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# Pure as Running Water: A Constitutional Argument for Utah's Public Trust Doctrine

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# PURE AS RUNNING WATER: A CONSTITUTIONAL ARGUMENT FOR UTAH'S PUBLIC TRUST DOCTRINE

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*In the West, "Whiskey is for drinkin' and water's for fightin'."*[1]

## I. INTRODUCTION

Water rights in America, particularly in western states, have been a pervasive source of legal contention.[2] The histories of these water rights, and the public trust doctrine more broadly,[3] have created a tremendously complex area of law. This field of law is very old and draws on policy concerns stretching back to 100 B.C., overlapping federal and state powers and precedents, and what can only be described as one of the longest games of jurisprudential telephone in existence.[4] As a result, anyone seeking to challenge a state statute, court opinion, or regulation, which they believe impermissibly restricts the public's right to use the waters, has a big job ahead of them. The party must take on the daunting task of organizing hundreds of years of law into a coherent argument and accounting for every nuance which may lurk in a myriad of state and federal opinions published on the issue.[5]

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 Fuller is a third-year law student at the University of Utah S.J. Quinney College of Law. First and foremost, I would like to thank my grandfather, Douglas A. Smith, for instilling in me the importance of water rights in the State of Utah. I would also like to thank the *Utah Law Review* board and staff—in particular Kayla Weiser, Jennifer Joslin, and the Junior Staff Copyworkers—for their tireless work and attention to detail.

[1] Though this quote is often attributed to Mark Twain, it is uncertain whether Twain actually said it. *Whiskey Is for Drinking; Water Is for Fighting Over*, QUOTE INVESTIGATOR (June 3, 2013), https://quoteinvestigator.com/2013/06/03/whiskey-water/ [https://perma.cc/7522-L76U].

[2] *See generally* Utah v. United States, 403 U.S. 9 (1971) (providing an example of a State's suit against the federal government to determine navigability for title of waters).

[3] In short, the public trust doctrine requires the state to hold navigable waters in trust for the use of the citizens of that state, and to not dispose of those trust resources unless doing so does not impair the interest of the people and where the disposal would serve the people's best interest. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892).

[4] *See* discussion *infra* Section II.

[5] *See, e.g.*, *Ill. Cent. R.R. Co.,* 146 U.S. at 435 (noting that ownership of and dominion and sovereignty over land covered by fresh water, within the limits of several states, belongs to the respective states within which it is found); Conatser v. Johnson, 194 P.3d 897, 900 (Utah 2008) ("While the public owns state waters, the beds that lie beneath those waters may be privately owned."); J.J.N.P. Co. v. State *ex rel.* Div. of Wildlife Res., 655 P.2d 1133, 1136–37 (Utah 1982) (holding that the public has recreational rights in the waters of a lake even though it is entirely surrounded by a landowner's private property).

Analysis of a public trust issue in Utah comes with some unique difficulties. First, unlike some states, Utah has not constitutionalized their public trust doctrine.[6] This creates problems in deciding these issues because jurisprudence concerning the public trust doctrine, as it exists in Utah now, is based on court decisions[7] and statutes,[8] rather than constitutional text. Both of these sources of law provide imperfect protection of the public's right to the water and provide unstable footing for a case seeking to challenge any impermissible restriction of the waters of the state. Second, Utah's rivers tend to be mountainous, obstructed, or low-flowing.[9] This makes the determination of the river's navigability for title purposes difficult, as the traditional test for navigability requires some form of commercial use.[10] Finally, for years private property owners, who have been paying taxes on streambeds that cross their property, are concerned that the state's upholding of public trust protections for those rivers will allow citizens to come onto their private property for recreational purposes, effectively extinguishing their right to exclude.[11] According to private property owners, upholding the public's right to use the waters of the state, where they cross private land, implicates potential takings claims from the government, title assurance issues for the defect of having a government easement on the land years after the land was bought, and the inability to exercise their right to exclude others from their land.[12]

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[6] Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 183 (2010).

[7] *See* Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648, 652 (Utah 1937) ("The title [to public waters] is in the public; all are equal owners; that is, have coequal rights therein, and one cannot obtain exclusive control thereof."); *J.J.N.P.*, 655 P.2d at 1136 ("Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole."); Utah Stream Access Coal. v. Orange St. Dev., 416 P.3d 553, 565 (Utah 2017) ("Under United States Supreme Court precedent and our constitution, the people of this State hold an interest in the lands held by the State under the public trust doctrine, including land under navigable waters.").

[8] *See* UTAH CODE §§ 73-29-201 to -208 (2018).

[9] *National Water Information System: Web Interface*, U.S. GEOLOGICAL SURVEY, https://waterdata.usgs.gov/ut/nwis/current/?type=flow [https://perma.cc/KE32-FCBL] (last visited Sept. 30, 2018).

[10] The Daniel Ball, 77 U.S. 557, 563 (1871) *superseded by statute*, Clean Water Act, Pub. L. No. 115-277, 62 Stat. 1155 (1948), *as recognized in* Rapanos v. United States 547 U.S. 715 (2006); *see also Ill. Cent. R.R. Co.*, 146 U.S. at 435.

[11] UTAH CODE § 73-29-201(1) (2018) ("The public may use a public water for recreational activity if . . . the public water . . . is a navigable water; or . . . is on public property; and . . . the recreational activity is not otherwise prohibited by law.").

[12] 38 AM. JUR. PROOF OF FACTS 3d *Easements not of record* § 19 (1996) ("Agreement, referenced in title commitment, to create an easement if, in the future, one was required, did not place purchasers on notice of future easement, and thus did not preclude breach of

This Note will provide a survey of relevant history and law relating to the public trust doctrine, as well as the history and development of the public trust doctrine in the state of Utah.[13] Using this history, this Note will then argue that, based on federal and state precedent and the relevant constitutional provisions, the courts should recognize a constitutional right to use the waters of Utah for lawful recreational use, regardless of who owns the lands beneath the waters.[14]

## II. BACKGROUND

One of the major difficulties in dealing with public trust issues at law is that the law itself is very old and often does not provide a relevant basis on which to adjudicate modern issues.[15] Moreover, this dated precedent was created to serve public policies or protect public interests that are no longer commonly at issue.[16] To understand how modern public trust analysis works, one must know how the public trust doctrine came to be and how it developed over the years.

