

2006

Jodi Conatser, Kevin Conaster, Lacey Conaster, and  
Nicole Mann v. Wayne Johnson, Clark Sessions,  
Shane E. Matthews, Duane Johnson, Randy  
Sessions, Michael McMillan, Lynn Brown, Gerald  
Stout, and Jane Does 6-25 : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JODI CONATSER, KEVIN CONATSER,  
LACEY CONATSER, and NICOLE  
MANN,

Plaintiffs and Appellants,

vs.

WAYNE JOHNSON, CLARK SESSIONS,  
SHANE E. MATTHEWS, Deputy Sheriff of  
Morgan County, DUANE JOHNSON,  
RANDY SESSIONS, MICHAEL  
McMILLAN, LYNN BROWN, GERALD  
STOUT, JOHN and JANE DOES 6-25,

Defendants and Appellees.

**BRIEF OF APPELLANT**

Supreme Court No. 20060558

District Court No. 000500092

(Oral Argument Requested)

---

Appeal from the Ruling of the Second Judicial District Court for Morgan County,  
The Honorable Michael D. Lyon, Presiding

---

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UTAH APPELLATE COURTS

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## **LIST OF PARTIES**

Defendants Clark Sessions and Shane E. Matthews were dismissed from the action prior to this appeal. *See* Order, Record (“Rec.”) at 00032; Decision, Rec. at 00187. Thus, the current parties to the proceeding are:

### Plaintiffs and Appellants:

Jodi Conatser  
Kevin Conatser  
Lacey Conatser, and  
Nicole Mann

### Defendants and Appellees:

Wayne Johnson  
Duane Johnson  
Randy Sessions  
Michael McMillan  
Lynn Brown  
Gerald Stout, and  
John and Jane Does 6-25

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## JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j), because this is an appeal over which the Court of Appeals does not have original appellate jurisdiction.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Only one issue is presented by this appeal, and it is an issue of first impression in this Court. Plaintiffs and Appellants (hereafter, unless otherwise noted, Plaintiffs and Appellants are referred to collectively as “the Conatsers”) challenge the partial denial of the Conatsers’ Motion for Partial Summary Judgment, specifically that portion of the district court’s ruling wherein the court concluded, as a matter of law, that touching of the streambed on Defendants’ property is permissible only when it is incidental to navigating the Weber River in a watercraft:

Where the use of the streambed is more than incidental to the right of floating on natural waters, such use would constitute a trespass.

Wading or walking along the river, where such conduct is not incidental to the right of floatation upon natural waters, would constitute a trespass of private property rights.

Judgment, Record (“Rec.”) at 00310; *see also* Findings of Fact and Conclusions of Law, Rec. at 00319 (“Where the use of the streambed is more that [sic] incidental to the right of floating on natural waters, such use constitutes a trespass.”).

These conclusions relate to a purely legal issue: the scope of the public easement in public waters. *See J.J.N.P. Co. v. State Div. of Wildlife Resources*, 655 P.2d 1133, 1136 (Utah 1982) (“there is a public easement over the water regardless of who owns the

water beds beneath the water”). The Conatsers contend that the district court erred by construing the public easement in state waters as serving the narrow purposes of navigation or floating, and therefore unduly restricted public use of the underlying lands to only that contact deemed incidental to navigation or floating. The Conatsers submit that waters in Utah are owned by the public not merely to serve purposes of navigation, but “for the benefit and welfare of the people of the State as a whole,” *Id.* at 1136. Accordingly, the public easement in waters is to be interpreted broadly, as serving all appropriate public uses, specifically including recreation. *See id.* (noting that “state policy recognizes an interest of the public in the use of state waters for recreational purposes”). If, as the Conatsers contend, the public easement in state waters is for the purpose of recreation (among other things), then they should have the right to make contact with the bed underlying the Weber River, so long as the contact is incidental to recreation.

This case is before the Court on appeal from a partial grant/partial denial of Conatser’s Motion for Partial Summary Judgment. “Appellate courts review a grant of summary judgment for correctness and afford no deference to [the trial court’s] conclusions of law. . . . [O]n appeal the facts must be viewed in the light most favorable to the nonmoving party.” *Johnson v. Utah Dept. of Transp.*, 133 P.3d 402, 406 (Utah 2006) (citations omitted). There were no facts disputed in connection with the parties cross motions for summary judgment, Memorandum Decision, Rec. at 00298, and none of the district court’s factual findings are challenged on appeal. *See* Statement of Issues, filed June 21, 2006.

Determining the scope of an easement is a question of law. *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998). Where, as here, the issues on appeal are “purely legal in nature,” the appellate court reviews the “district court’s decision for correctness, without deference.” *Thompson v. Utah State Tax Comm’n*, 112 P.3d 1205, 1207 (Utah 2004); *see also Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 (Utah 1996) (noting that the trial court’s interpretation of the effect of a prior judicial decision is a conclusion of law, reviewed for correctness).

This issue was preserved in the trial court – indeed, it was the central issue in the Conatsers’ claim for declaratory judgment. *See* First Amended Complaint, Rec. at 00015-020. It was an issue in the Conatsers’ Motion for Partial Summary Judgment, Rec. at 00131, and it was an issue on which the trial court rendered a specific ruling and judgment. Memorandum Decision, Rec. at 00303-04; Judgment, Rec. at 00310-11.

### **STATEMENT OF THE CASE**

The Conatsers brought this case as a declaratory judgment action in the Second Judicial District Court for Morgan County, seeking a judicial determination that they enjoyed the right, as members of the general public, to use for recreational purposes that portion of the Weber River crossing Defendants’ properties, and specifically that the Conatsers had the right: (1) to float down the Weber River in a “raft, boat, or other floating conveyance”; (2) to make contact with the bed of the Weber River in ways incidental to floating, such as by touching the river bottom with oars, fishing tackle, swim fins, the bottom of the boat, etc.; (3) to walk on the bed of the Weber River; and (4) the

right to travel in the Weber River, whether by floating or walking, unimpeded by fences or barbed wire strung across the river. *See* First Amended Complaint, Rec. at 00019-20.

The parties filed cross-motions for summary judgment on the purely legal issue of the Conatsers' rights, as members of the public, to use the Weber River and its bed as it crosses Defendants' properties.<sup>1</sup> Judge Michael D. Lyon ruled that the Conatsers, as members of the public, have the right to float down the Weber River, and to make contact with the bed of the Weber River so long as the contact is incidental to floating. Judge Lyon also ruled, however, that any contact with the streambed "more than incidental to the right of floating" would constitute a trespass. Judgment, Rec. at 00309-11. The district court also ruled that Defendants had "no legal right to erect fences to prevent plaintiffs from utilizing the public's easement to float down the river." *Id.*, Rec. at 00310.

Defendants did not appeal from the Judgment. The Conatsers filed a timely appeal, *see* Notice of Appeal, Rec. at 00333-35, and challenge only that portion of the Judgment limiting the Conatsers' right to make contact with the bed of the Weber River to uses of the streambed that are incidental to floating or navigation in or on the Weber River itself. *See supra*, p. 1.

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<sup>1</sup> Defendants also argued that a declaratory judgment action was not a proper vehicle for the Conatsers' claims. Defendants' Cross-Motion for Summary Judgment, Rec. at 00222-24. The district court ruled against Defendants on that point, Findings of Fact and Conclusions of Law, Rec. at 00315-18, and Defendants did not appeal that ruling.

## STATEMENT OF FACTS

The relevant facts were first set out in the Conatsers' complaint, Rec. at 00015-20, and were undisputed in essentially the same format at summary judgment. Memorandum Decision, Rec. at 00298. The district court more or less adopted the same statement of facts in its Findings of Fact and Conclusions of Law, Rec. at 00313-15, and the Conatsers do not appeal those findings. The facts are as follows:

On or about June 4, 2000, the Conatsers put a rubber raft in the Weber River at a public access point and proceeded to float down the river to another public access point where they exited the river. Findings of Fact and Conclusions of Law, Rec. at 00314. Between the public access points, the river crosses parcels of property that are in private ownership. *Id.* While floating the river, the Conatsers touched the streambed in the following ways: (1) the raft in which they rode touched or skidded along the bottom in shallow areas; (2) their paddles or oars touched the bottom on occasion; (3) Kevin Conatser's fishing tackle came in contact with the bottom; and (4) Kevin Conatser intentionally got out of the raft and walked along the bottom of the river to facilitate his fishing and to manipulate fencing that had been strung over the river by the property owners. *Id.*

Defendants Duane Johnson and Wayne Johnson confronted the Conatsers and ordered them off of the river. *Id.* Specifically, Duane and Wayne Johnson told the Conatsers to pick up their raft and walk out via a railroad easement that runs parallel and nearly adjacent to the river. *Id.* Instead, the Conatsers continued downstream to a public access point, where the Johnsons and the Morgan County Deputy Sheriff were waiting

for them. *Id.*, Rec. at 00315. The Deputy Sheriff cited Kevin Conatser and Jodi Conatser for criminal trespass. *Id.*; *see also* First Amended Complaint, Rec. at 00017. The Morgan County Justice Court found the Conatsers guilty of criminal trespass, but on appeal to district court, Morgan County dismissed the charges due to the uncertainty regarding the Conatsers' status as trespassers. Findings of Fact and Conclusions of Law, Rec. at 00315. Because there was a long-running dispute between the Conatsers and Defendants regarding the Conatsers' rights to use the Weber River, *id.*, the Conatsers brought this declaratory judgment action in Second Judicial District Court.

