

LEHIGH FALLS FISHING CLUB,, Plaintiff v. JOHN ANDREJEWSKI, Defendant.	IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY CIVIL ACTION - EQUITY NO. 1-E OF 1996
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ADJUDICATION

I. PROCEDURAL BACKGROUND AND HISTORY

This proceeding had its genesis on January 2, 1996 when Plaintiff, Lehigh Falls Fishing Club, an unincorporated association, filed its Complaint seeking a declaratory judgment that a portion of the Lehigh River, which traverses certain lands leased by it, is non-navigable, and that the public therefore has no right to fish in that portion of the river which traverses Plaintiff's leased land. The leased area comprises a piece or parcel of land located in Buck Township, Luzerne County, which includes a portion of the Lehigh River bed, extending downstream from Pennsylvania Legislative Route 115 to Boy Scout Camp land, as said area is described in certain leases (Plaintiff's Exhibits Nos. 6 and 7), which constitute a part of the record developed in this proceeding.

On February 20, 1996, the Defendant, John Andrejewski filed his Answer denying the averments of Plaintiff's Complaint, alleging that the section of the Lehigh River which traverses Plaintiff's leasehold interest is a navigable waterway, therefore open to members of the public, including the Defendant; and, that Plaintiff therefore had no right to bar his access to that portion of the river bed which traversed the area encompassed by Plaintiff's leases.

On March 25, 1996, Plaintiff petitioned this Court for a Preliminary Injunction, and a Rule was issued to Show Cause why an injunction should not be entered, barring Defendant from fishing in that portion of the river crossing Plaintiff's leasehold interest. This Court held hearings, with regard to the Preliminary Injunction, on April 15, April 16 and April 22, 1996, and on April 26, 1996, the Court granted the Preliminary Injunction sought by Plaintiff, thereby enjoining Defendant from entering that portion of the river which runs through the property Plaintiff leases. The Preliminary Injunction issued because the Court was of the opinion, based upon the testimony which it heard, that Defendant's conduct was such that it created a clear and present danger to Plaintiff's club members, and specifically a Michael Zavacky, in that Defendant, while brandishing a pistol or other similar weapon, threatened bodily harm if he was not permitted to fish in the river bed traversing Plaintiff's leasehold. Defendant thereafter, on May 13, 1996, filed a Notice of Appeal with the Superior Court from the Court's adjudication.

On October 15, 1997, the Superior Court issued a Memorandum Opinion, reversing this Court's determination that a Preliminary Injunction issue, further holding that the Plaintiff's right to exclude Defendant from the leasehold area was dependent upon whether or not the Lehigh River, which crosses Plaintiff's leased lands, is navigable at Such point, and declaring that Plaintiff bear the burden of establishing the non-navigability of the river across Plaintiff's leasehold interest. Thereafter, a full hearing on the issue of navigability commenced on February 23, 1998, with extensive testimony and voluminous exhibits presented to the Court in support of the parties' respective positions on the issue of navigability, following which the Court conducted a View of the disputed area on April 16, 1998 with Counsel for the parties.

Upon a thorough review of the record and after a careful analysis of the Briefs of the Parties, we conclude the following.

II. FINDINGS OF FACT

Counsel for the parties have furnished the Court with extensive and detailed proposed Findings of Fact. Plaintiff's proposed Findings of Fact comprise a total of thirty-four in number, and Defendant's proposed Findings of Fact comprise a total of sixty-seven separate findings, all of which the Court has reviewed and considered in conjunction with the record created by the parties, and concerning which the Court finds the following to be pertinent and relevant to the sole issue of the navigability of that portion of the Lehigh River traversing Plaintiff's leasehold interest.

1. Plaintiff, a fly fishing club, is an unincorporated association which began in the 1960's and has its principal office at Mertztown, Luzerne County, Pennsylvania.

2. The Defendant, John Andrejewski, is an adult individual residing at 78 Perkins Street, Plains, Luzerne County, Pennsylvania.

