4-16-1979

Collopy v. Wildlife Commission, Dept. of Natural Resources

IN THE COLORADO SUPREME COURT

No. 79SA43

CHARLES T. COLLOPY, Plaintiff-Appellant, vs. WILDLIFE COMMISSION, DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF COLORADO, DIVISION OF WILDLIFE, DEPARTMENT OF NATURAL RESOURCES of the State of Colorado, Defendants-Appellees.	)	Appeal from the District Court of the County of Weld - Nineteenth Judicial District No. 28808 The Honorable Robert A. Behrman District Judge

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OPENING BRIEF OF PLAINTIFF-APPELLANT

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I. STATEMENT OF THE PARTIES

Charles T. Collopy was the Plaintiff in the Trial Court and is the Petitioner in this Court. He will be referred to as Plaintiff or Dr. Collopy.

The Wildlife Commission and the Division of Wildlife are commissions within the Department of Natural Resources of the State of Colorado, established by and existing under the virtue of Title 33, Article 1 of the Colorado Revised Statutes, 1973 as amended. They will be referred to as Defendants or by their respective commission names.

II. STATEMENT OF THE ISSUES

1. Do the acts of the Defendants, which have resulted in substantial damage to Plaintiff's property, constitute an unlawful taking of Plaintiff's private property for public use without compensation in violation of Article II, Section 15 of the Colorado State Constitution?

2. Does the closure of Plaintiff's property to goose hunting deny equal protection of the laws in violation of Article II, Section 3 of the Colorado State Constitution and Amendment XIV of the United States Constitution?

III. STATEMENT OF THE CASE

A. Nature of the Case.

This is a case in which the Defendants have ordered Plaintiff's property to be closed to goose hunting and have failed and refused to compensate him for the damages which he has incurred as a direct result of this closure. Plaintiff seeks a preliminary and permanent injunction against further closure of his property to goose hunting until such time as he is paid just compensation for the damages which are inflicted as a result of such closure. Plaintiff also sought money damages for the injuries which he incurred during the period that the property was closed to goose hunting. Finally,

Plaintiff requests a declaration of the unconstitutionality of Section 33-3-106, C.R.S. 1973. This statute purports to afford a landowner relief for damages caused to his property by wildlife. Plaintiff contends that this statute is unconstitutional on its face and, more particularly, that it is unconstitutional as applied to the Plaintiff's situation, in that it affords relief only when the Division of Wildlife determines that "excessive damage" has occurred. No guidelines have been promulgated as to what constitutes "excessive damage".

B. Course of Proceedings and Disposition.

This case came up for trial to the Court on the 23rd day of November, 1977, (f. 438), Defendants' Amended Motion to Dismiss and to Strike (ff. 82-88) having been denied on August 22, 1977, (f. 148). At the time of trial there was pending before the Court the Defendants' Motion to Require Election of Remedies or to Dismiss. (ff. 164-171) At the conclusion of argument on said motion, the Court ruled that trial should proceed as to the following questions: (1) the validity of the statutes limiting compensation for wildlife damages as applied to the circumstances of the Plaintiff, and (2) whether the State should be enjoined from enforcing the closure to goose hunting of Plaintiff's property without first paying just compensation. (ff. 479-482)

The Court then took testimony from each side as to the facts under which the statutes in question were applied to the Plaintiff. At the conclusion of the testimony, the Court ordered each side to file memorandums on the constitutional issues presented by the case. (ff. 916-918) Following receipt of the parties' briefs, the Court issued its memorandum of decision and order. (ff. 362-371) The Court ruled that the statutes and regulations under which the Plaintiff's

property was closed to goose hunting were not unconstitutional in their application to Plaintiff. (ff. 370-371) The Court's judgment was based upon its conclusion that the present case is controlled by the case of Maitland v. People, 93 Colo. 59, 23 P.2d 116 (1933). (f. 369)

Plaintiff responded to the judgment of the Trial Court by timely filing a motion for new trial. (ff. 372-377) The Court entered findings which did not materially modify its prior judgment (ff. 920-924) and denied the motion. (f. 921) Thereafter, Plaintiff timely filed his notice of appeal. (ff. 381-383) The Defendants filed a notice of cross appeal (ff. 393-397) and also filed a motion to transfer the case to the Supreme Court of the State of Colorado on the grounds that the Court of Appeals does not have jurisdiction to determine the constitutionality of statutes. The Court of Appeals' request for determination of jurisdiction (ff. 402-404) was granted and this case was filed in the Supreme Court on January 26, 1979.

