

2006

Jodi Conatser, Kevin Conatser, Lacey Conatser, and  
Nicole Mann, vs. Wayne Johnson, Clark Sessions,  
Shane E. Matthews, Deputy Sheriff of Morgan  
County, Duane Johnson, Randy Sessions, Michael  
McMillan, Lynn Brown, Gerald Stout, John and  
Jane Does 6-25, : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael M. Quealy; Robert H. Hughes; Parsons, Behle and Latimer; Gerald E. Nielson; Parker M. Nielson; Attorneys for Plaintiffs/Appellants.

Ronald G. Russell; Royce B. Covington; Parr, Waddoups, Brown, Gee and Loveless; Attorneys for Defendants/Appellees.

---

### Recommended Citation

Reply Brief, *Conatser v. Johnson*, No. 20060558 (Utah Court of Appeals, 2006).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/6608](https://digitalcommons.law.byu.edu/byu_ca2/6608)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**IN THE SUPREME COURT OF THE STATE OF UTAH**

---

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

Plaintiffs and Appellants,

vs.

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

Defendants and Appellees.

**REPLY BRIEF OF APPELLANTS**

Supreme Court No. 20060558

District Court No. 000500092

(Oral Argument Requested)

---

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

---

RONALD G. RUSSELL (4134)  
ROYCE B. COVINGTON (10160)  
Parr, Waddoups Brown Gee & Loveless  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840

*Attorneys for Defendants and Appellees*

MICHAEL M. QUEALY (2667)  
ROBERT H. HUGHES (9787)  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 532-1234  
Facsimile: (801) 536-6111

GERALD E. NEILSON (2412)  
3737 Honeycut Rd.  
Salt Lake City, UT 84106

PARKER M. NEILSON (2413)  
655 South 200 East  
Salt Lake City, UT 84111

*Attorneys for Plaintiffs and Appellants*

FILED  
UTAH APPELLATE COURT  
APR - 4 2007

## TABLE OF CONTENTS

	Page
ARGUMENT .....	1
I. INTRODUCTION .....	1
II. THE CONATRSERS REPLY TO APPELLEES' SPECIFIC ARGUMENTS .....	3
A. Private ownership of the bed of the Weber River does <i>NOT</i> give Appellees an unlimited right to exclude others .....	3
1. The District Court's Ruling is <i>NOT</i> supported by prior Utah Supreme Court decisions .....	4
2. <i>Day v. Armstrong</i> commits a crucial error in reasoning, which this Court should not perpetuate .....	5
3. The Question of Navigability is Irrelevant in this Case .....	7
B. State wildlife statutes do <i>NOT</i> speak to the issue presented here .....	8
C. The "Wyoming Rule" is flawed, and should <i>NOT</i> be adopted simply because it falls somewhere in the middle of a continuum between the approaches adopted by other western states .....	9
D. Setting a foot on private riverbeds is a reasonable and necessary incidental use of public waters for fishing, and a holding to that effect will <i>NOT</i> convert streams into thoroughfares .....	12
CONCLUSION .....	14

## TABLE OF AUTHORITIES

### FEDERAL CASES

#### Page

<i>United States v. Causby</i> , 328 U.S. 256 (1946).....	10
---	----

### STATE CASES

<i>Day v. Armstrong</i> , 362 P.2d 137 (Wyo. 1961) .....	5
<i>Galt v. State Department of Fish and Wildlife</i> , 731 P.2d 912 (Mont. 1987) .....	11, 14
<i>J.J.N.P. Co. v. State Division of Wildlife Resources</i> , 655 P.2d 1133 (Utah 1982) .....	2, 3, 4, 6, 10, 12
<i>Monroe v. State</i> , 175 P.2d 759 (Utah 1946).....	4
<i>Montana Coalition for Stream Access v. Curran</i> , 682 P.2d 163 (Mont. 1984) .....	11
<i>Montana Coalition for Stream Access v. Hildreth</i> , 684 P.2d 1088 (Mont. 1984) .....	11
<i>Nielson v. Sandberg</i> , 141 P.2d 696 (Utah 1943).....	12
<i>People v. Emmert</i> , 597 P.2d 1025 (Colo. 1979) .....	6, 10
<i>Provo River Water Users' Association v. Morgan</i> , 857 P.2d 927 (Utah 1993) .....	6
<i>Southern Idaho Fish and Game Association v. Picabo Livestock, Inc.</i> , 528 P.2d 1295 (Idaho 1974).....	10

### STATE STATUTES

Utah Code Ann. § 23-13-3 .....	9
Utah Code Ann. § 23-20-14 .....	8

## ARGUMENT

### **I. INTRODUCTION**

In the Appellants' opening Brief the Conatsers put forth a simple argument, which takes the basic form of a syllogism:

*Major premise:*

The owner of a property right also holds whatever incidental rights are reasonable and necessary to fully enjoy the underlying property right. *See* Brief of Appellants at 18-19 (citing cases).