3. Plaintiff's lease indicates that its leasehold interest encompasses land on both banks of the Lehigh River, as well as the river bed, and Plaintiff's lease is for a portion of approximately 654.41 acres of woodland and approximately 1.75 miles of the Lehigh River bed. (Plaintiff's Exhibits Nos. 6 and 7)

4. The evidence presented by the Plaintiff to support its claim as lessee of the Lehigh River bed was its lease, and renewals thereof, from two estates. The Plaintiff did not trace, or attempt to trace, its leasehold claim to the bed of the Lehigh River traversing its leasehold estate from any predecessors of its lessors in chain of title, but relies solely upon the terms of its lease dated June 1, 1988 and subsequent renewals thereof.

5. Plaintiff has limited fishing on the leased property to that of fly fishing, and by reason of its lease permits only its members and invited guests upon the leasehold area, posting the premises with "No Trespassing" and "No Fishing" signs. (4/96 N.T. 121, 122-123, 125)

6. The Plaintiff's property is located approximately ten miles above the Route 940 Bridge at White Haven, approximately five miles above the Francis E. Walter Dam, and approximately two miles above the confluence of the Lehigh River with Tobyhanna Creek.(4/96 N.T. 25)

7. The Francis E. Walter Dam, which is two hundred and thirty-two feet high, was constructed by the United States Army Corps of Engineers in 1968; pursuant to an Act of the U.S. Congress which enacted The Flood Control Act of 1946, Public Law No. 526-79, 2nd session, which Act gave the U.S. Army Corps of Engineers jurisdiction over the project. This Dam totally eliminated the Lehigh River's uninterrupted flow downstream, thereby completely preventing passage on the River at its location. (4/96 N.T. 55) (Ex. II-P)

8. Historically, the Commonwealth of Pennsylvania has treated the Lehigh River as a navigable water and as a great river of the Commonwealth for its length. This use of rivers for transportation was natural in the early days of the Commonwealth, as overland transportation was expensive, difficult and only used for low bulk, high value items. Large bulk, low value goods moved by water. (N.T. 82)

9. Early efforts to improve the river for navigation in the time period 1792 to 1810 were fraught with difficulty, but later efforts, spurred by the development of the coal industry in the Lehigh Valley, improved the Lehigh River for commercial navigation for its length, from its mouth to the Great Falls at Stoddardsville. As evidenced by the consistent and repetitive passage of legislation by the Pennsylvania General Assembly, both before 1776 and after, improvement of the Lehigh and

other great rivers of the state for navigation was an object of great importance to trade and commerce during the development of the Commonwealth.

10. An Act of February 13, 1822 incorporated the Lehigh Coal & Navigation Co. and granted that company virtually unlimited rights to improve the river for its length between the Great Falls at Stoddardsville and its mouth.

11. From 1838 to 1862, the area of the Upper Grand Section of the Lehigh River at and near Stoddardsville was the scene of massive timbering operations, one of the greatest in American history, where whole forests were literally cut down. Stoddardsville, near the Great Falls at the head of the Upper Grand Section, provided the transportation access to the great pine forest reservation. (N.T. 128, 127)

12. The Lehigh Coal & Navigation Co. held all of its rights in the Lehigh until, in 1965, the Acts of March 20, 1818(P.L. 197) and of February 13, 1822 (P.L. 21) were repealed. The obligations and rights granted under those statutes reverted to the Commonwealth. Unlimited control of the river, long held by the Lehigh Coal & Navigation Co., reverted to the source of all property rights in the river, the Commonwealth.

13. The Congress of the United States, in 1946, authorized the construction of the Francis Walter Dam to control flooding on the Lehigh River; the dam was subsequently built approximately six miles downstream from the Plaintiff's leasehold. (79th Cong. Sess. Ch. 595, July 24, 1946; N.T. 23)

14. Section 3 of the Act of 1946, authorizing the building of the Francis E Walter Dam, states that the water areas of reservoirs created by such dams shall be open to the public, without charge, for "...boating, swimming, bathing, fishing and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use..." subject to regulation by the Army Corps of Engineers and the Commonwealth.