C. Statement of the Facts.

Plaintiff is the owner of real property in Weld County, Colorado, which is used for farming and other agricultural pursuits. (ff. 71, 73) Plaintiff's property is part of an area designated by the Defendants as the Windsor Lake Closure. (Defendant's Exhibit 1.) The hunting of geese is forbidden within this closure which consists of approximately four square miles of farm land and reservoir. (ff. 725-726) Adjacent to Plaintiff's property is property which is not a part of the closure and is used extensively for the hunting of geese. (ff. 542-544) Substantial income is derived by the owners of the unrestricted property from commercial goose hunting operations. (ff. 838-841, 883-884)

The Defendants have completely altered the flight pattern of migrating geese by closing to goose hunting the Plaintiff's property and certain other property in the vicinity of the Windsor Reservoir. (ff. 651-656) Through this closure, the Defendants have actively sought to attract geese to stop and rest in the area. (f. 651) The Defendants have been very successful in their efforts and geese now abound in the closure. Although as many as ten thousand geese have been counted in the closure at a single time (f. 782), the Defendants freely admit that they have provided no feed whatsoever for these geese. (ff. 661-663) As a result, large numbers of geese come upon Plaintiff's land, eat his crops and damage his fields. (f. 697) Yet, Plaintiff is unable to take any action to defend his property from such damage. (f. 745)

Goose hunting has not been restricted on the property adjacent to that of Plaintiff. (ff. 542-544) Indeed, there have been a total of not less than two hundred twenty-three goose hunting pits established surrounding the Windsor Lake Closure. (ff. 544, 746) This activity discourages the geese from wandering beyond the boundaries of the closure, thereby contributing to the destruction of Plaintiff's crops. (ff. 544-545, 666) Defendants have refused to compensate Plaintiff for the damages which he has incurred as a result of their activities. (ff. 719, 742-743)

IV. SUMMARY OF THE ARGUMENT

The State of Colorado has the right to regulate the hunting of wild game. However, the individual property owner has the exclusive right, subject to valid state regulation, to hunt the game on his property. The right of the State to regulate such hunting under the police power is

limited to such regulation as is reasonably necessary for the preservation and conservation of the game. In the present case, the Defendants have attracted thousands of geese to the vicinity of Plaintiff's property and have forbidden Plaintiff to shoot even a single bird. Despite this, nothing has been provided for the geese to eat. As a direct result of the Defendants' unreasonable actions, Plaintiff has incurred substantial property damage from geese feeding upon his fields. These damages are not mere incidents of a valid regulation. Instead, they represent a taking by Defendants of Plaintiff's property without just compensation.

The opportunity to apply for a controlled hunt pursuant to Section 33-3-106, C.R.S. 1973, does not justify Defendants' conduct. The statute is unconstitutional in that it is vague and impermissibly allows arbitrary and discriminatory action by a state agency. The statute also fails to provide just compensation.

The closure of Plaintiff's property to the hunting of geese while allowing hunting upon property which is closer to Windsor Reservoir than that of Plaintiff, is an unconstitutional denial of equal protection of the laws. The Defendants' determination as to the proper boundaries for the closure is arbitrary and discriminatory and has no rational basis.

