

1-1-2011

## Stream Wars: The Constitutionality of the Utah Public Waters Access Act

Jeremiah I. Williamson

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

### Custom Citation

Jeremiah I. Williamson, Stream Wars: The Constitutionality of the Utah Public Waters Access Act, 14 U. Denv. Water L. Rev. 315 (2011).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

# STREAM WARS: THE CONSTITUTIONALITY OF THE UTAH PUBLIC WATERS ACCESS ACT

JEREMIAH I. WILLIAMSON\*

Abstract .....	315
Introduction .....	315
I. The Public Easement in Water .....	318
A. Public Ownership.....	319
B. Public Rights .....	320
C. House Bill 141 .....	322
II. The Legal Origins of Public Ownership.....	323
A. Statutory Authority .....	324
B. Judicial Interpretations.....	328
C. Constitutional Foundations.....	329
IV. The Constitutionality of HB 141 .....	333
Conclusion .....	335

## ABSTRACT

*In 2008, the Utah Supreme Court held that the public right to recreational use of water includes the right to incidentally contact privately owned beds of waterways. The court's decision ignited controversy, and the Utah legislature responded emphatically with a new public ownership statute nullifying the court's holding. The statute's supporters concluded, not entirely without reason, that public ownership of Utah's waters arises solely from the Utah Code. If this reasoning is sound, it follows that the legislature was free to correct the judicial interpretation with which it disagreed. But, it is not altogether clear that public ownership of Utah's waters is purely statutory. Judicial precedent and constitutional history suggest that an alternative, independent legal basis for the public ownership of Utah's waters exists. The purpose of this article is thus to shed light on the origins of public ownership in Utah water law, and to assess the potential implications for the constitutionality of the new public ownership statute.*

## INTRODUCTION

The constitutions of most western states provide for public ownership of water. However, the Utah Constitution is exceptional in

---

\* Assistant Attorney General, Wyoming Office of the Attorney General, Water and Natural Resources Division. I am grateful to Robert Adler for inspiring this research and to Peter Michael for helpful comments on an earlier draft of this paper. Opinions and errors are mine alone.

this regard because it does not clearly assert public ownership of water. Instead, article XVII of the Utah Constitution provides only 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.”<sup>1</sup> Nevertheless, Utah courts have long recognized public ownership as an element of Utah water law.<sup>2</sup>

In most areas of water use, Utah and other western states apply the public ownership concept similarly — by common law and statutes that flesh out how the public water resource may be put to private use for the benefit of society.<sup>3</sup> For example, western water law generally allows individuals to divert publicly owned waters for private agricultural use.<sup>4</sup> While private agricultural use of publicly owned water has deep historical roots, public recreational use of water is a subject of more recent concern.

The issue of public use of water for recreational purposes came to the fore only recently, for obvious reasons — namely, western settlers focused on water use for survival and basic industry, not whitewater rafting and fly-fishing. By the end of the twentieth century, however, most western states had addressed the extent to which public ownership of water includes public rights of access to watercourses for recreational purposes such as fishing, boating, and hunting. The Colorado Supreme Court, for example, concluded that even though the Colorado Constitution provides that the water of every stream is public property dedicated to the use of the people,<sup>5</sup> the right of public ownership does not include the right to float and fish on non-navigable waterways.<sup>6</sup> In contrast, the supreme courts of other western states, including Wyoming, Montana, and New Mexico, have concluded that the constitutional provision for public ownership of water does include the right to float and fish on non-navigable waters.<sup>7</sup> These deeply divergent views on whether public ownership of water includes rights to recreational access help to illustrate the complex and controversial nature of the issues. Some states, such as Wyoming, have essentially settled the debate.<sup>8</sup> But the battle rages on in other states.<sup>9</sup>

---

1. UTAH CONST. art. XVII, § 1.

2. *Adams v. Portage Irrigation, Reservoir, & Power Co.*, 72 P.2d 648, 652-53 (Utah 1937).

3. See e.g., 1 WELLS A. HUTCHINS, COMPLETED BY HAROLD H. ELLIS & PETER DEBRAAL, WATER RIGHTS IN THE NINETEEN WESTERN STATES 5 (2004).

4. See e.g., *id.* at 17.

5. COLO. CONST. art. XVI, § 5.

6. *People v. Emmert*, 597 P.2d 1025, 1026 (Colo. 1979).

7. *Day v. Armstrong*, 362 P.2d 137, 147 (Wyo. 1961); *Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984); *New Mexico v. Red River Valley Co.*, 182 P.2d 421, 430-34 (N.M. 1945) (rejecting the reasoning of the Colorado Supreme Court).

8. *Day*, 362 P.2d at 147.

9. In Montana, for example, the 1984 Montana Supreme Court decision in *Curran* did not ultimately settle the issue; instead the fight continues. See Michael Babcock, *Anglers Anxious Bill Would Cut Stream Access*, GREAT FALLS TRIB., Feb. 10, 2011; Pat

Utah first faced the question of whether public ownership of water gives rise to rights to recreational access in 1982.<sup>10</sup> Borrowing from the law of Wyoming, the Utah Supreme Court concluded that a right to recreational access exists incident to public ownership of water.<sup>11</sup> At the time, however, the Utah Supreme Court reserved the question of whether the public recreational access right includes the right to touch privately owned streambeds.<sup>12</sup> That question materialized nearly three decades later; in a highly controversial opinion, the Utah Supreme Court held that the right of recreational access inherent in public ownership of water includes the right to incidentally touch privately owned beds of waterways.<sup>13</sup>

Private owners of riparian property and the Utah legislature reacted emphatically to this holding, declaring the court's opinion null and void through a new public ownership statute — the Utah Public Waters Access Act (HB 141).<sup>14</sup> The supporters of the bill asserted, not entirely without reason, that public ownership of Utah's waters arises solely from a statutory provision in the Utah code.<sup>15</sup> If this reasoning was sound, it follows that the legislature was free to correct the judicial interpretation with which it disagreed.

However, it is not altogether clear that public ownership of Utah water rests solely on a statutory foundation. Judicial precedent and constitutional history suggest that an alternative, independent legal basis for public ownership of Utah's waters exists. While Utah courts have repeatedly alluded to public ownership independent of statutory authority, explanations of the legal basis therefor are limited. The Utah Supreme Court has referred to a "doctrine of public ownership," explaining the concept in terms of prior appropriation and natural law.<sup>16</sup> But, Utah courts have not identified the doctrine's precise legal origin. As a result, the state of the law is uncertain. This uncertainty has ripened in the form of a constitutional challenge to HB 141 that will likely require the Utah courts to determine whether the doctrine

---

Munday, *Montana Puts Limits on National Trout Unlimited*, HIGH COUNTRY NEWS, Apr. 16, 2007, <http://www.hcn.org/issues/344/16953>. And, even though the Colorado Supreme Court has spoken authoritatively on the issue of public recreational access rights deriving from public ownership of water, debate over the subject has not ended. See Jimmy Valenti, *Rafting Bill Sent Upstream for More Study*, COLO. STATESMAN, Mar. 19, 2010,

<http://www.coloradostatesman.com/content/991683-rafting-bill-sent-upstream-more-study>; Lori Potter et al., *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENVER WATER L. REV. 457 (2002).

