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Fourth District Court
State of Utah
Utah County

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a Utah non-profit corporation, Plaintiff, v. VR ACQUISITIONS, LLC, a Delaware limited liability company; and STATE OF UTAH, Defendants.	**RULING AND ORDER GRANTING DEFENDANT VR ACQUISITIONS, LLC'S AND DEFENDANT STATE OF UTAH'S MOTIONS FOR SUMMARY JUDGMENT** Case No. 100500558 Judge Derek P. Pullan

Defendant VR Acquisitions, LLC ("VRA") and Defendant State of Utah each move for summary judgment. Plaintiff Utah Stream Access Coalition ("the Coalition") opposes both motions. Amicus Curiae, Utah Alliance to Protect Property Rights ("the Alliance"), joins in VRA's motion for summary judgment.

The Court heard oral argument on June 21, 2021. Each party appeared through counsel. VRA was represented by Mr. Nathan D. Thomas and Ms. Elizabeth M. Butler. The State of Utah was represented by assistant attorneys general, Mr. Andrew Dymek and Mr. David N. Wolf. The Coalition was represented by Mr. Craig C. Coburn. The Alliance was represented by Mr. Michael D. Zimmerman.

At the conclusion of the oral argument, the Court took the matter under advisement and now issues the following:

RULING

Legal Standard on Summary Judgment

A "court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). In a case where the non-moving party "will bear the burden of production [of evidence] at trial," the party moving for summary judgment is not required to "put[] on any evidence of its own." *Salo v. Tyler*, 2018 UT 7, ¶ 2, 417 P.3d 581. Instead, "the moving party may carry its burden of persuasion . . . by showing that the non[-]moving party has no evidence to support an essential element of a claim." *Id.* ¶ 2.

If the moving party can show this absence of proof as to an essential element of a claim, the burden shifts to the non-moving party to present that evidence. *See Vanderwood v. Woodward*, 2019 UT App140, ¶ 32, 449 P.3d 983 (internal citations omitted). The responsive "evidence must constitute more than a mere 'scintilla of evidence'" and "more than just conclusory assertions that an issue of material fact exists." *See id.* (internal citations omitted). It must be evidence upon which a reasonable jury could find that the essential element exists. *See Salo*, 2018 UT 7, ¶¶ 30–31.

Finally, the Court views all evidence produced by the non-moving party in the light most favorable to him and draws all reasonable inferences in the non-moving party's favor. *See Morra v. Grand Cty.*, 2010 UT 21, ¶ 12, 230 P.3d 1022 (internal footnote omitted).

Discovery, Scope of Mandate, and Order of Proceedings on Remand

In *Utah Stream Access Coalition v. VR Acquisitions, LLC,* the Utah Supreme Court ruled that the district court erred in failing to answer a "crucial threshold question." *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 2019 UT 7, ¶ 29, 439 P.3d 593. The unanswered question is whether "the scope of the easement recognized in *Conatser v. Johnson*[,] 2008 UT 48, 194

P.3d 897[,] was an interest in land that was 'acquired' and 'accepted' by the State at the time of the ratification of the Utah Constitution in 1896?" *Id*.

But the Supreme Court articulated the threshold question in a variety of ways, including:

- Is there "a basis in ***historical fact***—in the understanding of public easements in the late 19th century—for the easement we recognized in *Conatser*?" *Id.* ¶ 5 (emphasis added).

- Does "the *Conatser* easement ha[ve] ***a historical basis as a public easement*** as of the time of the framing of the Utah Constitution?" *Id.* ¶ 6 (emphasis added).

- Is the *Conatser* easement "an interest in land that was 'acquired' and 'accepted' by the State at the time of the ratification of the Utah Constitution in 1896? *Id.* ¶ 29.

- Is the easement recognized in *Conatser*
  > a right that was 'accepted' or 'acquired' by the State at the time of the framing of the Utah Constitution[?] This was an implicit but necessary basis of the district court's holding. And we find that it was in error because there was no inquiry into ***the historical basis for the Conatser easement***—only an assumption that the easement is somehow rooted in the constitution.

  Id. ¶ 60 (emphasis added).

- "We accordingly reverse the district court's decision and remand to give [the Coalition] an opportunity to establish ***a historical, 19th-century basis for the easement*** that it seeks to root in article XX, section 1, of the Utah Constitution." *Id.* (emphasis added).

