

1 **RECREATIONAL USE OF PUBLIC WATER ON**
2 **PRIVATE PROPERTY**

3 2010 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Kay L. McIff**

6 Senate Sponsor: Dennis E. Stowell

8 **LONG TITLE**

9 **General Description:**

10 This bill addresses public use of public waters on public and private property.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ makes legislative declarations concerning constitutional protections for private
- 14 property and related matters;
- 15 ▶ provides liability protection for owners of private property beneath or adjacent to
- 16 public waters;
- 17 ▶ defines terms;
- 18 ▶ recognizes a limited recreational floating right on public water;
- 19 ▶ outlines circumstances under which the public may acquire recreational access to
- 20 public water on private property;
- 21 ▶ provides a process for the declaration of the right to certain public recreational
- 22 access based on historical adverse use;
- 23 ▶ provides for injunctions;
- 24 ▶ addresses the chapter's effect on other uses of public waters;
- 25 ▶ requires a person using a public access area to remove refuse and personal
- 26 property;
- 27 ▶ addresses fences across public water; and
- 28 ▶ makes technical and conforming amendments.

29 **Monies Appropriated in this Bill:**

30 None

31 **Other Special Clauses:**

32 This bill provides an effective date.

33 **Utah Code Sections Affected:**

34 AMENDS:

35 **57-14-4**, as last amended by Laws of Utah 1997, Chapter 62

36 **73-1-1**, Utah Code Annotated 1953

37 ENACTS:

38 **73-29-101**, Utah Code Annotated 1953

39 **73-29-102**, Utah Code Annotated 1953

40 **73-29-103**, Utah Code Annotated 1953

41 **73-29-201**, Utah Code Annotated 1953

42 **73-29-202**, Utah Code Annotated 1953

43 **73-29-203**, Utah Code Annotated 1953

44 **73-29-204**, Utah Code Annotated 1953

45 **73-29-205**, Utah Code Annotated 1953

46 **73-29-206**, Utah Code Annotated 1953

47 **73-29-207**, Utah Code Annotated 1953

48 **73-29-208**, Utah Code Annotated 1953

49 REPEALS AND REENACTS:

50 **57-14-1**, as last amended by Laws of Utah 1997, Chapter 62

51

52 *Be it enacted by the Legislature of the state of Utah:*

53 Section 1. Section **57-14-1** is repealed and reenacted to read:

54 **57-14-1. Legislative purpose.**

55 This chapter's purpose is to limit the liability of public and private land owners toward
56 a person entering the owner's land as a trespasser or for recreational purposes, whether by
57 permission or by operation of Title 73, Chapter 29, Public Waters Access Act.

58 Section 2. Section **57-14-4** is amended to read:

59 **57-14-4. Use of private land without charge -- Effect.**

60 (1) Except as provided in Subsection 57-14-6(1), an owner of land who either directly
61 or indirectly invites or permits without charge or for a nominal fee of not more than \$1 per
62 year any person to use the land for any recreational purpose, or an owner of a public access
63 area open to public recreational access under Title 73, Chapter 29, Public Waters Access Act,
64 does not thereby:

65 [~~1~~] (a) make any representation or extend any assurance that the premises are safe
66 for any purpose;

67 [~~2~~] (b) confer upon the person the legal status of an invitee or licensee to whom a
68 duty of care is owed;

69 [~~3~~] (c) assume responsibility for or incur liability for any injury to persons or
70 property caused by an act or omission of the person or any other person who enters upon the
71 land; or

72 [~~4~~] (d) owe any duty to curtail the owner's use of his land during its use for
73 recreational purposes.

74 (2) This section applies to the relationship between an owner of land and a trespasser.

75 Section 3. Section **73-1-1** is amended to read:

76 **73-1-1. Waters declared property of public.**

77 (1) All waters in this state, whether above or under the ground are hereby declared to
78 be the property of the public, subject to all existing rights to the use thereof.

79 (2) The declaration of public ownership of water in Subsection (1) does not create or
80 recognize an easement for public recreational use on private property.

81 (3) The Legislature shall govern the use of public water for beneficial purposes, as
82 limited by constitutional protections for private property.

