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RECENT DEVELOPMENTS

THE TALE OF TWO LAKES—A NEW CHAPTER IN WASHINGTON WATER LAW¹

The State of Washington, through its Department of Game, purchased waterfront lots on Phantom and Ames Lakes² and developed both properties into public fishing access areas.³ Large numbers of the public took advantage of these facilities, fishing from boats and the lake-shore.⁴ The two lakes, however, were not the kind found in true fishermen's dreams, isolated from civilization and surrounded by forests primeval. Both Phantom and Ames Lakes were surrounded by numerous residences, whose owners brought separate actions to enjoin the State from maintaining the public access areas, alleging nuisance and abuse of the lakes by the State's licensees.⁵ The trial courts found

¹The omission of a general introductory survey and discussion of Washington water law prior to the principal cases is justified by three excellent articles. Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580 (1960); Johnson, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1 (1967); Morris, *Washington Water Rights—A Sketch*, 31 WASH. L. REV. 243 (1956).

²These lakes, though some miles distant from one another, are situated in the northern portion of King County, Washington. Under the present law of Washington, both lakes are non-navigable bodies of water. See *Proctor v. Sim*, 134 Wash. 606, 236 P. 114 (1925).

³These access areas generally included a large parking area and facilities for launching small boats. There was no attempt by the State to develop the access areas into public parks or similar recreation grounds.

⁴Interviews with residents on Phantom and Ames Lakes, and persons who had utilized the access areas during fishing season, confirmed that the lakes were extremely popular fishing waters. The largest crowds were to be found at the lakes on "opening day" and on the weekends.

Residents and witnesses agree that the greatest evidence of the lakes' popularity was the first day of every fishing season. Fishermen would begin arriving well before dawn and, after either placing their boats in the water or finding an attractive place on the lake-shore, a veritable celebration would ensue until first-light. A person, viewing the lakes at dawn, would behold scores of boats on all parts of the lakes and fishermen every few yards along the lake-shore.

⁵The plaintiffs alleged, and the trial courts found as fact, that the State's licensees had, by their conduct and numbers, caused the following results: (1) The market value of the plaintiffs' property had been decreased; (2) Thievery had substantially increased, including the theft of boats, boating equipment, furniture, and other personal property; (3) Persons had relieved themselves in the lake and on the plaintiffs' property, causing plaintiffs, their families and guests annoyance and embarrassment; (4) Various items of garbage had been deposited in the lake and upon plaintiffs' property; (5) Plaintiffs suffered frequent trespasses on their yards, docks, beaches, and other property; (6) Plaintiffs and their families had suffered personal injuries from broken bottles and other debris deposited on their property; (7) Fishermen, trespassing on plaintiffs' beaches and docks, often harassed members of plaintiffs' families; (8) Although hunting and shooting on the lakes were

as fact that such abuses had occurred and persisted, and concluded that the State's maintenance of such facilities unreasonably interfered with the property owners' rights, constituting a taking and damaging of property without compensation in violation of the Washington State Constitution.⁶ Based on these facts and conclusions, the trial courts permanently enjoined the State of Washington from maintaining and operating the public fishing access areas. Upon appeal by the State, the lower courts' injunctions were modified to provide that the State would be enjoined only until it obtained the trial courts' approval of comprehensive plans for regulating public use of the lakes. With this modification, the judgments of the trial courts were affirmed. *Held*: The State, where it enjoys riparian rights, need not acquire by condemnation the rights of other riparians before its licensees may use the water in reasonable numbers, but it has the obligation to regulate the number and conduct of its licensees so as to prevent undue interference with the rights of other riparians. *Botton v. State*, 69 Wn. 2d 751, 420 P.2d 352 (1966); *Ames Lake Community Club v. State*, 69 Wn. 2d 769, 420 P.2d 363 (1966).

The majority of the court,⁷ though without expressly so holding, accepted the State's contention that it enjoyed riparian status.⁸ From this premise, the court concluded that such status created an inherent obligation to police and control State licensees in order to prevent injury to the rights of other riparians. After advertent to, and incor-

illegal, persons came onto the lakes and engaged in such activities; (9) Uncontrolled speed boating endangered plaintiffs and their families while swimming in the lakes; (10) The noise level on and around the lake had greatly increased.

⁶ WASH. CONST. amend. IX provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made...."