### *A. Ancient Roots*

The public trust doctrine has its roots in Roman law and philosophy.[17] During the formation of the Roman empire, the common conception of people's right to use natural resources rested on two main principles: First, our universe was created by a divine being; and second, the divine being created air, water, land, and sunlight for the coequal use of all people.[18] Around the time of Cicero, in 100–25 B.C., this way of thinking began to be codified in formal law.[19] The codification rejected the view that any individual could own—and exclude others from—the natural things

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contract and negligence action against title company based on failure to include easement in title commitment . . .") (citing Izynski v. Chi. Title Ins. Co., 963 N.E.2d 592 (Ind. Ct. App. 2012)).

[13] *See infra* Part II.

[14] *See infra* Part III.

[15] *See* Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648, 654 (Utah 1937) (providing a discussion of an early public trust issue in Utah in which the main considerations were agricultural and culinary uses of the stream in question). In contrast to the Adams precedent, many modern concerns relating to the use of navigable waters in Utah are based on recreational uses and property rights. The difference in the public's ability to use the waters of the state for purposes necessary for survival and the public's ability to use the waters for leisure makes many of the policy concerns supporting older precedent somewhat less compelling to enforce a right to recreation.

[16] *See id.* at 654.

[17] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1968); *see also* Craig, *supra* note 6, at 59.

[18] NORMAN E. BOWIE & ROBERT L. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY 55 (4th ed. 2007).

[19] *Id.*

necessary for human survival, primarily running water and air.[20] Cicero was a prime advocate for this idea, which he hoped would ensure that developing property laws would not become the enemy of the common people.[21] By 500 A.D., natural law became the basis for many formal Roman Laws.[22] According to the Roman Institutes of the Justinian codex, "[b]y natural law common to all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the sea-shore . . . for these are not, like the sea itself, subject to the law of nations."[23]

The historical roots of the public trust doctrine are not based on complex and antiquated statutes, but on natural law; a simple, commonly held conception of what the law ought to be.[24] Since then, many leaps and bounds have been made in technology and society, and the public trust doctrine has been codified by many governing bodies in many ways.[25] However, it is important to keep in mind the basic system of equities upon which these codifications are based.

### *B. The Public Trust Doctrine in American Federal Law*

The American system for establishing water rights did not change the equation much. During the establishment of the American Colonies, water resources were utilized in much the same way as in the Roman system of laws.[26] After the American Revolution, the newly established American government acquired the rights to navigable streambeds from England and the governments of each state were granted the rights to all the waters of their state, to be "held in trust for the people."[27] When additional states were admitted to the Union, they were admitted on terms equal to

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[20] *Id.* at 57.

[21] *Id.* at 55 ("There is indeed a law, right reason, which is in accordance with nature; existing in all, unchangeable, eternal . . . It is not one thing at Rome, and another thing at Athens . . . but it is law, eternal and immutable for all nations and for all time.").

[22] *Id.*

[23] THOMAS COLLETT SANDARS, INSTITUTES OF THE JUSTINIAN, BOOK II OF THINGS 35 (J. B. Moyle trans., 4th ed.1906).

[24] *Id.* at 565.

[25] *See generally* Craig, *supra* note 6, at 93–194 (providing individualized background on states' public trust doctrines in the appendix). Many states have navigability tests which are closely tied to the environmental exigencies of their state. For example, Alaska is the only state which defines navigable waters as those waters which it is possible to land a seaplane on. *Id.* at 75. Of course, the possibility of landing a sea plane is enough, courts do not require brave seaplane pilots to actually land a plane on a borderline body of water to determine navigability at trial.

[26] *See* Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648, 654 (Utah 1937).

[27] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) ("It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.").

those of the original thirteen colonies.[28] This legal practice came to be known as the equal footing doctrine.[29] This doctrine granted all new states the title to tidal and navigable waters as of the date those states joined the Union.[30]

*1. Federal Ownership and the Definition of Navigability*

The federal government's Commerce Clause[31] power provides that the government may hold title to certain waterways based on their availability for commercial use.[32] The government preserves commercial freedom by regulating the "channels" of interstate commerce.[33] These channels include navigable waterways on which commerce could occur.[34] Therefore, the first step in any public trust analysis is to determine whether the waters are navigable.[35] If the waters are navigable, U.S. Supreme Court precedent vests title to those waters in the state.[36] However, this ownership is subject to certain duties.[37] The primary duty is to preserve the use of the navigable waterway as a channel of commerce.[38] The secondary duty is to use the water for the benefit of the citizens of the state.[39]

The federal test for navigability has undergone many changes to adapt both to policy considerations of local government and citizens and the varying physical properties of waterways.[40] The original test for navigability comes from the Supreme

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[28] *See* Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842); *see also* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 486 (1988).

[29] *See* Craig, *supra* note 6, at 63.

[30] *See id.*

[31] U.S. CONST. art. II, § 8, cl. 3.

[32] United States v. Lopez, 514 U.S. 549, 558 (1995).

[33] 29 C.F.R. § 776.29 (2017).

[34] *Id.*

[35] The Daniel Ball, 77 U.S. 557, 562 (1870). This case examines the issue of navigability extensively, and provides extensive accounts of the differences between domestic streams, commercial rivers, and the historic English "tidal waters" test. *Id.* at 563–64. Though *The Daniel Ball* was eventually superseded by statute, its text is still relevant in this context to track the history of our definition of navigability for title purposes.

[36] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892).

[37] *See* Craig, *supra* note 6, at 64–70.

[38] *Id.*

[39] *Id.*

[40] *See id.* The original test for navigability, still used in some eastern states, is the tidal ebb and flow test. *Id.* at 56. According to this test, waters which could be influenced by lunar tides were navigable for title. *Id.* This test was problematic for western states, where such bodies of water were few and far between. *Id.* at 64. As a result, the test became closely linked to the ability of the waters to be used for commerce. *Id.* at 65. The particular character of accepted commercial use varies greatly from state to state. *Id.* For example, in Montana and Oregon, the accepted test is the ability to float railroad ties or timber down the river. *Id.* at 140, 165.

