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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a Utah non-profit corporation, plaintiff, vs. ATC REALTY SIXTEEN, INC., a California corporation; *et al.*, Defendants.	**MEMORANDUM IN SUPPORT OF:** **UTAH STREAM ACCESS COALITION'S MOTION FOR SUMMARY JUDGMENT** Civil No. 100500558 Hon. Derek Pullan

Plaintiff Utah Stream Access Coalition, by and through its counsel of record and pursuant to Rules 7 and 56, Utah Rules of Civil Procedure, submits this Memorandum in Support of its Motion for Summary Judgment.

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INTRODUCTION[1]

At issue in this matter is whether the Utah Legislature may abrogate the public's right to lawfully access and use its public waters and to touch the beds of those waters when doing so. From its earliest days, Utah's Supreme Court has recognized that Utah's natural waters have always been owned by the public and that all who can gain legal access to those waters have a coequal right to use those waters for any lawful purpose. In 2008, the court, in *Conatser v. Johnson*, reaffirmed this right, by now characterized as an easement, and declared that it included a public right to engage in all recreational activities that utilize the water and to touch the privately owned beds of public waters in ways incidental to all recreational rights provided for in the easement.

In 2010, the Utah legislature passed House Bill 141 (H.B. 141) which declared that this right simply did not exist and never existed. Relying on H.B. 141, defendant ATC Realty Sixteen, Inc. ("ATC") is preventing Coalition members and the public from lawfully accessing and using the public waters of the Provo River and its bed where it flows through ATC's property. The present motion asks this Court to declare that H.B. 141's abrogation of the public's right to use its public waters and to touch the beds of such waters when doing so violates the Constitution of Utah and the Public Trust Doctrine and to enjoin the defendants from interfering with the public's use of the Provo River and other public waters and their beds.

[1] In this matter, the Coalition seeks to preserve the public's *right to use* public waters and their beds irrespective of whether the waters are navigable-in-fact under state and federal law and the Equal Footing Doctrine. In doing so, the Coalition does not concede that the Provo River is non-navigable. Indeed, the Coalition believes that the Provo is navigable. Should the Coalition not succeed in this matter, it anticipates that the Coalition or others will pursue a claim of public *ownership* of the waters and bed of the Provo River under the federal Equal Footing Doctrine.

STIPULATED STATEMENT OF UNDISPUTED MATERIAL FACTS

The Provo River

1. The Provo River has its headwaters in the Uinta Mountains in Summit County and flows, in turn, through Summit, Wasatch and Utah Counties, ultimately discharging into Utah Lake.

2. The Provo River is the principal water source for Utah Lake, Utah's largest natural freshwater lake.

3. The Provo River's drainage basin is 673 square miles.

4. Provo River waters flow through parcels of land that are owned by the federal government, state government, other state agencies and entities (including State Institutional Trust Lands), local government entities (including cities, counties, special service districts, and conservation districts), and private parties.

5. Historically and currently, and whether or not legally entitled or required to do so:

a. some landowners allow public access over their land to the Provo River waters;

b. some landowners deny public access over their land to the Provo River waters;

c. some landowners allow public use or enjoyment of the Provo River waters that flow through the owners' property;

d. some landowners deny public use or enjoyment of the Provo River waters that run through the property owned by them, and take action to interdict or stop such use or enjoyment; and

e. some members of the public access and use the waters of the Provo River, and touch the bed when doing so, irrespective of landowner consent.

6. The Provo River and many other Utah rivers and streams were trapped for beaver and other valuable pelts during the fur trade of the first half of the nineteenth century. Scott J. Eldredge and Fred R. Gowans, *The Fur Trade in Utah*, Utah History Encyclopedia[2]; Thomas G. Alexander, *Traders, Trappers, and Mountain Men*, Utah History to Go.[3] See, also, Declaration of Dee Halverson, Exhibit 2 at ¶¶ 6 a.-b.

7. Fur trapping is still permitted in Utah today, including trapping of beaver and mink, two species that are typically found in or in close proximity to rivers, streams and other natural waters. 2010-2011 *Utah Furbearer Guidebook*, Utah Department of Natural Resources, Division of Wildlife Resources.[4]

8. The Provo River was used during the 1880s and 1890s, to float timbers during high water from the Uinta Mountains to Utah Valley and points in between, where they were used for railroad ties, railroad trestle timbers, mine shoring timbers, cordwood or saw wood. Other Utah rivers and streams were used for this same purpose beginning in the late 1860s, with some being used for this purpose into the early 1900s. Lemon, Grace H., and Atkinson, Pearl W., *Echoes of Yesterday: Summit County Centennial History*, pp. 272-3, 291-307 (Daughters of Utah Pioneers; 1947); Carter, Lyndia, *'Tie-ing' Utah Together: Railroad Tie Drives* (*History Blazer*, July 1996)[5]; See, also, Declaration of Dee Halverson, Exhibit 2 at ¶¶ 6 c.-d.

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[2]University of Utah, Eldredge, Scott J and Gowans, Fred R., *The Fur Trade in Utah*, http://www.media.utah.edu/UHE/f/FURTRADE.html (last accessed Sept. 1, 2011).
[3]State of Utah, Alexander, Thomas G., *Traders, Trappers and Mountain Men*, Utah, The Right Place, http://historytogo.utah.gov/utah_chapters/trappers,_traders,_and_explorers/traderstrappersandmountianmen.html (last accessed Sept. 1, 2011).
[4]Utah Division of Wildlife Resources, *2010-2011 Utah Furbearer Guidebook*, http://wildlife.utah.gov/guidebooks/2010_pdfs/2010-11_furbearer.pdf.

[5]State of Utah, Carter, Lydia, *"Tieing" Utah Together: Railroad Tie Drives*, History Blazer, July 1996, http://historytogo.utah.gov/utah_chapters/mining_and_railroads/tieingutahtogether.html.

9. The lower Provo River and Utah Lake were fished extensively for june suckers during their annual spawning from pre-settlement days well into the 20th century for subsistence, sustenance or commercial purposes. *June Sucker (Chasmistes liorus) Recovery Plan*, U.S. Fish and Wildlife Service (June 1999)[6], citing Heckmann, R.A., Thompson, C.W. and White, D.A., *Fishes of Utah Lake*[7]; *Great Basin Naturalist Memoirs*, No. 5: Utah Lake Monograph. Provo, UT: Brigham Young University, p. 169 (1981); Carter, D. Robert, *Utah Lake: Legacy*, at pp. 11, 15, 25-26, 42-47, 50-51, 54-55[8]. See, also, Declaration of Dee Halverson, Exhibit 2 at ¶ 6 e.

10. The Provo River was fished commercially for mountain whitefish in the 1870's, with the product shipped to Salt Lake City markets. Sigler, William F. and Miller, Robert Rush, *Fishes of Utah*, Utah State Dept. of Fish and Game, p.59 (1963), citing Cope, E.D., and H.C. Yarrow, *Report upon the collections of fishes made in portions of Nevada, Utah, California, Colorado, New Mexico and Arizona during the years of 1871, 1872, 1873 and 1874* (Washington D.C.,1875) [9]; First Lieut. Geo. M. Wheeler, *Report from Geographical and Geological Explorations and Surveys West of the One Hundredth Meridian*, U.S. Army Corps of Engineers ("Wheeler Survey") pp.638, 683 (1875).

[6]U.S. Fish and Wildlife Service, *June Sucker Recovery Plan*, June 1999, http://www.junesuckerrecovery.org/pdfs/990625.pdf.
[7]BYU, Heckmann, Richard A., Thompson, Charles W. and White, David A, *Fishes of Utah Lake*, https://ojs.lib.byu.edu/ojs/index.php/gbnmem/article/viewFile/2947/3295 (last accessed Sept. 1, 2011).
[8]Utah Lake Commission, Carter, D. Robert, *Utah Lake: Legacy*, http://www.utahlakecommission.org/Utah_Lake_Legacy.pdf (last accessed Sept. 1, 2011).
[9]Cope, E. D., *Report upon the collections of fishes made in portions of Nevada, Utah, California, Colorado, New Mexico, and Arizona, during the years 1871, 1872, 1873, and 1874*, Published in 1875, http://babel.hathitrust.org/cgi/pt?id=njp.32101076035672;page=root;view=image;size=100;seq=7;num=637 (last accessed Sept. 1, 2011).