*Minor premise:*

Utah law recognizes a property right, held by the public, to use natural waters overlying privately owned lands to "float leisure craft, hunt, fish, and participate in any lawful activity...." *Id.* at 17-18 (citing *J.J.N.P. Co. v. State Div. of Wildlife Resources*, 655 P.2d 1133, 1137 (Utah 1982)).

*Conclusion:*

Therefore, the public should have the right to make contact with privately owned subaqueous land, where such contact is reasonably incident to a public right, such as fishing. *Id.* at 6, 22.<sup>1</sup>

Appellees' Brief in Opposition ("Opp. Brief") offers a number of discrete arguments in response. It seems most helpful to simply reply to each argument in turn, following the basic format adopted in the Opp. Brief.

---

<sup>1</sup> The Conatsers also made certain subsidiary arguments, which together support the premises relied on in reaching the conclusion. For instance, the Conatsers argued that the Weber River is a natural water, to which any public rights under the minor premise would attach, and that wading is a reasonable and customary method of fishing. Appellees have not contested any of these subsidiary arguments.

Before reaching the Argument section, Appellees' Opp. Brief introduces two assertions that it returns to from time to time throughout the brief. First, in describing *J.J.N.P. Co. v. State Div. of Wildlife Resources*, 655 P.2d 1133, 1136 (Utah 1982), Appellees assert that this Court held that "because the public owns the water in natural streams, there is a corresponding right to *float* upon such waters." Opp. Brief at 2 (emphasis added). The error in this assertion is clear, in that it misstates the holding of *J.J.N.P.*; that case did not hold that public ownership of water resulted in a public right of floatation only, but resulted in a broad recreational right, including the right to "hunt, fish, and participate in any lawful activities." 655 P.2d at 1137. This erroneous narrowing of *J.J.N.P.* is a means for Appellees to avoid the conclusion stated above (and argue for an affirmation of the district court's ruling) without challenging the major premise, that property rights include reasonable and necessary incidental rights. In other words, because Appellees more or less concede that the Conatsers are entitled to rights incidental to whatever rights were declared in *J.J.N.P.*, they are essentially forced to argue for an unduly narrow interpretation of that right.

Second, Appellees assert that since the Weber River is not federally navigable, and that their land is therefore privately owned (conclusions that Appellants have not contested in this litigation), that therefore "the owners thereof retain the important right to prohibit others from making use of it in the manner urged by the Conatsers." Opp. Brief at 4. This argument begs the very question presented in this appeal. No one disputes that Appellees, like all private landowners, generally enjoy the right to exclude others from their property. It is also undisputed, however, that Appellees' right to exclude is subject

to the public's right to use the Weber River to "float leisure craft, hunt, fish, and participate in any lawful activities." 655 P.2d at 1137. Thus, Appellees do not have the right to exclude the Conatsers from the Weber River, even as it crosses their private property, so long as the Conatsers are floating, hunting, fishing, or pursuing other lawful activities. The issue framed by footnote six of *J.J.N.P.*, and presented in this case, is the scope of that right, and specifically whether it includes the right to set foot on the bed of the river, or is merely a limited right to invade private airspace, so long as separated from the private dirt by the buoyancy of the public water. To simply assert that because the land is private, Appellees have the right to exclude the Conatsers, ignores the central issue and jumps directly to an unsupported conclusion.

## **II. THE CONATSEERS REPLY TO APPELLEES' SPECIFIC ARGUMENTS**

In the following sections, the Conatsers respond to Appellees' arguments point-by-point.

### **A. Private ownership of the bed of the Weber River does *NOT* give Appellees an unlimited right to exclude others.**

Appellee's repeat their blanket assertion that "because the bed in question is in private ownership, the owners thereof have the constitutionally protected right to prohibit others from making use of it." Opp. Brief at 5. Again, this argument begs the question and ignores that the Appellees' property is subject to what this Court described as a public easement, from which Appellees have no right to exclude any member of the public who is properly using that easement. At issue in this case is the scope of that easement – or, to put it in the terms used by Appellees – the scope of the limit on

Appellees' right to exclude. Appellees' insistence that ownership of the bed carries with it an unlimited right to exclude ignores *J.J.N.P.*, avoids true argument, and offers only a conclusory assertion.

