

1986

# William J. Colman v. Utah State Land Board : Brief of Respondent

Utah Supreme Court

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Carol Clawson; Giauque, Williams, Wilcox, and Bendinger; Attorney for Appellant.

L. Ridd Larson, Thomas L. Kay, Craig L. Taylor; Ray, Quinney, and Nebeker; Paul Van Dam; Utah Attorney General; R. Douglas Credille; Assistant Attorney General; Attorneys for Respondents.

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UTAH SUPREME COURT

BRIEF

860331

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM J. COLMAN,

Plaintiff-Appellant,

v.

UTAH STATE LAND BOARD; RALPH MILES,  
Director, Utah Division of State  
Lands and Forestry, Utah Department  
of Natural Resources; and SOUTHERN  
PACIFIC TRANSPORTATION COMPANY, a  
Delaware corporation,

Defendants-Respondents.

Supreme Court No. 860331

On Appeal from the Third Judicial District Court  
In and for Salt Lake County, State of Utah  
Honorable Jay E. Banks

STATE RESPONDENTS' SUPPLEMENTAL BRIEF

CAROL CLAWSON  
GIAUQUE, WILLIAMS, WILCOX  
& BENDER  
500 Kearns Building  
SALT LAKE CITY UT 84101  
Telephone: (801) 533-8383

ATTORNEYS FOR APPELLANT  
WILLIAM J. COLMAN

L. RIDD LARSON  
THOMAS L. KAY  
CRAIG L. TAYLOR  
RAY, QUINNEY & NEBEKER  
400 Deseret Building  
79 South Main Street  
SALT LAKE CITY UT 84145-0385  
Telephone: (801) 532-1500

ATTORNEYS FOR RESPONDENT  
SOUTHERN PACIFIC TRANSPORTATION CO.

PAUL VAN DAM  
UTAH ATTORNEY GENERAL  
R. DOUGLAS CREDILLE  
Assistant Attorney General  
1636 West North Temple, #300  
SALT LAKE CITY UT 84116  
Telephone: (801) 538-7227

ATTORNEYS FOR UTAH STATE  
RESPONDENTS

FILED

MAY 22 1989

COURT OF THE STATE OF UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM J. COLMAN,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	
	)	Supreme Court No. 860331
UTAH STATE LAND BOARD; RALPH MILES,	)	
Director, Utah Division of State	)	
Lands and Forestry, Utah Department	)	
of Natural Resources; and SOUTHERN	)	
PACIFIC TRANSPORTATION COMPANY, a	)	
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## STATE RESPONDENTS' SUPPLEMENTAL BRIEF

ATTORNEYS FOR UTAH STATE  
RESPONDENTS

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## ISSUE FOR THIS BRIEF

Whether damage arising from an exercise of the police power is ever compensable and, if so, under what circumstances.

## DETERMINATIVE PROVISIONS

1. Utah Governmental Immunity Act, Section 63-30-3, U.C.A.

1953, states in relevant part:

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

2. Utah Governmental Immunity Act, Section 63-30-10(1), states in relevant part: "Immunity from suit of all governmental entities is waived \* \* \* except \* \* \* (b) \* \* \* [for] civil rights [claims]."

3. Great Salt Lake Causeway Act (H.B. 30, 1984 Utah Laws, Ch. 32) is reproduced in Appendix A of Colman's original brief.

## STATEMENT OF THE CASE

The State's principal Statement is in the Brief of State Respondents (hereinafter State's "Primary Brief") at 2-6.

The level of the Great Salt Lake has fluctuated drastically over its recorded history. R. 133, pp. 3-10. When the railroad Causeway was completed in 1959, the Lake was in a down-trend.

Id. at 4. "[B]y 1963 it had reached an all-time historic low of 4,191.35 feet [elevation above sea level]." Id. at 7.

By 1967, when an earlier lessee began constructing the ditch (R. 494), the Lake was at 4194.35 on the north side of the Cause-

way. R. 133, p. 4. (The ditch was constructed on the state-owned lakebed about 1700 feet (one-third of a mile) north of the Causeway. R. 547.)

By July 1984, the Lake was engulfed in an unprecedented rise. It already had flooded hundreds of additional square miles<sup>1</sup> of private and public property, public facilities, and transportation routes. R. 164. And the Lake continued to rise. By this time, pursuant to the Great Salt Lake Causeway Act, work was in progress to breach the Causeway.

Appellant Colman's Complaint was filed July 20, 1984. R. 2. It alleged the breach of the Causeway would damage part of his ditch located on the lakebed. He prayed for an injunction to stop the breach and, in the alternative, for damages. R. 2-13.

On July 30, 1984, Judge Jay Banks conducted an evidentiary hearing on Colman's motion for preliminary injunction. By agreement, the parties' evidence was submitted in advance, by means of litigation affidavits. R. 488-489; 40-43; 204-207; 110-115; 194-203; 172-179; 163-169; 187-193. The parties also supplemented the affidavits by means of live testimony, which was transcribed. R. 485, 490. On July 31, 1984, Judge Banks announced his decision denying the motion for preliminary injunction. R. 572. The Causeway was breached August 1, 1984.

On February 10, 1986, Judge Banks heard arguments on the Respondents' respective motions to dismiss. He granted those

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<sup>1</sup> To illustrate the vast acreage being newly flooded by the rising Lake, the rise from September 1982 to July 1983 (when the Lake reached "only" 4205) flooded an additional 267 square miles. R. 133, p. 3. Of course, much more land was flooded by July 1984, when the Lake was over 4209. R. 134.

motions on May 2, 1986, after "having reviewed the entire file," R. 461, which included the evidence adduced on the motion for preliminary injunction. Colman appealed the district court's Order and Judgment.

The Utah Supreme Court heard oral argument on March 7, 1989. By letter dated March 9, 1989, the Chief Justice requested this Supplemental Brief.

Judge Banks decided as a matter of law that Colman has no cause of action, because of the Utah Governmental Immunity Act, the State's police power, the Great Salt Lake Causeway Act, and the State's public-trust authority. R. 462. He also concluded that "there otherwise has been no compensable taking of a property interest," and that Colman's Complaint "otherwise fails to state a cause of action." R. 462.

Judge Banks' decision is well supported by the record.<sup>2</sup>

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<sup>2</sup> Colman now does not want us to refer to the record developed in the trial court and referred to by Judge Banks. But this Court is free to consider the record; indeed, we respectfully submit that this competent evidence (some of which is uncontradicted) must not be ignored.

There is no virtue in rigid adherence to a technical rule that has no practical bearing on the proper outcome of a particular case. For example, as a practical matter it is immaterial that Judge Banks did not expressly treat this case as one for summary judgment under Rule 56, U.R.Civ.P. He did not make specific findings of fact, but before dismissing Colman's Complaint he "reviewed the entire file," which includes the record evidence. R. 461. Besides, uncontradicted evidence speaks for itself; no purpose would have been served by specific findings on those facts. Rule 56(e). At least as to the uncontradicted facts against his claim, Colman cannot avoid defeat by "the mere allegations or denials of his pleading." Rule 56(e).

Our situation compares to one in which, after a plaintiff presents his case at trial, a motion to dismiss is granted "on the ground that upon the facts and the law the plaintiff has

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<sup>2</sup>(...continued)  
shown no right to relief." Rule 41(b), U.R.Civ.P.

The hearing in the trial court was fair, and Colman had every opportunity to adduce whatever evidence he felt necessary. He certainly was not surprised by the State's evidence (e.g., that before the breach Colman had no ditch in the area opposite the breach-site), for the parties exchanged affidavits well before the hearing. R. 488-89.

Nevertheless, Colman now argues that the record cannot be used in this case because "[a]t the preliminary injunction hearing, the court specifically stated that it was ruling on whether the plaintiff met his burden of proof for a preliminary injunction and that the ruling was not dispositive of the other issues raised." Colman's Supp. Brief 4 n.6. Colman confuses the point.

When Judge Banks decided against the injunction, he could not decide the motions to dismiss, because those motions had not yet been filed (they were filed 20 days after the breach occurred). Besides, the evidence in the record was the same at and after the hearing. The evidence adduced in the injunction hearing had not changed, and the court could consider it in reaching a final disposition on the merits of the case. Colman's burden of persuasion in the injunction hearing is irrelevant, for the question here is the availability of the evidence itself, not the burden. (In any event, one of Judge Banks' tasks in the injunction hearing was to judge the merits of Colman's case; i.e., to weigh its likelihood of success on the merits.)

There is no reason to spend more time and judicial resources on another evidentiary hearing. The law is clear, as are several decisive, uncontradicted facts. Judge Banks properly could rely on the record. And whether or not he decided this case partly on the evidence or solely on the pleadings, this Court is free to consider the record before it, and may affirm the trial court for being correct as a matter of law, regardless of how the trial court reached its decision. This Court "may affirm a trial court's decision on proper grounds even though different than those relied upon by the trial court." *Branch v. Western Petroleum Inc.*, 657 P.2d 267, 276 (Utah 1982). This Court will choose from among "alternate bas[es] for decision," to "affirm a trial court's decision whenever we can do so on a proper ground." *Bill Nay & Sons Excavating v. Neeley Const.*, 677 P.2d 1120, 1123 (Utah 1984); also see *Buehner Block Co. v. UWC Associates*, 752 P.2d 892, 895 (Utah 1988).

Of course, the decision below can be affirmed without reference to the record evidence. The law, applied to the  
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Indeed, certain decisive facts are uncontradicted. For example, Colman admitted he has no water right<sup>3</sup> (i.e., no right to divert water (the brines) from the Lake). R. 501. Colman had not dredged his ditch in the area for years. R. 495. And Colman's witness, Clark Lin, agreed the ditch could have eroded away in the months and years before the breach, as the Lake's water arose around and against the ditch. R. 515. In fact, eight days before the breach, the only examination of the "ditch" showed that in the area opposite the breach-site there was no ditch.<sup>4</sup> R. 114. That area was in water 10 feet deep. R. 113.

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<sup>2</sup>(...continued)  
pleadings standing alone, shows that there was no "taking" and that no compensation is required. (Colman's allegation of a "taking" is a legal conclusion entitled to no deference.)

<sup>3</sup> Colman's application to appropriate water lapsed for lack of proof of appropriation; he had never yet achieved a perfected water right. His approved application simply permitted him to "appropriate" (divert and put to beneficial use) the water. Once he had successfully made the appropriation and filed proof of the appropriation, he would have been entitled to a certificate from the State Engineer, evidencing his perfected water right. But he has filed no proof that he ever appropriated any water under his application. (Of course, without a water right, he cannot extract brines from the Lake, and in that case the ditch has no function or value to him.)

<sup>4</sup> The only evidence from immediately before the breach showed that the remnant of the ditch at its most defined point had a maximum "conduit capacity" of only 3.2 feet (1.5 feet below the natural lakebottom plus a berm of 1.7 feet). R. 112-13. That location was closer to shore than is the area opposite the breach site. In the area "immediately north of and in line with the breach site \* \* \* the berm [was] completely eroded away and the ditch silted in, and for all intents and purposes [the ditch was] unusable as a brine conduit." R. 114.

That is uncontradicted record evidence. While he now complains about our use of the record (see our note 2), Colman incongruously (and improperly) makes allegations to this Court that are not in the record. Those allegations (Colman's Supp. Brief 3 at n.4) should be seen for what they are, the self-  
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Moreover, whatever rights Colman has in the "ditch" depend on the terms of the 1978 lease between Colman and the State.

On Colman's motion, the Court admitted into evidence both the lease (Exhibit 1P) and the Land Board's 1979 approval (Exhibit 2P) of Colman's request to add the "ditch" (which someone else had constructed in 1967) to the lease. R. 489, 494. By that 1979 Board action, the ditch became part of, and governed by, the lease. R. 489. The lease requires Colman to pay an annual rental of 50-cents per acre. Lease article III(a).

In the lease, Colman made certain agreements that bear on this case. For example, Colman understood and agreed that the lease expressly reserved to the State "[t]he right to permit for joint or several use such easements or rights of way upon, through, or in the land hereby leased as may be necessary or appropriate to the development of these or any other lands belonging to or administered by the Lessor [State]." Article IV (emphasis added)(Exhibit 1P, p.2).

He further agreed that "Neither party shall be liable to the other for any loss or damage suffered or incurred \* \* \* by reason or as a result of \* \* \* acts of God or the public enemy \* \* \* [or] floods \* \* \*." Article XIV (Exhibit 1P, p.4).

And Colman acknowledged that the "lease is granted subject to the laws of the State of Utah," including future regulations. Article I (Exhibit 1P, p.2).

