prevent use of the river by boats and fishermen; that this barrier was destroyed and washed out; that this action was brought by plaintiff with the advice, consent, counsel and collaboration of defendants; that intervenors contend only that they and the public are entitled to continue to float on waters of the river without hindrance and to catch fish owned by the State, having due regard and respect for the rights of adjacent landowners. The intervenors then describe their personal and business activities and the interests they represent, claiming that the action between plaintiff and defendants presents fictitious issues and misrepresents real issues between fishermen and ranchers on the river; allege the title of defendants to the lands involved is subject to reservations and restrictions of record, and as provided by the laws of the State and of the United States; that both the waters of the river and the fish in those waters belong to the State; that the public has the right to the use of the waters for boat fishing; and that it is the duty of the State to equally guard all the various interests of the public in those waters. Attached to the intervenors' motion for summary judgment *142 were a number of affidavits which we deem to have no material significance, with the exception of that of

the State Engineer certifying that the average flow of water for the month of July for the preceding ten years at Saratoga, Wyoming, gauging station on the North Platte River was 1,308 cubic feet per second, and other affidavits stating that the river flow at the point certified by the State Engineer was substantially the same flow as that of the river where it crossed the defendants' lands.

It is our understanding that a fair summary of the respective position of the parties is as follows: The plaintiff insists the river is navigable because it will float craft, and, therefore, the bed of the river is public property and can be used by the public between its high water marks for any purpose of which it is susceptible. The Attorney General denies the river is navigable, but asserts it may be used for floating of certain craft and for fishing and other lawful purposes. Defendants contend no one except themselves has any rights in the river as it passes through their properties. The intervenors claim for themselves and the public only the right to float upon and fish within the river. The wool growers and stock growers maintain no one has a right on streams which pass through properties in private ownership except the proprietors of the land.

There are certain sections of the State and Federal Constitutions which counsel deem have bearing upon the various questions involved here, as well as a host of Wyoming statutory provisions. Those having important significance are § 1 of the Fourteenth Amendment to the Federal Constitution relating to due process and equal protection of law, and the following sections of the Constitution of Wyoming: Art. 1, § 6, relating to due process of law; Art. 1, § 7, denying there is absolute arbitrary power over property; Art. 1, § 10, right of accused to demand the nature and cause of the accusation; Art. 1, § 31, giving the State the control of waters and requiring it to equally guard all various interests involved; Art. 1, § 34, requiring all laws of a general nature to have uniform operation; Art. 3, § 27, prohibiting certain special laws; Art. 8, § 1, declaring the State's ownership of all waters within its boundaries; and Art. 13, § 1, relating to municipal corporation classification. Applicable statutes will be referred to as may be necessary.

The criticized judgment being declaratory of the law under a particular set of circumstances, the court was entitled to and undoubtedly did consider every factual matter which was submitted. This included not only matter contained in the pleadings, but also that exhibited by affidavits and stipulation, even though

not expressly admitted or joined in by all parties. This is because such additional facts were not challenged or contradicted, and, hence, no genuine issue of fact was presented which required resolution.

[1] The 'Brief Amicus Curiae of Wyoming Wool Growers Association and Wyoming Stock Growers Association' advises the court that the members of those organizations have always contended the owner of lands through which flows a stream nonnavigable in the Federal sense may deny fishermen, hunters, wanderers, and campers the right to use his property, and although the Constitution declares all water is the property of the State, that provision is limited to right of appropriation for irrigation and other beneficial uses; that while the Legislature has provided for appropriation for water for those purposes, it has not declared streams stocked with fish to be 'public ways' nor regulated that type of use and such legislation is a condition precedent to the claimed use of waters. Aside from the fact that at the time this argument was advanced, Ch. 205, S.L. of Wyoming, 1959, § § 41-527, 41-528, W.S.1957, was enacted and purported to declare the State's waters might be used for floating transportation, as early as 1909, the Legislature enacted Ch. 68, § 2, S.L. of Wyoming, 1909 (substantially the same as § 41-3, W.S. 1957), which gives recognition that transportation is a use to which waters may be put in the language following:

*143 'Water rights are hereby defined as follows according to use: Preferred uses shall include rights for domestic *and transportation purposes* * * *.' (Emphasis supplied.)

Additionally, Ch. 89, Laws of Wyoming, 1901, and Ch. 16, S.L. of Wyoming, 1903, now § 41-224, W.S.1957, regulated the driving or floating of logs, timber or lumber down or upon any stream in the State, without reference to its being navigable or nonnavigable. These statutes indicate the Legislature was aware that, without regard to their being navigable or nonnavigable in the Federal sense or any other concept of navigability, its waters were usable for purposes other than irrigation, consumption, power or mining, and the waters might be used for transportation by flotation. So it would seem that subject to whatever statutory limitations may be imposed by the State on such use, or by the Federal government when interstate or international rights are involved, the actual usability of the waters is alone the limit of the public's right to so employ them.

[2] Nothing is found in either our State Constitution, the Act of Congress admitting the State to the Union,

or any subsequent act of Congress, which limits the kind or type of use the State may make of its waters.

[3] We understand that 'navigability in the Federal sense' means the capability or susceptibility of waters, in their natural condition, of being used for navigation in interstate or international commerce, and navigability in any other sense may mean any one of a variety of definitions given navigability by either of the several states of the Union.