1. The District Court's Ruling is *NOT* supported by prior Utah Supreme Court decisions.

Appellees argue that two prior decisions from this Court dictate a ruling in their favor. Opp. Brief at 6-8. Specifically, Appellees seize on two words used by the Court in *J.J.N.P.* to describe the public's easement: "over" and "upon." Opp. Brief. at 6. Appellees seem to contend that by describing the public easement as one "*over* the water" and noting that "the public does not trespass when *upon* such waters," the Court was limiting the public easement to only those uses that could be exercised while floating over or upon the surface of public waters. This argument is completely undermined by footnote six, which expressly declines to rule on that issue. 655 P.2d at 1138, n. 6. Given the Court's decision to remain silent on that issue, its choice of words is not surprising – it would seem that the *J.J.N.P.* court was careful with its words simply to avoid any argument that it was leaning one way or the other with respect to the question reserved by footnote six. Contrary to Appellees' suggestion, the Court today should not read a holding into a few arguably suggestive words contained in the *J.J.N.P.* decision, where the *J.J.N.P.* Court itself expressly disclaimed making a ruling on that issue.

Appellees' reliance on *Monroe v. State*, 175 P.2d 759 (Utah 1946) is equally unavailing. That case involved a straightforward question of federal navigability, where the only issue was *title* to the bed of Scipio Lake. *Id.* at 760. The question presented here



– public rights to step on the bed as an incident to recreational use of the public water – was simply not at issue.

In short, Appellees’ contention that precedent from this Court supports the trial court’s ruling is without foundation. *Monroe* is wholly inapposite, and *J.J.N.P.* expressly declined to rule on the issue.

2. *Day v. Armstrong* commits a crucial error in reasoning, which this Court should not perpetuate.

Appellees rely heavily on *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961) since it articulates the position taken by the district court in this matter. In doing so, however, Appellees have glossed over an error in the *Day* court’s reasoning. Specifically, Appellees describe *Day* as holding that “‘irrespective’ of navigability, the public was entitled to make use of the water for floating provided the water was actually capable of supporting such use.” Opp. Brief at 10. That is an incomplete description of the *Day* holding. Toward the beginning of the decision, the Wyoming Supreme Court actually held, much like the Utah Supreme Court in *J.J.N.P.*, that “the actual usability of the waters is alone the limit of the public’s right to so employ them.” 362 P.2d at 143. The *Day* court later reiterated that broad public right, stating that since the waters were owned by the public, “they are available for such uses by the public of which they are capable.” *Id.* at 145.

In the very next sentence, however, the *Day* court inexplicably narrowed its focus to floating, and proceeded to limit the public right to use the underlying bed to those uses incidental to floatation. *Id.* at 145-46. The *Day* court never explains why the public

should not have rights to use the riverbed that are incidental to other uses of which the waters are capable, and one is left with the impression that the court simply could not shake the legacy of “navigability,” despite its recognition that navigation is irrelevant when the water is owned by the public.

This Court should not repeat the error of *Day* – public water may be used for a wide variety of purposes, not just floating or navigation. Accordingly, in order for the public to fully enjoy its ownership of the water, its incidental rights should not be determined by the right of floating alone.

Appellees also comment on the state’s “power to regulate the use of water,” and argue that to “grant” the public the right to step on private riverbeds would constitute a taking. Opp. Brief at 10-11. This argument mistakes the role of this Court, which is not to regulate or grant anything,<sup>2</sup> but merely to find the law. *See Provo River Water Users’*

---

<sup>2</sup> Of course, regulation of public waters is the province of the legislative branch. *See J.J.N.P.*, 655 P.2d at 1136 (“The State regulates the use of the water, in effect, as trustee for the benefit of the people.”). That is not to say, of course, that the decision in this case will have no bearing on the issue. If the Court decides in favor of the Conatsers, and rules that public ownership of waters carries with it the right to make reasonable incidental use of private riverbeds, it would seem that the State Legislature could impose reasonable restrictions on that use. If, however, the Court finds that the public has no such incidental right, the Legislature’s options would seem to be more limited:

Ironically the majority opinion, while implying that the General Assembly is competent to change the rule adopted today, has complicated the prospects of having the rule changed in the future. The Court has painted the state into a corner, and its brushwork assures that any effort to alter the rule will be difficult and expensive. The Court, by creating a vested property right in stream water (with the concomitant right to exclude all others from that water), has created a valuable property interest. And the General Assembly, therefore, cannot give the public recreational access to rivers without taking away from landowners their newly recognized

*Assoc. v. Morgan*, 857 P.2d 927, 932-33, n. 8 (Utah 1993) (tracing evolution of the legal status of percolating water from private to public, but holding that “public ownership of all water in the state *must have always been so*.”) (emphasis in original). In other words, the Court’s decision in this matter will not take a property interest from anyone, but will merely declare what their property interests have always been.