⁷ Only four judges joined in the court's opinion. With an equal number joining in dissent, it was left to Judge Finley, concurring specially, to cast the decisive vote. This close division of the court reflects the difficult and evenly balanced policy considerations involved in the instant cases.

⁸ In the instant cases the State had acquired fee title to the riparian property. The law is long-established in Washington that riparian rights are "inextricably annexed" to fee-ownership of riparian property. See *Hayward v. Mason*, 54 Wash. 653, 104 P. 141 (1909); *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 P. 147 (1894). Therefore, the court's premise that the State, by acquisition of fee title to the two riparian properties, enjoyed riparian status was entirely correct.

Whether the State would enjoy riparian status by acquisition of a lake-front easement has yet to be determined by the court. This determination may well rest upon the court's classification of the property interests encompassed by an easement. Notwithstanding the result of that classification, it would appear that the purpose of the easement may be dispositive. If the easement were acquired for the purpose of providing public access to a watercourse or lake, there would be greater reason to conclude that the easement carried with it those riparian rights necessary to fulfill its purpose.

porating by reference, an addendum⁹ surveying prior decisions involving riparian rights in Washington,¹⁰ the court stated that it considered the recent decision in *Snively v. Jaber*¹¹ to be controlling, thereafter relying on the language of that opinion to support its decision.

In his concurring opinion, Judge Finley characterized the problem before the court as one of "balancing of interests and rights."¹² Stating that there were a number of factors¹³ to be considered, he reasoned that what was needed, rather than a strict riparian rights analysis, was a practical common-sense approach, balancing the need to protect private rights against the need to provide for maximum public use of Washington's lakes.

The dissent concurred with the court's refusal to adopt the trial courts' permanent injunction, but vigorously objected to the decree of a temporary injunction until implementation of an approved plan of lake regulation. Finding "no authority in law or in equity to enjoin all members of the public for the misconduct of a few,"¹⁴ the dissent argued that only those abusing the lakes and riparian property should be enjoined. The core of the dissent's reasoning was that maintenance of the access facilities was within State police power, and to enjoin operation of the facilities not only would be contrary to statutory com-

⁹ 69 Wn. 2d at 757, 420 P.2d at 356.

¹⁰ In the court's addendum, following discussion of *Proctor v. Sim*, 134 Wash. 606, 236 P. 114 (1925), a comment of potential significance in the future development of Washington water law is made, 69 Wn. 2d at 758:

It must be noted that this very broad statement [referring to the preceding quotation from *Proctor v. Sim*] may be limited to the arid portions of this state; and that, in subsequent cases in the western part of the state, a lowering of a lake or an interference with its riparian uses creates liabilities and, on occasion, a necessity for condemnation.

With this comment, the court suggests for the first time that the scope of, and protection afforded, riparian rights may vary between western and eastern Washington. A prominent authority on Washington water law has suggested that in evaluating methods of water control and use it is necessary to consider the different climatological conditions prevailing in eastern and western Washington. Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580, 583 (1960). Although consideration of differing climatological conditions may be proper in determining "reasonableness" or assessing the most "beneficial use" of lakes, it is submitted that allowing geography to per se vary established legal rights within the same state is highly questionable.

¹¹ 48 Wn. 2d 815, 296 P.2d 1015 (1956).

¹² 69 Wn. 2d at 762, 420 P.2d at 360.

¹³ These factors were: (1) The increasing interest and recreational needs of the public in fishing in the non-navigable lakes of the state; (2) The establishment of state fish hatcheries for propagation of game fish, coupled with the acquisition of lakefront, public-access areas to waters stocked by the state; (3) The fact that the state had not acquired complete ownership of all the water-front property on lakes having public-access areas; (4) The fact that much of the water-front property, on such lakes as Phantom and Ames Lakes, is held in private ownership by numerous individuals.

¹⁴ 69 Wn. 2d at 766, 420 P.2d at 362.

mand,¹⁵ but also would re-establish private fishing lakes. Also discernible in the dissenting opinion was the thought that a State program, properly within the police power, should not be subject to judicial approval as a condition precedent to its operation. Finally, the dissent stated that one who resides on a lake, such as Phantom or Ames Lake, must take his property with the benefits of its location, and the correlative burdens of public use of the water for recreation.