### **SUMMARY OF ARGUMENTS**

Though most states still adhere to a modified version of the common law test of navigability to determine public rights to use natural waters, Utah has abandoned navigability as a test for finding public rights. Instead, Utah has adopted the "doctrine of public ownership," which holds that all waters of the state are owned by the public, to be used for the public benefit and welfare.

This Court has characterized the public's rights in natural waters as an easement for the purposes of, among other things, recreation. Familiar rules of real property law dictate that the public easement includes all rights necessary to fully enjoy it. Because walking on the soil underlying the public waters is reasonably necessary to fully enjoy the recreational easement, and because such walking imposes no significant burden on the fee owner, the public recreational easement in waters of the state should be interpreted to include, as a necessary incident thereto, the right to stand and walk on the riverbed.

## ARGUMENT

### I. INTRODUCTION

This is an easement case – an atypical one, perhaps, but an easement case nonetheless. The easement at issue is the public easement in waters of the state, first articulated by this Court in *J.J.N.P. Co. v. State*, 655 P.2d 1133 (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. Therefore, public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters.

*Id.* at 1136. The Conatsers seek a ruling that this public easement in the Weber River, where it flows across Defendants’ property, includes the right to walk on the bed of the river in connection with recreational use of the river itself.

This general area of law – dealing with public versus private rights in natural waters – is an ancient one, dating back to the earliest days of both the common law and the civil law. *See generally* Harrison C. Dunning, 4 *Waters and Water Rights* ch. 29 (Robert E. Beck ed., 1996). Through most of the history of the common law, public rights in waters have been tied to the concept of “navigability.” In medieval England, the primary use of waters by the public was for travel or navigation, *id.* at § 29.02(b), and the common law recognized public rights of navigation in all “navigable waters,” which the common law defined as those waters influenced by the ebb and flow of the tides. *See id.*, *see also* R.L. Knuth, *Bases for the Legal Establishment of a Public Right of Recreation in Utah’s “Non-Navigable” Waters*, 5 *J. Contemp. L.* 95, 96-97 (1978).



In the United States, courts recognized that the common law definition of navigability was poorly suited to North American geography – limiting public rights to waters affected by the tides would be too restrictive, rendering large bodies of inland waters subject to private control. *See Knuth*, 5 J. Contemp. L., at 97-98, and cases cited therein. Accordingly, American courts set about redefining the concept of navigability in order to strike a more appropriate balance between public and private rights in waters. Most states today still analyze questions regarding public rights in waters through some sort of navigability framework – though the definition of navigability often bears little resemblance to its English predecessor. In other states, including Utah, courts have more or less jettisoned the concept of navigability as an obsolete or unnecessary test for public *rights* in waters, in light of constitutional or statutory declarations that all waters are *owned* by the public.

Notwithstanding that Utah law has never conditioned public rights in water on navigability, a brief discussion of navigability is nevertheless appropriate, because the concept of navigability permeates the vast body of case law considering public rights in waters, making it a concept both difficult to ignore and important to understand.

Following a brief discussion of navigability, the argument will circle back to the original assertion – that this is an easement case – and demonstrate that under familiar rules of real property law, the public easement in the waters of the state should be interpreted to include the incidental right to walk on the lands submerged beneath public waters.

The final section of the Brief looks at relevant precedent from the small handful of other states that, like Utah, analyze public rights in water in light of public ownership, and argues that the better reasoned of those decisions find a public right to walk on private lands submerged under public waters.

## II. “NAVIGABILITY” HAS LITTLE RELEVANCE TO THIS CASE.

The concept of navigability has both evolved and splintered since its origins in England, such that today, the term “navigable” is something of a legal chameleon, taking on “different meanings dependent upon the problem under consideration.” *Hitchings v. Del Rio Woods Recreation and Park Dist.*, 127 Cal.Rptr. 830, 834 (Cal. Ct. App. 1976) (going on to describe federal navigability tests for commerce clause and title purposes, and state recreational navigability test). For the purposes of this Brief, two versions of navigability are deserving of some discussion: federal navigability for title, and state recreational navigability.

### A. The “Federal Navigability” Test for Title Purposes is Not at Issue in this Case.

Perhaps the most familiar test of navigability is the one used to determine title to submerged lands. Under this version of navigability – sometimes termed “navigability for title” or navigability in the “federal sense” (hereafter “federal navigability”) – title to land under navigable waters rests with the state, rather than with riparian owners. *Utah v. United States*, 403 U.S. 9, 10 (1971). Waters are deemed federally navigable if they are used, or are susceptible to use in their natural condition, for purposes of trade and commerce, determined as of the date the state entered the union. *Id.*

The issue of federal navigability is not before this Court. Neither party offered evidence before the district court that the Weber River is a federally navigable water. Findings of Fact and Conclusions of Law, Rec. at 00315. Further, the district court held that a finding on the issue of federal navigability was not necessary to the decision, *id.*, Rec. at 00318, and that conclusion is not challenged on appeal. More importantly, that conclusion is correct, in that it is in accord with the decisions of this court and other state courts that have considered the question. *See J.J.N.P.*, 655 P.2d at 1136-37 (treating ownership of the bed as irrelevant to issue of public use in waters); *see also Hitchings*, 127 Cal.Rptr. at 837 (“the question of title to the bed of a navigable stream is not raised in this action to determine public use rights, nor is it relevant to the issues herein presented for decision.”). Thus, federal navigability is not at issue in this case.

**B. “Recreational Navigability” is Not the Law in Utah.**

Beginning well over a century ago, state courts from around the country began to fashion new and broader definitions of navigability, definitions that often had little to do with the actual ability to float watercraft. *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893) is an early and oft-cited example of this trend. In that case, the court noted that “[t]he division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters,” *id.* at 1143, and went on to suggest that the traditional link of public use to navigation made little sense:

Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used – and as population increases, and towns and cities are built up in their vicinity, will be still more used – by the people for

sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.

*Id.* The *Lamprey* court ultimately adopted a modified navigability standard, under which any water capable of supporting navigation by pleasure boats would be considered “navigable,” but as the language quoted above illustrates, the *Lamprey* court extended public rights in navigable waters to many uses having little or nothing to do with navigation – by pleasure boat or otherwise. *Id.* at 1143-44.

In the subsequent decades, many states adopted similar “recreational navigability” approaches, retaining “navigability” as the touchstone of public rights in waters, but fashioning less restrictive tests in order to broaden the class of waters deemed navigable, and/or recognizing broad public rights in navigable waters, which rights often have no connection to traditional navigation. *State v. Bunkowski*, 503 P.2d 1231, 1234 (Nev. 1972) (“many states have adopted varying and less stringent tests than the federal test in order to establish the right of public use in certain watercourses.”).

Of the states taking this “recreational navigability” approach, only a few have squarely addressed the question presented here – whether the public has the right to walk on the bed of public waters while recreating or in pursuit of other lawful activities. Those

states that have considered the question have generally found that such a public right exists.<sup>2</sup>

Nevertheless, “the great majority” of cases from the recreational navigability states “are of limited helpfulness,” *Day v. Armstrong*, 362 P.2d 137, 144 (Wyo. 1961), because Utah – like Wyoming, New Mexico, and Montana – does not consider navigability relevant to questions of public use:

Although “navigability” is a standard used to determine title to waterbeds, it does not establish the extent of the State’s interest in the waters of the State.

*J.J.N.P.*, 655 P.2d at 1136. Rather, in Utah, the public right to use natural waters derives from a far more straightforward conceptual framework: the “doctrine of public ownership.”<sup>3</sup> *Id.*

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<sup>2</sup> In *Elder v. Delcour*, 269 S.W.2d 17 (Mo. 1954), for instance, the Missouri Supreme Court held that waters navigable under state law were “common highways” pursuant to statute, that the defendant’s fee ownership of the riverbed was subject to a public highway easement “for travel and passage by floating and by wading,” and that therefore plaintiff was not in trespass when he waded down the stream to fish. *Id.* at 25-27. See also *Collins v. Gerhardt*, 211 N.W. 115, 116-18 (Mich. 1926) (finding no trespass in the defendant’s wading and fishing in the Pine River, since it was capable of floating logs and therefore “navigable” under state law, such that bed of river was subject to a public trust for not only navigation, but for fishing also); *Munninghoff v. Wisconsin Conservation Commission*, 38 N.W.2d 712, 716 (Wis. 1949) (agreeing that right of navigation “includes incidental use of the bottom” where such use “is connected with navigation, such as walking as a trout fisherman does in a navigable stream”).

<sup>3</sup> Navigability is anything but straightforward. The body of navigability case law is vast, often confusing, and generally difficult to synthesize into coherent principles or approaches. While it is interesting that “the courts in general uphold the right of the public to fish in navigable waters,” it can be exasperating that they “do not always indulge in a uniform line of reasoning in reaching that result.” *Collins*, 211 N.W. at 119 (Fellows, J. concurring). Fortunately, Utah law is unencumbered by the baggage of this inconsistent and confusing body of navigability law.

In short, the concept of navigability has little, if any, relevance to this case. Utah has never relied on the concept of navigability as determinative of public rights to waters, *id.*, and the federal test of navigability, employed to determine ownership of submerged lands, is not at issue. *See supra*, p. 9-10.