11. Other fish species were fished from other Utah rivers and streams, privately or commercially, for subsistence and sustenance purposes (*e.g.*, the Bonneville (or Utah) Cutthroat trout on Utah Lake tributaries). *Id*., Wheeler Survey at 681-703.

12. Sustenance fishing is still permitted today on the Provo River and most other Utah rivers, streams and other natural waters. *2011 Utah Fishing Guidebook*, Utah Department of Natural Resources, Division of Wildlife Resources.[10]

13. Some portions of the Provo River remain in a natural channel, while other portions do not due to re-channelization, diversion or other manmade structures, or other manmade changes to the river course.

14. Seasonal flows on the main stem of the Provo River range from 200 to 2,000 cubic-feet-per-second.

15. Flows in the Provo River are from time-to-time – typically on a seasonal basis – augmented by waters artificially diverted from the Weber River. Similarly, the flows of other Utah rivers and streams may, from time-to-time, be augmented by flows from other waters.

16. Flows in the Provo River are from time-to-time – typically on a seasonal basis – diminished by waters artificially diverted for irrigation, municipal, industrial and other uses. On some Utah streams, flows are diminished to where the water is not practicably usable.

17. The Provo River has long been one of Utah's leading sport fishing streams. The State of Utah has designated the Provo River as a "Blue Ribbon" fishery, meaning that it is a recreational fishery of extremely high quality.

[10]Utah Division of Wildlife, *2011 Utah Fishing Guidebook*, http://wildlife.utah.gov/guidebooks/2011_pdfs/2011_fishing.pdf.

18. The Provo River's predominant sport fish species are non-native rainbow trout and brown trout. Populations of these fish were introduced and have been sustained by natural propagation and public fish-stocking programs. The Provo River also supports a substantial native population of mountain whitefish and some non-game species (*e.g.*, sculpin).

19. Fishing on the Provo River is a source of business for local and regional sporting goods stores, guides and outfitters. It is a nationally recognized fly-fishing stream, and has been a popular destination for out-of-state anglers.

20. Portions of the Provo River are frequently floated by recreationists in canoes, rafts, whitewater kayaks and inner tubes. It is considered a recreational resource by river runners in Utah.

21. In 2006, more than 375,000 people bought Utah fishing licenses, including more than 288,000 Utah residents. *The 2006 Economic Benefits of Hunting, Fishing and Wildlife Watching in Utah*, Utah Division of Wildlife Resources (Southwick Associates 11/16/2007). These individuals: (a) fished app. 3.8 million days in 2006 (app. 10 days each) (*id.* at p.9); (b) generated $39.8 million in state/local tax revenue (*id.* at p. 15, Table 10); (c) generated app. $393 million in retails sales (*id*.); (d) generated app. 7000 Utah jobs (*id.*); and (e) had total economic impact of $708 million (*id*. at p.14).

Regulation of Water Use

22. The right to use water in the State of Utah has been regulated by Territorial and State legislative enactments and related case law since at least 1880.

23. Prior to 1903, water rights were established by diverting water and putting it to beneficial use. Such appropriative rights are legally recognized and are commonly referred to as "diligence rights."

24. In 1903, the Utah State Legislature declared that all natural waters of the State are the property of the public, subject to the existing rights to the use thereof, and codified application and certification procedures for the acquisition of water rights through the Utah State Engineer.

Victory Ranch

25. ATC Realty Sixteen Inc. ("ATC") is a California corporation that owns and operates a real estate development in Wasatch County known as 'Victory Ranch.'

26. ATC acquired the Victory Ranch property in November 2010.

27. Over five miles of the Provo River flow through the Victory Ranch property, from Woodland to the Jordanelle Reservoir.

28. The stretch of the Provo River running from the Trial Lake Basin in the Uinta Mountains down to Jordanelle Reservoir is known as the "Upper Provo." ATC's property is located on the final (lowest) five-mile stretch of the Upper Provo, right before the river enters Jordanelle Reservoir. According to a leading river-running guidebook, the entirety of the Upper Provo runs through a beautiful and wooded area containing numerous easy Class 2 and 3 rapids that, from May into July, is suitable for people with intermediate boating skills.

29. The Upper Provo, including the Victory Ranch stretch, is prime fly fishing water for trout.

30. ATC and its immediate predecessor have asserted and presently assert that the five-mile stretch of the Upper Provo that flows through Victory Ranch is not subject to private access and,

with the exception of a period beginning in about to August 2008 and ending in mid-May 2010, have prohibited public access to the waters and bed of the River where it flows through Victory Ranch. ATC or its immediate predecessor has posted 'No Trespassing' signs along the river and have asserted the stream is closed to public fishing.

31. ATC and its immediate predecessor have consistently contended that Victory Ranch is private property, including the portion of the Provo River's bed that flows through the property, and that members of the public have no rights therein, howsoever access to the river may be obtained. Victory Ranch was developed, in part, to provide exclusive private access to the Upper Provo River as an amenity to its residents. Victory Ranch employs a "Director of Fishing" to care for Victory Ranch's stretch of river for the protection of wildlife and the fishery and has, to date, spent substantial funds on restoration and preservation of the natural stream environment of the portion of the Provo River that flows through the property.

32. At the request of ATC or its immediate predecessor, law enforcement officials have cited or issued warnings to members of the general public for criminal trespass for fishing, wading and walking along the streambed of the Provo River where it flows through Victory Ranch.

The Utah Stream Access Coalition and its Claims

33. The Utah Stream Access Coalition ("the Coalition") is a Utah nonprofit corporation whose mission is to preserve the right of its members to use Utah's rivers and streams for lawful recreational purposes, and to make reasonable use of the stream beds when engaged in such activities.

34. Coalition members have significant recreational, business, educational, scientific, health and/or aesthetic interests in Utah's rivers and streams, including but not limited to the waters of the Provo River.

35. When using rivers and streams such as the Provo River where it flows through Victory Ranch, Coalition members use the water's bed for activities such as stopping, scouting, wade-fishing, resting, eating, wildlife watching, contemplating, and taking photographs. Prohibitions and limitations regarding access to and use of Utah's rivers and streams that flow through private property, such as the Provo River where it flows through Victory Ranch, and the touching and use of the beds of such waters when doing so, eliminates or significantly reduces the opportunities of Coalition members and the public to experience and enjoy those waters.

36. Since the Act became effective and due to the actions of defendants as herein described, Coalition members are uncertain about their right to lawfully access and use of Utah's rivers and streams, including the Provo River where it flows through Victory Ranch, for recreational and other lawful purposes, about what measures they may and may not take to ensure their safety and the safety of minors in their care when doing so, and whether they can reasonably touch and use the privately-owned beds of such waters when making such use.

37. But for the Act and the uncertainties it has created, Coalition members would have, from and after May 11, 2010, through the present, continued to access and use Utah's rivers and streams, including the Provo River where it flows through Victory Ranch, for recreational and other lawful purposes and to reasonably touch and use the beds of such waters when doing so.

38. The Coalition brings this action to secure the right of its members and the general public to lawfully access and use the Provo River and other rivers and streams where they flow

through private property for recreational and other lawful purposes and to reasonably touch and use the bed of the River when doing so.