10. J.J.N.P. Co. v. Utah Div. of Wildlife Res., 655 P.2d 1133, 1136 (Utah 1982).

11. *Id.* at 1137.

12. *Id.* at 1139.

13. *Conatser v. Johnson*, 194 P.3d 897, 903 (Utah 2008).

14. HB 141 (Utah 2010). The ownership provision is codified as paragraphs (2) through (4) of the public ownership statute. See UTAH CODE ANN. § 73-1-1 (West 2010).

15. *Floor Debate on House Bill 141: Recreational Use of Public Water on Private Property*, Utah H.R., Feb. 22, 2010 (statement of Rep. McIff) [hereinafter McIff], available at <http://le.utah.gov/~2010/hundoc/hbillhtm/HB0141.htm>

16. *Conatser*, 194 P.3d at 899.

of public ownership has roots in the Utah Constitution.<sup>17</sup>

This article thus aims to shed light on the origins of public ownership in Utah water law, and to assess the potential implications for the constitutionality of HB 141. The discussion begins with an overview of the evolution of the public recreational easement in Utah water law, examining first the *Conatser* decision and its predecessors, and then proceeding to the passage and substance of HB 141. This article then analyzes potential sources of public ownership law, including statutory declarations, judicial interpretations, prior appropriation doctrine, and Utah Constitution article XVII.

Several propositions become evident from analysis of these legal sources. First, article XVII of the Utah Constitution does not expressly provide for public ownership. Rather, it only preserves the status quo ante for water rights existing at the time of statehood. Second, article XVII protects water rights established according to Utah prior appropriation law. And third, public ownership has inhered in Utah's water appropriation law since territorial times. From these premises, this article argues that article XVII provides for public ownership, even if only as a component of the existing water rights system that the Utah Constitution preserves.

Whether the water amendment to the Utah Constitution provides for public ownership of water is a debatable point. The text of article XVII is not rich in meaning, and countervailing historical arguments concerning its interpretation exist. The weight of the evidence suggests that public ownership has always been a component of Utah water law. Yet the drafters of the Utah Constitution rejected a water amendment that expressly provided for public ownership.

Concluding that public ownership of water arises from the Utah constitution implicates serious questions concerning the validity of HB 141. Interpreting the meaning of constitutional provisions, such as whether public ownership of water entails a right to recreational access, as well as the nature and extent of that right, undoubtedly falls within the province of the judiciary. Nonetheless, HB 141 purports to usurp this judicial authority, replacing the Utah Supreme Court's interpretation with that of the legislature. Accordingly, this article closes with an analysis of the separation of powers implications that follow from concluding that public ownership of Utah water has roots in the Utah Constitution.

## I. THE PUBLIC EASEMENT IN WATER

The Utah Supreme Court has recognized a public recreational

---

17. See Complaint at 18, *Utah Stream Access Coal. v. Victory Ranch, L.C.* (4th Jud. Dist. Ct. of Utah 2010) [hereinafter *Coalition Complaint*], available at <http://utahstreamaccess.org/wp-content/uploads/2010/11/Ry8657.pdf>. (alleging that HB 141 violates public rights and the constitutional separation of powers). Also see Roxanna Orellana & Peter S. Lozancich, *Group Sues over Stream Access*, SALT LAKE TRIB., Nov. 19, 2010, <http://www.sltrib.com/sltrib/home/50666012-76/access-public-utah-act.html.csp>.

right incident to public ownership of water. Many other states recognize similar rights,<sup>18</sup> but the recreational easement, as it is understood in Utah, has become a controversial subject in the state's water law. The Utah Supreme Court first recognized the easement in a 1982 case involving a corporation's attempt to convert a public water body into a private fishery. However, the 1982 decision left open the question of whether the easement burdened the beds underlying public waters. That question ripened almost thirty years later, and Utah's high court concluded that the public easement granted the public license to incidentally contact privately owned streambeds while utilizing public waters.<sup>19</sup> Controversy followed the decision, and the Utah legislature responded with a statute to overrule the court's interpretation of the law. Opponents have now challenged the statute, raising questions concerning the constitutional separation of powers.

#### A. PUBLIC OWNERSHIP

The Utah Supreme Court first recognized the public recreational easement in water in the 1982 case of *J.J.N.P. Co. v. Utah Division of Wildlife Resources*.<sup>20</sup> In that case a corporation, which owned all of the land surrounding a natural lake, challenged the state's denial of its application to operate a private fishery on the lake.<sup>21</sup> The state asserted that the lake was navigable and, therefore, a public trust property that the company could not convert into a private fishery.<sup>22</sup> The court held, however, that "[a]lthough 'navigability' is a standard used to determine title to waterbeds, it does not establish the extent of the State's interest in the waters."<sup>23</sup>

Refusing to dispose of the case on public trust grounds, the court instead assessed the claims in light of public ownership of water.<sup>24</sup> In Utah, like most states west of the Mississippi River, public ownership of water is the rule.<sup>25</sup> The *J.J.N.P.* court began its analysis of public ownership with a reference to the Utah Code provision on public ownership, which provides that "all waters . . . are the property of the public."<sup>26</sup> The court then went on to explain that "public ownership is

---

18. See, e.g., *Day v. Armstrong*, 362 P.2d 137, 151 (Wyo. 1961); *S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1298 (Idaho 1974); *New Mexico v. Red River Valley Co.*, 182 P.2d 421, 434 (N.M. 1945); *Roberts v. Taylor*, 181 N.W. 622, 626 (N.D. 1921); *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936); *Hillebrand v. Knapp*, 274 N.W. 821, 822 (S.D. 1937); *Snively v. Jaber*, 296 P.2d 1015, 1019 (Wash. 1956).

19. *Conatser*, 194 P.3d at 903.

20. *J.J.N.P. Co. v. Utah Div. of Wildlife Res.*, 655 P.2d 1133, 1137 (Utah 1982).

21. *Id.* at 1135.

22. *Id.* at 1136.

23. *Id.* (citing *Monroe v. State*, 175 P.2d 759 (Utah 1946); Comment, *Basis for the Legal Establishment of a Public Right of Recreation in Utah's "Non-Navigable" Waters*, 5 J. CONTEMP. L. 95 (1978)).

24. *Id.* (citing UTAH CODE ANN. § 73-1-1).

25. See, e.g., COLO. CONST. art. XVI, § 5; IDAHO CONST. art. XV, § 1; WYO. CONST. art. VIII, § 1; NEV. REV. STAT. § 533.025 (2010).

26. *J.J.N.P.*, 655 P.2d at 1136.

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."<sup>27</sup> The legal corollary to this principle of necessity is what the *J.J.N.P.* court described as the "doctrine of public ownership."<sup>28</sup> However, the *J.J.N.P.* court did not clearly define the source of the public ownership doctrine. The court described the doctrine in terms of natural law, citing to Blackstone, and as a necessary incident to prior appropriation.<sup>29</sup>

One can understand the court's failure to more precisely explain this doctrine of public ownership, because regardless of the source, public ownership of water is settled Utah law.<sup>30</sup> Utah courts have long understood that the state serves as trustee of the water and regulates its use in protection of the public interest.<sup>31</sup> Public ownership provides the basis for the state to regulate water for the good of the people.<sup>32</sup> Only waters taken into physical possession by placement in storage receptacles may be privately owned.<sup>33</sup> All other waters are the property of the public; all are equal owners, with coequal rights, and no one can have exclusive control thereof.<sup>34</sup>

## B. PUBLIC RIGHTS

As an incident to public ownership, the Utah Supreme Court explained in *J.J.N.P.*, the public holds an easement over the water "regardless of who owns the water beds beneath."<sup>35</sup> Accordingly, the public does not trespass when utilizing publicly owned waters, even where such water is flowing over privately owned lands.<sup>36</sup> Interpreting the scope of the easement, the court concluded that "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."<sup>37</sup> But, the *J.J.N.P.* court left open the question of whether the public easement burdens privately owned beds of waterways, rendering the actual scope of the easement highly uncertain.<sup>38</sup>

27. *Id.*

28. *Id.*

29. *Id.* at 1136 n.3.