Court's opinion in *The Daniel Ball*.[41] This test takes a narrow definition of commerce and restricts federal ownership to only those rivers which are navigable by large commercial vessels. "[T]hey are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[42] In this case, the Court found that the Grand River was navigable because it was "capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan."[43]

*The Daniel Ball* set the first clear standard for navigability.[44] However, a series of cases followed this decision, which sought to clarify the federal standard of navigability in a variety of contexts.[45] *The Montello*, just four years later, broadened the rule slightly, holding that a river need not be used for *major* commerce to be considered navigable by the federal standard. "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."[46] Additionally, in *United States v. Utah*, the Court took a firmer stance on the nature of navigable waters. "The extent of existing commerce is not the test . . . . [W]here conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved."[47] Essentially, waters which were capable of being used for commerce were considered navigable, regardless of the amount of commerce the waters were actually used for.[48] Later, *Utah v. United States* added the contour that waters did not need to be *actually* engaged in that commerce in order to be considered navigable by the federal test.[49]

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[41] The Daniel Ball, 77 U.S. 557, 557 (1870); *see also* The Montello, 87 U.S. 430, 437 (1874) (using the test articulated in *The Daniel Ball*).

[42] *The Daniel Ball*, 77 U.S. at 563.

[43] *Id.* at 564.

[44] *Id.* at 557.

[45] *See The Montello*, 87 U.S. at 441–42 (clarifying the scope of the Court's rule, and holding that the correct test is not whether a river was capable of being navigated by steam or sail vessels, but whether the public could use the river for purposes of transportation and commerce in its natural state, regardless of the mode of commerce); Utah v. United States, 403 U.S. 9, 11 (1971) (holding that the Great Salt Lake satisfies the federal test for navigability when ranchers used the lake as a highway to transport livestock).

[46] *The Montello*, 87 U.S. at 441–42.

[47] United States v. Utah, 283 U.S. 64, 82 (1931).

[48] *Id.*

[49] Utah v. United States, 403 U.S. 9, 11 (1971) (providing that whether or not the waters are currently being used in commerce, if they were capable of being used in commerce at the time of statehood, those waters are considered navigable for title).

*2.* Illinois Central Railroad v. United States *and the Modern Public Trust Doctrine*

The federal test for navigability, established in *The Daniel Ball, The Montello*, and *Utah v. United States*, created the principal that some streambeds were owned by the state and some were not.[50] However, this line of cases mainly dealt with the clarification of title issues.[51] The question of what exactly a state should do once a court determines that they have title to a streambed remained open until 1892 when the Court decided *Illinois Central Railway Company v. Illinois*.[52] This case established the public trust doctrine in modern law by first acknowledging the duty that states owed to the federal government to keep waterways open for commerce,[53] and second, by establishing the states' duty to "preserve such waters for the use of the public."[54]

*Illinois Central* created the mandate for states to establish a public trust doctrine to preserve the public's interest in fishing, navigation, and commerce.[55] The case established that

> [t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[56]

This quotation illustrates two contentious points in modern case law: states have title to navigable waters to hold those waters in trust for the people, and the state may not abdicate its duty under the trust.[57] However, the state may "dispose" of lands, so

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[50] *See id.* at 14 (holding that since the lake was navigable at the time Utah became a state, Utah's claim of ownership overrode any claim of the United States); The Daniel Ball, 77 U.S. 557, 557 (1870) ("[T]hey constitute navigable waters of the United States[,] . . . in contradistinction from the navigable waters of the States, when they form their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreigin countries in the customary modes in which such commerce is conducted by water."); *The Montello*, 87 U.S. at 443–45 (holding that the Ordinance of 1787 was not needed to establish or preserve the national character of the rivers because of their importance for communication and commerce).

[51] *See*, *e.g.*, *Utah*, 403 U.S. at 9–10 (characterizing the nature of the claim as "Utah's claim to the lands is premised on the navigability of the lake").

[52] 146 U.S. 387 (1892).

[53] *Id.* at 435.

[54] *Id.* at 453.

[55] *Id.* at 435.

[56] *Id.* at 453.

[57] *See* Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 ECOLOGY L.Q. 123, 133 (2012). Though this article specifically discusses Wisconsin's public trust doctrine, the requirements on the trustee to preserve the waters for use of the people remain largely the same from state to state. *See also Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. at 435.

long as doing so serves the best interest of the citizens of the state for whom the trust is held.[58] A classic example of permissible disposal of these lands is the practice of selling portions of navigable water to private companies on the condition that those companies build a dock to enhance the ability of the public to use the waters for commerce.[59] The key is that the state may not take any action, which may have the effect of damaging the public's interest in the use of the waters in question.[60] If it would serve the public better to dispose of the waters and grant title to a third party, the state may do so under *Illinois Central*.[61]

Another key point in *Illinois Central* is that each state is left to establish its own public trust doctrine.[62] As a result, individual states' public trust doctrines differ considerably.[63] As such, when bringing a public trust lawsuit in a given state, it is not enough to pull sources from federal precedent and to have an understanding of what other states are doing because what works in one state may be illegal in another.[64]

### *C. History of Utah's Public Trust Doctrine*

Thus far, this Note has provided a brief background of public trust principals relevant to federal law and the doctrine's broader history. This information greatly informs how Utah has developed and has come to manage its own public trust doctrine, which is relevant to understanding how Utah courts will handle this issue. This section will examine the unique jurisprudential background and geographic characteristics of Utah and how those factors played in Utah's modern conception of public trust law.

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[58] *See* Shively v. Bowlby, 152 U.S. 1, 47 (1894).

[59] *See id.* (holding that a state granting title to a private party so that the party could build a dock on the public waterway was a disposal of the trust for the benefit of the people, and therefore allowable in light of the *Illinois Central* mandate to administer the trust for the benefit of the people).

[60] *Id.*

[61] This is another sticking point in modern litigation of public trust issues. All *Illinois Central* says is that a state must hold the waters in trust for the people and may dispose of the waters so long as doing so does not affect the peoples' interest in using the water. *See* Illinois *ex rel.* Hunt v. Ill. Cent. R.R. Co., 184 U.S. 77 (1902). Cases subsequent to Illinois Central establish that, so long as the disposal serves the best interest of the public, a state may in fact dispose of the waters. Mere disposal of the waters does not indicate prima facie abdication of the duties under the trust, the abdication must actually harm the public's interest in the waters. *See* PPL Montana, LLC v. Montana, 565 U.S. 576, 603 (2012).

[62] *See PPL Montana, LLC*, 565 U.S. at 603 ("Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law . . . .").

[63] *See* Craig, *supra* note 6, at 71–91.

[64] *See* Craig, *supra* note 6, at 94–194.