SUPPLEMENTAL STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Wilford Woodruff, fourth President of The Church of Jesus Christ of Latter Day Saints and an avid and accomplished fisherman, wrote extensively of his equally extensive experiences, spanning 1847 through 1887, fishing many Utah rivers and streams *(e.g.*, the Bear, Duchesne, Green, Provo, Strawberry, and Blacks Fork Rivers, and Mill, East Canyon, Currant, Deep, and Big and Little Cottonwood Creeks) for both sustenance and recreation. Phil Murdock and Fred E. Woods, *"I Dreamed of Ketching Fish": The Outdoor Life of Wilford Woodruff*, pp. 7-10, 12, 22-25, and 28-32, BYU Studies 37, no. 4, p. 22 (1997-98); See, also, Declaration of Dee Halverson, Exhibit 2 at ¶ 6 f.

2. In the 1930's and 40's, Thomas S. Monson, current President of The Church of Jesus Christ of Latter Day Saints and also an accomplished fisherman, spent much of his childhood and adolescence fishing (for sport and sustenance), floating and swimming in the Provo River and its tributaries. Heidi S. Swinton, *To the Rescue – The Biography of Thomas S. Monson*, chptr. 4, *Like Huck Finn and the River*, Deseret Book (2010); See, also, Declaration of Dee Halverson, Exhibit 2 at ¶6 g.

3. Richard Dombek is a Coalition member. On or about July 5, 2010, he accessed the Provo River where it flows through Victory Ranch from a bridge on S.R. 32 and, walking up the bed of the River below the high water mark, approached an individual believed to be an employee or agent of Victory Ranch, intending to ask him if he knew if this reach of the Provo River was private or public access. The individual confronted Dombek, told him that he was

trespassing and could not fish there, and Dombek and the individual exchanged words. As Dombek returned to S.R. 32 by the same route and at the same location where he had entered the River, he was confronted by a Utah Division of Parks & Recreation officer and cited for criminal trespass. Though desiring to do so, Dombek has not been back to the Victory Ranch section of the Provo River since. Exhibit 3 – Declaration of Richard Dombek.

4. Ryan Houk is a Coalition member. On multiple occasions beginning in or about 1990 and continuing into early 2010, including approximately 30 times after July 2008, he accessed the Provo River where it flows through Victory Ranch from a public right-of-way and, walking up the bed of the River below the high-water mark, fly fished the River. On several of the 2008-2010 occasions, Matt Eastman, whom Houk knows and understood to be an agent of Victory Ranch, confronted Houk while fishing, telling Houk that he would no longer be able to fish there after May 10, 2010, with May 11, 2010, being the effective date of the Public Waters Access Act. Though desiring to do so, Houk has not returned to fish the Provo River where it flows through Victory Ranch since May 10, 2010. Exhibit 4 – Declaration of Ryan Houk.

5. Nicholas Francis is a Coalition member. On multiple occasions beginning in approximately 1999 through May 10, 2010, he accessed the Provo River where it flows through Victory Ranch from a public right-of-way and, walking up the bed of the River below the high-water mark, fly fished the River. He returned to fish the Provo River where it flows through Victory Ranch after May 10, 2010, but was turned away by 'No Trespassing' signs and similar postings posted by ATC or its predecessor. Though desiring to do so, Francis has not returned to fish the Provo River where it flows through Victory Ranch since May 10, 2010. Exhibit 5 – Declaration of James Nicholas Francis.

6. Kris Olson is a Coalition member. On multiple occasions prior to and including May 10, 2010, he accessed the Provo River where it flows through Victory Ranch from a public right-of-way and, walking up the bed of the River below the high-water mark, fly fished the River. He returned to fish the Provo River where it flows through Victory Ranch after May 10, 2010, but was turned away by 'No Trespassing' signs and similar postings posted by ATC or its predecessor. Though desiring to do so, Francis has not returned to fish the Provo River where it flows through Victory Ranch since May 10, 2010. Exhibit 6 – Declaration of Kris Olson.

7. Gary Nichols is a Coalition member. He is the author of *River Runners' Guide to Utah*, a comprehensive guidebook to the rivers and streams of Utah, which has been in print since 1982. Nichols has accessed the Provo River from public rights-of-way and kayaked the River where it flows through Victory Ranch, utilizing its bed as hereinafter described, and intends to do so again in the future. Exhibit 7 – Declaration of Gary Nichols.

ARGUMENT

H.B. 141 VIOLATES THE UTAH CONSTITUTION AND THE PUBLIC TRUST DOCTRINE.[11]

I. THE DISPUTE: *CONATSER v. JOHNSON* AND H.B. 141.

In 2008, relying on, *inter alia*, its own precedent in several cases, including specifically *J.J.N.P. Co. v. Utah*[12] and *Adams v. Portage Irrigation*[13], the Utah Supreme Court resolved (or so everyone thought) a long-running feud between the Conatsers and the Johnsons over whether the Conatsers, as members of the public, had right to use the Weber River where it flowed through the Johnson's land and to there touch the bed of the River, which the Johnsons claimed to own, when doing so. *Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897. Reasoning that the public's right to use its public waters (characterized as an easement in *J.J.N.P.*) included a right to engage in all recreational activities that utilize the water, it also included the right to touch the privately-owned beds of public waters in ways incidental to those recreational uses. *Conatser*, 2008 UT 48 at ¶ 30, 194 P.3d at 902 (citing wade-fishing, floating, hunting, swimming and wading as examples of lawful activities which use the water and incidentally require touching of the water's bed to be enjoyed). (**NOTE:** For ease of reference and when appropriate, this easement is hereafter referred to "the Conatser easement.")

Both *Conatser* and *J.J.N.P.* were rooted in the principle that the public owns Utah's natural waters and both cases cited codified law (*e.g.*, in *Conatser*, Utah Code Ann. § 73-1-1 (Supp. 2007)) as well as case law, discussed *infra*, in support of this proposition. H.B. 141 modified codified law in a manner that abrogated the *Conatser* easement, then reinstated a limited public

[11] While H.B. 141's content is troublesome on several fronts, the operative content, at issue here, are Utah Code Ann. §§ 73-1-1(2), 73-1-1(3), 73-29-201(3) and 73-29-202.
[12] 655 P.2d 1133 (Utah 1982).
[13] 72 P.2d 648 (Utah 1937).

right to float 'floatable' waters. H.B. 141 had three main features. (Exhibit 1) First, it declared that Utah Code Ann. § 73-1-1's declaration of public ownership of water "does not create or recognize an easement for public recreational use on private property." Utah Code Ann. § 73-1-1(2). Second, it declared that "the Legislature [alone] shall govern the beneficial use of public water for beneficial purposes, as limited by constitutional protections for private property." Utah Code Ann. § 73-1-1(3). Third, it declared that the public's right to use Utah's public waters shall be governed by the Public Waters Access Act ("the Act"), Utah Code Ann. §§73-1-1(4) and 73-29-101, *et seq.*, wherein the legislature purported to legislatively overrule *Conatser* and *J.J.N.P.* and finished its business of abrogating the *Conatser* easement. H.B. 141 became law on May 11, 2010.

II. H.B 141 VIOLATES THE PUBLIC'S CONSTITUTIONAL RIGHT TO USE UTAH'S NATURAL WATERS FOR ALL RECREATIONAL ACTIVITIES THAT USE THE WATER AND TO TOUCH THE PRIVATELY-OWNED BEDS OF SUCH WATERS IN WAYS INCIDENTAL TO THOSE USES.

NOTE: The Coalition challenges the constitutionality of H.B. 141 on several fronts and its burden in doing so is, at all junctures, set forth in this note. Statutes are presumed to be constitutional. *Jones v. Utah Board of Pardons & Parole*, 2004 UT 53, ¶ 10, 94 P.3d 283, 285. Accordingly, one challenging a statute on constitutional grounds must show that the statute clearly, completely and unmistakably violates a specific provision of the Constitution or some plain mandate thereof. *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d. 431, 446 P.2d 958, 961-62 (Utah 1968). Every reasonable presumption and every reasonable doubt must be resolved in favor of constitutionality. *Id.*

A. Utah's Natural Waters Have Always Been Owned by the Public and the Public, If It Can Obtain Lawful Access to these Public Waters, Has Always Had a Constitutional Right to Use Public Waters for any Recreational Activity that Uses the Water and to Touch the Privately-Owned Beds of such Waters in Ways Incidental to Such Uses.