15. The U.S. Army Corps of Engineers, Philadelphia District, in its listing of navigable waters in the State of Pennsylvania, classifies the Lehigh River as navigable only with regard to the area below Pa. State Ihighway Route 94 (White Haven) and downstream to its mouth at the Delaware River, thereby opining that the area of the Lehigh River within the Plaintiff's leasehold is non-navigable.(4/96 N.T. 72-73) The record, however, fails to establish any basis for the opinion or authority by which such determination was made.

16. The Pennsylvania Fish Commission, on November 17, 1980, declared that it considered the Lehigh River between Route 115 and the confluence with the Tobyhanna Creek to be a non-navigable stream. That finding, however, was based upon the advice of a single attorney with the Attorney General's office of the Commonwealth of Pennsylvania, as outlined in a letter dated September 18, 1980.

17. That letter opinion (P. Exhibit 4) did not constitute a formal ruling authorized by the Office of the Attorney General, but merely expressed the opinion of its author, who stated therein, "... I quite obviously have no special expertise in making factual determinations such as the one I have had to make here before going on with my legal analysis."

III. DISCUSSION OF LAW

Plaintiff's Complaint, filed on January 2, 1996, seeks a Declaratory Judgment from this Court, declaring that the portion of the Lehigh River which traverses Plaintiff's leasehold interest is non-navigable, thereby precluding Defendant, John Andrejewski, and by implication other non-authorized parties, from entering upon Plaintiff's leasehold interest by use of the river bed for purposes of fishing.

The procedural history of this matter, which has already been set forth at the inception of this Opinion, need not be restated in detail.

Counsel for the respective parties are commended for the Herculean efforts expended by them in the preparation and presentation of their respective positions in this proceeding, focusing upon the issue of navigability. The Court has been provided with comprehensive Briefs and argument detailing the history and use of the Lehigh River and the standards by which navigability may be determined, as a result of which this Court, in seeking to fulfill its obligation as the trier of both fact and law, has expended considerable time and effort in arriving at a determination of the issue before it. The Court, being fully cognizant of the consequences attendant its determination, has reviewed in detail the statutory and case law cited by the parties, as well as the multitudinous exhibits, all of which were instructive and enlightening to the Court. The Court is of the opinion that the standards and touchstones by which the issue of navigability is to be determined have heretofore been established and recited in a series of decisions hereinafter noted.

The question as to whether the Lehigh River (or any other water of the Commonwealth) may be considered to be navigable cannot, in the Court's opinion, be resolved by merely observing the river in its present state of being. The issue is whether, when the United States declared independence on July 4, 1776, the Lehigh River was considered a navigable waterway; that is, a waterway capable of use by the public for purposes of transportation and commerce. The Montello, 87 U.S. (20 Wall) 430, 441-442 (1874). The test of navigability early adopted by the Courts of Pennsylvania was enunciated in The Daniel Ball Opinion. "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible to being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 10 Wall 557, 563, 19 L.Ed. 999 (1870); The Montello, 87 U.S. (20 Wall) 430, 439, 22 L.Ed. 391; United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926); United States v. State of Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); Flannaqan v. City of Philadelphia, 42 Pa. 219.

If the Lehigh River met the navigability test at any point in its history, it remains a legally navigable waterway subject to the Public Trust Doctrine. Economy Light & Power Company v. United States, 256 U.S. 113 (1921). This is commonly known as the Rule of Indelible Navigability. Economy Light, supra; Weston, Public Rights in Pennsylvania Waters, 49 Temple L.Q. (1976), at 525. The effect of the Rule is that a body of water once found to be navigable in its natural state is presumed to be navigable and "forever free." United States v. Appalachian Electric Power Company, 311 U.S. 377, 408, 61 S.Ct. 291, 299, 85 L.Ed. 243, 253 (1940).