3. The Question of Navigability is Irrelevant in this Case.

Appellees insist that the question of navigability is “inescapable,” and from the context it is clear that Appellees are referring to federal navigability for title purposes. *See* Opp. Brief at 12-13. Appellees’ insistence in this regard is somewhat puzzling: the only relevance of the federal test of navigability is to determine ownership to the submerged land, but the Conatsers have not contested the private status of the submerged land in question here.

At any rate, Appellees’ discussion of navigability presents a fallacious argument. Specifically, Appellees first note that if the Weber River were federally navigable, then the State would own the bed, and the Appellees would not have the right to exclude the public therefrom. *See* Opp. Brief at 12. Then, Appellees assert that since the Weber River is *not* federally navigable, Appellees must have the right to exclude the public from the bed. *See* Opp. Brief at 12-13. Obviously, this conclusion does not follow; the lack of federal navigability renders the bed of the Weber River private property, but privately owned property does not always carry with it an unlimited right to exclude. Private

---

property interests and paying them “just compensation.”  
*People v. Emmert*, 597 P.2d 1025, 1033 (Carrigan, J., dissenting)

property is often burdened by servitudes or estates that allow non-owners to make some use of the property. Once again, by trying to draw a strict equation between private property and an unlimited right to exclude, Appellees have begged the question and ignored the real issue.

**B. State wildlife statutes do *NOT* speak to the issue presented here.**

Appellees argue that Utah Code Ann. § 23-20-14 supports their position that the public holds no right to touch or walk upon a privately-owned riverbed. That statute provides that no person may enter privately owned land for the purposes of taking wildlife, where the land is “properly posted.” *Id.* at § 23-20-14(2)(a). The statute further provides that “properly posted”

means that "No Trespassing" signs or a minimum of 100 square inches of bright yellow, bright orange, or fluorescent paint are displayed at all corners, *fishing streams crossing property lines*, roads, gates, and rights-of-way entering the land.

*Id.* at § 23-20-14(1)(d). Appellees’ interpretation of this statute – that it allows private landowners to restrict public use of a fishing stream, merely by posting it as private – is incorrect. Rather, the inclusion of “fishing streams” in a list that includes “roads, gates, and rights-of-way entering the land” suggests a legislative recognition that the public may enter and pass through private land on public servitudes, including fishing streams, but that the landowner should be able to put the public on notice that the underlying fee is privately owned, and that taking of wildlife outside the scope of the right-of-way (in the case of a fishing stream, above the ordinary high water mark) is not allowed. To hold otherwise would allow private landowners to lock up rivers as private fisheries,

appropriating to themselves fish that are in fact public property. *See* Utah Code Ann. § 23-13-3 (declaring all wildlife in the state to be “the property of the state”). Had the Utah Legislature intended this result, surely it would have made that intent clear.

C. **The “Wyoming Rule” is flawed, and should *NOT* be adopted simply because it falls somewhere in the middle of a continuum between the approaches adopted by other western states.**

Appellees next argue that this Court should adopt the Wyoming rule, as articulated in *Day v. Armstrong*, because it is a “middle of the road” approach lying between the “extreme” positions taken by Montana and Colorado. Opp. Brief at 15.

The Conatsers first note that this argument would be more appropriately addressed to a legislative body, in that it is essentially an argument based on what Appellees believe to be the appropriate public policy with regard to public rights in waters and their underlying beds.

Secondly, Appellees’ argument is not compelling, even as a public policy argument. Even if the Montana and Colorado positions represent two ends of a spectrum of potential approaches, it does not necessarily follow that the preferred approach is one lying somewhere in between. This is rather like saying that since some countries guarantee universal suffrage, and others do not provide for democratic elections at all, the “best” approach would be to allow only half the populace to vote. In short, it makes little sense to argue that a given policy choice is best simply because it falls somewhere in between opposite approaches.