The premise that the State enjoys the status of a riparian by acquiring property abutting non-navigable lakes should not have led the court to conclude summarily that the determination of rights in the instant cases was controlled by *Snively v. Jaber*. That case involved a contest between two private riparians wherein the plaintiff, a land developer, obtained an injunction against his neighbor's allowing customers of his small resort to boat on the lake, because such persons had littered and abused property that the plaintiff had been attempting to develop and market. Although analogous, significant distinctions exist between this decision and the principal cases. First, the State, when holding property for use by the public, is a unique riparian whose powers and number of potential licensees clearly differentiate it from private riparians. The law of eminent domain is illustrative of the disparity between the powers of the State and those of the citizen.¹⁶ Once the State has acquired riparian status, by eminent domain or otherwise, and developed access facilities for use by the public without charge or limitation, it becomes self-evident that the number of its licensees far exceeds the number gaining access to the lake from the property of a private riparian. Second, the law of riparian rights has developed in contests between private persons, such as occurred in *Snively v. Jaber*.¹⁷ It is ill-suited for application to a dispute between a

¹⁵ WASH. REV. CODE § 90.03.010. The language upon which the dissent particularly relied was: "Subject to existing rights all waters within the state belong to the public . . ."

¹⁶ The State enjoys the power of eminent domain by which it may acquire riparian land or condemn the riparian rights of private property. WASH. REV. CODE § 90.03.040.

The private riparian does not ordinarily possess this power, nor can he usually successfully resist the State's exercise of this power for a proper objective pursuant to the required procedures. The Washington Water Code does provide that "[A]ny person may exercise the right of eminent domain to acquire any property or rights . . ." for the storage or application of water for the greatest public benefit. WASH. REV. CODE § 90.03.040. However, before a private person may exercise this right, he must prove not only that his use would be more beneficial, but also that such use would be of public benefit.

¹⁷ Although the right of use of the lake by the licensees of one of the litigants was involved in that case, the heart of the controversy was the conflicting interests of two riparians in the use of the lake surface.

private riparian, or class of such riparians, and the State acting as representative of the general public's competing interest.¹⁸

Finally, *Snively v. Jaber* primarily involved the conflict of two private persons in the use of a single lake. Only secondarily involving the interests and property rights¹⁹ of individuals in particular lakes, the primary conflict in the instant cases was between "private rights" and "public rights." This conflict is best characterized as a confrontation of the competing socio-legal policies of protection of private property rights and provision for public recreational development of Washington's lakes.

The court's decisions may be interpreted as an extension of the reasonable-use-in-common principle of *Snively v. Jaber* to such controversies as existed in the principal cases. Although this principle may be utilitarian in litigation between parties of relatively equal interests, it is of questionable value when parties represent greatly unequal and dissimilar interests. Reasonableness is but the foundation from which the court, with appreciation of the unique nature of the controversies created by the State's involvement, should have fashioned a more comprehensive analysis.

It is significant that the court was careful to state that it was not necessary to condemn the riparian rights of private riparians on the lakes in order to maintain and operate the public access facilities. However, the court did not foreclose the alternative of such condemnation by proceedings in eminent domain. Therefore, the State may

¹⁸In *Snively v. Jaber*, the licensees' right to use the lake depended upon the riparian rights of the private riparian licensors. The licensees in the instant cases sought to come upon the lakes in their own right as members of the public. In these cases the State only acted as the public's representative in the adjudication of the extent of permissible public use of the lakes.

It has been suggested that *Snively v. Jaber* has analogous application to the instant cases because in both instances the licensees' rights were derived from the riparian status of the licensor. Such analogical reasoning fails to appreciate the nature and source of the licensees' rights in each case. The licensees' rights in *Snively v. Jaber* were wholly derivative, Mr. Jaber's rights determining the extent of use which his licensees could make of the lake. The licensees in the instant cases, although coming upon the lakes over State-owned riparian property, claimed a right of use in their own right as members of the public. The basis of this claimed right was the statutory dedication of such waters to the public. See WASH. REV. CODE § 90.03.010. With assertion of this direct right of use, the controversies concerning Phantom and Ames Lakes became conflicts between relatively small groups of riparian landowners and the public.

Although recognizing the language of the statute, the court dealt with the State as if it were a riparian landowner. It is submitted that the possible dangers of this approach, in terms of restrictive definition of reasonable use, are as great as those inherent to the private riparian in adoption of any "public trust" approach.

