

Lehigh River Court Case Tests “Navigability”

by Linda Steiner

Most property in Pennsylvania, including waterways and watersides, is owned privately, without legal doubt. Some places, like state forests, county parks, game lands and Fish & Boat Commission lakes and boat accesses, are unquestionably in some form of public ownership.

The area of public rights in Pennsylvania waters is a “gray area” in Pennsylvania property law. Questions about which waters are legally navigable and the public’s rights to use them have sparked considerable litigation and debate. A recent decision by the Pennsylvania Superior Court has answered some questions about the status of one Pennsylvania stream.

On July 26, 1999, the Superior Court of Pennsylvania upheld a lower court ruling that the public “has the right to fish the bed of the Lehigh River for its length.”

The controversy over whether or not the public has a right to use the Lehigh River, in all its parts, has been closely watched by the angling and boating public, as well as private property owners.

The incident that prompted the court case occurred in the spring of 1995, when an angler, John Andrejewski, began fishing in a section of the Lehigh River upstream of Francis E. Walter Dam, near the Great Falls of the Lehigh, in Luzerne County. Andrejewski had accessed the Lehigh through lands co-owned by his father. He fished waters that had been leased and stocked with trout by a private group, the Lehigh Falls Fishing Club, and posted against trespass. Members of the club told Andrejewski he was not

permitted there; but the angler, believing the river was within the public domain, refused to leave. The stage was set for a court test of the navigability of the Lehigh, and public and private rights to the waterway.

In January 1996, the Lehigh Falls Fishing Club filed a complaint with the Court of Common Pleas of Luzerne County. As plaintiff it sought “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.” The defendant, John Andrejewski, filed his answer with the lower court, “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 “

In March 1996, the club petitioned the trial court for a preliminary injunction, and hearings were held in April. On April 26, Judge Ann H. Lokuta granted the preliminary injunction. The injunction ordered the defendant to stop entering and fishing the Lehigh on the club’s property. It was evidently issued to prevent further on-site altercation between the parties.

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photo: Robert & Lin Steiner



Lehigh River below White Haven

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The Superior Court of Pennsylvania reversed that injunction in October, saying that the club’s right to exclude the fisherman from the leasehold area depended on whether the Lehigh River was navigable there. The court put the burden on the club of establishing the non-navigability of the river section it leased. A major court case was in the works.

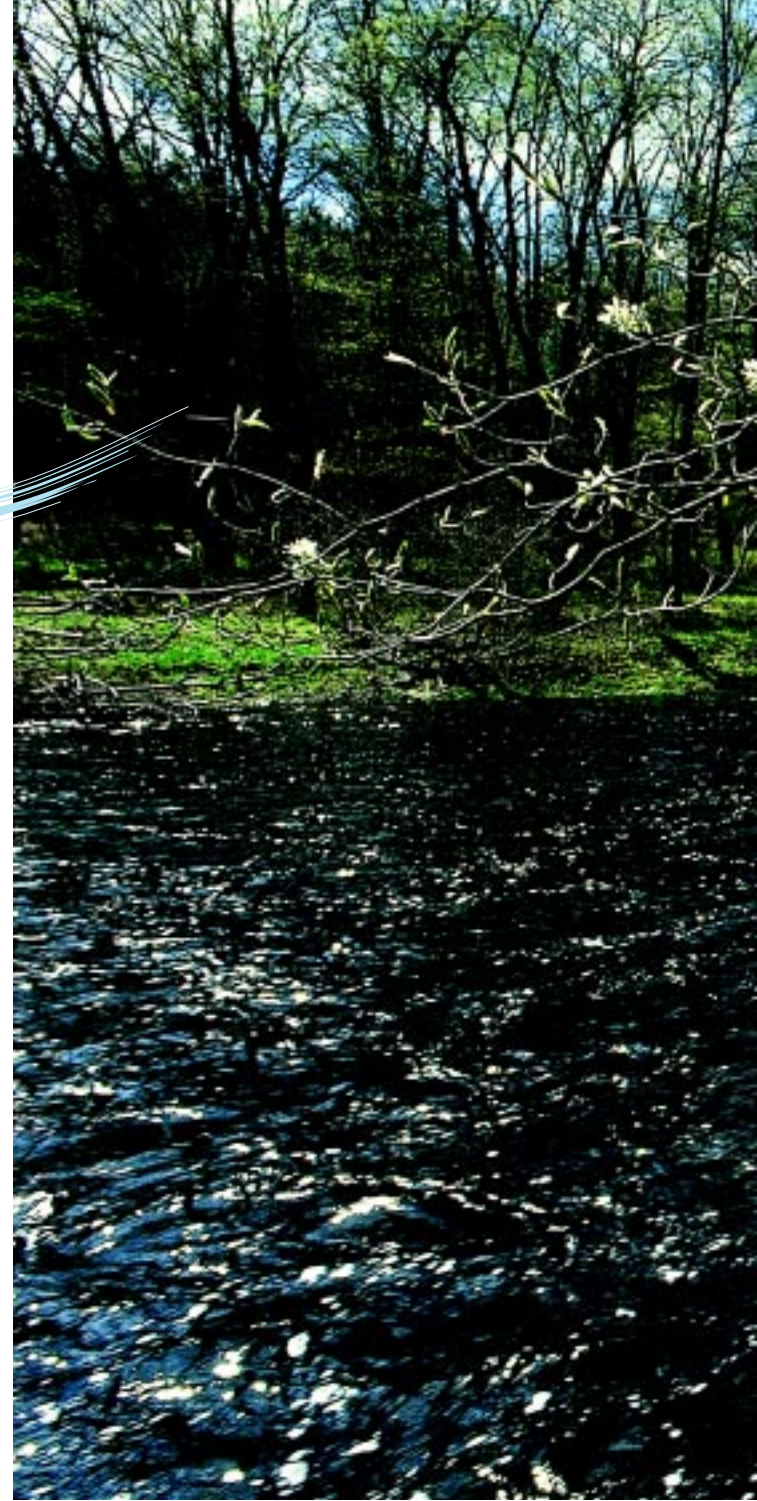
Almost two years later, in February 1998, what court papers call “extensive testimony and voluminous exhibits” were presented to the Common Pleas Court of Luzerne County. The proceedings even included a visit to the disputed area with the counsels for the parties involved.