**III. UNDER UTAH'S DOCTRINE OF PUBLIC OWNERSHIP OF WATERS, THE PUBLIC HAS THE RIGHT TO WALK ON THE GROUND UNDERLYING PUBLIC WATERS, AS AN INCIDENT TO LAWFUL USES OF THE WATERS.**

As noted above, the Court need not concern itself with applying any sort of navigability test in order to resolve the instant dispute. In Utah, all waters are owned by the public, and the public holds an easement to use that water, even when it lies over privately owned lands. The only question before the Court is whether that public easement includes the incidental right to walk on the underlying bed.

**A. Utah adheres to the Doctrine of Public Ownership of Waters.**

While Utah courts have applied the federal test of navigability to determine title to submerged lands, *Monroe v. State*, 175 P.2d 759 (Utah 1946), navigability has never been a part of the analysis of public rights:

Although “navigability” is a standard used to determine title to waterbeds, it does not establish the extent of the State’s interest in the waters of the State.

*J.J.N.P.*, 655 P.2d at 1136. Rather, in Utah, under a long-standing legislative pronouncement,

*All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.*

Utah Code Ann. § 73-1-1 (emphasis added); *see also Adams v. Portage Irr. Reservoir and Power Co.*, 72 P.2d 648, 652-53 (Utah 1937) (stating that title to water “flowing in natural channels” is in the public and that such waters are “the gift of Providence; they belong to us all as nature placed them”). In *J.J.N.P.*, this Court explained that the “doctrine of public ownership,” as expressed by the above-quoted statute, “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. . . .” 655 P.2d at 1136.

Thus, case law from “recreational navigability” states is of limited relevance; the questions presented by this appeal should be considered within the framework of public ownership of water.

**B. Under the Doctrine of Public Ownership, the Weber River is a Public Water.**

As already noted, Utah law skips the intermediate question of navigability and goes right to the fundamental issue: “[w]aters in this state are of two classes, public waters and private waters.” *Adams*, 72 P.2d at 652. By statute, all waters of the state fall into the first class, public waters, unless and until they are lawfully appropriated for a beneficial use. Utah Code Ann. § 73-1-1; *see also Adams*, 72 P.2d at 652 (explaining that waters become private only when lawfully reduced to actual, physical possession and control, as through appropriation into a ditch or canal).

The water at issue here is the Weber River as it crosses Defendants’ properties. In this location, where the Conatsers were floating and fishing, and where Kevin Conatser waded in the river and walked on the riverbed to fish and to move fencing out of the way

of the Conatsers' raft, the waters of the Weber River have not been reduced to physical possession or control. Under the test articulated in *Adams*, 72 P.2d at 652, these waters are undeniably public. See Findings of Fact and Conclusions of Law, Rec. at 00319.

**C. The Public Easement in the Weber River includes the Right to Walk on the Underlying Bed.**

Since the public owns the waters of the state, it follows that the public has the right to use the waters of the state wherever they naturally appear. The *J.J.N.P.* court described this public right to use public waters as an easement:

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 where they naturally appear, and the public does not trespass when upon such waters.

655 P.2d at 1136.

The district court followed the *J.J.N.P.* holding, ruling that Conatser was not in trespass so long as he was floating upon the public waters of the Weber River. Judgment, Rec. at 00309-10. The district court, however, was also called on to decide whether Kevin Conatser was in trespass when he made contact with the bed of the Weber River, both when the contact was incidental to floating, and when it was not incidental to floating. On this question, *J.J.N.P.* is expressly silent:

As to whether the public has an easement in the beds of streams and lakes, we express no opinion.



655 P.2d at 1138, n. 6.<sup>4</sup> Thus, the district court’s ruling lacked the benefit of guidance from this Court as to the scope of the public easement in public waters.

While the specific question presented here is one of first impression in Utah, there is an abundance of Utah case law dealing with various types of easements, and the principles developed in those cases are equally applicable here.

As with any easement case, the present dispute requires a balancing of interests between the easement holders and the servient estate: “[w]henver there is ownership of property subject to an easement there is a dichotomy of interests, both of which must be respected and kept in balance.” *North Union Canal Co. v. Newell*, 550 P.2d 178, 179 (Utah 1976). The goal is to allow both the easement holder and the servient estate to enjoy their respective property interests to the fullest extent possible, not inconsistent with the interests of the other. *Id.* There is no specific test, or list of factors, that courts must consider in determining an appropriate balance of interests. Rather, the inquiry is essentially one of reasonableness, weighing the benefits to the easement holder against the burdens imposed on the servient estate:

In construing any grant of right of way the use, in character and extent, is limited to such as is *reasonably necessary and convenient to the dominant estate* and as *little burdensome to the servient estate* as possible for the use contemplated.

*Morris v. Blunt*, 161 P. 1127, 1133 (Utah 1916). Courts typically look first at whether the disputed use is reasonable, given the purposes of the easement, and then examine whether the disputed use unnecessarily burdens the servient estate. *See, e.g., Valcarce v.*

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<sup>4</sup> The facts of *J.J.N.P.* did not involve wading, and therefore this Court had no reason to rule on the issue.

*Fitzgerald*, 961 P.2d 305, 313 (Utah 1998). The reasonableness of Kevin Conatser’s use of the riverbed, and the burden imposed on Defendants by that use, will be considered in turn.

1. Walking on the soil underlying public waters is a reasonably necessary incidental use of the public easement for recreation in public waters.

The uses reasonable and allowed under an easement must be decided with reference to the purpose of the easement. In other words, the scope of an easement “must be determined by the purposes of the grant and the requirements for a safe, proper, reasonable and convenient enjoyment thereof.” *Salt Lake City v. J.B. & R.E. Walker, Inc.*, 253 P.2d 365, 368 (Utah 1953).<sup>5</sup>

The public easement described in *J.J.N.P.* is intended for, among other things, “recreational purposes.” 655 P.2d at 1136 (reasoning that “state policy recognizes an interest of the public in the use of state waters for recreational purposes by requiring that recreational uses be considered by the State Engineer before he approves an application for appropriation, § 73-3-8, or permits the relocation of a stream, § 73-3-29.”). The *J.J.N.P.* court specifically listed several types of recreation falling within the scope of the easement:

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<sup>5</sup> See also 4 R. Powell & P. Rohan, *Powell on Real Property* § 34.12 (Matthew Bender 2000) (“[T]he parties are to be presumed to have contemplated such a scope for the created easement as would reasonably serve the purposes of the grant.”); Restatement (Third) Servitudes § 4.1 (easement should be interpreted “to carry out the purpose for which it was created.”); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997) (“In determining whether the scope of an easement or privilege has been exceeded, a court must look to its nature and purpose.”).

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 that water.

*Id.* at 1137.

The trial court deemed Kevin Conatser in trespass not because he was fishing – fishing is expressly a use within the scope of the public easement. Rather, Conatser was deemed to be in trespass because he set foot on property – the bed of the Weber River – that, unlike the water of the Weber River, is not owned by the public. In other words, while Conatser’s *use* was within the scope of the easement’s purposes, the district court found that the *location* of his use was outside the scope of the easement.

The district court’s ruling is in error because it fails to recognize that an easement always carries with it any incidental rights necessary to fully enjoy the easement: “The owner of an easement is said to have all rights incident or necessary to its proper enjoyment. . . .” 25 Am.Jur.2d Easements § 81 (1996), *quoted in U.P.C., Inc. v. R.O.A. General, Inc.*, 990 P.2d 945, 955 n.5 (Utah App. 1999); *see also J.B. & R.E. Walker*, 253 P.2d at 368 (stating that extent of easement must include “such uses as are reasonably sufficient for accomplishment of the objects of the grant.”); *Simon v. State*, 996 P.2d 1211, 1215 (Alaska 2000) (holding that highway easement included right to lower the grade and dispose of subsurface materials because “[c]ourts consistently find that an easement gives the holder the right to use the land to the extent necessary to serve the purpose of the easement.”).

This concept of “incidental rights” is a familiar one in Utah law, especially in the context of canal easements. The owner of an easement for a ditch to transport water holds the concomitant right to enter onto the lands of another for the purpose of maintaining the ditch. This principle enjoys a long heritage in Utah law:

... the ditch or canal constitutes an easement over respondent’s land which appellant had a right to maintain, and for that purpose has a right to go upon the land of respondent along the ditch, and to use so much thereof on either side of the ditch as may be necessary to make all necessary repairs and to clean out said ditch at all reasonable times. . . .

*Holm v. Davis*, 125 P. 403, 407 (Utah 1912); *see also Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 163 (Utah 1946) (Larson, J., concurring) (“the right to convey water through a ditch necessarily involves the right to maintain a ditch to convey the water.”); *United States v. 3.08 Acres of Land*, 209 F.Supp. 652, 659 (D. Utah 1962) (“The right to reasonably maintain such a canal, including the right to operate the fifty foot boom if reasonably necessary ... must be considered to be included in the reserved easement”). This maintenance right, attendant to a ditch easement, is sometimes considered an easement in itself, termed a “secondary easement.” *See J.B. & R.E. Walker*, 253 P.2d at 368. The concept of the maintenance easement evinces Utah courts’ recognition that in order to fully enjoy an easement for water conveyance, it is necessary for the easement holder to enter and use parts of the servient estate not subject to the principal easement.