In the Appalachian Electric Power Company case, the U.S. Supreme Court opined:

"... a number of dams have been built ... besides a considerable number of bridges of various kinds span the river. The fact, however, that artificial obstructions exist, capable of being abated by due exercise of public authority does not prevent the stream from being regarded as navigable in law, if supposing them to be abated, it is navigable in fact in its natural state." at U.S. 118

See also United States v. Pot-Nets, Inc., 363 F. Supp. 812 (E.D. Pa. 1973); Alaska v. Ahtna, 891 F. 2d 1401 (9th Cir. 1989).

Applying this Standard to the present case, in determining navigability, the river must be viewed as it existed prior to the construction of the Francis Walter Dam, i.e. "in its natural state".

Pennsylvania Courts long ago pronounced the Lehigh River to have met the test for navigability. See Shrunk v. Schuylkill Navigation Co., 14 S&R 71 C (1826); Southwest Pennsylvania Pipeline v. Roger Sand Company, 43 Pa. Super. 524, 526 (1910); McKeene v. The Delaware and Hudson

Canal Co., 49 Pa. 424, 434 (1865); "The Lehigh River is a navigable stream - a public highway". Fulmer v. Williams, 122 Pa. 191, 15 A. 726, 727 (1888).

The Court in McKeene stated as follows:

"The cherished purpose of the province and the state has been to preserve all the rights of navigation, not only in streams naturally navigable, but in many ways not so declared by law from time to time. The Lehigh River, known as the western branch of the Delaware River, we have noted as coming within this watchful care as early as 1771, when with the Delaware it was declared to be navigable" McKeene at 49 Pa. at 439.

In the view of the Pennsylvania Appellate Courts, therefore, the Lehigh River has been a navigable river and therefore open to the public for over two hundred twenty-five years. That has been the position and status of the Lehigh River and the other great rivers of this Commonwealth since colonial times. Fulmer v. Williams, 122 Pa. at 205; McKeene v. Delaware Division Canal Co., 49 Pa. at 433.

Because "in its natural state" this river is navigable, the construction of the Francis Walter Dam cannot change that prior determination of navigability. Accordingly, this Court must conclude that the river is navigable.

Moreover, the Court also concludes that the river is, in fact, presently navigable.

Navigability, in the sense of the law, is not destroyed because the water course is interrupted by an occasional natural obstruction. The Economy Light & Power Company v. United States, 256 U.S. 113, 123, 41 S.Ct. 409, 412, 65 L.Ed. 847, 855 (1921); Pennsylvania Environmental Inc. v. Bartlett, 315 F.Supp. 238 (1970), *affm'd*, 454 F.2d 613 (1971). The character of navigable water is not changed by any subsequent economic or geographic developments resulting in a commercial disuse of a river for navigation. Montana Power Company v. Federal Power Commission, 185 F.2d 491 (1950), *cert. denied*, 341 U.S. 912, 75 S.Ct. 620, 95 L.Ed. 1349 (1951); Pennsylvania Water & Power Company v. Federal Power Commission, 123 F.2d 155, 160 n.9, 74 Appl D.C. 351, 356 n.9, 42 P.U.R. 428, 434 n.9 (1941); State of Wisconsin v. Federal Power Commission, 214 F.2d 334, 337 (1954) [the fact that a river had not been used for transportation of logs since 1924 was of little moment in deciding the navigability of a river].

The federal test of navigability was developed and expanded in United States v. Appalachian Electric Power Co., 311 U.S.377 (1940).

"The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times, our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test. We draw from the prior decisions in this field and apply them ... to the particular circumstances presented." 311 U.S. 377 at 404 (1940).

The Supreme Court in Appalachian Electric explained that the navigability test does not depend on the ability of a river, in its natural (unimproved) condition, to support commercial navigation.

"To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary conditioⁿ' refers to volume of water, the gradients, and the regularity of the flow. 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 ... [T]here are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and

need at a time when the improvement would be useful. [W]hen once found to be navigable, a waterway remains so ... Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." (Emphasis Added)

In Pennsylvania, the evolution of the test(s) of a river's navigability seems to have been an extremely practical and logical product of the era. Before motor vehicles, highways, railroads or canals, the logical and practical routes of trade and commerce were natural waterways. Navigability can only be assessed by viewing the question through the eyes of those who first encountered the enormous resources of this Commonwealth.

