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THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, *et al.*, Plaintiffs, v. UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*, Defendants, and CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, et al. Intervenors.	**COMBINED OPPOSITION IN RESPONSE TO MOTIONS TO DISMISS** (Tier 2) Case No. 230906637 Honorable Judge Laura Scott

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INTRODUCTION

The Great Salt Lake is a defining feature of the American West, the namesake of Utah's capital, the source of thousands of jobs and billions of dollars of annual revenue, and a hemispherically significant habitat for 10 million migratory birds. The Lake, however, faces an existential crisis. Upstream diversions of water have driven the Lake to record low levels. As the Lake dries up, it threatens a public health disaster for millions of people and the collapse of an irreplaceable ecosystem. Yet the State's response has failed to meet the urgent demands of this moment.

The State of Utah has an affirmative duty to protect the Great Salt Lake's navigable waters and submerged lands, which are held in trust for the people of Utah. That public trust duty is a foundational principle of state sovereignty that cannot be abdicated, as the U.S. Supreme Court underscored in its seminal case on the public trust doctrine, *Illinois Central Railroad Company v. Illinois* (1892). It is also firmly rooted in the Utah Constitution—which was adopted just three years after *Illinois Central*—and Utah Supreme Court precedent. As the Court wrote in *Colman v. Utah State Land Board* (1990), "[t]he essence of this doctrine is that navigable waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing."

The State has not only the duty to confront the crisis facing the Great Salt Lake, but also the authority and expertise to address the root of the problem: unchecked upstream diversions of water, which experts have confirmed are the overwhelming cause of the Lake's decline. Those upstream diversions remain subject to the public trust, thereby preserving the State's continuing authority to assess and, where necessary, undertake feasible modifications of upstream water usage to protect public trust uses from impairment. Indeed, the State's own experts have

identified multiple viable pathways to modify water usage and restore the Great Salt Lake to its minimum healthy elevation, thereby averting the looming crisis and safeguarding trust uses.

Unfortunately, the State refuses to take even the first step of considering how best to implement the pathways to recovery identified by its own experts. Instead, it denies its public trust obligations based on an erroneous reading of the law. Plaintiffs Utah Physicians for a Healthy Environment, *et al*. (collectively "Physicians"), thus seek relief from this Court to correct the State's legal errors and to require it to comply with its fundamental trust obligations on remand. Enforcing the public trust is not only a classic judicial function, it is essential to prevent the loss of an irreplaceable trust resource—the Great Salt Lake—and protect the health of millions of Utahns.

The State and its supporting Intervenors have responded to Physicians' Complaint with a blizzard of dismissal arguments that reject both the foundational principles of the public trust and the judicial role in enforcing them. The State charts a course to disaster by advancing an unprecedented theory: that the public trust doctrine in Utah does not reach navigable waters *at all*. That position is extreme—if adopted, it would put this Court at odds with courts in every other state in the United States, and even with the State's own past advocacy to the Utah Supreme Court, where it clearly acknowledged that the State "holds the waters of the lake under the public trust."

Intervenor Water Users join in the State's misguided attempts to exclude all waters from the public trust, while also doubling down on the State's effort to afford private appropriators an absolute right to impair the navigable waters and underlying sovereign lands of the Great Salt Lake without limitation. Under their theory, water users possess an unalterable privilege to divert *all* the water from the Great Salt Lake and its tributaries, draining the Lake, desiccating

sovereign lands, and functionally destroying a globally significant natural resource and the very air they breathe in the process. This radical theory is based on a fundamental misreading of Utah water law, and it too would contravene public trust principles embedded in the Utah Constitution, foundational principles of sovereignty, and centuries of common law.

The State and the Intervenors also offer up a flurry of jurisdictional and procedural arguments in an attempt to evade liability for breaching the public trust. Not only are these arguments meritless, but they reveal the true purpose of the Defendants' kitchen-sink approach: to obfuscate and misrepresent the case in an effort to make it look more complicated than it is. In the end, the length of this opposition brief is more reflective of the multiplicity of Defendants' arguments than their weight.

The reality of Defendants' position is inescapable: an appropriative water rights system administered without consideration of the public trust will cause unnecessary and unjustified harm to trust interests of the highest public importance. Even so, Defendants ask the Court to stand idly by because the Utah Legislature has taken some steps to purportedly benefit the Lake. Yet the efforts Defendants cite—commendable as many of them may be—are inadequate to ensure protection of the public trust in the Great Salt Lake, as noted by the State's own experts. None of the efforts highlighted by Defendants in their briefs include any cuts to diversions, and none has achieved any significant reduction in water use—or meaningful increase in water reaching the Lake. They simply perpetuate the fundamental error that has placed the Great Salt Lake on the precipice of disaster—the State's refusal to even consider modifications that address unchecked water diversions. Judicial oversight is thus essential to the public trust as the legislative and executive branches cannot be expected to police themselves, nor have they. Physicians respectfully request that the Court deny the motions to dismiss.

BACKGROUND

The Great Salt Lake is the largest saline lake in North America, providing vital refuge for more than 10 million migratory birds each year and generating billions of dollars annually in the recreation, mineral extraction, brine shrimping, and skiing industries.[1] Yet the Great Salt Lake now faces an existential threat that is being inadequately addressed by State officials.

I. The Crisis Facing the Lake

Today, the Great Salt Lake is in crisis. The Lake's elevation fell to a record-low level of 4,188 feet in the fall of 2022. A report from Brigham Young University in early 2023 noted that the Lake had lost "over one million acre-feet of water" in each of the three prior years. *Emergency Measures*, *supra*, at 5. The report noted that the Lake was 10 feet and 6.9 million acre-feet below its minimum healthy elevation; it was 19 feet below its average natural level since 1850; and it had lost an astonishing 73 percent of its water and 60 percent of its surface area. *Id*. at 2, 5. This put the Lake "in uncharted territory." *Id*. at 2.

The causes of this decline are well documented: each year, the Lake receives less than a third of its natural inflow due to excessive upstream water diversions. *Emergency Measures*, *supra*, at 5. Of the roughly 3.1 million acre-feet of water that would naturally flow into the Lake each year, 2.1 million acre-feet are depleted under existing water appropriations and thus never reach the Lake. Individual indoor water use has little direct effect on Lake level; instead,

[1] See Emergency Measures Needed to Rescue Great Salt Lake from Ongoing Collapse, BRIGHAM YOUNG UNIV. 3–4 (2023), https://pws.byu.edu/GSL%20report%202023 ("Emergency Measures"); Bonnie K. Baxter, Great Salt Lake Microbiology: A Historical Perspective, 21 INT'L MICROBIOLOGY 79 (2018); Great Salt Lake Advisory Council, Economic Significance of the Great Salt Lake to the State of Utah (2012), https://documents.deq.utah.gov/water-quality/standards-technical-services/great-salt-lake-advisory-council/Activities/DWQ-2012-006863.pdf.

upstream water appropriations for agriculture, extractive industry, and unsustainable outdoor use collectively account for 67 to 73 percent of the Lake's decline.[2]

The Lake's falling elevation portends ecological collapse and a public health catastrophe. Further depletion of the Lake's water supplies will imperil myriad species, each of which plays a critical and interrelated role in the ecological health of the Lake. And as the Lake level drops, more and more lakebed is exposed, allowing the wind to transport lakebed sediments as dust that will be inhaled downwind by millions of Utahns. The coarse, fine, and ultrafine particulate matter that is on the lakebed can reach the deepest parts of lungs and will increase rates of numerous acute and chronic diseases, including cancer, lung disease, heart disease, and neurologic disease. Toxic sediments (such as arsenic, mercury, nickel, and lead) that have accumulated in the lakebed will also be transported downwind to be inhaled by Utahns, a process that will increase as the Lake's area continues to diminish. *See Emergency Measures*, *supra*, at 9; Wayne Wurtsbaugh et al., *Impacts of Water Development on Great Salt Lake and the Wasatch Front* 4 (Feb. 24, 2016), https://digitalcommons.usu.edu/wats_facpub/875/.

II. The State's Failure to Address the Crisis

The State of Utah has identified a minimum Lake level necessary to maintain ecological integrity and the public's ability to continue using the Lake in legally protected and economically beneficial ways. The State has also identified pathways to return the Lake to that minimum Lake elevation. Yet the State has failed to take actions necessary to accomplish that objective.

[2] *See* Great Salt Lake Strike Team, Great Salt Lake Policy Assessment 11 (Feb. 9, 2023), https://gardner.utah.edu/wp-content/uploads/GSL-Assessment-Feb2023.pdf?x71849 ("Policy Assessment"); *Emergency Measures*, *supra*, at 6–7.

More than a decade ago, the State determined that a healthy Lake requires an average elevation of at least 4,198 feet above sea level.[3] Below this elevation level, the Lake's salinity levels increase, making the Lake less hospitable for brine shrimp, threatening both commercial brine shrimp fishing and the multitude of wildlife that depend on the shrimp for food; wildlife-rich wetlands dry up or become dominated by invasive plant species; boat launches become increasingly unusable; many of the Lake's islands become connected to the mainland, allowing predators and other species to reach the islands and disturb nesting sites for birds. Indeed, below this elevation level, the Lake's ecosystem enters structural decline that threatens its ecological collapse.[4]

Recognizing the importance of returning the Lake to an elevation of at least 4,198 feet, the State's own experts have identified multiple pathways to do so. The Great Salt Lake Strike Team, a team of experts that includes officials from DNR, DWR, and FFSL, recently estimated that a 17.5 percent depletion in water use in agriculture, mineral extraction, and municipal/industrial use would be needed to "prevent further losses to the lake." Policy Assessment, *supra*, at 16–17. To "begin to refill the lake to the target level" of 4,198 feet within 20 years, the Strike Team projected three scenarios for that timeframe: (1) across-the-board 35 percent reductions in water use in agriculture, mineral extraction, and municipal/industrial use; (2) 20 percent reduction in water use in agriculture and 69 percent reductions in mineral

[3] *See* FINAL GREAT SALT LAKE COMPREHENSIVE MANAGEMENT PLAN AND RECORD OF DECISION 1-7 to 1-8 (Utah Dept. of Natural Res. Mar. 2013), https://ffsl.utah.gov/state-lands/great-salt-lake/great-salt-lake-plans/ ("2013 CMP"); *id*. at Elevation Matrix, https://ffsl.utah.gov/wp-content/uploads/Elevation_Matrix_3_1_13Cropped.pdf.
[4] *See id*. at Elevation Matrix, https://ffsl.utah.gov/wp-content/uploads/Elevation_Matrix_3_1_13Cropped.pdf.

extraction and municipal/industrial use; and (3) 42 percent reduction in water use in agriculture and 20 percent reductions in mineral extraction and municipal/industrial use. *Id*.

Despite identifying multiple pathways to restore the Lake to its minimum healthy elevation, the Defendant agencies have failed to take the critical steps necessary to do so. Most importantly, they have declined—indeed flatly refused—to oversee and, where necessary to protect the Lake and public health, modify the upstream diversions that are the overwhelming cause of the Lake's depletion. Indeed, in their motions to dismiss, Defendants have expressly (and erroneously) disclaimed any obligation or ability to do so. *See* DWR Mot. at 2 ("Utah law does not allow or require the State to modify or curtail existing water rights to maintain a certain lake level[.]"); *id*. at 6 ("Utah's public trust doctrine does not allow the State to 'modify diversions' of existing water rights to satisfy new trust duties over sovereign lands[.]"); FFSL Mot. at 6 (arguing that "DNR and the State Engineer . . . simply do not have public trust obligations to Great Salt Lake"); *id.* at 19 (arguing that "FFSL has no jurisdiction or authority over upstream diversions or water rights"); DNR Mot. at 4 (arguing that supervision/modification of perfected water rights "is unworkable as a matter of law").

The State has taken many actions aimed at returning more water to the Lake. *See* DNR Mot. at 2, 10–12; DWR Mot. at 4, 14–16; FFSL Mot. at 23. Such actions are laudable. They are also plainly insufficient to return the Lake to its minimum healthy elevation, because these actions do not address the paramount cause of the Lake's decline: unchecked upstream diversions. Indeed, none of the efforts highlighted by Defendants in their briefs includes any cuts to diversions, and none has achieved any significant reduction in water use.

For example, the State points to the new position of Great Salt Lake Commissioner, *see* DNR Mot. at 2, 12, but that position pointedly lacks any authority "to override, substitute, or

modify a water right with the state." Utah Code Ann. § 73-32-203(3). The State also cites Governor Spencer Cox's proclamation suspending all new water appropriations in the Great Salt Lake Basin, *see* DWR Mot. at 4, but that has no effect on existing appropriations that are impairing the Lake.[5] The Comprehensive Management Plan and "integrated surface and ground water assessment," DNR Mot. at 2, 10–11, are mere planning documents lacking substantive impact, while the Great Salt Lake Watershed Enhancement Program, "'turf buy-back' program," and legislative change permitting farmers to sell unused water to the State, DNR Mot. at 2, 10–11; DWR Mot. at 15–16, are voluntary initiatives, and the State has been unable to document any significant quantity of water reaching the Lake as their result.[6] In fact, in response to Weber Basin and Jordan Valley water conservancy districts "manag[ing] to scrape together a combined 30,000 acre-feet of extra water they could send to the lake," a program manager with FFSL told the press, "it wouldn't make a measurable difference in the level of the lake, given how large it is."[7]

III. Physicians Seek Judicial Review of the State's Breach of the Public Trust

Plaintiffs Utah Physicians for a Healthy Environment, American Bird Conservancy, Center for Biological Diversity, Sierra Club, and Utah Rivers Council (collectively "Physicians") suffer harm due the State's failure to fulfill its obligations to protect the Great Salt Lake. The

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[5] *See* Proclamation No. 2022-01, Suspending New Appropriations of Surplus and Unappropriated Waters in Great Salt Lake Basin Pursuant to Utah Code Section 73-6-1 (Nov. 3, 2022).

[6] *See* Office of the Legislative Auditor General, A Performance Audit of Utah's Water Management: Ensuring Data Integrity, Program Best Practices, and Comprehensive Water Planning 27 (Nov. 14, 2023), https://le.utah.gov/interim/2023/pdf/00004839.pdf; *see also* Leia Larsen, *Farmers Have Yet to Lease Water to Help the Great Salt Lake. Here's What They Have to Say*, SALT LAKE TRIB. (Mar. 17, 2023), https://www.sltrib.com/news/environment/2023/03/17/farmers-have-yet-lease-water-help/.

[7] Leia Larsen, *Water Districts Vowed to Send Billions of Gallons to the Great Salt Lake This Year. Here's How It's Going*, SALT LAKE TRIB. (Dec. 8, 2022), https://www.sltrib.com/news/environment/2022/12/08/water-districts-vowed-send/.

declining lake levels detrimentally impact the ecosystem that they use for recreational activities and commercial endeavors and impair their members' health and their families' health. Compl. ¶¶ 26–27. Faced with the State's inaction, Physicians filed suit on September 6, 2023, alleging that the State was in breach of its obligations under the public trust doctrine. *See id.* ¶ 106–111. Physicians seek declaratory and injunctive relief, asking this Court to confirm the State's trust duties and to instruct Defendants to fulfill those duties. *See id*. at 27–29, ¶¶ 1–4. On December 20, 2023, Defendants each filed a motion to dismiss. In late January and early February 2024, this Court permitted various municipalities, state agencies, water conservancy districts, and significant water users to intervene, and on March 15, 2024, the Intervenors filed additional motions to dismiss. Physicians now file this combined response opposing the motions to dismiss.

STANDARD OF REVIEW

Dismissal is a "severe measure," *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990), to be granted only if it appears "to a certainty" that a party is not entitled to relief "under *any* state of facts which could be proved in support of the claim." *Mack v. Dep't of Com., Div. of Sec.,* 2009 UT 47, ¶17, 221 P.3d 194 (emphasis added). "The courts are a forum for settling controversies, and if there is any doubt about whether a claim should be dismissed . . . the issue should be resolved in favor of giving the party an opportunity to present its proof." *Colman*, 795 P.2d at 624.

In reviewing a motion to dismiss under Rule 12(b)(6) of the U.R.C.P., this Court must assume the "truth of the [plaintiff's] allegations" and draw "all reasonable inferences therefrom in the light most favorable" to the plaintiffs. *Calsert v. Est. of Flores*, 2020 UT App 102, ¶ 9, 470 P.3d 464 (internal quotation omitted). The Court's inquiry here is "only the legal sufficiency of the complaint," *Williams v. Kingdom Hall of Jehovah's Witnesses*, 2021 UT 18, ¶ 10, 491 P.3d 852, and not the underlying merits of the case. *Fehr v. Stockton*, 2018 UT App 136, ¶ 8, 427 P.3d

1190. Thus, the Court must assess whether the complaint "allege[s] facts [that] give rise to a right enforceable in the courts," *Mack*, 2009 UT 47, ¶ 19, 221 P.3d at 200 (internal quotation omitted), while "liberally [construing rule 12] to favor finding [the] pleading sufficient." *Id.* ¶ 17, 221 P.3d at 200.

ARGUMENT

Defendants seek to dismiss the case based on an erroneous reading of the public trust doctrine—a reading so erroneous that it would place Utah at odds with every other state in the United States, and even with the State's own past advocacy to the Utah Supreme Court. To set the record straight, Physicians provide a comprehensive discussion of the public trust doctrine, which is grounded in inherent principles of sovereignty, steeped in centuries of common law, and rooted in the Utah Constitution. Physicians then refute the State and allied Intervenors' misplaced attempts to exclude all waters from the public trust and afford private appropriators an absolute right to impair the navigable waters and underlying sovereign lands of the Great Salt Lake without limitation. After addressing these substantive issues, Physicians turn to and refute the litany of procedural and jurisdictional arguments raised by Defendants.

I. The State of Utah Breached Its Public Trust Duties

Under the public trust doctrine, the State holds navigable waters and the lands thereunder in trust for the public. As trustee, it has a fiduciary duty to protect the integrity of these resources for public uses such as navigation, fisheries, and commerce. Yet the State refuses to modify water diversions that are indisputably impairing the Great Salt Lake. That is a clear-cut breach of the State's trust duties, and one that endangers an entire ecosystem and the health of millions of Utah residents.

A. The State of Utah's Authority and Duty to Preserve Navigable Waters and the Lands Underlying Them Is an Inherent Attribute of State Sovereignty

The public trust doctrine is an inherent attribute of Utah's status as a sovereign state. The doctrine "is of ancient origin"—its roots extend back to Roman law and were carried forward into the English common law. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012). At English common law, "navigable waters, and the lands under them, [were] held by the king, as a public trust." *Martin v. Waddell's Lessee*, 41 U.S. 367, 406 (1842); *see also id*. ("the navigable waters of England and the soil under them are held by the crown"). This became the law of each of the English colonies in what is now the United States. *Shively v. Bowlby*, 152 U.S. 1, 14–15 (1894). After the American Revolution, "the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use." *Martin*, 41 U.S. at 410. The same was true of all states subsequently admitted to the union "because the States in the Union are coequal sovereigns under the Constitution." *PPL Mont.*, 565 U.S. at 591.

States hold navigable waters and the lands underlying them in trust for the public. Among the first courts in this country to confirm the scope of the trust was the New Jersey Supreme Court, which in 1821 recognized that the state holds in trust navigable waterways, "including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products[.]" *Arnold v. Mundy*, 6 N.J.L. 1, 76–77 (1821). The State therefore cannot "make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right"—a result inconsistent with "the constitution of a well ordered society[.]" *Id.* at 78.

The U.S. Supreme Court agreed in its seminal case on the public trust doctrine, *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). There, the Court affirmed the scope

of the trust, reiterating that states hold "navigable waters, and the soils under them" in trust for the public. *Id.* at 456. *Illinois Central* was clear on this point, explaining that a state's title to sovereign lands underlying navigable water "necessarily carries with it control over the waters above them[.]" *Id.* at 452. States thus have the authority and duty to protect navigable waters and the lands thereunder so that the people "may enjoy the navigation *of the waters*, carry on commerce over *them*, and have liberty of fishing *therein*, freed from the obstruction or interference of private parties." *Id.* (emphases added); *see also Shively*, 152 U.S. at 11 (noting that the "natural and primary uses" of "[s]uch waters, and the lands which they cover . . . are public in their nature, for highways of navigation and commerce . . . and for the purpose of fishing").