Looking beyond Utah case law, it is apparent that the concept of incidental rights has been broadly applied to a variety of easements. *See, e.g., Knapp v. County of*

*Livingston*, 667 N.Y.S.2d 662, 668 (N.Y. Sup. Ct. 1997) (easement for drainage pipe included incidental right to enter dominant estate for purposes of maintenance and repair); *Cunningham v. Otero County Electric Cooperative, Inc.*, 845 P.2d 833, 837 (N.M. Ct. App. 1992) (“Courts have long recognized the right of power companies to prevent the erection of structures and other obstructions beneath transmission lines incident to rights acquired under a power line easement.”); *Boydston Beach Ass'n v. Allen*, 723 P.2d 914, 922 (Idaho App. 1986) (finding that right to build and use a dock was a necessary incident to an easement for boating on lake).

The law also recognizes the doctrine of incidental rights in a different, but conceptually similar, area of real property law, that of split mineral and surface estates. Ownership of the mineral estate carries with it, as a necessary incident of mineral ownership, the right to enter and use the surface estate:

It is a well established doctrine from the earliest days of the common law, that the right to the minerals thus reserved carries with it the right to enter, dig and carry them away, and all other such incidents thereto as are necessary to be used for getting and enjoying them.

*Cowan v. Hardeman*, 26 Texas 217, 222 (1862). Utah follows this rule. See *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976) (“ownership . . . of mineral rights in land is dominant over the rights of the owner of the fee to the extent reasonably necessary to extract the minerals therefrom.”).<sup>6</sup>

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<sup>6</sup> As a matter of largely academic concern, counsel notes that, arguably, the concept of split estates more accurately captures the relationship between the public and the fee owners of submerged lands than does an easement-based analysis. Water should not require an easement to exist where it naturally flows or pools. Water, after all, is real

This Court may take judicial notice of the fact that people engaged in fishing often do so by wading into the water itself, walking up or downstream in pursuit of a favorable spot. *See* Utah R. Evid. 201 adv. cmte. note (stating that rule applies only to adjudicative facts, and that judicial notice of legislative facts is left to discretion of appellate court); *see also Little Cottonwood Water Co. v. Kimball*, 289 P. 116 (Utah 1930) (“a court is presumed to know what every man of ordinary intelligence must know about such things.”). Several courts, considering questions similar to those presented here, have acknowledged that wading is a customary method of fishing. *See, e.g., Munninghoff*, 38 N.W.2d at 716 (stating that incidental use of the riverbed includes “walking as a trout

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property in its own right, and can be in trespass no more than a vein of minerals can be in trespass where it naturally exists.

The water of the state, however, is owned by the public, and as such, there is a severance of the “water estate” from the surface estate, just as there is a severance of the mineral estate from the surface estate when they are in separate ownership.

Under this view, the public’s right to use public water is not in the nature of an easement, because the public should not need an easement to use waters that it owns. *See Madison v. Graham*, 126 F.Supp.2d 1320, 1324 (D. Mont. 2001) (stating that public floating did “not necessarily involve[e] any easement over private land at all,” since there was “no public touching of the private streambed but only public use of a public resource.”). As with minerals, ownership of the “water estate” (“aqueous estate”?) should carry with it the right to make reasonably necessary use of the surface estate. Only this incidental right would properly be characterized as an easement. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997) (stating that the mineral owner’s right of surface access “is in the nature of an implied easement, since it entitles the holder to a limited right to use the land in order to reach and extract the minerals.”).

Again, though, the difference would seem to be of only academic concern, since the Court employs the same analytical framework to resolve split estate disputes as it does to resolve easement questions. *See Flying Diamond*, 551 P.2d at 511 (“[W]herever there exist separate ownerships of interests in the same land, each should have the right to the use and enjoyment of his interest in the property to the highest degree possible not inconsistent with the rights of the other.”). At any rate, because *J.J.N.P.* describes the interest as an easement, this Brief follows that framework.

fisherman does in a navigable stream”); *State v. Red River Valley Co.*, 182 P.2d 421, 451 (N.M. 1947) (noting that when waters are public “they are no less so when they flow across an owner’s land at a depth requiring one to tread upon the land itself in order to enjoy fishery in them.”) (Sadler, J., dissenting).<sup>7</sup>

In short, walking on the bed of a river is a reasonable and customary method of fishing, and use of the riverbed for that purpose is a reasonably necessary and convenient incidental use of the public easement in the river itself. In other words, without the right to walk on the bed, Conatser and other anglers like him will be denied the full use of the public easement to fish in waters of the state.

2. Walking on the bed of the river imposes no undue burden on the servient estate.

The other side of the balancing of interests requires an assessment of the burden imposed on the servient estate by the disputed use of the easement. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998). Naturally, this assessment should distinguish between the burdens *already* imposed on Defendant’s property, and the *additional* burden represented by contact with the bed of the river by waders. Only the latter burdens should be weighed against the reasonableness of the disputed use.

In that regard, it is worth noting the obvious – that the submerged lands at issue here are *submerged*. Being continually or periodically covered with water, the lands up

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<sup>7</sup> The analysis herein focuses on fishing, because that is the recreational use giving rise to this dispute. It is worth mentioning, however, that stepping on the bed of the river is a necessary incident to other recreational uses as well. Swimming may be the most striking example, because it is hard to imagine how a member of the public could enter the Weber River to enjoy his or her right to swim therein, and exit the river when finished, without making contact with the bed of the river.

to the mean high water mark are not valuable for agriculture or development, and obviously cannot be used or occupied by their owner in the same manner as adjacent uplands.<sup>8</sup>

Furthermore, submerged lands are subject to a variety of burdens imposed by state and federal law. For instance, state law forbids the landowners from altering the beds and banks of natural watercourses without first receiving written approval from the State Engineer. *See* Utah Code Ann. § 73-3-29 (requiring State Engineer to consider and protect recreational uses when considering applications for stream alteration permits). Nor could Defendants even rearrange the natural rocks and sand in the Weber River without first obtaining a permit from the Army Corps of Engineers. *U.S. v. Sinclair Oil Co.*, 767 F.Supp. 200 (D. Mont. 1990) (holding that “riverbed maintenance” activities, involving only the relocation of indigenous riverbed materials, required a dredge and fill permit).

Of course, submerged lands are also burdened by the public easement described in *J.J.N.P.* Thus, owners of submerged lands cannot exclude the public from entering, without trespass, the boundaries of their property in order to use the public waters overlying the privately owned lands. Furthermore, even under existing law as articulated by *J.J.N.P.*, public rights *already* extend beyond the water itself, unless it is possible to

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<sup>8</sup> Where states recognize public rights to use the bed or banks of natural waters, they almost always limit the right to the land below the “mean” or “ordinary” high water mark. *See, e.g., People v. Mack*, 97 Cal. Rptr. 448, 454 (Cal. Ct. App. 1971); *State v. Bunkowski*, 503 P.2d 1231, 1234 (Nev. 1972); *Kelley v. MacMullan*, 214 N.W.2d 856, 864 (Mich. Ct. App. 1974).



“float leisure craft, hunt, fish, and participate in any lawful activity,” 655 P.2d at 1137, without invading the airspace overlying the public water and the privately owned riverbed.

Those are the burdens already imposed on Defendants’ fee – they are limited in their ability to use the land, and in their right to exclude others. Under current law, articulated in *J.J.N.P.* and correctly applied by the district court, the Conatsers, as members of the public, already enjoy the right to “invade” Defendants’ airspace by floating down the Weber River where it crosses their property. The district court further ruled that the Conatsers can even make contact with Defendants’ submerged lands to facilitate their floating. It is hard to comprehend how contact with the bed while wading, instead of floating, imposes any *additional* burden on the Defendants. The Federal District Court of Montana, applying Montana law, analyzed the respective burdens imposed by waders:

[T]he private landowner cannot be viewed logically as having any right to exclude a floater from a Montana stream, regardless of the fact that the public water passes over a private streambed. The court acknowledges that not all users of the public resource float on the water, however, but *the extent of the touching of the private streambed by a wader, for example, is de minimis and causes no more interference with private property rights than does a floater.*

*Madison v. Graham*, 126 F.Supp.2d 1320, 1324 (D. Mont. 2001).

In summary, because walking on the bed of the river is a reasonable incidental use of the public easement in the Weber River, and because such walking does not impose any additional burden on the servient estate, this Court should hold that the public

easement in public waters of the state includes the right to walk on the underlying bed as a use incidental to recreation.

**D. Of the three other “Public Ownership” states, two have held or suggested that the public has the right to walk on the ground underlying public waters.**

Other states following some variation of the doctrine of “public ownership” include Wyoming, Montana, and New Mexico. *See* Dunning, 4 Waters and Water Rights, § 30.04.<sup>9</sup>

The most extensive application of the public ownership doctrine comes from a series of Montana cases. The courts of that state have expressly recognized that public ownership of water carries with it the right to make incidental contact with submerged private lands. In the first decision, issued in 1984, the Montana Supreme Court held that, pursuant to a constitutional declaration, all waters of the state were owned by the public, and that “the capability of use of the waters for recreational purposes determines their availability for recreational use by the public.” *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163, 170 (Mont. 1984).