"On this continent, the early settlers found large rivers with navigable tributaries forming vast systems of internal communication, extending hundreds, and in some instances thousands of miles above the reach of tidewater. The common law definition of a navigable river was unsuited to this state of things and seems never to have been adopted in Pennsylvania; on the contrary, navigability in fact was made the test by which the character of the stream, as public or private, was determined, wherein the great but tideless rivers of the state were held to be navigable rivers, public highways, belonging to the state and held for the use of all her citizens. The beds of such rivers between the lines of ordinary low water, on opposite sides, have not been granted by the Commonwealth to individuals but continue to be held and controlled by and for the public: Carson v. Blazer, 2 Binn. 475, Flannagan v. City of Philadelphia, 42 Pa. 219; Fulmer v. Williams, 122 Pa. 191, 206, 15 A. 726, 727-728 (1888).

"In the case of all navigable rivers the beds in which they flow belong to the public. The right to the use of the water follows the ownership of the bed in which it flows. The Commonwealth is therefore the owner of the rivers and holds them for the use of its citizens. They are public property - natural highways - open to all who may have occasion to use them"; Carson v. Blazer, supra.; Poor v. McClure, 77 Pa. 214, Id. 207-208, 15 A. 726; See City of Philadelphia v. Philadelphia Suburban Water Company, 309 Pa. 130, 144, 163 A. 297, 300 (1932).

Public rights in the navigable waters of Pennsylvania have been jealously protected by the Courts. "There is no natural right of the citizen, except the personal rights of life and liberty which is paramount to his right to navigate freely in the streams of the country he inhabits." Yoffee v. PP&L, 385 Pa. 520, 534, 123 A. 2d 636, 644 (1956) (citing Flannagan v. City of Philadelphia, 42 Pa. 219, 228 (1862).) No one can curtail the rights of a citizen using the rivers of the Commonwealth in aquatic navigation so long as a citizen remains within the laws and regulations prescribed by the constituted authorities.

"In general, title to the beds of the rivers and lakes in Pennsylvania is held by the Commonwealth in trust for the public." Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410, 416 (1842). Ownership by the Commonwealth encompasses submerged lands extended below the ordinary low water mark on either side of a river. Carson v. Blazer, 2 Binn. 475, 484 (1810); Stover v. Jack, 60 Pa. 339, 343 (1869); Ball v. Slack, 2 Wh. 508, 538 (1837).

"Between the ordinary high and low water marks the public retains a servitude or easement, to use the waters of Pennsylvania's navigable streams." Stover v. Jack, 60 Pa. 339 (1869); Fulmer v. Williams, supra.; Palmer v. Farrell, 129 Pa. 162, 169, 18 A. 1761 (1889); United States v. Pennsylvania Salt Mfg. Co., 16 F.2d 476, 480 (E.D. Pa. 1927), aff'd. 30 F.2d 332 (3rd Cir., 1929). "Within such easement, the public holds a right-of-way across submerged lands for the purposes of navigation including all uses which are reasonably necessary and convenient to navigation." Parcel v. Stover, supra.; Baker v. Lewis, 33 Pa. 301, 305 (1858). "This public easement between high and low water marks also includes a right of fishing." Jones v. Janney, 8 W.&S. 436,

443 (1844)(dicta); Wood v. Appal. 63 Pa. 210, 221 (1869) (dicta); Shrunk v. Schuylkill Navigation Co., supra.