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<sup>4</sup>(...continued)  
serving product of Colman's remarks to his counsel "[f]ollowing oral argument." His comments cannot withstand the record.

As the record shows, breaching the Causeway was the best way to give "immediate relief on any emergency basis from the widespread flooding caused by the rising waters of the South Arm of the Lake." R. 128. And the Legislature did breach the Causeway. R. 373-375 (Great Salt Lake Causeway Act).<sup>5</sup>

"On appeal, Colman does not claim that the Causeway Act was an arbitrary act or that the breach was an improper use of police power." Colman's Supp. Brief 13 n.11.

#### SUMMARY OF ARGUMENT

The State's authority or power is fully comprehended in its revenue powers, eminent domain powers, and police power. (The police power is everything not included in the revenue and eminent domain powers.)

To answer the Court's question: No, an exercise of the police power does not require compensation for any damage it causes. Only an exercise of eminent domain requires compensation. If a plaintiff wants compensation for an alleged "taking," he can prevail against the State only if his case comes within and qualifies under the law of eminent domain.

A plaintiff can maintain a claim for compensation under the law of eminent domain only by meeting each of these four conditions: (1) He must have the right to bring suit against the State for this type of claim; (2) his compensation claim must be

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<sup>5</sup> See also U.S. District Judge Aldon Anderson's discussion that the causeway-breach-project was a valid exercise of the State's police power. Great Salt Lake Minerals v. Marsh and State of Utah, 596 F.Supp. 548, 557-58 (D.Utah 1984), excerpted in State's Primary Brief at 29-30 n.16.

for the loss of a real, cognizable, protectable property right; (3) there must be a "taking" as a matter of law; and (4) there must be a "taking" as a matter of fact.

The plaintiff's first obstacle, condition 1, is sovereign immunity. Conditions 2, 3 and 4 go to the merits of the plaintiff's case. (Each of these latter three requirements must be met or else the plaintiff's case ipso facto falls outside the realm of eminent domain and within the noncompensable realm of police powers.)

Colman's claim under Article I, Section 22, is barred by the State's sovereign immunity. Similarly, his Fifth Amendment claim is barred as a matter of the State's immunity under federal law.

If Colman could overcome the State's immunity, his takings claim would still fail because he has no real, cognizable, protectable property right. There was no property right to "take." His lack of "property" in this case results from the terms of the lease between Colman and the State, and also from the Public Trust Doctrine.

Even if he had a cognizable property right, he can state no "takings" claim in this case as a matter of law.

He has no right to compensation because he cannot show that the State acted outside the realm of noncompensable police power; he cannot prove that breaching the Causeway was an act of eminent domain.

The Causeway was breached in response to a public emergency, and by law this exercise of emergency police power does not require the State to compensate Colman.

A separate body of law clearly shows that government effects a "taking" in flood situations only if the flooding actually and permanently invades the property so as to constitute an appropriation of, and not merely an injury to, the property. This body of "flooding" law represents another reason to conclude that Colman's "ditch" was not "taken."

The law relating respectively to emergencies and flooding clearly controls this case. On those bases alone, Colman's claim should be rejected.

Two other areas of "takings" jurisprudence (concerning physical interference, invasion or occupation of property; and regulation of property), are not directly relevant to this case, and do not help Colman, anyway.

We note also that, in the so-called "Salt Cases," this Court has recognized the importance of the State's right to manage and control its own Lake for the public good; and conflicting rights should not be allowed to diminish or fetter the State's control.

Because of sovereign immunity, the nonexistence of a cognizable property right, and the lack of legal merit of Colman's claim, there is no reason to reach the question of whether the "ditch" was taken as a matter of fact. (The record shows that the facts will not support Colman's "takings" claim in any event.)

Clear law and sound public policy require the conclusion that Colman has not had any property "taken." The Causeway breach was a valid, noncompensable exercise of the State's police power.

## ARGUMENT

The Court asks: When, if ever, does an exercise of the police power require compensation.

### A.

#### DISTINCTION BETWEEN POLICE POWER AND EMINENT DOMAIN

We must first define some terms. "In [one] sense, the police power is but another name for the power of government." Mutual Loan Company v. Martell, 222 U.S. 225, 233 (1911). In other words, the police power is the basis or authority for everything the State does or may do. It is an expansive, comprehensive power. Id. at 232-34.

The police power is "to promote the public convenience or the general prosperity \* \* \* [and] the public health, the public morals, or the public safety." Id. at 232, quoting Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561, 592 (1906). It "is not confined 'to the suppression of what is offensive, disorderly, or unsanitary,' but 'extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.'" Martell, 222 U.S. at 232-33, quoting Bacon v. Walker, 204 U.S. 311, 318 (1907).

The police power "is not subject to any definite limitations, but is coextensive with necessities of the particular situation and safeguard of the public interest." Ward v. State, 188 Ga.App. 372, 373 S.E.2d 65, 67 (1988).

All of the government's many powers (the comprehensive police powers) divide into three distinct categories: (a) revenue powers, (b) eminent domain powers, and (c) all other

police powers. State v. Mason, 94 Utah 501, 513-14, 78 P.2d 920, 925 (1938).

In this more specific sense (i.e., category (c) just above), "police power" is defined by its contradistinction to eminent domain. That is, as used hereinafter, "police power" is all governmental power except eminent domain powers.<sup>6</sup>

Eminent domain is the sovereign power to take property for public use without the owner's consent. 1 Nichols' Law of Eminent Domain (3rd ed. 1973, as updated 1988) (hereinafter "Nichols Eminent Domain"), Sec. 1.1, p. 1-7. Under Article I, Section 22, of the Utah Constitution,<sup>7</sup> and the Fifth Amendment of the United States Constitution,<sup>8</sup> just compensation must be paid for an exercise of eminent domain.

In contrast, by its nature and definition and by longstanding force of law, an exercise of police power does not require compensation. 1 Nichols Eminent Domain, Sec. 1.42[3], p. 1-248. See also id., Sec. 1.42, p. 1-145 ("an interference with the use of property as the result of a sovereign act, other than one of eminent domain, does not amount to a compensable taking");<sup>9</sup> Lewis

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<sup>6</sup> We exclude the revenue powers from this analysis because they obviously are not involved here.

<sup>7</sup> "Private property shall not be taken or damaged for public use without just compensation."

<sup>8</sup> "\* \* \* nor shall private property be taken for public use, without just compensation."

<sup>9</sup> The police power is "one of the most essential powers of government, one that is least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." Hadacheck v. Los Angeles,  
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v. DeKalb County, 251 Ga. 100, 303 S.E.2d 112, 115 (1983) (the Constitutional provisions requiring compensation for taking private property "have no relevance to the exercise of the police power")<sup>10</sup>; McKell v. Spanish Fork City, 6 Utah2d 92, 305 P.2d 1097 (1957).

If a plaintiff wants compensation for an alleged "taking," he can prevail only if his case comes within and qualifies under the law of eminent domain (which encompasses inverse condemnation). As between an exercise of police power and an exercise of eminent domain, only the latter requires compensation.

Therefore, the answer to the Court's question is: No, an

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<sup>9</sup>(...continued)  
239 U.S. 394, 410 (1915).

"[T]he police power, although it may take property, does not, as a general rule, appropriate it to another use, but destroys the property, while by eminent domain property is taken from the owner and transferred to a public agency to be enjoyed by the latter as its own." An exercise of the police power does not entitle the property owner "to any compensation for any injury which he may sustain, for the law considers that either the injury is *damnum absque injuria* or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power." 29A C.J.S., Eminent Domain, sec. 6, p. 179.

"Constitutional provisions against the taking of private property for public use without just compensation impose no barrier to the proper exercise of the police power." Id. at 180.

Note that, "[o]n appeal, Colman does not claim that the Causeway Act was an arbitrary act or that the breach was an improper use of police power." Colman's Supp. Brief 13 n.11 (emphasis added). Colman nevertheless demands compensation. Id.

<sup>10</sup> Also see Nichols Eminent Domain, Sec. 1.42[3], p. 1-252, and cases cited therein.

exercise of the police power does not require compensation for any damage it causes.<sup>11</sup>

We will now address the circumstances that do require the State to pay compensation (i.e., the circumstances that qualify for compensation under the law of eminent domain).

B.

FOUR CONDITIONS FOR COMPENSATION

Four criteria determine whether a particular situation qualifies for compensation under eminent domain. A plaintiff must meet each of these criteria or conditions in order to maintain a claim for compensation:

1. He must have the right to bring suit against the State for this type of claim;
2. His compensation claim must be for the loss of a real, cognizable, protectable property right;
3. There must be a "taking" as a matter of law; and
4. There must be a "taking" as a matter of fact.

The first condition concerns sovereign immunity, which is the plaintiff's first obstacle. Conditions 2, 3 and 4 go to the merits of the plaintiff's case: If he fails to prove his case on each of these latter three requirements, then he has failed to bring his case within the realm of eminent domain and, ipso

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<sup>11</sup> Of course, so far we have only drawn a definitional line of demarcation between the police power and eminent domain. The precedents and principles that place a given case on one side of the line or the other are discussed below. It is necessarily true, in any event, that a plaintiff can require compensation by a "takings" claim only if he proves a "taking" under the law of eminent domain. That is the test.

facto, he has proved that his case belongs in the noncompensable realm of police powers.

In sum, a plaintiff can require compensation for an alleged "taking" only if his case meets each of the four requirements.

1. Sovereign Immunity

- a.

Policy Reasons For Immunity. Colman's suit is barred by the State's immunity. (See State's Primary Brief at 8-15.) Fairclough v. Salt Lake County, 10 Utah2d 417, 354 P.2d 105, 106 (1960); Holt v. State Road Comm'n, 30 Utah2d 4, 511 P.2d 1286, 1288 (1973). To some, sovereign immunity may seem a harsh principle. In fact, though, it underlies effective government.

It "protect[s] the state from interference with the performance of its governmental functions." Hopkins v. State, 237 Kan. 601, 702 P.2d 311, 317 (1985). Government and its officials "require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

For "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty--at a cost not only to the defendant officials, but to society as a whole." Harlow, 457 U.S. at 814.

"These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Id.; also see Messina v. Burden, 321 S.E.2d 657, 660-61 (Va.

1984); Hurst v. Highway Dept., 16 Utah2d 153, 397 P.2d 71, 72-3 (1964).

"Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" Harlow, 457 U.S. at 814 (citation omitted). To diminish immunity "would contribute not to principled and fearless decision-making but to intimidation." Wood v. Strickland, 420 U.S. 308, 319 (1975), quoting Pierson v. Ray, 386 U.S. 547, 554 (1967). Judicial immunity has similar justification. Stump v. Sparkman, 435 U.S. 349 (1978).

Without immunity, the State and its officers might be less willing or able to make or implement difficult decisions and thereby "perform [their] duties." Wood, 420 U.S. at 321.

Immunity is necessary partly because the State might make mistakes. "The concept of immunity assumes this [i.e., that government may err] and goes on to assume that it is better to risk some error and possible injury from such an error than not to decide or act at all." Id., quoting Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).

Far from being outmoded, sovereign immunity is as vital to effective government now as when Fairclough and related cases were decided. Those decisions are correct and necessary.

b.

Utah Law Provides Immunity. Fairclough held that the eminent domain provision (Article I, Section 22) of the Utah Constitution "is not self-executing, nor does it give consent"

for suits against the State. 354 P.2d at 106. One may sue the State under that provision only by clear legislative consent.

Id.<sup>12</sup>

And by its terms Article I, Section 22, concerns only property rights; sovereign immunity does not violate the Constitution, partly because any opportunity to sue the State is "a privilege accorded," not a "property right." Fairclough, 354 P.2d at 106-107, quoting Lynch v. United States, 292 U.S. 571, 581 (1934).

Note that Fairclough states three separate reasons to uphold sovereign immunity: (1) The Utah Constitution's eminent domain provision is not "self-executing, [2] nor does it give consent to be sued"; and (3) sovereign immunity does not violate any constitutional property right. 354 P.2d at 106-107. The Court quotes Lynch on this third reason.

Lynch involved a contract between the Government and the plaintiffs. The Court noted that a contractor's rights under a government contract are property rights "protected by the Fifth Amendment," although nevertheless subject to the police power. 292 U.S. at 579. (The police power was not an issue, however. Id. at 580.)