[4] There is an element of paramount control by the Federal government with respect to navigable waters, but that superior right exists only where navigable waters may be used in either interstate or international commerce. This was made clear in City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 334, 78 S.Ct. 1209, 1217, 2 L.Ed.2d 1345, 1353, the court saying:

'It is no longer open to question that the Federal Government *under the Commerce Clause of the Constitution* (Art. I, § 8, cl. 3) has dominion, to the exclusion of the States, over navigable waters of the United States. * * *' (Emphasis supplied.)

See also 65 C.J.S. Navigable Waters § 10a, pp. 61, 62, and cases cited.

[5] However, except when so used or available for use in interstate or international commerce, the exclusive control of waters is vested in the state, whether the waters are deemed navigable in the Federal sense or in any other sense. See 65 C.J.S. Navigable Waters § 10b, pp. 63-65. It follows the state may lay down and follow such criteria for cataloging waters as navigable or nonnavigable, as it sees fit, and the state may also decide the ownership of submerged lands, irrespective of the navigable or nonnavigable character of waters above them. See Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820, Ann.Cas.1913E, 710, rehearing denied 228 U.S. 708, 33 S.Ct. 1024, 57 L.Ed. 1035.

All of counsel have dealt extensively with the question of navigability or nonnavigability of the river and rights incident thereto as it passes through or across defendants' lands. We have carefully examined the great volume of authorities referred to or cited by counsel and have found them to be very instructive. However, in the view we take, it would serve no purpose to make exhaustive reference to or give extensive quotations from them, as this would only serve to exhibit the differences between Federal views on what constitutes navigability and the

varieties of views on the subject entertained by the courts of different states. Furthermore, any attempt to improve upon or further elaborate the question would probably not be fruitful.

Although we are not prepared to say the criteria used by courts of different states and of the United States to determine navigability of waters and ownership of and beneath them were either unwise or unsound*144 when used to meet the special circumstances presented in their respective jurisdictions, if we are to observe the existing constitutional and statutory law of this State, the great majority of those decisions are of limited helpfulness. The mere capability of a stream to float a single commercial crosstie, which has been used at times as a somewhat extreme test determining navigability and consequent ownership of land underlying the water, does not solve the question of whether waters in this State, which are capable of being occasionally used to float acceptable craft, may be so used even if they are considered as being nonnavigable and are upon, pass or flow over and across lands claimed in private ownership.

The basic reason for using navigability as a classification was to designate certain waters as public and others as private, and to give to public authority, not only ownership and control of navigable waters, but also ownership and control of their beds and channels while leaving in private ownership and control the beds and channels of nonnavigable waters. In the instant case, however, this test is rendered unnecessary to establish the ownership of the waters, because by our Constitution and its Congressional approval, the title of all waters of the State is placed in public ownership. This makes apropos the statement in Ne-Bo-Shone Ass'n v. Hogarth, D.C. Mich., 7 F.Supp. 885, 889, affirmed 6 Cir., 81 F.2d 70:

'Because some waters are public, certain rights attach thereto. These rights are not limited by the test by which the nature of the waters is determined but to the rights incident to the characterization as public of the stream or body of water.'

[6][7] Public ownership of the bed and channel of navigable streams, as well as control of their waters, seems to have been considered necessary in order to forestall interference with the commercial navigation of which they were capable. However, riparian ownership to the center of nonnavigable streams need not necessarily materially interfere with and does not necessarily prevent the State's use of waters for purposes for which they are adaptable and to which

they may be put for the equal benefit of all members of the public. 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, except as it may be shown the title of the Federal government to such waters was incurred when that title passed from the Federal government to the State upon its admission to the Union. 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. The test of navigability does not determine other uses to which the State may put its waters even though navigability would determine the title to the land underlying them.

In a late Ohio case (1959), Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 163 N.E.2d 373, 375, it was said:

'The division of watercourses into navigable and nonnavigable is merely a method of dividing them into public and private, which is the more natural classification. * * *'

But such a division or classification of watercourses, while determining title to lands beneath navigable waters, does not necessarily limit, destroy or curtail the public's right to use nonnavigable waters nor prevent the public's floating in or upon those waters and fishing for fish planted and propagated therein by the State, so long as such uses do not unnecessarily trespass upon lands or properties which are in private ownership and so long as the State does not curtail such uses. Navigability is not the only touchstone by which waters become public. The public may receive title to them by grant and in the manner Wyoming became possessed of all waters within the State.

*145 Article 8, § 1, of our Wyoming Constitution declares the waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are the property of the State. By its Act of Admission, approved July 10, 1890, 26 Stat. 222, ratifying our State Constitution, Congress gave express approval to that declaration regarding the State's ownership of waters. Merrill v. Bishop, 69 Wyo. 45, 237 P.2d 186; Id., 74 Wyo. 298, 310, 311, 287 P.2d 620, 624; Mitchell Irr. Dist. v. Sharp, 10 Cir., 121 F.2d 964, 967. This court has interpreted the State's title to the waters to be one of trust for the benefit of the people. Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 50 L.R.A. 747, 87

Am.St.Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 P. 210, 100 Am.St.Rep. 939; Merrill v. Bishop, supra; Lake De Smet Reservoir Co. v. Kanfmann, 75 Wyo. 87, 292 P.2d 482. See also Ne-Bo-Shone Ass'n v. Hogarth, D.C.Mich., 7 F.Supp. 885, affirmed 6 Cir., 81 F.2d 70.