The Court's research has not revealed any statutory or pertinent case law which rescinds or otherwise modifies the aforesaid pronouncements regarding the standard by which navigability may and should be determined, and this Court is therefore bound and obligated by such precedent. In essence, all of the arguments propounded by the respective parties, as well as the statutory and case law authority submitted to the Court for its consideration, must be viewed and were considered by this Court in the light of the clear and unequivocal benchmark guidelines above noted. Lakeside Park v. Forsmark, 153 A.2d 486 (Pa. Supreme Court 1959), cited by Plaintiff in support of its position that the subject area of the Lehigh River is non-navigable, held, inter alia:

"We think that the concept of navigability should not be limited alone by lake or river, or by commercial use, or by the size of water or its capacity to float a boat. Rather it should depend upon whether water is used or usable as a broad highroad for commerce and the transport in quantity of goods and people, which is the rule naturally applicable to rivers and to large lakes, or whether with all of the mentioned factors counted in the water remains a local focus of attraction, which is the rule sensibly applicable to shallow streams and to small lakes and ponds. The basic difference is that between a trade route and a point of interest. The first is a public use and the second private."

The PP&L case is instructive, but by no means can it be said to be dispositive of the Lehigh River's present status. PP&L involved a river, subsumed by a lake sixty years ago, which had only once been declared navigable by the General Assembly. On appeal, the record contained scant evidence of historic navigability. The Courts of Pennsylvania had never pronounced Wallenpaupack Creek navigable. The rules to determine navigability are different from those applicable to rivers, as lakes are inherently local and provide no chain in a link of commercial commerce. Forsmark, supra. As of this writing, the PP&L decision has been denied certiorari by the Pennsylvania Supreme Court.

The Lehigh River's navigability is supported by abundant, authentic and reliable historical proof that the river was for many years a broad highroad of commerce, and that the Pennsylvania Courts and Legislature have regarded it as navigable since and before the formation of the Union.

Plaintiff further contends that the construction of the Francis E. Walter Dam by the U.S. Army Corps of Engineers, pursuant to the Flood Control Act of 1946, abrogated the navigability of the Lehigh River from the Dam's location upstream, including an area encompassing Plaintiff's leasehold interest, thereby expressly and/or by implication acknowledging the navigability of the Lehigh from an area of the Dam downstream to its mouth. Plaintiff has not contended that the lower portion of the river is incapable of navigation both downstream and upstream as to that section of the river located between the Dam and its mouth. Plaintiff, however, contends that the navigability of the Lehigh River above the area of the Dam ceased to exist by reason of the Dam's presence. The Court has experienced both difficulty and concern in attempting to distinguish the basis upon which Plaintiff argues that the section of the river below the Dam has continued to remain navigable, while the river's upper section, above the Dam, has been rendered non-navigable, since both sections can or could be traversed to the area of the Dam both downstream and upstream. In essence, the Court fails to comprehend Plaintiff's argument that the construction of the Francis E. Walter Dam did not affect downstream navigation while contending that navigation upstream from the Dam was terminated.

Upon consideration of the testimony of the many witnesses for the parties, taken at both the Preliminary Injunction hearing, which commenced on April 15, 1996, and the non-jury trial, which began on February 23, 1998, this Court is convinced and is therefore of the opinion that the preponderance of the testimony and evidence presented militates in favor of the Defendant with regard to the issue of navigability as to that portion or area of the Lehigh River which traverses Plaintiff's leasehold interest. In summary, the great bulk of Plaintiff's argument and testimony

related primarily to the present status and usage of the river traversing its lands, seeking to emphasize the present condition of the River, which the Court feels is not completely relevant in light of the various authorities cited as to navigability and the Public Trust Doctrine. While it is true that the subject area of the river is not presently used as a broad highroad of commerce and for the transport of goods and people, the Court is satisfied that the subject area of the Lehigh River is usable or can be made usable in such regard, and in any event, the bed thereof is Commonwealth property held in trust for the public.

Parenthetically, Plaintiff's leasehold interest(Plaintiff's Exhibits Nos. 6 and 7), standing alone, does not convince the Court in a clear and unequivocal manner as to Plaintiff's standing in this action. Stated in another manner, the rights which Plaintiff seeks to establish are detailed and set forth in various leases commencing on June 1, 1988, without any further evidence as to whether the rights granted to Plaintiff existed or were created by any prior documents of record, except for Plaintiff's Exhibit No. 7, being a deed to Plaintiff's lessors, and for that reason, the Court cannot with any meaningful certainty declare Plaintiff's leasehold rights as being convincingly declaratory as to its standing in this proceeding.

