

Chapter 29 Public Waters Access Act

Part 1 General Provisions

73-29-101 Title.

This chapter is known as the "Public Waters Access Act."

Enacted by Chapter 410, 2010 General Session

73-29-102 Definitions.

As used in this chapter:

- (1) "Division" means the Division of Wildlife Resources.
- (2) "Floating access" means the right to access public water flowing over private property for floating and fishing while floating upon the water.
- (3) "Impounded wetlands" means a wetland or wetland pond that is formed or the level of which is controlled by a dike, berm, or headgate that retains or manages the flow or depth of water, including connecting channels.
- (4) "Navigable water" means a water course that in its natural state without the aid of artificial means is useful for commerce and has a useful capacity as a public highway of transportation.
- (5) "Private property to which access is restricted" means privately owned real property:
 - (a) that is cultivated land, as defined in Section 23-20-14;
 - (b) that is:
 - (i) properly posted, as defined in Section 23-20-14;
 - (ii) posted as described in Subsection 76-6-206(2)(b)(iii); or
 - (iii) posted as described in Subsection 76-6-206.3(2)(c);
 - (c) that is fenced or enclosed as described in:
 - (i) Subsection 76-6-206(2)(b)(ii); or
 - (ii) Subsection 76-6-206.3(2)(b); or
 - (d) that the owner or a person authorized to act on the owner's behalf has requested a person to leave as provided by:
 - (i) Section 23-20-14;
 - (ii) Subsection 76-6-206(2)(b)(i); or
 - (iii) Subsection 76-6-206.3(2)(a).
- (6) "Public access area" means the limited part of privately owned property that:
 - (a) lies beneath or within three feet of a public water or that is the most direct, least invasive, and closest means of portage around an obstruction in a public water; and
 - (b) is open to public recreational access under Section 73-29-203; and
 - (c) can be accessed from an adjoining public access area or public right-of-way.
- (7) "Public recreational access" means the right to engage in recreational access established in accordance with Section 73-29-203.
- (8)
 - (a) "Public water" means water:
 - (i) described in Section 73-1-1; and
 - (ii) flowing or collecting on the surface:
 - (A) within a natural or realigned channel; or

- (B) in a natural lake, pond, or reservoir on a natural or realigned channel.
- (b) "Public water" does not include water flowing or collecting:
 - (i) on impounded wetland;
 - (ii) on a migratory bird production area, as defined in Section 23-28-102;
 - (iii) on private property in a manmade:
 - (A) irrigation canal;
 - (B) irrigation ditch; or
 - (C) impoundment or reservoir constructed outside of a natural or realigned channel; or
 - (iv) on a jurisdictional wetland described in 33 C.F.R. 328.3.
- (9)
 - (a) "Recreational access" means to use a public water and to touch a public access area incidental to the use of the public water for:
 - (i) floating;
 - (ii) fishing; or
 - (iii) waterfowl hunting conducted:
 - (A) in compliance with applicable law or rule, including Sections 23-20-8, 73-29-203, and 76-10-508; and
 - (B) so that the individual who engages in the waterfowl hunting shoots a firearm only while within a public access area and no closer than 600 feet of any dwelling.
 - (b) "Recreational access" does not include:
 - (i) hunting, except as provided in Subsection (9)(a)(iii);
 - (ii) wading without engaging in activity described in Subsection (9)(a); or
 - (iii) any other activity.

Enacted by Chapter 410, 2010 General Session

73-29-103 Declarations.

The Legislature declares:

- (1) the Utah Constitution's specific private property protections, including recognition of the inalienable right to acquire, possess, and protect property and the prohibition on taking or damaging private property for public use without just compensation, protect against government's broad recognition or grant of a public recreation easement to access or use public water on private property;
- (2) general constitutional and statutory provisions declaring public ownership of water and recognizing existing rights of use are insufficient to overcome the specific constitutional protections for private property and do not justify inviting widespread unauthorized invasion of private property for recreation purposes where public access has never existed or has not existed for a sufficient period and under the conditions required to support recognition under this chapter;
- (3) whether, or to what extent, a public easement exists for recreational use of public waters on private property is uncertain after judicial decisions in the cases of *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982) and *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008), which decisions did not address the constitutional prohibition on taking or damaging private property without just compensation;
- (4) legislative failure to provide guidance before, coupled with legislative inaction after the 1982 decision in *J.J.N.P. Co. v. State* form a compelling foundation for the Legislature to affirm a limited right to float on the water without violating the constitutional protections of the underlying private property;