30. *See, e.g.*, *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 67 P. 672, 677 (Utah 1902).

31. *Tanner v. Bacon*, 136 P.2d 957, 966-67 (Utah 1943).

32. *J.J.N.P.*, 655 P.2d at 1136 (citing *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971)).

33. *Adams v. Portage Irrigation, Reservoir, & Power Co.*, 72 P.2d 648, 652 (Utah 1937) (describing an ownership rule of capture).

34. *Id.*

35. *J.J.N.P.*, 655 P.2d at 1136.

36. *Id.* at 1136-37.

37. *Id.* at 1137 (citing *Day v. Armstrong*, 362 P.2d 137, 147 (Wyo. 1961); *S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1298 (Idaho 1974)). The court also notes a long list of other states that have found a public right to recreational use of public waters. *See J.J.N.P.*, 655 P.2d at 1137 n.4.

38. *Id.* at 1138 n.6.

That uncertainty came to the fore nearly thirty years later in *Conatser v. Johnson*.<sup>39</sup> The Conatsers were recreational users of the Weber River, who appear to have had a long running dispute concerning the scope of the public easement with the Johnsons, owners of property riparian to the Weber.<sup>40</sup> The Johnsons eventually notified the sheriff, who arrested the Conatsers for trespass based on their contact with the Johnsons' privately owned riverbeds.<sup>41</sup> The trial court convicted the Conatsers, but on appeal the state dropped its case due to "uncertainty regarding the Conatsers' status as trespassers."<sup>42</sup> Desiring a resolution to the long running conflict, the Conatsers filed an action seeking a declaration of their rights to the river.<sup>43</sup> They argued that the public easement to utilize the waters allows for non-obtrusive touching of the privately owned steam beds.<sup>44</sup> The District Court rejected this argument, concluding that the easement only allows members of the public to be upon the water and to touch the beds and banks incidental to flotation.<sup>45</sup>

The Utah Supreme Court, however, saw the matter differently. Rejecting the District Court's reliance on the Wyoming case of *Day v. Armstrong*, the high Utah court pointed out that *J.J.N.P.* had subtly departed from the holding in *Day*.<sup>46</sup> The *Day* court concluded that recreational rights to access publicly owned waters were derivative of the right to float, and thus the easement allowed only activities "upon" the water.<sup>47</sup> But, the Utah Supreme Court noted *J.J.N.P.* did not adopt the same limiting language.<sup>48</sup> Rather, *J.J.N.P.* found an easement to "utilize" the water, not merely to be upon it.<sup>49</sup> Thus, the question reserved by the *J.J.N.P.* court — whether the easement reached the beds of waterways — was not so easily disposed of as the trial court concluded.

Looking to the law of easements, the Utah Supreme Court in *Conatser* explained that an easement holder is privileged "to do such acts as are necessary to make effective his or her enjoyment of the

---

39. *Conatser v. Johnson*, 194 P.3d 897, 897 (Utah 2008).

40. *Id.* at 898-99.

41. *Id.* According to the record, the Conatsers contacted the river bottom in four ways: their raft occasionally made contact in shallow areas; their raft paddles occasionally touched bottom; fishing tackle occasionally touched bottom; and Mr. Conatser walked on the bed to fish and remove fencing the Johnsons installed across the river. *Id.*

42. *Id.* at 899.

43. *Id.*

44. *Id.*

45. *Id.* Accordingly, the trial court found that Mr. Conatser's act of walking on the river bottom while fishing constituted a trespass. *Id.*

46. *Id.* at 901.

47. *Day v. Armstrong*, 362 P.2d 137, 144 (Wyo. 1961).

48. See *Conatser*, 194 P.3d at 901. In fact, it is unclear why the *Day* court found it necessary to limit the public easement to activities incident to navigation, especially since the court expressly refused to resolve the case based on navigability. See *Day*, 362 P.2d at 143-44.

49. *J.J.N.P. Co. v. Utah Div. of Wildlife Res.*, 655 P.2d 1133, 1137 (Utah 1982).



easement.”<sup>50</sup> But the rights of the dominant and servient estates are “limited, each by the other, that there may be a due and reasonable enjoyment of both.”<sup>51</sup> Applying these general easement principles to the public easement in water, the Utah Supreme Court concluded that members of the public may engage in all lawful activities that utilize the water, including coming into contact with privately owned submerged lands, so long as the activities are conducted reasonably, and in a way that does not cause unnecessary injury to the servient estate.<sup>52</sup>

The effect of the *Conatser* decision was to make certain the public right to incidentally touch beds of waters that do not meet the traditional test for navigability-in-fact. Under Utah law, beds to waters that were navigable in fact at the time of statehood are owned by the state in trust for the public.<sup>53</sup> A watercourse is considered navigable if, in its natural state at the time of statehood, it was available as a public highway for practical, valuable, commercial purposes.<sup>54</sup> Beds to navigable waterways, then, are owned by the public and openly available to public recreational use irrespective of the public recreational easement. Watercourses that were not navigable-in-fact at the time of statehood, on the other hand, are not subject to the public trust, and the beds thereof may be privately owned.<sup>55</sup> Those privately owned beds of small streams and rivers are the estates that the recreational easement burdens.

### C. HOUSE BILL 141

Not surprisingly, the *Conatser* decision generated mixed reactions. While the case dealt a monumental victory to public recreational interests, it raised fears of trespassing and declining property values for riparian property owners.<sup>56</sup> Now, every stream or river reach that does not meet the navigable-in-fact test for public ownership, many of which flow through highly valuable residential property, would be opened up to public use. Given the vagueness of the *Conatser* standards — “reasonable use” and “unnecessary injury” — as well as the high transaction costs that would accompany prosecuting, for example, small scale littering, property owners argued that the *Conatser* decision disposed of what were seemingly settled investment-backed property expectations.<sup>57</sup>

---

50. *Conatser*, 194 P.3d at 902.

51. *Id.* (citing *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 158 (Utah 1946) (internal quotation marks omitted)).

52. *See id.*

53. *See Monroe v. State*, 175 P.2d 759, 760 (Utah 1946).

54. *See id.* at 761.

55. *See id.* at 760.

56. *See* Randy Parker, Op-Ed., *Balance Property Rights, Recreation*, DESERET NEWS, Mar. 10, 2010, <http://www.deseretnews.com/article/700015272/Balance-property-rights-recreation.html>.