Additionally, and while not directly determinative of the Court's holding in this matter, the Court, sua sponte, is of the opinion that the parties to this action have failed to Join, as an indispensable party in interest, the Pennsylvania Department of Environmental Protection, a Commonwealth agency, which the Court believes has standing, jurisdiction and an interest in matters relating to the issues of navigation and navigability.

The Administrative Code of the Commonwealth of Pennsylvania, 71 P.S. §510.4, setting forth the powers and duties of the Department of Environmental Resources, now the Department of Environmental Protection, provides, inter alia, that the Department shall have the power and its duty shall be:

"(6)To maintain a complete inventory of all the water resources of the Commonwealth; collect all pertinent data, facts, and information in connection therewith; classify, tabulate, record, and preserve the same; and, upon the basis thereof, determine, the points at which storage reservoirs may be constructed for flood control, for municipal and domestic supply, hydraulic and hydroelectric power, steam raising, steam condensation, navigation, and other utilization; and generally to devise all possible ways and means to conserve and develop the water supply and water resources of the Commonwealth for the use of the people thereof."
(Emphasis Added)

Had such joinder been effected, this Court would have had the benefit and guidance of the Commonwealth of Pennsylvania, acting by and through its Department of Environmental Protection, the result of which might have been to shed further light upon the issue of the navigability or non-navigability of the Lehigh River, as well as the interest of the public thereto, in the area in controversy. Despite the lack of such joinder, the Court believes the determination which it has made to be correct, and therefore finds the following.

IV. CONCLUSIONS OF LAW

1. The Lehigh River, including the section of the Lehigh which encompasses the leasehold of the Lehigh Falls Fishing Club, meets the tests of navigability heretofore adopted by the Courts of Pennsylvania. Therefore, the Lehigh River must be regarded as a public navigable river in law. The Lehigh River was used, and remains susceptible to being used, as a highway for commerce, over which trade and travel are or may be conducted. The Daniel Ball, 10 Wall 557, 563, 19 L.Ed. 999 (1870); The Montello, 20 Wall 430, 439, 22 L.Ed. 391; United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926); United States v. State of Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); Flannaqan v. City of Philadelphia, 42 Pa. 219.