- (5) the real and substantial invasion of private property rights did not occur with recognition of the right to float on water that passes over the land, but with the right, first recognized in *Conatser v. Johnson*, to physically occupy the land for an indeterminate time and for a wide range of activities by the public against the owner's will and without just compensation;
- (6) its intent to foster restoration of the accommodation existing between recreational users and private property owners before the decision in *Conatser v. Johnson*, affirm a floating right recognized by the court in *J.J.N.P. Co. v. State*, and recognize adverse use as a constitutionally sound and manageable basis for establishing a limited right of public recreational access on private property in accordance with this chapter.

Enacted by Chapter 410, 2010 General Session

Part 2

Recreational Access to Public Water

73-29-201 General access provisions.

- (1) The public may use a public water for recreational activity if:
 - (a) the public water:
 - (i) is a navigable water; or
 - (ii) is on public property; and
 - (b) the recreational activity is not otherwise prohibited by law.
- (2) A person may access and use a public water on private property for any lawful purpose with the private property owner's permission.
- (3) A person may not access or use a public water on private property for recreational purposes if the private property is property to which access is restricted, unless public recreational access is established under Section 73-29-203.

Enacted by Chapter 410, 2010 General Session

73-29-202 Public right to float on public waters.

- (1) There is a public right to float on public water that has sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating.
- (2) Subsection (1) includes the right to:
 - (a) incidentally touch private property as required for safe passage and continued movement;
 - (b) portage around a dangerous obstruction in the water, if portage is made in a manner that is:
 - (i) most direct;
 - (ii) least invasive; and
 - (iii) closest to the water; and
 - (c) fish while floating.
- (3) A person exercising the right that this section recognizes:
 - (a) shall enter and exit the water at a point on public property or private property with permission of the owner; and
 - (b) may not stop on private property.
- (4)
 - (a) The right this section recognizes does not prevent the establishment of broader public recreational access in accordance with this chapter.

- (b) Notwithstanding Subsection (4)(a), the right this section recognizes does not establish broader public recreational access.

Amended by Chapter 340, 2011 General Session

73-29-203 Establishment of public recreational access.

- (1) Public recreational access is established if:
 - (a) the private property has been used by the public for recreational access requiring the use of the public water for a period of at least 10 consecutive years that begins after September 22, 1982; and
 - (b) the public use has been:
 - (i) continuous during the season conducive to the recreational access;
 - (ii) open and notorious;
 - (iii) adverse; and
 - (iv) without interruption.
- (2) The permissive use of a public water on private property granted by the owner is not an adverse use.
- (3)
 - (a) A property owner's overt act intended to interrupt uninvited recreational access is a sufficient interruption to restart any period of use that may have already begun under Subsection (1) if the evidence, taken as a whole, shows that the act came to the attention of the public or resulted in actual interruption.
 - (b) If an overt act is established in a final judgment to have interrupted recreational access, no other person may challenge the existence of the overt act in a subsequent action.
- (4) The extent and nature of the public recreational access permitted under Subsection (1) is determined by the nature of the historical recreational access during the 10 consecutive years required under Subsection (1).
- (5) When a public water is a lake, pond, or reservoir located on a natural stream and on private property, any portion that has been developed or protected for private hunting is not subject to public recreational access even though the remainder of the public water qualifies for public recreational access under this section.
- (6) A right of public recreational access on private property, established in accordance with this section, may not be closed without authorization of other law.

Enacted by Chapter 410, 2010 General Session

73-29-204 Quiet title action.