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<sup>9</sup> The treatise also names Idaho as adhering to the doctrine of public ownership. *Id.* The leading Idaho case on public rights in waters, however, relies for the most part on a statute that essentially adopts a recreational navigability test. *See Southern Idaho Fish and Game Assoc. v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1297 (Idaho 1974) (describing statutory “log floating” navigability test, and statutory declaration that “navigable rivers” were “public highways”). In passing, the Idaho Supreme Court also mentioned that the trial court also based its holding on public ownership of water in Idaho, pursuant to a constitutional declaration. While the case can be read as adopting the doctrine of public ownership and declaring broader public rights than afforded by the statute alone, there is no clear statement to that effect. *Id.* at 1297-98.

In *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984), issued just months after *Curran*, the Montana Supreme Court clarified that the *Curran* holding – that public rights in waters derive from public ownership – was not limited to federally navigable rivers. In other words, the case held that the public had rights to use *all* waters of the state, including those overlying privately owned lands. *Id.* at 1091-92. In addition, the *Hildreth* court confirmed that the public also has the right to use “the bed and banks up to the ordinary high water mark.” *Id.* at 1091.

Following *Curran* and *Hildreth*, the Montana legislature enacted a stream access law that not only codified, but expanded on the *Curran* and *Hildreth* holdings. In *Galt v. State Dept. of Fish and Wildlife*, 731 P.2d 912 (Mont. 1987), the court considered the statute, which allowed the public the right to, among other things, build duck blinds, boat moorings, and to camp overnight, on the beds and banks of all state waters, beyond a minimum distance from occupied dwellings. *Id.* at 914-15. The court found these more intrusive uses of the bed to be outside the scope of the public easement, *id.* at 915, reasoning that “[w]hile the public has the right to use the water for recreational purposes and minimal use of the underlying and adjoining real estate essential to enjoyment of its ownership in water, there is no attendant right that such use be as convenient, productive, and comfortable as possible.”<sup>10</sup> *Id.*

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<sup>10</sup> The Conatsers have not sought in this declaratory judgment action any rights that would be intrusive or burdensome on Defendants’ fee, such as the public rights found overly burdensome in *Galt*. The Conatsers do not seek the right to go above the mean high water mark, or to camp on the banks, or to affix permanent fixtures to the riverbed. See *Curry v. Hill*, 460 P.2d 933 (Okla. 1969) (holding that public held right to fish in

Finally, in *Madison v. Graham*, 126 F.Supp.2d 1320 (D. Mont. 2001), the federal district court for Montana considered and dismissed another challenge to Montana's stream access law. The court reasoned that touching of the private streambed by waders did not infringe on the plaintiff's property interests, because "the extent of the touching of the private streambed by a wader, for example, is de minimis and causes no more interference with private property rights than does a floater." *Id.* at 1324.

The Montana cases are persuasive, not only because they offer the most extensive and recent discussion of the public ownership doctrine, but because they are the most carefully reasoned.

A less well-reasoned approach is illustrated by Wyoming law. In *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), the Wyoming Supreme Court rightly dismissed the question of navigability – and the case law discussing it – as unnecessary, "because by our Constitution and its Congressional approval, the title of all waters of the State is placed in public ownership." *Id.* at 144. The *Day* court described the purpose of public ownership of water as "the benefit of the people," *id.* at 145, and expressly rejected navigability as a test to "determine other uses to which the State may put its waters." *Id.* at 144. The court even held that the public waters are "available for such uses by the public of which they are capable." *Id.* at 145. Yet when the court examined the scope of the public easement, it inexplicably slipped back into a navigation framework, and seemed to consider floating the only relevant public use. *Id.* at 145-46. Specifically, the

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non-federally navigable river "with ordinary paraphernalia," but that fixing trot line to privately owned riverbed was a trespass). Rather, the Conatsers seek through this appeal only the right to stand and walk on the bed of the Weber River while they fish.

court held that the public had the right to float on public waters overlying private lands, along with the incidental right to make contact with the private riverbeds in order to facilitate floating. *Id.* at 146. Any contact with the bed not incidental to floating, however, was held to be a trespass, even though the waters were deemed public and available for any use “of which they are capable.” *Id.* Like the district court in this action, the Wyoming court’s narrow definition of the purpose of the public easement led to an unduly narrow set of allowable incidental uses.

New Mexico law on this point is less clear, but it appears that New Mexico would recognize the right to walk on the bed as an incident to public use of publicly owned waters. In *State v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1947), the New Mexico Supreme Court held that the public enjoyed the right to fish in portions of a reservoir overlying private lands. The court reasoned that, pursuant to a constitutional declaration, all waters in New Mexico were public, and that the right of fishery inhered in all public waters. *Id.* at 430-31. Though public rights to wade were not at issue, *id.* at 427, a heated, pro-surface estate dissent had little trouble concluding that if, as the majority held, all waters were public, “they are no less so when they flow across an owner’s land at a depth requiring one to tread upon the land itself in order to enjoy fishery in them. Obviously, the logic and rationale of today’s holding is that the fisherman so treading will not be a trespasser.” *Id.* at 451 (Sadler, J., dissenting).

The simple logic of the *Red River Valley* dissent is compelling, and bears repeating: if waters are public, and if the public enjoys the right to use those waters for recreational purposes such as fishing, then it follows that the public should have the right

to make normal, non-intrusive use of the underlying soil as an incident to their fishing activities. This rationale, which is also at the heart of the Montana precedent, is a straightforward application of familiar rules of real property, and should be adopted by this Court.

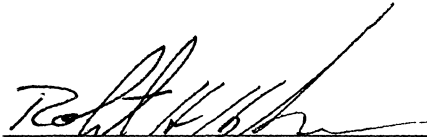
The district court's ruling, on the other hand, is in error, because it improperly relies on navigability in its analysis of public rights in waters. *Compare* Judgment, Rec. at 00310 ("Wading or walking along the river, where such conduct is not incidental to the right of floatation upon natural waters, would constitute a trespass...") *with J.J.N.P.*, 655 P.2d at 1136 (stating that navigability "does not establish the extent of the State's interest in the waters of the State."). While navigability may have been well-suited in medieval England as a test for public rights, it simply has no place in this arid state, where navigation has never been a significant use of natural waters. Here, the waters belong to all of us, and may be used for floating, hunting, fishing, or any other lawful activities. *J.J.N.P.*, 655 P.2d at 1136-37. When minimal use of the underlying streambed is reasonably necessary in order to use the public waters for those purposes, the public should have that right. Otherwise, the public will be deprived of the full use of the "gift of Providence," *Adams*, 72 P.2d at 652, and large stretches of our rivers will be essentially locked up as private fisheries.

### CONCLUSION

For the foregoing reasons, the Conatsers urge this Court to reverse that portion of the district court's ruling wherein the court concluded, as a matter of law, that touching of the streambed on Defendants' property is permissible only when it is incidental to

navigating the Weber River in a watercraft, *see* Judgment, Record (“Rec.”) at 00310, and to declare that the Conatsers, as members of the general public, have the right to walk on the bed of the Weber River and wade in its waters while fishing therein.

Dated this 14th day of December, 2006.



---

ROBERT H. HUGHES  
MICHAEL M. QUEALY  
PARSONS BEHLE & LATIMER

GERALD E. NIELSON

PARKER M. NIELSON

*Attorneys for Plaintiffs and Appellants Jodi  
Conatser, Kevin Conatser, Lacey Conatser,  
and Nicole Mann*

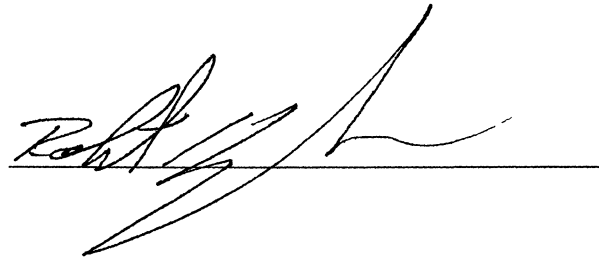
**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of December, 2006, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLANTS**, to:

Gerald E. Nielson  
Counsel for Plaintiffs  
3737 Honeycut Road  
Salt Lake City, Utah 84106

Parker M. Nielson  
Counsel for Plaintiffs  
655 South 200 East  
Salt Lake City, Utah 84111

Ronald G. Russell  
Royce B. Covington  
Counsel for Defendants  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111-1537





**ADDENDUM**

SECOND DISTRICT  
MORGAN COUNTY  
06 MAY 10 AM 10:59

Ronald G. Russell, Esq. (4134)  
Royce B. Covington, Esq. (10160)  
PARR WADDOUPS BROWN GEE & LOVELESS  
Attorneys for Defendants Lynn Brown,  
Duane Johnson, Wayne Johnson,  
Michael McMillan, and Randy Sessions  
185 South State Street, Suite 1300  
Post Office Box 11019  
Salt Lake City, Utah 84147-0019  
Telephone: (801) 532-7840

---

IN THE SECOND JUDICIAL DISTRICT COURT FOR MORGAN COUNTY

STATE OF UTAH

---

JODI CONATSER; KEVIN CONATSER; )  
LACEY CONATSER; and NICOLE )  
MANN, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
WAYNE JOHNSON; CLARK SESSIONS; )  
SHANE E. MATTHEWS, Deputy Sheriff )  
of Morgan County; DUANE JOHNSON; )  
RANDY SESSIONS; MICHAEL )  
McMILLAN; LYNN BROWN; GERALD )  
STOUT; and JOHN AND JANE DOES, )  
6-25, )  
 )  
Defendants. )

JUDGMENT

Civil No. 000500092PR

---

The court having issued its Findings of Fact and Conclusions of Law and for the reasons set forth therein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiffs, as members of the public, if they can gain lawful access to the Weber River, have the right to float leisure craft and participate in any lawful activity when upon the water.
2. The defendants have no legal right to prevent plaintiffs from making use of the public's easement to float down the Weber River.
3. The defendants have no legal right to erect fences to prevent plaintiffs from utilizing the public's easement to float down the river.
4. When floating upon the river, defendants may scrape or touch the river's bed by grounding of craft as a necessary incident to the use of the public's easement to float upon the river and do not commit a trespass thereby.
5. The right to disembark and pull, push, or carry over shoals, rapids, or obstacles accompanies the right of floatation upon natural waters, which plaintiffs enjoy as members of the public.
6. Plaintiffs may walk along the banks of the river to bypass a fence, obstacle, or danger in order to continue floating and so long as plaintiffs' actions are as minimally intrusive as possible of the private owners' land, there is no trespass.
7. Where the use of the streambed is more than incidental to the right of floating on natural waters, such use would constitute a trespass.
8. Wading or walking along the river, where such conduct is not incidental to the right of floatation upon natural waters, would constitute a trespass of private property rights.