The State's duty to preserve trust resources can never be abandoned: "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Ill. Cent.*, 146 U.S. at 453. This is because the doctrine is an inherent attribute of state sovereignty. *See id*. at 455 ("The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated[.]"). The Supreme Court thus affirmed the Illinois legislature's decision to revisit and revoke a deed granting a railroad title to Chicago Harbor. That prior grant was an "abdication . . . not consistent with the exercise of that trust which requires the government of the state to *preserve such waters* for the use of the public." *Id.* at 453 (emphasis added).

Consistent with *Illinois Central*, courts across the nation have confirmed that the public trust is a defining element of sovereignty that cannot be abdicated or relinquished. *See PPL*

Mont., 565 U.S. at 590 ("the people of each State, based on principles of sovereignty, hold the absolute right to all their navigable waters and the soils under them" (internal quotation marks omitted)); *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893) ("[W]e have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use."); *In re Water Use Permit Applications for the Waiahole Ditch*, 9 P.3d 409, 443 (Haw. 2000) (*Waiahole Ditch*) ("[H]istory and precedent have established the public trust as an inherent attribute of sovereign authority that the government . . . cannot surrender." (internal quotation marks omitted)); *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. Ct. App. 1991), *review dismissed*, 837 P.2d 158 (Ariz. 1992) (holding that the public trust doctrine "is an inabrogable attribute of statehood itself"); *Lawrence v. Clark Cnty.*, 254 P.3d 606, 612 (Nev. 2011) (holding that the public trust doctrine is "inherent from inseverable restraints on the state's sovereign power"); *Parks v. Cooper*, 676 N.W.2d 823, 837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority."); *Glass v. Goeckel*, 703 N.W.2d 58, 64–65 (Mich. 2005) ("[U]nder longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public . . . . The state, as sovereign cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources.").

B. The Public Trust in Navigable Waters and Submerged Lands is Deeply Rooted in Utah Common Law

Public trust responsibilities vested in Utah at the time it entered the union and took title to all navigable waters in the State and the lands underlying them. *See Martin*, 41 U.S. at 410; *PPL Mont.*, 565 U.S. at 590. On this basis, the Utah Supreme Court has expressly recognized the State's common-law public trust obligations: "The essence of this doctrine is that navigable

waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 635 (Utah 1990). The Court grounded this understanding in *Illinois Central*, which it recognized as the "controlling case" on the scope of the "public trust the state holds over waters." *Id.* at 635.

The public trust operates according to basic trust principles, which impose "legally binding duties" on the State. *Nat'l Parks & Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 918 (Utah 1993) (*NPCA*)*; see also Utah Stream Access Coal. v. VR Acquisitions, LLC*, 2019 UT 7, ¶ 86, 439 P.3d 593 (Utah courts "appl[y] common-law trust principles" in public trust cases). Foremost is the duty to "protect the trust property against damage or destruction." George G. Bogert et al., Bogert's Trusts and Trustees, § 582 (2016). This is an ongoing obligation. *See* Restatement (Third) of Trusts § 76 (2007), cmt. B. ("[A] trustee may commit a breach of trust by improperly failing to act, as well by improperly exercising the powers of the trusteeship."). The State must therefore actively preserve the "ecological integrity" of the trust, including for "uses such as commerce, navigation, and fisheries." *Colman*, 795 P.2d at 635; *NPCA*, 869 P.2d at 918.

For nearly a century, Utah Courts have specifically recognized that the State holds the Great Salt Lake in trust for the public. The Great Salt Lake was navigable at the time that Utah entered the union, as well as the lake's bed and surrounding lands. *See State v. Rolio*, 262 P. 987, 994 (Utah 1927) ("on Utah's admission into the Union absolute title in fee to all of the underlying waters of the [Great Salt Lake] vested in the state"); *see also Utah v. United States*, 403 U.S. 9, 10–12 (1971); *Utah State Road Comm'n v. Hardy Salt Co.*, 26 Utah 2d 143, 145–47 (1971); *Morton, Int'l, Inv. v. S. Pac. Transp. Co.*, 495 P.2d 31, 32–34 (Utah 1972). Thus, Utah

has a common-law duty to preserve the ecological integrity of the Great Salt Lake, including its waters and submerged lands, for public trust uses such as commerce, navigation, and fishing.

C. The Utah Constitution Preserves Public Trust Protections for Navigable Waters and Submerged Lands

The Utah Constitution incorporates the public trust doctrine as the foundational principle by which the State must manage public resources like the Great Salt Lake. The delegates to Utah's constitutional convention not only preserved this principle; they expressly built upon it, extending the State's duties as trustee over navigable waters and submerged lands to encompass all public lands.

Courts interpret the Utah Constitution in light of the "historical evidence of the state of the law when it was drafted." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 18, 450 P.3d 1092. As the Utah Supreme Court recognized, Utah adopted its constitution just three years after the U.S. Supreme Court's decision in *Illinois Central*. *See VR Acquisitions*, 2019 UT 7, ¶ 73, 439 P.3d at 608 n.5. *Illinois Central* thus confirms "the historical understanding of the public trust principles *embedded in the Utah Constitution*." *Id.* (emphasis added). Accordingly, embedded in the Utah Constitution is the Supreme Court's definition of the scope of the public trust to encompass "navigable waters and soils under them," which the state holds "by virtue of its sovereignty, in trust for the public," as an inherent principle "secured by the constitution of a well-ordered society[.]" *Ill. Cent.*, 146 U.S. at 455, 456 (quoting *Arnold*, 6 N.J. Law, 1).

Because *Illinois Central* had recently declared that navigable waters are held by the state as a public trust, 146 U.S. at 152, there was no need for Utah's constitutional framers to include specific language about navigable waters. As one delegate declared, "[W]e can say nothing in this Constitution which will give any increased right to the State of Utah to the water that it

would not have if it did not even mention it in the Constitution[.]"[8] This was because of the public trust in navigable waters and submerged lands inherent in statehood: "[W]hen the President of the United States signs this Constitution . . . [the water of the state] becomes the property of the State," meaning "[i]t belongs to the people of the State." OFFICIAL REPORTS 1212–13. This point was broadly understood: it "has all been talked over by the soundest lawyers in the nation, Colorado, Wyoming," the delegate continued. "It has been submitted to some of the soundest lawyers in the nation . . . . There is not a man here that pretends to say to the contrary." *Id.* at 1213. The bottom line was clear: the State has to "govern this water and control it and there shall not be any question in regard to that, there shall not be any man says it is mine." *Id*.; *see also J.J.N.P. v. State*, 655 P.2d 1133, 1136 (Utah 1982) (affirming that the "doctrine of public ownership is the basis upon which the State regulates the use of water").

Instead of reiterating established *Illinois Central* principles, the framers included express language in the Utah Constitution to expand on the holding of *Illinois Central*. Specifically, Article XX, section 1, declares that "the public lands of the State . . . shall be held in trust for the people," recognizing the State's affirmative duties as trustee. Utah Const. art. XX, § 1. This provision broadened the terrestrial public trust in Utah to encompass all public lands, not only the submerged lands whose trust status was recognized in *Illinois Central*. Nevertheless, it was rooted in longstanding public trust principles, recently confirmed in *Illinois Central*. As the Utah Supreme Court recognized, that "'trust' reference in article XX, section 1 would have been understood at the time of the framing of the Utah Constitution as invoking a term of art from

[8] OFFICIAL REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 1216 (1898) ("OFFICIAL REPORTS").

existing case law, including (perhaps most prominently) the Supreme Court's decision in *Illinois Central*." *VR Acquisitions*, 2019 UT 7, ¶ 73, 439 P.3d at 608.

In sum, the Utah Constitution was founded on, and incorporated, *Illinois Central's* recognition of a public trust in navigable waters and submerged lands as an inherent aspect of statehood, and nothing in the Utah Constitution could relinquish that trust. *Cf. Robinson Twp. v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) (holding that public trust guarantees are "preserved rather than created" by the state constitution).

D. The State Has Both the Authority and Obligation to Supervise Water Appropriations Consistent with the Public Trust

As trustee, the State must continuously supervise grants of private use of trust resources to ensure they are not impairing public trust uses. That duty attaches to water appropriations where the State grants water users a preferential right to use water, commonly referred to as a priority as against other users. Such a preferential right is not absolute; it is held subject to the public trust in the first instance.

Water use in Utah is based on the principle of public ownership of water. *See* Utah Code Ann. § 73-1-1 ("All waters in this state, whether above or under the ground are hereby declared to be the property of the public."). On the "basis" of this "doctrine of public ownership . . . the State regulates the use of water for the benefit and well being of the people." *J.J.N.P.*, 655 P.2d at 1136. Accordingly, an individual cannot simply divert water for their use, but must first apply to the State Engineer for authority to do so. *See* Utah Code Ann. §§ 73-3-1 to 2. Only after the State Engineer approves an application to appropriate is the applicant "clothe[d] with authority to proceed [with the] actual diversion and application of the water claimed to a beneficial use." *Little Cottonwood Water Co. v. Kimball*, 289 P. 116, 118 (Utah 1930). Even then, the State Engineer's approval "gives an individual only a usufruct in water—the right to use some

maximum quantity of water from a specified source, at a specific point of diversion or withdrawal, for a specific use, and at a specific time." *HEAL Utah v. Kane County Water Conservancy District*, 2016 UT App 153, ¶ 7, 378 P.3d 1246.

Appropriators acquire this usufruct subject to the public trust. *See Shively*, 152 U.S. at 13 ("title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the King" and such title "is held subject to the public right"); *Kootenai Env't All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983) (water appropriations "are given subject to the trust and to action by the state necessary to fulfill its trust responsibilities"). Thus, while a water user "may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 723 (Cal. 1983) (*Mono Lake*).

It is a basic tenet of Utah water law that usufructuary rights provide "only a preferential use, commonly called a priority, a right, as against subsequent appropriators." *Adams v. Portage Irrigation, Reservoir & Power Co.*, 72 P.2d 648, 653 (Utah 1937). An appropriative right "is *not* absolute and without limitation," *id.* (emphasis added), but remains subject to the State's obligation to oversee and amend those uses, as necessary to protect trust resources. *Colman*, 795 P.2d at 635; *Ill. Cent.*, 146 U.S. at 458. Therefore, the State Engineer remains responsible for "the general administrative supervision of the waters of the state." Utah Code Ann. § 73-2-1(3)(a); *see also Whitmore v. Murray City*, 154 P.2d 748, 750 (Utah 1944) (holding that the State Engineer is tasked with "administer[ing] and supervis[ing] the appropriation of the waters of the state").

More specifically, the State Engineer retains the authority and duty to modify water uses that are impairing the public trust. The Utah Supreme Court acknowledged this fundamental principle in *Colman* when it described *Illinois Central* as holding "that the Illinois Legislature's earlier grant to the railroad of lands submerged under Lake Michigan could be revoked by a later Legislature because the earlier grant was in violation of the public trust the State held over the waters." *Colman*, 795 P.2d at 635. Likewise, just as Illinois could modify transfers of the lakebed that were impairing trust uses, *see Ill. Cent.*, 146 U.S. at 455 ("Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time."), the State of Utah can modify water usage under appropriations that are impairing the Great Salt Lake.

This duty of continuing supervision is consistent not just with public-trust precedent, but also with trust law generally. As a prudent trustee, the State must monitor water resources to determine whether water appropriations are impairing trust uses. *See* Restatement (Third) of Trusts § 77 (2007) (the duty of prudence requires "monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries"). It also must take steps to protect the trust from impairment. *Id.* § 76, cmt. B. ("[A] trustee may commit a breach of trust by improperly failing to act, as well by improperly exercising the powers of the trusteeship."). In the case of the Great Salt Lake, fulfilling those duties requires the State to assess and, where necessary, undertake feasible modifications of water appropriations that are impairing trust uses, such as navigation, commerce, and fisheries. *See Colman*, 795 P.2d at 635; *Ill. Cent.*, 146 U.S. at 458.

Indeed, courts across the country have affirmed that, as a basic attribute of sovereignty, the public trust imposes continuing duties on the state. Foremost among these is the California

Supreme Court's recognition of the "duty of continuing supervision over the taking and use of the appropriated water," which is inherent in the State's sovereign responsibility to preserve trust resources for public use. *Mono Lake*, 658 P.2d at 728. As part of this duty, the State has the obligation to modify water usage under appropriations if new information reveals that those appropriations are harming the trust resource. *Id*. Without such a power, the state could not duly protect trust resources—consistent with its role as trustee—and instead might be "confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." *Id*. Such confinement, the court concluded, would be inconsistent with the authority of a sovereign or the preservation of trust resources for the public. *Id*.

Many other states have recognized this duty of continuing supervision as inherent in the sovereign's role as trustee. *See, e.g.*, *Waiahole Ditch*, 9 P.3d at 452–53 ("The continuing authority of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes. This authority empowers the State to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust." (internal citations omitted));[9] *Kootenai*, 671 P.2d at 1094 (holding that "the grant" of a trust resource remains within "the control of the state . . . the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance");[10] *State v. Cent. Vt. Ry*., 571 A.2d 1128, 1132 (Vt. 1989) ("[T]he state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power." (quoting *Mono Lake*)); *Karam v. Dept. of Envtl. Protection*, 705 A.2d 1221,

[9] *See also Lāna'ians for Sensible Growth v. Land Use Comm'n*, 463 P.3d 1153, 1165–66 (Haw. 2020) (affirming *Waiahole Ditch's* holding).
[10] *See also Newton v. MJK/BJK, LLC*, 469 P.3d 23, 29 (Idaho 2020) (holding that *Kootenai* remains "good law").

1228 (N.J. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999), *cert. denied*, 528 U.S. 814 (1999) ("[T]he sovereign never waives its right to regulate the use of public trust property."); *see also Hassell*, 837 P.2d at 169–70 ("The beneficiaries of the public trust are not just present generations but those to come . . . . [A]ny public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations.").

That mandate is essential to ensure that water appropriations do not impair trust uses. As courts have recognized, "an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests." *Mono Lake*, 658 P.2d at 728. The Great Salt Lake vividly illustrates this point. The State of Utah has never assessed whether water appropriations from the basin are impairing the navigable waters and submerged lands of the Great Salt Lake. Indeed, it flatly refuses to do so, notwithstanding the undeniable evidence portending the collapse of the Great Salt Lake ecosystem. *See* DWR Mot. at 2, 6. That is a clear-cut violation of the State's continuing duty, as trustee, to assess water appropriations and implement feasible accommodations where necessary to safeguard trust resources. *Mono Lake*, 658 P.2d at 728 ("The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses.").

II. There is No Basis for the State's Argument That Navigable Waters Are Exempt From the Public Trust

Contrary to all the foregoing authority, the State now asks this Court to hold that the common law public trust doctrine in Utah does not reach navigable waters *at all*. This position is extreme—in fact, it would put this Court at odds with courts in *every other state in the United States*. Further, this position does not even reflect the consistently held view of the State itself.

To the contrary, in a brief submitted to the Utah Supreme Court in the *Colman* case, the State acknowledged the scope of the public trust doctrine, affirming that "all private interests in navigable waters and their beds are subject to a governmental servitude." Brief of State Resps. at 35, *Colman v. Utah State Land Bd.* (Jan. 14, 1987) ("*Colman* Br.") (attached as Ex. 1). The State now contradicts its own prior position in an attempt to dismiss this lawsuit. It argues that the public trust doctrine in Utah entirely *excludes* navigable waters, thereby affording private water appropriators an absolute right to impair the navigable waters and underlying sovereign lands of the Great Salt Lake. The Court should reject the State's argument.

A. Case Law Does Not Support Excluding Navigable Waters from the Public Trust

To begin, the State (and allied Intervenors) ignore the extensive caselaw demonstrating that the public trust encompasses navigable waters and the lands thereunder. By contrast, in the *Colman* case, the State itself canvassed the caselaw and demonstrated that the public trust doctrine has long covered navigable waters, as well as submerged lands. *See Colman* Br. at 34–37 (collecting cases). Notably, the State's brief in *Colman* cited both *Shively* and *Illinois Central* for the holding that "the States having assumed all incidents of ownership of their navigable waters and beds, continue to hold them in public trust." *Id.* at 34 n.18. The State also cited representative cases on the "public trust," *id*. at 37 n.20, including *Mono Lake* where the court recognized the "well-settled" principle in the United States that the public trust "encompasses all navigable lakes and streams." *Mono Lake*, 658 P.2d at 719. The State's unfounded attempt to now exclude navigable waters would "eviscerate the State's power to carry out its public trust responsibility"—an outcome it rightly rejected in *Colman*. *Colman* Br. at 36–37.

The State's about-face here also fundamentally mischaracterizes the Supreme Court's decision in *Illinois Central*. The State argues that *Illinois Central* was confined to lands and thus

has nothing to do with navigable waters. *See* DNR Mot. at 6–7. To support this erroneous interpretation, the State selectively quotes from the case, carefully avoiding the Supreme Court's *thirty-six* references to "navigable waters." The result is highly misleading. For example, the State quotes a snippet of the Court's opinion that "such property . . . cannot be alienated," suggesting that this holding applies only to submerged lands. DNR Mot. at 6 (quoting *Ill. Cent.*, 146 U.S. at 544–45). The immediately preceding sentence in the opinion, however, made clear that "such property" refers to "the *navigable waters* of the harbor, *and* the lands under them." *Ill. Cent.*, 146 U.S. at 455 (emphasis added).

The State's treatment of *Illinois Central* is not merely misleading, it ignores the fundamental principle animating the case. The reason the Supreme Court rejected Illinois' attempt to alienate submerged lands was because doing so would divest "control of *the waters of a state*" overlying such lands. *Ill. Cent.*, 146 U.S. at 456 (emphasis added). The court did not therefore delimit the public trust to submerged lands; rather, it held that the public trust "necessarily carries with it control over the waters above." *Id.* at 452. To underscore the point, the Court held that a "state can no more abdicate its trust over property in which the whole people are interested, *like navigable waters and soils under them*, so as to leave them entirely under the use and control of private parties," than it can abdicate its police powers. *Id.* at 453 (emphasis added).[11]

The State misreads not only *Illinois Central* but also Utah Supreme Court precedent adopting that very decision. In *Colman*, the Utah Supreme Court identified *Illinois Central* as the "controlling case" and explicitly stated that the public trust encompasses "navigable waters."

[11] The State quotes this very same passage in its brief, but selectively omits the key language holding that the scope of the trust includes "navigable waters and soils under them." *See* DNR Mot. at 7 (quoting *Ill. Cent.*, 146 U.S. at 453).

795 P.2d at 635. The State wholeheartedly agreed, maintaining that "it holds the waters of the lake under the public trust." *Id.* at 635; *see also* Colman Br. at 34–37. Rather than addressing *Colman*, the State now tries to ignore it. DNR and the State Engineer omit any reference to the case, while FFSL notes that the case involved the disposal of sovereign lands. *See* FFSL Mot. at 9, n.8.[12] But the trust principles in *Colman,* as in *Illinois Central*, apply equally to navigable waters and the lands thereunder. In no way does *Colman* exclude navigable waters from the public trust; to the contrary, *Colman* recognized that the public trust doctrine protects public uses including "navigation" and "fishing," 795 P.2d at 635—uses that obviously require water and therefore cannot be reconciled with the State's "submerged lands-only" theory of the public trust.

