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ATTORNEYS FOR PLAINTIFF-APPELLANT

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I. THE CONDUCT OF THE DEFENDANTS IN CLOSING PLAINTIFF'S PROPERTY TO GOOSE HUNTING AND REFUSING TO COMPENSATE HIM FOR THE DAMAGE RESULTING THEREFROM DOES CONSTITUTE AN UNLAWFUL TAKING OF PLAINTIFF'S PROPERTY.

In their Answer Brief, the Defendants have attempted at length to show that they were entitled to close Plaintiff's property to goose hunting and that they had no obligation to compensate Plaintiff for the damages he incurred as a result of said closure. An examination of the Defendants' arguments reveals that they are unpersuasive and that they ignore certain facts which are essential to this case. For example, the Defendants refuse to acknowledge that the Plaintiff has been damaged by the geese, and state that any damages the geese did cause "were inconsequential." (Brief of Appellees at 26) This directly contradicts the finding of the Trial Court that Plaintiff "has suffered some damage from geese, who feed on certain of the remnants of his crop." (f.366) It is also clear that the Court found Plaintiff's damages to be substantial. Otherwise, it would not have reached the question of the applicability in Colorado of the case of State of Wisconsin v. Herwig, 117 Wis. 2d 442, 117 NW 2nd 335 (1962). The Court stated this was the decisive issue of the case and based its ruling against Plaintiff on a determination that Herwig is not applicable in Colorado. (ff. 368-369) It is this determination that Plaintiff now challenges.

Defendants also claimed that Plaintiff's damages were not deliberately induced because the purpose of the Windsor Lake

Closure was to provide a place for the geese to rest, not to eat. Yet there was no testimony whatsoever to the effect that it had not been anticipated that the geese would eat while they were within the closure. The testimony was that there was very little feed in the closure but that the closure was surrounded by agricultural land. (f.677-679) There was also testimony that the geese would learn that they were safe within the closure and would tend to concentrate there. (f.666) The clear implication of the various statements of the witnesses is that the geese stay within the closure where they are safe, and rest and eat what they can but that they must leave the closure at times because they cannot get enough to eat within it. Perhaps the specific purpose of the Windsor Lake Closure was not to provide feed for the geese but it must have been clearly understood that the geese would eat what food was available within the closure.

The Defendants' arguments rely upon the rule that private property is held subject to the exercise by the State of its police power. From this Defendants argue that a reduction in property value or inconvenience to any person is not sufficient to invalidate a police power measure. (Brief of Appellees at 21) However, to be valid, any exercise of the police power must be reasonable. See Combined Communications Corp. v. City and County of Denver, 542 P.2d 789 (Colo. 1975). As recently as July 2, 1979, this Court held that the police power of the state cannot be extended to allow it to take

any part of the property of a private individual without compensation to him. See People v. Emmert, Colo. Sup. Co. No. 28235 (Opinion announced July 2, 1979).

In this case the Defendants are using the police power to unreasonably invade the property rights of the Plaintiff. Regulations requiring the Plaintiff to sustain damage so that others may benefit impermissibly intrude upon Plaintiff's property rights.

It is apparently the Defendants' position that they should be permitted to pursue any course of action whatsoever without having to answer for the harm resulting therefrom. This is the way the Defendants have operated in the past. It is Plaintiff's challenge to this mode of operation which concerns Defendants far more than the specific issues raised by the facts of this case. To protect their right to operate as they please and to harm individuals with impunity, defendants have devoted an excessive amount of time and energy to this case. They are apparently attempting to overwhelm the Plaintiff by bringing greater resources to bear on this case than any individual could possibly afford. Fortunately, these efforts do not change the fact that the law is on the side of the plaintiff.

The facts of this case in many ways resemble those of People v. Emmert, Colo. Sup. Ct. No. 28235 (Opinion announced July 2, 1979). In Emmert, the Defendants who had ridden on rafts down a river surrounded by private property, were charged with criminal trespassing. The question was whether

the public could be excluded from recreational use of a non-navigable river by the owner of the property across which the river ran. The Court there emphasized that it is a fundamental principle of property law that the owner of the surface of the ground has the exclusive right to everything which is above it. As a result, the Defendants, or the general public, were not entitled to use the river for recreational purposes. It is this fundamental principle which the Defendants have ignored in this case. Plaintiff has the exclusive right to those things which are on his land. The Defendants, by closing Plaintiff's land to the hunting of geese and refusing to compensate him for the harm caused thereby, have taken the Plaintiff's crop remnants and used them to feed the geese. In essence, the Defendants are donating Plaintiff's property to the general public.

Defendants claim that it is well established that conservation and perservation of wildlife is a valid police power activity. However, each and every case cited by the Defendants involved regulation of wildlife which was already present. In this case, the Defendants have produced a huge number of geese where previously there were none. Prior to closing the Windsor Lake area to goose hunting there were no geese which rested there and only occasionally was one seen flying by. (f.654) The geese are not native Colorado wildlife but are migratory water fowl which previously did not stop in the area in question. However, given the protection of the Windsor Lake Closure, more than Ten Thousand (10,000) geese have been counted at

a single time on the New Windsor Reservoir alone. (f.782)
These facts do not fit within the definition of the words "conservation" or "perservation" of wildlife. Instead, the phrase "production of wildlife" is more appropriate. Plaintiff's property has been damaged by the thousands of geese which the Defendants have produced yet he has not been compensated for that damage. Plaintiff has located no cases which state that production of wildlife on private property is a valid police power activity. Certainly, this is unreasonable and intolerable conduct.

