THE PUBLIC RIGHT TO FLOAT THROUGH PRIVATE PROPERTY IN UTAH: *CONATSER V. JOHNSON*

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I. INTRODUCTION

In the summer of 2008, the Utah Supreme Court addressed the scope of the public's easement in state waters.[1] Specifically, the Court determined "whether the easement, which allows the public to engage in recreational activities in state waters, also allows the public the right to touch the privately owned beds below those waters."[2] The Supreme Court ruled that "[t]he district court [had] incorrectly interpreted the scope of the public's easement in state waters so as to limit the Conatsers' rights to being upon the water and to touching the privately owned bed of the Weber River only in ways incidental to the right of floatation."[3] In its decision, the Supreme Court found that under Utah law, the public has the right to "engage in all recreational activities that *utilize* the water" and that this right is not limited to "activities that can be performed *upon* the water."[4] While riparian land owners may see the *Conatser* ruling as a major step backwards in the protection of their property rights, recreation enthusiasts are likely to view the holding in this case as the right interpretation of the public's easement over state waters in Utah.[5] As the Court emphasized in its *Conatser* ruling, by statute all waters in Utah are property of the public.[6] Under such a "doctrine of public ownership,"[7] the public has an "easement over the waters regardless of who owns the water bed beneath."[8]

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[1] Conatser v. Johnson, 194 P.3d 897 (Utah 2008).

[2] *Id.* at 898.

[3] *Id.* at 903. The Conatsers were the plaintiffs. They had been found guilty of criminal trespass by the Morgan County [Utah] Justice Court and had appealed, but the State had dismissed their appeal, "finding that there was 'uncertainty regarding the Conatsers' status as trespassers.'" *Id.* at 899. The Conatsers then filed a civil action in the Second District Court to seek a judicial determination of their rights to float and engage in other recreational activities on the Weber River. *Id.*

[4] *Id.* at 901.

[5] The term "riparian land" is usually used in connection with "land that has particular physical relation to a watercourse or lake." Specifically, "riparian land" is a "tract of land that borders a watercourse or lake, whether or not it includes a part of the bed of the watercourse or lake." The "riparian landowner" has "certain rights and privileges in relation to the water that other persons do not have or do not have to the same extent." RESTATEMENT (SECOND) OF TORTS § 843 cmt. b (1979). A "riparian landowner" is "a person who is in possession of riparian land or who owns an estate therein." RESTATEMENT (FIRST) OF TORTS § 844 (1939).

[6] *Conatser*, 194 P.3d at 899.

[7] *Id.*

[8] *Id.*

The *Conatser* ruling resolved two issues: first, whether it is criminal trespass for members of the public to float on state waters through private property; and second, whether recreational users who float through private property on the state waters and touch the beds and banks of these streams are subject to being dragged into court by riparian land owners and charged with civil liability.[9]

This note examines *Conatser* and how it is likely to affect the continuing conflict between recreational users of the state's waters and riparian landowners. The note begins in Part II with an examination of the concept of navigability and its relationship to the ownership of waterbeds, and explores navigability in Utah and its role in the determination of ownership rights in the state's waterbeds. Part III briefly examines the law of servitudes and easements. The public's right to float on state waters is explored in Part IV. Part V outlines the factual and legal issues before the Utah Supreme Court in *Conatser*. Part VI tackles the issue of "reasonable use," which is at the core of the Court's decision in *Conatser*. Part VII critically assesses the court's *Conatser* decision and concludes that while the Supreme Court's decision may appear to resolve the feud between the Conatsers and the Johnsons, it has failed to deal in an effective and definitive way with the conflict between recreational enthusiasts and riparian landowners in Utah. The conflict between the Conatsers and the Johnsons, which is a microcosm of the continuing conflict between users of Utah waters and riparian landowners, is one of control over property rights. The *Conatser* Court essentially granted the public *open access* to private property and created the potential for excessive exploitation and abuse of such property. The *Conatser* decision exacerbates rather than resolves the long-standing conflict between the two groups—recreational users of the state's waters and riparian landowners. The effective solution to this conflict calls for a return of the control of access to privately-owned streambeds to landowners. The public will still be able to exercise those rights granted by the easement. However, if they want to engage in activities that require non-incidental access to privately-owned streambeds, they must seek permission from the private owners of these streambeds. The legislature should define those uses that are incidental to the public's exercise of the easement that grants it the right to use Utah waters for recreational purposes. This approach should bring stability to the law in this area and minimize conflict between riparian landowners and recreation enthusiasts.

II. NAVIGABILITY AND THE OWNERSHIP OF WATER BEDS

In dealing with issues of the navigability of a watercourse, the first question to answer is whether the determination should be made applying federal or state law.[10] The decision is influenced by the navigability determination.[11] Federal law

[9] *Compare* Day v. Armstrong, 362 P.2d 137 (Wyo. 1961), for the rule in Wyoming; *with* People v. Emmert, 597 P.2d 1025 (Colo. 1979), for the rule in Colorado.

[10] John R. Hill, Jr., *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331, 341 (2001).

[11] The U.S. Supreme Court has noted that "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked

is applicable when one is attempting to determine if the watercourse in question is subject to federal regulation, whether "admiralty and maritime jurisdiction applies" and who owns title to the waterbed.[12] State law is used to determine the nature and extent of public use of waters within the state, and states may choose to base their navigability tests on their constitutions or specific statutes and case law.[13] In Utah, the navigability of a waterway is determined by statute and case law.[14]

Utah uses navigability as a standard "to determine title to [the state's] waterbeds."[15] However, the public's right to float on Utah waters is not based on ownership of the state's waterbeds or navigability but on the "doctrine of public ownership," which, according to the Supreme Court, grants the public "an easement over the water regardless of who owns the water bed beneath."[16] 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."[17]

A. The Federal Navigability Test

An early U.S. Supreme Court case rejected the English common law definition of navigability, which limited navigability to waters that were influenced by the ebbs and flows of the tides because most of the watercourses in the United States that were critical to interstate and foreign commerce were inland waters not subject to the tides.[18] The main issue that the Supreme Court determined in *The Daniel Ball* was whether Michigan's Grand River was a navigable water of the United States within the meaning of the acts of Congress which regulated navigation.[19] The Court adopted a different test for navigability in the United States and held that:

> [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they

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in a particular case." Kaiser Aetna v. United States, 444 U.S. 164, 171 (1979) (internal quotation marks omitted).

[12] Hill, *supra* note 10, at 341.

[13] *Id*. at 342.

[14] First, by statute, the Utah State Legislature has decreed as follows: "[a]ll 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 (2008). Second, the Utah Supreme Court has held that "[t]o be navigable a water course must have a useful capacity as a public highway of transportation. . . . It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means." Monroe v. State, 175 P.2d 759, 761 (Utah 1946).

[15] J.J.N.P. Co. v. State, 655 P.2d 1133, 1136 (Utah 1982).

[16] Conatser v. Johnson, 194 P.3d 897, 899 (Utah 2008) (internal quotation marks omitted).

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

[18] The Daniel Ball, 77 U.S. 557, 562-563 (1870); s*ee also* Lori Potter, Steven Marlin & Kathy Kanda, *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER L. REV. 457, 459 (2002).

[19] *The Daniel Ball*, 77 U.S. at 562.