9. Plaintiffs have the right to make use of the river provided they stay within the bounds of the holding of J.J.N.P. Co. v. State Div. of Wildlife Res., 655 P.2d 1133 (Utah 1982) and this Judgment.

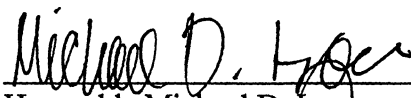
10. This declaratory Judgment is binding only on the parties to this action.

11. Except as to the declaratory relief provided by this Judgment, all claims and causes of action herein are dismissed and this Judgment constitutes a final Judgment for all purposes.


12. The parties shall bear their own costs.

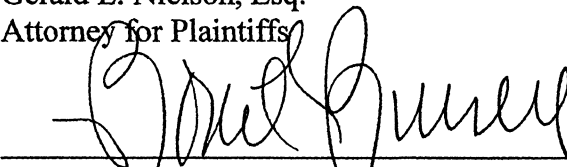
DATED this 25 day of Apr., 2006.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Michael D. Lyon  
District Court Judge

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Gerald E. Nielson, Esq.  
Attorney for Plaintiffs

  
\_\_\_\_\_  
Ronald G. Russell, Esq.  
Royce B. Covington, Esq. of  
PARR WADDOUPS BROWN GEE & LOVELESS  
Attorneys for Defendants Lynn Brown,  
Duane Johnson, Wayne Johnson,  
Michael McMillan, and Randy Sessions

CERTIFICATE OF SERVICE

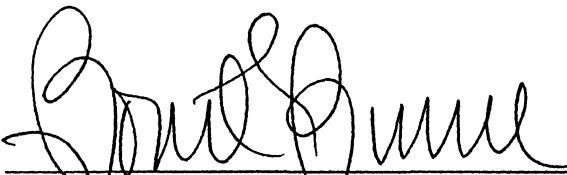
I hereby certify that on the 18<sup>th</sup> day of April, 2006 a true and correct copy of the foregoing JUDGMENT was mailed, postage prepaid, to:

Gerald E. Nielson, Esq.  
3737 Honeycut Road  
Salt Lake City, Utah 84106

Parker M. Nielson, Esq.  
655 South 200 East  
Salt Lake City, Utah 84111

Kelly W. Wright, Esq.  
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48 West Young Street  
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Brent A. Bohman, Esq.  
157 North Commercial Street, Suite 3  
Post Office Box 120  
Morgan, Utah 84050

  
\_\_\_\_\_  
Ronald G. Russell, Esq.

SECOND DISTRICT  
MORGAN COUNTY  
06 MAY 10 AM 10:59

Ronald G. Russell, Esq. (4134)  
Royce B. Covington, Esq. (10160)  
PARR WADDOUPS BROWN GEE & LOVELESS  
Attorneys for Defendants Lynn Brown,  
Duane Johnson, Wayne Johnson,  
Michael McMillan, and Randy Sessions  
185 South State Street, Suite 1300  
Post Office Box 11019  
Salt Lake City, Utah 84147-0019  
Telephone: (801) 532-7840

---

IN THE SECOND JUDICIAL DISTRICT COURT FOR MORGAN COUNTY

STATE OF UTAH

---

JODI CONATSER; KEVIN CONATSER;	)	
LACEY CONATSER; and NICOLE	)	
MANN,	)	
	)	
Plaintiffs,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
vs.	)	
	)	
WAYNE JOHNSON; CLARK SESSIONS;	)	
SHANE E. MATTHEWS, Deputy Sheriff	)	
of Morgan County; DUANE JOHNSON;	)	
RANDY SESSIONS; MICHAEL	)	
McMILLAN; LYNN BROWN; GERALD	)	Civil No. 000500092PR
STOUT; and JOHN AND JANE DOES,	)	
6-25,	)	
	)	
Defendants.	)	

---

On September 17, 2002, plaintiffs moved for partial summary judgment. On May 17, 2005, defendants, excepting Shane E. Matthews, cross-moved for summary judgment. The court heard oral argument on both motions September 30, 2005. Plaintiffs were represented by Gerald E. Nielson. Defendants were represented by Ronald G. Russell. After full consideration of the

motions, the memoranda of points and legal authorities filed therewith, the Affidavit of Kevin Conatser, and all other memoranda, pleadings, and papers on file with the court, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about June 4, 2000, plaintiffs put a rubber raft in the Weber River at a public access point and proceeded to float down the river to another public access point.
2. Between the public access points, the river crosses parcels of private property.
3. While floating the river, the plaintiffs touched the streambed in the following ways:
  - (i) the raft in which they were riding touched or skidded along the bottom of the river in shallow areas, (ii) the paddles or oars touched the bottom on occasion, (iii) Kevin Conatser's fishing tackle came in contact with the bottom, and (iv) Kevin Conatser intentionally got out of the raft and walked along the streambed to facilitate his fishing and to manipulate fencing that had been strung over the river.
4. On at least two occasions prior to June 4, 2000, the defendants informed the plaintiffs that they were trespassing. On one occasion, defendant Michael McMillan confronted Kevin Conatser and ordered him off the river. On another occasion, Kevin Conatser was ordered off the river by Clark Sessions.
5. On June 4, 2000, defendants Duane Johnson and Wayne Johnson confronted the plaintiffs and ordered them off the river. Defendants Duane Johnson and Wayne Johnson told the plaintiffs to pick up their raft out of the river and walk out via a parallel railroad easement.

6. The plaintiffs continued downstream to a public access point where the defendants Duane Johnson and Wayne Johnson and a Morgan County Deputy Sheriff were waiting.
7. The deputy sheriff cited plaintiffs for criminal trespass.
8. The Morgan County Justice Court later found plaintiffs guilty of criminal trespass.
9. The plaintiffs appealed the justice court's findings.
10. After appeal, the county moved to dismiss the trespass charges in light of the uncertainty regarding the Conatsers' status as trespassers.
11. There is a longstanding and continuing uncertainty between the plaintiffs and defendants regarding the plaintiffs' rights to use the river.
12. Both the plaintiffs and defendants have actively sought to assert the rights each side believes the law provides to them. Their dispute comes not from a disregard of the law, but a genuine uncertainty as to their respective rights.
13. The parties' dispute regarding use of the river has not ceased but has been placed on hold out of respect for the role of the courts.
14. The parties have provided the court with no evidence of whether the river has been used for commerce or of the river's capability to be so used.

#### CONCLUSIONS OF LAW

1. Utah's Declaratory Judgment Act authorizes the court to declare the respective rights or status between parties.
2. The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.



3. The Declaratory Judgment Act is intended to be remedial without requiring parties to get in serious trouble first and it is to be liberally administered.

4. The following four requirements must be met before the court can issue a declaratory judgment: (i) there must be a justiciable controversy, (ii) parties whose interests are diverse, (iii) a legally protectible interest residing with the party seeking relief, and (iv) issues ripe for judicial determination.

5. The Declaratory Judgment Act allows for a wide interpretation of what constitutes a justiciable controversy. This case presents a justiciable controversy, ripe for judicial determination, between private citizens whose interests are adverse, and have been so over time, regarding the rights and limitations of the plaintiffs when floating the river abutting and running over defendants' property.

6. A justiciable controversy is present in this case. Because the plaintiffs' interests to the river are in direct conflict with the defendants' attempts to prevent the plaintiffs' use of the river, the parties are adverse. –

7. The issue here is ripe for determination. The plaintiffs have had clashes with the defendants presenting a concrete set of facts regarding the plaintiffs' actual use of the river. This case does not present an academic controversy and it is not an effort by plaintiffs to obtain an advisory opinion.

8. The plaintiffs have a legally protectible interest in the controversy. The river belongs to the public and plaintiffs, as members of the public, have a legally protectible interest in the public easement over these natural waters free of defendants' interference. Plaintiffs have

repeatedly used a portion of the river. The defendants have interfered with the plaintiffs' use of the river. Plaintiffs Kevin Conatser and Jodi Conatser were arrested and convicted of criminal trespass, although the charges were later dismissed.