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<sup>12</sup> The holding in Fairclough, that no claim (even a constitutional claim) can be maintained against the State without legislative waiver of immunity, accords with Utah Constitution Article VIII, Section 3 (Supreme Court appellate jurisdiction "to be exercised as provided by statute"), and Section 5 (district courts have original jurisdiction "in all matters except as limited by this constitution or by statute"; all other courts' jurisdiction "shall be provided by statute"). Sovereign immunity is in "the nature of a jurisdictional bar," Edelman v. Jordan, 415 U.S. 651, 678 (1974), and the Utah Governmental Immunity Act expressly preserves immunity here.

In Lynch, the United States had successfully demurred in the trial court "on the ground that the court was without jurisdiction \* \* \* because the consent of the United States to be sued had been withdrawn" by a particular act of Congress. Id. at 575. On appeal, the plaintiffs claimed the act withdrawing the waiver of immunity had "deprived them of property" in violation of the Fifth Amendment. Id.

The Supreme Court decided, as a matter of statutory construction, that the act had not actually withdrawn the waiver of immunity. Id. at 575, 583, 585-87. The Government's immunity therefore remained waived.

But the Court clearly reaffirmed that the Government could have reestablished its immunity "at any time." Id. at 581. "The rule that the United States may not be sued without its consent is all-embracing." Id. Immunity--and even its reestablishment after its waiver--does not violate the Fifth Amendment. Id. The reason is as stated above: "[C]onsent to sue the United States is a privilege accorded, not the grant of a property right protected by the Fifth Amendment." Id.

"The sovereign's immunity from suit exists whatever \* \* \* the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress and to those arising from some violation of rights conferred upon the citizen by the Constitution." Id. at 582 (citations omitted).

In Fairclough the plaintiff sought to protect some property right (apparently ease of access to his land). 354 P.2d at 106. In Lynch the plaintiffs had contracts that were "property"

protected under the Fifth Amendment. 292 U.S. at 579. But, as those cases show, property rights do not translate into a right to sue the State. 354 P.2d at 106-107; 292 U.S. at 581. There is no right to sue the State without its consent.

Although Lynch concerned only the Fifth Amendment, this Court specifically noted that the word "damaged" in Art. I, Sec. 22, makes no difference; "[b]y no stretch of the imagination could this alter the principle involved." Fairclough at 107.

There was nothing new or radical in Fairclough. Its holding already was Utah law. The Court stated a compelling line of Utah authority for the fundamental principle that the State can be sued only if it first consents. Wilkinson v. State, 42 Utah 483, 492, 134 Pac. 626, 630 (1913) (the State was sued when it flooded land); State Road Comm'n v. Fourth District Court, 94 Utah 384, 389, 78 P.2d 502, 504 (1937) ("The State cannot be sued unless it has given its consent or has waived its immunity"); and other authorities cited, 354 P.2d at 107-108.

That was the law<sup>13</sup> when the Causeway was breached in 1984.

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<sup>13</sup> In 1968, in Hampton v. State Road Comm'n, 21 Utah2d 342, 445 P.2d 708, the Court held that "vibration, dust and noise" caused to plaintiff's property was mere "damage," and sovereign immunity barred any claim therefor. 445 P.2d at 709, 712.

The plaintiff also claimed a taking of the right of street access to his property, and the Court, relying on Justice Wolfe's dissent in State Road Comm. v. Fourth District Court, 94 Utah 384, 78 P.2d 502 (1938), apparently found immunity to be inapplicable. The Court remanded for a determination of whether a taking had occurred. Hampton, 445 P.2d at 709, 712.

In disregarding immunity, Hampton is anomalous. It does not comport with this Court's decisions before or after. In subsequent cases, the Court completely disregarded Hampton in deciding the same issues. E.g., Anderson Investment Corp. v.

(continued...)

There was no waiver of immunity; no right to sue the State under Art. I, Sec. 22; and (as this Court had explained) the State violated no Constitutional right by invoking its immunity.

Fairclough, 354 P.2d at 106, 107; Holt, supra, 30 Utah2d 4, 511 P.2d 1286 (1973); Walton v. State, 558 P.2d 609, 611 (Utah 1976).

In fact, shortly before the Causeway breach, the State's immunity in flooding cases was even more demonstrable than ever before. During the same 1984 legislative session that produced the Great Salt Lake Causeway Act, the Legislature also enacted, as companion legislation, the "floodwaters"-immunity amendment to the Utah Governmental Immunity Act. Section 63-30-3 (ante at 1).

In 1987, in Section 63-30-10.5, the Legislature did give consent for suits against the State under Art. I, Sec. 22. But Section 63-30-10.5 does not diminish the State's immunity here.<sup>14</sup>

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<sup>13</sup>(...continued)  
State, 28 Utah2d 379, 503 P.2d 144 (1972); Holt v. State Road Comm'n, 30 Utah2d 4, 511 P.2d 1286 (1973); Walton v. State, 558 P.2d 609, 611 (Utah 1976). (While Hampton was cited in Utah State Road Comm'n v. Miya, 526 P.2d 926, 929 n.2 (Utah 1974), it was not on the immunity issue.)

Indeed, whereas Hampton purported to rely on Justice Wolfe's dissent in Fourth District Court, supra, the cases decided after Hampton do the opposite (the Court required a strict reading of the majority opinion in Fourth District Court). Anderson, supra, 503 P.2d at 146; Holt, 511 P.2d at 1287 n.1. We submit that Hampton was simply wrong, and this Court apparently has agreed.

The validity of Hampton is doubtful also because of its reliance on Section 78-11-9, which was repealed soon thereafter (1971). And, in any event, Colman can take no comfort from Hampton, which expressly held that a claim of property damage from "the deposit of excessive amounts of dust" (which is Colman's allegation here) is barred by sovereign immunity. 445 P.2d at 708-9.

<sup>14</sup> Section 63-30-10.5 gives consent for suit against the State under Art. I, Sec. 22. It simply does what Fairclough  
(continued...)

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14(...continued)  
said the Legislature would have to do if the State were ever to be subject to suit under the Constitutional provision.

Section 63-30-10.5 ("Section 10.5") has no effect (i.e., there is no waiver of immunity ) where (as here) the plaintiff fails as a matter of law to state a claim in eminent domain. (That is, if there was no "taking," a plaintiff has no benefit from Section 10.5.)

Moreover, Section 10.5 does not (and does not purport to) countermand the "floodwaters" immunity provision of Section 63-30-3 ("Section 3").

Rules of construction require that Section 3 be given its full effect and scope. First, this Court has required a specific rule of construction for the Governmental Immunity Act: The Act must "be strictly applied to preserve sovereign immunity"; and immunity can be waived "only as clearly expressed therein." *Holt v. State Road Comm'n*, 30 Utah2d 4, 511 P.2d 1286, 1288 (1973) (citations omitted).

Since the purpose of Section 3 unequivocally is to preserve sovereign immunity, it should be "strictly applied" to that end. Id. And Section 10.5 should be construed with deference to Section 3.

Second, Section 3 and Section 10.5, both part of the Immunity Act, "should be construed with reference to each other and harmonized, if possible." *Murray City v. Hall*, 663 P.2d 1314, 1318 (Utah 1983).

These two provisions can easily be harmonized by giving each its straightforward effect. Section 3 declares that governmental entities "are immune from suit for any injury or damage resulting from those [floodwater-management] activities." (Emphasis added.) Section 10.5, read in harmony, therefore waives immunity for all "takings" of property except those resulting from floodwater-management.

That is also exactly the construction required by yet a third canon: "[The] provision which is more specific in its application [here, Section 3's very specific immunity for floodwater management] will govern over that which is more general." *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980).

Finally, whatever it denotes, Section 10.5 does not help Colman in this case because it was enacted three years after Colman's alleged injury. It applies only prospectively.

(continued...)

c.

Immunity and Self-Executing Provisions. As Fairclough shows, "Constitutional provisions are not necessarily self-executing. [Insofar] as they either expressly or by necessary implication require legislative action to implement them, they are not effective until that legislative action is had." Connecticut v. Sanabria, 192 Conn. 671, 687-88, 474 A.2d 760, 770-71 (1984), quoting State ex rel. Cotter v. Leipner, 138 Conn. 153, 158, 83 A.2d 169, 171 (1951).

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14 (...continued)

It is a "well-established rule that statutory enactments which affect substantive or vested rights generally operate only prospectively." Utah Dept. of Social Services v. Higgs, 656 P.2d 998, 1000 (Utah 1982). Only procedural rules apply retroactively, where they "do not enlarge, eliminate, or destroy vested or contractual rights." Id.

When the State breached the Causeway, it clearly had full immunity for managing floodwaters. Wilkinson v. State, 42 Utah 483, 134 Pac. 626, 630 (1913); Section 63-30-3. That immunity is the State's substantive right, which cannot be nullified by retroactive application of a statute that does not clearly require retroactivity. Nor may Colman's substantive rights, if any, be improved by retroactivity.

In managing the flood emergency, the State was exercising its police powers for the public good. It did so on the reasonable expectation that it would have immunity as it made its decisions. Given this Court's many explicit decisions supporting sovereign immunity (e.g., Fairclough), the State's expectation of immunity was obviously well founded.

Moreover, considering the political and fiscal milieu of 1987, it is virtually inconceivable that the Legislature intended to make Section 10.5 retroactive. The State's financial condition was dismal, and it is not reasonable to infer that the Legislature intended to retroactively waive the State's immunity and thereby open the treasury to unknown numbers of potential claims. (Indeed, in 1987 the State budget was so bad that the Legislature passed H.B. 310, a supplemental appropriations act, which abrogated appropriations already made, and cut the already-lean budget by over \$26 million.)

"A constitutional provision \* \* \* is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Sanabria, supra, 474 A.2d at 771, quoting Davis v. Burke, 179 U.S. 399, 403 (1900) (quoting Cooley, Constitutional Limitations 99).

Many constitutional provisions are not self-executing. E.g., Fairclough, supra (Art. I, Sec. 22); State v. Burks, 75 N.M. 19, 399 P.2d 920, 921 (1965) (N.M. Constitutional provision that "Private property shall not be taken or damaged for public use without just compensation" does not give consent to sue the state) (decided before enactment of express statutory waiver of immunity); Brunke v. Ridley Tp., 154 Pa.Super. 182, 35 A.2d 751, 752 (1944) (the eminent domain "provision of the Constitution is not self-executing"); State v. Colorado Postal Telegr., 104 Colo. 436, 91 P.2d 481, 484 (1939) (same); Colorado v. Dist. Court, 207 F.2d 50, 57 (10th Cir. 1953) (same); Connecticut v. Sanabria, supra (not self-executing on right to probable-cause hearing in criminal cases); Timm v. Schoenwald, 400 N.W.2d 260 (N.D. 1987) (not self-executing on right to judicial review of election contests).

Of course, whether or not a particular constitutional provision is self-executing depends on its own language and circumstances. But that question (of self-execution) has nothing to do with sovereign immunity. Davis v. Passman, 442 U.S. 228 (1979). One must not "confus[e] the doctrine of sovereign immunity with the requirement that a plaintiff [have] a cause of

action." Pennhurst State School v. Halderman, 465 U.S. 89, 112 (1984), quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 692-93 (1949). They are separate concepts.<sup>15</sup> Immunity bars claims (regardless of whether a provision is self-executing).<sup>16</sup>

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<sup>15</sup> Fairclough, supra.

<sup>16</sup> This was the issue in Davis v. Passman, 442 U.S. 228 (1979). Pleading directly under the Fifth Amendment (invoking no enabling legislation), a former congressional staff member sued her erstwhile employer, a Congressman, who asserted immunity. To decide whether she could maintain her suit, the Court subjected her claim to a series of analytical tests: (1) whether the Constitution provided the "right" she claimed; (2) whether she had a cause of action to assert the right; (3) whether a damages remedy was an appropriate form of relief; and (4) if all of the foregoing were decided in her favor, whether immunity nevertheless barred the claim. 442 U.S. at 234, 235, 236, 244, 249.

In Davis, the Court did not decide whether the defendant actually had immunity, because the lower court had not considered it. Id. at 249. It was remanded for that consideration. (Three of the Justices opined the immunity issue should have been decided first because it could have ended the case without more. See separate dissenting opinions of Justices Stewart and Powell, each joined by Justice Rehnquist, 442 U.S. at 251-254 and n.3.) But the Court did show that immunity will bar causes of action that arise directly under the Constitution.

The Court held the Fifth Amendment to be self-executing. Id. at 230 ("a cause of action and a damages remedy can \* \* \* be implied directly under the \* \* \* Due Process Clause of the Fifth Amendment"); and at 249 (plaintiff had a "cause of action under the Fifth Amendment, and \* \* \* her injury may be redressed by a damages remedy"). But the claim was nevertheless subject to the defendant's immunity (once established on remand). Id.