All parties seem to recognize that if a river is nonnavigable the bed and channel of the stream belong to the riparian owner. No one seriously disputes that the waters themselves belong to the State and are held in trust by it for the benefit of the public. So if the river is nonnavigable we would have a clear case of divided ownership of the river as an entity, because title to the bed and channel would be in the riparian owner and title to the waters is in the State. Whether this be considered as a conflict of interest or an overlapping of ownerships is of no particular importance. At all events, it would be desirable that each owner be accorded maximum incidents of ownership with minimum obligation upon the other.

The navigable or nonnavigable classification of waters does not affect the State's ownership of its waters nor lessen any use to which they may be put by the public, so long, in the case of waters navigable in interstate or international commerce, as that use leaves their flow or presence unimpaired and so long, in the case of nonnavigable waters, as such use is not prohibited by the State. There seems to be no considerable difference between dividing the ownership and use of lands beneath waters from the ownership and use of waters upon or flowing over or across that land than there is in the horizontal division in land ownership such as not infrequently occurs in ownership of surface and subsurface areas. Even where land is divided vertically there are certain obligations or duties placed upon each owner in order to enable the other to make use of and enjoy that which is his. So it is that while the right of ingress and egress upon and over the surface accompanies subsurface ownership where there is a horizontal division, there also is a similar right of ingress and egress across adjacent lands where no other access is available, as well as a restrainable right of nuisance use of adjacent lands. Also, it may be that a full use of lands underlying waters may entitle their owner to some type of reasonable easement in the State's waters. In each instance the enjoyment of rights incident to separate ownership may require easement in the property of another.

[8][9][10] 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. Callahan v. Price, 26 Idaho 745, 146 P. 732; Johnson v. Johnson, 14 Idaho 561, 95 P. 499, 24 L.R.A.,N.S., 1240; Nelson v. Robinson, 47 Cal.App.2d 520, 118 P.2d 350; Id., 73 Cal.App.2d 263, 166 P.2d 76; Scott v. Lattig, 227 U.S. 229, 33 S.Ct. 242, 57 L.Ed. 490, 44 L.R.A.,N.S., 107; Smith v. Long, 76 Idaho 265, 281 P.2d 483; 65 C.J.S. Navigable Waters § 93b(1), pp. 205, 206. 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 that use, the bed *146 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. As early as 1874, Michigan courts recognized that where a river was capable of floating logs, that right of flotage was but a right of passage, including only such rights as are incident to that right and necessary to render it reasonably available. See Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 319. In 1909, Missouri, in McKinney v. Northcutt, 114 Mo.App. 146, 89 S.W. 351, 355, did likewise and later in Elder v. Delcour, 241 Mo.App. 839, 263 S.W.2d 221, reversed 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370, reaffirmed that principle. On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful. Such trespass cannot be made lawful either by legislative or judicial action. Thus the use of waters for the floating of which they are capable and uses incidental thereto, as distinguished from unlicensed use of the land beneath them, is within the public's right unless made unlawful by statute. Except as herein specified, to use the bed or channel of the river to wade or walk the stream remains an unlawful trespass. This disagrees somewhat with Munninghoff v. Wisconsin Conservation Commission, 255 Wis. 252, 38 N.W.2d 712; Elder v. Delcour, supra; and perhaps with some other authorities.

Notwithstanding that the Elder-Delcour case was decided with reference to what was said to be its own

peculiar facts, those facts are so closely paralleled in the matter before us as to make them quite helpful here. There the river in question was held to be nonnavigable, notwithstanding it could be floated by canoes, rowboats and other small craft, and in the past had been used for floating and transporting logs and timber. The stream was well stocked with fish and was heavily fished by sportsmen, both by wading and floating and from the banks. Also access to the river could be gained from a public road and at points where it crossed privately owned lands. It was claimed the public had the right not only to float by craft upon the waters of the river and to leave the river and carry or drag around obstructions, but also the right to wade the river and use its banks for camping and recreation.

Under our conception of the law, if we hold the river in question here is nonnavigable, then title to the bed or channel of the stream will be in the riparian owner. By Constitutional edict, title to all waters is in the State. Under such circumstances the use of waters for floating, with incidental use of their beds and channels, cannot be interfered with or obstructed by the riparian owner. However, in using the State's waters for floating, the public is not privileged, except as incidental to such use, to violate other property rights of riparian owners. Where such divided ownership occurs, 'the landowner and the public have certain reciprocal rights, which may be enjoyed without the destruction of the other.' Charnley v. Shawano Water Power & River Improvement Co., 109 Wis. 563, 569, 85 N.W. 507, 509, 53 L.R.A. 895. We are not inclined to go as far as the Missouri court when it permitted wading or walking upon the bed or channel of the river or use of its banks for recreation. Perhaps the reason for our difference with the Missouri court is seated in the fact that our conclusions are based solely upon Wyoming's Constitutional declaration that all waters within its boundaries belong to the State, while the court in Missouri, which state does not have such an express constitutional declaration as ours, may have been largely influenced by other considerations.