No court in Utah has excluded navigable waters from the public trust, notwithstanding the State's mischaracterizations. The State quotes *NPCA* for the proposition that "[t]he public trust doctrine is . . . limited to sovereign lands." FFSL Mot. at 11 (quoting 869 P.2d at 919). Yet the State has taken this quotation out of context, as that case had nothing to do with navigable waters. It concerned the disposition of school trust lands. Thus, in referring to the public trust doctrine, the court made clear it was discussing only "the public trust that applies to sovereign lands," *NPCA*, 869 P.2d at 919—not the doctrine as it concerns water. Nothing in the opinion excludes navigable waters from the public trust. The State also cites *J.J.N.P.* to suggest that water is a "fundamentally different resource." FFSL Mot. at 11. But that case confirmed public ownership of waters and the State's corollary duties as trustee. *J.J.N.P.*, 655 P.2d at 1136 (holding

[12] The Agency Intervenors and Water District Intervenors likewise omit any reference to *Colman*. The Water User Intervenors mention it once, *see* Water Users' Mot. at 18–19, but solely in a discussion of whether the takings clause of the Utah Constitution is self-executing.

that the State "regulates the use of the water, in effect, as trustee for the benefit of the people").[13] Moreover, the court rejected the position taken by the dissent—and now advanced by the State in this case—that water users have an absolute right to use water. *Id.* at 1140 (Hall, C.J., dissenting). To the contrary, the majority of the court explained, "appropriation does *not* confer an ownership interest in the water itself." *Id.* at 1136 (emphasis added).

The State also mischaracterizes Utah's history in its attempt to eviscerate the public trust. It argues that Utah "adopted its unique version of the public trust doctrine"—allegedly covering land but not water—due to "the values and needs of its populace," as well as the state's aridity. DWR Mot. at 2. The truth is exactly the opposite. The first Mormon pioneers in the Salt Lake Valley recognized that there could be "no public ownership of the streams . . . . These belong to the people; all the people." EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830–1900, at 315 (1988) (quoting Brigham Young). As a result, they created a system whereby local authorities allowed settlers to use water, but county courts oversaw such use to ensure the protection of this common resource belonging to the public at large: "These courts, even without complaint, exercised the right to investigate the misuse or abuse of the use of waters if they saw fit because the waters were held to be public property." GEORGE THOMAS, THE DEVELOPMENT OF INSTITUTIONS UNDER IRRIGATION WITH SPECIAL REFERENCE TO EARLY UTAH CONDITIONS 87 (1920); *see also id*. at 83–84 (noting that the "primary consideration" of these courts "was the welfare of the community rather than the interest of the individual unless these interests were

[13] Without any explanation, the Water Users cite *J.J.N.P.* to support the assertion that "the state does not manage publicly owned water . . . in the same trustee role in which it controls sovereign land." Water Users Mot. at 27. Nowhere does *J.J.N.P.* state this, and in fact its text would appear to state the precise opposite.

coincident"). Although the legislature eventually relocated primary regulatory authority over water rights from the county courts to a State Engineer, it never abandoned the public ownership of water, a principle that "has always been and continues to be." *Whitmore v. Salt Lake City*, 57 P.2d 726, 731 (Utah 1936).[14]

Ultimately, the State's and Intervenors' attempt to exclude navigable waters from the public trust is not just unsupported but would turn Utah into an outlier in the United States. Not one single court has excluded navigable waters from the public trust.[15] To the extent courts have debated the scope of the trust *res*, they have not questioned the coverage of navigable waters—a coverage that has been fixed since Roman law—but rather the extent to which the trust encompasses *all* waters, including non-navigable tributaries. Thus, for example, the Nevada Supreme Court concluded that "the doctrine applies to *all* waters within the state, including those previously allocated under prior appropriation." *Min. Cnty. v. Lyon Cnty.*, 473 P.3d 418, 421

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[14] For this reason, the Water Users' truncated account of history is unconvincing. *See* Water Users' Mot. at 9–11. They seem to believe that Utah's history began in 1880, which ignores the decades of communitarian water management that came before (in both Territorial Utah and the short-lived State of Deseret) and that informed all that came after. *See* An Ordinance, Authorizing the Judges of the Several Counties of this State, to Grant Mill, and Other Water Privileges, and to Control the Timber in their Respective Counties, § 1 (Feb. 12, 1851) (empowering county judges to grant "water power privileges, or any watercourse, or creek . . . inasmuch as the said privileges do not interfere with the rights of the community, for common uses"); Territorial Laws of Utah, ch. 1, § 39 (Feb. 4, 1852) (confirming that "county courts shall . . . have control of all timber, water privileges, or any watercourse or creek, to grant mill sites, and exercise such powers as in their judgment shall best preserve the timber and subserve the interests of the settlements in the distribution of water for irrigation or other purposes."). The Water Users also devote several pages to federal law's severance of waters from lands, *see* Water Users Br. at 7–9, an obvious historical point—and one whose relevance the Water Users never explain. To the extent the Water Users are seeking to imply that, due to this severance, water is not within Utah's public trust doctrine, this is belied by history and precedent, as previously noted. *See Colman*, 795 P.2d at 635 ("The essence of this doctrine is that *navigable waters* should . . . be preserved for the general public for uses such as commerce, navigation, and fishing." (emphasis added)).

[15] *See* app. A (providing a fifty-state survey demonstrating that no court has held navigable waters to be excluded from the public trust).

(Nev. 2020) (emphasis added). The South Dakota Supreme Court reached a similar result. *See Cooper*, 676 N.W.2d at 839 ("[A]ll waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public"). By contrast, the California Supreme Court recognized that the public trust doctrine undoubtedly "encompasses all navigable lakes and streams"—a point "well settled in the United States." *Mono Lake*, 658 P.2d at 719. The State thus has a duty to protect those navigable waters from "diversions from a nonnavigable tributary that impair the public trust in a downstream river or lake." *Id.* at 720. Put another way, the public trust "protects navigable waters from harm caused by diversions of nonnavigable tributaries." *Id.* at 721. All of these cases underscore the State's obligation to protect the Great Salt Lake from diversions that are impairing trust uses.

B. The Utah Constitution Does Not Exclude Navigable Waters from the Public Trust

The State argues that the Utah Constitution not only excluded navigable waters from the public trust but enshrined an absolute right to use waters to the detriment of public trust resources. *See* FFSL Mot. at 10–14; DWR Mot. at 8–12. This argument contravenes basic principles of constitutional construction and would impermissibly eviscerate the public trust.

1. Article XX Does Not Exclude Navigable Waters from the Public Trust

As discussed above, the Utah Constitution was premised on the founders' understanding of the State's obligation to hold navigable waters and submerged lands in trust for the people, as recognized in the then-recent *Illinois Central* decision. *See VR Acquisitions*, 2019 UT 7, ¶ 73, 439 P.3d at 608 n.5. Article XX, section 1, built on that sovereign principle by explicitly stating that all "public lands . . . shall be held in trust for the people[.]" Utah Const. art. XX, § 1. The State, however, now attempts to transform this provision into an *exclusion* of navigable waters from the public trust. *See* FFSL Mot. at 10–13. That argument is not grounded in the text of the

provision, which nowhere excises navigable waters from the public trust. *See Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 15, 466 P.3d 178 ("our job is first and foremost to apply the plain meaning of the text."). Instead, the State relies on a negative implication, suggesting that the Utah Constitution *excludes* navigable waters because Article XX does not explicitly *include* them. *See* FFSL Mot. at 10. That interpretation runs contrary to the text, historical evidence, and common sense. *See NLRB v. SW Gen., Inc*., 580 U.S. 288, 302 (2017) ("The force of any negative implication . . . applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.") (cleaned up).

To begin, the State's reliance on a negative implication contravenes decades of caselaw confirming that the public trust is an inherent attribute of sovereignty that *cannot* be relinquished. *See Ill. Cent.*, 146 U.S. at 455 ("The trust with which they are held, therefore, is governmental, and cannot be alienated[.]"). The framers could not therefore have explicitly excluded navigable waters from the public trust, let alone done so implicitly. The State's negative implication is not grounded in any historical evidence, either. *See Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 24, 140 P.3d 1235, 1243 (2006) ("Constitutional language must be viewed in context, meaning that its history and purpose must be considered in determining its meaning."). The State asserts that the framers "intentionally" excluded navigable waters from the public trust yet fails to provide any evidence supporting that striking assertion. FFSL Mot. at 12. There is none. Just three years before Utah adopted its constitution, *Illinois Central* confirmed that the public trust encompasses navigable waters and submerged lands, both of which must be protected for trust uses such as navigation, fisheries, and commerce. Indeed, as noted, *Illinois Central* affirmed the inextricable link between waters and land, noting that the state's "title to the soils under tide water . . . necessarily carries with it control over the waters above them." *Ill.*

Cent., 146 U.S. at 452. Given that *Illinois Central* "help[s] inform the search for the historical understanding of the public trust principles embedded in the Utah Constitution," *VR Acquisitions*, 2019 UT 7, ¶ 73, 439 P.3d at 608 n.5, one would have expected the framers to employ explicit language had they intended to depart from *Illinois Central*'s understanding of the public trust. They did not.

Finally, common sense reveals the fallacy at the heart of the State's negative inference. The State assumes that the framers explicitly affirmed protections for the lands under navigable waters, but excluded the very waters necessary to protect trust uses, such as navigation, fisheries, and commerce. That makes no sense. Just as the public trust doctrine constrains uses of submerged lands that destroy navigation and other public trust uses in navigable waters,[16] so too does it constrain the extraction of water that destroy those same public trust uses. "Both actions result in the same damage to the public trust." *Env't L. Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 402 (Cal. Ct. App. 2018); *see also id.* at 403 ("the dispositive issue is not the source of the activity . . . but whether the challenged activity allegedly harms a navigable waterway"). Indeed, this point is axiomatic: the State's ability to preserve navigable waters depends on the maintenance of the lands beneath those waters, and the State's ability to preserve submerged lands depends on the waters overlying those lands. The two cannot be disaggregated; it is impossible to navigate a lake that has been filled with dirt *or* drained of water. The Court

[16] For example, FFSL recently canceled an exchange of Utah Lake's submerged lands because the recipient proposed to build a series of artificial islands that would have impaired public trust uses of the Lake's waters, including navigation. Record of Decision, No. 22-1027, *Cancellation of Application Pursuant to Utah Admin. Code R652-3-400*, ¶ 21, UTAH DIV. FORESTRY, FIRE & STATE LANDS (Oct. 27, 2022), https://ffsl.utah.gov/wp-content/uploads/ROD-20221027_101253.pdf.

should therefore reject the State's baseless attempt to use Article XX's affirmation of the public trust as a basis to eviscerate the public trust.

2. Article XVII Does Not Create an Absolute Right to Use Water to the Detriment of Public Trust Resources

The State's argument under Article XVII also fails. The State acknowledges that "both the public trust doctrine and prior appropriation doctrine are fundamental, and neither is subordinate to the other." DWR Mot. at 11. But it then proceeds to contradict that point by insisting that the framers "sought to protect water rights and did not intend the State's public trust obligation to impair these rights." *Id*. The State's attempt to contrive an absolute constitutional right to water—one that supersedes the public trust—is belied by the text, history, and precedent interpreting Article XVII.

The State's argument contravenes the text of Article XVII, *see Am. Bush*, 2006 UT 40, ¶ 10, 140 P.3d at 1239 (explaining that constitutional interpretation begins with the "plain meaning" of the text), which provides that "[a]ll existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed." Utah Const. art. XVII, § 1. The Article thus "recognized and confirmed" *existing* rights to use water—that is, usufructuary rights held subject to the public trust as made clear by the U.S. Supreme Court's decision just three years earlier in *Illinois Central*. The Article did not seek to break new ground by creating an unprecedented and absolute right to water, which would constitute a sharp break with the public trust principles enunciated in *Illinois Central*. Indeed, to have done so would have contradicted the Supreme Court's admonition that a state cannot "abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties." *Ill. Cent.*, 146

U.S. at 453. The text offers no indication that such a sharp break with *Illinois Central* was intended.

The State's argument also ignores the fundamental tenet of "interpreting constitutional provisions in light of their historical background and the then-contemporary understanding of what they were to accomplish." *See In re Inquiry Concerning a Judge*, 1999 UT 6, ¶ 15, 976 P.2d 581. That historical evidence confirms that Article XVII was a compromise provision intended to maintain the status quo, not a revolutionary rejection of *Illinois Central*. At the outset of the constitutional convention, the first proposed water amendment borrowed almost verbatim from the Wyoming Constitution and included an explicit declaration that waters are "hereby declared to be the property of the state."[17] Some delegates, however, objected on the grounds that the proposed language provided no protections for existing water appropriations. Their objections reflected the desire of many Utahns that the constitution confirm the validity of water rights they had obtained in informal ways, as at this time such rights could be acquired without any "formal proceedings," *Riordan v. Westwood*, 203 P.2d 922, 924 (Utah 1949), and thus were not consistently recorded by state authorities. The constitution's framers also feared a public "misunderstanding" that the provision would result in the immediate state confiscation of water. Jeremiah I. Williamson, *Stream Wars: The Constitutionality of the Utah Public Waters Access Act*, 14 U. DENV. WATER L. REV. 315, 330 (2011).[18]

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[17] *See* Wyo. Const. art. VIII, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.").

[18] One delegate noted "a great uneasiness among the farmers of this Territory in relation to the word ceding the water to the State" and explained that he had been "petitioned to do all that was possible to prevent the water being given to the State as its property." OFFICIAL REPORTS 1204; *see also id*. at 1208 (noting that the proposed article created "furore … throughout the whole country [i.e., territory]"). In fact, some framers apparently misunderstood the proposed

In the face of this persistent confusion, the delegates opted to confirm the status quo, adopting a provision that neither "added to nor detracted from the conditions already existing[.]". THOMAS, *supra*, at 188–89. The resultant language in Article XVII reflects a compromise that confirmed the validity of all preexisting water rights, including those that had been obtained informally or without explicit state sanction. *See* OFFICIAL REPORTS 1204 (noting that the farmers of Utah "feel as though they ought to be protected very pointedly in their *already acquired rights*" (emphasis added)); *Wrathall v. Johnson*, 40 P.2d 755, 768 (Utah 1935) (noting that Article XVII confirmed water rights "by whatever method of procedure acquired"). Article XVII also dispelled any implication that "existing rights" at statehood were meant to be affirmatively confiscated by the state constitution. OFFICIAL REPORTS 1207 (explaining that the proposed language would be "harmless" and "appease that element" concerned about confiscation of appropriative rights). As one delegate stated, adopting such a spare provision "may have a tendency to appease that unsettled feeling and condition existing throughout the Territory in relation to the possibility of confiscating the water rights of the people." *Id.* at 1210.

At the same time, however, the delegates made clear that public ownership was a core tenet of Article XVII, and the amendment did not seek to create an absolute private right to water: the state "govern[s] this water and control[s] it and there shall not be any question in regard to that, there shall not be any man says it is mine." *Id.* at 1213; *see also id*. at 1210 (recounting a letter to the framers from Utah attorney George Sutherland, later a U.S. Supreme Court Justice, "declar[ing] . . . citizens merely have the right to use that water. They do not own

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amendment as "tak[ing] away vested rights by constitutional amendment or enactment," and thus opposed the language. OFFICIAL REPORTS 1209; *see also id.* at 1209–10 ("section 1 does not protect vested rights at all. You will see in the first part of the section there is a declaration that the State is the owner of all the water."); *id*. at 1211 ("I think the effect of it is to confiscate the water rights of the Territory and place them under State control.").

the water. They simply have the right to use it, and if they run any of it to waste why that waste water can be appropriated by somebody else").

Given this history, the Utah Supreme Court rejected the notion that Article XVII creates an "absolute" right to water held by appropriators. *Adams*, 72 P.2d at 653. It rightly recognized that the "right of the public, as well as the rights of the appropriator, were confirmed by the State Constitution in article 17." *Id*.

The State's position, by contrast, would eviscerate the "right of the public" in the navigable waters of the state. The logical extension of the State's argument is that water users would have a right under Article XVII to divert *all* the water from the Great Salt Lake and its tributaries, draining the Lake and desiccating sovereign lands; there simply is no limiting principle to the State's position. That approach is already destroying core trust uses: the disappearing water makes navigation impossible, threatens to destroy the brine shrimp fishery, undermines lake commerce, thwarts recreational opportunities, devastates the lake's ecology, and turns the submerged public lands into a public health crisis. That outcome infringes on the public trust embedded in the constitution, including the State's explicit duty to hold submerged lands in trust. *See* Utah Const. art. XX, § 1. Article XVII cannot therefore create rights that supersede or undermine the public trust.[19]

III. The State Cannot Disclaim Its Obligations Under the Public Trust Doctrine

As the foregoing makes clear, the caselaw and Utah Constitution foreclose the State's attempt to confer upon private users an absolute right to appropriate water regardless of the

[19] As one influential commentator wrote in response to the assertion "that a water right is a special kind of property right which cannot be regulated in the same manner as other property rights, a simple response can be given: that view is wrong. . . . [B]ecause their exercise may intrude on a public common, they are subject to several original public prior claims, such as the navigation servitude and the public trust[.]" Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. Colo. L. Rev. 257, 260 (1990) (cleaned up).

impact on the public trust. Undeterred, the State claims that it is powerless to modify water usage under appropriations that are imperiling the Great Salt Lake. *See* DWR Mot. at 13–23; FFSL Mot. at 17–20. The argument rests on two fundamental errors of statutory construction. First, the State contends that Utah's system of prior appropriation is "separate" from the public trust doctrine, and thus the State Engineer has no authority to modify water appropriations impairing the public trust. DWR Mot. at 13. That simply ignores the fact that water appropriations are granted subject to public trust, leaving undisturbed the State's authority to modify water usage under those appropriations as needed to protect trust uses. *See supra* pt. I.D. Nothing in Utah's water code eliminates that authority—nor could it, given that the State's trustee status is an inherent attribute of statehood. *See Ill. Cent.*, 146 U.S. at 453.

Second, the State narrowly focuses on FFSL's obligation to manage sovereign lands consistent with the public trust. *See* DWR Mot. at 13–17. But that does not diminish the State Engineer's obligation to supervise water appropriations that are harming public trust uses. To the contrary, *both* FFSL and the State Engineer must work in tandem—under the supervision of DNR—to fulfill the State's trust obligation to protect the navigable waters and sovereign lands of the Great Salt Lake. Their refusal to do so violates the public trust, and unlawfully imperils the Great Salt Lake and the people of Utah.

A. Water Appropriations Are Held Subject to the Public Trust

As trustee, the State retains the authority to modify water usage under appropriations that are impairing the Great Salt Lake. Contrary to the State's arguments, the water code does not eliminate the public trust doctrine, nor could it. The State's policy arguments are equally unavailing.

1. The State Has Authority to Review and Modify Water Usage Under Appropriations that Imperil Trust Resources, Irrespective of the Water Code

The State first contends that its breach of the public trust is not actionable because Utah's water code "provide[s] no authority for the public trust doctrine to undercut appropriative water rights." DWR Mot. at 17. However, that ignores the central point that the public trust is not founded in Utah's water code, but instead is founded in inherent principles of sovereignty, common law, and the Utah Constitution. *See supra* pt. I. For this reason, the State is not powerless to modify water usage under appropriations that imperil the Great Salt Lake; its authority to do so exists "independently of any statutory [water source] protections supplied by the legislature." *See Waiahole Ditch*, 9 P.3d at 444 (collecting cases); *Cooper*, 676 N.W.2d at 837 ("The doctrine exists independent of any statute.") (collecting cases); *Kootenai*, 671 P.2d at 1095 ("The public trust doctrine *at all times* forms the outer boundaries of permissible government action with respect to public trust resources.") (emphasis added); *Robinson v. Ariyoshi*, 658 P.2d 287, 310 (Haw. 1982) (describing the trust as "a retention of authority and the imposition of a concomitant duty").

Courts have repeatedly held that water appropriations remain subject to the public trust, thereby "preserving the continuing sovereign power of the state to protect public trust uses[.]" *Mono Lake*, 658 P.2d at 732; *accord Cooper*, 676 N.W.2d at 838 (aligning South Dakota's jurisprudence with other jurisdictions, including Utah); *United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W. 2d 457, 460-63 (N.D. 1976); *Waiahole Ditch*, 9 P.3d at 443. To that end, the public trust doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." *Mono Lake*, 658 P.2d at 727. The State relied on these very principles in its briefing to the Utah Supreme Court in the *Colman* case. *See Colman* Br. at 37. There, it approvingly cited *Mono Lake*, *United*

Plainsmen, and multiple other cases recognizing that private appropriative rights are held subject to the public trust. *Id*. at 37–39 & n.20 (collecting cases). It further recognized that the "trust exists perpetually for the benefit of the public." *Id*. at 35 (citing *Ill. Cent.*, 146 U.S. at 452–454). To hold otherwise—the State recognized—"would eviscerate the State's power to carry out its public trust responsibility, which the U.S. Supreme Court in *Illinois Central* [] has said cannot be abdicated." *Id*. at 36–37.