V. ARGUMENT

The issues raised on this appeal have been dealt with extensively in briefs submitted by the Plaintiff to the Trial Court. Plaintiff's Memorandum Brief in Opposition to Motion to Dismiss and to Strike (ff. 106-146) sets out the legal basis for his claim that Defendants' actions constitute an unconstitutional taking without just compensation. (See ff. 107-128) Plaintiff's Memorandum Brief on Constitutional issues (ff. 184-240) further elaborates upon Plaintiff's

position that the closure of his property to goose hunting constitutes a taking and also argues that said closure results in an unconstitutional denial of equal protection of the laws. In view of the fact that the issues raised by this appeal have been extensively briefed in the Trial Court, this brief will discuss only those issues and authorities which are deemed essential to the present appeal. Plaintiff would ask that the Court consider the arguments presented and the authorities cited in Plaintiff's previous briefs in addition to the Court's consideration of this brief.

A. The closure of Plaintiff's property to goose hunting and the refusal of Defendants to compensate Plaintiff for the damage incurred thereby, represent an unlawful taking of Plaintiff's property for public use without just compensation in violation of Article II, Section 15 of the Colorado State Constitution.

Plaintiff readily acknowledges that the State of Colorado, in its sovereign capacity as representive of the people, owns, or has the power to control, migratory geese within its borders. However, the ownership of wild game should not be confused with the right to hunt the game. The right to hunt game on one's own land is a property right which has existed throughout the history of the common law and which continues to be recognized by American courts today. Alford v. Finch, 155 So.2d 790 (Fla. 1963). In the Alford case, the Florida Supreme Court elaborated upon the law pertaining to the taking of wild game, as follows:

> Wild game is vested in the State as trustee for all its citizens with full power and authority in the State to regulate and protect. * * *
>
> The owner of the soil, however, has special and qualified interest in the wild game while it is thereon. Such special and qualified interest is a property right incident to his ownership of the soil. That property right is the right to exclusively hunt such wild game upon the soil, subject to any

> lawful regulation by the State. Ibid at 793, quoting from Hamilton v. Williams, 145 Fla. 697, 700, 200 So. 80, 81 (1941).

In response to arguments made by the Florida counter part to Defendant Wildlife Commission, the Alford Court stated:

> The appellant has confused the ownership of the game in its wild state with the ownership of the right to pursue the game. The landowner is not the owner of the game, ferae naturae, but he does own, as private property, the right to pursue game upon his own lands. That right is property just as are the trees on the land and the ore in the ground, and is subject to lease, purchase and sale in like manner. Ibid at 793.

Plaintiff does not dispute that the State of Colorado, through the Defendant agencies, has the right to regulate the hunting of wild game. However, the validity of any such regulation is dependent upon its being reasonably necessary to further a legitimate state purpose such as the conservation or preservation of wild life. The Colorado Supreme Court has specifically ruled that any exercise of the police power can be valid only under a standard of reasonableness. Combined Communications Corp. v. City and County of Denver, 542 P.2d 789 (Colo. 1975).

The conduct of the Defendants in this case is clearly unreasonable and as such constitutes a taking of private property without just compensation. There was uncontradicted testimony that prior to the initiation of closures in the Windsor Lake area there were hardly ever any geese there: "maybe two or three geese now and then, you would see, just flying through and maybe half a dozen." (f. 654) Recently, more than ten thousand geese have been counted on the new Windsor Reservoir alone. (f. 782) The activities of Defendants have undisputably gone beyond the scope of "preservation" or "conservation" of wildlife. Instead, the Defendants have

attracted hoardes of geese to the Windsor Reservoir closure and failed to provide any feed whatsoever for these birds. The inevitable result of this conduct is that the birds feed on farm lands within the closure where they will be safe from surrounding hunters. This in turn results in damage to Plaintiff's property which he can do nothing about. Despite this, Defendants have refused to compensate Plaintiff for the inconvenience and injury which he has suffered.

The case of Maitland v. People, 93 Colo. 59, 23 P.2d 116 (1933) is not applicable to the facts of the present case. The Defendant in Maitland was the owner of a ranch situated within a game refuge and was prosecuted for killing a deer within the refuge limits. The Defendant argued that the state could not prevent him from hunting deer on his own property. The Colorado Supreme Court upheld the deer hunting regulation in question. However, the reasoning of the Court was that the regulation was necessary for the preservation of game for the benefit of all the people of the State of Colorado:

> The power of the state to make regulations tending to conserve the game within its jurisdiction 'is based largely on the circumstance that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity; and as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right but it is the duty of the state to take such steps as shall preserve the game from the greed of hunters.' 23 P.2d at 117 (citations omitted, emphasis added.)