[11][12] Streams in their natural state, such as that described by the factual matter appearing in the record before us, although capable of intermittent floating of craft for recreational use and for small *147 commercial use in the floating of ties, logs, and timber, are nevertheless unsuited for navigation in interstate or international commerce and are not of such economic value for transportation as justifies their being classified as navigable waters, thereby taking from riparian proprietors the title and

ownership of the bed and channel of the river where it flows by, through, over, across, or upon their lands. So we must hold the portion of the river here in question is nonnavigable and that its bed and channel are the property of the riparian owner. This conclusion is fortified by the fact that the use to which the waters of the river have been put in the past to seasonably float logs and timber and certain small craft by which various activities, such as fishing, hunting, pleasure, etc., may be continued by the public's using only the waters of the stream themselves and without any but minor and incidental use of the lands beneath them.

[13] Irrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this State for floating usable craft and that use may not be interfered with or curtailed by any landowner. It is also the right of the public while so lawfully floating in the State's waters to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful. See Ne-Bo-Shone Ass'n v. Hogarth, D.C.Mich., 7 F.Supp. 885, affirmed 6 Cir., 81 F.2d 70.

Although Ch. 205, S.L. of Wyoming, 1959, now § § 41-527, 41-528, W.S.1957 (1959 Supp.), was enacted after the commencement of this litigation, a mere declaration of the law's application respecting the relative rights of the public and riparian owners of the river, before it became effective, would be valueless if the Act in any way affected those relative rights. We should, therefore, examine the new law, first, to determine its constitutionality, and if found not to transcend constitutional law, then to ascertain what, if any, change it makes in the rights involved.

Plaintiff-appellee suggests the 'floating' is used as an opposite to wading or walking. We, therefore, assume he concluded the Act does not affect any rights of those who wade or walk the river, because the Act is silent respecting them. With this conclusion we can agree without conceding the right to wade or walk exists.

In condemning the Act as void for ambiguity, lack of uniformity and vagueness, this appellee cites In re Newbern, 53 Cal.2d 786, 3 Cal.Rptr. 364, 350 P.2d 116, 120, 121, 123, as follows:

'The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of

penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" Lanzetta v. [State of] New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888; see also Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322. Such also is the law of the State of California. People v. McCaughan, 49 Cal.2d 409, 414, 317 P.2d 974.'

The court continued 350 P.2d at page 123:

'* * * The first aspect of the difficulty is that citizens are not sufficiently warned by vague language as to what course of conduct is denounced. Secondly, the court is given insufficient standards by which to judge the defendant's conduct. Consequently, each judge and jury is free to define the crime in any manner that it sees fit, giving rise to the dangers of imposing ex post facto punishment on the defendant, having the jury find the *148 law as well as the facts and giving the statute the effect of a bill of attainder in each particular case.

'Finally, we might point out that the Constitution of the State of California commands that all general laws be of uniform operation. Const., Art. I, § 11. That provision will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries. * * *'

Counsel also likens the Newbern holding to what this court had to say in Eastwood v. Wyoming Highway Department, 76 Wyo. 247, 301 P.2d 818, claiming that although a portion of our Driver License Law was held unconstitutional for improper delegation of legislative power to an administrative office, this court indicated that the ambiguity of the statute would also render it unconstitutional.

[14] It seems to us Chapter 205 is fraught with indefiniteness, leaving uncertain legislative intent and impregnating the Act with ambiguities.

In substance the Act says persons and property may only float by boat, canoe and raft down a stream where for ten years preceding the stream had an average flow for July exceeding 1,000 cubic feet per second. It then makes it unlawful to obstruct or

prevent such use except to protect present and future authorized installations; provides that those invested with property rights may fence, so long as the fencing shall not interfere with the prescribed floating; makes it unlawful for any person floating to go upon, or shoot over or into, or damage or litter the property on either side of the water; and provides a fine of \$100 for violation of the Act.

One meaning which may be given to the word 'only' would merely limit the means and methods by which persons and property may be floated. Another meaning would be that floating downstream was permitted while floating upstream was not sanctioned. A boat, canoe or raft is floating, whether it goes upstream or downstream, even though the upstream progress requires use of oars, motors, poling, sails, pushing, or other means of propulsion.

If the Act be considered as prohibiting the floating of persons or property in streams of the specified flow in any other manner than by boat, canoe or raft, it excludes the floating in such streams of any tie, log, or other material unless made into some kind of raft, yet in streams of less flow, it would leave untouched their use for tie, log and timber drives.

Again the Act might be construed as prohibiting all types of floating use in streams unless the stream meets the flow specifications prescribed, and, if so, is it intended to repeal by implication § 41-224, W.S.1957, which provides for floating of certain materials without regard to average flow?

In fact, the Act, as far as flotation goes, does not in terms either permit or prohibit anything. If the statute is said to grant a permissive right not theretofore enjoyed by the public, the word 'only' might fairly be construed as a word of limitation upon the grant. If, however, it is taken to have the connotation of prohibition, it would imply the previous existence of a right which was being denied, at least in part, by the statute. That which is made unlawful is, of course, prohibited by law. The proscriptive fencing and going upon, shooting over or into property, and the damaging or littering of property while floating are made unlawful, and consequently, prohibited and properly made subject to penalty. But in the balance of the Act, relating to floating upon the river, nothing is expressly commanded, prohibited or made unlawful. If the Act merely limits floating to being exercised in a certain way, floating in any other way violates the Act and subjects to penalty, even though that is not made unlawful. A person charged in the language of the

statute with violation of that part of the Act would be at loss to know exactly with what crime he was being charged. Would it be because he had *149 floated in some manner other than by boat, canoe or raft; or that he had floated up or otherwise than down the river; or that he floated in the river when it failed of having averaged the prescribed flow of water?