Nonetheless, the State now insists that it cannot protect the Great Salt Lake under the public trust doctrine absent a "senior water right making a call for water[.]" DWR Mot. at 19–20. The argument is a red herring. The priority of senior versus junior water rights-holders governs conflicts *among* appropriators, *see Patterson v. Ryan*, 108 P. 1118, 1119 (Utah 1910) (holding that an appropriator has "acquired the right to take the water so used *as against all subsequent claimants*") (emphasis added); it does not alter the relationship between appropriators and the State, much less limit the State's authority to regulate appropriation to ensure the protection of the public trust. Nor could it. "The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute[.]" *Marks v. Whitney*, 491 P.2d 374, 380–81 (Cal. 1971).[20] It does not therefore take a senior water right to enforce the public trust. Nor has any court imposed such a requirement.

Instead, the State attempts to conjure such a requirement by mischaracterizing this case as a dispute between water rights-holders, akin to a statutory curtailment action. *See* DWR Mot. at 19–20. To that end, it repeatedly and erroneously tries to recast the case as an attempt to assert a senior water right on behalf of the Great Salt Lake and, on that basis, curtail other (i.e., junior)

[20] *Marks* is a foundational public trust precedent on which the Utah Supreme Court and DWR have both relied. *See J.J.N.P.*, 655 P.2d at 1136; DWR Mot. at 21–22.

users. *See, e.g.,* DWR Mot. at 20 ("Plaintiffs would require this Court to create the equivalent of a new riparian water right for the Lake, overriding existing appropriated rights"); *see also id*. at 21 (rejecting "Plaintiffs' claim to a new quasi-riparian water right for Great Salt Lake"); *id*. at 3 (claiming that Plaintiffs seek to "override the State's prior appropriation system in favor of a newly recognized riparian or 'super-priority' water right to Great Salt Lake that has never existed before"). The Water Users mimic these arguments, implying that the State cannot exercise its trust authority in the absence of its own senior water rights. *See* Water Users' Mot. at 16 (claiming that Defendant agencies would need "'a perfected water right'" of their own to deliver the relief Plaintiffs seek).

However, Plaintiffs do not claim any water right for the Lake (or the State). Rather, Plaintiffs invoke the authority of the State, embedded in its law and inherent in its sovereignty, to protect trust resources (including the Great Salt Lake) for established purposes (including navigation, fishing, and commerce). This is therefore not a dispute between respective water rights-holders, nor is it an action to claim a riparian right to the Great Salt Lake. Rather, it is an action by beneficiaries of the public trust against the public trustee. In fact, it is especially inapt for the State or Intervenors to attempt to frame this case as a dispute among property-owners because a public trust resource "is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner," but is instead "impressed with a public trust[.]" *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 367 (Mass. 1979). Navigable waters and the lands thereunder must "be preserved for the general public for uses such as commerce, navigation, and fishing," *Colman*, 795 P.2d at 635, and private rights-holders can take no action inconsistent with continued trust uses.

The precedent on which the State relies is not to the contrary. It places considerable weight on *Mineral County*, 473 P.3d 418, to support the proposition that the "public trust doctrine does not permit the reallocation or curtailment of adjudicated water rights." DWR Mot. at 22. There, however, the Nevada Supreme Court "explicitly recognize[d] that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right." *Min. Cnty.*, 473 P.3d at 425 (emphasis added). It then proceeded to conclude that the State of Nevada had considered the public trust in allocating water rights, thereby "satisfy[ing] all of the elements of the dispensation of public trust property[.]" *Id.* at 426.

That conclusion does not apply in Utah for at least three reasons. First, the State of Utah never evaluated the public trust in authorizing water appropriations, readily distinguishing this case from the facts of *Mineral County*. Second, even assuming the State had considered the public trust, the Utah water code does not contain an explicit provision stating that water appropriations "shall be final and shall be conclusive upon all persons[.]" *Id*. at 429 (quoting Nev. Rev. Stat. § 533.210(1)). It was this unique "finality . . . firmly rooted in [Nevada] statutes" that led the Nevada supreme court to ultimately conclude that it could not reallocate water rights. *Id*. at 430. No comparable provision exists in the Utah water code. Third, that holding from *Mineral County* is inconsistent with *Colman* and *Illinois Central*, both of which foreclose the state from abdicating its duty to protect the public trust. *Colman*, 795 P.2d at 635 –36; *Ill. Cent.*, 146 U.S. at 455.[21] Thus, the State of Utah is "not confined by past allocation decisions which

[21] Further, public trust experts have dismissed the majority's reasoning in *Mineral County* as "confusing," *see* Erin Ryan, *A Short History of the Public Trust Doctrine and Its Intersection*

may be incorrect in light of current knowledge or inconsistent with current needs." *Mono Lake*, 658 P.2d at 728. Rather, it has the ongoing authority to revisit and modify those decisions in conformance with a core teaching of *Illinois Central*.[22]

The State also tries to distinguish the public-trust cases it cited and endorsed in *Colman,* now claiming that they involved entirely "different water management plans[.]" DNR Mot. at 7–8 & n.28. That about-face is unpersuasive. The analysis in *Mono Lake* focused squarely on the relationship between "the public trust doctrine and the appropriative water rights system," harmonizing the two. 658 P.2d at 726–27. It did not turn on "riparian water rights," contrary to the State's false distinction. DWR Mot. at 22 n.10. Equally wrong is the State's attempt to distinguish *Mono Lake* because the court there held that "no vested rights bar reconsideration of the allocation of waters flowing in the Mono Basin into Mono Lake." *Id.* That is precisely the point: private water users do not obtain "a vested right in perpetuity to take water without concern for the consequences to the trust." *Mono Lake*, 658 P.2d at 727. Those appropriations are held subject to the public trust and the State's continuing supervision—a fundamental principle that "cannot be abdicated." *Colman* Br. at 37 (citing *Ill. Cent*., 146 U.S. 387). Public trust uses of the Great Salt Lake "should not be destroyed because the state mistakenly thought itself powerless to protect them." *Mono Lake*, 658 P.2d at 732.

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with Private Water Law, 39 VA. ENV'T L.J. 135, 201 (2020), making this a rather slender reed for the State of Utah to place such weight.

[22] The State also miscites *White Bear Lake Restoration Association v. Minnesota Department of Natural Resources*, 946 N.W.2d 373 (Minn. 2020), as declining to extend the public trust doctrine to water rights. DWR Mot. at 22. There the Minnesota supreme court rejected the plaintiffs' effort to "extend the public trust doctrine" into the realm of "groundwater permits," 946 N.W.2d at 386, contrasting such an attempt with the "common-law public trust doctrine," which "entrusts the states with navigable waters[.]" *Id*. at 385. This case, of course, involves navigable waters.

2. Utah's Water Code Does Not—and Cannot—Eliminate the Public Trust Doctrine

The State and Water Users suggest that the Utah water code forecloses any consideration of the public trust. *See* DWR Mot. at 17–18; Water Users' Mot. at 12–17. The argument is a non-starter given the constitutional and sovereign dimensions of the public trust. *See supra* pt. I. Put simply, the legislature does not have the power to exempt water appropriations from the public trust. *See Ill. Cent.*, 146 U.S. at 453 (noting that a state cannot abdicate its duties under the public trust doctrine); *San Carlos Apache Tribe v. Super. Ct. ex rel. Cnty. of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (citing *Hassell*, 837 P.2d at 168–71) (holding that a legislature cannot "by legislation destroy the constitutional limits on its authority" or "order the courts to make the [public trust] doctrine inapplicable to . . . any proceedings" governing water rights); *Cooper*, 676 N.W.2d at 838 (rejecting the argument that the legislature could "supplant the scope of the public trust doctrine").

Nor does the water code attempt any such exemption. Tellingly, Defendants fail to identify any language in the water code that extinguishes the public trust. The State focuses instead on the concept of priority, noting that "a water right is subject to distribution by priority." DWR Mot. at 18 (citing Utah Code Ann. § 73-5-3(2)(a)). Yet that simply articulates the relative priority of senior versus junior water rights-holders; the State's sovereign authority as trustee is unaltered by a statutory system determining the relationship among various water users. The State and the Water Users also rely on Utah Code Ann. § 73-1-3 to suggest that the concept of "beneficial use" precludes the State's consideration of the public trust. *See* Water Users' Mot. at 11–13; *see also* DWR Mot. at 17. But that provision "operates as a constraint on appropriation . . . . That is, an appropriator of water rights may only obtain a right to whatever amount of water has been put to beneficial use ('the basis' and 'the measure') and no more than can beneficially

be used ('the limit')." *Bingham v. Roosevelt City Corp.*, 235 P.3d 730, 738 (Utah 2010). In other words, "beneficial use" is the "measure" that the legislature has provided for assessing an appropriation, *Wrathall*, 40 P.2d at 777, and a water user can appropriate no more than that "finite quantit[y][.]" *Bingham*, 235 P.3d at 738. Beneficial use is thus a limitation on a water-user's rights, *not* the state's authority. *Id.* at 738 n.33 (citing *Salt Lake City v. Gardner*, 114 P. 147, 150 (Utah 1911)) ("[A]ppellants should be limited to the amount of water they applied to a beneficial use, and not to an amount they could have claimed or require."). No Utah precedent embraces an interpretation of beneficial use as displacing the public trust in water.

The Water Users are also wrong to assert that appropriators obtain "title" to waters "[o]nce beneficial use is established," thereby cutting off public trust considerations. Water Users' Mot. at 11. Throughout its history, the Utah Supreme Court has repeatedly rejected that misstatement by "uniformly recogniz[ing] that title to 'public water is not subject to private acquisition.'" *In re Uintah Basin*, 2006 UT 19, ¶ 34, 133 P.3d 410, 420 (quoting *Adams*, 72 P.2d at 652-653). As explained in *Adams v. Portage Irrigation, Reservoir and Power Co.*—a case cited by the Water Users—an appropriative "right is *only* a preferential use . . . as against subsequent appropriators" and "this right in the appropriator is *not* absolute and without limitation." 72 P.2d at 653 (emphasis added). Further, as the Water Users correctly note, the "state never 'owned' water in the ordinary sense." Water Users' Mot. at 10. Rather, it holds water in trust for the public, as explained in detail above. *See supra* pt. I.

Finally, the Water Users cite *Wrathall v. Johnson* for the holding that water that "has been actually diverted from the stream, and is taken into the possession of the appropriator in his ditches, canals, or reservoirs . . . becomes the absolute property of the appropriator." Water Users' Mot. at 10 (quoting 40 P.2d at 767). But they fail to acknowledge the narrowness of this

conclusion. Water rights themselves never become absolute property; rather, diverted water that ceases to be free-flowing can become absolute property. "[O]ne cannot obtain exclusive control" of "public waters"—while "rights to the use thereof may be granted to bodies or individuals as provided by law, but no title to the corpus of the water itself has been or can be granted, while it is naturally flowing[.]" *Adams*, 72 P.2d at 652–53. Water that is diverted into ditches, canals, reservoirs, buckets, or other receptacles, by contrast, ceases to be "wild" and the capturer therefore "acquires a property right therein as long as he maintains his capture[.]" *Id*. at 653. Free-flowing, public water is at issue in the present case.

3. Policy Arguments Do Not Excuse the State from its Breach of the Public Trust

The State and Water Users are wrong to suggest that "public policy" excuses the State's breach of its public trust obligations. DWR Mot. at 20–22; *see also* Water Users' Mot. at 13–16. Assuming for the sake of argument that policy choices could supersede sovereign duties, the arguments still fail.

The Water Users argue that "certainty" in water appropriations supersedes the State's sovereign obligation to protect the public trust. Water Users' Mot. at 13–16. To begin, the argument overstates the certainty provided by Utah's system of water rights. While an appropriator can be certain of its "priority relative" to other appropriators, *see* Water Users' Mot. at 14, the amount of water available each year is never guaranteed: it depends on the supply of water, which is held in trust for the public. *See In re Escalante Valley*, 348 P.2d 679, 683 (Utah 1960) ("An appropriator has a right to use a given quantity of water each year when the supply is available in the source according to his priority. If the supply is not sufficient the use must be curtailed or cut off in inverse order of priority."). Furthermore, the State Engineer must ensure water uses comply with the requirements of beneficial use—a flexible doctrine that "is

susceptible to change over time in response to changes in science and values associated with water use." *In re Gen. Determination of Rts. to Water*, 2004 UT 67, ¶ 46, 98 P.3d 1 (citing Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENV'T L. 919, 942 (1998)).[23] Thus, wholly apart from the public trust doctrine, authorizations for private water use are subject to subsequent adjustment by the State based on new information and changing values under the doctrine of beneficial use.

The Water Users also misconstrue the public trust doctrine itself, claiming that it would "scrub[]" away prior appropriations and "undo" general adjudications. Water Users' Mot. at 14–15. Not so. The public trust would not divest anyone of rights they previously held. *See Mono Lake*, 658 P.2d at 723 ("[A water user] holds subject to the trust . . . ."). Furthermore, the State must make "every effort . . . to preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine." *El Dorado Irrigation Dist. v. State Water Res. Control Bd.*, 48 Cal. Rptr. 3d 468, 490 (Cal. Ct. App. 2006). The caselaw thus defies the Water Users' assertion that State compliance with public trust obligations would "undo" priority or have the State take water "out of priority." Water Users' Mot. at 14–15. While the State could potentially alter the amount of water available for private use—just as any other natural constraint on the already variable availability of water might—that does not effect a reallocation of vested water rights.

[23] The Utah Supreme Court further recognized that "[w]hat is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.'" *In re Gen. Determination of Rts. to Water*, 2004 UT 67, ¶ 46, 98 P.3d at 11–12 (quoting *Imperial Irrigation Dist. v. State Water Res. Control Bd*., 275 Cal. Rptr. 250, 266 (Cal. Ct. App. 1990)). "As developed in the courts, beneficial use has two different components: the type of use and the amount of use." *Id.* ¶ 52, 98 P.3d at 13 (quoting Neuman, *supra*, at 926). Thus, while a use may be beneficial "where water is present in excess of all needs," it may not satisfy that criteria in a time "of great scarcity and great need." *Id.* at 11.

The State raises its own set of policy arguments, none of which supersede the public trust. It asserts that Utah is an "arid state," DWR Mot. at 20, but that only underscores the crucial role of the public trust in protecting water resources, a point also emphasized by the caselaw and Utah's own history as discussed above. *See Cooper*, 676 N.W.2d at 838 (citing *Knight v. Grimes*, 127 N.W.2d 708, 711 (S.D. 1964)) (noting that the public trust plays a crucial role in a "semi-arid state," like Utah, where "the public welfare requires the maximum protection and utilization of its water supply"). In an arid state, diligent execution of the State's trust responsibilities is *more* crucial, not less.

The State also cites Utah's general policy of "respect for water rights," DWR Mot. at 21 (quoting Utah Code Ann. § 73-1-21(1)(b)(viii)), but the State's position goes far beyond respect to posit an absolute right to appropriate water to the detriment of vast public trust resources. Contrary to the State's argument, "[t]he private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health"—i.e., the public trust in public waters. *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (Holmes, J.). Further, the very policy cited by the State recognizes the pressing need for "strategies and practices necessary to address declining water levels and protect the water quality and quantity of the Great Salt Lake"—precisely what the public trust requires the State to undertake. Utah Code Ann. § 73-1-21(1)(b)(xv).

Finally, the Division of Wildlife Resources notes that it has an obligation to preserve, protect, conserve, perpetuate, introduce, and manage wildlife. DWiR Mot. at 2. The Division of State Parks similarly raises its statutory mandate to care for state parklands. *See* DSP Mot. at 3–4. But such obligations are not in tension with the public trust doctrine, which requires the State to protect the "ecological integrity" of the public trust res. *Colman*, 795 P.2d at 635; *see also*

NPCA, 869 P.2d at 919. Nor have DWiR or DSP provided any evidence to the contrary. Rather, DWiR vaguely speculates that the public trust would "undoubtedly" implicate its ability to protect wildlife and wetland habitat, DWiR Mot. at 3, while DSP asserts that it "might" have to "offset the loss of use of its own water rights through the purchase of water at higher prices which could, in turn, result in higher use fees for park visitors." DSP Mot. at 3. But neither Division provides any evidence to support such speculation, nor any examples of how such a conflict might arise. Furthermore, the State can take into account any genuine conflicts between wildlife or parkland protection and the preservation of trust resources when determining *feasible* means of complying with its public trust obligations. *See* Compl. at 28–29, ¶¶ 1(c), 2(b) (requesting that the Court order Defendants to determine and implement "feasible means" of public trust compliance) (emphasis added). What it cannot do is abdicate its public trust obligations by claiming that that environmental protection is a matter too "complex" or "ill-suited" for the courts. DWiR Mot. at 3. Complexity does not alter the State's obligation to bring its expertise to bear in assessing what steps are necessary and feasible to protect the Great Salt Lake. *See* Bogert's Trusts and Trustees § 541 ("If a trustee has greater skill, the trustee must use that greater skill").

B. Utah Statutes Do Not Limit the Public Trust to FFSL's Management of Sovereign Lands

The State tries to delimit the public trust to sovereign lands based on a constricted reading of FFSL's statutory duties. It acknowledges that the legislature tasked FFSL "with managing Utah's sovereign lands 'for the purposes as serve the public interest and do not interfere with the public trust.'" DWR Mot. at 14 (quoting Utah Code Ann. § 65A-10-1(1)). It then leaps to the conclusion that the State—writ large, not just FFSL—is powerless to modify

water appropriations because the legislature did not "extend" that authority to FFSL. *Id.* at 14–15.

The argument fails. At the outset, nothing in the cited legislative enactment speaks to the authority of any agency other than FFSL or disavows the State's public trust responsibility for navigable waters and underlying lands. *See* Utah Code Ann. § 65A-10-1(1). Nor could it do so, for the basic reason that the legislature could not abdicate the State's public trust obligations over such core public trust resources. *Ill. Cent.*, 146 U.S. at 453; *see also supra* pt. I.A (collecting cases). Furthermore, the statutory language actually supports implementation of the State's trust obligations. The legislation tasks FFSL with an obligation to identify "strategies to effectively and efficiently manage the Great Salt Lake based on the Great Salt Lake's fluctuating lake levels." Utah Code Ann. § 65A-10-203(1)(a). FFSL has already identified the minimum healthy elevation of the Great Salt Lake to sustain trust uses—4,198 feet. *See* 2013 CMP at 1-7 to 1-8 & Elevation Matrix. The Great Salt Lake Strike Team has also identified multiple pathways to achieving and maintaining that elevation, including limiting water appropriations as necessary to ensure adequate flows reach the Lake. Policy Assessment, *supra*, at 16–17. While FFSL itself may not "override, supersede, or modify any water right within the state," the legislation explicitly recognizes "the role and authority of the state engineer," Utah Code Ann. § 65A-10-203(16), who has a continuing duty under the public trust to supervise and, where necessary, modify water appropriations to protect trust resources. *See supra* pt. I.D. In fact, the legislation imposes an affirmative duty on FFSL to "coordinate the activities of the various divisions within the Department of Natural Resources with respect to the Great Salt Lake," which includes the State Engineer, Utah Code Ann. 65A-10-203(10). The statute does not therefore confine the State's public trust obligations to FFSL; it recognizes that *both* FFSL and the State Engineer—

under the supervision of the Department of Natural Resources—must work together to manage the level of the Great Salt Lake. Yet, by failing to address the overwhelming cause of the Lake's decline, the Defendant agencies have breached the public trust and imperiled trust uses.