Unlike the situation in Maitland, the Windsor Lake Closure does not merely protect Colorado wildlife. Instead, it attracts migratory water fowl who would not otherwise stop in the State. Undeniably, this is a laudable activity. Unfortunately,

it is also an activity in which there exist certain inherent costs. In particular the geese must eat while they are present in Colorado. To require the Plaintiff to incur this cost for the benefit of the people of the State of Colorado is a taking of his property for public use without just compensation. There is no constitutional justification for burdening Plaintiff when it is the neighboring property owners and others who are able to hunt the geese who benefit from their presence.

The Wisconsin Supreme Court has ruled that a property owner's constitutional rights were violated by a closure very similar to the closure at issue in this case. In State of Wisconsin v. Herwig, 17 Wis. 2d 442, 117 N.W.2d 335 (1962), the State Conservation Commission had prohibited hunting in an area consisting of about 2,800 acres of privately owned land attractive to water fowl. It was stipulated that as a result of the closing, the defendant, a property owner within the closure, had been damaged in the amount of Five Hundred Dollars ($500.00) annually by the foraging of water fowl in his corn, alfalfa and rye fields. 117 N.W.2d at 337. The defendant was prosecuted for shooting a teal duck on his property during duck hunting season. The defendant urged that the rule which closed the area to the hunting of water fowl was an unreasonable exercise of the police power which resulted in an unconstitutional taking of his property without just compensation.

The Wisconsin Court acknowledged that wild animals were owned by the state, that the state had the right to enact rules to protect wildlife and that the state was entitled as a valid exercise of the police power to regulate hunting in the interest of conservation. But the Court also recognized that there is a limit to the damage which a state can cause to people's property while exercising its rights:

> The damage done by the exercise of the police power must be incidental, which is normally the case. However, the nature and extent of the damage flowing from the act of the government may, in a given case, render the act a taking of private property. There is a limit to the extent to which the state may restrict the use of property or damage property under the police power. What amounts to deprivation of property without due process of law is often difficult to determine and the determination largely depends upon the nature of the particular case. 117 N.W.2d at 338.

An examination of the nature of the case at bar, will reveal that a "deprivation of property without due process of law" has occurred here, as it did in Herwig. Certainly it is well-established any taking of private property without compensation violates the prohibition against deprivation of property without due process of law found in Article II, Section 25 of the Colorado Constitution. See Jenks v. Stump, 41 Colo. 281, 93 P. 17 (1907); City and County of Denver v. Denver Buick, 141 Colo. 121, 347 P.2d 919 (1959).

Furthermore, although the closure in Herwig involved all migratory water fowl rather than only geese, the relevant facts of the two cases are virtually indistinguishable. In Herwig, for example, it was stipulated that "[t]he purpose of this closed area is to attract migratory water fowl to stop and tarry there in their migratory journey south." Id. at 338-339. While the testimony of the present case may not clearly establish such to be the purpose of the Windsor Lake closure, the effect of the closure has been to accomplish exactly that purpose.

In Herwig, as in this case, the state owned no part of the land in the closed area in question and no owner of property within the area received any compensation from the state. Ibid at 339.

The Wisconsin Court described the effect of the closure there in the following language:

> The prohibition of hunting under these circumstances results in an unnaturally concentrated foraging upon the defendant's land by wild fowl and a substantial damage to the defendant's property sufficient to constitute a taking without compensation. Ibid at 340.

The Trial Court in the present case also recognized that the geese caused significant damage to the Plaintiff's crops after their arrival in the closure. (f. 366)

Finally, both the Wisconsin Court and the Trial Court in the case at bar recognized the importance of the respective closures to the wildlife management programs of the respective states. Cf. 117 N.W.2d at 340 with f. 365. However, the Wisconsin Court recognized the applicability of that state's prohibition against taking of private property without just compensation and ruled that

> . . . if the lake and the necessary lands surrounding the pond is [sic] to be a refuge, the state should acquire whatever rights or easements are needed by purchase, lease or condemnation. 117 N.W.2d at 340.