> are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[20]

The Court thus rejected the English common law test for navigability, holding instead that "[h]ere [in the United States] the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of navigability of waters," and set forth a test for navigability in fact for public use.[21] Thus, the test for navigability in the United States is that a navigable stream or water course is one which, in its "natural and ordinary condition," is capable of being utilized as a "highway" for trade and travel.[22] As long as the stream or water course is "susceptible of being used" as a "highway" for trade and travel, it is navigable even if occasionally it cannot be effectively accessed for commercial and travel purposes.[23]

The Daniel Ball Court also defined what constitutes "navigable waters of the United States" and distinguished them from "navigable waters of the States."[24] To qualify as a "navigable water of the United States," a water that is navigable in fact must be in use or susceptible of being used for interstate or foreign commerce.[25]

The Utah Supreme Court has held that "[t]o be navigable a water course must have a useful capacity as a public highway of transportation."[26] The *Monroe* Court relied on an 8th Circuit opinion in a 1906 Louisiana case in which the court discussed the element of "usefulness" as being critical to the definition of navigability.[27] According to the 8th Circuit, "[t]o meet the test of navigability as understood in American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs."[28] The 8th Circuit went on to argue that "[a] theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient."[29] A

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[20] *Id*. at 563.
[21] *Id*.
[22] United States v. State of Utah, 283 U.S. 64, 76 (1931).
[23] *Id*.
[24] *The Daniel Ball*, 77 U.S. at 563.
[25] *Id*.
[26] Monroe v. State, 175 P.2d 759, 761 (Utah 1946).
[27] Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906).
[28] *Id*.
[29] *Id*. at 784.

watercourse need not be continuous to be classified as navigable.[30] It must, however, "continue long enough to be useful and valuable in transportation . . . ."[31]

The *Monroe* Court adopted the 8th Circuit's approach to the determination of navigability and agreed that for a watercourse to be defined as navigable, it must be used for commerce and have "practical usefulness to the public as a public highway in its natural state and without the aid of artificial means."[32] There are three distinguishable types of navigability: navigable for federal purposes, navigable for title, and navigable for use (also called "navigable for state purposes" or "state navigability"), which will be discussed in the next section.[33]

B. The Federal Navigable Servitude

In English common law, navigable watercourses could not be owned privately.[34] Ownership of such streams was vested in the Crown in order to protect the right of the public to use them for commerce.[35] The origin of the federal navigational servitude can be traced to English common law and is incorporated into the U.S. Constitution's Commerce Clause.[36] It grants the federal government "the power to regulate activities affecting commerce."[37] As has been held by the U.S. Supreme Court, "[i]t is well settled that, under the Commerce Clause, U.S. Const. Art. I, s. 8, Cl. 3, the United States has the power to improve its navigable waters in the interest of navigation without liability for damages resulting to private property within the bed of the navigable stream."[38]

The U.S. Supreme Court has explained the federal navigational servitude as follows: "all land within the bed of a navigable stream is subject to a servitude in favor of the United States, relieving it from liability for damages to such land resulting from governmental action in the interest of navigation."[39] Hence, if any federal government action to improve the "navigable waters of the United States" in an effort to foster interstate and foreign commerce damages private interests in these navigable waters, the government is not liable because "such loss [is] covered by the Government's dominant power to change the river's level in the interest of navigation."[40] The "navigable water(s) of the United States," hence, are subject to the federal navigational servitude.[41]

Although the Court had, through a series of cases, established that private interests in the "navigable waters of the United States" are not absolute but are

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[30] *Id*.
[31] *Id*.
[32] *Id*. at 783-784. *See also* Conatser v. Johnson, 194 P.3d 897, 900 (Utah 2008).
[33] Potter et al., *supra* note 18, at 461.
[34] *Id*.
[35] *Id*. at 461.
[36] U.S. CONSTITUTION, ART. I, § 8, cl. 3.
[37] Potter et al., *supra* note 18, at 462.
[38] United States v. Kansas City Life Ins. Co., 339 U.S. 799, 804 (1950).
[39] *Id*. at 806.
[40] *Id*. at 807.
[41] Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

subject to a federal navigational servitude, the latter does not grant the federal government "a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation."[42] Hence, the Court limited the federal government's ability to exercise its navigational servitude.[43]

C. Navigability in Utah and the Ownership of Waterbeds

In Utah, all state waters are owned by the public.[44] Several Utah Supreme Court decisions have reiterated the public's ownership of state waters.[45] In *J.J.N.P. Co. v. State*, the Court was called upon to decide whether the public had recreational rights in the waters of a lake that was surrounded entirely by privately-owned land. The Court held that the public did have recreational rights and went on to declare that "individuals have no ownership interest as such in natural waters, only the right to put the water to certain uses."[46]

According to Utah statutory law, "[a]ll 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 theoreof."[47] Under Utah's doctrine of public ownership, state waters are owned by the public which has an "easement over the water regardless of who owns the water beds beneath the water."[48] The Utah Supreme Court has held that in granting the public an easement over state waters, "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 . . . or permits the relocation of a stream."[49] Although the public owns state waters, "the beds that lie beneath those waters may be privately owned."[50]

In Utah, the standard used to determine title to the state's waterbeds is *navigability*. A body of water is navigable if it can be used for commerce and has "practical usefulness to the public as a public highway."[51] As the *Conatser* Court declared, if a stream or body of water is determined to be navigable, then the state owns its bed; if the body of water is non-navigable, "then its bed may be privately owned."[52] In addition, the Utah Supreme Court has ruled that, "[i]rrespective of the ownership of the bed and navigability of the water, the public, if it can obtain

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[42] *Id*. at 172.
[43] *Id*.
[44] UTAH CODE ANN. § 73-1-1 (2008).
[45] *See, e.g.*, Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648 (Utah 1937); Monroe v. State, 175 P.2d 759 (Utah 1946); and Conatser v. Johnson, 194 P.3d 897 (Utah 2008).
[46] J.J.N.P. Co. v. State, 655 P.2d 1133, 1135-36 (Utah 1982).
[47] UTAH CODE ANN. § 73-1-1 (2008).
[48] *J.J.N.P. Co.*, 655 P.2d at 1136.
[49] *Id*. *See also* UTAH CODE ANN. §§ 73-3-8 & 73-3-29.
[50] *Conatser*, 194 P.3d at 900.
[51] *Id*. (internal quotation marks omitted).
[52] *Id*.

lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water."[53]

The Utah Supreme Court has held that "[w]aters [in Utah] are of two classes, public waters and private waters."[54] Title to public waters "is in the public; all are equal owners; that is, have coequal rights therein, and one cannot obtain exclusive control thereof."[55]

In Utah, under this doctrine of public ownership of state waters, the public has an "easement over the water regardless of who owns the water bed beneath."[56] State policy behind the granting of this easement to the public "recognizes an interest of the public in the use of state waters for recreational purposes."[57] Specific public recreational rights that fall within the easement include "the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water."[58] The Court has left unresolved the conflict between the rights of recreation enthusiasts and those of riparian landowners. The recent *Conatser* decision failed to resolve this conflict and leaves the state's riparian landowners at the mercy of recreational water users.

III. THE LAW OF SERVITUDES AND EASEMENTS

A. Servitudes and Easements

A servitude "is a legal device that creates a right or obligation that runs with land or an interest in land" and includes easements, profits, and covenants.[59] An easement can be defined as "an incorporeal hereditament or proprietary estate in land, conferring on its owner (in the absence of contrary intention) such ancillary rights as are reasonably necessary—as distinct from merely convenient—for the effective exercise and enjoyment of the right granted."[60]

The modern American definition of an easement has five elements.[61] According to a definition accepted by most U.S. jurisdictions,

> [a]n easement is an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land; (d) is not a normal incident of the possession of any land

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

[54] Adams v. Portage Irrigation, Reservoir & Power, Co., 72 P.2d 648, 652 (Utah 1937).