- > The threshold error that we identify is the district court's determination that the public easement recognized in *Conatser* is an interest in land that is 'included in Article XX, section 1.' . . . [T]here is a key unanswered question lurking in the background here. It concerns ***the nature and scope of that easement interest*** at issue—and whether it can be viewed as having been 'acquired' and 'accepted' by the State under the terms of article XX, section 1.

  Id. ¶ 85 (emphasis added).

- Is the *Conatser* easement "in line with the sort of ***public access right that our law would have dictated*** at the time of the framing of the Utah Constitution—and thus 'acquired' and 'accepted' by the State under the terms of article XX, section 1?" *Id.* ¶ 88 (emphasis added).
- Is the *Conatser* easement "a ***public easement dictated by our law in the late 19th century?***" If so, it is "arguably 'land' that was 'accepted' by the State through "ratification of article XX, section 1 of the Utah constitution." *Id.* ¶ 89 (emphasis added).

- Is the *Conatser* easement a "public easement that would have been ***accepted under the law of the late 19th century***" or is it merely "a product of common law developments in the 20th and 21st centuries?" *Id.* ¶ 91 (emphasis added).

Faced with these different articulations of the threshold question, the parties disagreed about whether fact discovery should be reopened. VRA and the State contended that no discovery was necessary because the threshold question was a legal one—whether the *Conatser* easement was a "public easement that would have been accepted under the law of the late 19th century." *Id.* The Coalition contended that the threshold question should be the subject of additional fact discovery because it presented issues of historical fact regarding the manner in which the people customarily used Utah waterways in Utah in the late 19th century.

In its May 31, 2019 Ruling and Order, the Court resolved this discovery dispute in favor of the Coalition. The Court ruled:

> Read together, th[e] language in the Supreme Court's opinion suggests that the "threshold question" on remand is a mixed question of historical fact and law. The historical and customary use of Utah waterways by members of the public in the late 19th century will certainly demonstrate how the law of that era relating to public easements and access rights was actually applied. This marriage of historical fact and law appears to be one reason for remand to the trial court. If the "threshold question" was one of law alone, the Supreme Court could have decided it in the first instance [on appeal]. It did not.

Ruling and Order, 5/31/2019, p. 4. The Court further observed that "this case involves weighty questions of state constitutional law" which would inevitably be the subject of a second appeal. In light of this, "prudence dictate[d] that a complete record of the historical facts and law be made" in the district court. *Id.*

On remand, the parties also disagree about the scope of the Supreme Court's mandate. The Court resolved this disagreement in its July 17, 2020 Ruling and Order which reads:

> The Utah Supreme Court remanded this case to decide a threshold question. The threshold question is whether "there is a basis in historical fact—in

the understanding of public easements in the late 19th century—for the easement [the Utah Supreme Court] recognized in *Conatser*.["]

If the threshold question were resolved in [the Coalition]'s favor, the Supreme Court authorized the Court to reach four "invitation-only" issues—questions on which the Court provided guidance, but no decision. The invitation-only questions are:

- Was the easement a "land of the State" under article XX, section 1?
- Was the easement acquired and accepted under article XX, section 1?
- Whether or not the Public Waters Access Act ("the PWAA") disposed of the easement for the purposes for which it was acquired as required by article XX, section 1?
- Even if the PWAA did not dispose of the easement, did the PWAA violate article XX, section 1's mandate that lands of the State be "held in trust for the people."

This Court has already ruled that the threshold question presents a mixed question of historical facts and law. The Court remains of the same view today. Because the threshold question is a mixed question of historical facts and law, the Court declines to limit the scope of relevant evidence to the law of public easements existing in the late 19th century.

The State's arguments that when the Utah Supreme Court used the phrase "historical fact" it actually meant "historical law," and that only certain types of evidence are admissible to determine the threshold question are not persuasive. Certainly, historical evidence of public easement law is a fact of consequence to determining the threshold question. But so are other historical facts including customary use of public waterways in the late 19th-century, the "***understanding*** of public easements in the late 19th century" and the "scope of the ***public understanding*** of 'lands of the State' as of the time of the framing of the Utah Constitution." *Utah Stream Access* [*Coal.*], 2019 UT 7, ¶¶ 5, 64.