Equally misplaced is the Water Users' attempt to excuse FFSL's breach of its trust obligations on the ground that it (or another agency) could file a change application to provide water within the state for use on sovereign lands. *See* Water Users' Mot. at 16–17 (citing Utah Code Ann. § 73-3-30(2)(a)). Fortunately, our law does not require the sovereign, acting to protect the Great Salt Lake for the benefit of all Utahns, to "get[] in line" behind every private appropriator in the Great Salt Lake Basin. *Id.* at 23. Nothing in that provision of the code eliminates the State's trust obligations, nor could it. Furthermore, FFSL's authority to obtain water appropriations is distinct from the State's public trust duty, which requires and authorizes continuing supervision over *all* water appropriations. The two are not interchangeable, nor mutually exclusive, readily refuting Water User's suggestion that Utah Code Ann. § 73-3-30(2)(a) is "superfluous." *Contra* Water Users' Mot. at 17.

This Court should recognize the Defendants' statutory arguments for what they are: an impermissible attempt to effectively nullify the public trust doctrine. The State argues that FFSL "is tasked with managing Great Salt Lake's fluctuating lake level [but] has no jurisdiction or authority over upstream diversions or water rights." FFSL Mot. at 19; *see also* DWR Mot. at 18 ("FFSL is charged with maintaining the public trust over sovereign lands but does not have authority to act with respect to water or water rights."). But the State also argues that the State Engineer, *i.e.*, the authority with jurisdiction over upstream diversions/water rights, equally lacks any obligation or power to manage Lake levels. *See* DWR Mot. at 13 (arguing that DWR lacks "authority to curtail water rights to maintain a specific lake level in Great Salt Lake"); *see also*

id. at 18–19; FFSL Mot. at 7 ("Neither the State Engineer nor DNR are delegated with public trust obligations."). So, according to the State's interpretation, the legislature has bifurcated authority over the Lake and vested trust authority only in the agency that, according to the State, lacks any authority to deliver an effective remedy. The ultimate consequence of the State's proffered reasoning is that *no state agency or official* has authority or jurisdiction to protect the public trust, and the people of Utah are left without a remedy, even as the crisis at the Lake grows ever more dire. The Court should reject this extreme view.

IV. The Political Question Doctrine Does Not Bar Plaintiffs' Right to Enforce the Public Trust Doctrine

The State's political question arguments are also misguided. For more than 130 years, courts have played a key role in enforcing the public trust doctrine against state actors, stretching back to the U.S. Supreme Court's declaration of public trust principles in *Illinois Central*. Yet the State asks this Court to abdicate that role on the grounds that this case presents a non-justiciable political question. *See* DNR Mot. at 14. It does not. At its heart, this case asks the Court to determine whether the State has violated the public trust doctrine, as embedded in the Utah Constitution, common law, and inherent principles of sovereignty. Resolving that issue involves applying legal standards to facts—a core judicial function. The Court should not abdicate its duty or jurisdiction to enforce the public trust, especially given the impending disaster facing the Great Salt Lake.

A. Enforcing the Public Trust Is Squarely Within the Purview of the Judiciary

The Utah Constitution grants district courts, as courts of general jurisdiction courts, the authority to adjudicate matters that affect citizen's legal rights. *See* Utah Const. art. VIII, §§ 1, 5. Utah courts have thus repeatedly considered public trust cases, and never once have they doubted their jurisdiction to do so. *See VR Acquisitions*, 2019 UT 7, ¶¶ 33–38, 439 P.3d at 601–02

(concluding that a public trust case "is justiciable"); *see also Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897; *Colman*, 795 P.2d 622.

Utah courts have exercised unwavering jurisdiction over public trust cases for at least two reasons. First, it is the court's *duty* "to declare the law as it finds it[.]" *See In re Childers-Gray*, 2021 UT 13, ¶ 48, 487 P.3d 96, 110 (quoting *Eames v. Bd. of Comm'rs*, 199 P. 970, 972 (Utah 1921)); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Water Users' Mot. at 2 ("The Court states the law[.]"). Interpreting the scope of the public trust—an inherent principle of sovereignty grounded in the Utah Constitution and common law—is a classic judicial function. *See Colman*, 795 P.2d at 635. Utah Courts have thus refused to "'shirk' those roles by announcing [an issue] nonjusticiable" based on political controversy. *In re Childers-Gray*, 2021 UT 13, ¶ 67, 487 P.3d at 115 (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

Second, courts have "inherent," and indeed "unquestioned," jurisdiction over the "regulation and enforcement of trusts." *Decorso v. Thomas*, 50 P.2d 951, 956 (Utah 1935). That oversight is essential to the public trust as the legislative and executive branches cannot be expected to police themselves. *Hassell*, 837 P.2dat 168 ("judicial review provides a level of protection against improvident dissipation of an irreplaceable *res*") (emphasis added). Utah Courts have thus recognized their "*broader* powers in trust cases in making certain that trusts are properly administered." *NPCA*, 869 P.2d at 922 n.11 (emphasis added).

These points are well-established across the United States. Since the Supreme Court's decision in *Illinois Central*, many cases "have been brought by private parties to prevent agencies of government from abandoning or neglecting the rights of the public with respect to

resources subject to the public trust." *Ctr. for Biological Diversity v. FPL Grp.*, 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008) (citing *Ill. Cent.*, 146 U.S. 387). Courts have repeatedly confirmed the judiciary's authority to determine "whether the alienation or impairment of a public trust resource violates the public trust doctrine[.]" *Kootenai*, 671 P.2d at 1092; *see Mono Lake*, 658 P.2d at 718–19 (recognizing that, "from the earliest days," California's "judicial decisions have recognized and enforced the trust obligation"). And they have specifically resolved cases implicating the public trust doctrine and water appropriations. *See Waiahole Ditch*, 9 P.3d at 455–56; *Mono Cnty. v. Walker River Irrigation Dist.*, 3:73-cv-00128-MMD-CSD, 2022 WL 3143993, at *9 (D. Nev. Aug. 5, 2022); *Mono Lake*, 658 P.2d 709. Enforcing the public trust does not therefore pose a political question. Rather, it is "ground[ed] . . . in [the judiciary's] constitutional commitment to the checks and balances of a government of divided powers." *Hassell*, 837 P.2d at 168. These cases confirm the Court's role in enforcing the public trust in this case.

B. The *Baker* Considerations Are Not Present

The political question doctrine is a misnomer. Courts are well equipped to address complex, politically charged cases implicating constitutional, statutory, and common-law rights. *See, e.g.*, *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, 67 P.3d 436 (adjudicating controversial provisions of the Utah Wrongful Life Act); *Salt Lake City v. Roberts*, 2002 UT 30, 44 P.3d 767 (adjudicating politically charged privacy issue related to police searches). The Utah Supreme Court has thus rejected attempts to limit judicial authority in cases that "may have significant political overtones." *In re Childers-Gray*, 2021 UT 13, ¶ 67, 487 P.3d at 115 (citing *Japan Whaling Ass'n*, 478 U.S. at 230). And for good reason. Such an approach would spell "doomsday" for the "historic judicial function" of interpreting the law. *Id*. ¶ 68, 487 P.3d at 115. It would also render the public trust unenforceable by the public or judiciary—an outcome

"contrary to all principles of equity and shocking to the conscience of the court." *Kapiolani Park Pres. Soc'y v. City of Honolulu*, 751 P.2d 1022, 1025 (Haw. 1988). The Utah Supreme Court has thus made clear that "[t]he exercise of common-law authority, when not abrogated by statute, neither runs afoul of the political questions doctrine nor violates the separation-of-powers requirements of article V, section 1." *In re Childers-Gray*, 2021 UT 13, ¶ 68, 487 P.3d at 115.

Despite these rulings, the State asserts that Utah courts "follow the *Baker* test to determine whether a claim presents a political question." DNR Mot. at 16. But the federal political question doctrine does not form the basis for non-justiciability in Utah. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("state courts are not bound by . . . federal rules of justiciability"). "Several Utah cases have noted that, on matters like standing and justiciability, a lesser standard may apply." *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2022 WL 21745734, at *7 (Utah Dist. Ct. Nov. 22, 2022) (collecting cases). While the Utah Supreme Court has once cited the so-called "*Baker* test" in dicta, *see In re Childers-Gray*, 2021 UT 13, ¶ 64, 487 P.3d at 115 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *see also Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995), the Court has *not* relied on the *Baker* test in the very few instances in which it has actually found a case to be presenting a non-justiciable political question. *See, e.g.*, *State v. Evans*, 735 P.2d 29, 32 (Utah 1987). Nor should that test apply in Utah, given the important judicial review role of state courts. *See In re Childers-Gray*, 2021 UT 13, ¶ 63, 487 P.3d at 114 (finding that case did not pose a political question with a "resounding no").[24]

[24] Further, many other states have soundly rejected the applicability of the *Baker* test. *See, e.g.*, *Cruz-Guzman v. State*, 916 N.W.2d 1, 8 n.4 (Minn. 2018); *Lobato v. Colorado*, 218 P.3d 358, 370 (Colo. 2009) (en banc). For example, the Wyoming supreme court cited University of Utah law school professor Robert Keiter, who noted the "significant institutional differences between the

Yet even assuming, for the sake of argument, that the *Baker* test does apply, none of its six factors are "inextricable" from this case. 369 U.S. at 217. The first *Baker* factor—"a textually demonstrable constitutional commitment of the issue to a coordinate political department"—is indisputably *not* present. *Id.* To the contrary, courts play an essential role in declaring and enforcing the public trust. *See, e.g., Ill. Cent.*, 146 U.S. at 452–64. That weighs heavily, if not conclusively, against dismissing this case on political question grounds. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). While the State invokes three of the remaining *Baker* factors, DNR Mot. at 14–23, they are not present either, let alone inextricably bound up in the case.

1. There are Judicially Manageable Standards for Resolving the State's Breach of its Trust Obligations

The State claims that the case implicates the second *Baker* factor because there are no "judicially discoverable and manageable standards." *Baker*, 369 U.S. at 217. That simply ignores *Illinois Central*—the "controlling case" that established public trust principles over a century ago, *Colman*, 795 P.2d at 635, as well as the extensive caselaw demonstrating that suits by beneficiaries charging their trustee with breaching a duty are paradigmatically suitable for the judicial forum. *See supra* pt. IV.A (collecting cases). The Court is thus well equipped to "first determine the nature and scope of the duty" imposed by the public trust and "then apply[] this analysis to the particular set of facts" of the case. *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

For over 120 years, Utah courts have relied on well-accepted principles to determine the scope of a trustee's duties and whether the trustee breached those duties. *See Hamilton v. Dooly*,

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Article III federal courts and the state courts which justify a more expansive judicial review role for [state] courts on public law issues than is appropriate for the federal courts." *Wyoming v. Campbell Cnty. Sch. Dist.*, 32 P.3d 325, 335 (Wyo. 2001)

15 Utah 280, 49 P. 769, 776 (1897) ("Having thus considered the principles which apply to trustees, or those holding fiduciary relations to others, it now becomes important to determine whether, under the facts and circumstances disclosed by the record, the case at bar falls within the prohibition of the general rule[.]"). Indeed, there is a whole body of law setting forth the standards applicable to trustees. *See* Utah Code Ann. §§ 75-7-801 to 804; *see also* Restatement (Third) of Trusts §§ 77–79 (2007) (articulating same duties of loyalty, impartiality, and prudence). Foremost among these is the duty to "protect the trust property against damage or destruction." George G. Bogert et al., Bogert's Trusts and Trustees, § 582 (2016); *see also* Restatement (Third) of Trusts § 76 (2007).

Public trust caselaw builds on these well-established principles, providing the Court with readily discoverable standards for determining whether the State breached its trust duties. *See VR Acquisitions*, 2019 UT 7, ¶ 86, 439 P.3d at 610 (Utah courts "appl[y] common-law trust principles" in public trust cases); *Ching v. Case*, 449 P.3d 1146, 1173 (Haw. 2019) (recognizing that "the widely developed common law of trusts provide many judicially discoverable and manageable standards for determining whether the State breached its [public] trust duties"). In particular, *Illinois Central* sets forth the State's duty to prevent "substantial impairment" of trust resources so that the public can continue to use these resources for commerce, fishing, and navigation. 146 U.S. at 435. That duty requires the State to maintain the Great Salt Lake at least at the minimum elevation necessary to sustain core trust uses including navigation, commerce, and fishing. *Id.* at 452; *NPCA*, 869 P.2d at 919. In fact, the State's own scientific evidence establishes this minimum healthy elevation at 4,198 feet above sea level. Compl. ¶¶ 45–54. Yet, the State refuses to assess and modify, where necessary, upstream diversions to restore the Lake to this minimum level. That is a clear-cut breach of its duties as trustee.

Additional caselaw provides this Court with readily discoverable standards for determining the scope of the public trust. As explained in detail above, the trust *res* encompasses both the navigable waters and submerged lands of the Great Salt Lake. *See supra* pt. I. The State is thus wrong to delimit the trust to just sovereign lands—a fundamental doctrinal error that cries out for judicial correction. *See, e.g.*, *Min. Cnty*., 473 P.3d at 425–26 (resolving dispute over trust *res* by holding that the public trust doctrine "applies to all waters in the state and the lands submerged beneath navigable waters.").

Yet the State urges the Court to abandon its judicial function based on two mischaracterizations of the case. First, the State contends that the Court cannot set a minimum healthy lake elevation of 4,198 feet without making policy determinations about whether that "outcome is better than any other outcome." DNR Mot. at 17. But Physicians do not ask this Court to set the "best" lake level; the State's own experts have already demonstrated that 4,198 is the minimum elevation for supporting public trust uses. *See* 2013 CMP at 1-7 to 1-8 & Elevation Matrix. Physicians therefore ask this Court to direct the State to maintain the minimum lake level that the State has already deemed necessary to prevent "substantial impairment" of protected trust uses—the widely-applied judicial standard for protecting trust resources. *Ill. Cent.*, 146 U.S. at 435; *Colman*, 795 P.2d at 635. Due, in other words, to the State's own research, one thing this case surely does *not* suffer from is "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217.

Second, the State claims that the Court will have to make policy determinations about the "best way" to achieve a minimum healthy lake level of 4,198 feet. DNR Mot. at 17. But Physicians do not ask this Court to dictate which steps the State must take to raise the lake level; Plaintiffs ask this Court to direct the *State agencies* to identify and then undertake all feasible

steps necessary to restore the Lake to its minimum healthy level. Compl. at 28, ¶ 2. It is not therefore the Court that will answer the questions raised by the State, *see* DNR Mot. at 17–18, but rather the State agencies themselves that must use their expertise on remand to fulfill their trust duties—duties they have so far refused to undertake. *See* Bogert's Trusts and Trustees § 541 ("If a trustee has greater skill, the trustee must use that greater skill").

This course is consistent with the customary remedy by which courts remand cases to state agencies to apply their expertise and fulfill their legal obligations. *See, e.g.*, *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 48, 226 P.3d 719, 735 (Utah 2009) (remanding to agency to consider available emission control strategies for power plant permit). The California Supreme Court followed that well-established path in *Mono Lake* when it remanded to the expert state agency—the State Water Resources Control Board—to "take the public trust into account in the planning and allocation of water resources" and thereby "reconsider the allocation of the waters of the Mono Basin," 658 P.2d at 728–29. The court thus relied on the board to use "the skills and knowledge [it] already possesses" to fulfill its trust obligations. *Id.* at 731–32. On remand, the board reconsidered water usage in the Mono Basin, engaging in "scientific inquiry, public hearings, and policy research," and ultimately issuing a reallocation decision. Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of* National Audubon Society v. Superior Court, 45 ENV'T L. 561, 613 (2015). As a result, Mono Lake, which had been on a path to complete collapse, did not disappear and persists today; nor did the sky fall in Los Angeles, which still has water to support its millions of inhabitants.

Nonetheless, the State tries to frame up a *future* political question by asserting that there is no judicially manageable standard to "supervise" the State's obligation to protect the Great Salt Lake once it is legally established. *See* DNR Mot. at 19. That fails for three reasons. First,

the court's ability to supervise relief is irrelevant to the "manageable standards" prong. In *Baker*, the court required the presence of "judicially discoverable and manageable standards for resolving" the case, not for overseeing the relief ordered as a result of that case. *Baker*, 369 U.S. at 217; *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012) ("Our precedents have also found the political question doctrine implicated when there is a lack of judicially discoverable and manageable standards for resolving the question before the court." (internal quotation marks omitted)).

Second, speculation about secondary or tertiary remedial stages of this case, let alone *future* cases challenging the State's discharge of its public trust duties, does not support dismissal. *Baker*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."). To the contrary, courts enforcing public trust obligations against state defendants have recognized that, "[i]n times of greater scarcity . . . the state will confront difficult choices that may not lend themselves to formulaic solutions." *Waiahole Ditch*, 9 P.3d at 454; *see also Mono Lake*, 658 P.2d at 727 (requiring an "accommodation" between "the public trust doctrine and the appropriative water rights system"). Yet the prospect of such difficult choices has not ousted the judiciary from its traditional role as enforcer of the public trust. Instead, courts have adopted judicially enforceable standards for reviewing state implementation decisions. *See Waiahole Ditch*, 9 P.3d at 455–56 (requiring that balancing of interests must "begin with a presumption in favor" of public trust uses, placing burden on private commercial uses to justify interference with trust, and imposing on state a duty to consider, protect, and advance trust rights "at every stage of the planning and decisionmaking process") (citing cases).

Third, even accepting the State's ill-conceived "prospective" framing, the court is well equipped to assess whether the State's future actions comply with its trust obligations. Assuming a subsequent lawsuit against the State, it would be governed by familiar principles of administrative review. *See Friends of Great Salt Lake v. Dep't of Env't Quality, Div. of Waste Mgmt. & Radiation Control*, 2023 UT App 58, ¶ 20, 531 P.3d 767 (setting forth standards for reviewing agency action). For example, the Court would assess whether the State took all feasible steps necessary to prevent impairment of trust resources, requiring that "the findings of fact be adequately supported by the record, which affords significant deference to the agency's factual determinations." *Id.* ¶ 27, 531 P.3d at 777. Courts routinely undertake this very type of inquiry to assess agency action, even where the decision involves complex issues. *See, e.g.*, *Utah Chapter of Sierra Club*, 2009 UT 76, ¶ 48, 226 P.3d at 734–35 (reviewing and setting aside level set by agency for nitrogen oxide emissions from power plant).

There is thus no justiciability exception for cases of great complexity that involve administrative agencies, especially where, as here, the agency denies it has any role in the matter at all. *See Alperin v. Vatican Bank*, 410 F.3d 532, 552, 555 (9th Cir. 2005) ("[T]he crux of th[e political question] inquiry is . . . not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint," but rather whether "a legal framework exists by which courts can evaluate . . . claims in a reasoned manner."). To hold otherwise—as urged by the State—would render numerous suits seeking review of an agency action beyond the jurisdiction of the courts. That outcome is not only contrary to the well-established and longstanding judicial commitment to enforcing the public trust doctrine, but also to the Utah Supreme Court's commitment to applying the *Baker* factors sparingly, if at all. *See In re Childers-Gray*, 2021 UT 13, ¶ 64, 487 P.3d at 115.

Notably, the State fails to identify any case where a court invoked the political question doctrine to preclude judicial review where water diversions were impairing trust uses, as is the case here. Instead, the State relies on inapposite cases far from the core of the public trust doctrine, such as the recent atmospheric trust cases. *See* DNR Mot. at 18–19 (citing *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022); *Aji P. ex rel. Piper v. State*, 480 P.3d 438 (Wash Ct. App. 2021); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020)). That precedent has little relevance because it involved litigants seeking "an unprecedented extension of the common law in a new subject area"—the global atmosphere. *Svitak ex rel. Svitak v. State*, No. 69710-2-1, 2013 WL 6632124, at *2 (Wash. Ct. App. Dec. 16, 2013). Here, by contrast, Plaintiffs are seeking to enforce the doctrine to protect core trust resources—the navigable waters and submerged lands of the Great Salt Lake.