* * * * *

All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.

Constitution of Utah, art. XVII, sect.1.

* * * * *

Any discussion regarding the right of Coalition members and the public to use Utah's public waters is best had in the context – that is, in view of the public's extensive historical use of Utah's rivers and streams. See Stipulated and Supplemental Statements of Undisputed Materials Facts at ¶¶ 6-21 and 1-7, respectively. Indeed, according to the Utah Supreme Court:

> [I]n interpreting the constitution, we consider all relevant factors, including the language, other provisions in the constitution that might bear on the matter, historical materials, and policy. [citation omitted] Our primary search is for intent and purpose. Consistent with this view, this court has a very long history of interpreting constitutional provisions in light of their historical background and the then-contemporary understanding of what they were to accomplish.

In re Young, 1999 UT 6, ¶ 14, 976 P.2d 581, 586-587 (emphasis added).

Utahn's rich history of using their natural waters, their public waters – for trapping beaver, floating logs to sawmills or railroad ties or timbers to market, fishing for food, sport or profit, swimming, wading or just simply experiencing and enjoying the water – gives essential context to the many decisions of Utah's highest court recognizing the public's ownership of and right to use its public waters in place. In context, it becomes clear that the court in these many decisions was simply recognizing what had always been – that the public had always used and was

entitled to use its public waters in place and, in doing so, was entitled to touch the private beds of such waters in ways incidental to those uses.

Public ownership of natural waters is not a new principle. To the contrary, it can be traced back to at least Roman law, where the principle in turn was viewed as being rooted in natural law. "By natural law the air, flowing water, the sea, and therefor the shores of the sea are common to all." Justinian, Institutes (Sanders ed. 1917) Lib. II, ch. 1, § 1, at 90. From there it winds its way through English common law and into American jurisprudence. *Glass v. Goeckel*, 473 Mich. 667, 677, 703 N.W.2d 58, 63 (2005).

The concept of 'natural law' and that it should govern the affairs of man permeated legal thought in Utah on many fronts in the nineteenth century[14] and continues to do so today. "Public ownership of all natural resources, including water, was one of the foundation principles of the State of Deseret, and later of the Territory of Utah." Hunter, Milton R., *Brigham Young the Colonizer*; citing Mead, Elwood, *Irrigation Institutions*, p. 221. Brigham Young recognized the importance of water in Utah's pioneer community, and the Mormon irrigation system was carried out through a community effort. Swenson, Robert W., *A Primer of Utah Water Law: Part I*, 5 J. Energy L. & Policy 165, 166-167 (1983-1984).[15] Consistent with this theme, in early territorial days, the right to use water from the public domain was acquired either by actual diversion and application of the water to beneficial use, or by legislative grant. Hutchins, Wells A., *The Utah Law of Water Rights*, p. 10 (1965) (hereinafter, "Hutchins").

[14] *See e.g.*, Thomas G. Alexander, *Utah's Constitution: A Reflection on the Territorial Experience*, 39 Utah Hist. Q. 264, 269.

[15] Brigham Young is said to have declared, by some accounts on July 25, 1847 and by others in 1848, that "[t]here shall be no private ownership of the streams that come out of the canyons, nor the timber that grows in the hills. These belong to the people: all the people." See Thomas v. Cech, *Principles of Water Resources* 262 (2009); Arrington, Leonard J., *Great Basin Kingdom: An Economic History of the Latter-Day Saints, 1830-1900*, p. 52 (2004); Dunbar, Robert, *Forging New Rights in Western Waters*, p. 13 (1983).

In 1852, an act passed by the Territorial Legislative Assembly gave the county courts (6 of them) control of all water privileges. *Deseret Live Stock Co. v. Hooppiania*, 66 Utah 25, 239 P. 479, 482-483 (1925); citing Terr. Utah Laws 1852, p.38 sec. 39, "An Act in Relation to the Judiciary," approved February 4, 1852. The county courts legislation was in effect until 1880, when county courts were replaced by county water commissioners. Hutchins, pp. 12-13. The 1880 law remained in effect until 1897, when Utah's state legislature established procedures for appropriating water and repealed all conflicting legislation. Hutchins, p.14. The common thread in all of this legislation was that Utah's natural waters were public waters and would be managed as such (*e.g.*, a right to use public water could be appropriated by diversion for beneficial use and forfeited back to the public domain for nonuse or abuse). *McNaughton v. Eaton*, 121 Utah 394, 242 P.2d 570, 573 (1952).

Utah's territorial supreme court agreed that Utah's natural waters were public waters:

> This is a free country, and the lands are open to all, and the appropriation of water is open to all, and the legislature cannot pass any law that will put it into the power of an irrigating company to control and manage the waters of any part of the Territory, regardless of the rights of the parties. Nor will the court allow irrigating companies to become engines of oppression.

Munroe v. Ivie, 2 Utah 535 (1877-1880 term).

When Utah became the nation's 45th state in January 1896, its constitution, unlike the constitutions of many western states, did not (and does not) declare that Utah's natural waters are owned by either the public or the state. Nonetheless, the doctrine of public ownership of natural waters that formed the foundation for Utah water law in territorial times continued in that role following statehood, and continues in that role today.

In 1902, a unanimous Utah Supreme Court was first to reaffirm territorial law that Utah's natural waters were, until diverted, "public juries *[sic]*, and others have the same right to use it as the [appropriator], so long as they do not interfere with the [appropriator's] use." *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 67 P. 672, 677 (1902) (emphasis added) (Baskin, J. dissented on other grounds) (dispute over appropriated water diverted for power generation and returned to stream above appropriator's diversion).

One year later, the Utah legislature followed suit when, as part of Utah's first complete water appropriation statute, it declared that "[t]he waters of all streams and other sources in this State, whether flowing above or underground, in known or defined channels, … [are] the property of the public, subject to all existing rights to the use thereof." Hutchins, p.15, citing 1903 Utah Laws ch. 100, sec. 47. The 1903 statute, which established state-wide policies for the appropriation of water[16] and for the forfeiture of water for nonuse[17], was revised and reenacted in 1905, and again in 1919. *Id.* Utah Code Ann. § 73-1-1(1) (2010) roots can be traced to the 1903 statute and, for purposes of the present debate, is essentially identical to the 1903 provision.

In 1925, a unanimous court stated that "[u]nder the statute, and before its enactment, it is and was settled doctrine in arid and semiarid sections of our country that the corpus of the water of a natural stream was not subject to private ownership but was the property of the public or of the state … ." *Oldroyd v. McCrea*, 65 Utah 142, 235 P. 580, 584 (1925) (emphasis added).

In 1937, without so much as mentioning the statute, a unanimous court reiterated its view that Utah's natural waters were and had always been, by their nature, property common to all.

[16] 1903 Utah Laws ch. 100, sec. 1, sec. 35.
[17] *Id.* at sec. 50.

> Public waters, on the other hand, are not the subject of larceny. The title thereto is in the public; all are coequal owners; that is, have coequal rights therein, and one cannot obtain exclusive control thereof. These waters are the gift of Providence: they belong to all as nature placed them or made them available. They are the waters flowing in natural channels or ponded in natural lakes and reservoirs. * * * While it is flowing naturally in the channel of the stream or other source of supply, it must of necessity continue common to all by the law of nature, and is therefore nobody's property, or property common to everybody.

Adams, 72 P.2d at 652-653.

The dispute in *Adams* was whether stockmen had a right to use waters from a spring on their land for camp (culinary) water and stock watering where those waters had been lawfully appropriated but not yet diverted by the others downstream. Because the stockmen had lawful access to the springs, the court sided with them.