The Defendants herein, like the conservation commission of the State of Wisconsin, have the power of eminent domain. Section 33-1-112, C.R.S. 1973, describes the pertinent powers of the Defendant Wildlife Commission, as follows:

> 33-1-112. Powers of Commission. (1) The Commission has power to:
>
> (a) Acquire by gift, transfer, devise, lease, purchase, or long-term operating agreement such land and water, or interest in land and water, as in the judgment of the commission may be necessary, suitable, or proper for wildlife purposes or for the preservation or conservation of wildlife. The term 'interest in land and water', as used in this section, means any and all rights and interests in land less than the full fee interest, including but not limited to future interests, easements, covenants, and contractual rights.

Despite having the power of condemnation, the Defendants have proceeded to take Plaintiff's property without affording

him just compensation. Yet the modern cases repeatedly hold that a state agency which has the power to condemn land or a limited interest therein cannot create a migratory bird resting ground on private property without exercising that power. See Herwig; see also Allen v. McClellan, 75 N.M. 400. 405 P.2d 405 (1965); Shellnut v. Arkansas State Game & Fish Commission, 222 Ark. 25, 258 S.W.2d 570 (1953). In the McClellan case, the New Mexico Supreme Court reasoned as follows:

> It is our view that the commission may not create a game refuge or migratory bird resting ground on private land without consent, or without acquiring the necessary interest in the land by eminent domain or in such other manner as is authorized by law. Were it otherwise, the owner would be deprived of the right, enjoyed by others in the vicinity but outside the refuge, to hunt game on his own property and thereby be in violation of the due process and equal protection clauses of the Constitution. 405 P.2d at 407-408. (The court goes on to conclude that if the property owner incurs consequential damage as a result of the closing, there is an unconstitutional taking of the property although the land itself is unaffected.)

The logic of this position is so strong that the Defendants have acknowledged that

> [i]n the state courts where an agency has the power of eminent domain, there is a closure of hunting on property and an allegation of damages, the majority of courts are inclined to tell the agency to exercise the powers and condemn the land. (f. 310)

Plaintiff is no longer seeking to be compensated for the taking of his property. Nor is he seeking to have the closure invalidated. Instead, Plaintiff is asking the Court to recognize that as applied to his particular case, the Windsor Lake closure operates as a taking of private property without just compensation. Plaintiff would therefore request that his constitutional rights be protected by an injunction preventing enforcement of the goose hunting prohibition against him.

Defendants contend that Plaintiff is not entitled to any relief because he has failed to exaust his available administrative remedies. They assert that Dr. Collopy should have applied for a controlled damage hunt under the regulations of the Wildlife Commission. It is stressed in support of the adequacy of such relief that this procedure is specifically authorized by Section 33-3-106, C.R.S. 1973. (f. 101)

Plaintiff should not be required to apply for relief pursuant to Section 33-3-106, C.R.S. 1973, because that section is unconstitutional both on its face and as applied. The pertinent part of said statute states:

> 33-3-106. Excessive damage--permit to take wildlife. (1) Where wildlife is causing excessive damage to property, as determined by the division, the division is authorized to issue a permit to the property owner or to such other persons selected by the division to kill a specified number of the wildlife causing such excessive damage.

This statute requires Dr. Collopy to permit the State of Colorado to appropriate his land as a wildlife refuge until such time as the Division of Wildlife deems it proper to compensate him. He is not entitled to receive any relief as long as the Division deems his damages to be only "normal" or "ordinary". It is only after the damages reach the point of being "excessive" as determined solely by the Division of Wildlife in its complete discretion that the Plaintiff can seek relief under said statute. Even then the relief afforded Plaintiff will only be in relation to those damages deemed "excessive". Defendants contend that this statute authorizes them to take Plaintiff's property without in any way compensating him and without allowing him any possibility of judicial relief until such time as they deem appropriate to grant relief to Plaintiff.