Immunity is a distinct principle with its own legal effect. Where it exists, it does so irrespective of the separate consideration of whether a provision is self-executing. One cannot avoid immunity on the mere proposition that a provision is self-executing and therefore creates a cause of action. For, as the Court has said in a somewhat different context, if that were enough, "A plaintiff would need only to claim an invasion of his legal rights in order to override sovereign immunity." Pennhurst, supra, 465 U.S. at 112 (internal quotation and citation omitted). "Except in rare cases it would make the constitutional doctrine of sovereign immunity a nullity." Id.

d.

Immunity Under Fifth Amendment. Two points of federal law need to be explained in relation to Colman's Fifth Amendment claim. First, the Taking Clause is self-executing. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S.Ct. 2378, 2386 (1987). That is, no enabling statute need exist or be pled as the basis for bringing the claim; a plaintiff need only invoke the Fifth Amendment.<sup>17</sup>

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<sup>17</sup> In First English, the issue of self-execution was pursued by an amicus curiae, the U.S. Solicitor General. The plaintiff (the church) had raised the Fifth Amendment but had not pled 42 U.S.C. 1983, "the damage remedy provided by Congress under Section 5 of the Fourteenth Amendment." Brief for the United States as Amicus Curiae Supporting Appellee ("U.S. Amicus Brief") at 9, in First English.

The Solicitor General argued (U.S. Amicus Brief 9, 14) the plaintiff should have pled under Section 1983 because the Fifth Amendment alone was insufficient basis for the suit; but the Court disagreed. 107 S.Ct. at 2386. The Court concluded the Fifth Amendment is a self-executing "remedial provision" (id. n.9) that does not need statutory enactment such as by Section 1983. The Court did not hold that the Fifth Amendment nullifies the State's immunity.

In First English no party-defendant raised sovereign immunity as a defense. Immunity clearly was not at issue. Rather, the question, raised by the amicus, was one of proper pleading. U.S. Amicus Brief 9, 14. In that connection, the Amicus Brief discussed sovereign immunity as one of "[t]hree important indicia" that the Fifth Amendment did not self-effectuate a damage remedy. Id. at 16.

The Court referred to immunity only once, 107 S.Ct. 2386 n.9, and only to reject the amicus's argument that immunity prevented the Fifth Amendment from being interpreted as self-executing. U.S. Amicus Brief 16.

The Court did not address or purport to change the principle of Lynch v. United States, supra (sovereign immunity applies against takings claims asserted under the Constitution, 292 U.S. at 582); and the U.S. Amicus Brief (at 18) had quoted Lynch on that point. Lynch is still good law. (Note that Lynch itself did not address whether the Fifth Amendment is self-executing,  
(continued...)

Second, the State's immunity against Colman's Fifth Amendment claim "raises a question of federal law." Martinez v. California, 444 U.S. 277, 284 n.8 (1980); Felder v. Casey, 108 S.Ct 2302 (1988). Since the State's immunity is recognized by, and accords with, federal law, Colman's federal claim (like his state-law claim) is barred .<sup>18</sup>

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<sup>17</sup>(...continued)  
but only the separate issue of immunity.)

A further indication that the Court did not intend to affect sovereign immunity is the authority it cites for its holding that the Constitution is self-executing. The Court (107 S.Ct. at 2386), cites only cases in which no party asserted immunity. In those cases, Clarke, San Diego Gas, Jacobs, Kirby Forest, Causby, Seaboard Air, and Monongahela, immunity was not an issue. (Indeed, Justice Henroid in Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157, 171 (1960), showed in detail that Jacobs is not "authority for the proposition that [the constitutional eminent domain provision] waives sovereign immunity.") Of the Court's cited cases, only Armstrong v. U.S., deals with any sort of immunity, but it was "[t]he sovereign's immunity against materialmen's liens," 364 U.S. 40, 42 (1960); immunity was not asserted against the takings claim in that case.

The State is immune from Colman's claims and First English is not to the contrary.

<sup>18</sup> In Felder, supra, the plaintiff sued in state court, alleging violations of the Fourth and Fourteenth Amendments, and invoking Section 1983. The defendants were a city and certain of its policemen. 108 S.Ct. at 2304-5.

The plaintiff had failed to comply with the state-law notice-of-claim requirement, and the Wisconsin Supreme Court held the complaint must be dismissed on the basis of state law. Id. at 2305-6. The U.S. Supreme Court reversed on the basis of federal preemption.

The Court explained it was invalidating a notice-of-claim statute that was part of legislation "governing the righ[t] \* \* \* to sue the State's subdivisions." 108 S.Ct at 2308 (emphasis added). It was a limited "waiver of local governmental immunity." Id. Because under Monell v. New York City, 436 U.S. 658 (1978), local governments (as opposed to State government) already were subject to Section 1983 claims, Felder seems to say nothing new; it does not purport to invalidate the State's  
(continued...)

State sovereign immunity has long been recognized and honored as a matter of federal law. The states, of course, existed as sovereigns before they created a federal government and constitution. The union of these several states was accomplished only after proponents of the new government convinced the others that states would retain their essential sovereignty (including immunity from suit).

Article III of the U.S. Constitution, which states the

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18 (...continued)  
immunity here. Indeed, the Court noted that "of course" federal law provides immunity for State defendants. 108 S.Ct. at 2307. There clearly is immunity for a state qua state. See, e.g., Quern v. Jordan, 440 U.S. 332, 341-43 (1979).

Also, Felder found preemption because conflicting state law would "frequently and predictably produce different outcomes in [sec.] 1983 litigation based solely on whether the claim is asserted in state or federal court." Felder, 108 S.Ct. at 2307. Therefore, under Felder, a plaintiff may obtain prospective injunctive relief under sec. 1983 against government officials in state court "to the same extent as in federal court," but she is not entitled "to any greater relief \* \* \* in the state courts than she could obtain in federal court." Truesdale v. Univ. of N.C., 91 N.C.App. 186, 371 S.E.2d 503, 508, 510 (1988). "The effect of this decision is to insure that plaintiff's relief, if any, will be the same [in state court as] in federal court under \* \* \* Section 1983. We note that in federal court the Eleventh Amendment \* \* \* would mandate the same result we have reached in this case." Id. at 510 (citing cases). The State has immunity against compensation claims in both state and federal court.

Martinez, supra, also does not impair the State's immunity. The question there involved state employees sued under Section 1983 in their personal capacities (i.e., no question of State immunity or liability was before the Court, 444 U.S. at 279 and 285 n.11). Note also that, on the merits, no claim had been stated under Section 1983. Martinez should not be given an "expansive reading." Kristensen v. Strinden, 343 N.W.2d 67, 75 (N.D. 1983).

If they affect a state's immunity at all, Felder and Martinez mean at most that a state's immunity against federal claims is limited to that permitted by federal law. Since the State's immunity in our case fully comports with federal law, Colman's claim is barred.

federal judicial powers, "was a matter of concern and active debate in the state ratifying conventions." Mossman v. Donahey, 46 Ohio St.2d 1, 6-7, 346 N.E.2d 305, 309 (1976), citing III Elliott, Debates in the Several State Conventions on the Adoption of the Federal Constitution ("Debates") 318-19; Jacobs, The Eleventh Amendment and Sovereign Immunity 33.

Some (including Patrick Henry) argued the new constitution would subject the states to suit against their will. Id. "James Madison replied \* \* \* that the Judiciary Clause did not disturb the principle of sovereign immunity with regard to suits by individuals." Id. "'It is not in the power of individuals to call any state into court. The only operation it [Article III] can have, is that, if a state should wish to bring a suit against a citizen [of another state], it must be brought before the federal court.'" Id., quoting Madison, "Debates" 533.

John Marshall agreed, as did Alexander Hamilton, who stated: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." Mossman, supra, at 309 (emphasis in original). This immunity, "as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." Hamilton in The Federalist No. 81, at 487 (C. Rossiter ed. 1961). Hamilton emphasized that the Constitution did not work a surrender of state immunity. Id.

"[I]t seems fair to say that the ratifiers \* \* \* were assured by the leading Federalists that they might rely upon the preservation of state sovereign immunity under the Constitution \* \* \*." Mossman, supra, 346 N.E.2d at 309.

Thus was sovereign immunity understood. The federal constitution made a few clear exceptions to immunity (not relevant here), but otherwise state immunity was to remain intact (and states were always immune in their own courts). The Constitution presupposes this immunity.

Unfortunately, at first the Supreme Court saw things differently; in Chisholm v. Georgia, 2 Dall. 419 (1793), the Court assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. "The five participating justices delivered five separate opinions." Only Justice Iredell, in dissent, honored the state's immunity. Mossman, 346 N.E.2d at 310.

"The Court's judgment and its rejection of state sovereign immunity 'fell upon the country with a profound shock. Both the Bar and the [general] public['s] \* \* \* surprise was warranted, [given] the fact that the vesting of any such jurisdiction over sovereign States had been expressly disclaimed and even resented by the great defenders of the Constitution \* \* \*.'" Id., quoting 1 Warren, The Supreme Court in United States History 96 (1922).

Two days after Chisholm was decided, the Senate proposed the Eleventh Amendment, which was ratified five years later. Mossman at 310. "The purpose of the Amendment was to overrule Chisholm and to reassert the principles of state sovereignty rejected in that decision." Id. Since its ratification, the Eleventh Amendment has been construed by the Supreme Court "in accordance with the expressed views of the Founding Fathers and of Justice Iredell in his dissent in Chisholm, as affirming that state

sovereign immunity to suits by individuals is a constitutional right." Mossman, 346 N.E.2d at 311.

In Hans v. Louisiana, 134 U.S. 1 (1890), the Court held that, despite the Eleventh Amendment's silence on the question, a state may not be sued in federal court by one of its own citizens (unless the state consents). Hans showed from the constitutional debates that states were to have their sovereign immunity. Id. at 13-15. The plaintiff's suit "strain[ed] the Constitution" in a way "never imagined or dreamed of." Id. at 15. It was "almost an absurdity on its face" to suppose the Eleventh Amendment would allow suit against a state "by its own citizens in cases arising under the Constitution or laws of the United States." Id.

As shown in Mossman v. Donahey, supra, "state sovereign immunity is a right of constitutional proportions, whether it is considered to derive from the plan of the Constitution itself, or from the Eleventh Amendment \* \* \*." 346 N.E.2d at 312. "[A]s to suits by individuals [i.e., not other states or the United States] against a state, the plan of the Constitution envisions no \* \* \* surrender of immunity, as demonstrated by the statements of the Founding Fathers, \* \* \* the Eleventh Amendment, and the language of numerous decisions of the Supreme Court." Id.<sup>19</sup>

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<sup>19</sup> One justifiable view is that the Eleventh Amendment directly immunizes the state against federal claims in state court. E.g., Mossman, supra. Another view finds the same immunity in the common law and by "compelling analogy" to the Eleventh Amendment (which arguably "on its face governs [only] the federal judicial power"). Hill v. Dept. of Corrections, 513 So.2d 129, 132 (Fla. 1987), quoting Karchefske v. Dept. of Mental Health, 143 Mich.App. 1, 371 N.W.2d 876, 881 (1985).

(continued...)

Other courts agree with the Ohio Supreme Court's conclusion in Mossman that "a state may not be sued for damages by an individual under federal law, without its consent, and that this principle applies equally to state as well as federal courts." 346 N.E.2d at 315 (emphasis added).

In Hill v. Dept. of Corrections, 513 So.2d 129 (Fla. 1987), a Section 1983 case brought in state court,<sup>20</sup> the Florida Supreme Court held the State immune on the basis of common law immunity. "We reject [the] argument" "that the state has no common law immunity against a suit brought under federal law alleging the violation of a federal constitutional right." Id. at 131.

In Makanui v. Dept. of Education, 721 P.2d 165 (Haw.App. 1986), the principle was aptly explained: "Immunity in state court from [sec.] 1983 damages liability is a question of federal law, and conduct \* \* \* cognizable under that provision cannot be

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<sup>19</sup>(...continued)

Such distinctions are probably academic, however, because immunity is clearly required under either view. And regardless of labels or phraseology, this much is clear: States have had sovereign immunity since before the framing of the Constitution, and the Eleventh Amendment memorializes that immunity (with the few exceptions it clearly allows). States seem to be immune from federal claims as a matter of constitutionalized common law. See Imbler v. Pachtman, 424 U.S. 409 (1976), in which the Court held a state prosecutor immune from a Section 1983 claim because of "the immunity historically accorded \* \* \* at common law." Id. at 418, 421, 427.