Whatever view is taken as to the meaning of the word 'only' in its context, the result must arise solely by implication, construction or interpretation. There is no plain, clear, unambiguous meaning expressed by it which gives that certainty required in criminal statutes. Nevertheless, the Act is definitely intended as a criminal law for it makes unlawful the obstruction of 'such' stream so as to prevent its use, except so far as may be necessary to protect existing installations and authorized future installations. It also makes unlawful certain acts by persons when floating any stream. The penalty prescribed by the Act is to be inflicted upon all persons who 'violate' the Act, whether such violation consists of doing that which is made unlawful, or for the doing of a thing which may be considered as being impliedly prohibited, or for going beyond the permission which may be thought to be impliedly granted.

If the word 'only' is taken as a limitation upon floating, the Act is violated and subjects to penalty when floating occurs in any other manner even though that which is done is neither prohibited nor made unlawful. But this statutory definition of the limit of a right does not in itself make going beyond that limit a crime and subject the offender to criminal punishment. Floating in or upon the waters of a river, the flow of which does not meet that which is specified, is not expressly prohibited or made unlawful, nor is floating up the river or merely remaining afloat or floating by some other means made unlawful or prohibited. So the Act may be violated in those respects without committing a crime or breaching the law. In Commonwealth v. Galloway, 203 Ky. 102, 261 S.W. 887, 888, where a statute provided that a failure to comply with any of its provisions was a misdemeanor, the court held:

'* * * In a penal statute the mere granting of the privilege to do a thing in a particular way may not be construed into a prohibition against doing that thing in any other way, especially when the whole act contemplates the doing of that thing in some way.'

When our Act says such violation is to be penalized, it is clearly unconstitutional, as it assumes to punish that which is not prohibited, unlawful or made

criminal. This in itself not only makes that portion of the Act unconstitutional, but as the statute is penal and to be strictly construed, we must hold Ch. 205, S.L. of Wyoming, 1959, unconstitutional in toto. McFarland v. City of Cheyenne, 48 Wyo. 86, 42 P.2d 413; Annotation, 104 A.L.R. 1095.

If we had any doubt about the unconstitutionality of the 1959 law, it would seem to be resolved by pronouncements in State v. A. H. Read Co., 33 Wyo. 387, 401, 402, 240 P. 208, 212, 213. There it was argued that nothing was declared unlawful by the statute, and nothing penalized, except a violation of the provisions of statute which merely declared a legislative limitation of the time of service upon public works without expressly commanding or prohibiting anything. After pointing out that the Federal Supreme Court had held

“ * * * that a penal statute, prescribing no certain standard of conduct, violates the fundamental principle of justice embodied in the conception of due process of law, and is void because violating the provisions of the Fifth Amendment to the Constitution of the United States declaring that no person shall be deprived of life, liberty, or property without due process of law, and the provision of the Sixth Amendment declaring that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation; * * *

this court said:

“ * * * And state laws thus uncertain are likewise held to be void *150 upon the same principle, as violating the due process of law clause and the other related provisions of the Fourteenth Amendment, which applies to state governments. * * *

It then noted that because of the absence from the statute of the necessary expressions of command or prohibition, a Federal constitutional question was presented and our own State constitution provided that in all criminal prosecutions the accused had the right to demand the nature and cause of the accusation (Art. 1, § 10, Wyoming Constitution), this would be denied him in the absence of sufficient certainty in the statute under which he was being prosecuted, and said at 240 P. 212-213:

“ * * * no one can be lawfully convicted of a * * * misdemeanor, unless the act charged, if not a crime at common law, is clearly denounced or penalized as a crime by statute. So it is well settled that criminal statutes are to be strictly construed, which means that

they are not to be enlarged by implication or extended by inference or construction * * *.

Of the rule thus stated, the court further said it “ * * * requires a sufficient degree of certainty in a criminal statute, that will place it outside the necessity of judicial determination, through mere implication or construction, of who or what acts are punishable under it. * * *

And the court quoted with approval at 240 P. 213:

“Thus in U. S. v. Reese, 92 U.S. 214, 23 L.Ed. 563, it is said:

“If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * * It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.”

The case now before us is thus placed squarely within those pronouncements of State v. Read, supra, because it would be only by judicial determination through implication or construction that other than certain types of floating would be prohibited and made unlawful so as to subject an accused to the penalty provided if such floating occurred.

The patents from which defendants' titles are deraigned do not exclude or reserve therefrom the bed or channel of the river. The most that is claimed to be contained in the patents involved is that they were granted subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights. 43 U.S.C.A. § 661. We do not understand these reservations to withdraw from the patent the beds or channels of rivers.

Furthermore numerous decisions support our view that the title to the nonnavigable waters belong to the riparian owners.

“ * * * Title to the beds of the nonnavigable rivers and streams within the state remains in the United States, or in those persons who have received title from the

United States. * * * 93 C.J.S. Waters § 71, p. 748.