The State's reliance on the *Juliana* atmospheric trust case is particularly misplaced because the Ninth Circuit did *not* "find this [matter] to be a political question[.]" 947 F.3d at 1174 n.9; *see also Juliana v. United States*, No. 6:15-cv-01517-AA, 2023 WL 9023339, at *15 (D. Or. Dec. 29, 2023) ("[T]his lawsuit . . . is squarely within the purview of the judiciary . . . . [T]he political question doctrine does not impede plaintiffs' claims[.]"). Furthermore, the plaintiffs in that case sought a court order to protect their "right to a climate system capable of sustaining human health"—a problem that the court worried was "beguiling," rendering a judicially manageable solution elusive. *Juliana,* 947 F.3d at 1173. But that concern does not apply to this case, contrary to the State's suggestion. *See* DNR Mot. at 18–19. The State's own experts—the Great Salt Lake Strike Team—identified *multiple* pathways to restore the Lake to its minimum healthy elevation of 4,198 feet. Compl. ¶¶ 66–68. Yet the State flatly refuses to consider all feasible means needed to do so, including modifying upstream diversions where

necessary. That is a clear-cut breach of the public trust, which the Court can redress by instructing the State to review the causes of impairment of trust resources and undertake steps to ameliorate such impairment, i.e., to discharge its duties as trustee.

The State also quotes extensively from *Iowa Citizens for Community Improvement v. State*, 962 N.W.2d 780 (Iowa 2021), but it is doubly inapposite. First, the plaintiffs in that case sought to have the court "force the [legislature] to enact legislation," *id*. at 785, a form of relief that would require the judiciary to intrude into the legislative realm—and that Physicians in this case do *not* seek. Second, the plaintiffs in *Iowa Citizens* sought to compel the state to adopt water *quality* requirements for agricultural runoff, an area outside the core of the public trust. The court was thus unable to find a "meaningful standard at all." *Id.* at 796–97. By contrast, the court recognized "the public trust doctrine applied to . . . removals of nonnavigable water that had an adverse effect on navigable water." *Id.* at 798–99 (citing *Env't L. Found.* 237 Cal. Rptr. 3d 393). In that situation, as here, the oft-applied public trust doctrine provides the court with judicially manageable standards for assessing whether those diversions are substantially impairing trust uses.[25] *Id.* This case does not therefore implicate the second *Baker* factor.

2. Resolving this Case Does Not Require Policy Determinations

The State also invokes the third *Baker* factor, which arises where it is "impossibl[e]" to resolve a claim "without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217. But the public trust doctrine is not a policy prescription; it is a well-established legal doctrine that imposes binding duties on the State. The resolution of this case

[25] As noted above, the State's reliance on *White Bear Lake Restoration Association*, *see* DNR Mot. at 22–23, is misplaced for similar reasons. *See White Bear Lake Restoration*, 946 N.W.2d at 385–86 (rejecting the plaintiffs' effort to "extend the public trust doctrine" into the realm of "groundwater permits," in contrast to the "common-law public trust doctrine," which "entrusts the states with navigable waters").

thus requires the court to answer a legal question: whether the State, as trustee, breached the duties it owes to the public, as beneficiaries. That is a task suitable to the judiciary, as "the ultimate authority to interpret" the public trust doctrine "rests with the courts of this state." *Waiahole Ditch*, 9 P.3d at 455.

The State overlooks this fundamental point, and then relies on two mischaracterizations.[26] First, it falsely claims that the Physicians seek to impose a "lake elevation trumps all other uses" policy. DNR Mot. at 20. At the outset, the State has it backward: it is the State's theory that seeks to improperly elevate a single category of water utilization—upstream diversions—over all other uses, including even the core uses protected by the public trust doctrine. But regardless, the State's characterization is mistaken. As explained above, the public trust imposes on the State a legal obligation to determine and undertake all feasible means needed to maintain a minimum healthy lake elevation of 4,198 feet, including modifying upstream diversions where necessary. *See supra* Background & pt. I. Yet, the State has refused to even consider any modification of water diversions based on the erroneous position that water appropriations categorically supersede the public trust—and, apparently, that the public trust does not apply to waters at all. It is the Court's function to correct those legal errors. *See E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) (finding the third *Baker* factor inapplicable where the court is "not called upon to make an 'initial policy determination,'" but rather to "resolv[e] the dispute through legal and factual analysis").

Second, the State mistakenly claims that the Court will have to make policy determinations about whether to modify water diversions to protect the Great Salt Lake. *See*

[26] The State's arguments on the second and third *Baker* factors largely overlap, and they fail for substantially the same reasons. *See Alperin*, 410 F.3d at 544 (noting that the *Baker* factors "often collaps[e] into one another").

DNR Mot. at 20. But Physicians are not asking the Court to "tak[e] over" the position of State Engineer and curtail diversions, *id.*; Physicians are asking the Court to order the State Engineer to perform her duties as trustee. That is an appropriate remedy under trust law. *See* Restatement (Second) of Trusts § 199 (1959). There is thus no need for the Court to step out of its core judicial role to decide this case on the law and facts. The third *Baker* factor is not present.

3. The Case Can Be Resolved Without Expressing Lack of Respect for the Coordinate Branches of Government

Finally, the State invokes the fourth *Baker* factor, which applies only where it is "*impossibl*[*e*]" to undertake "independent resolution without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217 (emphasis added). It is, however, the "rare" case where *Baker's* "final factors alone render a case nonjusticiable." *Zivotofsky*, 566 U.S. at 207 (Sotomayor, J., concurring). This is no such case.

To the contrary, it is the Court's obligation to ensure that responsible State officials fulfill their duty to protect the public trust, not willfully ignore its unnecessary destruction. As courts have explained, "[t]he check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res." *Hassell*, 837 P.2d at 169. While the court cannot "supplant its judgment for that of the legislature or agency . . . this court *will* take a 'close look' at [agency] action to determine if it complies with the public trust doctrine[.]" *Kootenai*, 671 P.2d at 1092 (emphasis added). That "close look" is not only warranted here, but essential: the State has breached its fiduciary duties based on an erroneous misinterpretation that would exclude water from the public trust altogether and elevate water appropriations above any other interest.

Directing the State to develop and implement a plan to protect trust assets—as is its lawful obligation—does not "demonstrate a lack of respect" for the coordinate branches of government. DNR Mot. at 20. It merely ensures that the State exercises its authority to meet the

crisis facing the Lake, as is its duty as public trustee. By contrast, adopting the State's argument would neutralize judicial review for illegal or unconstitutional actions by other branches of the government—an outcome that would undermine the crucial role of the judiciary.

To be clear, Physicians are not claiming that the "only" way to raise the Lake is through curtailing diversions. DNR Mot. at 20. Rather, Physicians are challenging the *State's* categorical refusal to consider modifying, let alone to actually modify, *any* water diversions—a clear-cut violation of its trust obligations and one that has caused "unnecessary and unjustified harm to trust interests," as exemplified by the dire condition of the Great Salt Lake. *Mono Lake*, 658 P.2d at 728.

Yet the State asks the Court to stand idly by, citing two steps that the legislature hopes might protect the Lake. *See* DNR Mot. at 21. Neither step is a substitute for fulfilling the State's public trust obligations, nor a justification for the Court to abdicate its judicial role. First, the State attempts a sleight of hand, noting that it manages water uses "in the public interest by priority beneficial use[.]" *Id*. But courts have soundly rejected attempts to equate a generalized determination of the public interest with the specific requirements of the public trust, as the two are not equivalent. *See Waiahole Ditch*, 9 P.3d at 454 (rejecting any suggestion "that the state's public trust duties amount to nothing more than a restatement of its prerogatives"); *accord Mono Lake*, 658 P.2d at 728; *see also Min. Cnty.*, 473 P.3d at 427–28 (distinguishing between beneficial use and public trust protections). The State readily acknowledges this distinction, *see* FFSL Mot. at 20 n.16, as have scholars. *See* Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. 541, 567 (1995). And that distinction is crucial to preservation of trust resources, as shown by this case. The State authorized water appropriations that were purportedly for beneficial uses but admittedly without

considering public trust values; it now claims it is powerless to modify those appropriations, even as they are impairing the public trust uses of the Great Salt Lake. The public trust doctrine and the public interest embodied in prior appropriations are not interchangeable, but rather impose independent duties on the State as part of an integrated system of water law.

Second, the State asserts that the political branches are "already undertaking many efforts to put more water into the Great Salt Lake[.]" DNR Mot. at 21. Yet these attempts—commendable though many of them may be—are inadequate to ensure protection of the public trust in the Great Salt Lake. Indeed, the State's own experts—a "strike team" including officials from DNR, DWR, and FFSL—recently estimated that significant cuts to diversions would be necessary to prevent further losses to the Lake, much less refill it to "the target level" of 4,198 feet. Compl. ¶¶ 67–68. None of the efforts highlighted by Defendants in their briefs, however, include *any* cuts to diversions, and none have achieved any significant reduction in water use; none have resulted in raising the Lake's elevation to the level identified by the State itself as necessary to protect the trust. *See supra* Background. These measures do not make up for the State's abdication of its trust obligations; they perpetuate the fundamental error that has placed the Great Salt Lake on the precipice of disaster—the State's refusal to even consider modifications to address the source of the problem: unchecked water diversions.

Rather than confronting its own evidence, the State relies on speculative and unavailing policy arguments. It contends that "[w]ater right holders . . . may dig in their heels . . . choosing instead to engage in lengthy litigation to protect their rights from mandatory curtailment." DNR Mot. at 21. But the prospect of controversy does not strip this Court of jurisdiction to hear this case. *See In re Childers-Gray*, 2021 UT 13, ¶ 67, 487 P.3d at 115 (affirming Utah courts' "long-standing commitment to effectuate the judicial task laid upon us by the legislature, despite the

sensitivity of the issues involved"). It is the Court's role to correct the State's misconception of its public trust duty and set it on the pathway to safeguarding the Great Salt Lake from an ecological and public health crisis. That is not an attack on the legislative branch. Rather, it corrects a fundamental legal error at the root of the State's inaction.

V. Defendants Err in Attacking Physicians' Standing

The State challenges Physicians' standing to bring this case. *See* DNR Mot. at 24–26. Contrary to this argument, Physicians satisfy applicable standing requirements, and the State's argument concerning the redressability of Physicians' injury is meritless.

A. Physicians Satisfy Standing Requirements Under Either Applicable Test

Physicians meet all standing requirements under either the "traditional criteria," which focus on a "distinct and palpable injury" requirement, or under the alternative test that applies where, as here, appropriate plaintiffs raise "issues of significant public importance." *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶¶ 19, 35, 148 P.3d 960 (cleaned up).

1. Physicians Meet the Traditional Standing Criteria

First, a plaintiff satisfies the "traditional criteria" where it asserts that "it has been or will be adversely affected by the challenged actions," it alleges "a causal relationship between the injury to the party, the challenged actions and the relief requested," and the relief requested is "substantially likely to redress the injury claimed." *Id.* ¶ 19, 148 P.3d at 967 (cleaned up). Where, as here, standing is challenged on "a motion to dismiss brought prior to discovery," courts "do not hold plaintiffs to a high standard of proof," and instead "all allegations in [plaintiffs']

complaint, and all reasonable inferences drawn from those allegations, are taken as true." *Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 32, 424 P.3d 95, 106.[27]

The allegations of Physicians' complaint satisfy these criteria. Because Physicians are associations, they have standing if their "individual members have standing and the participation of the individual members is not necessary to the resolution of the case." *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 21, 148 P.3d at 967 (citing *Utah Rest. Ass'n v. Davis Cnty. Bd. of Health*, 709 P.2d 1159, 1163 (Utah 1985)). Physicians' complaint alleges that their members "use the Great Salt Lake for navigation, brine shrimp fishing, commerce, recreation, and to ensure the cleanliness of the air they breathe," and explains how the Lake's decline has harmed Physicians' members' interests. Compl. ¶¶ 26–27. The complaint goes beyond generalized allegations to detail the particularized impacts felt by Physicians' individual members, including: Jim Hopkins, a former brine shrimper who ceased such activity in part due to difficulties created by the Lake's decline; Mike Olsen, who used the Lake for sailing before declining levels forced him to remove his boat from its waters; Craig Provost, an avid birder whose recreational activity is impaired by dwindling Lake habitats; Robert Weir, a neurologist who is concerned for the health of his three young children due to air-quality degradation caused by increasing wind-born sediments from the exposed Lakebed; and Matthew Berry, a cancer survivor who fears that his vulnerable condition makes him particularly susceptible to health-related harms from such sediments. *Id.*

[27] Although not required at this stage of the litigation, in the interest of expediency and resolving any possible question about their standing to bring this case, Physicians are attaching to this response brief their member declarations providing evidentiary support for their standing. *See* Decl. of Annie Payne (attached as Ex. 2); Decl. of Chandler Rosenberg (attached as Ex. 3); Decl. of Colton Fonnesbeck (attached as Ex. 4); Decl. of Craig Provost (attached as Ex.5); Decl. of Geoff Hardies (attached as Ex. 6); Decl. of Jim Hopkins (attached as Ex. 7); Decl. of Jonny Vasic (attached as Ex. 8); Decl. of Matthew Berry (attached as Ex.9); Decl. of Michael Olsen (attached as Ex. 10); Decl. of Muskan Walia (attached as Ex. 11); Decl. of Nan Seymour (attached as Ex. 12); Decl. of Robert Weir (attached as Ex. 13).

Physicians' attached declarations further articulate these injuries. *See, e.g.*, Decl. of Colton Fonnesbeck (declaration of a man whose business leading boat tours of the Great Salt Lake has been materially harmed by the declining water levels).

These allegations that the Lake's decline "will harm [Physicians' members'] health and their families' health . . . and detrimentally impact the ecosystem . . . [that] they use for recreational activities" and commercial endeavors satisfy the adverse-effects requirement for standing. *Utah Chapter of Sierra Club*, 2006 UT 74, ¶¶ 22–23, 148 P.3d at 968; *see also Living Rivers v. Exec. Dir. of the Utah Dep't of Env't Quality*, 2017 UT 64, ¶ 29, 417 P.3d 57, 63–64 (finding adverse-effects requirement satisfied where plaintiff group's member faced harm to his "aesthetic" and "recreational" interests, including interest in "watch[ing] birds and wildlife"); *Cedar Mountain Env't., Inc. v. Tooele Cnty. ex rel. Tooele Cnty. Comm'n*, 2009 UT 48, ¶ 14, 214 P.3d 95 (same where plaintiff established injury to commercial interest), *abrogated on other grounds by McKitrick v. Gibson*, 2021 UT 48, 496 P.3d 147. Such allegations address harms to people who "either live or recreate, or both," near the Lake, "and have alleged injuries that are particular to them, rather than expressing generalized concerns about the [Lake's] impact on the public at large." *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 28, 148 P.3d at 969. Accordingly, they satisfy the first traditional standing criterion. *Id.*[28]

Physicians equally satisfy the causation and redressability criteria. Physicians "have alleged a plausible connection between their injuries" and Defendants' challenged actions and omissions. *Id.* ¶ 32, 148 P.3d at 971. Defendants manage and administer authorizations for upstream diversions that are far and away the leading cause of inadequate inflows to the Great

[28] As with the environmental group plaintiff in *Utah Chapter of Sierra Club*, here too "there is no reason the individual participation of [Physicians'] members is necessary to the resolution of this case." 2006 UT 74, ¶ 34, 148 P.3d at 972.

Salt Lake. *See* Compl. ¶¶ 28–30, 63–64. Defendants have continued to authorize such diversions without modification even as the Lake's dwindling water levels threatened ecological collapse and impairment of trust uses. *See id.* ¶¶ 70, 72–76, 108–11. Because Defendants' breach of their trust obligations is injuring Plaintiffs' members' interest in the Great Salt Lake, Physicians satisfy the causation requirement. *See Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 32, 148 P.3d at 971–72 (finding causation requirement satisfied where defendant state administrator was "responsible for denying or granting permits" causing plaintiff's members harm).

Regarding redressability, Physicians request an order from this Court that would redress their injuries by, among other things, providing declaratory and injunctive relief. Physicians seek a declaration defining the scope of the public trust, including the State's ongoing obligation to supervise water appropriations that are impairing trust uses, and establishing the State's breach of that obligation. *See* Compl. at 27–28, ¶ 1. That declaration satisfies the requirement of redressability. The "practical consequence" of such a declaration "would amount to a significant increase in the likelihood that the plaintiff[s] would obtain relief that directly redresses the injury suffered." *Utah v. Evans*, 536 U.S. 452, 464 (2002).

Physicians' request for injunctive relief further demonstrates their satisfaction of the redressability requirement. Physicians request an injunction order requiring Defendants to halt any further decline in the Lake's average annual elevation within two years and to restore the Lake to at least the minimum viable elevation consistent with continued public trust uses within ten years, including by taking feasible actions to modify existing water diversions that are inconsistent with maintaining and restoring the Lake. *See* Compl.at 28–29, ¶ 2.a–b. While Defendants disclaim any obligation or authority to undertake such actions, *see* DWR Mot. at 6–12, their dispute goes to the merits of Physicians' claim regarding the scope of Defendants'

public trust duties and does not defeat Physicians' standing to raise that claim in the first instance. *See S. Utah Wilderness All. v. San Juan Cnty. Comm'n*, 2021 UT 6, ¶¶ 25–27, 484 P.3d 1160 ("[W]hether a plaintiff has standing does not depend on the merits of the plaintiff's argument that particular conduct violated the plaintiff's rights."). Accordingly, Physicians satisfy the redressability criterion regardless of Defendants' contention that Physicians' challenge is based on "a misinterpretation" of the public trust doctrine. *Id.* ¶ 25, 484 P.3d at 1168.

2. Physicians Equally Meet the Alternative Standing Test

Physicians also meet both prongs of the alternative test, under which a plaintiff proves standing by establishing (1) "that it is an appropriate party to raise the issue in the dispute before the court," and (2) "that the issues it seeks to raise are of sufficient public importance in and of themselves to warrant granting the party standing." *Utah Chapter of Sierra Club*, 2006 UT 74, ¶¶ 36, 39, 148 P.3d at 972–73 (citing *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)).

First, as organizations representing members of the community who are directly impacted by the loss of Great Salt Lake waters, Physicians are appropriate parties because they have "the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions[.]" *Id.* ¶ 36, 148 P.3d at 972 (quoting *Jenkins*, 675 P2.d at 1150); *see City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 18, 233 P.3d 461, 467 (holding that member of affected community was appropriate plaintiff). Just as the Sierra Club, "as an entity focused on protecting the environment," had "the interest and expertise necessary to investigate and review all relevant legal and factual questions" surrounding the permitting dispute at issue in *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 42, 148 P.3d at 974, so here the Sierra Club and its co-Plaintiffs have the requisite interest and expertise to assist this Court in addressing pertinent questions surrounding the Defendants' public trust obligations regarding the Great Salt Lake.

Further, these public trust obligations "are unlikely to be raised" if Physicians here are denied standing. *Gregory v. Shurtleff*, 2013 UT 18, ¶ 28, 299 P.3d 1098, 1109 (quoting *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 36, 148 P.3d at 972–73). Where, as here, "no other plaintiff has emerged" and other theoretical plaintiffs have remained silent, it "is indeed unlikely" that these issues will be raised if Physicians are denied standing. *Id*. ¶ 30, 299 P.3d at 1110. This is especially so because Defendants' standing argument would preclude *any* members of the public from challenging the State's breach of its trust obligations. Physicians are therefore appropriate parties.

Second, "the outcome of the particular dispute at issue" in this case "will itself affect the community," as opposed to only "certain individual members of the public[.]" *BV Lending, LLC v. Jordanelle Special Serv. Dist.*, 2013 UT App. 9, ¶ 14, 294 P.3d 656, 661. Indeed, it is hard to imagine a more "significant" issue of "public importance," *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 35, 148 P.3d at 972 (citing *Jenkins*, 675 P2.d at 1150), than the ongoing existential threat to the Great Salt Lake, which Defendants themselves acknowledge is a "critical resource" of great importance "to the ecology of the region, the economy of the State of Utah, and the health of Utah's citizens." DWR Mot. at 1; FFSL Mot. at 1. *See, e.g., NPCA*, 869 P.2d at 913–14 (recognizing that conservation group had standing to challenge administration of school trust lands "because it raises issues of significant public importance.").