<sup>20</sup> Section 1983 itself creates no substantive rights; it simply provides a cause of action or remedy when the U.S. Constitution or other federal law is violated under color of state law. Chapman v. Houston Welfare, 441 U.S. 600, 617, 618 (1979). Analysis of state sovereign immunity is the same whether the plaintiff pleads under Section 1983 or directly under the Constitution. Each of these types of claims "derives from the same constitutional source." Rutherford v. State, 188 Cal.App.3d 1267, 233 Cal.Rptr. 781, 793 (Cal.App. 1987).

immunized by state law." Id. at 171, citing Martinez v. California, 444 U.S. 277, 284 n.8 (1980). "Under [sec.] 1983, a state cannot be sued unless it has consented to be sued or has otherwise waived its sovereign immunity. See Quern v. Jordan, 440 U.S. 332, 341 \* \* \* (1979) (in enacting [sec.] 1983, Congress did not intend to override the traditional sovereign immunity of the states); 15 Am.Jur.2d Civil Rights [sec.] 268 (1985)." Makanui at 171. Hawaii has not waived its sovereign immunity. Id.

State immunity prevailed also in Fetterman v. University of Connecticut, 473 A.2d 1176 (Conn. 1984). "[S]overeign immunity was well established at common law [when Section] 1983 was enacted. It is supported by a strong policy reason; that is, to prevent \* \* \* enormous fiscal burdens on states." Id. at 1182, citing Owen v. City of Independence, 445 U.S. 622 (1980), and Quern v. Jordan, supra.

The North Dakota Supreme Court, in Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983), likewise held the state immune from an "action for the alleged violation of Federal constitutional rights." Id. at 75. The plaintiff argued that "the only absolute immunity available to a State in a [sec.] 1983 action is [under] the Eleventh Amendment and \* \* \* the Supremacy Clause requires [state courts] to cast aside State law, including sovereign immunity, if it is inconsistent with the commands of the United States Constitution." Id. The Court authoritatively rejected those arguments.

In Lowery v. Dept. of Corrections, 146 Mich.App. 342, 380 N.W.2d 99, 106 (1985), the court relied on clear U.S. Supreme

Court authority to show that Congress had not intended to "abrogate a state's sovereign immunity" under Section 1983; and there is no reason to subject states to Section 1983 actions in state courts, "while barring [such actions] in federal forums." The State has immunity in all courts.

Other cases immunizing states against federal constitutional claims in state court include: Thiboutot v. Maine, 405 A.2d 230, 237 (Me. 1979), aff'd on other grounds, Maine v. Thiboutot, 448 U.S. 1 (1980); Ramah Navajo School Bd. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M.App.), cert. denied, 479 U.S. 940 (1986); Rutherford v. State, 188 Cal.App.3d 1267, 233 Cal.Rptr. 781, 791-93 (Cal.App. 1987); Kapil v. Ass'n of Pa. State College, 448 A.2d 717 (Pa.Cmwlth 1982), rev'd on other grounds, 470 A.2d 482 (Pa. 1983); and DeBleecker v. Montgomery County, 292 Md. 498, 438 A.2d 1348, 1356 n.4 (1982); Truesdale v. Univ. of N.C., 91 N.C.App. 186, 371 S.E.2d 503, 510 (1988); also see Troyer v. Dept. of Health, 722 P.2d 158 (Wyo. 1986).

Supreme Court precedent definitely supports the principle that states have immunity against federal claims asserted in state court.<sup>21</sup> "[T]he fundamental principle enunciated in Hans

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<sup>21</sup> So far as we know, however, the Court has not decided the precise question of whether immunity bars a federal claim asserted against a state in state court. But the principles declared in the Court's many decisions leave little doubt, we submit, that the Court would sustain the state's immunity in such a case, as have many state courts already.

The Court has rejected the argument that since states cannot be sued in federal court, they must be suable in state court because violations of federal law might otherwise go unredressed. See Welch v. Texas Dept. of Highways, 107 S.Ct. 2941, 2953 (1987). One must remember that immunity is itself the State's

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[v. Louisiana, supra] has been among the most stable in our constitutional jurisprudence." Welch v. Texas Dept. of Highways, 107 S.Ct. 2941, 2952 (1987). Hans "firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity." Id. And that doctrine has "a clear rationale." Id.

In Welch, the Court addressed the argument that sovereign immunity protects states from the consequences of their illegal conduct. As the Court noted, "Relief often may be obtained through suits against state officials rather than the State itself, or through injunctive or other prospective remedies." Id. at 2953, citing Edelman v. Jordan, 415 U.S. 651 (1974). "Municipalities and other local government agencies may be sued under [Section] 1983." Id., citing Monell v. New York City, 436 U.S. 658 (1978). "In addition, the States may provide relief by waiving their immunity from suit in state court on state-law claims. That States are not liable in other circumstances is a necessary consequence of their role in a system of dual sovereignties." Welch at 2953 (emphasis added and footnote omitted).

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21(...continued)  
constitutional right, that it rests on sound policy, and that it is vital to effective government.

Sovereign immunity is not bad; and it should not be rejected simply because it occasionally might work a hardship on certain plaintiffs. For if that were the test, the sovereign should also be denied the power to tax, which regularly works a hardship on many citizens. Both the State's authority to tax and its sovereign immunity serve the public's legitimate needs, and both are for the Legislature to determine. John H. v. Brunelle, 500 A.2d 350, 351 (N.H. 1985). Also see Welch, supra, at 2952-53.

"[S]overeign immunity is required by the structure of the federal system, \* \* \* [and it] has been deeply embedded in our federal system from its inception." Id. (internal quotation omitted).

As noted in Hill v. Dept. of Corrections, 513 So.2d 129, 132 (Fla. 1987), the Eleventh Amendment "exemplifi[es] \* \* \* the fundamental rule that 'a State may not be sued without its consent.' Ex parte State of New York No. 1, 256 U.S. 490, 497 \* \* \* (1921), quoted in [Pennhurst, supra,] 465 U.S. 89, 98[-99] \* \* \* (1984)." And that rule applies regardless of the claim's asserted basis.

A constitutional claim is no more able to override immunity than is any other type of claim.<sup>22</sup> The very purpose of Section

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<sup>22</sup> The Supreme Court routinely has recognized immunity against federal constitutional claims asserted directly under the Constitution (without enabling legislation). E.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (First Amendment claim); Anderson v. Creighton, 107 S.Ct. 3034 (1987) (Fourth Amendment); Lynch v. United States, 292 U.S. 571 (1934) (Fifth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment); and Carlson v. Green, 446 U.S. 14, 19 (1980) (Eighth Amendment). This sort of claim, like any other, is subject to state immunity in state court. Rutherford v. State, 188 Cal.App.3d 1267, 233 Cal.Rptr. 781, 793 (Cal.App. 1987).

Under the Eleventh Amendment, the Court has found immunity also against claims asserted under Section 1983 or other federal statutes. E.g., Welch v. Texas Dept. of Highways, 107 S.Ct. 2941 (1987) (Jones Act) (overruling Parden v. Terminal Railway, 377 U.S. 184 (1964)); Edelman v. Jordan, 415 U.S. 651 (1974) (federal statute and Equal Protection Clause); Davis v. Scherer, 468 U.S. 183 (1984) (Section 1983 and Due Process Clause).

Because of the Eleventh Amendment, no federal court may award "damages against the state treasury even though the claim arises under the Constitution." Pennhurst State School v. Halderman, 465 U.S. 89, 120 (1984), citing Quern v. Jordan, 440 U.S. 332 (1979). And "if a [Section] 1983 claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting any relief on that claim." Id., citing Alabama v. Pugh, 438 U.S. 781 (1978) (emphasis added).

(continued...)

1983, for example, is to provide "a cause of action" or "a remedy" when rights "secured by the Constitution" are violated under color of state law. Chapman v. Houston Welfare, 441 U.S. 600, 617, 618 (1979). But Section 1983 actions do not "override the traditional sovereign immunity of the States." Quern v. Jordan, 440 U.S. 332, 341 (1979). And "one of the most 'traditional' dimensions of state sovereign immunity is that which states historically have enjoyed in their own courts from most suits for money damages. \* \* \* [T]hat \* \* \* immunity clearly preexisted Section 1983 \* \* \*." Kristensen, supra, 343 N.W.2d 67, 76 (N.D. 1983), quoting Kapil, supra, 448 A.2d at 720 (emphasis in original).

"It follows" that the State's immunity against federal constitutional claims is not limited to being free from suit in federal courts; it also bars those claims in state court. Kapil, supra, 448 A.2d at 720.

"The right of individuals to sue a state, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the state." Palmer v. Ohio, 248 U.S. 32, 34 (1918). Accord, Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857); Maloney v. State, 207 Misc. 894, 141 N.Y.S.2d 207, 213 (NY Ct.Cl. 1955).

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22 (...continued)

Pennhurst held that the states' Eleventh Amendment immunity bars a federal court from hearing federal-law or state-law claims, even if they otherwise would be within the court's jurisdiction. 465 U.S. at 120.

e.

Colman's Suit is Barred. The State emphatically asserts its immunity against all of Colman's claims. There was no waiver;<sup>23</sup> and if there had been, the waiver would have to be construed "strictly in favor of the sovereign." Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); Fairclough, supra, 354 P.2d 105 (Utah 1960); Holt, supra, 511 P.2d 1286 (Utah 1973). Colman's suit is barred.<sup>24</sup>

## 2. No Cognizable Property Right

If Colman could overcome sovereign immunity, his takings claim would still fail because he has no cognizable, protectable property right in this case.

Article I, Section 22, and the Fifth Amendment concern only "property." But "[p]roperty interests . . . are not created by

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<sup>23</sup> Section 63-30-10(1)(d) expressly preserves immunity against civil rights claims. While that provision is now modified by the 1987 enactment of Section 63-30-10.5 (waiver for "takings"), civil rights claims, including "takings" claims, were barred when Colman's claim arose.

<sup>24</sup> A constitutional claim is just as subject to immunity and dismissal as any other claim. A claim sounding in the constitution is easily alleged, but "[u]nless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss." Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982) (internal quotation and citation omitted). "Insubstantial lawsuits can be quickly terminated by \* \* \* courts alert to the possibilities of artful pleading." Id. "[C]onstitutional [claims] need not proceed to trial." Id. Indeed, one of the purposes of immunity "is to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government." Anderson v. Creighton, 107 S.Ct. 3034, 3042 n.6 (1987) (internal quotations and citation omitted). After all, "the entitlement is an immunity from suit rather than a mere defense to liability, and \* \* \* it is effectively lost if a case is erroneously permitted to go to trial." State v. Hogg, 311 Md. 446, 535 A.2d 923, 927 (1988) (emphasis in original), quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (citation and internal quotations omitted).<sup>25</sup> We must "conside[r] property not as a particular thing but rather as the legal relations relating thereto. \* \* \* [P]roperty consists of the legal relations between persons in respect to a thing." Boyer, Survey of the Law of Property 4 (3rd ed. 1981), citing Restatement of Property, sec. 3.

"[N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." United States v. Willow River Power Co., 324 U.S. 499, 502 (1945); Utah Road Comm'n v. Hansen, 14 Utah2d 305, 383 P.2d 917, 920 (1963). Whether Colman has "legally protected interests" depends in part on his "rights in the land" and "the navigable or non-navigable nature of the waters" involved. Willow River, 324 U.S. at 503.

For at least two basic reasons, Colman has no cognizable, protectable property right in this case. First is the lease between Colman and the State. Second is the Public Trust Doctrine.

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<sup>25</sup> State law normally defines "property" in "takings" cases. Generally, "the United States, as opposed to the several States, [is not] possessed of residual authority that enables it to define 'property' in the first instance." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

a.

The Lease. The lease created Colman's property right (i.e., the right to use the state-owned lakebed), and the lease governs and limits that right. Colman has no property right beyond that permitted in the lease. And so long as the State acted in accordance with the lease, Colman doesn't even have a claim for breach of contract, much less a constitutional "takings" claim.

The lease subordinates Colman's right to use the ditch or right-of-way. For example, the parties agreed the State would be free to create other easements or rights-of-way that might conflict with the "ditch." Specifically, the State could allow other easements "upon, through, or in the land hereby leased as may be necessary or appropriate." Lease art. IV (Exh. 1P, p.2). That agreement eviscerates any claim that the State could be liable for breaching the Causeway and allowing a flow of water to pass over the ditch.