The Supreme Court's mandate requires this Court on remand to provide [the Coalition] a full and fair "opportunity to establish a historical 19th-century basis for the easement that it seeks to root in article XX, section 1 of the Utah Constitution." *Id.,* 2019 UT 7, ¶ 60. To afford [the Coalition] this opportunity, the Court must admit all relevant evidence. Evidence is relevant if it has "any tendency to make a consequential fact more or less probable than it would be without the evidence." URE 401. And public easement law in the late 19th century is not the only fact of consequence to determining the threshold question.

The State contends that the spirit of the mandate requires this Court to revisit its prior that "[w]aters flowing in rivers, streams, and natural water courses (including courses realigned or channelized) are and always have been owned by

the public, and as such are public waters." *Final Judgment,* dated 11/4/15, p. 2, citing *Memorandum Decision*, dated 5/21/2012 at p. 20. The Court disagrees. The State did not appeal this ruling. It remains the law of the case. Deciding the threshold question does not require the Court to revisit this issue.

The State argues that the law of the case doctrine should bar the Court from revisiting the following prior rulings:

- Prior to the Utah Supreme Court's decision in *Conatser* the source and scope of the public's easement on state waters had not been conclusively determined. *Final Judgment*, p. 19, ¶ 39.
- Twenty-five years [after J.J.N.P.], the Court decided *Conatser*, defining for the first time the full scope of the public's easement on state waters. *Id*., p. 20, ¶ 43.
- The evidence presented at trial established that before *Conatser* customary use of public water on private land was generally consistent with the framework established in the Act. *Id.,* p. 20, ¶ 43.
- Thus, before *Conatser* the scope of the public's right to use state waters flowing over or impounded on private land was an undecided legal question. *Id.,* p. 20, ¶ 43.

The Court disagrees. These prior rulings really go to the threshold question itself—whether there was basis in historical fact or law for the *Conatser* easement in the late 19th century. The Utah Supreme Court mandated that this Court decide this question. Both the letter and spirit of the mandate require that the Court revisit each of these four prior rulings.

[The Coalition] contends that the mandate requires the Court to revisit its prior ruling that the PWAA did not violate Article XVII of the Utah Constitution. The Court disagrees. [The Coalition] did not appeal this decision. It remains the law of the case. Nothing in the Supreme Court's opinion suggests that answering the threshold question or any of the "invitation-only" questions require the Court to revisit this decision.

Ruling and Order, 7/20/20, pp. 1-4 (emphasis in original).

Finally, the Court determined the order in which issues would be presented and decided.

The Court ruled:

[T]he proceedings in this case will be conducted in two phases.

In phase one, the Court will determine: (1) the threshold question; and (2) if that question is decided in [the Coalition]'s favor, the question of whether the

Conatser easement was a "land of the State" that was "acquired" and "accepted" for purposes of article XX, section 1.

If the issues in phase one are decided in [the Coalition's] favor, we will move to phase two. In phase two, the Court will decide (1) whether the PWAA violated article XX. section 1 by "disposing" of the easement for purposes other than those for which it was acquired;" and, (2) even if no disposition was made, whether the PWAA violated the requirement that lands of the State be held in trust for the people.

Id. at pp. 4-5 (internal footnote omitted).

The Threshold Question

As stated, in the *Utah Stream Access Coalition* decision the Supreme Court articulated the threshold question in a variety of ways. The clearest articulation appears at the end of the decision:

> The threshold error that we identify is the district court's determination that the public easement recognized in *Conatser* is an interest in land that is "included in Article XX, Section 1." That decision was rooted only in the observation that in *J.J.N.P.* and *Conatser* we "applied principles of real property law." That may be true. But there is a key unanswered question lurking in the background here. It concerns the nature and scope of that easement interest at issue—and whether it can be viewed as having been "acquired" and "accepted" by the State under the terms of article XX, section 1.
>
> That determination cannot be made by mere reference to our analysis in *J.J.N.P.* and *Conatser*. In those cases we were not asked to analyze the historical scope of a public easement in use of public waters at the time of the framing of the Utah Constitution. And we did not make any such determination. We simply applied common-law trust principles in concluding (1) that the "touching" of a streambed "is reasonably necessary and convenient for the effective enjoyment of the public's" right to "float, hunt, fish, and participate in all lawful activities that utilize state waters," *Conatser v. Johnson*, 2008 UT 48, ¶ 23, 194 P.3d 897; and (2) that such touching does not "cause unnecessary injury" to owners of private streambeds, *id.* ¶ 22.
>
> These conclusions were rooted in common-law trust principles that we imported from modern case law and a chapter from *American Jurisprudence*.[6] *Id.* ¶¶ 20–21. And if the scope of the easement established in *Conatser* is rooted only in common-law trust principles then