¹⁹A riparian right is a property right in Washington. *In re Clinton Water Dist.*, 36 Wn. 2d 284, 218 P.2d 309 (1950); cf. *Litka v. Anacortes*, 167 Wash. 259, 9 P.2d 88 (1932).

operate access facilities pursuant to a comprehensive regulatory plan, as directed by the court, or it may condemn the riparian rights of all private property on the lakes and operate access facilities without a regulatory plan. The latter alternative, however, would be one of last resort because of the substantial expense of the condemnation awards.²⁰

It is also significant that the court did not proceed under any theory of "public trust," nor did it construe the Washington Water Code²¹ as granting the State pre-emptive rights in non-navigable lakes. These theories, though available to the court, have as yet to find favor in any Washington decision. The Washington Water Code does declare that "[A]ll waters within the state belong to the public."²² However, this phrase is qualified by the introductory words, "Subject to existing rights. . . ."²³ The court's failure to adopt either a public-trust or pre-emption theory would seem to indicate the validity of two conclusions. First, public ownership and any trustee-power of the State are limited to those waters not already appropriated or subject to existing riparian rights. Second, the language, "Subject to existing rights," qualifies the extent of State control of lakes, and inhibits pre-emptive rights being exercised by the State in such waters.

The court wisely rejected the two solutions to the controversies urged by the dissent. The first solution was that protection of private rights and full recreational use of the lakes would be served best by individual civil and criminal actions against persons committing the alleged abuses. The dissent's second solution was that persons owning lake-front property should be required to enjoy the benefits of such location along with the abuses and wrongdoing by certain members of the public. Implementation of the dissent's first solution would place responsibility for control and regulation of lake use upon the private

²⁰ In addition to the acquisition of footage on the immediate periphery of the lakes, the State would properly be required to compensate owners of lake-front property for the other recognized riparian rights. Perhaps the most important compensable right involved would be the use of the lake for recreation. See *Snively v. Jaber*, 48 Wn. 2d 815, 296 P.2d 1015 (1956). In Washington, a riparian also has an established right to have a lake remain at such a level, and in such a condition, as to not detract from the scenic or aesthetic value of the riparian property. Cf. *In re Martha Lake Water Co.*, 152 Wash. 53, 277 P. 382 (1929). There is also a recognized riparian right to use the lake for irrigation or drainage. See *In re Clinton Water Dist.*, 36 Wn. 2d 284, 218 P.2d 309 (1950). These rights, as well as the appraised value of the actual property condemned by the state, are property interests protected by the Washington State Constitution. See *In re Clinton Water Dist.*, *supra*; *Litka v. Anacortes*, 167 Wash. 259, 9 P.2d 88 (1932); *In re Martha Lake Water Co.*, *supra*.

²¹ WASH. REV. CODE § 90.03.010.

²² *Id.*

²³ *Id.*

property owners. It is doubtful that this responsibility could be effectively discharged without these persons retaining a small "police force" to determine the identity of persons committing trespass and to apprehend those committing criminal acts. Rather than placing the burden of regulation, and its inherent costs, upon the State as the court required, the dissent effectively would have placed it on the lake residents. Because the State was responsible for bringing the public upon the lake, as part of a comprehensive plan for increasing recreational opportunities for its citizens, the dissent's determination of regulatory responsibility would appear unjust and inequitable. The second solution advanced by the dissent is no less troublesome than the first. A property owner may reasonably be expected and required to take his property subject to municipal or State easements for subterranean or surface utilities. Residents on the shore of a navigable body of water, such as Lake Washington or Puget Sound, may fairly be called upon to endure occasional raucous speed-boats or to evict waterfront hikers who may stray onto their property. However, the resident on the shore of a relatively small non-navigable lake, having paid a premium for privacy and accessibility to water recreation, cannot reasonably be said to take his property subject to the abuses and depredations proven to have taken place on and about Phantom and Ames Lakes.

In his concurring opinion,²⁴ Judge Finley employed the proper analysis in resolving the controversy, the basis of which he defined as "*the uncontrolled, indiscriminate public use, and, more importantly, the destructive abuse*"²⁵ of the lakes. He concluded that "a common sense" balancing of the private property interests of the lakeside residents and the interests of the public in the fullest development of recreational resources was required.²⁶ Regulation of State licensees, as a solution to such controversies as those in the instant cases, is properly supported by such "balancing of interests," and reflects that the overriding issue is one of competing social policies rather than mere adjudication of conflicting property rights.²⁷

²⁴ 69 Wn. 2d at 761, 420 P.2d at 359.