Section 33-3-106 does not in any way restrict the Division of Wildlife in its determination as to what constitutes excessive damage. Moreover, the Division has promulgated no regulations to aid them in making such a determination. The word "excessive" implies that some standard has been surpassed but nowhere is that standard defined. As a result, the determination is left entirely to the whim and caprice of the Division. Under this scheme, it would be possible for the Division to award damages in one situation as "excessive", and deny an award of damages in another situation although there was no material difference between the two. A statute or ordinance which permits such arbitrary decision-making must be held to be void. See, Weicker Transfer and Storage Company v. Council of City & County of Denver, 75 Colo. 475, 226 P. 857 (1924).

Regardless of the constitutionality of Section 33-3-106, C.R.S. 1973, it cannot cure the impropriety of the Defendants' actions in this case. It has been established in Colorado since 1883 that "just compensation" means compensation for the entire value of the damages which result from the taking. See, City of Denver v. Bayer, 7 Colo. 113, 2 P. 6 (1883). The statute cited by Defendants does not even purport to deal with any damage that is not "excessive". Instead, it provides for a controlled hunt wherein "a specified number of the wildlife causing such excessive damage" may be killed. Further, it is not clear how such a controlled hunt compensates Plaintiff in any way. It would appear that the principal effect of such a hunt would be to temporarily reduce the number of geese damaging Plaintiff's property. Defendants assert that Dr. Collopy cannot claim a taking without just compensation because he failed to pursue this "remedy". Yet Defendants have offered no evidence which would indicate

that the State Legislature ever intended this statute to serve a compensatory function. If this defense is not frivolous, it is certainly without merit.

In summary, Plaintiff has suffered substantial damages as a result of his property being closed to the hunting of geese. His crops have been damaged and he has been unable to establish any pits for rental to goose hunters. Article II, Section 15 of the Colorado Constitution states:

> Private property shall not be taken or damaged, for public or private use, without just compensation.

Clearly, Plaintiff's property has been "taken or damaged" without just compensation. Thousands of geese have been attracted to the area for the benefit of the people of the State of Colorado, yet no feed is provided for the geese. As a result, the geese feed on Plaintiff's fields where they are safe from hunters outside the closure while others receive the benefit of being able to hunt the birds. This must be the precise type of situation which the drafters of our State Constitution envisioned as requiring "just compensation".

Plaintiff is not challenging the validity of the Windsor Lake Closure. He is merely saying that as applied to him the closure constitutes a taking without just compensation. The only relief which is available to Plaintiff is a controlled hunt pursuant to Section 33-3-106, C.R.S. 1973, which is unconstitutional both on its face and as applied, and which does not under any circumstances provide "just compensation". It is therefore only proper that the Court should exercise its equity powers and enjoin enforcement against Dr. Collopy of the goose hunting closure.

B. The closing of Plaintiff's property to goose hunting while allowing adjacent property owners to hunt geese is an unconstitutional denial of equal protection of the law.

Article II, Section 3 of the Constitution of the State of Colorado provides that

> [a]ll persons have certain natural, essential and inalienable rights, among which may be reckened the right . . . of acquiring, possessing and protecting property.

Defendants in the case at bar have deprived Plaintiff of his right to possess and protect his property. While it must be acknowledged that under certain circumstances a state is entitled to deprive a citizen of his property, the circumstances under which such state action is permitted are strictly limited. One such limitation is found in Section 25 of Article II of the State Constitution which says that no deprivation of property shall be without due process of law. This commandment is expanded upon in Amendment XIV to the United States Constitution where it is stated that

> . . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

It is generally recognized by the Colorado Supreme Court that any taking of private property for public use without compensation is a denial of due process. See, Jenks v. Stump, 41 Colo. 281, 93 P. 17 (1907); City & County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1959). In addition to denying Plaintiff due process of law, the activity of Defendants in this case has violated the federal guarantee of equal protection of the law. The Windsor Lake closure, although possibly valid on its face, is arbitrary and discriminatory in its application to Plaintiff and has served to deny him equal protection.