the legislature is free to override our analysis. The legislature retains broad legislative power. UTAH CONST. art. VI, § 1 (vesting "[t]he Legislative power of the State" in the house and senate). And that power encompasses the right to second-guess or override the standards set forth in our common-law decisions. *See Anderson v. Bell*, 2010 UT 47, ¶ 16 n.5, 234 P.3d 1147 ("It is a fundamental principle that . . . the legislature has the authority to abrogate the common law . . . .").

This highlights the threshold error that we see in the district court's decision. The mere fact that *Conatser* represents this court's assessment of the proper scope of a common law public easement does not mean that that easement was "acquired" and "accepted" by the State. To rise to that level the easement would, at a minimum, have to be shown to be in line with the sort of public access right that our law would have dictated at the time of the framing of the Utah Constitution—and thus "acquired" and "accepted" by the State under the terms of article XX, section 1.

The governing provision of the Utah Constitution says that lands acquired by the State by any of a range of means—"by gift, grant[,] devise" or "otherwise"—are "hereby accepted." UTAH CONST. art. XX, § 1. So a public easement dictated by our law in the late 19th century is at least arguably a "land" that was "accepted" by the State through ratification of article XX, section 1 of the Utah Constitution.[7]

That question was not resolved by the district court and it is not adequately presented for our disposition on appeal. We therefore reverse and remand to allow the parties to present further argument and analysis of this question to the district court in the first instance. We do so because we view this as a threshold question of significance in this important case—and because the disposition of this issue could moot the remaining questions presented to us on this appeal.

If the district court determines that the *Conatser* easement exceeds the scope of the public easement that would have been accepted under the law of the late 19th century, then that may be the end of this litigation. [The Coalition], as noted, has placed all of its eggs in the easement basket in this litigation. It has rooted its article XX, section 1 claim to access to the Provo River in the notion that the *Conatser* easement is a public land that was acquired and accepted by the State, and subject to the public trust doctrine. If that premise fails because the scope of the *Conatser* easement is shown to be a product of common-law developments in the 20th and 21st centuries, then [the Coalition] would be in no position to assert that the State "acquired" or "accepted" any such easement at the time of the ratification of the Utah Constitution. And in that event [the Coalition]'s claim may be subject to dismissal.

Utah Stream Access Coal., 2019 UT 7, ¶¶ 85–91.

Arguments of the Parties

VRA and the State both move for summary judgment on the threshold question. In doing so, both concede that during the second half of the 19th century Utahns widely and freely touched and used both private and public beds of Utah's lakes, rivers, and streams for a variety of purposes, including recreation. But this historical use—even if coextensive with the easement recognized in *Conatser*—never was "in line with the sort of public access right that our law would have dictated at the time of the framing of the Utah Constitution." *Id.* ¶ 88. Therefore, the public's use of Utah's waters was not land "acquired" and "accepted" by the State under Article XX, Section 1 of the Utah Constitution.

The Coalition disagrees. It argues that Utah's territorial trespass laws never prohibited members of the public from touching the privately owned bed of a river or steam. Accordingly, any such use by members of the public was recognized as lawful at the time of statehood. The Coalition further argues that waters of the State (even non-navigable ones) are owned by the public and "the public has an unquestioned right to use [them]." *Id.* ¶ 31 (citing, *Adams v. Portage Irrigation, Reservoir & Power Co.,* 72 P.2d 648, 653 (Utah 1937). In the Coalition's view, this unquestioned legal right—and the public easement to touch privately-owned river and stream beds while utilizing those waters—existed at the time of statehood and was land acquired and accepted for purposes of Article XX, Section 1 of the Utah Constitution.