Under the equal footing doctrine, title to navigable waters within the State of Utah was vested in the Utah government at the time of statehood, on January 4, 1896.[65] Once these rights vested, the government of the State of Utah was responsible for creating proper safeguards to ensure that the state—as trustee—upheld its duties under the public trust doctrine.

*1. Public Trust Protections in Utah's Constitution*

Utah has not constitutionalized its public trust doctrine, unlike some other states.[66] This is problematic because when parties sue claiming a right to access public waters, they cannot argue that the right has a constitutional basis, which makes it easier for the courts and legislature to limit public access to state waters.[67] However, while Utah never expressly constitutionalized its public trust doctrine, certain articles of the Utah Constitution are relevant to the issue. For example, Article XX, section 1 states, "[a]ll lands of the State that have been . . . granted to the State . . . are declared to be the public lands of the State; and shall be held in trust for the people . . . for the respective purposes for which they [were] . . . acquired."[68] This provision problematically leaves waters out of its consideration and thus falls just short of being a perfect constitutional expression of the public trust doctrine for protecting water rights.[69] However, the protection of lands otherwise acquired by the State provides an important foothold for arguing for the protection of the public's interest in water rights.

Additionally, in Article XVII, section 1, the Utah Constitution provides protections for existing water rights for beneficial 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."[70] This provision likewise falls short of being a perfect expression of public trust law, but only because it does not explicitly state it is protecting these rights pursuant to the public trust.[71]

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[65] *See PPL Montana, LLC*, 565 U.S. at 580 ("The question is whether discrete, identifiable segments of these rivers in Montana were nonnavigable, as federal law defines that concept for purposes of determining whether the State acquired title to the riverbeds underlying those segments, when the State entered the Union . . . ."); *Quick Facts*, UTAH.GOV, https://www.utah.gov/about/quickfacts.html [https://perma.cc/WL6A-MUA8] (last visited Sept. 30, 2018).

[66] *See* Craig, *supra* note 6, at 93–194 (providing a comprehensive summary of various State's public trust doctrine at the time the article was written).

[67] *See* Scanlan, *supra* note 57, at 132–34 (providing that, in Wisconsin, the legislature has a constitutional duty to protect the public's right to access waters, which means closer judicial scrutiny is applied to statutes that endanger the public's interest in the trust).

[68] UTAH CONST. art. XX, §1.

[69] *See* Craig, *supra* note 6, at 83–88.

[70] UTAH CONST. art. XVII, §1.

[71] *See* Craig, *supra* note 6, at 132.

Finally, in Article XI, section 6, Utah's Constitution provides a strong admonition to municipal corporations, restricting their ability to dispose of or alienate certain water rights. "No municipal corporation, shall directly or indirectly . . . dispose of any . . . water rights" and water rights should "be devoted in like manner to the public supply of its inhabitants."[72] This provision supports the notion that the government should not dispose of water rights in any way that harms the public's interest in those rights. In this way, it is quite similar to the initial pronouncement of the public trust doctrine in *Illinois Central*, which required the states to hold water rights in trust for the people.[73]

None of these provisions alone provide a clean constitutional expression of Utah's public trust doctrine. However, the policies they promote and the specific language they use leave plenty of room to argue that the public trust is confirmed under Utah's Constitution.

*2. Key Cases in Utah's Public Trust History*

In the absence of any explicit constitutional expression of Utah's public trust doctrine, much of the defining law on the issue comes from cases dating back almost one hundred years.[74] While many of the cases deal with the public trust doctrine in passing, a few cases make concrete determinations about the nature of the public's ownership of water rights that are still relevant today. This section will examine a few of the quintessential Utah cases dealing with the public trust doctrine from the oldest case to the newest.

*(a)* Adams v. Portage Irr., Reservoir & Power Co.[75]

The court in *Adams v. Portage Irrigation, Reservoir & Power Co.* provides Utah's first real expression of the public trust doctrine.[76] In the case, Utah-based shepherds who owned grazing lands in Box Elder County sued the Portage Irrigation, Reservoir & Power Company to establish "the right of plaintiffs to the use of part of the waters of certain springs in Portage Canyon for culinary and stock

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[72] UTAH CONST. art. XI, §6.

[73] *See* Scanlan, *supra* note 57, at 130–33. Though Scanlan's Article specifically discusses Wisconsin's public trust doctrine, the requirements of the trustee to preserve the waters for use of the people remain largely the same from state to state. *See also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892).

[74] *E.g.*, Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648 (Utah 1937); Salt Lake City v. Salt Lake City Water & Elec. Power Co., 67 P. 672 (Utah 1902) (providing examples of the history of cases which are helpful in analyzing the history of the public trust doctrine in Utah).

[75] *Adams*, 72 P.2d at 648.

[76] *Id.*

watering purposes and to enjoin defendants from interfering with plaintiffs' use thereof."[77]

The first beneficial point *Adams* makes is to confirm that the public has coequal rights to the waters, and those rights must be protected by the state government, who holds title to those waters through the equal footing doctrine for purposes of the trust.[78] "The title [to public waters] thereto is in the public; all are equal 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."[79] The proposition that the public right to waters is coequal and not able to be exclusively controlled by one person is an essential piece of the public trust analysis, which is based on well-established social-contract based human rights theory.[80] If the public has these rights, then any private or public action which restricts the public's access to navigable waters would directly violate the trust and would be invalid under *Adams*.

*Adams* additionally explains how water rights can be privately acquired.[81] Understanding the acquisition of water rights in the abstract is helpful in grasping the contours of the public trust doctrine's work in practice. When faced with the concept that the public possesses coequal and nonexclusive rights to the corpus of the water, the clear follow-up question would be: But people obtain water rights all the time, how does that work if nobody can claim exclusive control of the water? The key is in understanding the difference between diverted and "wild" waters. "Having thus captured the 'wild [waters],' [a person] acquires a property right . . . as long as [he or she] maintains . . . possession."[82] Due to water's complex physical properties,[83] proving ownership of a moving river would be very difficult. Therefore, in Utah, to own water is not to own the corpus of the water itself, but the right to divert the water for use.[84] But once the water is reduced to a form or state where it can be measured and accounted for, it is possible to acquire property rights to it.[85] However, the water in a natural river is decidedly beyond human control, and therefore is the coequal property of the citizens of the state.[86]

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[77] *Id.* at 650.