²⁵ *Id.* at 762, 420 P.2d at 360.

²⁶ Although in concurring Judge Finley commended the majority opinion, it would appear the commendation was directed to its result rather than its reasoning since he criticized resolution of the controversy by application of the doctrine of riparian rights as being too restrictive and limited.

²⁷ Cardozo writes: "Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 65 (1922).

Despite the significant social aspects adhering in controversies typified by the principal cases, a more precise and utilitarian "balancing of interests" analysis should be employed. The basic principle of such an analysis should be: Whether the use, or abuse, of a lake by State licensees constitutes an actionable wrong depends upon, and is measured by, the residential and commercial development of the riparian property. Such measurement goes, primarily, to the quantum of proof required of riparian property owners to show unreasonable interference with their property interests, and thereby compel State regulation of its licensees using the lake. If the riparian property is minimally developed, the property owners would be required to show gross abuse or permanent damage in order to compel regulation. By contrast, if the lake is bordered by substantially developed property, owners of that property would be required to prove only minor abuse and continuing misconduct by the State's licensees in order to compel regulation. In sum, whether State regulation would be decreed would depend *primarily* upon the kind and extent of damage to the lake and riparian property, as measured against the overall existing development of the riparian property. This analysis must, in all cases, incorporate the general test of reasonableness, allowing the court to consider additional factors²⁸ when necessary.

Under the suggested analysis the State would be free, initially, to create and operate fishing and recreation access facilities without regulation. Should the riparian property owners object to the conduct or number of the State's licensees, their proper course would be an action to enjoin unregulated use of the lake by the State's licensees.²⁹ At trial the court would employ the suggested analysis to determine whether the riparians should obtain relief. Should the court determine that the State's operation of the facilities, absent regulation, constitutes unreasonable interference with the plaintiff's rights, regulation would properly be decreed.³⁰ Should the riparian property owners fail to prove that the alleged abuses, measured against riparian property

²⁸ Typical factors that may assume importance in particular cases are the size of the lake, the configuration of the lake, and the population density in the general locality. The court should be free to consider any other factors relevant to the question of general "reasonableness."

²⁹ Implicit in this analysis is the requirement that riparians, acquiring residences on the lake subsequent to establishment of conditions alleged to constitute unreasonable interference with their interests, would not be estopped to compel State regulation of the lake.

³⁰ The court should have broad discretion in framing the decree in this type of controversy. The decree should be tailored to the particular conditions and abuses in each case, and should have reference to seasonal patterns of abuse where they exist.

development and other relevant factors, entitle them to relief, regulation would not be decreed and the State would be free to continue its access facility operations as before.

Resolution of such controversies by the suggested analysis has several practical and beneficial results. First, a "balancing of interests" is achieved by an analysis affording guidance to both attorney and judge. Second, should the State desire to develop access areas, or similar facilities, without assuming the financial burdens of regulation, such development could be accomplished on those lakes not surrounded by substantial residential or commercial development. Finally, should the State undertake creation of access facilities on lakes with substantially developed riparian property, it would be required to assume the legitimate responsibility of regulation. It is submitted that such results are equitable and advantageous to both the interests of private property owners and the interests of the State in maximizing the fishing and recreational development of Washington's lakes.

Although the court's reasoning may be subjected to criticism, and alternative analyses may be suggested, its decisions in the principal cases are commendable. State regulation of the lakes which it opens for public use is not only equitable, but also preserves established legal rights while furthering a sound social policy.³¹ The Washington Court has again distinguished itself as a leader in the continuing development of water law.

³¹ There is little question that the expansion of sports and recreational opportunities for the general public constitutes sound public policy. The only question that may yet remain is the specific remedy which the court fashioned to achieve this policy. The State was required, prior to further operation of its access facilities, to submit a regulatory plan to the trial court for approval. There are no expressions in any of the opinions of the majority or dissent questioning that the State is within its police power in operating the lake access facilities. It might be suggested, therefore, that the decree required the State, in the performance of a program within its police powers, to obtain judicial approval as a condition precedent to its implementation. This poses interesting questions of the constitutionality, or at least propriety, of the court's decree, particularly in regard to the very basic doctrine of separation of powers.