See also State v. Brace, 76 N.D. 314, 36 N.W.2d 330; United States v. State of Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed 1267; United States v. State of Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844; United States v. Champlin Refining Co., 10 Cir., 156 F.2d 769, affirmed 331 U.S. 788, 67 S.Ct. 1346, 91 L.Ed. 1818, rehearing denied 331 U.S. 869, 67 S.Ct. 1727, 91 L.Ed. 1872; *151 Aladdin Petroleum Corp. v. State ex rel. Com'rs of Land Office, 200 Okl. 134, 191 P.2d 224; Luscher v. Reynolds, 153 Or. 625, 56 P.2d 1158; Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488.

The question presented here is not that of creating a new public right nor even of giving initial recognition to an unused public right. We are dealing with a use long enjoyed by the public which is properly theirs, but which is now sought to be denied them.

[15] The intervenors' contention that there is no justiciable issue and that this is not a class action is without merit. The plaintiff not only claimed a right and attempted to indulge it, but was prevented from doing so by the acts of the defendants. Thereby a real justiciable issue arose. It provided a real dispute, not a moot one. Under the facts submitted we are also convinced the litigation is properly considered as a class action affecting the rights of the public generally.

Intervenors' further complaint that their motion for summary judgment was improperly denied, while possibly having some merit, is at least subject to considerable doubt, especially as it was predicated upon a statute which is held to be unconstitutional. In any event, the substantial result sought by the motion is accomplished by our holdings herein.

In conclusion, while we recognize the legislative right to regulate within constitutional limits the floating, as well as other uses of public waters, until such time as regulations are promulgated we hold: That the portion of the river in dispute is nonnavigable; that its riparian owners have title to the bed and channel of the river, but that this title is subject to an easement for a right of way of the river's waters in their natural channel through, over and across defendants' lands; that the waters of the river are the property of the State and are held by it in trust for the equal use and benefit of the public; that the waters of the river may be used by the public for floating usable craft therein or thereon and for

transporting in such usable craft persons or property; that as an incident to the full enjoyment and use of the State's easement for its waters over and across the lands held in private ownership, persons so floating in usable craft may, when necessary, disembark and walk, or wade upon submerged lands in order to pull, push, or carry craft over or across shallows, riffles, rapids or obstructions; that while so floating in usable craft, the public may fish or hunt or do any and all other things which are not otherwise made unlawful, but that the State is without power to authorize the violation of any property rights of riparian or other owners except as incident to the full exercise of easement to which property may be subject; that the waters of the river, if capable thereof, may also be used for transporting logs, ties, timber and other material when permitted by State law; that riparian owners of lands bordering upon or through which the river flows may not in any manner obstruct the flow of the river's waters so as to interfere with or prevent the free passage of any craft used commercially or for recreation or for floating ties, logs, or timber; that Ch. 205, S.L. of Wyoming, 1959, now § § 41-527, 41-528, W.S.1957 (1959 Supp.), is unconstitutional as being vague, uncertain, ambiguous and subjecting to its penalty the violation of provisions of the Act which are neither made unlawful nor prohibited; and that the judgment appealed from must be reversed insofar as it permits unrestricted walking or wading in or upon the bed or channel of the river and that the judgment of the lower court be vacated in this respect.

The judgment is therefore reversed in part, and the cause remanded with direction to vacate so much of the judgment as is contrary to our holdings herein, and to make such further judgment as may be necessary to conform with this opinion.

Reversed in part and remanded with directions.

Wyo. 1961
Day v. Armstrong
362 P.2d 137

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MONROE v. STATE Utah 1946
 Supreme Court of Utah.
 MONROE et al.
 v.
 STATE et al.
 No. 6964.

Dec. 20, 1946.

Appeal from District Court, Fifth Judicial District,
 Millard County; Will L. Hoyt, Judge.

Suit by Ralph Monroe and others against the State
 and another to quiet title to the bed of a lake. Decree
 for defendants, and plaintiffs appeal.

Reversed and remanded.

West Headnotes

[1] Navigable Waters 270 ⚓ 36(1)

270 Navigable Waters

270II Lands Under Water

270k36 Ownership and Control in General

270k36(1) k. Ownership by State. Most

Cited Cases

Waters and Water Courses 405 ⚓ 111

405 Waters and Water Courses

405IV Natural Lakes and Ponds

405k111 k. Rights to Bed and Banks. Most

Cited Cases

Owners of property on shores of lake should fail in
 their suit to quiet title to bed of lake as against state,
 if lake was navigable when state was admitted to
 union, but should prevail if lake was non-navigable at
 that time. Utah Code 1943, 86-1-14.

[2] Navigable Waters 270 ⚓ 1(7)

270 Navigable Waters

270I Rights of Public

270k1 Navigability in General

270k1(7) k. Evidence as to Navigability.

Most Cited Cases

Evidence that lake was comparatively small and so
 located that it was easier to go around than to cross it
 and that it would probably develop in future as
 irrigation reservoir, as it had in past, supported
 district court's finding of improbability that lake

would ever be valuable as highway for commerce, as
 required to render it navigable and preclude owners
 of property on shores thereof from quieting title to
 lake bed as against state. Utah Code 1943, 86-1-14.

[3] Navigable Waters 270 ⚓ 1(3)

270 Navigable Waters

270I Rights of Public

270k1 Navigability in General

270k1(3) k. Test of Navigability in General.