[78] *See Ill. Cent. R.R. Co.*, 146 U.S. at 435; PPL Montana, LLC v. Montana, 565 U.S. 576, 592 (2012) ("For state title under the equal-footing doctrine, navigability is determined at the time of statehood and based on the 'natural and ordinary condition' of the water." (citations omitted)).

[79] *Adams*, 72 P.2d at 652.

[80] *See* BOWIE & SIMON, *supra* note 18, at 55.

[81] *Adams*, 72 P.2d at 653.

[82] *Id.* (citation omitted).

[83] "'Such water,' says Blackstone, 'is a movable, wandering thing,' here today and there tomorrow, like wild birds on the wing." *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 652–53.

Finally, *Adams* gives a nod to the Utah Constitution in determining public ownership of the state's waters. "This right of the public, as well as the rights of the appropriator, were confirmed by the State Constitution in article 17: 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."[87] *Adams* goes on to define beneficial use as "the basis, the measure and the limit of all rights to the use of water in this state."[88] In providing this ruling, the court in *Adams* did three major things. First, it confirmed that the undiverted waters in the State of Utah are the coequal property of the citizens of Utah and distinguished ownership of diverted water from purported ownership of "wild" waters.[89] Second, it acknowledged a constitutional basis for the extension of this right to use the water for beneficial uses.[90] And third, the *Adams* court defined beneficial uses under the constitutional provision and provided that any use of waters that is not beneficial and economic will not supersede the right of the public to use and enjoy those waters.[91]

*(b)* J.J.N.P. v. State, By and Through Division of Wildlife Services[92]

In the era after *Adams*, the coequal public right to the corpus of the water and distinctions in ownership were well accepted, but provisions for precisely *how* the public could use the waters were still a source of debate.[93] The Utah Supreme Court addressed this issue in *J.J.N.P. v. State, By and Through Division of Wildlife Services*, and held that 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."[94]

The birth of the idea that the easement creates the public right to use the water, regardless of who owns the beds beneath the water, marked a huge turning point in the law.[95] Essentially, the easement grants the public the right to float on the water wherever it may naturally flow, regardless of whether the waters are navigable.[96] This means that those private landowners who own the area around a nonnavigable

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[87] *Id.* at 653 (quotation marks omitted).

[88] *Id.* at 654 (citation omitted).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] J.J.N.P. Co. v. State *ex rel.* Div. of Wildlife Res., 655 P.2d 1133 (Utah 1982).

[93] *See generally* Tanner v. Bacon, 136 P.2d 957 (Utah 1943) (discussing the propriety of private appropriation of waters from the Provo river for power purposes); *see also* Day v. Armstrong, 362 P.2d 137, 140 (Wyo. 1961) (discussing a claim that the public has a right to use the bed and channel of a river for fishing and recreational purposes, and defendant may not exclude such use by the public).

[94] *J.J.N.P.*, 655 P.2d at 1136.

[95] *See id.*; *Day*, 362 P.2d at 145.

[96] *J.J.N.P.*, 655 P.2d at 1137.

stream have no legal right to exclude the public from floating on a stream that passes through the landowner's property.[97]

Additionally, *J.J.N.P.* characterizes the easement as a "corollary of the proposition that the public owns the water."[98] The term "corollary" has its roots in mathematics and means "something that naturally follows."[99] The use of this word strongly suggests that the corollary easement to use the waters has existed for as long as the public has held the rights to the waters or since the equal footing doctrine granted those water rights to the state.

Finally, *J.J.N.P.* provides strong language reinforcing the public trust doctrine in Utah. "Public ownership is founded on the principle that water, a scarce and essential resource . . . is indispensable to the welfare of all the people . . . . 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."[100] In this quotation, the court provides support for the "beneficial use" theory of water usage. It also reinforces the specific exigencies of Utah's climate and agricultural industry, which necessitate the existence of protections for public use of water in order to support Utah's agricultural economy.

*J.J.N.P.* provides two major legal footholds for future arguments: First, it confirms the existence of a corollary easement for the public to use the corpus of the water regardless of who owns the streambeds below.[101] Second, it reinforces the policy concerns that necessitate the public's ability to use waters freely.[102] However, *J.J.N.P.*'s legacy left the public and the legislature confused on how exactly the public could use the waters.[103] The confusion came with *J.J.N.P.*'s use of the word "utilize" when describing the easement's protection of the public's activities on the 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 . . . participate in any lawful activity when *utilizing* that water."[104] The problem this created was

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[97] *Id.*

[98] *Id.*

[99] *Corollary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/corollary [https://perma.cc/5Z79-9EDA] (last visited Sept. 30, 2018).

[100] *J.J.N.P.,* 655 P.2d at 1136.

[101] *Id.* ("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.").

[102] *Id.* ("Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of the water for the benefit and welfare of the people of the State as a whole.").

[103] *See* Conatser v. Johnson, 194 P.3d 897, 901 (Utah 2008) ("Instead, we established our own rule that the public has 'the right to float leisure craft, hunt, fish, and participate in any lawful activity when *utilizing* that water.' The interpretive difference turns on [this] single, significant word." (internal citations omitted)).

[104] *J.J.N.P.*, 655 P.2d at 1137 (emphasis added).

similar to the problem addressed by the Wyoming Supreme Court in *Day*—which discussed the ways that ambiguous language regarding the use of the easement could create only the right to float *on top* of the water as opposed to the right to tread on the riverbed.[105] By using the word "utilize" the *J.J.N.P.* court effectively broadened the easement through ambiguity to allow the public to tread on the streambeds as well, if doing so was necessary to "utilizing" the water.[106] As a result, the public could now walk up privately owned riverbeds, stand on those beds to fish or float the rivers, and otherwise occupy privately owned land without repercussion.[107] Several years later, some of those private landowners took the issue to the court again.[108]

*(c)* Conatser v. Johnson[109]

The plaintiffs in *Conatser* were river rafting on a portion of a stream that was privately owned.[110] The plaintiffs were floating the river where it was deep and walking on the streambed where it was shallow.[111] The private owner of the stream confronted the plaintiffs, telling them to exit the stream immediately.[112] The Conatsers refused and were subsequently prosecuted for criminal trespass.[113] The Conatsers sought to clarify the scope of the easement created by *J.J.N.P.*[114] Post-*J.J.N.P.*, the public's easement was generally interpreted broadly to cover lawful recreational activities which necessitated stepping on the beds of the stream.[115] However, private landowners looked to the Wyoming Supreme Court's decision in *Day* and argued that it restricted use of the riverbeds only to incidental "scraping" that may occur while floating a raft.[116] Ultimately, the *Conatser* court clarified the *J.J.N.P.* standard for the easement. "[T]ouching the water's bed is reasonably necessary and convenient for the effective enjoyment of the public's easement . . . . The practical reality is that the public cannot effectively enjoy its right to 'utilize'

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[105] *See* Day v. Armstrong, 362 P.2d 137, 149–51 (Wyo. 1961) (noting that, though the court ultimately held that the public had the right to tread on the streambed, the court noted that vagueness in statutory language regarding the public's rights to use waters creates serious problems in the application of the penal law—in this case the law of trespass).