9. The plaintiffs' interest is apart from the general public. The plaintiffs have repeatedly used a particular portion of the river, intend to continue doing so, and have suffered a particularized injury of interference. The defendants have individually interfered with the plaintiffs' use of the river on multiple occasions.

10. A legally protectible interest does not require a property interest.

11. A declaratory judgment will end the uncertainty and therewith the instant controversy.

12. The plaintiffs have requested a broad declaration of plaintiffs' and the public's rights to use the river and waters located in Utah; however, a declaratory judgment only settles the legal rights between the parties to the proceeding. The court's judgment will not exceed the plaintiffs' interests or prejudice any persons who have not been made a party to the proceeding. For this reason, the court cannot consider the broad relief requested by the plaintiffs.

13. The court can only declare the rights to use of the river as between the plaintiffs and defendants.

14. A fair determination as to the respective rights between the defendants and plaintiffs on claims arising from their own behavior will not prejudice any person not made a party to this case. Therefore, the State of Utah and the record owners of the property in question are not necessary parties.

15. The court denies plaintiffs' request for a declaration that the public has a right to walk along the beds of streams and rivers. Such a declaration would require the weighing of competing interests and is a matter better left for the legislature.

16. A declaratory judgment will end the present controversy. This case is ideally situated to the stated purpose of the Declaratory Judgment Act. This case is properly before the court and a declaration of the respective rights between the plaintiffs and defendants is appropriate.

17. The declaration made by the court in this case is binding only on those made parties hereto and no one else.

18. The court exercises its discretion to grant a declaratory judgment in this case because it feels that it is the place of a court to obviate future potential confrontations between the parties and to facilitate a peaceful co-existence. Otherwise, people resort to self-help and anarchy.

19. This case does not require either a determination of bed ownership or navigability.

20. All waters in the state are the property of the public. Individuals, therefore, have no ownership interest in natural waters.

21. The public does not trespass when upon natural waters, regardless of who owns the bed beneath the water.

22. Irrespective of the ownership of the bed and irrespective of the navigability of the water, the public, if it can gain lawful access to a body of water, has the right to float leisure craft and participate in any lawful activity when upon the water.

23. The right to be on public waters applies to the section of the river at issue in this case.

24. The defendants have no legal right to prevent plaintiffs from making use of the public's easement to float down the river.

25. The defendants have no legal right to erect fences to prevent the plaintiffs from utilizing the public's easement to float down the river.

26. When floating down the river, a person may scrape or touch the river's bed by grounding of craft. These are necessary incidents to the use of the easement and do not constitute trespass.

27. The right to disembark and pull, push, or carry over shoals, rapids, or obstacles accompanies the right of floatation on natural waters.

28. A person may walk along the banks in order to bypass a fence, obstacle, or danger in order to continue floating.

29. Provided a person is as minimally intrusive of the private owners' land as possible, there is no trespass.

30. Where the use of the streambed is more than incidental to the right of floating on natural waters, such use constitutes a trespass.

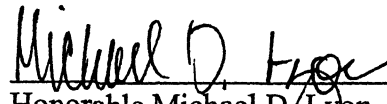
31. Plaintiffs have the right to make use of the river provided they stay within the bounds of the holding of J.J.N.P. Co. v. State Div. of Wildlife Res., 655 P.2d 1133 (Utah 1982) and this decision.

32. This decision is binding only on the parties hereto.

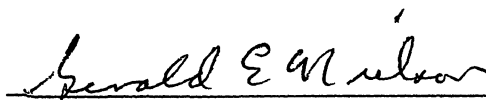
33. The court will enter a declaratory judgment consistent with the foregoing conclusions.

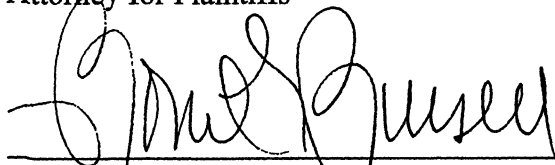
DATED this 25 day of Apr., 2006.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Michael D. Lyon  
District Court Judge

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Gerald E. Nielson, Esq.  
Attorney for Plaintiffs

  
\_\_\_\_\_  
Ronald G. Russell, Esq.  
Royce B. Covington, Esq. of  
PARR WADDOUPS BROWN GEE & LOVELESS  
Attorneys for Defendants Lynn Brown,  
Duane Johnson, Wayne Johnson,  
Michael McMillan, and Randy Sessions

CERTIFICATE OF SERVICE

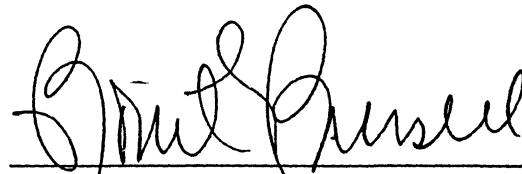
I hereby certify that on the 18<sup>th</sup> day of April, 2006 a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed, postage prepaid, to:

Gerald E. Nielson, Esq.  
3737 Honeycut Road  
Salt Lake City, Utah 84106

Parker M. Nielson, Esq.  
655 South 200 East  
Salt Lake City, Utah 84111

Kelly W. Wright, Esq.  
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Morgan, Utah 84050

Brent A. Bohman, Esq.  
157 North Commercial Street, Suite 3  
Post Office Box 120  
Morgan, Utah 84050



\_\_\_\_\_  
Ronald G. Russell, Esq.

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**IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR  
MORGAN COUNTY, STATE OF UTAH**

2005 DEC 16 3:52

---

JODI CONATSER, KEVIN CONATSER,  
LACEY CONATSER, and NICOLE  
MANN,

Plaintiffs,

vs.

WAYNE JOHNSON, CLARK  
SESSIONS, SHANE E. MATTHEWS,  
Deputy Sheriff of Morgan County,  
DUANE JOHNSON, RANDY  
SESSIONS, MICHAEL McMILLAN,  
LYNN BROWN, GERALD STOUT,  
JOHN and JANE DOES 6-25.

Defendants.

DISTRICT COURT

**MEMORANDUM DECISION  
GRANTING DECLARATORY  
JUDGMENT**

050500092  
Civil No. ~~050701817~~  
Judge Michael D. Lyon

DEC 16 2005

This action for a declaratory judgment arises out of a dispute between these parties regarding the Plaintiffs' rights to use a portion of the Weber River. The Plaintiffs moved for summary judgment on September 17, 2002. The Court previously granted a motion to dismiss Defendant Shane E. Matthews. On September 30, 2005, the remaining Defendants moved for summary judgment to dismiss the Defendants' claims. The Court heard oral argument on September 30, 2005. Following the hearing, both parties submitted supplemental briefs on the issue of Plaintiffs' standing. Having now carefully considered the parties' briefs and having heard argument, the Court denies the Defendants' motion in part and gives a declaratory judgment.

### **Background**

The relevant facts are not in dispute. On or about June 4, 2000, Plaintiffs put a rubber raft in the Weber River at a public access point and proceeded to float down the river to another public access point where they exited the river. Between the public access points, the river crosses parcels of property that are in private ownership. Plaintiffs touched the streambed in the following ways: (1) the raft in which they rode touched or skidded along the bottom in shallow areas, (2) their paddles or oars touched the bottom on occasion, (3) Plaintiff Kevin Conatser's fishing tackle came in contact with the bottom, (4) Kevin Conatser intentionally got out of the raft, and walked along the bottom of the river to facilitate his fishing and to manipulate fencing that had been strung over the river by the property owners.

On two occasions prior to June 4, 2000, the Defendants told the Plaintiffs that they were trespassing. On June 4, 2000, Defendants Duane Johnson and Wayne Johnson confronted the Plaintiffs and ordered Plaintiffs off of the river. Specifically, Duane and Wayne Johnson told the Plaintiffs to pick up their raft and walk out via a parallel railroad easement. The Plaintiffs refused to walk out and continued downstream to a public access point, where the Johnsons and the Morgan County Deputy Sheriff were waiting for them. The Deputy Sheriff cited Mr. and Mrs. Conatser for criminal trespass. The Morgan County Justice Court found the Plaintiffs guilty. After Plaintiff's appeal to the district court, the county moved to dismiss the charges because of the uncertainty regarding the Conatsers' status as trespassers.



## Analysis

### A. Plaintiffs Meet the Requirements to Seek a Declaratory Judgment

Utah's Declaratory Judgment Act authorizes the Court to declare the respective rights or status between parties. Utah Code Ann. § 78-33-1. The purpose of the Declaratory Judgment Act is to "settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" and it is to be liberally administered. *Id.* at § 78-33-12; *Salt Lake County v. Salt Lake City*, 570 P.2d 119, 121 (Utah 1977) (stating that courts "will be indulgent in entertaining actions to achieve [the Act's] objective). Nevertheless, four requirements must be met before the Court can give a declaratory judgment: "(1) there must be a justiciable controversy, (2) parties whose interests are adverse, (3) a legally protectible interest residing with the party seeking relief, and (4) issues ripe for judicial determination." *Miller v. Weaver*, 66 P.3d 592, 597 (Utah 2003) (citing *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983)).

The Declaratory Judgment Act "allows for a wide interpretation of what constitutes a justiciable controversy." *Salt Lake Co. Comm'n v. Short*, 985 P.2d 899, 903 (Utah 1999). It is sufficient that the parties are adverse, the plaintiff asserts a bona fide claim, and the issues are ripe for adjudication. *Id.* In this case, the parties are adverse as the Plaintiffs' interests to be on the river are directly in conflict with the Defendants' attempts to prevent the Plaintiffs' use.