Most Cited Cases

To be "navigable," a water course should be
 susceptible of use for purposes of commerce or
 possess capacity for valuable floatage in
 transportation to market of products of country
 through which it runs and should be of practical
 usefulness to public as public highway in its natural
 state, without aid of artificial means, and theoretical
 or potential navigability or temporary, precarious and
 unprofitable one is insufficient.

[4] Navigable Waters 270 ⚓ 1(3)

270 Navigable Waters

270I Rights of Public

270k1 Navigability in General

270k1(3) k. Test of Navigability in General.

Most Cited Cases

While navigable quality of water course need not be
 continuous, it should continue long enough to be
 useful and valuable in transportation, and fluctuations
 should come regularly with the seasons, so that
 period of navigability may be depended upon, to
 render it a navigable water course.

[5] Navigable Waters 270 ⚓ 1(3)

270 Navigable Waters

270I Rights of Public

270k1 Navigability in General

270k1(3) k. Test of Navigability in General.

Most Cited Cases

Mere depth of water, without profitable utility, or its
 sufficiency for pleasure boating or to enable hunters
 and fishermen to float their boats will not render
 water course navigable in legal sense, so as to subject
 it to public servitude, but to be navigable it must have
 useful capacity as public highway of transportation.

[6] Navigable Waters 270 ⚓ 1(3)

270 Navigable Waters
270I Rights of Public
270k1 Navigability in General
270k1(3) k. Test of Navigability in General.

Most Cited Cases

"Navigable water" is that which, by its depth, width and location, is rendered available for commerce, whether actually so used or not.

[7] Navigable Waters 270 ¶1(3)

270 Navigable Waters
270I Rights of Public
270k1 Navigability in General
270k1(3) k. Test of Navigability in General.

Most Cited Cases

"Navigability" is not dependent merely on physical capabilities of particular body of water to support transportation of goods, but public interest therein arises only when it is so situated that it becomes or is likely to become a valuable factor in commerce.

[8] Navigable Waters 270 ¶1(7)

270 Navigable Waters
270I Rights of Public
270k1 Navigability in General
270k1(7) k. Evidence as to Navigability.

Most Cited Cases

In suit by owners of property on shores of lake to quiet title to bed thereof as against state and its grazing lessee, evidence showed that lake was not navigable when state was admitted to union, so as to require decree for plaintiffs. Utah Code 1943, 86-1-14.

FN1. Poynter v. Chipman, 8 Utah 442, 32 P. 690; Knudsen v. Omanson, 10 Utah 124, 37 P. 250; State v. Rolio, 71 Utah 91, 262 P. 987; Robinson v. Thomas, 75 Utah 446, 286 P. 625.

**760 *3 Elias Hansen, of Salt Lake City, for appellants.
Grover A. Giles, Atty. Gen., C. N. Ottosen, Asst. Atty. Gen., and Milton A. Melville, of Fillmore, for respondents.
PRATT, Justice.

What is a navigable lake? This issue arises in a suit in which plaintiffs and defendants each seek to quiet title to the bed of Scipio Lake, in Millard County, this State. Plaintiffs own property on the shores of the

lake and the defendant State of Utah has leased part of the bed of the lake to defendant George E. Brown, for grazing purposes. The grazing brought plaintiffs and Brown in conflict.

[1] If the lake was navigable when this state was admitted to the Union plaintiffs should fail. Sec. 86-1-14, U.C.A. 1943; Poynter v. Chipman, 8 Utah 442, 32 P. 690; Knudsen v. Omanson, 10 Utah 124, 37 P. 250; State v. Rolio, 71 Utah 91, 262 P. 987; Robinson v. Thomas et al., 75 Utah 446, 286 P. 625; and annotation 23 A.L.R. 757.

It the lake was non-navigable at that time plaintiffs should prevail. In addition to the above authorities: Annotation 112 A.L.R. 1114; State v. Aucoin, 206 La. 787, 20 So.2d 136, at page 158; United States v. Appalachian Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243; United States v. State of Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267; United States v. State of Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844; United States v. Holt Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465; State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771; and Gratz v. McKee, 8 Cir., 270 F. 713 23 A.L.R. 1393. (The dissenting opinion in the Louisiana case and the annotations of 23 A.L.R. and 112 A.L.R. cover the authorities upon this question rather thoroughly. The Louisiana case was decided in 1944. Sec. 86-1-14, U.C.A.1943, by its terms excludes the beds of non-navigable lakes from the legislative declaration of ownership.)

*4 The lower court found in favor of defendants and plaintiffs have appealed.

Conveyances to plaintiffs and their predecessors in interest are by lot and section number so no claim can arise that plaintiffs' property rights are specifically limited by description to the meander line of the lake.

Among the facts found by the lower court are these: At the time Utah was settled, Scipio Lake was a natural lake; a 2 foot dam was, about that time (1867), built at the lower end of the lake; that the lake had an extreme length of about 1 1/2 miles, and a maximum width of about 5/8 of a mile; that it had an average depth of 4 to 5 feet and covered an area when filled to capacity of the natural basin of approximately 580 acres (plaintiffs contend 277 acres); that the Federal Government surveyed the lake in 1871, fixing its meander line, fixing the length of the lake at 1 3/4 miles and width of 3/4 mile; that it has maintained that size until the present time, except for dry years when irrigation lowered it considerably;

that the meander line fixed the approximate size of the lake when this State was admitted to statehood (Jan. 4, 1896); that it has not been used for transportation of 'goods of commerce'; that it has no connection with navigable streams or other navigable bodies of water; that it has been used for boating, fishing, and swimming; and that its surroundings are such it appears improbable the lake will ever be valuable as a highway for commerce. The court then makes this statement as a part of his findings of fact: '* * * that in view of the trend of decisions in recent years to view similar shallow bodies of water as **761 navigable, the Court finds that Scipio Lake at the time Utah was admitted to the Union was a navigable body of water * * *.'