> [N]o title to the corpus of the water itself has been or can be granted, while it is naturally flowing, any more than it can to the air or the winds or the sunshine. * * * While it is flowing naturally in the channel of the stream or other source of supply, [water] must of necessity continue common by the law of nature … or property common to everybody. And while so flowing, being common property, everyone has equal rights therein or thereto, and may alike exercise the same privileges and prerogatives in respect thereto, subject at all times of course to the same rights in others, and to the special rights to divert and use which have theretofore attached, vested or been recognized. Said Mr. Justice Moffat in *Wrathall v. Johnson*, 86 Utah 50, 40 P.2d 755, 766: "Water from the source to the point where the appropriator or user captures or diverts it into his conveying channels or containers is *publici juris*; and others have the same right to use it as the appropriator, so long as they do not interfere with the appropriator's use, by diminishing his quantity or impairing the quality."
>
> See, also, [*Salt Lake City Water & Elec., supra*]. And so, **while water is still in the public, everyone may drink or dip therefrom or water his animals therein, subject to the limitations above noted … . This right of the public, as well as the rights of the appropriator, were confirmed in the State Constitution in art. XVII: 'All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.'**

Adams, 72 P.2d at 648, 652-53 (emphasis added). Simply stated, the *Adams* court held that the public's right to use public waters is guaranteed by article XVII of the Utah Constitution.

Later, in *Riordan v. Westwood*, the court reaffirmed the principle of public ownership of natural waters:

> From the earliest history to the present time this court has recognized that the right to the use of public waters of this state could be acquired by diversion and beneficial use.

203 P.2d 922, 927 (Utah 1949) (emphasis added), citing *Munroe, supra.* (dispute whether spring waters appearing on and confined to single parcel were 'public waters' subject to appropriation). Further, after noting that the 1903 statute as amended in 1935 made clear the legislature's intent "to declare all waters of the state … to be public property", the *Riordan* court stated that "[s]uch has probably been the law of this state regardless of this amendment." 203 P.2d. at 927.

In a separate opinion in *Riordan,* Justice Wolfe elaborated on the public's ownership of natural waters, stating that all unappropriated waters of the state "are, and *have always been,* public waters." *Id.* at 932. Further, after acknowledging the various legislative efforts spanning 1903-43 to bring order to the appropriation process, Justice Wolfe made these observations:

> When the settlers first came to this state they took the land and the necessary water to make it fruitful. The waters were free for everyone to enjoy beneficially … [a]nd in that status the waters of this state remain today … . * * * The legislature did not by a declaration, make public what were previously nonpublic waters. It simply extended to all public waters the necessity of application to the state engineer in order to appropriate, and made such appropriation subject to all existing rights. The above view, which I think is the correct one, avoids any question of the constitutional right of the legislature to 'declare' private waters to be public. They were always public until appropriated by diligence or by application, when the latter was made the necessary method of appropriation.

Id.[18]

Three years later, in *McNaughton v. Eaton*, a unanimous court again confirmed its view that the public ownership of Utah's natural waters was "probably always the law of the state

[18] While Justice Wolfe states that waters are public until 'appropriated', it is believed that what he really meant was that waters are public until possessed by the appropriator.

regardless of this amendment." 242 P.2d 570, 573 (1952), quoting *Riordan*, 203 P.2d at 927 (dispute whether percolating waters confined to single parcel are 'public waters' subject to appropriation). In his concurring opinion, now Chief Justice Wolfe agreed, adding:

> [A]ll rain and snow water belongs to the public regardless of whose land it falls upon. Like all fugitive substances, it can belong to no one else except the public. * * * [T]he fact that the State progressively applied regulation to the acquisition of use rights in water does not disturb the fundamental principle that all water … from the time it reaches land within this state belongs to the public – the people of this state. [When the legislature declared] certain waters 'to be the property of the public', [it] recognized a fact that had always been so.

Id. at 575.

Also in 1952, while interpreting the legislature's expansion of its statutory declaration of public ownership to groundwater, a unanimous court reaffirmed its view that public ownership of Utah's natural waters "has probably always been the law of this state regardless of this amendment." *Fairfield Irr. Co. v. Carson*, 122 Utah 225, 247 P.2d 1004, 1007 (1952), quoting *Riordan*, 203 P.2d at 927.

The following year, the court reiterated its view that the public had a right to use public waters in place in a dispute between stockmen and a private landowner (Sharp) regarding, *inter alia*, access to and use of unappropriated waters from a spring located entirely on Sharp's land. *Deseret Live Stock Co. v. Sharp*, 259 P.2d 607 (1953). Because the evidence demonstrated that a public prescriptive easement existed over some of Sharp's land, including where the springs were located, the court confirmed that the stockmen and the rest of the public had a right to use in the spring waters, stating:

> It is settled law in Utah that one acquiring title to public lands does not also acquire title or interest in or to the water flowing upon that land. [citations omitted] * * * [S]uch water is still unappropriated public water and we conclude that [the wool growers] have

> an equal right with all other members of the public, including the [landowner], to use the water as they desire until a superior right to such water is established.

Id. at 611.

Almost 30 years later, in *J.J.N.P.*, the court reiterated yet again that ownership of Utah's natural waters had always resided in the public and that the state's regulation of water was, in effect, "as trustee for the benefit of the people." 655 P.2d at 1336; See, also, *Deseret Live Stock Co. v. Sharp*, 259 P.2d at fn.3 (quoting *Adams*, 72 P.2d at 652-53, extensively for the proposition that public ownership of natural waters was natural law).

J.J.N.P. involved a dispute over private and public rights to use the waters of a natural lake situated entirely on private ground. The dispute arose when, after expiration of a public easement to access the lake, the state rejected the landowners' application to establish a private fish installation in the lake. After discounting the state's argument that rejection of the application was warranted because the lake was navigable and therefor the state owned the bed, the court nonetheless upheld state's rejection of the application.

> [Navigability] does not establish the extent of the State's interest in the waters of the State. * * * The doctrine of public ownership is the basis upon which the State regulates the use of water for the benefit and well being of the people. [citation omitted] A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water. Therefore, public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters. * * * Irrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when ***utilizing*** the water. * * * The right to use public waters for pleasure purposes is no less a right just because some landowners, for reasons sufficient to themselves, prohibit public access over their land to reach those public waters.

Id. at 1136-38 (emphasis added).

In 1993, a unanimous court "agree[d] with Chief Justice Wolfe's statement, made in 1952, that the public ownership of all water in the state "must always have been so. * * * [A]ll water … from the time it reaches land within the confines of this state belongs to the public – the people of this state." *Provo River Water Users Ass'n. v. Morgan*, 857 P.2d 927, 933 fn.8 (1993) (quoting *McNaughton*, 242 P.2d at 575 (Wolfe, C.J., concurring)) (dispute whether general adjudication regarding rights to river waters encompassed rights to isolated springs in drainage). In 2000, a unanimous court again affirmed this principle. *Salt Lake City v. Silver Fork Pipeline Co.*, 2000 UT 3, ¶ 31, 5 P.3d 1206, 1216.[19]

The inescapable conclusion is that, despite H.B. 141's suggestion to the contrary, public ownership of water does not rely upon legislative enactment. To the contrary, the legislative enactment is, like the cases cited, simply confirmation of what has always been – that the public has always owned the water. Similarly, the public's right to lawfully access and use its public waters does not rely upon legislative enactment. Like public ownership of water, the public's right to use public waters has always been the law in Utah. Further, as established in *Adams*, public ownership of water and the public's right to use public waters are confirmed and protected by article XVII of Utah's Constitution.

Which brings the discussion back to where it started – to *Conatser v. Johnson*, where a unanimous court held that the public's easement to use its public waters allowed the public to engage in all recreational activities that utilize the water and included the right to touch the privately-owned beds of public waters in ways incidental to all recreational rights provided in the easement. 2008 UT 48, 194 P.3d 897.

[19] See, also, *Uintah Basin v. United States*, 2006 UT 19, ¶34, 133 P.3d 410, 420 (2006).