57. Amy Joi O’Donoghue, *Gov. Herbert Signs Bill Restricting Access to Streams on Private Property*, DESERET NEWS, Apr. 1, 2010 (noting the perception that *Conatser* “guttered”

The Utah legislature took up the riparian owners' cause, and in the first week of February 2010, Utah Representative Kay McIff introduced House Bill 141 (HB 141), also known as the Utah Public Waters Access Act. The Bill railed against the *Conatser* decision, declaring it to be a violation of Utah's constitutional protection against uncompensated takings of private property.<sup>58</sup> Nevertheless, Representative McIff explained on the house floor that HB 141 was "not intended as an attack on the Supreme Court."<sup>59</sup> McIff went on to assert that the "good news is the [*Conatser*] court did not rely upon any constitutional provisions; there's [*sic*] no constitutional analysis; it relied on a statute; the legislature can deal with statutes; it can clarify and amend."<sup>60</sup> Therefore, McIff concluded, the legislature could undo the *Conatser* decision without violating the constitutional separation of powers.

The bill passed both houses of the legislature, and in late March 2010 Utah Governor Gary Herbert signed HB 141 into law. The bill amended the Utah statute on public ownership of water, providing that the declaration of public ownership "does not create or recognize an easement for public recreational use on private property."<sup>61</sup> HB 141 asserted further that "The Legislature shall govern the use of public water for beneficial purposes,"<sup>62</sup> again noting a concern for constitutional protections for private property. In rejecting the *Conatser* decision, HB 141 did not do away with the public easement altogether. Instead, it essentially substituted the reasoning of the *Conatser* trial court decision and *Day v. Armstrong* for that of the Utah Supreme Court, declaring that the public easement allows only touching of streambeds incidental to flotation.<sup>63</sup>

Like the *Conatser* decision, HB 141's passage into law received mixed reviews. Riparian property owners praised the bill as a restoration of their private property rights,<sup>64</sup> whereas water recreationists saw it as a devastating blow to public rights.<sup>65</sup>

## II. THE LEGAL ORIGINS OF PUBLIC OWNERSHIP

Riparian property owners may have found relief in the legislature, but Utah's stream wars continue. In November 2010, recreational

---

property rights), <http://www.deseretnews.com/article/700020962/Gov-Herbert-signs-bill-restricting-access-to-streams-on-private-property.html>.

58. See UTAH CODE ANN. § 73-29-103 (2010).

59. McIff, *supra* note 15.

60. *Id.*

61. UTAH CODE ANN. § 73-1-1 (2011).

62. *Id.*

63. See *id.* § 73-29-202.

64. See, e.g., Opinion, *Ask Permission*, SALT LAKE TRIB., Apr. 9, 2010, <http://www.sltrib.com/sltrib/opinion/49373875-82/utah-bill-anglers-ask.html.csp> (describing HB 141 as leveling the playing field for riparian owners).

65. See Opinion, *Guv's Bad Decision*, SALT LAKE TRIB., Apr. 2, 2010, <http://www.sltrib.com/sltrib/opinion/49335333-82/outdoor-utah-decision-quality.html.csp>.

water users filed suit asking the judiciary to invalidate HB 141, arguing that the law violates public rights in water and the constitutional separation of powers.<sup>66</sup> The challenge to the validity of the Utah Public Waters Access Act raises complex questions about the legal origins of public ownership of water in Utah. As supporters of HB 141 will be quick to point out, the Utah Code provides for public ownership. Nevertheless, the Utah Supreme Court has repeatedly emphasized that the Code is not the only legal authority for public ownership, often referring also to the “doctrine of public ownership.” Unfortunately, Utah courts have been vague about the precise legal origin of this independent, alternative basis for public ownership.

Teasing out the meaning of the doctrine of public ownership requires a careful review of the history of public ownership in Utah water law. The analysis begins at the most certain point — the Utah Code — which expressly declares public ownership of water. Next, this paper examines the judicial expressions of an independent alternative basis. Notably, the Utah Supreme Court understood public ownership to be the rule even before the enactment of the public ownership statute, describing public ownership in terms of prior appropriation doctrine and natural law. The Utah Constitution also expresses these concepts, raising questions about whether the independent basis for public ownership of Utah water is, in fact, constitutional. The authorities suggest that the case for public ownership of water finds traction in Utah Constitution article XVII’s protection of the water rights status quo at the time of statehood. The evidence is not conclusive, however, and countervailing arguments exist.

### A. STATUTORY AUTHORITY

The Utah Code provides for the public ownership of water, stating that “all waters . . . are hereby declared to be the property of the public.”<sup>67</sup> This provision traces its roots to the 1903 irrigation bill,<sup>68</sup> and its language remains essentially unchanged today.<sup>69</sup> The 1903 bill, which many contemporary observers believed to be the most important legislation of the session,<sup>70</sup> aimed to resolve the enforcement problems and according uncertainties that were

---

66. See Coalition Complaint, *supra* note 17, at 15.

67. UTAH CODE ANN. § 73-1-1(1) (West 2011).

68. See 1903 Utah Laws ch. 100, § 47. Interestingly, Westlaw traces the current codification of the public ownership statute to a 1919 law, which in fact inherited the provision from the 1903 irrigation bill.

69. See *id.* The 1903 bill provided as follows: “The waters of all streams and other sources in this State, whether flowing above or underground, in known or defined channels, is [*sic*] hereby declared to be the property of the public, subject to all existing rights to the use thereof.”

70. See, e.g., *Legislature in Expiring Throes*, DESERET NEWS, Mar. 14, 1903, at 1 (describing the irrigation bill as “[t]he most important piece of legislation that has been enacted”); *Gov. Urges Passage of Irrigation Bill*, DESERET NEWS, Mar. 9, 1903, at 1.

wreaking havoc on Utah water supply management.<sup>71</sup> In addition to public ownership, the bill provided for centralized control of water<sup>72</sup> and forfeiture of water rights for non-use.<sup>73</sup> The bill faced insignificant opposition and generated little relevant debate.<sup>74</sup>

That the bill faced little opposition is remarkable because less than a decade earlier, similar public ownership language proposed for the Utah Constitution gave rise to staunch opposition.<sup>75</sup> One possible explanation for this apparent discrepancy is that in 1903 the state of water supply management was more objectionable than it was a decade earlier, and that a majority of the public believed comprehensive legislation was the solution.<sup>76</sup> It may also be that the 1903 public ownership provision was included as an unexamined piece of legislation borrowed from another jurisdiction.<sup>77</sup> Another explanation for the disparity may lie in a subtle semantic distinction between the proposed constitutional amendment and the 1903 irrigation bill. The proposed constitutional text provided that all waters would be the property of the "State,"<sup>78</sup> whereas the irrigation bill declared the waters to belong to the "public."<sup>79</sup> Had the public ownership provision in the 1903 irrigation bill stimulated more debate, some insight might have been gleaned as to the legislature's understanding

---

71. Prior to 1903, county courts served as the forum for water rights disputes. However, county lines restrained jurisdiction, which normally contained only segments of water sources. See *Rights of Water Owners: Important Case Heard in the Court at Fillmore*, SALT LAKE TRIB., Dec. 15, 1897, at 7. As a result, inconsistent decrees became the norm, and the jurisdictionally constrained focus of county court judges led to decrees far in excess of supplies. See, e.g., UTAH IRRIGATION COMM'N, IRRIGATION IN UTAH 96 (1894) ("How then, shall we rank him, who, by judicial fiat alone, can cause 800 inches of water to run where Nature only put 100 inches?"). Uncertainty over water supplies persisted and litigation was widespread. See, e.g., *Water Famine Near: Mrs. Dudler Takes Half of Parley's Creek Flow*, SALT LAKE TRIB., Aug. 25, 1898, at 8; *Big Irrigation Suit*, SALT LAKE TRIB., Aug. 23, 1897, at 1; *Southern Utah Water Famine*, SALT LAKE TRIB., May 4, 1896, at 8.