[55] *Id*.

[56] *Conatser*, 194 P.3d at 899.

[57] *Id*. (internal quotation marks omitted).

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

[59] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1 (2000) [hereinafter RESTATEMENT (THIRD)].

[60] KEVIN GRAY & SUSAN F. GRAY, ELEMENTS OF LAND LAW 620 (4th ed. 2005).

[61] RESTATEMENT OF PROPERTY § 450 (1944).

> possessed by the owner of the interest; and (e) is capable of creation by conveyance.[62]

What appears clear from these definitions is that there must be a servient estate or the land over which the easement is exercised or is capable of being exercised.[63] The easement entitles the owner "to exercise certain rights over the land of another."[64] Easements can be classified as either in gross or appurtenant.[65] An easement in gross, also called a personal easement, is one that benefits the owner of the easement personally regardless of whether the individual owns any real property or not.[66] An easement that grants the public the right to use state waters for recreational purposes, for example, would be an easement in gross since a member of the public does not have to own any land in order to exercise the right granted by the easement—that is, to float on state waters, fish, swim, and engage in other legal activities that involve those state waters.[67] On the other hand, an appurtenant easement "benefits the owner or possessor of a particular parcel of land."[68] Thus, "an easement appurtenant benefits the easement owner in the use of land belonging to that owner, but an easement in gross benefits the easement owner personally rather than in connection with use of land which that person owns."[69]

The operation of an easement appurtenant requires at least two parcels of land. The piece of land that is burdened by the easement is called the servient estate (or tenement).[70] The real property that is benefited by the easement is the dominant estate (or tenement).[71] Note, however, that it is the owners of the estates who are benefited or burdened when they exercise rights to use their property, not the estates.[72]

In the early years of the development of the law of easements, one of the most common easement was the "right of way" across servient land.[73] In addition to conferring on the owner of the dominant estate "a right to pass and re-pass along the way," the easement also granted its owner a variety of ancillary rights, which enhanced the ability of the owner to effectively utilize the easement as stipulated in the original grant.[74] The nature of the ancillary rights was determined by what was necessary for the grantee to repair, develop, and effectively make the

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[62] *Id*.

[63] GRAY & GRAY, *supra* note 60, at 621.

[64] E. H. BURN, MAUDSLEY & BURN'S LAND LAW: CASES AND MATERIALS 690 (8th ed. 2004).

[65] JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 671 (6th ed. 2006).

[66] *Id*.

[67] *See* J.J.N.P. Co. v. State, 655 P.2d 1133, 1135-36 (Utah 1982) (discussing the public easement in state waters in Utah).

[68] BARLOW BURKE & JOSEPH SNOE, PROPERTY: EXAMPLES & EXPLANATIONS 434 (2d ed. 2004).

[69] DUKEMINIER et al., *supra* note 65, at 671.

[70] *Id*.

[71] *Id*.

[72] BURKE & SNOE, *supra* note 68, at 434.

[73] GRAY & GRAY, *supra* note 60, at 654-655.

[74] *Id*. at 655.

improvements necessary to render the right of way "suitable for the reasonable accommodation or enjoyment of the dominant tenement."[75] During the last 150 years, there has been a significant increase in the types of these so-called affirmative easements and the extent to which they burden the servient estate.[76]

In terms of the public easement over state waters in Utah, the servient estate is held either by the state (if the waterbed in question is owned by the state) or the riparian landowner (if the waterbed is privately owned). The conflict, which the Supreme Court has failed in its many rulings to resolve, is between the public's desire to enjoy its dominant tenement and the riparian landowner's need to prevent unreasonable interference with the exercise of its property rights.[77]

B. The Law of Easements in Utah

In Utah, "[t]he accepted rule [in the state] is that the language of the grant is the measure and extent of the right created; and that the easement conveyed should be construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant."[78] According to the Utah Supreme Court, it has "many times considered and interpreted easements based on deeds, and the law in this state is plain: A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument."[79] It is well-established law in Utah that "a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed."[80] In addition, "when the deed creates an easement the circumstances attending the transaction, the situation of the parties, and the object to be attained are also to be considered."[81]

Utah courts have made it clear that the scope of an easement is determined by the terms of the grant and that "once the character of the easement has been fixed no material change or enlargement of the right acquired can be made if thereby a greater burden is placed on the servient estate."[82] Where the language of the grant speaks directly and clearly to the terms of the easement, the trial court has no discretion "to expand the terms of the easement."[83] Changing the character of the easement, once it has been fixed by the express terms of the grant, the Court reasoned, would allow for a use of the easement that may not be compatible with the interests of the servient estate owner.[84]

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[75] *Id*.

[76] DUKEMINIER et al., *supra* note 65, at 671.

[77] *See* Conatser v. Johnson, 194 P.3d 897 (Utah 2008) (discussing the scope of the incidental rights implied in the public's easement to use the waters of the state of Utah for recreational purposes).

[78] Weggeland v. Ujifusa, 384 P.2d 590, 591 (Utah 1963).

[79] Labrum v. Rickenbach, 711 P.2d 225, 227 (Utah 1985).

[80] Wood v. Ashby, 253 P.2d 351, 353 (Utah 1952).

[81] *Id*.

[82] Big Cottonwood Tanner Ditch Co. v. Moyle, 159 P.2d 596, 597 (Utah 1945).

[83] *Labrum*, 711 P.2d at 227.

[84] *Id*.

IV. THE PUBLIC'S RIGHT TO FLOAT ON STATE WATERS

The public right to use state waters for recreational purposes has been recognized in California, Idaho, Minnesota, Missouri, New Mexico, North Dakota, and Wyoming.[85]

Almost half a century ago, the Wyoming Supreme Court was called upon to determine the scope of public access to state waters in *Day v. Armstrong*.[86] Specifically, the Court was asked to determine the rights of plaintiffs and the public, "under applicable provisions of the Federal Constitution, the State [of Wyoming] Constitution, the laws of Wyoming, and judicial decisions, to go upon the channel, between its high water marks, and to float upon the waters of the North Platte River where it flows upon and across defendants' lands."[87] In this case, a citizen of Wyoming had asked the Court to declare that he and other members of the public were entitled to fish "either from a boat floating upon the river waters, or while wading the waters, or walking within the well-defined channel of" the North Platte River while it passed through and across privately owned land.[88] The Court granted the plaintiffs the right to fish *only by floating*, stating that because waters are not "in trespass upon or over the lands where they naturally appear, they are available for such uses by the public of which they are capable."[89] In addition, the Court held that "[w]hen waters are able to float craft, they may be so used."[90] Thus, in its ruling, the Wyoming Supreme Court limited the right of the public easement over state waters to the "right of floatation" *upon* the water.[91] The *Day* Court's ruling limited the public's right to engage in various recreational activities that involve use of the state's waters only to those activities that could be undertaken while the individual was lawfully floating—floating, of course, occurred *upon* the water.[92] According to the Court, "[i]rrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this State for floating usable craft and that use may not be interfered with or curtailed by any landowner."[93] The Court went on to say that the public has the right "to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful" while it is "lawfully floating in the State's waters."[94]

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[85] *See* People v. Sweetser, 72 Cal.App.3d 278 (Cal. App. 1977); People v. Mack, 19 Cal.App.3d 1040 (Cal. App. 1971; Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974); Johnson v. Seifert, 100 N.W.2d 689 (Minn. 1960); Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954); State v. Red River Valley Co., 182 P.2d 421 (N.M. 1945); Roberts v. Taylor, 181 N.W. 622 (N.D. 1921); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

[86] Day v. Armstrong, 362 P.2d 137, 138 (Wyo. 1961).