What separated *Conatser* from its predecessors is that the court faced, for the first time, the question of whether, and if so to what extent, the public's easement to use public waters included a right to touch the privately-owned beds of those waters.[20] The court answered this question by applying basic easement law. Specifically and simply, it reasoned that because the public's easement encompassed "utilizing" public waters for any recreational activities that uses the water and include the right to touch the privately-owned beds (*i.e.*, the servient estate) of public waters in ways incidental to such uses, so long as doing so did not cause undue injury to the private bed. *Id.* at ¶¶ 20-30. Stated otherwise, just as public waters do not trespass on the private beds beneath them, the public does not trespass upon those beds when it uses the water for recreational purposes and touches the bed of those waters in a way incidental to that use – or, if one prefers, just as public waters burden the lands across which they flow, so too does the public's easement to use those waters for recreational purposes.

B. H.B. 141 Violates the Constitutional Right of Coalition Members and the Public to Use Their Public Waters for Recreational Activities and to Touch the Privately-Owned Beds of those Waters in Ways Incidental to those Recreational Activities.

As demonstrated in point II. A., *supra*, the public has always owned Utah's natural waters, has always had a right to lawfully access and use its public waters for recreational and other activities, and may touch the privately-owned beds of such waters in ways incidental to those recreational activities. And it has held that this right to use its public waters is confirmed by article XVII of the Utah Constitution.[21]

[20] The *J.J.N.P.* court declined to address this issue. 655 P.2d at 1138, n.6.
[21] Based on the same historical evidence and legal precedent, the public's right to use public waters and to touch the beds of such waters as herein described is also guaranteed by Article I, sect. 25, Constitution of Utah: *"This enumeration of rights shall not be construed to impair or deny others retained by the people."*

H.B. 141 violates this right. While there are many troubling provisions in H.B. 141[22], the operative provisions presently at issue are:

- Utah Code Ann. § 73-1-1(2) (2010): "*The declaration of public ownership of water in Subsection (1) does not create or recognize an easement for public recreational use on private property.*" While the legislature is certainly free to say what it will in a statute and often does, to the extent that this section purports to abrogate the constitutionally-protected *Conatser* easement – which by all appearances is its 'clear, complete and unmistakable' intent – it is unconstitutional.[23]
- Utah Code Ann. § 73-29-201(3) (2010): "*A person may not access or use a public water on private property for recreational purposes if the private property is property to which access is restricted, unless public recreational access is established under Section 73-29-203.*"[24] Preliminarily, section 73-29-203 renders this section inapplicable if, in essence, the public can establish a "public recreational access' easement under adverse possession principles. Stated otherwise, the legislature eliminated the constitutionally-protected *Conatser* easement

[22] For example, the Act purports to allow use of 'navigable' public waters presumably because, under the federal Equal Footing Doctrine, the public owns both the waters and bed of navigable waters. See *U.S. v. Utah*, 283 U.S. 64, 75 (1931); *Monroe v. State*, 175 P.2d 759, 760 (Utah 1946). However, while the equal footing doctrine looks to navigability as of the time of statehood, *U.S v. Utah*, 283 U.S. at 75, the Act defines a navigable water in terms of present navigability; that is, "a water course that … *is* useful for commerce and *has* a useful capacity as a public highway of transportation." See Utah Code Ann. § 73-29-102(4) (2010) (emphasis added). Whether intentional or inadvertent, this definition is void and unenforceable, as it conflicts with the federal definition and the question of whether waters are navigable for title is preempted by federal law. See, *U.S. v. Utah*, *Monroe*, *supra*. As another example, the Act's definition of "public waters" neither includes nor excludes natural waters collected in manmade reservoirs, etc., constructed on a natural or realigned channel. *Cf.* §§73-29-102(8)(a) and 73-29-102(8)(a)(iii)(C). These waters are public waters.

[23] Utah Code Ann. § 73-1-1(2) (2010) reads "[t]he Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property." Although phrased prospectively, this section reveals the intended reach of H.B. 141– that the legislature alone will decide who gets to use Utah's public waters, limited only by "constitutional protections for private property", while the rest of the Utah Constitution, including article XVII, and the courts will play no role.

[24] Utah Code Ann. §73-1-1(4) (2010) states that recreational access to public waters will be governed by the Public Waters Access Act, Utah Code Ann. §73-29-101, *et seq.* Section 73-29-201(3) is the provision which abrogates all of the Conatser easement, while §73-29-202 reinstates a limited public right to float public waters.

and told the public, 'you might be able to use your waters if you can prove that you have adversely possessed them.'

Moving to the heart of section 102(3), the term "private property … to which access is restricted" means any property that has been posted in any manner allowed by Utah law. Utah Code Ann. § 73-29-102(5). In short, this provision prohibits the public from lawfully accessing and using public waters that flow through private property that has been posted. In practice, ATC and other landowners post their property where, *inter alia*, public waters cross public rights of way (or vice versa), such as highway bridges; precisely where the public can move directly from public property to its public easement, and back again. Here again, H.B. 141 allows private landowners to prohibit lawful public access to and use of public waters, abrogating the Conatser easement.

- Utah Code Ann. § 73-29-202 (2010): "*There is a public right to float on public water that has sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating … .*" This section is the only vestige of the constitutionally-protected Conatser easement. Because the immediately preceding arguments that sections 73-1-1(2) and 73-29-201(3) violate article XVII arguably subsume a similar argument here, it is simply noted that the limitations imposed by this provision on the public's right to float public waters (*e.g.*, no touching of beds, etc.) also violate article XVII.

There is no mistaking H.B. 141's intent. It was intended to get rid of the *Conatser* easement. What H.B. 141's proponents didn't count on and perhaps even ignored, most among many things, was *Adams*, which, once again, held that the public's right to use its public waters, as most recently defined in *Conatser*, was as a right confirmed and protected in article XVII of

the Utah Constitution. H.B. 141, by abrogating the *Conatser* easement, violates the clear mandate of article XVII and, as such, is unconstitutional and enforceable.

III. H.B. 141 VIOLATES ARTICLE XX, SECT. 1 OF THE UTAH CONSTITUTION.

* * * * *

> *All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.*

Constitution of Utah, art. XX, sect.1.

* * * * *

A. The Scope of Article XX, Section 1.

Article XX, section 1 imposes express trust responsibilities upon the State of Utah with respect to state lands and other public interests in lands. As trustee, the State owes fiduciary duties to the beneficiaries of the trust and is required to act only for the benefit of the beneficiaries and to exercise prudence and skill in administering the trust. *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918 (Utah 1993). These are legally binding duties, enforceable by those with a sufficient interest in the lands to have standing. *Id.*

As will be shown below, the rights of the public to use and enjoy Utah's natural waters, and to make reasonable use of the beds of those waters when doing so, is an interest in land that is protected article XX, section 1. H.B. 141's abrogation of those rights violates the State's trust responsibilities under article XX, section 1.

B. The Conatser Easement is an Interest in Land Protected Under Art XX, § 1.

As has been established in pt. II.A., *supra*:

> [Utah's natural waters] are the gift of Providence: they belong to all as nature placed them or made them available. They are the waters flowing in natural channels or ponded in natural lakes and reservoirs. * * * While it is flowing naturally in the channel of the stream or other source of supply, it must of necessity continue common to all by the law of nature, and is therefore nobody's property, or property common to everybody. And while so flowing, being common property, everyone has equal rights therein or thereto, and may alike exercise the same privileges and prerogatives in respect thereto, subject at all times of course to the same rights in others … .

*Adams,*72 P.2d at 652-653.

If public waters themselves are a gift of Providence, the same is true of the right to use those waters. But that right, as recognized in *Conatser*, is also an easement burdening the lands over which the waters pass. *Conatser*, at ¶¶ 20-30. In *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625-26 (Utah 1990), the court recited a well established rule that easements, even implied easements, are property interests protected from taking under article I, section 22. If privately held easements are so protected, then it follows that a publicly held easement should be regarded as the type of interest in land that can be protected under article XX, section 1.