83 (4) The right of the public to use public water for recreational purposes is governed by
84 Chapter 29, Public Waters Access Act.

85 Section 4. Section **73-29-101** is enacted to read:

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CHAPTER 29. PUBLIC WATERS ACCESS ACT

Part 1. General Provisions

73-29-101. Title.

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

Section 5. Section **73-29-102** is enacted to read:

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:

- 114 (i) Section 23-20-14;
- 115 (ii) Subsection 76-6-206(2)(b)(i); or
- 116 (iii) Subsection 76-6-206.3(2)(a).
- 117 (6) "Public access area" means the limited part of privately owned property that:
- 118 (a) lies beneath or within three feet of a public water or that is the most direct, least
- 119 invasive, and closest means of portage around an obstruction in a public water; and
- 120 (b) is open to public recreational access under Section 73-29-203; and
- 121 (c) can be accessed from an adjoining public access area or public right-of-way.
- 122 (7) "Public recreational access" means the right to engage in recreational access
- 123 established in accordance with Section 73-29-203.
- 124 (8) (a) "Public water" means water:
- 125 (i) described in Section 73-1-1; and
- 126 (ii) flowing or collecting on the surface:
- 127 (A) within a natural or realigned channel; or
- 128 (B) in a natural lake, pond, or reservoir on a natural or realigned channel.
- 129 (b) "Public water" does not include water flowing or collecting:
- 130 (i) on impounded wetland;
- 131 (ii) on a migratory bird production area, as defined in Section 23-28-102;
- 132 (iii) on private property in a manmade:
- 133 (A) irrigation canal;
- 134 (B) irrigation ditch; or
- 135 (C) impoundment or reservoir constructed outside of a natural or realigned channel; or
- 136 (iv) on a jurisdictional wetland described in 33 C.F.R. 328.3.
- 137 (9) (a) "Recreational access" means to use a public water and to touch a public access
- 138 area incidental to the use of the public water for:
- 139 (i) floating;
- 140 (ii) fishing; or
- 141 (iii) waterfowl hunting conducted:

142 (A) in compliance with applicable law or rule, including Sections 23-20-8, 73-29-203,
143 and 76-10-508; and

144 (B) so that the individual who engages in the waterfowl hunting shoots a firearm only
145 while within a public access area and no closer than 600 feet of any dwelling.

146 (b) "Recreational access" does not include:

147 (i) hunting, except as provided in Subsection (9)(a)(iii);

148 (ii) wading without engaging in activity described in Subsection (9)(a); or

149 (iii) any other activity.

150 Section 6. Section **73-29-103** is enacted to read:

151 **73-29-103. Declarations.**

152 The Legislature declares:

153 (1) the Utah Constitution's specific private property protections, including recognition
154 of the inalienable right to acquire, possess, and protect property and the prohibition on taking
155 or damaging private property for public use without just compensation, protect against
156 government's broad recognition or grant of a public recreation easement to access or use
157 public water on private property;

158 (2) general constitutional and statutory provisions declaring public ownership of water
159 and recognizing existing rights of use are insufficient to overcome the specific constitutional
160 protections for private property and do not justify inviting widespread unauthorized invasion
161 of private property for recreation purposes where public access has never existed or has not
162 existed for a sufficient period and under the conditions required to support recognition under
163 this chapter;

164 (3) whether, or to what extent, a public easement exists for recreational use of public
165 waters on private property is uncertain after judicial decisions in the cases of *J.J.N.P. Co. v.*
166 *State*, 655 P.2d 1133 (Utah 1982) and *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008), which
167 decisions did not address the constitutional prohibition on taking or damaging private property
168 without just compensation;

169 (4) legislative failure to provide guidance before, coupled with legislative inaction

170 after the 1982 decision in *J.J.N.P. Co. v. State* form a compelling foundation for the
171 Legislature to affirm a limited right to float on the water without violating the constitutional
172 protections of the underlying private property;

173 (5) the real and substantial invasion of private property rights did not occur with
174 recognition of the right to float on water that passes over the land, but with the right, first
175 recognized in *Conatser v. Johnson*, to physically occupy the land for an indeterminate time
176 and for a wide range of activities by the public against the owner's will and without just
177 compensation;

178 (6) its intent to foster restoration of the accommodation existing between recreational
179 users and private property owners before the decision in *Conatser v. Johnson*, affirm a floating
180 right recognized by the court in *J.J.N.P. Co. v. State*, and recognize adverse use as a
181 constitutionally sound and manageable basis for establishing a limited right of public
182 recreational access on private property in accordance with this chapter.