[87] *Id*. at 138-139.

[88] *Id*. at 140.

[89] *Id*. at 145.

[90] *Id*.

[91] *Id*. at 147.

[92] *Id*.

[93] *Id*.

[94] *Id*.

Nearly twenty years after the Wyoming decision, the Supreme Court of Colorado was called upon to address the same issue in *People v. Emmert*.[95] Specifically, the Court had to answer the following question: "Did the defendants have a right under section 5 of Article XVI of the Constitution of Colorado to float and fish on a non-navigable natural stream as it flows through, across and within the boundaries of privately owned property without first obtaining the consent of the property owner?"[96] According to Article XVI, § 5 of the Colorado Constitution, "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be a property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."[97] The defendants in this case were three children and one adult, who had started their float-trip on the Colorado River from public land but were later arrested when the party reached the stretch of the river that bisects the ranch of the Ritschard Cattle Company ("RCC") near the town of Parshall.[98] The defendants' rafts were designed with "leg-holes" in them to allow them to "extend their legs into the water below the rafts."[99] This innovation on the rafts "enabled the defendants as they floated down the river to touch the bed of the river from time to time to control the rafts, avoid rocks and overhangs, and to stay in the main channel of the river."[100] As the boaters crossed the RCC ranch, they touched the river's bed but they did not leave their rafts nor make contact with the shoreline or the banks of the river.[101]

None of the defendants had been permitted by the RCC to float on the stretch of the Colorado River that passed through the Ritschard ranch.[102] In fact, defendants Taylor and Wilson had earlier been warned that they were not permitted to float through the property.[103] However, this time, they were eventually placed under arrest by a deputy sheriff and later charged with third-degree criminal trespass.[104]

During the trial, the rafters argued that they had acted lawfully pursuant to Article XVI, section 5 of the Constitution of the State of Colorado.[105] The Court

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[95] People v. Emmert, 597 P.2d 1025, 1026 (Colo. 1979).

[96] *Id*.

[97] COLO CONST. art. XVI, §5.

[98] *Id*. *See also* Richard Gast, *People v. Emmert: A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247 (1981).

[99] *Emmert*, 597 P.2d at 1026.

[100] *Id*.

[101] *Id*.

[102] *Id*.

[103] *Id*.

[104] *Id*. The state of Colorado codified the charge of criminal trespass in COLO. REV. STAT. § 18-4-504 (2008). The statute states, "A person commits the crime of third degree criminal trespass if he unlawfully enters or remains in or upon premises." COLO. REV. STAT. § 18-4-504 (2008). The statute also defines "premises" to include "the stream banks and beds of any nonnavigable fresh water streams flowing through such real property." COLO. REV. STAT. § 18-4-504.5 (2008).

[105] According to COLO. CONST. art. XVI, § 5, "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the

ruled that section 5 did not grant the public the "right to the use of waters overlying private lands for recreational purposes without the consent of the owner."[106] The Court's reasoning was based on its earlier decision in *Hartman v. Tresie*[107] where it had held that the public did not have a right to fish in a non-navigable stream passing through private property without first obtaining permission from the owner.[108] Thus, under the Constitution of Colorado, there is not an independent right for the public to use non-navigable waters within the boundaries of privately-owned lands for recreation.[109] Members of the public intending to do so must first obtain permission from the private owner of the watercourse's bed.[110]

A. The Equal Footing Doctrine and the Public's Right to Float on State Waters

The Equal Footing Doctrine establishes each state's property interest in the beds of navigable waters in addition to any statutory provisions[111] that may also ensure this right.[112] According to this doctrine, when a territory within the United States gained statehood, title to lands beneath navigable waters within the new state's territory passed from the federal government to the state.[113] In *United States v. State of Utah*,[114] the U.S. Supreme Court held that,

> [i]n accordance with the constitutional principle of the equality of states, the title to the beds of rivers within Utah passed to that state when it was admitted to the Union, if the rivers were then navigable; and if they were not then navigable, the title to the river beds remained with the United States.[115]

Under this principle, title to beds of navigable rivers and streams passed to states upon admission to the Union and the United States retained title to beds of non-

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same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." *See also* Gast, *supra* note 98, at 248.

[106] *Emmert*, 597 P.2d at 1030. *See also* Gast, *supra* note 98, at 248.

[107] Hartman v. Tresie, 36 Colo. 146, 84 P. 685 (1906).

[108] *Emmert*, 597 P.2d at 1028. The Court held that "section 5, Article XVI of the Colorado Constitution was primarily intended to preserve the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded, rather than to assure public access to waters for purposes other than appropriation." *Id*.

[109] *Id*. at 1030.

[110] *Id*. at 1029. *See also* John R. Hill, Jr., *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. DENV. WATER L. REV. 331 (2001); Lori Potter, Steven Marlin, Kathy Kanda, *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 5 U. DENV. WATER. L. REV. 457 (2002); and Richard Gast, *People v. Emmert: A Step Backward for Recreational Water Use in Colorado*, 52 U. COLO. L. REV. 247 (1981).

[111] *E.g*., UTAH CODE ANN. § 73-1-1 (2008).

[112] For an analysis of the Equal Footing Doctrine, see for example, Potter et al., *supra* note 18, at 479. *See also* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

[113] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

[114] United States v. State of Utah, 283 U.S. 73, 75 (1931).

[115] *Id*.

navigable watercourses.[116]

Under the Equal Footing Doctrine, Utah acquired title to the beds of all navigable streams and rivers within its territory from the United States when Utah achieved statehood in 1896.[117] Since then, the Utah legislature has declared all waters in the state to be public property.[118] However, while the public owns all waters in the state, the beds that lie beneath these waters "may be privately owned."[119] The continuing controversy over the public's exercise of its easement over the waters of Utah arises in cases where the land beneath the waters is privately owned. Thus, riparian land owners such as the Johnsons in the *Conatser* case, believe that public exercise of its easement over state waters enfringes on their private property rights.

V. *CONATSER V. JOHNSON*: THE SCOPE OF THE PUBLIC'S EASEMENT IN STATE WATERS IN UTAH

Utah's private landowners have often argued that the public does not have the right to float on or have access to any state watercourse or stream that runs through their privately-owned property.[120] The problem usually arises when a floater begins a trip at a public access point and then has to cross parcels of private lands while still in his floating raft or canoe.[121] In this scenario, the question is whether the riparian landowner may legally deny the floater the right to float on that stretch of the river falling within his land. In Utah, the courts have ruled that, regardless of who owns the beds of state waters, the public has an easement to use state waters.[122] Hence, the floater who begins his trip at a public access point does have, under Utah law,[123] the right to *reasonably* utilize the floatable stretch of the river that crosses private lands.[124] However, the scope of the public's easement remained to be explicitly interpreted by the courts. Specifically, it was necessary for the courts to determine whether this easement allows the public to touch the privately owned beds in state waters.