72. 1903 Utah Laws ch. 100, § 1 (granting broad administrative authority to state water engineer). See also *id.* § 35 (establishing a permit system).

73. See *id.* § 50.

74. See *Big Irrigation Bill Is Passed*, SALT LAKE HERALD, Mar. 11, 1903, at 1 (noting widespread support and minimal opposition in the legislature). Opposition to the bill focused primarily on the cost of administration and central versus local control. See *Opposed to Bill: American Fork Men Don't Like Irrigation Measure*, SALT LAKE HERALD, Mar. 6, 1903, at 7. The support the bill received from newspaper editors is also noteworthy. See, e.g., *The Irrigation Question*, DESERET NEWS, Mar. 2, 1903, at 5; *Pass the Joint Irrigation Bill*, SALT LAKE HERALD, Mar. 1, 1903, at 12.

75. See *infra* notes 111-114 and accompanying text.

76. See *Solons Asked to Legislate*, SALT LAKE HERALD, Feb. 18, 1903, at 2 (asserting that comprehensive legislation was best way to remedy the system). The proponent cites Wyoming as a model. Ironically, Wyoming served as the model for the language rejected from the constitution. See *The Irrigation Article*, SALT LAKE TRIB., Mar. 11, 1895, at 3.

77. See *Solons*, *supra* note 76. Public ownership did come up in debate over another water bill. See *Ogden Water Was in Senate*, SALT LAKE HERALD, Mar. 5, 1903, at 5. However, the issue there was not so much public ownership as municipal power to condemn water rights. See *id.*

78. See *The Irrigation Article*, *supra* note 76.

79. 1903 Utah Laws ch. 100, § 47.

of the origins of public ownership in Utah water law. Instead, it is uncertain whether the legislature believed that the public ownership provision in the 1903 irrigation bill implemented new law, codified common law, or enacted law pursuant to the constitution.

The passage of the 1903 irrigation bill, though significant, was not the only important water policy event in Utah that year. Six months after the irrigation bill passed, the Eleventh National Irrigation Congress convened in Ogden, Utah.<sup>80</sup> Though not bearing directly on Utah legislation, the proceedings in Ogden shed some light on professional understandings of public ownership of water at the time. Moreover, the meetings may also say something about the Utah legislators' understanding of public ownership. More than one-fifth of the Utah legislators who voted for the irrigation bill were among the official delegates to the Irrigation Congress.<sup>81</sup> Utah Senator David McKay, a leader in Utah water law,<sup>82</sup> helped to organize the convention.<sup>83</sup> The meaning to be derived from the proceedings may be limited, however, because the recently passed Utah public ownership law was not mentioned once on the record.<sup>84</sup>

That is not to say that public ownership was not a prominent theme in the proceedings. In fact, the delegates discussed public ownership of water both as a general theoretical proposition and as an aspect of Utah water management. George H. Maxwell, the Executive Chairman of the Congress, for example, introduced a resolution, which a majority of the delegates later adopted,<sup>85</sup> declaring that public ownership of water is the ideal.<sup>86</sup> Another speaker explained the

---

80. The annual irrigation congress meetings received widespread press and were among the most significant events of the day. The first meeting, held in Salt Lake City in 1891, was later described as the first time that Mormons and Gentiles "joined hands with equal enthusiasm and in utter forgetfulness of the differences of the past." William E. Smythe, *The Influence of Irrigation on the American Ideal*, in OFFICIAL PROCEEDINGS OF THE ELEVENTH NATIONAL IRRIGATION CONGRESS: HELD AT OGDEN, UTAH, SEPTEMBER 15-18, 1903, 182, 188-89 (Gilbert McClurg ed., 1904) [hereinafter 11TH IRRIGATION]. More than 1,200 delegates from thirty states and two foreign nations attended the 1903 Congress, including noteworthy leaders like Chief Forester Pinchot and Chief Engineer Newell. 11TH IRRIGATION, at 107, 124.

81. See *id.* at 117-22. See also Utah State Legislature, Utah State Legislators: Session 1903, <http://le.utah.gov/asp/roster/roster.asp?year=1903> (last visited Dec. 17, 2010). Senators serving as delegates included John M. Barnes, Henry Gardner, and Joseph R. Murdock. Delegate representatives included George H. Adams, John C. Child, Stephen L. Chipman, Asa R. Hawley, Archibald McFarland, Robert McKinnon, and David R. Roberts.

82. McKay was considered to be an expert in Utah irrigation. See, e.g., *Talked of Irrigation Law: Joint Session of Legislative Committees*, SALT LAKE TRIB., Feb. 20, 1896, at 8 (noting that Sen. McKay presided over discussion of irrigation issues); see also *Ogden Water Was in Senate*, *supra* note 777 (reporting on Sen. McKay debating water policy).

83. See 11TH IRRIGATION, *supra* note 80, at 5, 13.

84. See generally *id.* However, Nevada's public ownership law was discussed in detail. See A.E. Chandler, *The Irrigation Laws of Nevada*, in 11TH IRRIGATION, *supra* note 80, at 411, 412.

85. 11TH IRRIGATION, *supra* note 80, at 220. No Utah delegate opposed the resolution. *Id.* at 226-27.

86. *Id.* at 79.

importance of the “rights of the public in the control and disposal of public water supplies.”<sup>87</sup> Although indicative of general support for the policy of public ownership, these facts say little about the legal origins of public ownership of Utah water.

William E. Smythe, a leading thinker on irrigation and former president of the irrigation congress,<sup>88</sup> spoke specifically of public ownership of water in Utah, shedding some light on its origins.<sup>89</sup> Prophetically, he explained to the convention the story of Utah’s founders:

Standing there by the banks of City creek, in the midst of a boundless extent of rich but arid soil, they asked themselves this question: “In a place like this, where land is worthless without the artificial application of moisture, who should own the water — who should own the melting snow and the bubbling brook?”

The life of every man, woman and child in the party depended upon the answer. . . . If water in an arid land is property subject to private ownership, then the men having the strength or capital to take possession of that stream have the right to dictate the terms upon which their fellowmen should live.<sup>90</sup>

Smythe continued, “What then was City creek?”<sup>91</sup> He answered that “to the everlasting credit of the Mormon pioneers,”<sup>92</sup> they recognized the public importance of water for survival in an arid land, and that each has a right in such a vital resource.<sup>93</sup>

What bearing the convention proceedings have on the Utah Legislature’s understanding of the public ownership provision in the 1903 irrigation bill is subject to argument. The widespread emphasis on the importance of public ownership may help to further explain why that portion of the irrigation bill passed without debate. William E. Smythe’s account, however, suggests that some sense of public ownership of Utah water traces its origins back further than the 1903 bill. Even so, courts have repeatedly referred to the public ownership statute as legal authority for public ownership of Utah water.<sup>94</sup> The

---

87. Morris Bien, *Relation of Federal and State Laws to Irrigation*, in 11TH IRRIGATION, *supra* note 80, at 397, 399.

88. San Diego History Ctr., William Ellsworth Smythe (1861-1922), <http://www.sandiegohistory.org/bio/smythe/smythe.htm> (last visited Dec. 17, 2010). Smythe once astutely noted that “there never was, there is not now, and there never will be plenty of water.” Smythe, *supra* note 80, at 187.