- (1)
 - (a) A person, including the division, may file a quiet title action in accordance with Title 78B, Chapter 6, Part 13, Quiet Title, to obtain a judicial declaration of the existence of a right to public recreational access under Section 73-29-203.
 - (b) The division may intervene in a quiet title action filed in accordance with Subsection (1).
 - (c) The division may not be compelled to:
 - (i) file a quiet title action; or
 - (ii) join a quiet title action filed by another person.
- (2) The claimant in a quiet title action under Subsection (1) shall:
 - (a) name the property owner of record as a party; and

- (b) notify the division of the suit by certified mail no later than 20 days after the day on which the quiet title action is filed.
- (3) Within five days after receiving notice in accordance with Subsection (2)(b), the division shall post notice of a quiet title action under this section on its Internet website.
- (4) A quiet title action under this section shall be commenced within four years after the day on which a period of prescriptive use ceases.
- (5) The burden of proof for a quiet title action under this section is on the claimant to prove the existence of a right to public recreational access or floating access under Section 73-29-203 by clear and convincing evidence.
- (6) A quiet title action under this section is limited to a declaration concerning the property and property owner joined in the action.
- (7)
 - (a) Multiple claimants and multiple property owners may be included in a quiet title action concerning public water common to the property owners.
 - (b) In a case with multiple property owners, the court shall make a separate finding concerning each property owner included in the action.
- (8) A final judgment on the merits that a piece of private property is not subject to public recreational access:
 - (a) is binding; and
 - (b) may not be challenged in subsequent litigation.
- (9) The court may award attorney fees and costs in an action under this section if the court finds that the losing party's arguments lack a reasonable basis in law or fact.

Enacted by Chapter 410, 2010 General Session

73-29-205 Injunctive relief.

- (1) The owner of private property may obtain injunctive relief against a person who, without permission, enters, remains, or persists in an effort to enter or remain on the owner's property for recreational use of public water other than use in accordance with Sections 73-29-202 and 73-29-203, when effective.
- (2) An injunction under this section is in addition to any remedy for trespass.
- (3) The existence of an easement under Section 73-29-203 is a defense in an action for injunctive relief under this section or a claim of trespass under other law.
- (4) If a person against whom an injunction is sought, or a person charged with trespass, establishes by clear and convincing evidence the existence of an easement for defense purposes, as described in Subsection (3), the establishment of the existence of the easement applies only to the defense and does not constitute a judicial declaration of the easement's existence for another purpose.
- (5) If an owner obtains an injunction against a person under this section, the injunction does not serve as a declaration that there is no public easement on the owner's property.
- (6) The court may award attorney fees and costs in an action under this section if the court finds that the losing party's arguments lack a reasonable basis in law or fact.

Enacted by Chapter 410, 2010 General Session

73-29-206 Effect of chapter on other uses and restrictions -- Required acts.

- (1) Nothing in this chapter affects the right of the public to use public water for public recreational access, including the touching of the bed beneath the public water if:

- (a) the bed beneath the public water is public property; or
 - (b) the bed beneath the public water is private property to which access is not restricted.
- (2) A person using a public water for public recreational access is subject to any other restriction lawfully placed on the use of the public water by a governmental entity with authority to restrict the use of the public water.
- (3) Nothing in this chapter limits or enlarges any right granted by express easement.
- (4) When leaving a public access area, a person shall remove any refuse or tangible personal property the person brought into the public access area.

Enacted by Chapter 410, 2010 General Session

73-29-207 Fences across public water.

- (1) The owner of a public access area adjacent to and lying beneath a public water may place a fence or obstruction across a public water for agricultural, livestock, or other lawful purposes.
- (2) A fence or other obstruction shall:
- (a) comply with an applicable federal, state, or local law; and
 - (b) be constructed in a manner that does not create an unreasonably dangerous condition to the public lawfully using the public water.
- (3) The owner of a public access area shall allow the placement of a ladder, gate, or other facility allowing portage around a fence or obstruction if:
- (a) the owner places a fence or obstruction across a public water in accordance with Subsection (1); and
 - (b) the water is open to public recreational access by permission or under Section 73-29-203.

Enacted by Chapter 410, 2010 General Session

73-29-208 Severability.

If any of this chapter's provisions, or the application of any of this chapter's provisions, is held to be unconstitutional, the provision is severable and this chapter's other provisions and applications remain effective.

Enacted by Chapter 410, 2010 General Session