By statute, all waters in Utah are "the property of the public."[125] It is this doctrine of public ownership that governs how the "State regulates the use of water for the benefit and well being of the people."[126] If a watercourse is determined to be navigable, then the state owns the bed; however, if the watercourse is non-navigable, then "its bed may be privately owned."[127] Regardless of who owns the

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[116] Gable v. Angle, 7 F.Supp. 967, 969 (W.D. Okl. 1933).
[117] *Utah*, 283 U.S. at 75. *See also Gable*, 7 F. Supp. at 969.
[118] UTAH CODE ANN. § 73-1-1 (2008).
[119] Conatser v. Johnson, 194 P.3d 897, 900 (Utah 2008).
[120] *Id*. at 898-899.
[121] *Id*.
[122] *Id*. at 900.
[123] *Id*.
[124] *Id*.
[125] UTAH CODE ANN. § 73-1-1 (2008).
[126] J.J.N.P. Co. v. State, 655 P.2d 1133, 1136 (Utah 1982).
[127] *Conatser*, 194 P.3d at 900.

stream's bed, as well as whether the stream is navigable or non-navigable, a public easement to use the water exists.[128] The case, *Conatser v. Johnson*,[129] gave the Utah Supreme Court the opportunity to elaborate on the scope of the public's easement in state waters.[130] Specifically, the Court "determine[d] whether the easement, which allows the public to engage in recreational activities in state waters, also allows the public the right to touch the privately owned beds below those waters."[131]

In early June 2000, the Conatsers decided to take a float-trip down the Weber River.[132] Using a rubber raft, the Conatsers entered the river at a public access point and proceeded to float down river, eventually crossing parcels of private real property owned by the Johnsons.[133] While floating on the stretch of river that crossed the Johnsons' property, the Conatsers touched the river's bed in four ways: "(1) the raft occasionally touched the shallow parts of the river bottom, (2) the raft's paddles occasionally touched the river bottom, (3) the fishing tackle used by Kevin Conatser touched the river bottom, and (4) Kevin Conatser intentionally got out of the raft and touched the river bottom by walking along it to fish and move fencing that the Johnsons had strung across the river."[134] Although the Johnsons ordered the Conatsers to disembark and get off the river, the Conatsers continued with their recreational activities and were eventually arrested by a Morgan County Deputy Sheriff when they exited at a public access point.[135] They were later charged with criminal trespassing.[136]

The case was heard before the Morgan County Justice Court, which convicted the Conatsers of criminal trespassing.[137] The Conatsers appealed and the State dismissed the charge due to "uncertainty regarding the Conatsers' status as trespassers."[138] Because of the Conatsers' long-standing dispute with the Johnsons over the recreational use of the stretch of the Weber River that passed through the Johnsons' land, and the fact that the criminal case remained unresolved, the Conatsers sought declaratory judgment from the Second District Court.[139] They asked the court to determine what their rights were regarding use of the Weber River for recreation.[140] The Conatsers, as well as the Johnsons, "filed cross-motions for summary judgment on the issue of the Conatsers' right to touch the

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[128] *Id*.

[129] 194 P.3d 897 (Utah 2008).

[130] *Id*. at 898.

[131] *Id*. at 898. *See also* UTAH CODE ANN. § 73-3-8(1)(b)(i) (2008) (requiring that recreational uses of water be given consideration by the State Engineer before an application for the appropriation of water is granted); *J.N.N.P. Co*., 655 P.2d at 1136 (recognizing a public right to use state waters in.).

[132] *Conatser*, 194 P.3d at 898.

[133] *Id*.

[134] *Id*. at 898-99.

[135] *Id*. at 899.

[136] *Id*.

[137] *Id*.

[138] *Id*. (internal quotation marks omitted).

[139] *Id*.

[140] *Id*.

Weber River's bed where the river crosses the Johnsons' property."[141] The Conatsers argued, in their partial motion for summary judgment, that "as a matter of law, they were entitled to 'recreate in natural public waters . . . [which] includes the right to touch or walk upon the bottoms of said waters in non-obtrusive ways.'"[142]

The Second District Court rejected this part of the Conatsers' motion and held that the Conatsers' rights under the public easement were limited to those activities that could be performed "upon the water."[143] Chief among activities, which could be performed upon the water was floatation and hence, the right to touch the river's bed was only incidental to the right to float.[144] According to the Second District Court, then, the Conatsers "may walk along the banks of the river . . . in order *to continue floating* . . . so long as [their] actions are as minimally intrusive as possible of the private owners' land."[145] On the other hand, the district court held, "[w]ading 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."[146] The Second District Court, thus, limited the Conatsers' right to *touch* the privately owned land under the Weber River only to activities that could be performed while one was floating lawfully on the water.[147]

Before the Utah Supreme Court, the Conatsers challenged that portion of the district court's ruling which limited their right to touch the Weber River's bed only in ways "incidental to the right of floating"[148] and asked the Court to declare that "as members of the general public,"[149] the Conatsers "have the right to walk on the bed of the Weber River and wade in its water."[150]

The Supreme Court began its analysis of the case by reviewing the law governing public ownership rights in state waters in Utah, as well as the private ownership rights in the beds that underlie these waters.[151] Utah statutory law vests ownership of all state waters in the public: "[a]ll 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."[152] The Supreme Court has recognized that while the public owns state waters, it also has an "easement over the water regardless of who owns the water beds beneath the water."[153] The Court has also noted that in granting the public this easement, the State also "recognizes an

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[141] *Id*.
[142] *Id*.
[143] *Id*. at 899 (internal quotation marks omitted).
[144] *Id*.
[145] *Id*. (internal quotation marks omitted).
[146] *Id*. (internal quotation marks omitted).
[147] *Id*. at 900. The term "touch" is used by the Utah Supreme Court to "encompass all aspects of touching, including walking and standing on the privately owned beds of state waters." *Id*. at 898, n.1.
[148] *Id*. at 899.
[149] *Id*.
[150] *Id*. (internal quotation marks omitted).
[151] *Id*. at 899.
[152] UTAH CODE ANN. § 73-1-1 (2008).
[153] J.N.N.P. Co. v. State, 655 P.2d 1133, 1136 (Utah 1982).

interest of the public in the use of state waters for recreational purposes" and that those specific recreational rights that fall within this public easement include "the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water."[154]

In Utah, while the public owns all state waters, these waters' beds may be privately owned.[155] To determine title to the beds of state waters, a navigability test is employed.[156] In this case, navigability was only used to establish "(1) that the Johnsons own the river bed at issue, and (2) that the public has an easement to use the Weber River where it crosses the Johnsons' property."[157]

According to the district court's interpretation of the scope of the public's easement, the Conatsers were limited to "(1) being 'upon the water' and (2) touching the privately owned bed of the Weber River in ways 'incidental to the right of floatation upon' the water."[158] The Conatsers challenged only the second part of the district court's ruling.[159] However, the Supreme Court, arguing that "the scope of incidental rights is dependent on the scope of actual rights provided for in the easement," decided to address both issues.[160]

In limiting the scope of the public easement to use state waters for recreation to being "upon the waters," the Second District Court relied on the Wyoming Supreme Court's decision in *Day v. Amstrong*.[161] The *Day* Court held that the scope of the public's easement was limited to the "right of floatation" *upon* the water and to those activities (including hunting and fishing and any other lawful things) that could be undertaken while the individual was "lawfully floating in the State's waters."[162] Although the Second District Court "adopted the precise language of *Day* in limiting the Conatsers' rights to being upon the water," the court also held that "the Conasters' use of the river is limited to the bounds of the holding of *J.N.N.P. Co. v. State*."[163] In *Day*, the scope of the public's easement is limited to activities that can be undertaken "upon" the water, while in *J.N.N.P. Co*., the Utah Supreme Court expanded the scope of the public easement to all recreational activities that "utilize" the state's waters.[164]