Colman also agreed: "Neither party shall be liable to the other for any loss or damage suffered or incurred \* \* \* by reason or as a result of \* \* \* acts of God or the public enemy \* \* \* [or] floods \* \* \*." Art. XIV (Exh. 1P, p.4). That provision clearly covers this case and insulates the State from liability.

Lease article I states the obvious: the "lease is granted subject to the laws of the State of Utah," expressly including future Board regulations. That statement is legally unnecessary, because all contract rights and property rights are automatically subject to all valid laws and exercises of the police power.

Retan v. Salt Lake City, 226 Pac. 1095 (Utah 1924); George v.

Oren Ltd. & Assoc., 672 P.2d 732, 737-38 (Utah 1983). And the Great Salt Lake Causeway Act and the resulting breach constitute a proper exercise of the police power, as Colman concedes. Colman's Supp. Brief 13 n.11.

By operation of law and by virtue of Colman's express agreement, Colman's right to use the ditch is a limited right. By contract, his right is always subordinate to the exercise of the State's right to take action such as breaching the Causeway. Colman has no property right beyond that point. He has no property right in the ditch that could be "taken" by the State's breaching of the Causeway, and the State cannot be made liable for the damage he alleges.

b.

The Public Trust Doctrine. The second reason Colman has no cognizable, protectable property right in the lakebed in this case is the Public Trust Doctrine. It relates to the Equal Footing Doctrine, the basic principle of Constitutional law that all states own and control the beds of their navigable waters. Martin v. Waddell, 16 Pet. 367 (1842); Shively v. Bowlby, 152 U.S. 1 (1894). Such lakebeds and riverbeds are held by each state in trust for the public. Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

The State "may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held." Smith

v. Maryland, 18 How. 71 (1855).

Since the State's Primary Brief (at 33-39) discusses these principles, we will not repeat that discussion; we will, however, address Colman's new argument. He argues that the State cannot exercise authority under the Public Trust Doctrine ("Doctrine") except in matters of commerce, fishing, and navigation, and he cites Illinois Central. That is wrong.

The Doctrine "especially" protects those uses, but it also protects "all other public uses." Illinois Central, 146 U.S. at 457. Other cases corroborate that the Doctrine has a more expansive purpose.<sup>26</sup> See Kootenai Environ'l Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085, 1086 (1983).

Also, contrary to Colman's bald assertion, the Doctrine is not merely a matter of common law to be overridden by allegations of a taking. That is evident from Illinois Central, in which Illinois granted the railroad fee title in lakebed land ("sovereign land") in Lake Michigan, and then later revoked the grant without compensation. Id. at 450, 460.

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<sup>26</sup> In addition to the cases discussed in the State's Primary Brief at 33-39, note the various manifestations of public-trust authority in these cases: Montana Coalition v. Hildreth, 684 P.2d 1088 (Mont. 1984) (recreation); Wisconsin's Environmental Decade v. D.N.R., 85 Wis.2d 518, 271 N.W.2d 69 (1978) (fishing, hunting, recreation, scenic beauty, and use of chemicals); North Dakota State Wat. Comm. v. Bd. of Mgrs., 322 N.W.2d 254 (N.D. 1983) (authority to control drainage of waters from lake); Clifton v. Passaic Valley Wat. Comm., 224 N.J.Super. 53, 539 A.2d 760 (N.J.Super. 1987) (control of drinking water reserves); Eldridge v. Trezevant, 16 S.Ct. 345 (1896) (no compensation against state under Fourteenth Amendment for state's imposition, on private land bordering navigable stream, of servitude to build public works); Orion Corp. v. State, 109 Wash.2d 621, 640-41, 747 P.2d 1062, 1073 (1987) ("Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.").

The Court explained that the State owns the lakebed because of its sovereign rights at common law and its constitutional right under the Equal Footing Doctrine. Id. at 434-437. The State's title in these sovereign lands is "different in character from that which the state holds in lands intended for sale. \* \* \* It is a title held in trust for the people of the state \* \* \*." Id. at 452.

This trust is exercised by the State for the people's "common use and as a portion of their inherent sovereignty." Id. at 459. Because of the trust, any property right granted in the lakebed is necessarily subject to "an implied reservation of the public right," and the grantee's right is "void" to the extent it conflicts with "public uses for which [the sovereign lands] are adapted." Id. at 457, 458.

Illinois Central held that the grant in fee to the railroad "was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof." Id. at 460.

The Illinois legislature could revoke the grant because the railroad's property rights were inherently subject to the State's rights under the public trust. Id. Any conflicting "right" was void. The railroad had no property right cognizable against the State's Public Trust rights.<sup>27</sup>

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<sup>27</sup> Colman's argument that the Public Trust Doctrine is only a common law doctrine is misleading, and is clearly wrong in suggesting that the Doctrine can be overridden by a constitutional claim. Illinois Central shows that even a grant of fee title cannot constitute or create a property right in the grantee if the grant conflicts with the State's public-trust rights. And (continued...)

The Causeway-breach easily comes within the State's Public-Trust authority. As a matter of law, Colman has no property right equalling the State's Public Trust rights and, therefore, he has no cognizable, protectable property right in this case.

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27(...continued)  
since there is no property right, there can be no "taking" of a property right.

The Doctrine has its roots in the pre-Constitution common law, but it has carried forward as adjunct to the constitutional Equal Footing Doctrine. It is the law in Utah. See, e.g., Section 65-1-15(3) (which is now repealed but which applied to Colman's lease at all material times) (lease was "subject to the use of the waters for public purposes"); Section 65A-6-1(3); Section 65A-10-1(1) (sovereign lands and the public trust); *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982); Utah Const. art. XX; *State v. Rolio*, 71 Utah 91, 262 Pac. 987, 993 (1927).

Colman also misunderstands the effect of the Public Trust Doctrine when he states: "Colman's use of the ditch has never impeded the public's full enjoyment of navigable waters for fishing, navigation or commerce." Colman's Supp. Brief 52. His assertion misses the point. The basic principle of the Doctrine is that the State does not lose "control [or] sovereignty and dominion" over sovereign lands. *Illinois Central*, 146 U.S. at 460. The grant to Colman of a limited right to use the lakebed is necessarily subject to "an implied reservation of the public right," and his right is void to the extent it conflicts. *Id.* at 457, 458. Colman is subject to the Doctrine by operation of law (because he located on the lakebed), and he cannot avoid its effect even if he has not "impeded the public's full enjoyment" of certain rights in this case.

Also, if Colman had a cognizable property interest, it could not command compensation "even in the case of an actual taking," because of the State's special rights in the lakebed. *Nichols Eminent Domain*, sec. 1.42[6], p. 1-266 (referring to the federal government's authority to control navigable waters). (The same authority and result must apply a fortiori with regard to the State because, besides its authority to control and regulate the lakebed, *People v. California Fish Co.*, 138 Pac. 79, 89 (Cal. 1913), the State also owns the lakebed.) Cf. *U.S. v. Cherokee Nation*, 107 S.Ct. 1487, 1490 (1987) (exercise of federal navigational servitude, which compares with State's public-trust authority, does not invade any private property rights in the water or underlying bed, "for the damage \* \* \* does not result from taking property \* \* \* within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject").

Obviously, "a property right must exist before it can be taken."  
Orion Corp. v. State, 109 Wash.2d 621, 641, 747 P.2d 1062, 1073  
(1987) (en banc) (citation and internal quotation omitted).

c.

Colman Has No "Property". The Supreme Court "has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." Penn Central Trans. Co. v. New York City, 438 U.S. 104, 124-25 (1978).

Colman's position is particularly untenable. He voluntarily located his business on the bed of a navigable, terminal lake. His permission from the State to locate and operate there was always subject to the State's overriding authority to manage the Lake for the public good.<sup>28</sup> Morton International, Inc. v.

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<sup>28</sup> Realistically, Colman did not file this lawsuit because of his "ditch." If Colman had been in operation, he could have pumped brines from the Lake without having any ditch. When the ditch was built in 1967, when the water level was very low, the ditch may have served to convey lakewater to shore for processing. But by 1984, when the "ditch" was under 10 feet of water, there was no need for the ditch.

We have always maintained that Colman's real concern was the Lake's salinity north of the Causeway (where Colman is located). That is why he wanted to enjoin the breach. He knew the breach would allow the relatively fresh south-side water to dilute the more concentrated north-side water. The dilution would require him to spend more time evaporating the water from north-side brines, thereby slowing his processing. He simply did not want to lose the natural advantage found north of the Causeway.

He also knew, however, that this Court (twice) and the Tenth Circuit have held that permittees like Colman have no right to have the Lake managed for their benefit. They cannot demand that

(continued...)

Southern Pacific Trans. Co., 27 Utah2d 256, 259-60, 495 P.2d 31, 33-34, cert. denied, 409 U.S. 934 (1972); Solar Salt Co. v. Southern Pacific Trans. Co., 555 P.2d 286 (Utah 1976); Hardy Salt Co. v. Southern Pacific Trans. Co., 501 F.2d 1156 (10th Cir.), cert. denied, 419 U.S. 1033 (1974). Water naturally seeks the lowest available point, which in this region is the Great Salt Lake; and in times of flooding, great volumes of water reach the Lake. And breaching the Causeway simply returned the Lake to its more natural condition. All things considered, the only "reasonable expectation" was that the Lake would someday flood, the ditch would be covered with water, and the Causeway would be breached.

By those facts and the lease and the Public Trust Doctrine, Colman had no property that could be "taken" by the Causeway breach. He cannot transmute his claim into a "right" requiring compensation.

### 3. No "Taking" as a Matter of Law <sup>29</sup>

If Colman could overcome sovereign immunity and had a cognizable property right, he would then be required to prove, as a

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<sup>28</sup>(...continued)  
the Causeway be breached or not breached so as to give them the salinity they prefer. Morton, Solar Salt, and Hardy Salt, supra.

<sup>29</sup> Colman alleges that the issue of a "taking" is a question of fact. That is not true. It is a question of law. Department of Trans. v. Rasmussen, 439 N.E.2d 48, 54 (Ill.App. 1982); Fairclough and Holt, supra. The factual basis of an alleged taking may become important (Colman certainly would have to be able to prove a taking as a matter of fact), but he must first prove his claim to be valid as a matter of law.

Colman's position would work a great hardship on Government. It would be grossly unfair to subject the State and other governmental entities to a trial every time someone alleges a taking.

matter of law, that his property has been "taken."<sup>30</sup> We think he cannot do it. The law and common sense are against him.

Of course, to ask whether there has been a compensable "taking" is to ask whether there has been an exercise of eminent domain, which stands in contrast to the police power. Colman can prevail on this issue only if he shows that in breaching the Causeway the State acted outside the police power and "took" his property by an exercise of eminent domain. To prove that here, he would have to overcome some very substantial precedent.

"Not every governmental action interfering with a property interest is a taking entitling the owner to compensation."

Charles J. Arndt, Inc. v. Birmingham, 748 F.2d 1486, 1491 (11th Cir. 1984). The police power is enforceable though a plaintiff may be "deprived of property." Salt Lake City v. Bernhagen, 189 Pac. 583, 587 (Utah 1920). All rights are subject to reasonable police regulation. Thatcher v. Industrial Comm'n, 207 P.2d 178, 181 (Utah 1949); Retan, supra, 226 Pac. 1095 (Utah 1924).

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<sup>30</sup> Indeed, he must prove that his property was "taken" for "public use." In breaching the Causeway, the State did not use Colman's ditch at all. He cannot meet this essential burden.

He alleged the Causeway breach would send water over his ditch. But that allegation does not signify a public use. There is no more public use of Colman's property here than there was in McNeil v. City of Montague, 268 P.2d 497 (Cal.App. 1954). In that case, the court held there was no public use of the plaintiff's land when it burned by catching fire from nearby city property on which the city was burning weeds.

The Utah cases also do not help Colman. In the cases finding a public use, there was a clear, actual use of the affected property. Not so here. See Nash v. Clark, 27 Utah 158, 75 Pac. 371 (1904), aff'd, 198 U.S. 361 (1905); Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 78 Pac. 296 (1904), aff'd, 200 U.S. 527 (1906); Alcorn v. Reading, 66 Utah 509, 243 Pac. 922 (1926); Town of Perry v. Thomas, 82 Utah 159, 22 P.2d 343 (1933).

"A statute enacted in the proper exercise of the police power, even though it may limit or destroy private property, is not a deprivation of property without due process of law." Alber v. Nolle, 98 N.M. 100, 645 P.2d 456, 461 (1982). For "no one has any absolute rights, but they are all conditioned upon the rights of others. Everyone in a well-ordered society must make some concessions of his individual rights \* \* \* in deference to the common good and in recompense for all of [his] other rights \* \* \*." Hurst v. Highway Dept., 16 Utah2d 153, 397 P.2d 71, 74 (1964); also see McKell v. Spanish Fork City, 6 Utah2d 92, 305 P.2d 1097, 1100 (1957).