2. The Lehigh River met the navigability test for a well defined period in its history. It remains a legally navigable waterway under the Rule of Indelible Navigability. Economy Light & Power Company v. United States, 55 U.S. 113 (1921).
3. The effect of the Rule of Indelible Navigability is that the Lehigh, once found to be navigable in its natural state, is presumed to be navigable and "forever free". United States v. Appalachian Electric Power Company, 311 U.S. 377, 408, 61 S. Ct. 291,299,85L.Ed. 243,253 (1940).
4. The navigability of the Lehigh in the sense of the law is not destroyed because the water course is interrupted by an occasional natural obstruction such as the Great Falls.The Economy Light & Power Company v. United States, 256 U.S. 113, 123124, 41 S.Ct. 409, 412, 65 L.Ed. 847, 855 (1921); Pennsylvania Environmental Inc. v. Bartlett, 315 F.Supp. 238 (1970), affirm'd. 454 F.2d 613 (1971).
5. The character of navigable water is not changed by any subsequent economic or geographic developments. The construction of the Francis E. Walter Dam did nothing to alter its navigable status on either side of the Dam. Nor did the commercial disuse of the river at Stoddardsville for navigation. Montana Power Company v. Federal Power Commission, 185 F.2d 491 (1950), cert. denied, 341 U.S. 912, 75 S.Ct. 620, 95 L.Ed. 1349 (1951); Pennsylvania Water & Power Company v. Federal Power Commission, 123 F.2d 155, 160 n.9, 74 Appll D.C. 351, 356 n.9, 42 P.U.R. 428, 434 n.9 (1941); State of Wisconsin v. Federal Power Commission, 214 F.2d 334, 337 (1954).
6. The law of Pennsylvania is settled to be that a public stream is a stream that is navigable, that is, floatable or boatable, and a private stream is one that is not. See Southwest Pennsylvania Pipe Lines v. Rodgers Sand Company, 43 Pa. Super. 524 (1910).
7. The Lehigh is not barred from classification as navigable merely because artificial aids were used to make the highway suitable for use for commercial navigation. Appalachian Power, supra.
8. Navigability, to fix ownership of the Lehigh River bed or riparian rights, is determined as of the time of the formation of the Union by the original States or the admission to statehood of those formed later. Navigability, for the purpose of the regulation of commerce, may later arise. There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents. Appalachian Power, pp. 407-409.
9. Pennsylvania Courts long ago pronounced the Lehigh River to have met the test for navigability. See Shrunk v. Schuylkill Navigation Co., 14 S&R 71 C (1826); Southwest Pennsylvania Pipeline v. Roger Sand Company, 43 Pa. Super. 524, 526 (1910); McKeene v. The Delaware and Hudson Canal Co., 49 Pa. 424, 434 (1865); "The Lehigh River is a navigable stream - a public highway." Fulmer v. Williams, 122 Pa. 191, 15 A. 726, 727 (1888).
10. The beds of all navigable rivers, including the Lehigh, belong to the public. The right to the use of the water follows the ownership of the bed in which it flows. The Commonwealth is therefore the owner of the Lehigh River and holds it in trust for the use of all of its citizens. It is a public property - a natural highway - open to all who may have occasion to use it. Poor v. McClure, 77 Pa. 214, 15 A. 726; See City of Philadelphia v. Philadelphia Suburban Water Company, 309 Pa. 130, 144, 163 A. 297, 300 (1932).
11. "The bed of the Lehigh is held by the Commonwealth -in trust for the public." Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410, 416 (1842). Ownership by the Commonwealth encompasses submerged lands extended below the ordinary low water mark on either side of the river.Carson v. Blazer, 2 Binn. 475, 484 (1810); Stover v. Jack, 60 Pa. 339, 343 (1869); Ball v. Slack, 2 Wh.508,538(1837).

12. "Between the ordinary high and low water marks the public retains a servitude or easement to use the waters of Pennsylvania's navigable streams." Stover v. Jack, 60 Pa. 339 (1869); Fulmer v. Williams, supra.; Palmer v. Farrell, 129 Pa. 162, 169, 18 A. 1761 (1889); United States v. Pennsylvania Salt Mfg. Co., 16 F.2d 476, 480 (E.D. Pa. 1927), aff'd. 30 F.2d 332 (3rd Cir. 1929). "Within such easement, the public holds a right-of-way across submerged lands for the purposes of navigation including all uses which are reasonably necessary and convenient to navigation." Baker v. Lewis, 33 Pa. 301, 305 (1858). "This public easement between high and low water marks also includes a right of fishing." Jones v. Janney, 8 W.&S. 436, 443 (1844)(dicta); Wood v. Appal, 63 Pa. 210, 221 (1869)(dicta); Shrunk v. Schuylkill Navigation Co., supra.

13. The case law and historic statutes of Pennsylvania Courts and Legislature make it clear that the Lehigh River is navigable, and has always been so regarded. A declaratory judgment may not search out new legal doctrine, and so the -Plaintiff's claim must fail. Doe v. Johns Manville Corp., 471 A. 2d 1252, 324 Pa. Super. 469 (Pa. Super. 1984).

14. Equitable rights must be established by clear, convincing and precise evidence as to result in a clear conviction of the truth of the precise facts in issue. Broida v. Travelers Ins. Co., 316 Pa. 444, 175 A. 492 (1934). The Plaintiff's evidence does not meet this standard. The rights of the Plaintiff to the bed of the river are not clear and free from doubt. No injunction can issue.

15. The Defendant has the right to fish the bed of the Lehigh River for its length.

DECREE NISI APPENDED

**Issued by Luzerne County Court of Common Pleas
May 26, 1998**