89. Smythe, *supra* note 80, at 182.

90. *Id.* at 186.

91. *Id.*

92. *Id.*

93. *See id.*

94. *See, e.g.*, *Wrathall v. Johnson*, 40 P.2d 755, 767 (Utah 1935); *J.J.N.P. Co. v. Utah Div. of Wildlife Res.*, 655 P.2d 1133, 1136 (Utah 1982); *Conatser v. Johnson*, 194 P.3d 897, 899 n.2 (Utah 2008).

sponsor of HB 141 even noted this fact when voicing his support for the bill.<sup>95</sup>

## B. JUDICIAL INTERPRETATIONS

The Utah Supreme Court's water law jurisprudence is consistent with William Smythe's account, which suggests that there may be more to the story of public ownership than simple statutory declarations. In February 1902, more than a year before the legislature declared public ownership of water, Utah's highest court expressly understood the public to own naturally flowing waters.<sup>96</sup> The theme of public ownership of water independent of statutory authority appears also not long after the legislative codification. In 1925, for example, the Utah Supreme Court explained that "[u]nder the statute, *and before its enactment*, it is and was settled doctrine in arid and semiarid sections of our country that the corpus of the water of a natural stream was not subject to private ownership but was the property of the public."<sup>97</sup> In *Riordan v. Westwood*, Justice Wolfe reiterated this principle by stating that all unappropriated waters of the state "are, and *have always been*, public waters."<sup>98</sup> Interpreting the statutory declaration of public ownership when it was expanded to groundwater in the 1950s, the Utah Supreme Court again affirmed its belief in an independent, alternative basis for public ownership, asserting that public ownership of ground water "has probably always been the law of this state."<sup>99</sup>

The source of this independent basis for public ownership is a point on which Utah courts have not been clear. In *Oldroyd*, for example, the court simply asserted "[w]e all know" that public ownership is "settled doctrine."<sup>100</sup> The *Salt Lake Water & Elec. Power Co.* court provided more support for its argument, basing its assertion of an independent basis for public ownership on prior appropriation principles.<sup>101</sup> Justice Wolfe's separate opinion in *Riordan* elaborates upon this idea of public ownership as a necessary condition for prior appropriation.<sup>102</sup> He explained that "the legislature at various times concerned itself with different categories of public waters by extending to them certain statutory requirements in order to appropriate said waters."<sup>103</sup> Justice Wolfe went on:

---

95. See McIff, *supra* note 15.

96. See *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 67 P. 672, 677 (Utah 1902) (explaining that unappropriated water belongs coequally to the public and remains so until capture in artificial ditches or reservoirs). This same case supported the Utah Supreme Court's analysis in *J.J.N.P.*, 655 P.2d at 1136.

97. *Oldroyd v. McCrea*, 235 P. 580, 584 (Utah 1925) (emphasis added).

98. *Riordan v. Westwood*, 203 P.2d 922, 932 (Utah 1949) (Wolfe, J., concurring in part, dissenting in part) (emphasis added).

99. *Fairfield Irrigation Co. v. Carson*, 247 P.2d 1004, 1007 (Utah 1952).

100. *Oldroyd*, 235 P. at 584.

101. See *Salt Lake Water & Elec. Power Co.*, 67 P. at 677.

102. See *Riordan*, 203 P.2d at 932.

103. *Id.*

The legislature did not, by a declaration, make public what were previously non-public waters. It simply extended to all public waters the necessity of application to the state engineer in order to appropriate. . . . They were always public until appropriated by diligence or by application, when the latter was made the necessary method of appropriation.<sup>104</sup>

Justice Wolfe's point, then, is that public ownership is a necessary antecedent to appropriative rights. Were unappropriated water not owned by the public, an appropriation would constitute a trespass against the non-public owner. But, because water in its natural state belongs to all, it is available to each to be put to beneficial use.

This explanation, however, raises further questions about the legal origin of public ownership. If prior appropriation law necessarily entails public ownership, and that law predates the 1903 irrigation bill, then what is the source of that law? Is it merely common law, subject to legislative modification? Moreover, is public ownership so inextricably linked to prior appropriation doctrine that public ownership cannot be removed without changing prior appropriation itself? Because the Utah Constitution does not expressly guarantee that prior appropriation will be the system of water appropriation, the Utah legislature could presumably do away with prior appropriation, subject to existing vested rights. However, even if the Utah legislature could not do away with prior appropriation altogether, could it nevertheless define the contours of public ownership as long as the definition is consistent with prior appropriation? Arguably, this is exactly what the legislature did in passing HB 141.

### C. CONSTITUTIONAL FOUNDATIONS

The Utah Constitution provides 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.”<sup>105</sup> The irrigation article, as it was known,<sup>106</sup> is unique among water amendments to western states’ constitutions because it does not expressly provide for public ownership of water.<sup>107</sup> Understanding the meaning of this provision, which on its face protects the water rights status quo at the time of statehood, requires a careful analysis of Utah’s constitutional history.<sup>108</sup>

---

104. *Id.*

105. UTAH CONST. art. XVII, § 1.

106. *See The Irrigation Article, supra* note 76.

107. *Compare* UTAH CONST. art. XVII, § 1, *with* COLO. CONST. art. XVI, § 5, *and* IDAHO CONST. art. XV, § 1, *and* WYO. CONST. art. VIII § 3. The Utah Constitution is unique among western states’ constitutions also because it does not clearly guarantee that prior appropriation will govern water supply management.

108. *See* *Am. Bush v. S. Salt Lake*, 140 P.3d 1235, 1240 (Utah 2006) (citing *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring)) (explaining that the constitution “is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them”):



It took nearly half of a century of effort and at least seven constitutional drafts for Utah to achieve statehood. The final, 1895 constitution followed "an eclectic model," drawing on "numerous" sources, including previous draft Utah constitutions and the constitutions of many other states, including Washington, Idaho, Montana, Colorado, and Wyoming.<sup>109</sup> Because the 1895 convention delegates were able to rely so extensively on the work of both previous Utah conventions and the drafters of others states' constitutions, the convention involved little serious debate.<sup>110</sup>

Yet, the text proposed for Utah Constitution article XVII generated noteworthy discussion. The first proposal for a water amendment to the 1895 Utah Constitution borrowed, essentially verbatim, from the Wyoming Constitution and included a declaration that all waters in the state are the property of the state.<sup>111</sup> Utah citizens feared that in declaring state ownership of water, the amendment would eliminate vested private rights to appropriate and use water.<sup>112</sup> The subcommittee that proposed the text tried to clarify the misunderstanding, explaining that the text did not intend to eradicate existing usage rights and that the amendment included an express protection of those rights.<sup>113</sup> The commission went forward with the original text, which declared state ownership and protected existing rights, submitting it to the constitutional convention.<sup>114</sup> But public fear and confusion persisted, and the convention eventually rejected the proposed text. Instead, the drafters provided only the following vague, constitutional mandate on water: "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."<sup>115</sup>

This piece of history could mean that the Utah Constitution does not provide for public ownership of water. That conclusion, however, reasons too far from the facts. At most, article XVII is ambiguous with respect to public ownership, for it neither affirms nor denies it. The rejection of the Wyoming public ownership text does not fully elucidate the meaning of article XVII, for it proves only that the adopted text intended to clarify that vested appropriation rights would

---

109. Thomas G. Alexander, *Utah's Constitution: A Reflection on the Territorial Experience*, 64 UTAH HIST. Q. 264 (1996).