Colman admits the breach and the Great Salt Lake Causeway Act constitute proper use of the police power. Incongruously, he nevertheless claims compensation. He has no right to compensation, however, because (almost by his own admission) he cannot show that the State acted outside the realm of noncompensable police power; he cannot prove that breaching the Causeway was an act of eminent domain.

Issues of noncompensable police power versus compensable eminent domain arise in various settings. The cases fall into these categories: (a) emergency, (b) flooding, (c) physical interference, invasion or occupation, and (d) regulation of property.<sup>31</sup>

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<sup>31</sup> We think these four categories encompass all of the "takings" cases except straight (formal) condemnation cases. Even if we have overlooked other categories, these cases represent the law that controls this case.

a.

Emergency. "It is the law that in meeting an emergency, such as fire, flood or pestilence, public officials and private citizens may employ almost any available means in an endeavor to control the danger." Short v. Pierce County, 78 P.2d 610, 614 (Wash. 1938); Lewis, supra, 303 S.E.2d 112 (Ga. 1983)(flood from breaching dam); U.S. v. Caltex, 344 U.S. 149, 154 (1953).

And no compensation is required. For example, California recently acted to eradicate the medfly. In one case, the State's wide-scale chemical spraying ruined paint on cars insured by five insurance companies, who sued in inverse condemnation for the many claims they had to pay. Farmers Ins. Exchange v. State, 175 Cal.App.3d 494, 221 Cal.Rptr. 225 (1985). In another case, a farmer claimed a taking when his crop rotted from the spraying. Teresi v. State, 180 Cal.App.3d 239, 225 Cal.Rptr. 517 (1986). In each case, the court recognized the emergency, upheld the police power action, and denied compensation on that basis.

In Miller v. Schoene, 276 U.S. 272 (1928), a case the Supreme Court regularly discusses with approval (see, e.g., Key-stone Bituminous Coal Ass'n v. DeBenedictis, 107 S.Ct. 1232, 1244 (1987); Penn Central Trans. Co. v. New York City, 438 U.S. 104, 125-26 (1978)), the Court held the Takings Clause did not require Virginia to compensate the owners of cedar trees for the value of the trees when the State ordered them destroyed. The trees had to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a more valuable resource.

In Miller v. Schoene, "the Court did not consider it neces-

sary to 'weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute.' Rather, it was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation." Keystone, supra, 107 S.Ct. at 1245, quoting Schoene, 276 U.S. at 280.

Colman suggests he can overcome the "emergency" doctrine and demand compensation simply because his ditch was not a nuisance. That is not true, as just shown in the Keystone discussion of Schoene. Property may be affected by emergency action, without compensation, regardless of whether the property itself is a nuisance. The status of Colman's property has nothing to do with it. There was an emergency, the State met it with police power, and no taking occurred thereby.

Colman also argues the "emergency" cases apply only if the plaintiff's property would have been destroyed by the emergency in any event. The foregoing cases refute Colman's argument.<sup>32</sup> The emergency (the disease) in Schoene, for example, apparently affected the apple trees but not the cedars. The State had to make "a choice between the preservation of one class of property [or] \* \* \* the other," 276 U.S. at 279, and the State decided to destroy the cedars.

In the California cases, obviously the medflies (the emergency) would not have harmed the cars' paint, nor was it inevitable that medflies would have damaged the particular plaintiff's

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<sup>32</sup> It is evident, of course, that Colman's ditch already was in the emergency. Before the breach, as after, the ditch was under 10 feet of floodwater, and the Lake continued to rise.

crop specifically. In each case, police power was exercised against the emergency without compensation, and it was not a prerequisite that the plaintiff's property would have been destroyed by the emergency in any event.<sup>33</sup>

In extraordinary floods, like that around the Lake in this case, the State (as well as any affected property owner) may treat floodwater as a common enemy, and may take any reasonable action, without liability to anyone who may be damaged by those defensive efforts. McKell v. Spanish Fork City, 6 Utah2d 92, 305 P.2d 1097, 1100 (1957).

The Utah Legislature recognized the emergency of the rising Lake. The Great Salt Lake Causeway Act (see Appendix of Colman's

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<sup>33</sup> There are many examples of noncompensable emergency police-power action. E.g., in United States v. Caltex, 344 U.S. 149 (1953), there was no taking when the army destroyed private property to prevent it from possibly falling into enemy hands. "The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. \* \* \* [M]any losses must be attributed solely to the fortunes of war, and not to the sovereign." Id. at 155-56.

In a case involving Mt. St. Helens, Cougar Business Owners Ass'n v. State, 97 Wash.2d 466, 647 P.2d 481 (1982) (en banc), the State imposed emergency restrictions on access to private property because of volcanic activity. The court held there was no taking, id. 647 P.2d at 486, and the restrictions did not deprive property rights without due process. Id. at 488.

Also see Ropico, Inc. v. City of New York, 425 F.Supp. 970, 977 (S.D.N.Y. 1976) ("In order to fulfill its primary obligation to protect the well-being of its citizens in times of emergency, a sovereign may take action which constitutes some taking of property without being required to pay compensation."); City of Rapid City v. Boland, 271 N.W.2d 60, 66 n.3 (S.D. 1978) (citing McKell, supra (Utah 1957)); Franco-Italian Packing Co. v. U.S., 128 F.Supp. 408, 413 (Ct.Cl. 1955) (The Government's "regulatory and police powers, war powers or emergency powers in cases of imminent peril to the general welfare do not fall within the fifth amendment limitation, although taking of property often result[s]."); Bowditch v. Boston, 101 U.S. 16 (1879).

original brief) expressly recognized that the Lake's "extraordinary flooding conditions [were] resulting in substantial damage to public and private facilities." R. 373. The floodwater "pose[d] a threat to life, health, and property, and in particular may result in extensive damage to public lands, major transportation routes, and other public facilities." Id. The Legislature therefore ordered the breach.<sup>34</sup>

Some may disagree with the Legislature's decision to breach the Causeway, but "debatable questions as to reasonableness are not for the courts but for the legislature." Cougar Business Owners Ass'n v. State, 647 P.2d 481, 487 (1982).

Breaching was the best solution under the circumstances. It averted much worse flooding; the Lake continued to rise dramatically even after the breach. Indeed, the breach was literally essential to the West Desert pumping project, which the Legislature later undertook against the continuing flooding.<sup>35</sup>

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<sup>34</sup> In his supplemental brief (at 49-50), Colman continues from his original brief his argument that the Causeway Act "implies" the State had some obligation to condemn Colman's property. We disagree. We refer the Court to the State's Primary Brief (at 10 n.5) for our response to Colman's argument.

<sup>35</sup> One could not reasonably argue that, because it took several weeks to accomplish, breaching the Causeway did not constitute emergency action. The flooding (the emergency) was already occurring. The breach was the fastest available remedy, and it took some time. One should not judge whether there is an emergency by how much time is required to remedy it. If, for example, an astronaut has trouble in space, he is in an emergency, regardless of how long it takes to rescue him. One cannot say his predicament is other than an emergency because his problem cannot be solved in a matter of hours, days or even weeks. Emergencies cannot be standardized.

Also, if there could be any question about the existence of an emergency here, we respectfully submit that "the legislature's  
(continued...)

In breaching the Causeway, the Legislature and the executive branch did what government is supposed to do. They preserved "life, health, property and public peace" and thereby discharged "a basic governmental policy." Cougar Business, supra, 647 P.2d at 484.

Since the State reasonably exercised its police power in meeting this emergency, we need look no further. Colman cannot sustain a "taking" as a matter of law. We continue the analysis, however, for the benefit of other cases that might not involve an emergency.

b.

Flooding. The flood cases also deny Colman's "takings" claim. The U.S. Supreme Court "has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982) (citing cases) (emphasis added).

"[T]o be a taking, flooding must 'constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.'" Id., quoting Sanguinetti v. United States, 264 U.S. 146, 149 (1924).

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35(...continued)  
determination of an emergency in an act is a policy decision exclusively within the ambit of legislative authority, and the judiciary cannot second-guess that decision." Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1136 (Idaho 1986).

Loretto also explains that, in flooding cases, there is no "taking" where governmental "obstruction only impair[s] the use of plaintiffs' property." 458 U.S. at 428, citing Northern Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879) (a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises. Significantly, "[n]o entry was made upon the plaintiffs' lot.").

There is a taking in flooding situations only where government permanently causes the property to be flooded. Loretto at 427, citing Pumpelly v. Green Bay Co., 13 Wall. 166, 181 (1872). Dudley v. Orange County, 137 So.2d 859, 863 (Fla.App. 1962).

Colman's ditch has not been permanently (or even temporarily) occupied by the State. We maintain Colman's ditch was not impaired at all; but even assuming some damage, breaching the Causeway could at most be considered "government action outside the owner's property that cause[s] consequential damages within," which is not a "taking." Loretto, 458 U.S. at 428.

As a matter of law, Colman cannot sustain his takings claim. The State has shown two independent reasons (emergency police power, and "takings" law relative to flooding) to affirm the lower court. (Of course, one reason would be enough.) We continue our analysis only to complete the discussion of the takings categories (for other cases that might not involve either an emergency or flooding).

c.

Physical Interference, Invasion or Occupation. We emphasize that the emergency and flooding cases control this case. The remaining cases are useful only indirectly, to illuminate the field of eminent domain generally.

For example, Loretto, supra, outlines the law for non-flooding invasions of property. Loretto found a taking where, with governmental authority, the cable company's intrusion "involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the [plaintiff's] building." Id., 458 U.S. at 438.

The Court's holding, "that a permanent physical occupation of property is a taking," is, as the Court emphasized, "very narrow." Id. at 441. It should not be broadened or misused.

Mere "physical intrusion" does not necessarily constitute a taking until it "reaches the extreme form of a permanent physical occupation." Id. at 426. That principle is clear also from Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). In Pruneyard, state law required the shopping-center owner to permit the public to enter and use his property as a public forum. That, the Court held, was no taking of his property rights. As we therefore see, "the fact that [the public] may have 'physically invaded' [the] property cannot be viewed as determinative." Id. at 84.

In sum, an actual "permanent physical occupation" constitutes a taking, but a lesser physical "invasion" usually does not. Of course, mere "interference" is even less able to be

characterized as a "taking" of property.

This Court follows those basic principles. For example, in Springville Banking Co. v. Burton, 10 Utah2d 100, 349 P.2d 157 (1960), the plaintiff sued the State Road Commission for placing in the street a concrete island that impaired access to his property. The Court found no compensable taking. "[I]f the sovereign exercises its police power reasonably and for the good of all the people, when constructing highways, consequential damages such as those alleged here, are not compensable." Id., 349 P.2d at 158. "Access has not been denied. Interfered with, it is true, but in our opinion to no unreasonable extent." Id. at 159 (emphasis added). Mere "interference" generally is not a taking.

As Springville aptly suggests, if the State had to compensate every time someone alleged a "taking," there would be dire public consequences. "Highways would remain unmarked because of the prohibitive cost [of paying] damages \* \* \*. Highways would become increasingly more dangerous." Id. Of course, each case is different, but each should be decided "with the general public good being the primary consideration." Id.

In Holt v. State Road Comm'n, supra, the plaintiff alleged interference with property-access. The Court simply held "[t]here [was] no taking of property." 511 P.2d at 1287.

In Bailey Service v. State, 533 P.2d 882 (Utah 1975), the plaintiff sued when the State built a viaduct that obstructed access to his property by large (delivery) trucks. This inter-

ference was no taking.<sup>36</sup>

In Twenty-second Corp. v. Oregon Short Line R.R., 36 Utah 238, 103 Pac. 243 (1909), the plaintiff unsuccessfully claimed that noise so interfered with the use of its property as to constitute a taking.

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<sup>36</sup> Utah State Road Comm'n v. Miya, 526 P.2d 926 (Utah 1974), might seem to deviate from the rule that a taking requires more than mere interference with property. To the extent it deviates, it is probably errant. But Miya can be distinguished in any event. Miya was not an inverse condemnation case; the State was the formal condemnor. There was no doubt some "taking" had occurred. The only question was the basis and amount of severance damages.