As part of the analysis of its *Conatser* decision, the Supreme Court went on to say that the difference between their earlier decision in *J.N.N.P. Co*. and the Wyoming Supreme Court's holding in *Day*, turns on the word "upon."[165] While the *Day* Court limited the scope of the public's easement to only activities that can be performed "upon" the water, the Utah Supreme Court in its *J.N.N.P. Co*. decision

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[154] *Id*. at 1136-37.
[155] *Conatser*, 194 P.3d at 900.
[156] *J.N.N.P.Co.*, 655 P.2d at 1136.
[157] *Id*.
[158] *Id*. at 900.
[159] *Id*.
[160] *Id*.
[161] Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).
[162] *Id*. at 147.
[163] *Conatser*, 194 P.3d at 901.
[164] *Day*, 362 P.2d at 147; *J.N.N.P. Co.*, 655 P.2d at 1137.
[165] *Conatser*, 194 P.3d at 901.

expanded the scope of the public easement to recreational activities that "utilize" the water.[166] Thus, in Utah (unlike Wyoming), the public's right to fish, hunt, and participate in any lawful activity is not qualified or limited by floating.[167] A member of the Utah public who wants to engage in fishing in state waters, for example, not need have to float upon the water in order to do so, as is the case in Wyoming under *Day*.[168]

The next issue that the *Conatser* Court had to decide was the scope of the public's incidental rights as implied in its easement.[169] According to the district court, the Conatsers could touch the Weber River's bed "only in ways incidental to the right of floatation and that any 'use of the streambed [that] is more than incidental to the right of floating . . . would constitute a trespass.'"[170] The Supreme Court held that the district court had erred when it adopted the *Day* language.[171] The *Day* Court had ruled that the public, in exercising its easement to use state waters, may "touch" or "scrape" the river's "bed or channel" as long as these activities were "a necessary incident to the full enjoyment of the public's easement."[172] However, "where the use of the bed or channel is more than incidental to the right of floating . . . such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful."[173]

The Utah Supreme Court argued that the *Day* limitation, while it is reasonable given the Wyoming Supreme Court's "narrow interpretation of the easement's scope," conflicts with the scope of the public easement established in *J.N.N.P. Co*.[174] However, in *J.N.N.P. Co*., the issue of incidental rights was not before the Court, and as such, the Court did not reach it.[175] In the *Conatser* case, the issue was before the Court and the Court held that "the public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement."[176]

In reaching its decision, the Utah Supreme Court briefly reviewed the theory of easements in real property.[177] An easement creates two distinct property interests—a dominant estate, which has the right to use the property of another, and a servient estate, which grants permission for that use to take place.[178] Given the fact that there are two competing rights to the use of the same piece of real property, each is

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[166] *Id*.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] Day v. Armstrong, 362 P. 2d 137, 145-47 (Wyo. 1961).
[172] *Id*.
[173] *Id*.
[174] *Conatser*, 194 P.3d at 901. *See also* J.N.N.P. Co. v. State, 655 P.2d 1133 (Utah 1982).
[175] *J.N.N.P. Co*., 655 P.2d at 1139, n.6: "As to whether the public has an easement in the beds of streams and lakes, we express no opinion."
[176] *Conatser*, 194 P.3d at 901.
[177] 25 AM. JUR. 2D EASEMENTS AND LICENSES IN REAL PROPERTY § 1 (2008).
[178] *Id*.

not absolute.[179] According to established law in Utah, the owner of an easement has the right to "make incidental uses beyond the express easement and does not exceed the easement's scope if those uses are 'made in a reasonable manner and they do not cause unnecessary injury to the servient owners.'"[180]

Based on the brief analysis of easements as they apply to real property in Utah, the Court then had to decide whether touching the river's bed is "reasonably necessary and convenient for the effective enjoyment of the public's easement."[181] Having established that in Utah, the public "has the right to float, hunt, fish, and participate in all lawful activities that utilize state waters,"[182] the Court concluded that "[t]he practical reality is that the public cannot effectively enjoy its right to 'utilize' the water to engage in recreational activities without touching the water's bed."[183] The final issue left to be determined by the Court was whether "such touching causes unnecessary injury to landowners."[184] The Court held that it did not.[185] In doing so, the Court noted that in an earlier decision it had held that the "[p]laintiff would not be exceeding its easement in improving its ditches provided the improvements are, under all circumstances, made in a reasonable manner and they do not cause unnecessary injury to the servient owners."[186] The Court extrapolated from that decision that:

> [T]he Johnsons and every private landowner to whom the easement applies are subject to reasonable burdens imposed by the easement. These burdens include the public's right to both travel over private property when floating and to touch the water's bed while floating. Touching a water's bed in association with other easement rights is merely part of the existing burden—it is not an additional burden and thus is not more injurious to landowners.[187]

The Court concluded its analysis of the case by listing the limitations that it imposed on the public in order to protect the landowner's interest:

> First, the public may engage only in lawful recreational activities. Second, those activities must utilize the water. Where utilizing the

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[179] Big Cottonwood Tanner Ditch Co. v. Moyle, 174 P.2d 148, 158 (Utah 1946). Each is a "qualified" right. While the owner of the dominant estate is entitled to reasonable enjoyment of his tenement, he is not entitled to cause unreasonable harm to the servient estate or interfere with the ability of the servient tenement holder to reasonably enjoy his property, unless the terms of grant expressly permit such interference. On the hand, the holder of the servient estate is not entitled to interfere with any and all uses authorized by grant of the easement. *See, e.g.*, RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1 (2000).

[180] *Conatser*, 194 P.3d at 902. *See also Big Cottonwood*, 174 P.2d at 160.

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

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Big Cottonwood Tanner Ditch Co.*, 174 P.2d at 160.

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

> water is not the purpose, the activity is beyond the scope of the easement. Third, as noted, the public must act reasonably in touching the water's bed. Finally, the public may not cause unnecessary injury to the landowner.[188]

VI. A REASONABLE USE STANDARD

To protect the servient owner's interests, the Supreme Court imposed several limitations on the public in the exercise of its easement.[189] One of these strictures is the command that the public must act *reasonably* in exercising its right to float, hunt, fish, and undertake all other lawful activities that utilize waters of the state of Utah.[190] The Court made it clear that the holder of the easement (i.e., the public) is legally allowed to "make incidental uses beyond the express easement" and in doing so, "does not exceed the easement's scope if those uses are 'made in a reasonable manner and they do not cause unnecessary injury to the servient owners.'"[191] This is a two-part test: the use must be *reasonable*; and the use must not cause *unnecessary injury* to the servient owner.[192] The standard does not bar all injury to the servient estate; it bars only injury that is *unnecessary*.[193] The *Conatser* Court, however, did not provide definitions for these critical terms, nor did it provide a scheme that can be used to determine when exercise of the public easement is unreasonable, and when it imposes unnecessary injury to the servient estate.[194] One must look to State case law and various secondary sources to provide guidance.

An easement has been defined as "a privilege which one person has a right to enjoy over the land of another."[195] According to the RESTATEMENT (FIRST) OF PROPERTY,

> An easement is an interest in land in the possession of another which (a) entitles the owner of such interest to a *limited* use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land; (d) is not a normal incident of the possession of any land possessed by the owner of the interest; and (e) is capable of creation by conveyance.[196]

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[188] *Id*. at 903.
[189] *Id*.
[190] *Id*. at 902.
[191] *Id*.
[192] *Id*.
[193] *Id*.
[194] *Id*.
[195] 25 AM. JUR. 2D EASEMENTS AND LICENSES IN REAL PROPERTY § 1 (2008).
[196] RESTATEMENT (FIRST) OF PROPERTY § 450 (1944) (Current through August 2008).