Undisputed Facts

At the outset, the Court accepts as true all of the historical facts set forth in the Coalition's opposition memorandum. The Court views these facts in the light most favorable to

the Coalition and draws all reasonable inferences in the Coalition's favor. In summary, these facts support the Coalition's two central contentions—(1) that "[t]hroughout history, until the advent of trespass laws in the mid-20th century, due to its unique religious and homogenous pioneer culture and history, Utahns freely, ubiquitously and, with few exceptions, without landowner objection or legal repercussion, touched and utilized the beds of . . . waters [in Utah's rivers, streams, and lakes]" when accessing and using these waters—"whether navigable with publicly-owned beds or non-navigable with privately owned beds—for any lawful purpose (*e.g.*, fishing, baptisms, washing, bathing, swimming, floating, wading, tie/log and similar drives, installation of irrigation and mill works)"; and (2) the nature and scope of this historical public use of Utah's rivers, streams, and lakes was co-extensive with the easement recognized by the Utah Supreme Court in *Conatser*. *See* Expert Reports of Thomas Alexander (Docket #626) and Sara Dant (Docket #627).

Conclusions of Law

Accepting the Coalition's historical facts as true and viewing them in the light most favorable to the Coalition, the Court turns to the threshold question presented on remand. That question is whether the historical facts established by the Coalition gave rise to "a public easement dictated by our law in the late 19th century?" *Utah Stream Access Coal.,* 2019 UT 7, ¶ 89; *see also id.* ¶¶ 6, 60, 88, 91. As explained, this is a mixed question of fact and law. Therefore, it requires "application of a legal standard to a set of facts unique to [this] particular case." *Swallow v. Jessop (In re United Effort Plan Tr.),* 2013 UT 5, ¶ 19, 296 P.3d 742. More specifically, it requires application of relevant legal standards existing in the late 19th century just before Utah achieved statehood.

To decide this legal side of the threshold question, the Court must examine separately two early stages of Utah history and the law that governed public easements during each stage. The Court will then address the remaining legal theories underlying the Coalition's claims.

Stage One—1847 to 1869

Fleeing religious persecution successively encountered in Ohio, Missouri, and Illinois, Mormon pioneers trekked west arriving in the Salt Lake Valley in July 1847. *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 922 (Utah 1993). At that time, the Salt Lake Valley and the surrounding lands which would later comprise the Utah territory were part of Mexico. These lands were not uninhabited. It is estimated that at the time of Mormon settlement, 20,000 Native Americans lived on the land that would later become the State of Utah. These Native Americans represented a number of tribes, including Southern Paiute, Ute, Goshute, and Navajo. David Rich Lewis, *Native Americans in Utah, Utah History,* https://www.uen.org/utah_history_encyclopedia/n/NATIVE_AMERICANS.shtml . Fur traders, trappers, and explorers were also there.

In 1851, the United States acquired the Utah territory from Mexico under the Treaty of Guadalupe Hidalgo. *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States,* 136 U.S. 1, 45 (1890). By this treaty, the Utah territory "became the absolute property and domain of the United States." *Id.* As matter of federal law, people already living in the Utah territory at the time of the treaty had no title to the land they occupied. Nathan B. Oman, *Preaching to the Court House and Judging in the Temple,* 2009 BYU L. REV. 157, 211. They "were, legally speaking, squatters." *Id.*

Under the Property Clause of the U.S. Constitution, Congress had plenary authority over the lands acquired by treaty in the Utah territory. *United States v. Midwest Oil Co*., 236 U.S.

459, 488 (1915) ("The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."). This plenary authority included the power to "prescribe the conditions upon which others may obtain rights" in the land. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917).

Legal title to lands in the Utah territory did not pass from the United States to private owners until 1869, when the United States extended its land laws to the territory and opened a land office. *See Tarpey v. Madsen*, 178 U.S. 215, 216 (1900); L. Rex Sears, *Punishing the Saints for Their "Peculiar Institution": Congress on the Constitutional Dilemmas*, 2001 UTAH L. REV. 581, 589 ("But a federal land office was not opened until 1869, until which time settlers could not even secure good title to their land by purchase."). Thus, from 1851 to 1869, the United States owned all of the land in the Utah territory. Any public easement in rivers and streams traversing that land would have required Congressional approval.