183 Section 7. Section **73-29-201** is enacted to read:

184 **Part 2. Recreational Access to Public Water**

185 **73-29-201. General access provisions.**

186 (1) The public may use a public water for recreational activity if:

187 (a) the public water:

188 (i) is a navigable water; or

189 (ii) is on public property; and

190 (b) the recreational activity is not otherwise prohibited by law.

191 (2) A person may access and use a public water on private property for any lawful
192 purpose with the private property owner's permission.

193 (3) A person may not access or use a public water on private property for recreational
194 purposes if the private property is property to which access is restricted, unless public
195 recreational access is established under Section 73-29-203.

196 Section 8. Section **73-29-202** is enacted to read:

197 **73-29-202. Public right to float on public waters.**

198 (1) There is a public right to float on public water that has sufficient width, depth, and
199 flow to allow free passage of the chosen vessel at the time of floating.

200 (2) Subsection (1) includes the right to:

201 (a) incidentally touch private property as required for safe passage and continued
202 movement;

203 (b) portage around a dangerous obstruction in the water, if portage is made in a
204 manner that is:

205 (i) most direct;

206 (ii) least invasive; and

207 (iii) closest to the water; and

208 (c) fish while floating.

209 (3) A person exercising the right this section recognizes:

210 (a) shall enter and exit the water at a point on public property or private property with
211 permission of the owner; and

212 (b) may not stop on private property.

213 (4) (a) The right this section recognizes does not prevent the establishment of broader
214 public recreational access in accordance with this chapter.

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

217 Section 9. Section **73-29-203** is enacted to read:

218 **73-29-203. Establishment of public recreational access.**

219 (1) Public recreational access is established if:

220 (a) the private property has been used by the public for recreational access requiring
221 the use of the public water for a period of at least 10 consecutive years that begins after
222 September 22, 1982; and

223 (b) the public use has been:

224 (i) continuous during the season conducive to the recreational access;

225 (ii) open and notorious;

226 (iii) adverse; and

227 (iv) without interruption.

228 (2) The permissive use of a public water on private property granted by the owner is
229 not an adverse use.

230 (3) (a) A property owner's overt act intended to interrupt uninvited recreational access
231 is a sufficient interruption to restart any period of use that may have already begun under
232 Subsection (1) if the evidence, taken as a whole, shows that the act came to the attention of the
233 public or resulted in actual interruption.

234 (b) If an overt act is established in a final judgment to have interrupted recreational
235 access, no other person may challenge the existence of the overt act in a subsequent action.

236 (4) The extent and nature of the public recreational access permitted under Subsection
237 (1) is determined by the nature of the historical recreational access during the 10 consecutive
238 years required under Subsection (1).

239 (5) When a public water is a lake, pond, or reservoir located on a natural stream and
240 on private property, any portion that has been developed or protected for private hunting is not
241 subject to public recreational access even though the remainder of the public water qualifies
242 for public recreational access under this section.

243 (6) A right of public recreational access on private property, established in accordance
244 with this section, may not be closed without authorization of other law.

245 Section 10. Section **73-29-204** is enacted to read:

246 **73-29-204. Quiet title action.**

247 (1) (a) A person, including the division, may file a quiet title action in accordance with
248 Title 78B, Chapter 6, Part 13, Quiet Title, to obtain a judicial declaration of the existence of a
249 right to public recreational access under Section 73-29-203.

250 (b) The division may intervene in a quiet title action filed in accordance with
251 Subsection (1).