[106] *J.J.N.P.*, 655 P.2d at 1137.

[107] *Id.*

[108] *See, e.g.*, Conatser v. Johnson, 194 P.3d 897 (Utah 2008).

[109] *Id.*

[110] *Id.* at 898–99.

[111] *Id.* at 899.

[112] *Id.*

[113] *Id.* at 897.

[114] *Id.* at 899.

[115] *Id.* at 902 ("The practical reality is that the public cannot effectively enjoy its right to 'utilize' the water to engage in recreational activities without touching the water's bed.").

[116] *See* Day v. Armstrong, 362 P.2d 137, 145–46 (Wyo. 1961).

the water . . . without touching the water's bed."[117] This quotation establishes a very broad easement that allows the public to essentially walk on any streambed, whether publicly or privately owned, incidental to lawful use.[118] This means that no private landowner may legally exclude someone from stepping on the beds of their privately owned stream, so long as that person is engaged in a "lawful activity" that requires utilization of the water.[119]

Additionally, the court in *Conatser* took steps to clarify the public's easement to use these streambeds as an interest in land. "[A]n easement 'gives rise to two distinct property interests: a "dominant estate," that has [the] right to use land of another, and a "servient estate," that permits the exercise of that use.'"[120] Characterizing the easement as an interest in the land of the streambed rather than the body of the water is an important clarification in *Conatser*. The *J.J.N.P.* easement was a corollary of the public ownership of the water, and it was unclear whether the easement was the right to use the water or the streambed.[121] Without knowing what actual property the public had an interest in, it was difficult to adjudicate properly the rights at stake. Moreover, characterizing the easement as a corollary interest in land which has existed in tandem for as long as the public has enjoyed coequal ownership of the waters of the state has important constitutional ramifications.[122]

In response to the broad scope of the *Conatser* easement, Utah's legislature enacted the Public Waters Access Act (PWAA).[123] The PWAA allows an individual who owns private land through which a public waterway flows to restrict the public's access to the waterway.[124] The tension between the *Conatser* easement and the PWAA has created widespread confusion concerning whether the public has access to certain public waterways.[125] In response to this confusion, the Utah Supreme Court in *Utah Stream Access Coalition v. Orange Street Development*[126] took the PWAA's side and held that *Conatser* was an incorrect statement of the public's easement to use public waters.[127]

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[117] *Conatser*, 194 P.3d at 902.

[118] *Id.*

[119] *See id.*

[120] *Id.* (quoting 25 AM. JUR. 2d *Easements and Licenses in Real Property* § 1 (2007)).

[121] J.J.N.P. Co. v. State *ex rel.* Div. of Wildlife Res., 655 P.2d 1133, 1136 (Utah 1982) ("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.").

[122] *See id.* at 1136–1139.

[123] *See* Utah Stream Access Coal. v. Orange St. Dev., 416 P.3d 553, 555 (Utah 2017); *see also* UTAH CODE §§ 73-29-101 to -202 (2018).

[124] *See* UTAH CODE § 73-29-201 (2018).

[125] *See Orange Street*, 416 P.3d at 559.

[126] 416 P.3d 553 (Utah 2017).

[127] *Id.* at 559.

*(d)* Utah Stream Access Coalition v. Orange Street Development

In *Orange Street*, the Utah Stream Access Coalition sought to enjoin a group of private landowners from barring their right to access public waters.[128] The parties, however, did not assert a quiet title claim, and therefore the court did not rule on whether the river was a public waterway under the PWAA.[129] The court instead conducted an analysis of the federal and state standards for navigability. The court found that the federal standard for navigability, which contemplated navigability at the time of statehood, was incorporated into the statute.[130] In doing so, the court acknowledged that, at least temporally, the determination of navigability is tied to the equal footing doctrine, rather than modern characteristics of waterways.[131] This necessarily means that the standard of navigability as contemplated by the statute is also temporally rooted in conditions at the time of statehood.[132]

This opinion, however, falls just short of granting the public the right to access the section of the Weber River at issue in the case.[133] The court noted that because the parties did not raise a quiet title claim, the court would not quiet title to the Weber River, even though the opinion acknowledged ample evidence suggesting that the section of river is navigable, and therefore state-owned under the statute.[134] However, under the statute, even if the waterway was navigable and public, the owner of the property surrounding the public waterway could still exclude the public from accessing the waters.[135] If a Utah court were to acknowledge a constitutional basis for the right to access public waters, this problematic exclusion of the public from waters the public ostensibly owns could provide the necessary basis for challenging the PWAA in the future.[136]

*(e)* Utah Stream Access Coalition v. VR Acquisitions

In *VR Acquisitions*, the Utah Supreme Court once again addressed the nature of the public's interest in waters of the State of Utah.[137] The Court ultimately declined to rule on the constitutional nature of the public's easement to use waters of the state.[138] Instead, the Court took the opportunity to, once again, clarify that the

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[128] *Id.* at 555.
[129] *Id.* at 556.
[130] *Id.* at 559.
[131] *Id.* at 556–58.
[132] *Id.* at 559.
[133] *Id.* at 561.
[134] *Id.*
[135] UTAH CODE § 73-29-201 (2017).
[136] *See Orange Street*, 416 P.3d at 563–64 (Durham, J., concurring in part and dissenting in part).
[137] Utah Stream Access Coal. v. VR Acquisitions, No. 20151048, 2019 WL 761022, at *1 (Utah Feb. 20, 2019).
[138] *Id.*