As set out in the State's moving papers, Congress enacted laws granting a variety of easements over land owned by the United States and these laws applied in the Utah territory. *See* 43 U.S.C.§ 931 (2019) (Dating from 1796, Congress deemed "[a]ll navigable rivers, within the territory occupied by the public lands" to be "public highways."); *Garfield Cty. v. United States,* 2017 UT 41, ¶ 2, 424 P.3d 46 (In 1866 Congress enacted Revised Statute 2477 granting "the right of way for the construction of highways over public lands, not reserved for public uses."); *Utah Power & Light Co.*, 243 U.S. at 405–506 (noting Revised Statutes in which Congress granted easements or rights of way for the construction of irrigation "ditches, canals, and reservoirs" to be used in "mining, agricultural, manufacturing, and other purposes"). But the

Coalition has failed to produce any statute or other evidence of Congressional action granting a public easement in the beds of non-navigable rivers and streams in the Utah territory.

Thus, because of the plenary power of Congress over lands in the Utah territory, public use of non-navigable river beds and stream beds in the territory between 1851 and 1869 could not create an easement dictated by law in the late 19th century.

Stage Two—1869 to Statehood in 1896

As explained above, before legal title to land in the Utah Territory could pass from the United States to private parties, Congress had to extend the land laws of the United States to the Territory and open a land office. This did not occur until 1869.

Beginning in 1869, the United States began to transfer title to some of the land in the Utah Territory to private owners. These transfers of land to private parties were accomplished through a document called a "patent." A patent passes to the purchaser "a perfect and consummate title," free of any encumbrance or adverse claim. *See Shiver v. United States*, 159 U.S. 491, 495 (1895); *Wilcox v. Jackson, ex rel. M'Connel*, 38 U.S. 498, 499 (1839); *Hawke v. Deffenbach*, 22 N.W. 480, 489 (1885).

Thus, before Statehood in 1896, private parties who purchased land in the Utah territory from the United States, acquired "perfect and consummate title," free of any claimed encumbrance arising from public use of non-navigable rivers and streams traversing the purchased land. The Court is not persuaded by the Coalition's unsupported claim that the *Conatser* easement is somehow an exception to this rule. Moreover, for the reasons stated above in the section titled "Stage One—1847 to 1869," any land retained by the United States from 1869 until statehood in 1896, was not encumbered by any such easement.

The remaining question is whether public use of non-navigable rivers and streams' traversing private land in the Utah territory between 1869 and statehood in 1896' gave rise to a public easement dictated by our law in the late 19th century. For the reasons set out in section I.B and I.C of VRA's memorandum and section A.3(ii) of the State's memorandum, the answer to this question is no.

The Coalition is correct about state trespass laws in the late 19th century and early 20th century. These laws did not prohibit a member of the public from touching the privately owned bed of a non-navigable river or stream. But the absence of civil or criminal liability for this public use does not mean that the use also gave rise to a public easement. In fact, Utah law in the late 19th century held that a public right of way could be established only by condemnation, dedication, or prescription. *Harkness v. Woodmansee*, 26 P. 291, 292 (1891). And the Coalition does not rely on any of these three legal grounds as the basis for its claims.

Instead, the Coalition contends that *Harkness* did not define the universe of ways in which a public easement might be lawfully established. Indeed, if *Harkness* had set forth an exclusive list of paths to public easement acquisition, "then the Supreme Court got it wrong in *Conatser* [*v. Johnson,* 2008 UT 48, 194 P.3d 897], in *J.J.N.P.*[*Co. v. State*, 655 P.2d 1133 (Utah 1982),] and here, and the last ten years of litigation in this case has been merely an academic exercise." Coalition Opp. Memo, p. 35. The Court disagrees.

The issue presented on remand asks the Court to view the Coalition's claim through the lenses of the law as it existed at statehood in 1896, not the lenses of the common law as it developed some one hundred years later. The fact that a public easement, to touch privately-owned beds of Utah's rivers and streams, was recognized in *Conatser* and *J.J.N.P. Co.* is not evidence that these decisions were wrong. Rather, it merely demonstrates that the public

easement recognized in those cases is the "product of common-law developments in the 20th and 21st centuries." *Utah Stream Access Coal.,* 2019 UT 7, ¶ 91.