In summarizing the findings of fact in the case, Judge Lokuta noted that “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.”

About the Lehigh River itself and its history as a public waterway, the findings of fact in the case included that the development of the coal industry in the Lehigh Valley spurred efforts to improve the river “for commercial navigation for its length, from its mouth to the Great Falls at Stoddardsville.” The river was the subject of “consistent and repetitive passage of legislation by the Pennsylvania General Assembly,” before and after 1776, regarding improving it and other rivers of the state for navigation, because they were so important to trade and commerce. The area near Stoddardsville was the scene of massive timbering operations in the mid-1800s, and the river provided access.

A federal dam on the Lehigh, Francis E. Walter Dam, near White Haven, was authorized in the late 1940s and subsequently built by the U.S. Army Corps of Engineers. It blocked in modern times the ability to boat (or navigate) the waterway continuously, without at least portaging around the dam. That structure became part of the plaintiff’s contention that the river was not navigable upstream of the dam.

Judge Lokuta wrote that “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.” At issue was whether, when the United States declared independence on July 4, 1776, the Lehigh was considered a navigable waterway, and capable of use by the public for transportation and commerce. Uses accepted in the doctrine of navigability include fishing and boating.

The accepted test of navigability by the Courts of Pennsylvania is navigability, in fact, “when they are used, or are susceptible to being used, in their ordinary condition, as highways for commerce.” Judge Lokuta wrote that “if the Lehigh River met the navigability test at any point in its his-



photo-T. L. Gettings

tory, it remains a legally navigable waterway subject to the Public Trust Doctrine.” The judge cited several court cases that reinforced that “a body of water once found to be navigable in its natural state is presumed to be navigable and forever free.”

As for a dam having been built, a U.S. Supreme Court case had already decided that “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.” Judge Lukota said that “applying this standard to the present case, the (Lehigh) river must be viewed as it existed prior to the con-

struction of Francis Walter Dam, i.e. in its natural state.”

As to whether the Lehigh itself was ever pronounced a navigable river, Judge Lokuta’s statement talked about a number of prior Pennsylvania Court cases, some dating to the early 1800s. One case, *Shrunk v. Schuylkill Navigation Co.* (1826) specifically says that “owners of land on the banks of the Susquehanna and other principal rivers, have not an exclusive right to fish in the river immediately in front of their lands, but that the right to fisheries in these rivers, is vested in the state, and open to all. It is unnecessary to enumerate at this time the rivers which may be called principal, but that name may safely be given to the Ohio,

“The rights of the Plaintiff (the fishing club) to the bed of the river are not clear and free from doubt... The defendant has the right to fish from the bed of the Lehigh River for its length,” ordered the judge.

Monongahela, Youhiogeny (*sic*), Alleghany (*sic*), Susquehanna, and its north and east branches, Juniata, Schuylkill, Lehigh, and Delaware.”