An easement creates two distinct property interests: a "dominant estate," which is granted the right to use the land of another, and a "servient estate," which allows that use to take place.[197] In line with the common law of property and the RESTATEMENT (FIRST) OF PROPERTY, the Utah Supreme Court has held that "[t]he right of the easement owner and the right of the land-owner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that they may be a due and reasonable enjoyment of both."[198] Both parties must "have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands."[199] In addition, exercise of the easement must be "as reasonable and as little burdensome to the servient estate as the nature of the easement and its purpose will permit."[200]

The Utah Supreme Court has already ruled that if the easement is exercised reasonably and does not cause unnecessary injury to the servient estate, then such use does not exceed the scope of the easement.[201] However, mere injury to the servient estate by the easement holder does not necessarily mean that the owner of the dominant estate has acted unreasonably or has exceeded the scope of the easement.[202] The fact that there is injury to the servient estate resulting from the exercise of the easement is not probative.[203] This fact only forms part of the materials that should be "considered in determining the reasonableness" of the easement holder's exercise of his rights.[204]

A use is considered reasonable if it imposes as little burden on the servient estate as possible.[205] In one of its earlier decisions, the Utah Supreme Court held that whether a use "is reasonable must be determined by the circumstances."[206] In the *Salt Lake City* case, "[a]ny use which results in an appreciable pollution which is preventable by incurring reasonable expense or making reasonable effort cannot be deemed a reasonable use . . . ."[207] The standard is (1) that the use by the easement holder must impose "appreciable pollution" on the servient estate; and (2) that the pollution is preventable, either by "incurring reasonable expense," or by "making a reasonable effort."[208] Thus, if the injury done to the servient estate by the holder of the easement is appreciable and could have been prevented through, for example, the exerting of reasonable effort, then the easement holder has likely behaved unreasonably.[209] However, the determination of whether the use

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[197] EASEMENTS AND LICENSES IN REAL PROPERTY, *supra* note 177.

[198] Big Cottonwood Tanner Ditch Co. v. Moyle, 174 P.2d 148, 158 (Utah 1946) (internal quotation marks omitted).

[199] *Id*. (internal quotation marks omitted).

[200] *Id*. (internal quotation marks omitted).

[201] *Id*. at 160.

[202] *Id*.

[203] *Id*.

[204] *Id*.

[205] Shingleton v. State, 133 S.E.2d 183, 187 (N.C. 1963). *See also* 25 AM. JUR. 2D EASEMENTS AND LICENSES § 72 (2008).

[206] Salt Lake City v. Young, 145 P. 1047, 1050-1051 (Utah 1915).

[207] *Id*.

[208] *Id*.

[209] *Id*. at 1051.

is, indeed, unreasonable, falls upon the finder of fact, who has the opportunity to examine all the facts and make a determination in the light "of the situation of the property and the surrounding circumstances."[210]

Similarly, in *Dahl*, the Utah Supreme Court held that "what is reasonable use of one's property must necessarily depend upon the circumstances of each case, for a use for a particular purpose and in a particular way, in one locality, that would be lawful and reasonable might be unlawful and a nuisance in another."[211] To determine if the use was unreasonable, the court took into consideration the nature of the use (e.g., hunting, floating, fishing), the particular locality (e.g., rural-farm-agricultural area, or residential neighborhood with children, or industrial district with many noisy machines and a significant level of air pollution), and all the other surrounding circumstances of the case.[212]

Ultimately, "[w]hether the use of property by one person is reasonable, with reference to the comfortable enjoyment of his own property by another, generally depends upon many and varied facts, such as location, nature of the use, character of the neighborhood, extent and frequency of the injury, the effect on the enjoyment of life, health and property, and the like."[213]

VII. A CRITIQUE OF THE *CONATSER* DECISION

Recreation on state waters in Utah, as in neighboring Western states, has become a very popular social and economic activity.[214] Therefore, recreation enthusiasts are likely to herald this decision as an indication of the state's desire to nurture an industry which continues to grow in popularity as well as in economic significance. State waters in Utah flow through both private and public land and what the *Conatser* Court has decreed is that the public has the right "to float, hunt, fish, and participate in all lawful activities that utilize the [state] water[s]" and that in carrying out these activities, the public "has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the [public's] easement, so long as they do so reasonably and cause no unnecessary injury to the landowner."[215]

The *Conatser* Court's ruling is in stark contrast to the law in neighboring Wyoming, where the public easement is narrowly construed, and hence, appears to provide a more balanced approach to the protection of the rights of the public and those of the riparian landowners.[216] Pursuant to the *Conatser* Court decision, an

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[210] 25 AM. JUR. 2D EASEMENTS AND LICENSES § 72 (2008). *See also* Dahl v. Utah Oil Refining Co., 262 P. 269, 273 (Utah 1927).

[211] *Dahl*, 262 P. at 273.

[212] *Id.*

[213] *Id.*

[214] *See, e.g.*, Hill, *supra* note 10, at 331-332.

[215] Conatser v. Johnson, 194 P.3d 897, 903 (Utah 2008).

[216] In Wyoming, the State Supreme Court has limited the public's right to engage in the various recreational activities that involve the use of state waters only to those that can be undertaken while the individual is lawfully floating, and hence, such individuals can only touch privately-owned

aggrieved riparian landowner must prove that public use is *unreasonable* and that it has caused *unnecessary* injury to his or her interests.[217] The *Conatser* decision has not fully resolved the long-running dispute between riparian landowners and recreational enthusiasts such as the Conatsers.[218] Only further litigation will resolve questions of fact and questions of law regarding whether a given public use is unreasonable and imposes unnecessary injury on the servient estate.[219]

According to the evidence presented to the court, the Conatsers and the Johnsons had had a long-running dispute over the Conatsers' activities on that part of the Weber River that flows through the Johnsons' land.[220] The *Conatser* decision cannot be said to have fully resolved that dispute.[221] What the decision does is set up the stage for further litigation as the Johnsons would most likely have to return to court to prove that the Conatsers or other public users have engaged in unreasonable use and imposed unnecessary injury on the Johnsons' property.[222] Therefore, the *Conatser* decision has left the door open for a lot of litigation, as private landowners whose property is traversed by state waters are left with the additional burden of proving in court that public use of waterways within their property is unreasonable and imposes unnecessary injury on their property. In order to protect their private property rights, then, affected landowners must seek relief, at their own expense, from the courts.

The *Conatser* case arose from an on-going feud between the Conatsers and the Johnsons over the Conatsers' activities on that portion of the Weber River, which passes through the Johnsons' property.[223] According to the evidence presented in court, during the incident that led to his arrest, "Kevin Conatser intentionally got out of the raft and touched the river bottom by walking along it to fish and move fencing that the Johnsons had strung across the river."[224] The fact-finder established that there was a "long-running dispute between the Johnsons and the Conatsers" and in its ruling, limited the Conatsers "to activities that could be performed upon the water—chiefly floating—and that the right to touch the river's bed was incidental only to the right of floatation."[225] The district court's interpretation of the public's easement, while it allowed the Conatsers to engage in all lawful recreational activities on the Weber River, it nevertheless, constrained them from molesting the Johnsons and infringing on their private property rights.[226] The district court allowed the Conatsers to touch the waterbeds, but only

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waterbeds if doing so is "incidental to the right to float." *Conatser*, 194 P.3d at 899. *See also* Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

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

[218] *Conatser*, 194 P.3d at 898.