The next question is whether the *Conatser* easement qualifies for that protection given its purpose and the manner in which it was acquired. Although most cases decided under article XX, section 1 involve lands expressly granted by Congress to the State of Utah for specific purposes, the language expressly includes "all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired." This leaves no doubt as to the article's broader application.

Many years ago, the Utah Supreme Court held that the beds of navigable rivers and lakes are lands "otherwise acquired" and are therefore subject to the trust obligations under article XX,

section 1. *State v. Rolio,* 71 Utah 91, 262 P. 987 (Utah 1927). In short, a specific grant, patent or deed of land in trust is not necessary for the trust protections of article XX, section 1 to apply. Ownership of the beds of Utah's navigable waters passed to the people of Utah implicitly under Utah's Enabling Act and the Equal Footing Doctrine, not pursuant to an express grant of those lands to the State. *U.S. v. Utah*, 283 U.S. 64, 51 S.Ct. 438 (1937). Likewise, the ownership of public waters and the rights to use them passed implicitly to the people of Utah as a "gift of Providence" without a specific grant. As with the beds of navigable waters, this manner of acquisition should not stand in the way of the trust protections under article XX, section 1.

To conclude, the *Conatser* easement is an interest in land acquired by "the gift of Providence" and, as such, is subject to public trust obligations imposed on the State under article XX, section 1 of the Utah Constitution.

C. H.B. 141's Abrogation of the Conatser Easement Violates Art. XX, § 1.

Given the application of article XX to the *Conatser* easement, there can be no question that the article's trust protections were violated by H.B. 141's abrogation of the easement. Article XX, section 1 commands that the *Conatser* easement "shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which [it has] been … granted, donated, devised or otherwise acquired." There is no doubting the purpose of the *Conatser* easement – it is to allow the public to use and enjoy the rivers and streams they own, and to make incidental uses of the stream beds as necessary to that purpose. Likewise, there is no question that H.B. 141's abrogation of the *Conatser* easement is fundamentally inconsistent

with that purpose.[25] The sole purpose of H.B. 141 is to benefit private landowners and free them from the burdens of the *Conatser* easement.[26] This disposition of the easement in no way advances the purpose for which it was acquired – indeed, it completely destroys that purpose.

IV. H.B. 141 VIOLATES ARTICLE V OF THE UTAH CONSTITUTION.

*** * * * ***

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Constitution of Utah, art. V, sect.1.

* * * * *

The separation of powers doctrine is firmly ensconced in the American system of government and, more specifically, in both Utah's Constitution and case law. In essence, the doctrine states that, while each branch of government operates as a check and balance against the other two and while there is necessarily functional overlap among the three branches, no branch shall usurp the core functions of the other two branches.

As framed in the second clause of article V of the Utah Constitution, separation of powers is violated where "[a] person charged with the exercise of powers properly belonging to one of these departments … exercise[s] any functions appertaining to either of the others … ." The test of whether this clause has been violated is fairly narrow:

[25] If further analysis of H.B. 141's violation of public trust principles would be helpful, the court is referred to Point V, below, dealing with the manner in which H.B. 141 violates the Public Trust Doctrine.

[26] In this manner, H.B. 141 also violates article I, section 23 of the Utah Constitution, as it also effectively grants riparian landowners an irrevocable and exclusive franchise or privilege to use public waters that flow through their properties as well as to use related public resources (*e.g.*, game fish). See, also, *Deseret Live Stock, supra*., 259 P.2d 607, 611 (ownership of land does not grant title or interest to waters flowing across that land).

> [F]or powers or functions to fall within the reach of the second clause of article V, section 1, they must be "so inherently legislative, executive or judicial in character that they must be exercised exclusively by their respective departments."

In re Young, 1999 UT 6 at ¶ 14, 976 P.2d at 586, quoting *Taylor v. Lee*, 226 P.2d 531, 537 (Utah 1951) (emphasis added) (dispute whether legislation encroached upon powers reserved to the judiciary, thereby violating the second clause of article V).

At issue here is whether the legislature, in H.B. 141, violated the second clause of article V by exercising powers reserved exclusively to the judiciary. In this context, "[t]he power and duty of ascertaining the meaning of a constitutional provision resides exclusively with the judiciary." *Utah School Boards Ass'n. v. Utah State Board of Education*, 2001 UT 2, ¶ 9, 17 P.3d 1125, 1128 (emphasis added). Similarly, "the determination of existing rights [to use water] … is peculiarly a judicial function." *Little Cottonwood Water Co. v. Kimball, et al.*, 289 P. 116, 117 (Utah 1930). In short, the adjudication of what the Utah Constitution and other laws mean and of who has what rights under those laws is a core judicial function.

In the context of these principles, it is clear that H.B. 141 set out to adjudicate the constitutional and other issues imbedded in the Conatser easement.[27] Specifically:

- H.B. 141 declares that, because *Conatser* and *J.J.N.P.* (and, by implication, the other court decisions comprising the *Conatser* easement) did not consider the constitutional prohibition against the taking or damaging of private property for public purposes absent just compensation[28], those decisions are, effectively, either bad law or constitute a judicial taking

[27] In an ironic reversal of roles, rather than accusing a court of "legislating from the bench", the legislature stands accused of "adjudicating from 'The Hill.'"
[28] See, article I, section 22 of the Utah Constitution.

or damaging of private property without just compensation. *Cf.* Utah Code Ann. §§73-29-103(1), -103(2) and -103(3).

- H.B. 141 subordinates the public's constitutionally-protected *Conatser* easement, along with article XVII, to the constitutional prohibition against the taking or damaging of private property for public purposes absent just compensation. *Id.*
- H.B. 141 abrogates the constitutionally-protected *Conatser* easement and, in doing so, legislatively overrules the court decisions comprising that easement and the court's interpretation of the Utah Constitution. *Cf.* Utah Code Ann. §§ 73-29-102(8)(a) and 73-29-202.

Simply stated, by interpreting and adjudicating the meanings and priorities of supposedly competing constitutional provisions and by adjudicating and ultimately abrogating or severely restricting the constitutionally-protected *Conatser* easement – in short, by exercising powers and functions reserved "exclusively" and "peculiarly" to the courts – the legislature, in H.B. 141, has violated article V of the Utah Constitution.

V. H.B. 141 VIOLATES THE PUBLIC TRUST DOCTRINE.

The public trust doctrine is a common law principle that requires certain public resources be managed by government in trust for the benefit of the people. Like the doctrine of public ownership of natural waters, its roots can be traced from natural law, through Roman law and English common law and, early on, into American jurisprudence.[29] Originally, the doctrine developed to protect the public interest in commerce, fishing and navigability on or in waters affected by the tide and, in this manner, tidal lands as well. *Arnold* at n.1.; *Martin v. Wadell*, 41

[29] See, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-478 (1970); *Arnold v. Mundy*, 6 N.L.J 1, 76-77, 10 Am. Dec. 356, 368 (1821).

U.S. (16 Pet.) 367, 418 (1842). In time, the doctrine made its way inland, where it was applied to require states to manage non-tidal navigable waters and their beds in trust for the public. *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

Illinois Central is, by most accounts, the most influential case regarding the public trust doctrine in American jurisprudence. In *Illinois Central*, the U.S. Supreme Court upheld the Illinois legislature's revocation of a prior legislative grant in fee to a private party of a section of Lake Michigan shoreline and lake bed, reasoning that the prior legislative grant was revocable if not void *ab initio* as being inconsistent with the state's fiduciary duty to manage sovereign resources in trust for the benefit of the people. *Id.* at 452-53 ("The state can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace.")

In time, the public trust doctrine made its way into the state courts as well. Arizona in particular has seen considerable activity on this front. In *Arizona Center for Law in the Public Interest v. Hassell*, the Court of Appeals of Arizona stated:

> Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, [citations omitted] so the legislative and executive branches are judicially accountable for their dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.