252 (c) The division may not be compelled to:

253 (i) file a quiet title action; or

254 (ii) join a quiet title action filed by another person.
255 (2) The claimant in a quiet title action under Subsection (1) shall:
256 (a) name the property owner of record as a party; and
257 (b) notify the division of the suit by certified mail no later than 20 days after the day
258 on which the quiet title action is filed.
259 (3) Within five days after receiving notice in accordance with Subsection (2)(b), the
260 division shall post notice of a quiet title action under this section on its Internet website.
261 (4) A quiet title action under this section shall be commenced within four years after
262 the day on which a period of prescriptive use ceases.
263 (5) The burden of proof for a quiet title action under this section is on the claimant to
264 prove the existence of a right to public recreational access or floating access under Section
265 73-29-203 by clear and convincing evidence.
266 (6) A quiet title action under this section is limited to a declaration concerning the
267 property and property owner joined in the action.
268 (7) (a) Multiple claimants and multiple property owners may be included in a quiet
269 title action concerning public water common to the property owners.
270 (b) In a case with multiple property owners, the court shall make a separate finding
271 concerning each property owner included in the action.
272 (8) A final judgment on the merits that a piece of private property is not subject to
273 public recreational access:
274 (a) is binding; and
275 (b) may not be challenged in subsequent litigation.
276 (9) The court may award attorney fees and costs in an action under this section if the
277 court finds that the losing party's arguments lack a reasonable basis in law or fact.
278 Section 11. Section **73-29-205** is enacted to read:
279 **73-29-205. Injunctive relief.**
280 (1) The owner of private property may obtain injunctive relief against a person who,
281 without permission, enters, remains, or persists in an effort to enter or remain on the owner's

282 property for recreational use of public water other than use in accordance with Sections
283 73-29-202 and 73-29-203, when effective.

284 (2) An injunction under this section is in addition to any remedy for trespass.

285 (3) The existence of an easement under Section 73-29-203 is a defense in an action for
286 injunctive relief under this section or a claim of trespass under other law.

287 (4) If a person against whom an injunction is sought, or a person charged with
288 trespass, establishes by clear and convincing evidence the existence of an easement for defense
289 purposes, as described in Subsection (3), the establishment of the existence of the easement
290 applies only to the defense and does not constitute a judicial declaration of the easement's
291 existence for another purpose.

292 (5) If an owner obtains an injunction against a person under this section, the
293 injunction does not serve as a declaration that there is no public easement on the owner's
294 property.

295 (6) The court may award attorney fees and costs in an action under this section if the
296 court finds that the losing party's arguments lack a reasonable basis in law or fact.

297 Section 12. Section **73-29-206** is enacted to read:

298 **73-29-206. Effect of chapter on other uses and restrictions -- Required acts.**

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

301 (a) the bed beneath the public water is public property; or

302 (b) the bed beneath the public water is private property to which access is not
303 restricted.

304 (2) A person using a public water for public recreational access is subject to any other
305 restriction lawfully placed on the use of the public water by a governmental entity with
306 authority to restrict the use of the public water.

307 (3) Nothing in this chapter limits or enlarges any right granted by express easement.

308 (4) When leaving a public access area, a person shall remove any refuse or tangible
309 personal property the person brought into the public access area.

310 Section 13. Section **73-29-207** is enacted to read:

311 **73-29-207. Fences across public water.**

312 (1) The owner of a public access area adjacent to and lying beneath a public water
313 may place a fence or obstruction across a public water for agricultural, livestock, or other
314 lawful purposes.

315 (2) A fence or other obstruction shall:

316 (a) comply with an applicable federal, state, or local law; and

317 (b) be constructed in a manner that does not create an unreasonably dangerous
318 condition to the public lawfully using the public water.

319 (3) The owner of a public access area shall allow the placement of a ladder, gate, or
320 other facility allowing portage around a fence or obstruction if:

321 (a) the owner places a fence or obstruction across a public water in accordance with
322 Subsection (1); and

323 (b) the water is open to public recreational access by permission or under Section
324 73-29-203.

325 Section 14. Section **73-29-208** is enacted to read:

326 **73-29-208. Severability.**

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

330 Section 15. **Effective date.**

331 Sections 73-29-203 and 73-29-204 take effect on May 10, 2011.