110. John J. Flynn, *Federalism and Viable State Government — The History of Utah's Constitution*, UTAH L. REV. 311, 323 (1966). Of notable contention among the delegates, however, was the issue of seating arrangements. Stanley S. Ivins, *A Constitution for Utah*, 25 UTAH HIST. Q. 95, 101 (1957). A serious issue that received considerable, heated debate was women's suffrage. *Work of the Committees: Elections and Suffrage Clauses — Irrigation Questions*, SALT LAKE TRIB., Mar. 14, 1895, at 5.

111. See *The Irrigation Article*, *supra* note 76.

112. See *id.*; see also *Confiscation of Water: Cache County Farmers Utterly Opposed to It*, SALT LAKE TRIB., Mar. 12, 1896, at 5. Even the full committee was uncertain of the meaning of a declaration of public ownership. See *Work of the Committees*, *supra* note 110.

113. *The Irrigation Article*, *supra* note 76, at 11; *Farmers Need Not Be Alarmed*, DESERET NEWS, Mar. 30, 1895, at 8.

114. See *Irrigation in the Constitution*, DESERET NEWS, Apr. 6, 1895, at 11.

115. UTAH CONST. art. XVII, § 1.

not be confiscated. The most persuasive reading of article XVII, which gives a plain meaning to its text,<sup>116</sup> is that the article merely reaffirms the status quo with respect to ownership of water. Interpreting the water provision requires, thus, analyzing not only the text rejected from the irrigation article, but also the status quo, which the language of the constitution reaffirms. From this analysis, it becomes clear that the water management status quo at the time of statehood included a general understanding of public ownership of water accompanied by usufructuary rights to the use thereof.

The 1895 constitution was very much a product of the historical experience of early Utahns,<sup>117</sup> and in that history we find some of the meaning the drafters intended to attribute to the irrigation article. Irrigation began in Utah at the pioneer camps on City Creek.<sup>118</sup> The pioneers recognized that “[i]n an arid land water is natural wealth essential to the existence of every human being.”<sup>119</sup> Accordingly, small appropriations of water were the rule of irrigation,<sup>120</sup> with each person “entitled to so much of it as he may apply to a beneficial use, but not a single drop [more].”<sup>121</sup> The Utah District Law of 1865 is the first law regulating Utah water, representing the transition from a common law rule of capture to a regulated system of administration.<sup>122</sup> Utah water law remained publicly oriented, emphasizing community control, rights, and interests throughout territorial times.<sup>123</sup>

As one authority remarked, “the way water law developed in the Territory of Utah was unique in the West.”<sup>124</sup> Utah water law strongly emphasized community interests and public ownership.<sup>125</sup> Evidencing this originality, Brigham Young famously pronounced in 1848 — a year before the drafting of Utah’s first constitution — that “[t]here shall be no private ownership of the streams that come out of the canyons, nor the timber that grows in the hills. These belong to the

---

116. See, e.g., *Am. Bush v. S. Salt Lake*, 140 P.3d 1235, 1240 (Utah 2006) (explaining that constitutional interpretation begins with the “plain meaning” of the text).

117. See Alexander, *supra* note 109, at 281.

118. See ORSON F. WHITNEY, *POPULAR HISTORY OF UTAH* 547 (1916); see also Smythe, *supra* note 80.

119. Smythe, *supra* note 80, at 186.

120. WHITNEY, *supra* note 118, at 547-48.

121. Smythe, *supra* note 80, at 186.

122. See CHARLES H. BROUGH, *THE ECONOMIC HISTORY OF IRRIGATION IN UTAH* 148, 150-51 (1898). Brough observed that under the regulated system “water is the common property of all the people.” *Id.* at 148. He traced this concept to Justinian law, and concluded that public ownership is the foundational principle of water rights regulation. *Id.* at 160.

123. See JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 328 (4th ed. 2006); see also Robert Swenson, *A Primer of Utah Water Law: Part I*, 5 J. ENERGY L. & POL’Y 165, 167 (1984); Howard R. Lamar, *Statehood for Utah: A Different Path*, 39 UTAH HIST. Q. 307, 310 (1971) (emphasizing the communitarian nature of early Utah social norms).

124. Swenson, *supra* note 123, at 166.

125. See LEONARD J. ARRINGTON, *GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS, 1830-1900*, at 52-53 (2004) (explaining how Mormon stewardship principles directed natural resource management).

people: all the people.”<sup>126</sup> Young’s proclamation indicates an emphasis on community values and an orientation toward natural law permeating early Utah society.<sup>127</sup>

Although Utah’s communal treatment of water was exceptional, Utah’s founders’ strong orientation to natural law was typical of legal thinkers of the time. As one scholar noted, Utah was founded on the idea that sovereignty derives “from natural rights consistent with human intelligence and liberty.”<sup>128</sup> Natural law arguments appear also throughout the Utah Supreme Court’s decisions on public ownership of water. In *Adams v. Portage Irrigation, Reservoir & Power Co.*, for example, Justice Larson offered the following natural law explanation:

These waters are the gift of Providence: they belong to all as nature placed them or made them available. They are the waters flowing in natural channels or ponded in natural lakes and reservoirs. The title thereto is not subject to private acquisition and barter, even by the federal government or the state itself . . . no title to the corpus of the water itself has been or can be granted, while it is naturally flowing, any more than it can to the air or the winds or the sunshine.<sup>129</sup>

In *Justesen v. Olsen* the court followed similarly naturalistic reasoning, stating “There can be no more ownership of water moving through the soil than there can be of ownership of water moving across the surface. It is evasive and constantly changing. In either case any use must of necessity be in its nature usufructory [*sic*] only.”<sup>130</sup> This orientation toward the public ownership of water has deep legal roots, tracing its origin to early English common law and Blackstone, who explained that “water is a movable, wandering thing, and must of necessity continue common by law of nature; so that I can only have a

126. THOMAS V. CECH, *PRINCIPLES OF WATER RESOURCES* 262 (2009); ARRINGTON, *supra* note 125, at 52; ROBERT DUNBAR, *FORGING NEW RIGHTS IN WESTERN WATERS* 13 (1983). Although many authors cite to this quotation, their investigations did not reveal its location in the historical record. As one author also noted, while Brigham Young always acknowledged the importance of public ownership of water, he and the early Deseret legislature regularly granted exclusive rights to private use. See Swenson, *supra* note 123, at 166.

127. Brigham Young, however, was not the only leader to recognize the necessity of public ownership of water in western states. President Theodore Roosevelt even said that “[i]n the arid States the only right to which water should be recognized is that of use.” SAMUEL C. WEIL, *WATER RIGHTS IN THE WESTERN STATES* § 63, at 125-26 (2d ed. 1908) (internal citation omitted). Also indicative of these attitudes is *Monroe v. Ivie*, 2 Utah 535 (Utah Terr. 1880), where the territorial court declared that “the lands are open to all, and the appropriation of the water is open to all.”