This is a conclusion of law supported by the court's explanation of why he believed it necessary. The conclusion of navigability is repeated as paragraph one of his conclusions of law. We are of the opinion that navigability should not be determined without regard to practical considerations.*5 The fact that the lower court included the explanation impresses one with the thought that he thought the lake was not, as a matter of fact, navigable, but, due to the idiosyncrasies of the law, it must be so held.

[2] Scipio Lake is comparatively small and so located that, as stated by one witness, it is easier to go around it than to cross it. The public left to itself, is not going to select the hard way of travel, and if it is a short cut to go around it, that short cut will be used. These facts considered in the light of the probability of the future of that lake developing as it has in the past, as a reservoir for irrigation, are ample support for the court's finding that it is improbable the lake will ever be valuable as a highway for commerce. Such a finding is inconsistent with the idea that 'The natural navigation of the river is such that it affords a channel for *useful* commerce.' (Italics ours.) (Quoting Mr. Justice Hughes in United States v. State of Utah, supra [283 U.S. 64, 51 S.Ct. 445]). The author of the cited opinion also uses the expression 'To meet the *needs* of commerce.' (Italics ours.) The factual differences between that case and this must not be lost to our sight. There the court was dealing with miles of river crossing state lines which might easily be broken up into navigable and non-navigable areas. There was value in the use of such long stretches of water-they were useful-the public had need for them. But Scipio Lake is so small it must be treated as a unit. It, as a unit, is either valuable for transportation or it is not valuable. There is no evidence justifying any conclusion that it is likely ever to develop as a valuable means of

public commercial transportation. Obviously its navigability should not be governed by our powers of imagination to vision what we deem sufficient to make it such a public waterway.

[3][4][5] In Harrison v. Fite, 8 Cir., 148 F. 781, 783, cited in the Louisiana case (dissenting opinion) of our list above, there is some discussion of the element of *6 usefulness. We quote therefrom: 'To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation. * * *.'

[6] In the Louisiana case [206 La. 787, 20 So.2d 154], the prevailing opinion states the law to be (as to navigable water): 'It is that which, by its depth, width, and *location* is rendered available for commerce whether it be actually so used or not.' (Italics ours.) We believe that location is an important factor in this western mountainous and desert country. The writer has in mind a lake above timber line and near the top of a 10,000 foot mountain peak which from the standpoint of depth and width would have floatage potentialities sufficient for the transportation of goods-but to where? That's the question. Furthermore it is almost a hands **762 and knees climb to get to that lake. To hold it to be a navigable body of water would be an oddity to say the least. Sailing that lake, one would get nowhere fast.

In the case of Gratz v. McKee, supra, speaking of a stream, the court quoted the following language from a Washington case as the weight of authority: *7 'It must be so situated, and have such length and capacity, as will enable it to accommodate the public

generally as a means of transportation.' Page 716 of 270 F., Page 1396 of 23 A.L.R.

In *United States v. Holt State Bank*, *supra*, the term 'useful commerce' is used and these words were adopted in the case of *United States v. State of Utah*.

[7] It seems fair to say from all of these decisions that navigability is not dependent merely upon the physical capabilities of the particular body of water to support transportation of goods. The public interest in such a body of water arises only when it is so situated that it becomes or is likely to become a valuable factor in commerce.

[8] In addition to the facts found by the lower court, there is evidence in the record that the only clear part of the lake in the early days was its center, that bullrushes and cattails covered part of it; and that part was sod used for haying, which was so soft in places that an ox sunk through it. There is also evidence of a growth upon its bed that cattle would wade out to eat. In some of the survey reports the term 'swamp' is used as to part of it. In the winter it froze over. Since statehood and since the dam has been increased considerably in height, there have been years when the lake went dry, presumably from irrigation use and dry weather. All these facts point away from the idea of navigability. If we hold the principle set out in the case of *United States v. Appalachian Power Co.*, *supra* [311 U.S. 377, 61 S.Ct. 299], as applicable here there is still the factor of value or usefulness involved. The principle of that case, to which reference is made, is this: 'A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.' But the court also says: 'There must be a balance between cost and *need* at a time when the improvement would be *useful*.' (Italics ours.) *8 This is also said: 'The tests as to navigability must take these variations into consideration.' The words 'these variations' refer to a comparison made between the heavy traffic of the harbors of our seacoast and the traffic of the sparsely settled regions of the western mountains.

For the reasons given we are of the opinion that Scipio Lake was not navigable at the time this State was admitted to the Union. We believe the evidence justifies a finding of the facts as we have set them out in this opinion, and that the conclusions and decree should be in favor of plaintiffs. The decree of the lower court is reversed and the cause remanded for findings, conclusions and decree to conform to this

opinion. Costs to appellants.

LARSON, C. J., and McDONOUGH, and WADE, JJ., concur.

WOLFE, J., concurs in the result.

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