“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,” wrote Judge Lokuta. “Public rights in the navigable waters of Pennsylvania have been jealously protected by the courts,” she added. Past court cases also confirmed that “between the ordinary high and low water marks the public retains a servitude or easement, to use the waters of Pennsylvania’s navigable streams.” Ownership by the Commonwealth included the submerged lands, in other words the underwater bed, of navigable rivers, according to past court decisions.

The plaintiff’s contention to the court was that the construction of Francis E. Walter Dam rendered the river’s upstream section, including the club’s leaseholding, non-navigable, while only the section below the dam remained navigable. Judge Lokuta decided that “both sections can or could be traversed to the area of the Dam both downstream and upstream.” In other words, both were navigable.

In its decision, the Court of Common Pleas recognized that the disputed area isn’t currently used as “a broad high-road of commerce,” but was “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.”

Judge Lokuta concluded in her decision that the Lehigh was navigable, that natural obstructions that interrupt it (like the Great Falls) didn’t destroy its navigability under the law, and that “the character of the navigable water is not changed by any subsequent economic or geographic developments.” She specifically cited the Francis E. Walter Dam as not affecting the navigable status on either side of the dam. “The rights of the Plaintiff (the fishing club) to the bed of the river are not clear and free from doubt...The defendant has the right to fish from the bed of the Lehigh River for its length,” ordered the judge.

Appeal

The Lehigh River’s day in court was not over, though. Judge Lokuta’s decision was appealed by the Lehigh Falls Fishing Club to the Superior Court of Pennsylvania, in July 1998. Almost exactly one year later, on July 26, 1999, the Superior Court affirmed the lower court’s ruling. The judges who decided were James R. Cavanaugh, Joseph A. Hudock and John P. Hester.

In the original court case, neither side sought to join the Commonwealth of Pennsylvania “as an indispensable party in interest,” as Judge Lukota described it. She especially mentioned the Pennsylvania Department of Environmental Protection, which “the Court believes has standing, jurisdiction and interest in matters relating to the issues of navigation and navigability.” The judge noted that the Court would have had the “benefit and guidance of the Commonwealth,” if the Department of Environmental Protection had been asked to be a party, but she still believed the determination of navigability to be correct.

In his opinion for the Superior Court, Senior Judge Hester noted the Commonwealth’s absence in the lower court. But when the case came before the higher court, several entities became involved as *amicus curiae*, or “friends of the court.” In the appeal, the Department of Conservation and Natural Resources, the Department of Environmental Protection, the Fish & Boat Commission and the Pennsylvania Federation of Sportsmen’s Clubs all filed *amicus curiae* briefs. Judge Hester said that “all four *amici curiae* support the trial court’s conclusion that the Lehigh River is a navigable waterway.”

Again at the Superior Court, the opposing parties agreed that navigable waterways are owned by the Commonwealth and held in trust for public use, while beds of non-navigable waterways are owned by the property owners of the land along the waterways. The central issue was whether the Lehigh River, including the contested section, is a navigable waterway.

Public river

The early court cases counting the Lehigh River as one of the state’s public rivers were reconsidered by judges Cavanaugh, Hudock and Hester, including some discrepancies in wording between published versions of the court decisions. One of the arguments was that these cases looked at different sections of the Lehigh River than the one currently in question.

“We find this fact to be irrelevant,” said Judge Hester. “Rivers are not determined to be navigable on a piecemeal basis. It is clear that once a river is held to be navigable, its entire length is encompassed.”

“Since the Appellant’s land is on the Lehigh River,” wrote Judge Hester, “the public has the right to fish on the portion of the river located through its land...Order affirmed.”

In closing, Judge Hester commented that “the relevant case law necessarily is old since the issue of what rivers are public rivers became important early in the history of our