In the late 19th and early 20th centuries, the common law related to public access rights to non-navigable rivers and streams was not as developed as it is today. This was true not just in Utah but throughout the western United States. In 1967, after an exhaustive survey of the common law related to rights of use in western rivers and streams, Professor Ralph W. Johnson and attorney Russell A. Austin, Jr. concluded:

> The cases prior to 1926 tended to lump together both the issues of title to bed and right of public use. The courts were prone to say that if the state owned the bed of the water, that is, if it were navigable for title, then the public had a right of use; and conversely, if the beds were privately owned, the public had no such right of use. The notion of treating separately these two issues of title and right of use had not occurred, evidently, to either courts or counsel.

Ralph W. Johnson and Russell A. Austin, Jr., *Recreational Rights and Titles to Bed on Western Lakes and Streams,* 7 NAT. RESOURCES J. 1 (1967). At statehood, Utah's territorial law had not developed beyond this general rule so as to recognize a *Conatser* easement, even though—as the Coalition's historical facts demonstrate—public use of Utah's non-navigable rivers and streams was at the time widely accepted and extensive.

Other Theories Advanced By the Coalition

In the briefing and at oral argument, the Coalition presented two legal theories which require comment. In the briefing, the Coalition argues that before 1896 certain "guiding principles" animated the theological, political, and cultural life of early Mormon pioneers in the Utah territory. Among these principles were "divine ownership of land and other resources, cooperation, relative equality, and benevolence among all." And it is in these principles and their customary application that the *Conatser* easement is rooted.

Even if these historical facts are accepted as true, they do not state a late 19th century legal basis for the easement the Coalition claims. In practical effect, the Coalition argues that by custom, the public acquired an easement to touch privately owned beds of rivers and streams. For the reasons stated in section I.C of VRA's memorandum, the Court concludes that (1) easement by custom was a doctrine of the English common law that never took root in United States soil; and (2) at the time of Utah statehood, easement by custom was not a recognized basis upon which to establish a public easement.

In their respective reply memoranda, both VRA and the State argue that grounding a legal right in early Mormon theology or doctrine would violate Article I, Section 4 of the Utah Constitution. Section 4 provides that "[t]here shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions." UTAH CONST. art. I, § 4. Because the Coalition's claims can be resolved on other grounds, the Court need not reach this constitutional question. *State v. Wood,* 648 P.2d 71, 82 (Utah 1982) ("It is a fundamental rule that [courts] should avoid addressing a constitutional issue unless required to do so."). Moreover, the question was raised for the first time in VRA's and the State's respective reply memoranda and for that reason has not been adequately briefed.

Finally, at oral argument the Coalition argued that the public easement to touch the privately owned beds of Utah's non-navigable rivers and streams arises out of the public's ownership of state waters. In the Coalition's view, this legal ownership has always existed and it is the source from which the *Conatser* easement springs. In fact, the Utah Supreme Court has held that the public right to use state waters was "recognized and confirmed" in Article XVII, Section 1 of the Utah Constitution. *Adams v. Portage Irrigation, Reservoir & Power Co.*, 72 P.2d 648, 653 (Utah 1937).

The Coalition's recitation of these legal principles is accurate. But the Coalition has failed to show how public ownership of state waters and the rights of use derived from that ownership constituted an easement under our law as it existed in the late 19th century. This failure to prove the existence of an easement upends the Coalition's "public ownership" theory—for, in the absence of an interest in "land," or "lands of the State" Article XX, Section 1 of the Utah Constitution simply has no application.

ORDER

The Coalition has come forward with substantial evidence that in the last half of the 19th century, Utahns widely and freely touched and used both public and private beds of Utah's lakes, rivers, and streams for a variety of purposes, including recreation. But, the Coalition has failed to prove that this historical use gave rise to a public easement dictated by our law in the late 19th Century.

Therefore, as to the threshold question presented on remand, the Court GRANTS both VRA's motion and the State's motion for summary judgment.

Granting summary judgment on the threshold question in favor of both VRA and the State marks the end of this litigation, at least in the district court. All other issues on remand are moot. The Court need not determine whether the *Conatser* easement constituted a "land" or "land of the State" that was "acquired" and "accepted" under Article XX, Section 1 of the Utah Constitution. And the Court need not reach any of the "invitation-only" questions articulated by the Supreme Court in *Utah Stream Access Coalition*.

Counsel for VRA shall prepare an order and final judgment consistent with this Ruling and Order.

DATED this 16th day of August, 2021.

/s/ Derek P. Pullan

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JUDGE DEREK P. PULLAN
Fourth District Court