Moreover, Appellees’ contention that Montana and Colorado lie at the extreme ends of the spectrum, with Wyoming in the middle, is not accurate. The *J.J.N.P.* court,

after all, identified a Wyoming case (*Day*) and an Idaho case (*Southern Idaho Fish and Game Associate v. Picabo Livestock, Inc.*, 528 P.2d 1295 (Idaho 1974)) as offering examples of the “differing rules” on this issue. 655 P.2d at 1138, n. 6. The *J.J.N.P.* court did not even mention Colorado, perhaps because unlike Utah and Wyoming (and arguably Idaho, *see* Brief of Appellants at 25, n. 9), Colorado has rejected the doctrine of public ownership of water. *People v. Emmert*, 597 P.2d 1025 (Colo. 1979). Ironically, if one excludes Colorado from the comparison, since it is not a public ownership state, Wyoming becomes the extreme position, and – under Appellees’ reasoning – should be rejected on that basis alone.

All of that said, the Conatsers agree that the Colorado approach is a poor one, in part because it clings to a strict application of the common law principle that “he who owns the surface of the ground has the exclusive right to everything which is above it.” *Emmert*, 597 P.2d at 1027. That principle has been recognized as outmoded by the United States Supreme Court. *United States v. Causby*, 328 U.S. 256, 261 (1946) (“that doctrine has no place in the modern world”). More importantly, this Court has already rejected the Colorado approach, and held that the public owns and may use all natural waters in the state, even where those waters lie above the surface of privately owned ground. *See J.J.N.P.*, 655 P.2d at 1136-37.

Appellees criticize the Montana line of decisions because, in their view, they have led to “considerable uncertainty.” Opp. Brief at 19. The Conatsers disagree. The first two Montana cases established, in clear terms, that public rights in waters derive from public ownership of the waters, and that public rights extend to “the bed and banks up to

the ordinary high water mark.” See *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163, 170 (Mont. 1984); *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984).

Whatever uncertainty that has existed in Montana law came not from those cases, but from the Montana Legislature. Following *Curran* and *Hildreth*, the Montana Legislature enacted a stream access law, which recognized the holding of those cases and sought to specify precisely what rights the public should enjoy in public waters and privately owned beds underneath. Certain of those rights, however, were deemed by the Montana Supreme Court as too burdensome on the servient estate, and declared to be unconstitutional takings of private rights. *Galt v. State Dept. of Fish and Wildlife*, 731 P.2d 912 (Mont. 1987) (finding unconstitutional provisions of the stream access law which allowed the public to build duck blinds, boat moorings, and to camp overnight on the beds and banks of all state waters). The *Galt* decision, however, did not result in any uncertainty – quite the contrary, it reiterated its earlier holdings that “the public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership in water.” *Id.* at 915.

In short, since at least the issuance of the *Hildreth* decision in 1984, both Montana decisional and statutory law have consistently upheld the public’s right to step on privately owned riverbeds as an incident to the use of public waters. Accordingly, Appellees’ critique of the Montana decisions – that they have led to uncertainty – is unfounded.

**D. Setting a foot on private riverbeds is a reasonable and necessary incidental use of public waters for fishing, and a holding to that effect will NOT convert streams into thoroughfares.**

Lastly, Appellees argue that walking on the bed of a public river is “clearly” more than incidental to the use of the river itself, and further that such a rule would be “unmanageable.” Opp. Brief at 26.

Specifically, Appellees urge that an easement cannot be “enlarged” to place a greater burden on the servient estate. This is a correct statement of an inapplicable rule. The question of enlargement arises where the easement in question is reasonably well defined, such as by grant or prescription, and the easement holder seeks to impose some new or different use on the servient estate. *See, e.g., Nielson v. Sandberg*, 141 P.2d 696, 700 (Utah 1943) (holding that ditch easement created for the benefit of one party for power purposes could not be used by another party for different purposes, because an easement “is limited to uses for which, or by which, it was acquired, and to the person who acquired it, or for the benefit of the property for which it was acquired.”).

Here, however, it is the physical or spatial scope of the easement which is uncertain, and which is expressly undefined. *J.J.N.P.*, 655 P.2d. at 1138, n. 6. One could only call the Conatser’s position an “enlargement” if it is assumed that the public easement currently does not include the right to walk on the bed. Again, this is an example of Appellees begging the question, advancing an argument that only makes sense if one presumes from the outset that their position is correct.