Plaintiff's Opening Brief cited a number of cases which clearly showed that the trend of the law is to invalidate conduct such as that exhibited by the Defendants in this case. See Alford v. Finch, 155 So.2d 790 (Fla. 1963); State of Wisconsin v. Herwig, 17 Wis. 442, 117 N.W. 2d 335 (1942); Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965); Shellnut v. Arkansas State Game and Fish Comm'n, 222 Ark 25, 258 S.W. 2d 570 (1953). Defendants, in their Answer Brief, have attempted to distinguish this authority. To the extent that the attempted distinctions are real, they are irrelevant. For example, the Defendants assert that because they do not have the power of eminent domain, they should be allowed to take Plaintiff's property without compensating him. Plaintiff's Opening Brief erroneously stated that the Defendants do have the power of eminent domain. In fact, the Defendant agencies are not explicitly granted any such power. Of course, the state does have that power. Whether or

not an agency has the power of eminent domain, should not affect the constitutionality of its conduct. If the Defendants' conduct so interferes with the Plaintiff's use of his land as to constitute a taking of property, and if the Plaintiff is not able to obtain just compensation, then the Defendants' actions are unconstitutional regardless of what other course of conduct they had the power to pursue and the closure cannot be enforced against the Plaintiff. Whether it is the defendant agency or another entity which must condemn or purchase the Plaintiff's right to hunt, is irrelevant.

Another attempt which the Defendants have made to distinguish the Plaintiff's predicament from that of other property owners who have been found to have had their constitutional rights violated by a hunting prohibition, is to claim that in Colorado the areas closed to goose hunting consist predominantly of private property whereas in other states most of the closed area has been owned by the state. Plaintiff does not understand why the conduct of the Defendants should be justified by the fact that Plaintiff is not the only person who has been damaged. Apparently it is the Defendants' contention that more than two wrongs make a right. Otherwise, this is an irrelevant distinction that should in no way cause the outcome of this case to differ from those cases which hold that a property owner cannot be forbidden to hunt on his property without payment of just compensation for the damages he incurs as a result thereof.

II. THE VALIDITY OF THE WINDSOR LAKE CLOSURE AS APPLIED
TO THE PLAINTIFF IS AN ISSUE PROPERLY BEFORE THE
TRIAL COURT.

The issue in this case, as framed by the Trial Court, was "limited to a determination, by way of declaratory judgment, as to whether or not the application of the statutes and regulations governing the Windsor Lake Closure violated the constitutional rights of the Plaintiff." (f.368) Defendants have filed an extremely lengthy brief which largely disregards this basic issue and which attempts to confuse matters by referring to numerous legal doctrines, many of which are entirely inapplicable to the case as finally tried. For example, Defendants assert that this is in fact an inverse condemnation action and should be framed as such. This is not true. The claim for damages which is the essence of an inverse condemnation suit was abandoned by the Plaintiff prior to trial. As a result, there is no need to have three free holders or a jury decide the case. Plaintiff is merely asserting that the application to him of the regulations promulgated by the Defendants, when considered together with the operation of C.R.S. 1973 Section 33-3-106, effects an unconstitutional deprivation of his property without due process of law.

It is the joint operation of the Defendants' closure and Section 33-3-106 which results in the taking of Plaintiff's property without just compensation. Plaintiff is unable to understand how the Defendants can assert that this statute

is unrelated to the taking issue (Brief of Appellees at 37) and at the same time say that there has not been an improper taking of Plaintiff's property because he has failed to exhaust the administrative relief available under said statute.

(Brief of Appellees at 40) Plaintiff feels that he has adequately stated his position concerning Section 33-3-106 in his Opening Brief. This position is simply that a statute which affords relief only for "excessive damage" cannot possibly afford "just compensation."

Plaintiff is also mystified at Defendants' inability to understand that he is not attacking the way in which the regulation closing Plaintiff's land to the hunting of geese was promulgated. Defendants state that there is adequate relief available to the Plaintiff under the Administrative Procedure Act. However, it is not the agency action itself, which the Plaintiff is attacking. Instead, it is the application of the closure to the Plaintiff as an individual in view of Section 33-3-106 which is the basis of the Plaintiff's injury.

The proper way to resolve this controversy is through a declaratory judgment. Defendants state that a declaratory judgment is not proper because it will not terminate the controversy or afford Plaintiff relief. (Answer Brief of Appellees at 40) Clearly, the Defendants have again forgotten that the issue which was before the Trial Court was whether or not the application of the statutes and regulations governing

the Windsor Lake Closure violated the constitutional rights of the Plaintiff. (f.368) A declaratory judgment determining that Plaintiff's constitutional rights were so violated would make the closure unenforcable as against the Plaintiff. As such, the judgment would terminate the controversy and would afford Plaintiff all the relief he desires. Therefore, Plaintiff's decision to pursue this matter through a declaratory judgment action was correct and the Defendants' cross appeal should be dismissed.

III. CONCLUSION.

It is respectfully submitted that for the reasons advanced in Plaintiff's Opening Brief and in this Reply Brief, the Trial Court committed reversable error in ruling that the Plaintiff's Constitutional Rights had not been violated. Plaintiff would request that the Court dismiss the Cross Appeal of the Defendants, Plaintiff would further request that the Court reverse the judgment of the Trial Court and order that an injunction issue to prevent enforcement of the Windsor Lake Closure against the Defendant.

Respectfully Submitted,

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