837 P.2d 158, 167-68 (Ct. App. Arizona 1991).

> We hold that when a court reviews a dispensation of public trust property, as when a court reviews the dispensation of any other property, the two … elements – public purpose and fair consideration – must be shown."

Id. at 170 (statute substantially relinquishing state's interest in the beds all state watercourses, except for four named rivers, for no or nominal consideration, violated public trust doctrine and

gifts clause). See, also, *Defenders of Wildlife v. Hull*, 18 P.3d 722, 738 (Ct. App. Arizona 2001) and *State v. Arizona Navigable Stream Adjudication Commission*, 229 P.3d 242 (Ct. App. Arizona 2010). [30]

As noted in *Arizona Center*, the public trust doctrine does not prohibit any and all dispositions of public trust properties. Rather, it requires that any such disposition be consistent with trust principles – that is, for a trust purpose and fair consideration. In this regard, Idaho case law offers further insight. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983) (containing discussion of the public trust doctrine as developed in other states). In upholding the state's lease of public trust resources to a private yacht club, the court, relying on *Illinois Central*, stated:

> [A] two part test emerges to determine the validity of the grant of public trust property. One, is the grant in aid of navigation, commerce, or other trust purposes, and two, does it substantially impair the public interest in the lands and waters remaining?

Id. at 1089.[31]

> Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will supplant its judgment for that of the legislature or agency. However, it does mean that this court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.

[30] These three cases comprise a trilogy documenting the struggle in Arizona between the legislature and the state court of appeals over disposition of the beds of state waters. For those interested in such matters, they make for entertaining reading. Further, if history is any indication, the court's 2010 ruling is unlikely to be the final engagement between the two camps and a fourth engagement (and, perhaps, a 'tetralogy') may be on the horizon.

[31] While *Kootenai*, identifies a two-part test, because the lessee had entered into a commercial lease for the trust property at issue, the question 'fair consideration' was not at issue, leaving the court to deal only with the 'trust purpose' component of the test described in *Arizona Center*.

Id. at 1092. The court went on to state that in making such a determination the court would examine, among other things, the effect of the grant "on public trust uses, navigation, fishing, recreation and commerce …" *Id.*

As has been discussed, *supra* at pt. III, public trust principles are imbedded in article XX, section 1 of the Utah Constitution. However, in this context and others, the public trust doctrine has received only modest attention in Utah case law. See, *e.g.*, *Coleman v. Utah State Land Board*, 795 P.2d 622, 634 (Utah 1990). That said, the Utah Supreme Court has suggested that the public trust doctrine may not be limited to article XX 'sovereign' lands.

> The "public trust" doctrine … protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large. The public trust doctrine, however, is limited to sovereign lands and perhaps other state lands that are not subject to specific trusts, such as school trust lands.

National Parks and Conservation Ass'n. v. Board of State Lands, 869 P.2d 909, 919 (Utah 1993) (rejecting challenge of state-county exchange of school trust land located in national park for county-owned land). Consistent with this theme, several states have extended public trust principles to waters and rights other than traditional federally navigable waters and their beds.[32]

The issue here is whether the *Conatser* easement warrants protection under the public trust doctrine. Specifically, is the easement a public trust resource and, if so, does H.B. 141 violate the public trust doctrine? Turning to the *Kootenai* and *Arizona Center* tests with the understanding that the 'grant' in question is H.B. 141:

- *Is the grant in aid of navigation, commerce, or other trust purposes?* Short answer: No.

H.B. 141 does not mention navigation or commerce and nothing in its language suggests

[32] See, *e.g.*, *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984) ("surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability …"); *Parks v. Cooper*, 676 N.W.2d 823, 833-836 (S.D. 2004) (non-navigable seasonal lakes); Alaska Stat. Ann. 38.05.965(13) (2004) (waters useful for landing and takeoff of aircraft).

either was even considered. Public trust purposes clearly weren't even on the legislature's radar.

- *Does the grant substantially impair the public interest in the lands and waters remaining?* Short answer: Yes. To say that H.B. 141 'substantially impairs' the public's interest in its use of public waters is an understatement. Absent landowner permission, H.B. 141 prohibits any recreational use of 'non-floatable' public waters that flow across private land and any recreational use other than but severely-restricted floating and fishing of 'floatable' waters that flow across private land.[33] In short, H.B. 141 abrogates the public's right to engage in several otherwise lawful recreational uses of public waters that flow across private beds, such as wade-fishing, wading, swimming, and hunting.
- *Is the grant supported by fair consideration*? Short (and obvious) answer: No. H.B. 141 gave the *Conatser* easement to private riparian landowners.

In short, H.B. 141's abrogation of the *Conatser* easement served no public purpose, substantially impaired the public's interest in what little arguably remains of the easement, and did it all for free.

Turning to the question of whether the *Conatser* easement is a public trust resource, it is clear that, as "gift of Providence", it is, though perhaps not a traditional one. Again, the public trust doctrine originally evolved to protect navigable waters and their beds in the interests of public commerce, navigation and fishing. With this in mind, it must be remembered that the State regulates the use of public waters, in effect, "as trustee for the benefit of the people",

[33] Conceptually, H.B. 141 impacted virtually all public waters that do not flow across federal or state lands, including, *inter alia*, most of the Bear, Duchesne, Logan, Ogden, Price, Provo, Sevier, Strawberry, Virgin and Weber Rivers, their tributaries, and myriad other streams – many of which have been used by the public for generations. All told, the Coalition estimates that H.B. 141 impacted as much as 17,000 miles of public waters.

suggesting that all public waters, whether navigable or nonnavigable, are subject to public trust principles.[34] Indeed, as Justice Larson observed in *Tanner v. Bacon*:

> Due to the limited supply of water and its importance to the people of this State, it has wisely been provided that this resource shall be so used as to best subserve the needs of the people and the development of the state, to the end that no one shall acquire a dominating right to such use of water as will retard the maximum development of the state's resources, or curtail the satisfaction of the people's needs in the things most important to their sustenance, development and happiness. * * * Where a matter is of such moment and serious public concern as water is in this state, and is the property of the public, it properly is declared not subject to private rights or claims except to the limited extent provided by law, in the uses which shall be deemed most beneficial to the public welfare … . The state, as trustee for the people, must so administer its trust as to not permit its misuse, or its use in any way adverse to the interests of the public.

136 P.2d 957, 966 (Utah 1943) (Larson, J., concurring) (appeal from decision of state engineer rejecting application to appropriate waters for power generation).

Here, while the Conatser easement may not be a traditional 'public trust' resource, as a "gift of Providence" it is clearly a public resource that, in the words of *Illinois Central*, is "property in which the whole people are interested"[35] and that, in the words of Justice Larson, lends itself to "the satisfaction of the people's needs in the things most important to their sustenance, development and happiness." It is, in short, a public resource that past, present and future generations of Utahns have entrusted to the State of Utah to protect and, as such, a public resource deserving of and, as it turns out, requiring protection under the public trust doctrine. H.B. 141 violates the State's fiduciary duties and the people's trust and must be set aside.

[34] *J.J.N.P.*, 655 P.2d at 1336 ("doctrine of public ownership is the basis upon which the state regulates the use of water for the benefit and well being of the people").

[35] While fishing is but one recreational use of public waters, statistics from this use help illustrate the extent to which the public uses Utah's public waters for recreation. Again, in 2006, more than 375,000 people bought Utah fishing licenses, including more than 288,000 Utah residents, and fished app. 3.8 million days, or app. 10 days each. See, Stipulated Statement of Undisputed Material Facts at ¶ 21.

CONCLUSION

H.B. 141 violates the Utah Constitution and the Public Trust Doctrine and, as such, is void and unenforceable.

DATED this _____ day of September, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September, 2011, I served the foregoing ***Memorandum in Support of Utah Stream Access Coalition's Motion for Summary Judgment***, including exhibits, on all parties to this action as indicated below:

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