Further, unlike in cases presenting issues that are "more appropriately addressed by another branch of government pursuant to the political process," *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 39, 148 P.3d at 973, here—as discussed *supra*—declaring and enforcing the public trust obligations of state officials concerning activities impacting navigable waters has been a well-recognized *judicial* function dating back to the U.S. Supreme Court's decision in

Illinois Central, including in closely analogous circumstances where plaintiffs raised a claim similar to Physicians' here, *see Mono Lake*, 658 P.2d at 718–19, 727–29 (addressing public trust doctrine's application to "the taking and use" of appropriated water, and recognizing that, "from the earliest days … judicial decisions have recognized and enforced the trust obligation"). Indeed, "[i]f the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it." *Paepcke v. Pub. Bldg. Comm'n of Chicago*, 263 N.E.2d 11, 17–18 (Ill. 1970). Accordingly, Physicians have also established standing under the alternative test.

B. The State's Redressability Argument is Meritless

The State's standing argument attacks only the redressability element of Physicians' standing under the traditional criteria. *See* DNR Mot. at 24–26. This argument is ultimately unavailing because Physicians have standing under the alternative test regardless of the traditional test criteria. *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 35, 148 P.3d at 972 (citing *Jenkins*, 675 P2.d at 1150). But even so, the State's redressability argument is meritless.

The State claims Physicians cannot demonstrate redressability because "their requested relief exceeds the equitable power of the Court," essentially recapitulating their political question argument. DNR Mot. at 24–25. Again, however, as discussed *supra*, judicial authority supporting issuance of relief declaring the scope of the public trust and requiring state officials to protect the public trust in navigable waters dates back for more than 130 years, *see, e.g.*, *Ill. Cent.*, 146 U.S. 387; *Mono Lake*, 658 P.2d at 727–29. The State's attempt to sidestep this long-established judicial precedent enforcing the public trust in navigable waters based on readily-distinguishable case law concerning an atmospheric trust theory, *see* DNR Mot. at 24–25 (quoting *Juliana*, 947 F.3d at 1170–71), is unpersuasive.

The State next argues that Physicians' claim is unredressable "in the absence of all parties who have vested water rights tributary to the Lake." DNR Mot. at 26. This argument reflects a repackaging of the State's "necessary part[y]" arguments under Rule 19 and the Utah Declaratory Judgments Act. *See* DNR Mot. at 31–33. It fails for the same reasons those arguments fail: it rests on the false assertion that Physicians seek to adjudicate the rights of water appropriators when, in fact, they seek an order directing the State to comply with its trust obligations. *See infra* pt. VII.A. The State's citation of *Carlton v. Brown*, 2014 UT 6, 323 P.3d 571 (cited in DNR Mot. at 25–26), does not support a different conclusion. The *Carlton* plaintiff's claim was deemed unredressable because the district court in that case prevented him from joining the only defendants who were positioned to afford him relief. *See id.* ¶ 32, 323 P.3d at 580. Here, by contrast, Physicians have joined as defendants the three principal state agencies holding public trust responsibilities over the navigable waters and underlying lands at issue, and this Court can afford Physicians relief by ordering those defendants to fulfill their trust responsibilities in the manner that Physicians have requested. *See* Compl. at 27–29, ¶¶ 1–4. Accordingly, this redressability argument also fails.

VI. Physicians Have a Cause of Action to Enforce the Public Trust Against the State

The State and Water Users argue narrowly that Physicians lack a cause of action because Art. XX, § 1, of the Utah Constitution is not "self-executing." FFSL Mot. at 14–16; Water Users' Mot. at 24–27. First, this shared argument is unavailing as Physicians indisputably possess a common law cause of action to enforce the public trust doctrine. Second, the argument fails on its own terms as Article XX is self-executing, providing Physicians with an additional, constitutional basis for their cause of action.

A. Physicians Possess a Common Law Cause of Action to Enforce the Public Trust

Neither the State nor Intervenors dispute that Physicians possess a common law cause of action to enforce the public trust. This is sensible, as a beneficiary's ability to bring suit against a trustee to compel that trustee to perform its duties or to enjoin a breach is a foundational principle of trust law. *See* Restatement (Third) of Trusts § 95 ("[T]he remedies of trust beneficiaries are equitable in character and enforceable against trustees in a court exercising equity powers."); Restatement (Second) of Trusts § 199 ("The beneficiary of a trust can maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; (c) to compel the trustee to redress a breach of trust[.]"); *see also* 76 AM. JUR. 2D TRUSTS § 247 (2018). Indeed, "[t]he court of equity first recognized the trust as a legal institution and has fostered and developed it. Thus the beneficiary naturally goes to this court for protection of his rights under the trust." Bogert's Trusts and Trustees § 870.

For this reason, it is well-established in Utah that where a trustee "has failed to execute his trust," beneficiaries "who are injured by its nonperformance have a right to maintain an action for its enforcement." *Barrette v. Dooly*, 59 P. 718, 719–20 (Utah 1899). "The regulation and enforcement of trusts is one of the original and inherent powers of a court of equity, and . . . the jurisdiction of equity in all cases of trusts, express or implied, resulting or constructive, is unquestioned." *Decorso*, 50 P.2d at 956 (internal quotation marks omitted).

Reflecting this unquestioned principle, sister states have repeatedly held that members of the public (i.e., beneficiaries) have a common law cause of action against the state (i.e., the trustee) for failing to preserve public trust resources or the public's use of such resources. *See, e.g.*, *Paepcke*, 263 N.E.2d at 18 ("If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must

have the right and standing to enforce it."); *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 602–03 ("[P]laintiffs have the right to insist that the state, through its appropriate subdivisions and agencies, protect and preserve public trust property[.]"). Indeed, in the related school trust context, the Utah Supreme Court has noted that the State's trust obligations are "enforceable by those with a sufficient interest in school trust lands to have standing." *NCPA*, 869 P.2d at 918. Likewise, Physicians here have a common law cause of action to compel their trustee, the State, to perform its trust duties.

B. In Addition, the Utah Constitution Provides a Self-Executing Cause of Action

In addition, Physicians possess a self-executing cause of action to enforce the trust guarantees embodied in the Utah Constitution. *See* Utah Const. art. XX, § 1 (holding that the "public lands of the State . . . shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired"). The State claims otherwise, but it neglects to go through the relevant factors laid out by the Utah Supreme Court and, in any event, its arguments are unsupported and unavailing. *See* FFSL Mot. at 14–16. The Water Users repeat this claim at slightly greater length, *see* Water Users' Mot. at 24–27, but their arguments too are meritless.

To be self-executing, a constitutional provision must articulate "a rule sufficient to give effect to the underlying rights and duties intended by the framers" and not merely announce "a general principle or line of policy without supplying the means for putting them into effect." *Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533 (citation omitted). Courts consider three factors: (1) if the provision is "prohibitory," (2) if it is "judicially definable and enforceable," and (3) if "the context in which the clause was adopted suggests the framers intended to constitutionalize existing concepts . . . rather than create a new provision requiring legislative implementation." *Id.* ¶¶ 11–13, 16 P.3d at 536; *see also Intermountain*

Sports, Inc. v. Dep't of Transp., 2004 UT App 405, ¶ 15, 103 P.3d 716 (articulating same three factors). All three factors are present in Art. XX, § 1, confirming that it provides a self-executing cause of action.

1. Article XX, Section 1, Is Prohibitory

First, Art. XX, § 1, is prohibitory. The Utah Constitution unambiguously states that "all of its provisions are 'mandatory and prohibitory, unless by express words they are declared to be otherwise.'" *Spackman*, 2000 UT 87, ¶ 11, 16 P.3d at 536 (quoting Utah Const. art. I, § 26). Where a provision "does not contain express words declaring that it is not 'mandatory and prohibitory,'" its text is sufficient to satisfy the first factor. *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 62, 250 P.3d 465. Art. XX, § 1, contains no express limiting language, so the first factor is satisfied. Neither the State nor the Water Users make any argument to the contrary.

2. Article XX, Section 1, Is Judicially Definable and Enforceable

Second, Art. XX, § 1, is judicially definable and enforceable. Satisfaction of this second *Spackman* factor turns on an inquiry into whether the "plain language" of a provision "sufficiently gives effect to the underlying rights and duties without implementing legislation." *Jensen*, 2011 UT 17, ¶ 63, 250 P.3d at 482. This inquiry "requires 'careful analysis of the precise terms' in the provision and the framer's original meaning of those terms." *Kuchcinski v. Box Elder Cty.*, 2019 UT 21, ¶ 19, 450 P.3d 1056 (quoting *Zimmerman v. Univ. of Utah*, 2018 UT 1, ¶ 19, 417 P.3d 78).

The plain language of Art. XX, § 1, gives effect to a state duty to hold public lands in trust. *See* Utah Const. art. XX, § 1 ("[The] public lands of the State … shall be held in trust for the people[.]"). On a purely textual basis, the provision contains the word "shall," which signals a mandatory state obligation. Further, the provision creates this trust obligation without the need for implementing legislation. Unlike the State's power to adjust tax rates, the legislature has

never "limited the circumstances in which" the State can exercise its trust authority under Art. XX, § 1. *Alpine School Dist. Bd. of Educ. v. State Tax Comm'n, Prop. Tax Div.*, 2000 UT App 319, ¶ 13, 14 P.3d 125. And while constitutional language stating that "the rights expressed in [a constitutional provision] must be protected through 'appropriate legislation'" is not self-executing, *see Harvey v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 2017 UT 75, ¶ 77, 416 P.3d 401, that is not the case with Art. XX, § 1. The provision *requires* the State to hold public lands in trust and then states that such land *may* be disposed of pursuant to subsequent legislation. This is distinct from, say, Art. XVI, § 7, which the Utah Supreme Court held not to be self-executing largely because the provision "states that '[t]he Legislature … *shall* provide for enforcement of the provisions of this article.'" *Harvey*, 2017 UT 75, ¶ 77, 416 P.3d at 427 (emphasis added). Art. XX, § 1, contains no equivalent language.

The framers' intent and understanding of this article confirms such an interpretation of Art. XX, § 1. The framers of Utah's Constitution distinguished between the State's duty to hold public lands in trust and its ability to dispose of those lands "as may be provided by law." They were clear that, in contrast to the disposal of these lands—which was a matter best left to the legislature—the duty to hold these lands "in trust for the people" was within the power of the convention to fix in the Constitution. For this reason, the convention eliminated proposed language stating that public lands "shall be classified by the board of land commissioners" according to a complex taxonomy, *see* OFFICIAL REPORTS 808, 1765, and trimmed a lengthy draft article down to a straightforward command: that all public lands be held in trust. *Id*. at 1701–02 (emphasis added). The Water Users' argument fails because it neglects to engage *at all* with the historical record—or even to grasp the basic distinction between the hold-in-trust obligation and the disposal power. *See* Water Users' Mot. at 26.

For its part, the State claims that its "duty to '[hold] in trust for the people' the sovereign lands of the state . . . does not sufficiently enunciate the duties under which such a general statement of policy could be enforceable," FFSL Mot. at 15, but provides no reasoning or precedent to support this conclusory statement. This stands in stark contrast to the reasoned conclusions of sister states, which have held that nearly identical hold-in-trust provisions are judicially definable and enforceable because they sufficiently give effect to the underlying rights and duties without the need for implementing legislation. For instance, the original Montana Constitution (adopted in 1889, i.e., less than a decade before the Utah Constitution) contained the following lands provision: "All lands of the state that have been, or that may hereafter be granted to the state by congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised[.]" Mont. Const. art. XVII, § 1 (1889).[29] The Montana Supreme Court held that this provision is "clear and unambiguous and require[s] no construction," so it is "self-executing and mandatory in form." *State ex rel. Boorman v. State Bd. of Land Comm'rs*, 94 P.2d 201, 203 (Mont. 1939). The same conclusion applies here.

Further, as Physicians explained at length in the political question section of this brief, *see supra* pt. IV, Utah courts "appl[y] common-law trust principles" in public trust cases, *VR Acquisitions*, 2019 UT 7, ¶ 86, 439 P.3d at 610, so the common law trust duties of loyalty, impartiality, and prudent administration guide the State's obligation to "h[o]ld [public lands] in trust for the people." Utah Const. art. XX, § 1. For this reason, the Water Users' suggestion that

[29] In the current Montana constitution, adopted in 1972, a nearly identical provision is at Art. X, § 11.

Art. XX, § 1, "mandates 'a general principle or line of policy' *without* 'supplying the means for putting them into effect,'" Water Users' Mot. at 26 (emphasis in original), fails. And contrary to the State's unsupported suggestion, judicial confirmation of the self-executing nature of Art. XX, § 1, would not provide a cause of action for plaintiffs seeking to challenge "a mere disagreement over land management practices," FFSL Mot. at 15–16, but rather would allow the beneficiaries of the public trust in land to challenge the State's failure to comply with these longstanding trust duties.

3. Article XX, Section 1, Constitutionalized Existing Concepts

Third, Art. XX, § 1, constitutionalized existing public trust concepts rather than creating a novel provision requiring legislative implementation. As noted above, *see supra* pt. I.C, the Utah Supreme Court has confirmed that *Illinois Central*, decided just three years before ratification of the Utah Constitution, can "help inform the search for the historical understanding of the public trust principles embedded in the Utah Constitution." *VR Acquisitions*, 2019 UT 7, ¶ 73, 439 P.3d at 608 n.5. In *Illinois Central*, the U.S. Supreme Court unambiguously confirmed that the state "holds title to soils under tide water," which "necessarily carries with it control over the waters above them . . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein[.]" 146 U.S. at 452. The State therefore has a duty to protect sovereign lands from actions that would cause "substantial impairment of the public trust in the lands and waters," including the trust uses of navigation, commerce, and fishing. *Id*. at 453. It is precisely this duty that was constitutionalized in Art. XX, § 1: the "public lands of the State . . . shall be held in trust for the people."

Indeed, the Utah Supreme Court has effectively recognized this in *VR Acquisitions*, where it explained that "the district court may have erred in" suggesting that a court could

uphold a state law restricting "the use of certain public lands so long as other, 'remaining' lands are not 'substantially impair[ed].' . . . Indeed, the *Illinois Central* court at least arguably suggests the opposite." 2019 UT 7, ¶¶ 75, 77, 439 P.3d at 608–09. Thus, the context in which the State adopted Art. XX, § 1, shows the framers intended to constitutionalize the hold-in-trust principles embodied in *Illinois Central*, rather than create a new provision requiring legislative implementation. Because the three *Spackman* factors are satisfied, Physicians possess a self-executing cause of action to enforce the Utah Constitution's trust guarantees.

C. No Disposal of Land is Necessary for Physicians to Seek an Equitable Remedy

The State's suggestion that "a breach of the public trust doctrine is actionable only when evaluating the propriety of a disposal of sovereign lands," FFSL Mot. at 16, is illogical and unsupported. Physicians can bring suit under the public trust doctrine when the state fails in its duty to "preserve" trust resources "for the general public for uses such as commerce, navigation, and fishing." *Colman*, 795 P.2d at 635. This does not depend on the disposal of trust resources, because protected uses of these resources can be impaired in the absence of disposal. *Cf. Chernaik v. Brown*, 436 P.3d 26, 32 (Or. Ct. App. 2019), *aff'd* 475 P.3d 68 (Or. 2020) ("[T]he state may not convey interests in those lands *or* allow uses of those lands or the waters over them in a manner that causes a substantial impairment to the public's right to navigation, commerce, fishing, or recreation in those waters." (emphasis added)).

Indeed, public trust plaintiffs *routinely* challenge state action that they allege is harming trust resources without a disposal of those trust resources (much less trust lands in particular). *See, e.g.*, *Min. Cnty.*, 473 P.3d at 422–23 (county plaintiff invoking the public trust doctrine to challenge water appropriations affecting Walker Lake); *Kramer v. City of Lake Oswego*, 446 P.3d 1 (Or. 2019) (plaintiffs suing under the public trust doctrine to challenge municipal restrictions

on recreational access to Oswego Lake); *Mono Lake*, 658 P.2d at 711–12 (plaintiff bringing suit under the public trust doctrine to challenge upstream diversions affecting Mono Lake). For example, in *United Plainsmen Association*, 247 N.W.2d 457 (N.D. 1976), plaintiffs brought suit under the public trust doctrine to challenge water appropriations in the absence of conservation planning. The state water agency and State Engineer urged the state supreme court to interpret the doctrine "in a narrow sense, limiting its applicability to conveyances of real property," but the court squarely rejected this argument: "We do not understand the doctrine to be so restricted. The State holds the navigable waters, as well as the lands beneath them, in trust for the public." *Id*. at 461.

In the school trust context, the Utah Supreme Court has firmly rejected the "distinction between trust duties owed during possession of the land and trust duties owed on disposition of the land [a]s essentially an argument that a trustee can use the trust corpus for its own purposes during possession and that the trust obligations attach only on disposition of trust assets or realization of proceeds therefrom." *NPCA*, 869 P.2d at 920 n.7. Rather, the trust duty demands that the State preserve trust resources as well as refrain from violating the doctrine in the disposition of those resources.

Tellingly, the State cites just one case for support, and its reliance on this case is misleading. The State provides a block quotation purportedly from *VR Acquisitions*, and then argues that the decision limited Article XX's trust clause "exclusively" to situations involving "land disposals." FFSL Mot. at 16–17 (citing *VR Acquisitions*, 2019 UT 7, ¶¶ 61–92, 439 P.3d at 606–11). Yet the apparent quotation is entirely the State's invention—it appears nowhere in *VR*

Acquisitions, and it reflects no test or holding from that case.[30] Furthermore, the *VR Acquisitions* Court did not limit Article XX to land disposals. While it underscored the State's trust obligations when disposing of lands, it also noted the State's "independent duty attaching to public lands—a requirement that the State hold such lands 'in trust for the people' while such lands are still owned by the State, and before they are sold or devised." 2019 UT 7, ¶ 68, 439 P.3d at 607 (quoting Utah Const. art. XX, § 1). This Court should reject the State's spurious formulation.

D. The Water Users' Arguments Regarding the Probate Code are a Red Herring

Casting about for a basis to exclude Plaintiffs' claim for relief, the Water Users seize on two passing references in the Complaint to Utah Code Ann. § 75-7-1001. *See* Water Users' Mot. at 27–28. The Water Users then proclaim, "If the legislature intended to include in the *probate* code the 'public trust' over Article XX's sovereign land, *and* the public's water, surely it would have said so." *Id*. (emphases in original); *see also id*. at 17. Because it did not, the Water Users conclude that Plaintiffs "have no claim" thereunder and the case must be dismissed in its entirety. *Id*. at 27.[31]

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[30] Instead, the Court "discussed" questions somewhat similar to those that the State wrongfully presents as a judicial test *because the State and the Plaintiff posed them* in their "briefs filed with the court." 2019 UT 7, ¶ 59, 439 P.3d at 606. The Court was simply responding to the parties' allegations, not formulating a legal test, a point underscored by the Court's statement that it "stop[ped] short of resolving the case on these grounds." *Id*.

[31] The Water Users make much of the fact that the Utah Uniform Trust Code is codified within the Utah Uniform Probate Code. *See Matter of Estate of Osguthorpe*, 2021 UT 23, ¶ 66 n.17, 491 P.3d 894 ("The Utah Uniform Probate Code is all of Title 75 of the Utah Code. The Utah Uniform Trust Code is Chapter 7 of Title 75."). But obviously this does not foreclose plaintiffs from seeking trust remedies in suits other than those concerning probate matters. Indeed, the Water Users' own counsel knows this well, as they have represented parties in trust cases having nothing to do with probate in which the State nonetheless relied extensively on the Trust Code. *See* Reply Brief of State of Utah & Utah Att'y Gen., *In the Matter of the United Effort Plan Trust*, No. 20120300, 2012 WL 10678168, at *8–10 & n.6 (Utah Sup. Ct. June 4, 2012).