Appellees also argue that it is inappropriate for this Court to consider the burdens to which their servient estate is already subject. Opp. Brief at 27-28. Appellees cite no



authority for this proposition, and it defies common sense – how can a reviewing court assess the burden created by some disputed use without an understanding of the nature of the servient property? *See* Restatement (Third) of Prop: Servitudes § 4.10, cmt. g (noting that in determining whether burdens imposed on the servient estate are reasonable, the character of the servient property is an important concern).

In this appeal, Appellees do not challenge the Conatsers' right to *float* through their property to fish, but they insist that if the Conatsers are allowed to *wade* through their property to fish, they are subject to some unreasonable additional burden. The only difference between the two uses is contact with the rocks and mud under the Weber River.<sup>3</sup> Thus, it seems entirely appropriate – if not necessary – to assess what rights the Appellees have in those rocks and that mud. As noted in the Conatsers' opening brief, though Appellees own the rocks and mud in fee, their use of that property is severely limited not only by the existence of the overlying water itself, but by the public nature of the water, and by state and federal laws that recognize the public interest in the submerged land. Brief of Appellants at 23. In short, those regulatory restrictions are an important part of the context in which this Court analyzes the burden on Appellees' property from the Conatsers' disputed use, and ultimately arrives at an appropriate balancing of interests.

---

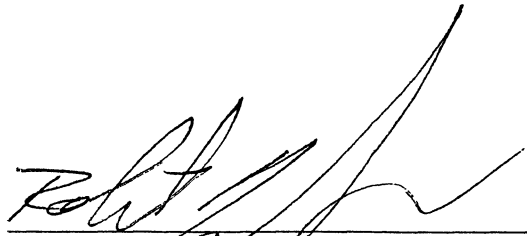
<sup>3</sup> In fact, since even under Appellees' view, an angler in a raft would be entitled to step on the bed in order to maneuver his or her raft over sandbars, around rapids, etc., the only difference between floaters and waders is the *reason* that the angler's boot touches the riverbed. Appellees cannot seriously contend that this subjective distinction imposes any different burden – let alone an additional and unreasonable burden – on their submerged land.

Lastly, Appellees insist that under the Conatsers' theory, "every streambed in the state of Utah, regardless of its size and usefulness for floating, would be subject to a public easement for walking and wading." Opp. Brief at 28. This is not so. Any rights the public may have to make contact with a streambed must be incidental to a *bona fide* use of the public water itself. *See Galt*, 731 P.2d 912, 915 ("The public has a right of use up to the high water mark, but only such use as is necessary to utilization of the water itself.") In other words, use of a streambed as a mere way of passage through private property would constitute a trespass under the approach urged by the Conatsers, since such walking or wading would not be incidental to a lawful use of the water. Only when the public is making use of the public water – such as by fishing, hunting, swimming, or floating – should the public enjoy the attendant right to make reasonably necessary contact with the underlying bed. If a stream or lake does not support public uses such as sport fishing, either because it is too small, too muddy, or too urban, there is no attendant public right to step on the bed in furtherance of those public uses.

### **CONCLUSION**

For the foregoing reasons, the Conatsers urge this Court to reverse that portion of the district court's ruling wherein the court concluded, as a matter of law, that touching of the streambed on Defendants' property is permissible only when it is incidental to navigating the Weber River in a watercraft, *see* Judgment, Record ("Rec.") at 00310, and to declare that the Conatsers, as members of the general public, have the right to walk on the bed of the Weber River and wade in its waters while fishing therein.

Dated this 4th day of April, 2007.

A handwritten signature in black ink, appearing to read 'Robert H. Hughes', is written over a horizontal line.

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

GERALD E. NIELSON

PARKER M. NIELSON

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

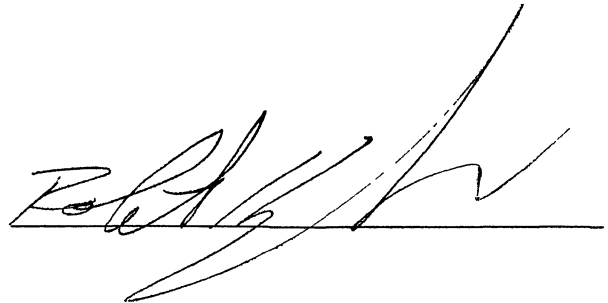
**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of April, 2007, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS**, to:

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

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

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

A handwritten signature in black ink, appearing to read "Royce B. Covington", is written over a horizontal line.