The Court specifically noted that "even if it diminishes the value of abutting property," erection of the public highway could not constitute damage "in the constitutional sense" "[u]nless the structure violates some right appurtenant to the abutting property or otherwise inflicts some special and peculiar injury." Only then would compensation be required. Id. at 929. The Court did allow severance damages for "impairment of light and air, \* \* \* view, invasion of privacy, and deprivation of access"; but apparently did so on the basis of a statute expressly mentioning such rights. Id. Miya is inapposite here.

We also respectfully submit that, considering this Court's precedents (discussed above) and the general rule, a recent case was incorrectly decided in a lower court. Three D Corp. v. Salt Lake City, 752 P.2d 1321 (Utah App. 1988), involved not a physical occupation or invasion, but at most an interference with public parking. Access, although now somewhat more limited, was still readily available. As one commentator has noted in criticizing Three D, the court followed the wrong precedent. In requiring compensation, the court applied Miya, but "Bailey [supra] is the case most similar to Three D," and compensation should not have been allowed. 1989 Utah Law Review 143, 205.

We agree with that comment, and find fault with Three D also on another ground. We think the plaintiff had no property right in public parking on the public right-of-way. The roadway is city property, and the city certainly can manage it to allow, disallow or limit parking thereon. The store owner may have a right to reasonable access (which he apparently had in fact), but no right to have the city guaranty public parking for his customers on public land. (In contrast, in Miya there was a property right because a statute specifically acknowledged it.)

Compensation for bothersome traffic noise (caused when the highway was widened by formal condemnation) was also disallowed in State Road Comm'n v. Williams, 22 Utah2d 331, 452 P.2d 881, 882 (1969), because "such damage is not special, unique and peculiar to the property." (Any flood or sediment damage to Colman's "ditch" also could not be special, unique or peculiar, considering his ditch is located on the bed of a flooding lake.)

None of the foregoing cases and principles helps Colman. The record shows Colman's "ditch" was not affected by the breach.<sup>37</sup> And there obviously was no permanent physical occupation of the ditch by the State; nor did the State physically invade his ditch. As Pruneyard proves, even if the ditch were physically invaded, that alone could not "be viewed as determin[ing]" a taking. 447 U.S. at 84. Colman has alleged at most an interference with his ditch, and he has stated no legal basis for a "taking."

d.

Regulation of Property. The regulatory cases (e.g., zoning cases, etc.) have no direct bearing on our case, because in breaching the Causeway the State was not regulating Colman in the use of his property. Those cases therefore lack direct precedential value here. They do, however, demonstrate significant principles in "takings" law generally, and therefore shine some light on Colman's claim.

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<sup>37</sup> See R. 117-126. The State's expert testified that "the initial breach will have little, if any, adverse effect on [Colman's] ditch, and after approximately 30 days the breach will have no adverse impact on the ditch at all." R. 124.

"Suffice it to say that government regulation--by definition--involves the adjustment of rights for the public good." Andrus v. Allard, 444 U.S. 51, 65 (1979). We might say that by breaching the Causeway and managing floodwaters the State was adjusting rights for the public good. "Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." Id. (emphasis in original).

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" Id., quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

When acting in matters of public health, safety and welfare, and especially in emergencies, the State should not be faced with the specter of having to compensate everyone (known or unknown, foreseeable or unforeseeable) who might claim to be adversely affected. As Andrus suggests, the State should not be compelled to meet emergencies "by purchase."

Note also that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Andrus, 444 U.S. at 65-66.

Colman alleges a taking of his "ditch." But the ditch itself has no value outside Colman's mineral extraction operation, which is made possible only by the State lease. Assuming a

physical destruction of the ditch, that loss would constitute a loss of only one "strand" of the otherwise-unaffected "bundle" of property rights Colman has in his brine-extraction operation. And the ditch represents a very slender "strand" indeed. When, as now, the ditch is in 10 feet of brines, there is no need for the ditch itself; Colman can pump directly from the Lake. In these conditions, the ditch has no substantial function or value.

Assuming the ditch existed and had some utility, and were then damaged, Colman still has his lease and (except for his own lack of a water right) he could pump and process brines and otherwise carry on his business. Any reduction in value of Colman's business because of damage to the ditch is not legally significant. Sometimes police power regulations "prevent the most profitable use of \* \* \* property. [But] that is not dispositive. \* \* \* [A] reduction in the value of property is not necessarily equated with a taking." Andrus, 444 U.S. at 66.

"The interference with [Colman's] property is, considered as a whole, insignificant relative to those in which the Supreme Court has found no taking." Petrolite Corp. v. E.P.A., 519 F.Supp. 966, 972 (D.D.C. 1981).

The Causeway breach was beneficial to society generally and to Colman personally (he doubtless uses I-80, which the breach helped spare, to travel to his lakeside facility). And even if Colman's alleged damage were real, his was not the only burden borne in all the flooding. His burden, like others', must be "borne to secure 'the advantage of living and doing business in a civilized community.'" Id. at 67, quoting Mahon, supra, at 422.

e.

First English. We cannot discuss all the countless regulatory cases; and we need not, for they do not control this case. But we must rebut Colman's assertion that "under First English, Colman is entitled to compensation for the period that the ditch was rendered useless." Colman's Supp. Brief 38. He misapplies First English, supra, 107 S.Ct. 2378 (1987).

What the Court expressly did not decide in First English is, to the instant case, more important than what was decided. The Court stated it had "no occasion to decide [1] whether the ordinance at issue actually denied appellant all use of its property or [2] whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." 107 S.Ct. at 2384-85 (footnote omitted).

Thus, the Court did not rule there was an actual taking of property, and it specifically noted that the State's police power might preclude a compensable taking as a matter of law. Id.

The Court decided only this issue: If a "taking" is established, and the taking is only temporary, must the government compensate "for 'temporary' regulatory takings." Id. at 2385 (emphasis added). The Court held yes.

Contrary to Colman's assertion, First English obviously does not apply here. Even by his own allegations his ditch was not the object of a regulatory taking. And First English clearly did not expand the concept of what constitutes a "taking." Id.

at 2384-85. Indeed, First English represents additional evidence of the police power's vitality against takings claims. Id.

Colman can demand compensation for a temporary taking only if, on the basis of the principles of eminent domain discussed above, he can prove a taking at all. To do that he must overcome all of the law pertaining to emergencies, floods, and physical interference with property rights. That he cannot do.

f.

Torts Cannot be Stretched into "Takings". As a matter of law, Colman has not stated a "takings" claim against the State. If his claim could prevail, the police power would be diminished and the State would be less eager to exercise it in an emergency. In the long run, the public health, safety and welfare would suffer.

There would also be other negative consequences. If a claim no stronger than Colman's could prevail, so might others try. (We believe Colman has stated no viable claim of any sort. His claim is unreasonable, to say the least, considering he demands compensation because the State allegedly put water over a ditch located on the bed of the Great Salt Lake.) If he could stretch his unmeritorious tort claim<sup>38</sup> into a successful takings claim, then almost any damage claim against the State could be transformed into a "taking."

That is also why, in our view, there is considerable risk in giving broad or special meaning to the word "damaged" in Article

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<sup>38</sup> At most, Colman stated only a trespass claim when he alleged the Causeway breach would send a flow of water over his already-submerged ditch.

I, Section 22. The Constitution should not become "a font of tort law." Paul v. Davis, 424 U.S. 693, 701 (1976).

"Takings" jurisprudence already requires compensation for property "damaged" in the constitutional sense of a "taking."<sup>39</sup> And we submit that, to maintain the integrity of the Constitution as a constitution (rather than a font of tort law), the present meaning and application of "damaged" should not be broadened.

#### 4. No "Taking" As a Matter of Fact

Because of sovereign immunity, the nonexistence of a protectable property right, and the lack of legal merit of Colman's claim, there is no reason to reach the question of whether the "ditch" was taken as a matter of fact.

However, we refer the Court again to the record, including the uncontradicted facts relating to the existence or condition

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<sup>39</sup> Our point is simply that "takings" law already appropriately covers property "damaged" for public use. Any expansion of that concept would be too much.

A "taking" is legal shorthand for the conclusion that a governmental entity has exercised its eminent domain power and that just compensation is therefore required. A "taking" can occur, in some instances, from a physical occupation or seizure of property (a literal taking), Loretto v. Teleprompter, supra, and sometimes from governmental actions that may "damage" but not literally "take" property. Pennsylvania Coal v. Mahon, supra. Obviously, though, not every damaging (in the literal sense) requires compensation under the Constitution (nor does every literal physical occupation, seizure or destruction of property). Miller v. Schoene; U.S. v. Caltex, supra. It would be unnecessary and unwise to give the word "damaged" special meaning separate from its legal equivalent, "taken." To emphasize "damaged" would be to suggest it operates disjunctively from "takings" analysis (the law of eminent domain). It clearly cannot so operate, or else the Constitution would become an all-purpose basis for suit anytime anyone alleges the State somehow damaged property. Cf. Lund v. Salt Lake County, 200 Pac. 510 (Utah 1921); Belmar Drive-In Theater v. Illinois, 34 Ill.2d 544, 216 N.E.2d 788, 792 (1966).

of the ditch before the breach. The facts will not support Colman's takings claim.

C.

THE STATE'S RIGHT TO CONTROL THE LAKE

This Court has consistently recognized that the State must be free to manage and control the Great Salt Lake for the public good. Morton International, Inc. v. Southern Pacific Trans. Co., 27 Utah2d 256, 495 P.2d 31, cert. denied, 409 U.S. 934 (1972); Solar Salt Co. v. Southern Pacific Trans. Co., 555 P.2d 286 (Utah 1976); also see Hardy Salt Co. v. Southern Pacific Trans. Co., 501 F.2d 1156 (10th Cir.), cert. denied, 419 U.S. 1033 (1974).

In the cited cases (the "Salt Cases"), the State did not violate the plaintiffs' rights by refusing to breach the Causeway for their benefit. Here, the State violated none of Colman's rights by breaching the Causeway for public benefit.

What this Court noted in Morton, supra, also applies to Colman: "[His] theory would contemplate \* \* \* that the public, state-owned waters of Great Salt Lake could be used for no purpose whatever" if it somehow interfered with his use of the Lake. 495 P.2d at 33-34.

The State must be free to take any reasonable action in the public good on its own Lake. Colman's claim would fetter the State, and would "affec[t] the public weal," id., and that should not be allowed.

D.

SUMMARY OF LAW AND POLICY

We have shown that as a matter of law and sound policy Colman cannot prevail.

Perhaps our position may be summarized by the following disinterested observations about Utah's flood situation.

"The reasons for state immunity in flood control activities are compelling. The onslaught of naturally caused floodwaters requires speedy action, often dictating abrupt remedial measures. The state should not be prevented from managing flood emergencies as circumstances dictate." Comment, "The Only Way to Manage a Desert: Utah's Liability Immunity For Flood Control," 8 Journal of Energy Law and Policy 95, 118 (1987).

"Emergency management sometimes necessitates incidental property damage, and the state should not be distracted by threats of liability from making wise and proper decisions necessary for the public's safety." Id.

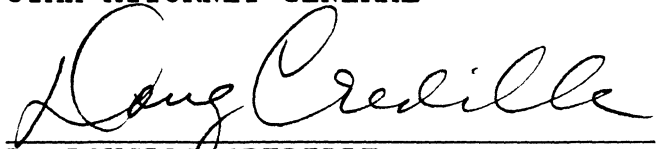
"To suggest any state liability for flooding damage would be to suggest that the state insures that the waters of the state will never flood. State statutes, case law, common sense, and sound public policy do not put such an impossible burden on the state." Id.

**CONCLUSION**

The lower court's judgment should be affirmed.

Respectfully submitted this 22nd day of May, 1989.

R. PAUL VAN DAM  
UTAH ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Doug Credille". The signature is written in dark ink and is positioned above a horizontal line.

R. DOUGLAS CREDILLE  
Assistant Attorney General


ATTORNEYS FOR STATE RESPONDENTS  
1636 West North Temple, Suite 300  
SALT LAKE CITY UT 84116  
(801) 538-7227

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing STATE RESPONDENTS' SUPPLEMENTAL BRIEF were served by mailing the same, first-class postage prepaid, this 22nd day of May, 1989, to:

Carol Clawson  
GIAUQUE, WILLIAMS, WILCOX  
& BENDINGER  
500 Kearns Building  
SALT LAKE CITY UT 84101

L. Ridd Larson  
Thomas L. Kay  
Craig L. Taylor  
RAY, QUINNEY & NEBEKER  
400 Deseret Building  
79 South Main Street  
SALT LAKE CITY UT 84145-0385

  
\_\_\_\_\_  
R. DOUGLAS CREDILLE  
Assistant Attorney General  
State of Utah