[219] *Dahl*, 262 P. at 273.

[220] *Conatser*, 194 P.3d at 898-899.

[221] *Id*. at 898-899, 903.

[222] *Dahl*, 262 P. at 273.

[223] *Conatser*, 194 P.3d at 898-99.

[224] *Id*.

[225] *Id*. at 899.

[226] Note that Kevin Conatser did not dispute testimony that he had "intentionally got out of the raft and touched the river bottom by walking along it to fish and move fencing that the Johnsons had

if such touching was incidental to floating.[227] Thus, the district court did not totally limit the Conatsers' right to touch the waterbeds; it only made it conditional on activities that could be performed upon the waters and by doing so, considered the impact of the Conatsers' activities on the ability of the owner of the servient estate to enjoy his property.[228]

The Supreme Court's interpretation of the public's easement, on the other hand, was not as narrow as that of the district court.[229] The Court extended the right of the public to touch privately-owned waterbeds to all activities that utilize the water.[230] It also held that public touching of privately-owned waterbeds while the public enjoys all the "rights provided for in the easement," does not cause unnecessary injury to landowners.[231] One can argue, of course, that the *Conatser* ruling is in line with the doctrine of public ownership of state waters in Utah.[232] Under the doctrine of public ownership of state waters, the public owns state waters and has an "easement over the waters regardless of who owns the water beds beneath the water."[233] The legislature has instructed the State Engineer to recognize the public's interest in the use of state waters for recreational purposes when the Engineer approves an application for water appropriation.[234] Hence, the *Conatser* Court's interpretation of the scope of the public's easement seems to be in line with the intent of the legislature in granting the public such an easement.[235] Nevertheless, the decision has failed to definitively resolve the long-running conflict between the state's recreational enthusiasts and riparian landowners over when touching privately-owned waterbeds constitutes unnecessary injury.

Utah's is a market-driven economy and I believe that a carefully-structured market solution can allow the public to effectively utilize its easement while at the same time minimizing harm to riparian landowners. The conflict between recreational enthusiasts and riparian landowners is essentially one over property rights. What the *Conatser* decision has done is to grant *open access* to private property and by doing so, subject the property to potentially excessive exploitation and abuse.[236] Despite the fact that the *Conatser* Court imposed some constraints on

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strung across the river," apparently to prevent trespassers from interfering with the peaceful enjoyment of their property. *Id*. at 899.

[227] *Conatser*, 194 P.3d at 899.

[228] *Id*.

[229] *Id*. at 902

[230] *Id*.

[231] *Id*.

[232] UTAH CODE ANN. § 73-1-1 (2008).

[233] J.N.N.P. Co. v. State, 655 P.2d 1133, 1136 (Utah 1982).

[234] UTAH CODE ANN. § 73-3-8(b)(i) (2008).

[235] *Id*. *See also, J.N.N.P. Co*., 655 P.2d at 1136.

[236] S. Hanna, C. Folke & K.G. Mäler, *Property Rights and Environmental Resources, in* PROPERTY RIGHTS AND THE ENVIRONMENT 15, 29 (H. Hanna & M. Munasinghe eds., 1995). The authors developed a taxonomy of four types of property rights regimes and the rights and duties associated with each of them. These are private property, common property, state property, and open access. Open access is considered the source of the "tragedy of the commons" described by Hardin. G. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Open access creates a free rider problem and usually leads to overuse and abuse.

the public (e.g., reasonable use), nevertheless, the decision essentially grants the public the type of access to private property that would most likely lead to abuse and create incentives that discourage investment by riparian landowners to improve the productivity of their resources.[237] A more efficient and socially equitable solution is one that returns to the private property owner the right to control access to his property. The owner can place appropriate restrictions on access and minimize excessive use and abuse. While the public will still be able to float on state waters, if they want to engage in or undertake activities that require non-incidental access to privately-owned waterbeds, they must secure permission from the owners of such private property. The legislature can legislatively define those uses that are incidental to the public's exercise of its easement so that recreational users who want to engage in activities that require non-incidental access to private property must then seek permission from the owners of such property. This approach should effectively resolve the conflict between riparian landowners and recreation enthusiasts.

As this paper goes to press, the Utah State Legislature is proposing a bill that would designate certain specific public waters as available for recreational use and others as off limits to the public.[238] The bill, if passed, would severely limit public access to Utah waters, which by statute, are property of the public and which have historically been open to the public for recreational activities.[239] The main issue for the legislature should be how to balance the public's right to utilize state waters for recreational purposes and the right of riparian landowners to protect their private property from excessive exploitation and abuse.[240]

VIII. CONCLUSION

In July 2008, the Utah Supreme Court in *Conatser v. Johnson*[241] made a determination of the scope of the public's easement to utilize state waters for

[237] Under a private property rights scheme, the owner is guaranteed by law, access and the right to use the property in ways that are considered socially acceptable. Although private ownership can be considered exclusive, it is not an unrestricted right. The ownership of real property, for example, is subject to restrictions imposed by the law. However, state attenuation of property rights does affect the expectations of property owners regarding the uses to which they can put their property, as well as the value of the property to the owner and other market participants. THE ECONOMICS OF PROPERTY RIGHTS 4 (E. G. Furubotn & S. Pejovich eds., 1974). If state action attenuates private property rights to the extent made possible by the *Conatser* decision, the consequences could include failure to invest in property improvements, increased litigation, and significant uncertainties regarding the nature of ownership. *See also* Hanna, Folke & Mäler, *supra* note 236.

[238] According to the proposed bill, H.B. 187, seventeen public waters are listed as available for recreational use. *Id*. at line 215. The bill also provides a new system for recreational use of public waters over private beds. *Id*. at line 166.

[239] UTAH CODE ANN. § 73-1-1 (2008).

[240] The Utah Supreme Court has ruled that, "[i]rrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water." *J.J.N.P Co*., 655 P.2d at 1137.

[241] Conatser v. Johnson, 194 P.3d 897 (Utah 2008).

recreational purposes and the scope of the incidental rights implied in the easement. The Court held that the scope of the public's easement in Utah's waters grants the public the right to undertake all recreational activities "that utilize the water and does not limit the public to activities that can be performed upon the water."[242] The Court also held that the public, in exercising its easement to use Utah waters for recreational purposes, has the right "to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement."[243]

The Court, nevertheless, imposed certain constraints on the public in order to protect the interests of the riparian landowner.[244] One of these strictures is that in exercising its easement, the public must act reasonably and may not cause unnecessary injury to the servient estate.[245] Unfortunately, this decision does not fully resolve the long-running dispute between public users of state waters and riparian landowners.

The *Conatser* Court effectively turned a *private property* scheme into an *open access* one, creating the potential for overexploitation and abuse of private property. The effective solution, one that brings stability to the law in this area of environmental resource allocation, is to return control of access to the private property owner. Pursuant to the public's easement, the recreation enthusiast will still be able to float and engage in other related activities, however, if he or she desires more than incidental access to privately-owned waterbeds or streambeds, permission must be sought from the private owner. The legislature should, through legislation, define those uses that are incidental to the exercise of the easement which grants the public the right to use Utah waters for recreational purposes. This approach would resolve, in a more effective way, the conflict between public water users and riparian landowners in the state.[246]

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[242] *Id*. at 901.
[243] *Id*. at 901.
[244] *Id*. at 903.
[245] *Id*.
[246] *Id*. at 903.