An issue is ripe for determination when it has "sharpened into an actual or imminent clash of rights" and where the issue presents a concrete set of facts. *Pett v. Autoliv ASP, Inc.*, 106 P.3d 705, 706 (stating that a mere difference of opinion regarding a hypothetical application of the law to a situation in which the parties might one day find

themselves is unripe). The Plaintiffs have had actual clashes with the Defendants on several occasions. This case presents a concrete set of facts regarding the Plaintiffs' actual use of this portion of the Weber River. This case does not present an academic controversy or require an advisory opinion.

The Plaintiffs must also have a legally protectible interest in the controversy. A legally protectible interest is "one that the substantive law recognizes as belonging to or being owned by the party." *Alternative Options and Services for Children v. Chapman*, 106 P.3d 744, 750 (Utah Ct. App. 2004) (quoting *In re Marriage of Gonzalez*, 1 P.3d 1074 (Utah 2000)). This requires that the plaintiff have an interest that is distinct from that shared by the general public. *Jenkins*, 675 P.2d at 1148-50 (holding that the airing of generalized grievances and the vindication of public rights are properly addressed to the legislature). In *Jenkins*, the plaintiff sought a declaratory judgment stating that public schools could not hire state legislators. *Id.* at 1148. The court held that plaintiff's reliance on his status as a taxpayer and citizen "d[id] nothing to distinguish himself from any member of the public at large," and that the plaintiff did not claim any particularized injury. *Id.* at 1151 (stating that plaintiff lacked the harm that persons living in the affected school districts or legislative districts would have).

In this case, the Plaintiffs have repeatedly used a portion of the Weber River. The Defendants have individually interfered with Plaintiffs' use of the river on multiple occasions. Plaintiffs Kevin Conatser and Jodi Conatser were arrested and convicted, although dismissed on de novo appeal, of criminal trespass in the justice court. Although the Plaintiffs share an interest in using Utah's natural waters with the general public, the Plaintiffs have also repeatedly used a particular portion of the Weber River, intend to

continue doing so, and have suffered particularized injury of interference, which sets them apart from the general public.

A legally protectible interest requires that Plaintiffs' interest be protectible. *Miller v. Weaver*, 66 P.3d 592, 597 (Utah 2003). Once given, a declaratory judgment must be able to provide specific relief. *Id.* In *Miller*, the plaintiffs sought a declaration that a teacher's classroom conduct was unconstitutional. *Id.* The court refused to give a declaratory judgment because its declaration would not terminate the uncertainty or end the controversy. *Id.* The court noted that a declaratory judgment would not serve a useful purpose as the teacher would remain employed, students would continue to be placed in her class, and the school board would still have the discretion to refuse action on the plaintiffs' complaints. *Id.* The Defendants argue that a legally protectible interest requires some property interest. The Court disagrees. Here, the Plaintiffs seek a declaration of the respective rights between themselves and these Defendants. The Court finds that there is a longstanding and continuing uncertainty between these parties regarding Plaintiffs' rights to use this portion of the river. Both the Plaintiffs and the Defendants have actively sought to assert the rights each side believes the law provides to them. Their dispute comes not from a disregard of the law, but a genuine uncertainty as to their respective rights. A declaratory judgment will end this uncertainty and therewith the controversy.

The Plaintiffs have requested a broad declaration of the public's rights to rivers and waters in Utah. A declaratory judgment only settles the legal rights between the parties to the proceeding. Utah Code Ann. § 78-33-11. The Court's judgment will not exceed the Plaintiffs' interests or prejudice any persons not made parties to the

proceeding. For this reason, the Court cannot consider the broad relief requested by the Plaintiffs. The Court will only declare the Plaintiffs' rights to use the river with respect to these Defendants. Similarly, the Defendants argued that the State of Utah and the record owners of the property in question are necessary parties. However, a fair determination as to the respective rights between these particular parties on claims arising from their own behavior will not prejudice any person not made a party to this case.

The Plaintiffs have asked the Court to declare as a matter of law that the public has the right to walk along the beds of streams and rivers. Plaintiffs cite to Montana law, which has recognized this right. *See* Montana Code Ann. § 23-2-301 *et seq.* Declaring such a right would require the weighing of competing interests that is better left for the legislature. The Court, therefore, denies this relief.

The purpose of the Declaratory Judgment Act is to resolve controversies and uncertainty. Utah Code Ann. § 78-33-12. The act is intended to be remedial without requiring parties to get in serious trouble first. *Alternative Options and Services for Children*, 106 P.3d at 749. Prior to June 4, 2000, Defendant Michael McMillan confronted Kevin Conatser and ordered him off the river. Kevin Conatser's Aff. at ¶ 3. On another occasion prior to June 4, 2000, Clark Sessions acting for Randy Sessions ordered Kevin Conatser off of the river. *Id.* at ¶ 4. There have been threats of violence between these parties. Verified Complaint at ¶ 11. The Conatser's were arrested and convicted of criminal trespass. The Court finds that there has been a continuing controversy between these parties for years. The Defendants argue that because the hostilities and use of the river have ceased, a declaratory judgment is inappropriate. However, the Court finds that the parties' dispute has not ceased, but has been placed on

hold out of respect for the role of the courts. A declaratory judgment will end this controversy. This case is ideally suited to the stated purpose of the Declaratory Judgment Act. The Court, therefore, concludes that this case is properly before the Court and that a declaration of the respective rights between these parties is appropriate.

**B. Plaintiffs' Use of the Public Easement to Float on Natural Waters Does Not Constitute a Trespass**

The parties urge the Court to make a determination of the navigability of the Weber River. The parties have provided the Court with no evidence of whether the Weber River has ever been used for commerce or of the river's capability to be so used. The Court, therefore, will not address navigability on this motion. However, as discussed below, this case does not require either a determination of bed ownership or navigability.

"All waters" in this state are the property of the public. Utah Code Ann. § 73-1-1. Individuals, therefore, have no ownership interest in natural waters. The Utah Supreme Court has recognized a public easement over natural waters. *J.J.N.P. Co. v. State Div. of Wildlife Res.*, 655 P.2d 1133 (Utah 1982). The public does not trespass when upon natural waters, regardless of who owns the bed beneath the water. *Id.* "Irrespective of the ownership of the bed and irrespective of 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 that water." *Id.* (citing *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961)). This right to be on public waters applies to the section of the Weber River at issue in this case. The Defendants have no legal right to prevent the Plaintiffs from making use of the public's easement to float down the Weber River. The

Defendants have no legal right to erect fences to prevent the Plaintiffs from utilizing the public's easement to float down the river.

When floating on natural waters, a person may scrape the river bed or touch the bed by the grounding of craft. *Day*, 362 P.2d at 146. These are necessary incidents to the use of that easement and do not constitute a trespass. *Id.* at 145-46. Even the "right to disembark and pull, push, or carry over shoals, rapids, or obstacles accompany the right of flotation" on natural waters. *Id.* at 146. A person may walk along the banks in order to bypass an obstacle or danger in order to continue floating. *Id.* As long as the person is as minimally intrusive on the private owner's land as possible there is no trespass. *Id.*

However, where the use of the stream bed is more than incidental to the right of floating on natural waters, the use constitutes a trespass. *Id.* This would include wading or walking along the river. In this case, the Plaintiffs, with the exception of Kevin Conatser, never left their raft and, therefore, did not trespass on the property in question. When Kevin Conatser got back in his raft he was no longer trespassing. Walking out along the parallel railroad easement was unnecessary. These rights are both already recognized in Utah and in line with the clear majority of western states.

### **Conclusion**

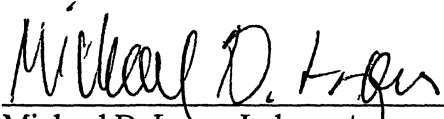
This case presents a justiciable controversy, ripe for judicial determination, between private citizens whose interests are adverse, and have been so over time, regarding the rights and limitations of the Plaintiffs when floating the Weber River abutting the Defendants' property. The Weber River belongs to the public, and the Defendants, as members of the public, have a legally protectible interest in the public

easement over these natural waters, free of Defendants' interference, provided they stay within the bounds of the holding of *J.J.N.P. Co.*

In granting the circumscribed relief found in this decision, the Court settles the longstanding and continuing uncertainty and insecurity concerning the parties' rights to the river. In doing so, it declares the rights of the parties only, no one else. The Court exercises its discretion to grant a declaratory judgment because it feels that it is the place of a court to obviate future potential confrontations between the parties and to facilitate a peaceful co-existence. If courts do not act in these situations in society, people resort to self-help and anarchy.

The Court requests that Mr. Russell prepare the appropriate findings of fact, conclusions of law, and judgment.

Dated this 15 day of December, 2005.

  
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Michael D. Lyon, Judge

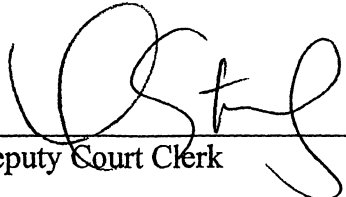
CERTIFICATE OF MAILING

I hereby certify that on the 10 day of December, 2005, I sent a true and correct copy of the foregoing memorandum decision to counsel as follows:

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Deputy Court Clerk