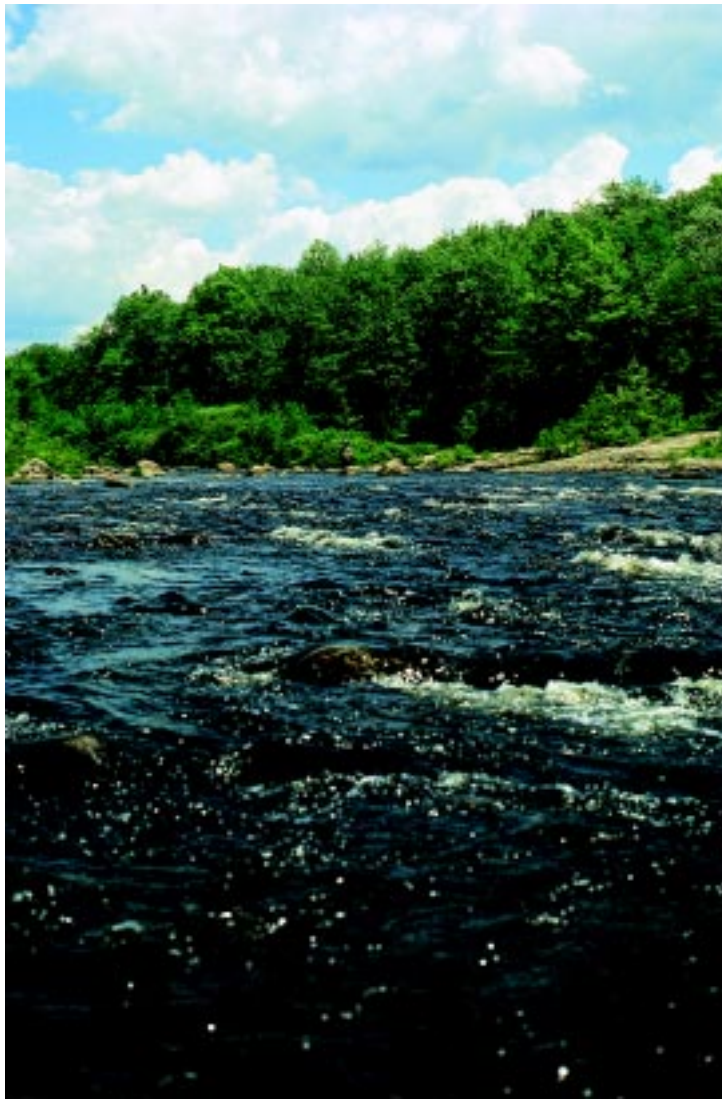
Commonwealth.” With the recent decision, future courts will have one more definition of what navigability means, and the public’s rights to navigable waters.

PA Supreme Court

The plaintiff has one more level of Pennsylvania court that can be appealed to, the Supreme Court. The Supreme Court is Pennsylvania’s “court of last resort,” in matters of law. Like the U.S. Supreme Court, the Pennsylvania Supreme Court can exercise discretion in accepting or rejecting most appeals, which allows it to devote greater attention to cases of far-reaching effect. The Lehigh Falls Fly Fishing Club has asked the Pennsylvania Supreme Court to review this case. A decision on whether this case will be subject to further review is pending.

Joseph Neville, former Executive Director of the Pennsylvania Federation of Sportsmen’s Clubs, observed that the final conclusion may not be reached for a year or more. “We’re hoping the Supreme Court will look at the decision and say it’s correct,” said Neville.

What ramifications will the Lehigh River navigability court case have? It’s unclear what, if any, effect the decision will have on determining the navigable status of other waters, because the decision is specific to the facts about the Lehigh River. That case involved some unusual features,



including a dam and a waterfall that “divided” the stream. The Fish & Boat Commission web site (www.fish.state.pa.us) has the full text of the case, and it is also available in .pdf format from the Pennsylvania Courts (www.aopc.org).

Although the public has the right to fish, boat, wade and otherwise use state navigable rivers, no one has the right to trespass across property to access that river. Private landowners’ ground adjacent to navigable rivers should always be respected, and private property owners should respect the public’s right to be in or on the navigable river that flows by their land.

The Commonwealth has no comprehensive list of its navigable waters, according to Dennis Guise, Esq., Fish & Boat Commission Chief Counsel, and the determination of whether a stream qualifies as navigable waters often is difficult. Historical evidence, legislative

enactments from early days of the state and scientific information can be useful in making the determination. “Neither the Fish & Boat Commission or the Department of Environmental Protection is authorized to make navigability determinations,” said Guise. “As a result, parties disputing the navigability of a particular stream or river may have to go to court, which can be an expensive and time-consuming process.” □

Wildlands Conservancy Buys Disputed Tract

Ironically, while the court case regarding the Lehigh River’s navigability was dragging on, the land in question, called the Creveling Tract, was sold to the Wildlands Conservancy. The conservancy obtained about 660 acres in Bucks Township, Luzerne County, abutting the Great Falls of the Lehigh. The property itself is mainly dry upland woodlands. A small portion of the land will be sold, subject to a conservation easement, with the remainder transferred to the Pennsylvania Game Commission. The purchase was made with what the conservancy calls the “kind generosity” of Mr. and Mrs. John Butler, of Blakeslee. Butler is a descent of the Stoddart family, which originally settled the area.

The Wildlands Conservancy can be reached at 3701 Orchid Place, Emmaus, PA 18049-1637; (610) 965-4397.–LS.