*Conatser* decision was based on "common-law easement principles."[139] In doing so, the Court held that the district court erred in treating the *Conatser* easement as being constitutionally based, but declined to rule on the constitutionality of the easement itself.[140] The Court then went on to discuss, in dicta, some of the constitutional arguments which the Utah Stream Access Coalition had presented, without definitively ruling on any of them.[141]

The Court first examined the *Conatser* easement and the current landscape of Public Trust Law. This easement, the Court clarified, was recognized in order to balance the interests of landowners and the public, and was based on common-law principles rather than constitutional interpretation.[142] Indeed, the Court in *Conatser* did not conduct any historical analysis of the constitutional basis of the easement at all.[143] As such, when the Utah Stream Access Coalition relied on *Conatser* on appeal, they relied on the implication that the *Conatser* easement must be constitutionally based, rather than any explicit discussion of the constitutional basis for the easement.[144] This was a stretch that the Court was not willing to make in *VR Acquisitions*, and the Court makes it clear that it will require much more than the implication present in *Conatser* to make a constitutional holding on the nature of the easement.[145] Specifically, the inquiry must focus on "the scope of the public understanding of 'lands of the State' as of the time of the framing of the Utah Constitution."[146]

Moving forward from *VR Acquisitions*, the Court has indicated an openness to recognizing a constitutional basis for the public's easement, provided that it is properly presented to the Court.[147] This presentation must include an examination of the historical understanding of the public's interest at the time the Utah Constitution was ratified in 1896.[148]

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[139] *Id.*

[140] *Id.* at *2.

[141] *Id.*

[142] *Id.* at *3.

[143] *Id.*; *See generally* Conatser v. Johnson, 194 P.3d 897 (Utah 2008) (omitting any discussion of a constitutional basis for the public's easement.).

[144] Utah Stream Access Coal. v. VR Acquisitions, No. 20151048, 2019 WL 761022, at *5 (Utah Feb. 20, 2019).

[145] *Id.* (reversing on the basis of the district court's "(implicit) conclusion that the scope of the easement recognized in [*Conatser*] was an interest in land that was "acquired" and "accepted" by the State at the time of the ratification of the Utah Constitution in 1896." (citation omitted)).

[146] *Id.* at *12.

[147] *Id.*

[148] *Id.*

## III. ANALYSIS

This Note has thus provided an account of the relevant history and precedent, both state and federal, affecting the public trust analysis in the State of Utah. The remainder of this Note will examine the public's constitutional right to touch privately owned streambeds incidental to lawful recreation as a right protected under the Utah Constitution.

### *A. Constitutional Protection Under Art. XVII, Section 1*

The Utah Constitution protects existing rights to use the waters of the state, in that "[a]ll existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed."[149] Under the equal footing doctrine, Utah received title to the waters of the state, to hold those waters in trust for the people, at the time Utah was granted statehood in 1896.[150] *Adams* stands for the proposition that, "[t]hese waters are the gift of Providence; they belong to all as nature placed them or made them available."[151]

This quotation refers to the philosophical, if not theological, basis for holding that the public enjoys coequal ownership of the waters.[152] The court in *J.J.N.P.* then established that the easement to utilize the water for lawful recreational purposes is a corollary of this right.[153] If the easement results from a natural law right, and is therefore tied to the legal proposition that the public has a right to the waters of the state, then the easement would have been recognized and confirmed as an "existing right" under Article XVII, section 1 of the Utah Constitution when it was ratified in 1895.[154] If the easement is constitutionally guaranteed, that means any attempt to limit the public's ability to utilize the waters for lawful recreational use is subject to heightened judicial scrutiny.[155] The notion that the easement has its basis in natural law is supported by Utah's long tradition of recognizing the right to use water as belonging to the people since the days of the pioneers, and by the court's consistent holdings that public ownership of the waters has always been the law.[156]

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[149] UTAH CONST. art. XVII, §1.

[150] *See* PPL Montana, LLC v. Montana, 565 U.S. 576, 580 (2012); *History Facts*, UTAH HISTORY TO GO, http://historytogo.utah.gov/facts/index.html [https://perma.cc/8UE4-C8Z2] (last visited Sept. 30, 2018).

[151] J.J.N.P. Co. v. State *ex rel.* Div. of Wildlife Res., 655 P.2d 1133, 1136 n.3 (Utah 1982) (quoting Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648, 652–53 (Utah 1937)).

[152] *Id.*

[153] *Id.*

[154] *See* UTAH CONST. art. XVII, §1; *Utah State Constitution*, UTAH DIV. OF ARCHIVES AND RECORDS SERVICE, https://archives.utah.gov/community/exhibits/Statehood/conintro.htm [https://perma.cc/876H-AFF5] (last visited Sept. 30, 2018).

[155] *See* Gallivan v. Walker, 54 P.3d 1069, 1081–82 (Utah 2002).

[156] *See Adams*, 72 P.2d at 653.

### *B. Constitutional Protection Under Art. XX, Section 1*

Article XX, section 1 of the Utah Constitution provides "[a]ll lands of the State that have been . . . granted to the State by Congress, and all lands acquired . . . are declared to be the public lands of the State; and shall be held in trust for the people."[157] As established in *Conatser*, the easement constitutes an interest in land,[158] and as such, if it were acquired by the state, the easement should be entitled to constitutional protections under Article XX, section 1.[159]

The common counter-argument is that the rights created in *J.J.N.P.* were judicially created, and could not have been affirmed by the constitution or acquired by the state because the state never took any affirmative action to accept responsibility for the easement.[160] This argument, however, ignores the jurisprudential background of the public trust doctrine and the plain language in both *J.J.N.P.* and *Conatser*. Both cases discuss the right as being a "corollary" or necessary part of the right.[161] Based on this language, the easement must have existed as long as the right, and the right has existed, at least in Utah, since the time of statehood.

### *C. Constitutional Recognition of the Public's Right and Takings Claims*

Easements, even implied easements, are property interests protected from taking under Article I, section 22 of the Utah Constitution.[162] This assertion supports two propositions. First, easements are in fact an interest in land, and therefore subject

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[157] UTAH. CONST. art. XX, §1.

[158] *See* Conatser v. Johnson, 194 P.3d 897, 899 (Utah 2008) (providing that the public has "an interest . . . in the use of state waters for recreational purposes"). The easement includes the "right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water." *Id.* at 899–900. Furthermore, the easement to use the water exists "[i]rrespective of the ownership of the bed and the navigability of the water." *Id.* at 900. Because public ownership of the water itself is well established, the easement is an interest in the land beneath the waters, which allows the public to use the waters for lawful recreational activities regardless of who owns the bed. Therefore, the easement encompasses the right to touch privately owned streambeds incidental to the use of the publicly owned waters.