128. Alexander, *supra* note 109, at 270. Alexander notes that the 1862 constitutional convention grounded its entire argument for statehood on the naturalistic ideal of self-rule as an “unquestioned right.” *Id.*

129. *Adams v. Portage Irrigation, Reservoir & Power Co.*, 72 P.2d 648, 652-53 (Utah 1937).

130. *Justesen v. Olsen*, 40 P.2d 802, 805 (Utah 1935); see also *Riordan v. Westwood*, 203 P.2d 922, 929 (Utah 1949). Both of these cases were overruled on other grounds. See *Fairfield Irrigation Co. v. Carson*, 247 P.2d 1004, 1007 (Utah 1952) (explaining that a statutory provision for prior appropriation superseded the holdings of *Justesen* and *Riordan* with respect to correlative groundwater rights).

temporary, transient, usufructuary, property therein.”<sup>131</sup> Although Blackstone’s reasoning can be applied to all water allocation systems, including the riparian systems of the eastern United States, it appears frequently as a component of water law in western prior appropriation states,<sup>132</sup> where scarcity necessitates limits to the private control of water.

The framers of the Utah constitution reaffirmed this orientation towards natural law and cultural understanding of public ownership in article XVII. The plain language of article XVII reaffirms the water rights and ownership status quo at the time of statehood, recognizing and confirming “[a]ll existing rights to the use of any of the waters in this State for any useful or beneficial purpose.”<sup>133</sup> It is difficult to conceptualize how Utah’s founders could have understood this reaffirmation of the prior appropriation system without the widely understood principle of public ownership that had always inhered in Utah water law. The Utah Supreme Court has rightly recognized this fact before, explaining that the “right of the public, as well as the rights of the appropriator, were confirmed by the State Constitution in article 17.”<sup>134</sup> This reading of article XVII finds support both in precedent and in the breadth of historical authority. And, this confirmation of public rights in article XVII may be the independent and alternative basis for public ownership of Utah’s waters.

Opponents can argue, however, that Utah Constitution article XVII says nothing about public ownership of water. The framers’ rejection of the proposed public ownership text provides noteworthy support for this position. Even so, substantial evidence suggests that the irrigation amendment may in fact entail some notion of public ownership, if only as a condition of the prior appropriation system of water management. In either case, the question is constitutional and therefore appropriate for judicial inquiry.

#### IV. THE CONSTITUTIONALITY OF HB 141

The possibility of a constitutional foundation for public ownership of water raises questions concerning the validity of HB 141. The Utah Constitution establishes tripartite government, dividing powers among the legislative, executive, and judicial branches, and provides that “no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others.”<sup>135</sup> Accordingly, the judicial power is vested in the

---

131. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 18. The Utah Supreme Court recited Blackstone’s language essentially verbatim in *Adams*, 72 P.2d at 653. See also *In re Bear River Drainage Area*, 271 P.2d 846, 852 (Utah 1954) (Ellett, J., dissenting).

132. See, e.g., *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1076 (Mont. 1933); *Van Sickle v. Haines*, 7 Nev. 249, 1872 WL 3542, at \*5.

133. UTAH CONST. art. XVII, § 1.

134. *Adams*, 72 P.2d at 653.

135. UTAH CONST. art. V, § 1.

Supreme Court,<sup>136</sup> and the legislative power is vested in the Senate, the House of Representatives, and the people of Utah.<sup>137</sup> By mandating separation of powers and vesting the judicial power solely in the courts, the Utah Constitution “preserves the sanctity of the judiciary and helps to ensure that the rule of law, and not political partisanship or transient majoritarian preferences, shall govern in our courts.”<sup>138</sup>

The judicial power includes the authority to hear and determine controversies arising between adverse parties,<sup>139</sup> as well as exclusive jurisdiction to interpret the constitution.<sup>140</sup> As ultimate arbiter of the constitution, the Utah Supreme Court holds the power to invalidate legislation defying the constitution, including legislative acts that violate the separation of powers.<sup>141</sup>

HB 141 purports to interpret article XVII, asserting that public ownership of water is purely statutory, even though both constitutional history and Utah Supreme Court precedent suggest a different understanding. The Act states in relevant part that “general constitutional and statutory provisions declaring public ownership of water and recognizing existing rights of use are insufficient to overcome the specific constitutional protections for private property and do not justify inviting widespread unauthorized invasion of private property for recreation purposes.”<sup>142</sup> Interpreting the meaning of article XVII and its relationship with the Utah Constitution’s protections for private property is the province not of the Utah House of Representatives, Senate, or Governor, but of the Utah Supreme Court. In attempting to call into question the legal bases of *J.J.N.P.*,<sup>143</sup> which relied in part for its decision on the doctrine of public ownership, HB 141 may intrude upon the judiciary’s exclusive authority to interpret the constitution, violating the separation of powers commanded by Utah Constitution article V.

But, the separation of powers analysis may also be more nuanced, if article XVII provides only a very basic protection for public ownership of water. In such a case, it remains open to discussion whether the constitutional separation of powers requires that the responsibility for defining the contours of public ownership rest solely with the Utah courts, or if instead the Utah legislature may also act in this arena, so long as the judiciary ensures retention of the ultimate nature of public ownership.

---

136. *See id.* art. VIII, § 1.

137. *See id.* art. VI, § 1(1).

138. *In re Young*, 976 P.2d 581, 602 (Utah 1999).

139. *See Timpanogos Planning & Water Mgmt. Agency v. Cent. Utah Water*, 690 P.2d 562, 569 (Utah 1984).

140. *See, e.g., Rampton v. Barlow*, 464 P.2d 378, 390 (Utah 1970).

141. *See id.* (invalidating legislation on separation of powers grounds).

142. UTAH CODE ANN. § 73-29-103(2) (2010).

143. *See id.* § 73-29-103(3).

### CONCLUSION

Drawing the line separating private property from public rights is always controversial, as Utah's stream wars make evident. The controversial and potentially unsettling nature of dividing public from private is likely the reason that courts have shied away from navigability in fact claims,<sup>144</sup> which could convert property that riparian owners have long believed to be private into public ownership. Instead, courts have preferred public recreational easements as an alternate way to resolve these public access cases. The story of *Conatser* and HB 141 makes clear that even recreational rights can have unsettling, controversial effects, and that courts might create more enduring certainty by addressing, rather than dodging, navigability claims.

Which branch of Utah government ultimately has the power to decide the nature and extent to which recreational rights inhere in Utah water law is uncertain. If public ownership is purely statutory, then HB 141 should withstand a separation of powers challenge based on article XVII. However, if public ownership is rooted in the Utah Constitution, as Utah precedent and constitutional history suggest, then the Utah Public Waters Access Act raises serious and challenging constitutional separation of powers concerns.

---

144. In *J.J.N.P.*, for example, the state asserted a navigability claim, which the court set aside with little explanation even though a finding of navigability would have disposed of the case. See 655 P.2d at 1136. See also *Day v. Armstrong*, 362 P.2d 137, 143-44 (Wyo. 1961) (refusing to address navigability claims).