Property owners whose lands have not been designated as being in said closure continue to enjoy goose hunting

privileges. As a result of hunting being allowed on their lands, the geese do not land nor forage for food on those lands. Yet many of these property owners are located on farms no further from the lake than Plaintiff's farm. Indeed, although the Windsor Lake Closure is apparently bounded by the road surrounding the Windsor Reservoir (f. 763), there appears to be at least one point at which the reservoir extends all the way beyond the boundary road. (f. 739) Defendants' own witness testified to this fact and to the fact that the reservoir is not actually located in the middle of the closed area. (f. 738) Despite this, the Defendants' expert stated that he would not want to change the location or configuration of the closure. (ff. 741-742) His only justification for not doing so was that if the boundary on any one side was moved closer to the water a "harassment effect" would result. (ff. 755-756)

At least part of Plaintiff's land is further from the reservoir than some parts of the closure boundary. Yet Plaintiff is not allowed to shoot even one goose while there are no less than two hundred twenty-three goose hunting pits located in the surrounding area. (ff. 523-524) Moreover, the surrounding property owners are able to rent out those pits to hunters and thereby realize substantial profits. Plaintiff therefore suffers damage through the loss of his crops and also by being prevented from making a profit that adjacent property owners are able to make.

The Defendants have been unable to advance any reason or rational basis for their decision to close Plaintiff's land rather than other land located the same distance or less from the lake. It is a general rule of classification that no one may be subjected to any greater burdens and charges

than are imposed on others in the same calling or condition or in like circumstances. See, for example, Yickwo v. Hopkins, 118 U.S. 356 (1886); see also, 16 Am. Jur. 2d, Constitutional Law, Section 528. It is contrary to generally recognized principles of liberty and natural justice and to the spirit of our Constitution and laws that anyone should be subject to losses from which others in like circumstances are exempted. It is well-settled that for a classification to be valid the activities and things of a person included within the classification must be substantially and materially different from those excluded. If there is no real difference between localities, persons, occupations or property, the state cannot make one. See, 16 Am. Jur. 2d, Constitutional Law, Section 500 and cases cited therein.

Once properly attacked, a classification must disclose its rational basis. If the classification is clearly capricious, arbitrary, or unnatural it is the duty of the Courts to uphold constitutional rights and declare the statute invalid. See, State v. Holtgreve, 58 Utah 563, 200 P. 894 (1921); and 16 Am Jur. 2d, Constitutional Law, Section 496.

In the present case, the only attempt by the Defendants to justify their arbitrary conduct was a claim that the choice of roads for closure boundaries was a rational classification in that it would aid the public in recognizing the extent of the closure. (f. 762) However, the Defendants do not explain why the public requires such boundary information when the closure consists of private property. Any fixed boundary, once established, could be easily recognized and obeyed by the individual landowners. The goose hunting pits which are presumably set up as close to the closure as possible would themselves quickly become an effective boundary line.

The Defendants' witness has testified that having boundaries too close to the lake results in harassment of the geese. Despite this, the Defendants have set up a boundary which actually allows a part of the reservoir to be outside the closure. There can be no rational basis for this classification. Such arbitrary and capricious action must be struck down as in violation of the Federal Constitutional guarantee of equal protection of the laws.

VI. CONCLUSION

It is respectfully submitted that the Trial Court erred in denying Plaintiff's Motion for New Trial (ff. 372-377) and in entering judgment declaring that the Windsor Lake Closure and the laws and regulations pertaining thereto were constitutional as applied to the Plaintiff. Plaintiff requests that judgment be reversed and that an injunction issue preventing Defendants from enforcing the closure against him.

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CERTIFICATE OF MAILING

I, Stephen E. Howard, attorney for Plaintiff, above named, hereby certify that I placed a copy of the above and foregoing Opening Brief of Plaintiff-Appellant in an envelope properly addressed to Ms. Lynn B. Obernyer, Natural Resources Section, 1525 Sherman Street, 3rd Floor, Denver, Colorado 80203, attorney for Defendants, with sufficient postage affixed thereto, and placed the same in the United States mail this 16th day of April, 1979.

Stephen E. Howard