[159] UTAH CONST. art. XX, §1.

[160] J.J.N.P. Co. v. State *ex rel.* Div. of Wildlife Res., 655 P.2d 1133, 1136 (Utah 1982); *Conatser*, 194 P.3d at 902.

[161] *J.J.N.P.*, 655 P.2d at 1136.

[162] UTAH CONST. art. I, §22 ("Private property shall not be taken or damaged for public use without just compensation."); John Martinez, *A Framework for Addressing Takings Problems*, 9 UTAH B.J. 13, 15 (1996) ("The relevant property defined, the next question is whether there has been a 'taking' of it. As a threshold matter, the takings claimant would have to decide whether to challenge the governmental action 'as applied' to his/her particular property or 'on its face,' . . . . In general, whether a taking has occurred involves consideration of the character of the governmental action . . . .").

to analysis under Article XX. Second, the counter-argument that the *J.J.N.P.* easement was a taking against private landowners is unsound. This is because the easement is a corollary to the natural law and has always existed.[163] Assuming that the easement is based on natural law and has always existed, there is no potential for a takings claim here. The fact that the easement has existed as long as the public's right has existed means that no property actually changed hands between private landowners and the government. The analysis for a takings claim requires some sort of government action against the landowner.[164] If the easement has existed since statehood, the government would have taken no action against private landowners because the easement was established at the same time the state government was established.

Arguing for the proposition that the easement has always existed, and therefore cannot be a taking, opens an entirely separate can of worms in the area of title insurance claims. When a title insurance company insures title to a parcel of land, they do so as a warrant that the land is unencumbered by any title defects.[165] A holding that the easement was a constitutionally protected interest in land which has existed since the time of statehood essentially means that every parcel of land with a river running through it, regardless of navigability, would have been encumbered by this easement.[166] In other words, the unintended side effect of holding that the easement is subject to constitutional protections, is the possibility of a wave of title insurance claims and landowners seeking to recover taxes paid on streambeds crossing their lands.

### *D. How the State Is Authorized to Manage the Trust*

Because the easement is arguably a constitutionally recognized right under Article XVII, section 1, Utah's common-law public trust doctrine should govern the regulation of public waters "as trustee for the benefit of the people."[167] The precedent on the federal side supports a "substantial impairment" test—i.e., the state may dispose of public trust rights for the benefit of the public trust when there is no substantial impairment to the public's interest.[168] In *Illinois Central*, the U.S. Supreme Court established that the state can dispose of trust lands so long as there

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[163] *See supra* Sections II.A, II.B; *see also* PPL Montana, LLC v. Montana, 565 U.S. 576, 601–03 (2012) (holding that the relevant inquiry of Public Trust rights should focus on the legal landscape at the time of statehood).

[164] *See* Martinez, *supra* note 162, at 15.

[165] *See* 38 AM. JUR. PROOF OF FACTS 3D, *Proof of Title Insurance Claims*, § 19 (2017).

[166] *See* Conatser v. Johnson, 194 P.3d 897, 899–900 (Utah 2008).

[167] J.J.N.P. Co. v. State *ex rel.* Div. of Wildlife Res., 655 P.2d 1133, 1136 (Utah 1982).

[168] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) ("It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . . .").

is no "substantial impairment of the public interest in the lands and waters remaining."[169] The cases following *Illinois Central* support a need for the disposal of the public trust rights to benefit the public, such as the disposal of shoreland to a private party that they might build a publicly accessible dock.[170] Although Article XX does not include a substantial impairment test, it still provides that the lands acquired by the state are held in trust.[171] Using the *Illinois Central* test, the state must neither dispose of the rights in a way which substantially impairs the public's interest nor do so in a way that does not serve the public interest.[172]

If a court were not to apply the *Illinois Central* test and instead were to rely on a careful reading of Article XX of the Utah Constitution, it would find no express substantial impairment or public benefit requirement. Instead, the state would have extensive authority to "dispose of" the land (or the easement as an interest in land) as may be provided by law.[173] To provide such broad legislative power would be against both the long-standing principle that the state holds title to the waters of the state in the public trust and that the public has a right to access the waters.

A close reading of *Illinois Central* requires the state to dispose of the lands in a way that is for the benefit of the public trust. Moreover, the state must do so in a way that does not create a substantial impairment of the remaining waters. This seems to be the best way to establish the scope of the legislature's ability to dispose of the easement, rather than relying solely on the expansive language of Article XX.

## IV. CONCLUSION

Based on the unique legal background of Utah's public trust doctrine, the public's easement to touch streambeds of rivers in Utah, regardless of their status as public or private lands, merits constitutional protection. The reason for this is simple: The state holds its waters in trust for the benefit of the public. A corollary of the public's ownership of the waters of the state is an easement that allows the public to use those waters for lawful recreation and to—incidental to those activities—touch the beds of those streams. Because this easement is a corollary to the original doctrine of public ownership, it was confirmed as an "existing right" under Article XVII, section 1. Additionally, because the easement is an interest in land, the easement itself was "otherwise acquired" by the state under the equal footing doctrine and Article XX, section 1. Once the easement was acquired by the state, the state had the duty to maintain that easement for the benefit of the public and could not dispose of the easement if doing so did not benefit the public or if it substantially hindered the public's interest in the waters. Despite these protections, the state may

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[169] *Id.* at 452.

[170] *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 47 (1894) (providing an example where the court authorized the state to dispose of public riverbeds to a private party in order to allow the private party to build a publicly accessible dock on the waters).

[171] UTAH CONST. art. XX, §1.

[172] *Ill. Cent. R.R. Co.*, 146 U.S. at 453.

[173] UTAH CONST. art. XX, §1.

still dispose of the easement, as well as the publicly owned beds of navigable rivers, if doing so served the interest of the public as a whole.

As of today, public trust law in Utah is unclear and subject to change by the legislature or Supreme Court precedent. With the growth of privatized recreation companies that may seek to restrict access to certain parts of rivers for fishing or rafting and to only allow access to fee-paying members, it is vital that Utah establish ironclad legal doctrine protecting the public's right to access the waters they coequally own. Recognizing a constitutional basis for this easement is the best way to achieve this goal.