This argument is irrelevant. Plaintiffs do not purport to state a claim under the probate code. Rather, Plaintiffs have brought a common law public trust claim. *See supra* pt. VI.A; *see also* Compl. at 26–27. Plaintiffs cited to § 75-7-1001 in their complaint simply because that is where the Utah legislature codified common law trust remedies, adopting the Uniform Trust Code's remedies provision verbatim and in full. *See* Unif. Trust Code § 1001 cmt. ("This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary."). Indeed, the Editors' Notes make crystal clear, "This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code *but also by the common law of trusts and principles of equity*." *Id*. (emphasis added). The Trust Code further provides an express savings clause: "The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or laws of this state." Utah Code Ann. § 75-7-106. Physicians' citation to § 75-7-1001 does not deprive them of the very remedies the legislature sought to codify—or cut off their access to the common law remedies preserved by the Trust Code's savings clause.

Additionally, Physicians sought injunctive relief "pursuant to Utah Code Ann. § 75-7-1001 *and this Court's equitable authority*." Compl. at 28, ¶ 2 (emphasis added); *see also id*. ¶ 18 ("This Court has the power to grant declaratory and equitable relief pursuant to the Utah Declaratory Judgment Act, Utah Code Ann. § 78B-6-401 et seq., as well as *id*. § 75-7-1001 *and the general equitable powers of this Court*." (emphasis added)). Even under the most strained reading of Physicians' Complaint, their claim for relief is not limited to the Trust Code.

E. The Water Users' Arguments Regarding Extraordinary Relief are Equally Irrelevant

Finally, the Water Users argue that even though "Plaintiffs do not expressly couch their claim as a petition for extraordinary relief under Rule 65B," Plaintiffs "seek that kind of relief." Water Users' Mot. at 29. This attempt to put words in Physicians' mouths is unfounded and unavailing.

The Water Users' argument fails for the simple reason that Physicians did not bring a petition for extraordinary relief under Rule 65B. *See* Compl. at 26–27. Instead, Physicians sought declaratory and injunctive relief, *id*. at 27–29, which are the ordinary forms of relief that public trust plaintiffs routinely seek. *See, e.g.*, *Mono Lake*, 658 P.2d at 716 ("[C]ontinued diversions threaten to turn [Mono Lake] into a desert wasteland . . . . To abate this destruction, plaintiffs filed suit for injunctive and declaratory relief[.]"); *Coastal Conservation Ass'n v. State*, 878 S.E.2d 288, 294–95 (N.C. Ct. App. 2022) ("Plaintiffs are seeking declaratory and injunctive relief against the State seeking a declaration the State has breached its alleged obligations under the public trust doctrine and enjoining the State from further violations of its alleged obligations under the public trust doctrine."). Declaratory and injunctive relief are sufficient to remedy Physicians' injuries, which is why Physicians sought these forms of relief. The Water Users' disquisition on Rule 65B is irrelevant to this case—and no basis to dismiss.

VII. This Court Has Subject Matter Jurisdiction Over the State's Breach of Its Public Trust Obligations

The Utah Constitution provides that "[t]he district court shall have original jurisdiction in all matters except as limited by this constitution or by statute." Utah Const. art. VIII, § 5. This is a "broad jurisdictional grant," *Western Water, LLC v. Olds*, 184 P.3d 578, 590 (Utah 2008), which has been codified by statute. *See* Utah Code Ann. § 78A-5-102(1) ("Except as otherwise provided by the Utah Constitution or by statute, the district court has original jurisdiction in all

matters civil and criminal."). Given that authority, the Utah Supreme Court has long held that the court's "jurisdiction of equity in *all* cases of trust . . . is *unquestioned*." *Decorso*, 50 P.2d at 956 (emphasis added). There can thus be no question that this Court has subject matter jurisdiction over this public trust lawsuit against the State.

Nonetheless, the Intervenor Water Districts attempt to strip this Court of subject matter jurisdiction by mischaracterizing the case and the relief sought—a pattern that is repeated in virtually every ground for dismissal addressed in the remainder of this brief. First, they claim that the case is "essentially" a general adjudication to establish water rights, and thus is barred by statute. Water Districts' Mot. at 22. Alternatively, they assert that the case "targets" federal property, and thus is barred by sovereign immunity. *Id*. at 19–21. Neither is true. This is a public trust action against the State; the Court's subject matter jurisdiction is unquestioned; and the Water Districts should stop trying to lead this Court astray by mischaracterizing this case as something it is not.

A. This Is a Public Trust Action, Not a General Adjudication

The nature of a case is determined by the pleadings and, specifically, by what the request for relief seeks to accomplish. *See Carter v. State*, 2015 UT 38, ¶ 20, 345 P.3d 737 ("The jurisdictional question is resolved by looking at the claim for relief and ascertaining whether the forum in which the claim is brought has authority to decide it."). Here, the Complaint sets forth all of the elements establishing the State's breach of its public trust duties. For relief, it seeks a declaration regarding the scope of the State's public trust obligations and an injunction to ensure the State complies with those duties in a timely manner. Compl. at 27–29. Thus framed, the case falls squarely within the court's "unquestioned" subject matter jurisdiction over trust suits. *Decorso*, 50 P.2d at 956.

The Water Districts try to strip the Court of its jurisdiction by misrepresenting the case as "essentially" a statutory general adjudication subject to Utah Code Ann. § 73-4-3. Water Districts' Mot. at 22. Not so. Statutory adjudications are distinct in almost every way. They arise when a suit calls for "a *determination of the rights*" of competing claimants, *see* Utah Code § 73-4-3(1) (emphasis added), as in *Salt Lake City v. Anderson*, 148 P.2d 346 (Utah 1944). There, Salt Lake City named more than 2,000 parties "who claim rights to the use of water from" Utah Lake and its tributaries. *Id*. at 347. The city sought an order "that the rights and title of each plaintiff . . . be *determined and quieted*" and that the "rights of each defendant . . . be *adjudged and determined*." *Id.* (emphases added). It further sought injunctive relief to ensure "full exercise and enjoyment . . . of every right herein decreed." *Id*. Given the relief sought, the court concluded that the case fit within the "exclusive statutory method provided for the determination of relative rights in a river system"—that is, a statutory adjudication under Title 73. *Id.* at 349.

Unlike *Anderson*, Physicians do not request that any water rights be "determined," "adjudged," or "decreed" by the Court. *Id.* at 347. Nor do they seek a judicial determination about the "relative" priority between users "in a river system." *Id.* at 349. This case is not a statutory adjudication, and it would be an abuse of discretion to treat it as such. *See Second Big Springs Irr. Co. v. Granite Peal Properties LC*, 2023 UT App 22, ¶¶ 43, 46, 526 P.3d 1263 (holding that district court abused its discretion by treating an interference action as a general adjudication).

Even so, the Water Districts argue that because the Court will have to remand the case to the State to "review" and "modify any diversions" that are inconsistent with the public trust, "Plaintiffs are *essentially* asking for a general adjudication." Water Districts' Mot. at 22 (emphasis added). The Water Districts are wrong. Existing rights are held subject to the public

trust, imposing fiduciary obligations that cannot be abdicated by the State. *See supra* pt. I.D. The Complaint thus focuses on the *State's* obligation to modify water usage, where necessary, to comply with the public trust doctrine, not to adjudicate water rights. The statutory adjudication procedures are inapplicable because no adjudication is being sought. *Morris v. Smith*, 288 P. 1068, 1070 (Utah 1930) ("[T]he provision of law relied upon is limited in its application to suits wherein a general adjudication is sought.").

There is no basis for the Water District's sweeping assertion that every case potentially involving "imported water" must proceed as a general adjudication. Water Districts' Mot. at 24–26. The case cited by the Water Districts—*In re Uintah Basin*, 2006 UT 19, 133 P.3d 410—provides no such rule.[32] There, the parties sought a judicial determination about who had the right to appropriate the return flows of water imported by the Strawberry Valley Project. *Id*. ¶ 5, 133 P.3d at 413. The United States submitted a claim to recapture 49,200 acre-feet of return flows, whereas the water users submitted a competing claim for 64,400 acre-feet. *Id.* ¶ 22, 133 P.3d at 417. Given the relief sought—a determination of the validity of competing water-right claims—the Utah Supreme Court concluded that the issue should be resolved as part of the ongoing general adjudication for the basin. *Id.* ¶¶ 59–60, 133 P.3d at 427. There is nothing remarkable in that conclusion—the issue was suitable for a general adjudication not because it involved "imported water," but because it sought a judicial determination of competing claims.

[32] Indeed, such a rule would contravene the extensive caselaw recognizing that numerous cases involving water rights are *not* general adjudications, nor should be treated as such. *See, e.g.*, *Second Big Springs*, 2023 UT App 22, ¶ 27, 526 P.3d at 1275 ("[S]uits involving water rights [are] not necessarily general adjudications." (quotation marks omitted)).

By contrast here, Plaintiffs are not seeking to determine any water rights, readily distinguishing *In re Uintah Basin*.[33]

It would not only be error "to force" this case "through the statutory procedure for a general adjudication," but a trap. *Second Big Springs*, 2023 UT App 22, ¶ 27, 526 P.3d at 1275. The State maintains that adjudications are not appropriate proceedings to resolve any subject other than the validity and relative priority of rights. *See* Brief of Amicus Curiae Utah State Engineer in Support of Appellants, *Second Big Springs Irrigation Co. v. Granite Peak Properties LC*, No. 20210207, 2021 WL 9666506, at *11–13 (Utah Ct. App. Sept. 2, 2021). Under that view, the public trust doctrine is outside the scope of water adjudications. The Water Districts' attempt to transform this case into a general adjudication is thus nothing more than an attempt to foreclose consideration of the public trust. That would destroy the very foundation of the public trust doctrine, which is this: when the State abdicates its obligation to protect trust resources, it is this Court's duty to ensure the State complies with its trust obligations. *See supra* pt. IV.A. This

[33] The Water Districts also provide a lengthy discussion of imported water, suggesting that it warrants "special treatment" and could raise complex issues for the State to consider on remand. Water Districts' Mot. at 24. The arguments are not ripe as the State has yet to undertake its foremost task on remand and consider feasible means to protect the public trust. *See Salt Lake Cnty. v. State*, 2020 UT 27, ¶ 22, 466 P.3d 158 (holding that a claim "premised on a merely hypothetical state of facts" is "unripe"); *Teamsters Loc. 222 v. Utah Transit Auth*., 2018 UT 33, ¶ 14, 424 P.3d 892 ("[Plaintiff] wants us to decide this case to avert a future case . . . . But such a decision would run afoul of the doctrine of ripeness."). Furthermore, as the Water Districts note, the issue about appropriating return flows of imported water has "been addressed and decided" in the Utah Lake-Jordan River general adjudication. Water Districts' Mot. at 25 n.12 (providing link to proposed order). According to the proposed order in that case, and consistent with basic principles of water law, no matter who appropriates the return flows of imported water, "imported water is public water subject to Utah law[.]" State Engineer, Proposed Order, *In the Matter of the General Determination of the Rights to the Drainage Area of Utah Lake and Jordan River*, Civil No. 360057298, at 2 (Apr. 14, 2009), https://waterrights.utah.gov/strawberryreturnflow/Proposed%20Determination%20and%20Recommendation.pdf.

Court has broad—indeed unquestioned—subject matter jurisdiction to resolve this public trust suit.

B. Sovereign Immunity Is No Bar to This Public Trust Case Against the State

Sovereign immunity bars those suits that are "prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821). Whether or not a suit is against the sovereign depends upon whether the government is "the real, substantial party in interest" in the proceeding. *See United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 433 (7th Cir. 1991) (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101 (1984)).

Here, the Water Districts have failed to demonstrate that the United States is a "real, substantial party in interest" in this case. As they acknowledge, the United States is not a named party to the case. *See* Water Districts' Mot. at 20. That is not an oversight. It reflects the fact that the case seeks a declaration that the *State of Utah* breached its public trust obligation and an order directing the *State of Utah* to comply with those trust obligations. The proceeding does not require the United States' involvement; sovereign immunity is not at issue. *See Ching*, 449 P.3d at 1169 (holding that sovereign immunity was not an issue because the United States was not a necessary party in a public trust lawsuit against the State).

Nonetheless, the Water Districts try to invoke sovereign immunity on the grounds that the United States' interests are "substantial" due to the total amount of "Reclamation-owned water rights." Water Districts' Mot. at 19. But the Utah Supreme Court rejected just such a misstatement in the very case cited by the Water Districts, *In re Uintah Basin*, 2006 UT 19, ¶ 35, 133 P.3d at 421. There, the court explained that "beneficial ownership" of water resides in the water users, *not* the Bureau of Reclamation, which was a "stranger" to the "day-to-day beneficial use" of the water. *Id.* ¶ 43, 133 P.3d at 423. The Court thus emphasized that Reclamation's "ownership" of water is at most "*nominal*." *Id.* ¶ 38, 133 P.3d at 422 (quoting *Nevada v. United*

States, 463 U.S. 110, 126 (1983)) (emphasis in original). Indeed, courts have repeatedly explained that "[t]he reclamation laws did *not* vest in the United States ownership of any water rights except for those properly appropriated and put to beneficial use[.]" *Grey v. United States*, 21 Cl. Ct. 285, 295 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991) (emphasis added); *see also Nevada*, 463 U.S. at 126 (holding that "the Government is *completely mistaken*" in claiming "'ownership' of the water rights" (emphasis added)); *United States v. Pioneer Irr. Dist*., 157 P.3d 600, 603–09 (Idaho 2007).[34] The Water Districts have thus failed to demonstrate a "substantial, real interest" of the United States that would provide the basis for invoking sovereign immunity. *See Rural Elec.*, 922 F.2d at 435 (rejecting any categorical rule that sovereign immunity applies whenever United States has "some legal interest in property, however attenuated this interest may be").[35]

The Water Districts cannot make up for this shortfall by conflating Reclamations' ownership of "project facilities" with "water rights." Water Districts' Mot. at 19; *see also id.* at 8 (emphasizing that Reclamation owns "[t]itle to the project *works*" (emphasis added)). The Utah

[34] Furthermore, in *Strawberry Water Users Association v. United States*, 576 F.3d 1133 (10th Cir. 2009)—another case cited by the Water Districts—the Tenth Circuit built on *Uintah Basin* and affirmed the "equitable ownership" of beneficial users, rather than Reclamation. *Id*. at 1147. The Tenth Circuit further made clear that *Uintah Basin* was consistent with U.S. Supreme Court precedent declaring that "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law," *California v. United States*, 438 U.S. 645, 675 (1978), with state water law taking precedence in all instances except where directly contrary to "specific congressional directives." *Id*. at 672 n.25.

[35] Notably, the Water Districts do not identify any water appropriations put to beneficial use by Reclamation. Instead, they claim that "89% of the water rights" in the Weber Basin Water Conservancy District and 83 percent of the water rights in the Central Utah Water Conservancy District are "owned" by the federal government. Water Districts' Mot. ¶ 22, 41; *see also id*. at 19. The Utah Supreme Court *squarely* rejected that contention. *See In re Uintah Basin*, 2006 UT 19, ¶ 30, 133 P.3d at 419 (rejecting the federal government's claim to be the "owner" of "water rights" it did not put to beneficial use and concluding that the *water users* in fact owned the water rights).

Supreme Court rejected just such an argument in *In re Uintah Basin* because it found no support in the law. *See* 2006 UT 19, ¶ 30, 133 P.3d at 419; *see also Nevada*, 463 U.S. at 125 ("[T]he water-rights became the property of the land owners, wholly distinct from the property of the government in the irrigation works."). As owner of the project facilities, the Bureau of Reclamation is best understood as "a carrier and distributor of water." *Id.* at 123 (quoting *Ickes v. Fox*, 300 U.S. 82, 95 (1937)); *see also Nebraska v. Wyoming*, 325 U.S. 589, 614–15 (1945) ("The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals . . . . [I]ndividual landowners have become the appropriators of the water rights, the United States being the storer and the carrier."). That is not a basis for the Water Districts (let alone the State) to hide behind sovereign immunity. *See City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992, 1013 (Colo. 1954) (holding that United States' "interest" as a carrier did not "extend" sovereign immunity to water users).

At any rate, there is no evidence that the case impairs the United States' interests. *Rural Elec. Convenience Co-op. Co.*, 922 F.2d at 436 ("[T]he government's interest must be determined in each case by the essential nature and effect of the proceeding as it appears from the entire record." (quotations omitted)). Notably, the United States has not appeared to present any evidence that a ruling against the State of Utah would impair a "real, substantial interest" of the United States.[36] The Water Districts do not present any evidence, either.[37] Rather, they

[36] That stands in stark contrast to cases cited by the Water Districts where the United States was either a party or appeared to assert that sovereign immunity barred the case from proceeding. *See, e.g.*, *In re Bear River Drainage Area*, 271 P.2d 846, 847 (Utah 1954); *Minnesota v. United States*, 305 U.S. 382, 384 (1939); *Neukirchen v. Wood Cnty. Head Start, Inc.*, 53 F.3d 809, 811 (7th Cir. 1995).

[37] The Water Districts attempt to mount a "factual attack" on jurisdiction pursuant to Rule 12(b)(1). Water Districts' Mot. at 18. But their evidence simply confirms that Reclamation owns facilities associated with the Weber Basin and Central Utah Project. *See id.* at 19 (citing *id*. ¶¶

mischaracterize the nature of this case, falsely claiming that it "targets" the United States' interests. Water Districts' Mot. at 20. But this is not a general adjudication that seeks to "quiet title" to water rights, readily distinguishing it from the cases cited by the Water Districts. *See In re Bear River*, 271 P.2d 846, 848 (Utah 1954); *In re Uintah Basin*, 2006 UT 19, ¶¶ 23–25, 133 P.3d at 417–18 (acknowledging that United States would be immune from a general adjudication, absent a waiver of sovereign immunity). Indeed, this case is distinguishable from *every* case cited by the Water Districts as "targeting" federal property. Water Districts' Mot. at 20. This is not a suit by a contractor to recover funds paid to the United States. *See Blake Constr. Co. v. Am. Voc. Ass'n*, 419 F.2d 308 (D.C. Cir. 1969). It is not an action brought by a state to condemn a federal highway. *See Minnesota v. United States*, 305 U.S. 382 (1939). It is not an action by a creditor seeking to execute a judgment against federal property. *Neukirchen v. Wood Cnty. Head Start, Inc.*, 53 F.3d 809 (7th Cir. 1995). It is a public trust suit against the State that does not impair the United States' interests.

Ultimately, Water Users try to invoke sovereign immunity based on speculation about how the State might "do the job" on remand. Water Districts' Mot. at 21. But that is not adequate. *See United States v. Rural Elec. Convenience Co-op. Co*., 768 F. Supp. 256, 259 (C.D. Ill. 1991) (refusing to dismiss case where United States failed to present "sufficient, credible evidence" establishing impairment of its sovereign interests). Nor does it demonstrate *this* case implicates the United States. Even assuming the State took some future action on remand that affected an interest of United States, that would not warrant dismissal of this case on sovereign immunity

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15.d, 21.k, 32, 36.h, 40, 50). Noticeably absent, however, is any "specific evidence" that this lawsuit harms those interests. *See United States v. Rural Elec. Convenience Co-op. Co*., 768 F. Supp. 256, 259 (C.D. Ill. 1991). Even assuming such evidence, sovereign immunity still would not extend to this case against the State, as explained. *See City & Cnty. of Denver*, 276 P.2d at 1013. The Water Districts' "factual attack" is thus factually and legally unavailing.

grounds given "the United States' ability to defend itself against any such speculative future claim" in a future proceeding. *Ching*, 449 P.3d at 1169. Sovereign immunity is thus no bar to this Court's subject matter jurisdiction.

VIII. Exhaustion Does Not Bar this Suit to Enforce the Public Trust

Defendants next argue that the case must be dismissed because Physicians did not exhaust the administrative remedies provided by the Utah Administrative Procedures Act ("UAPA"). *See* DNR Mot. at 29–31; FFSL Mot. at 20–24. These arguments fail for the simple reason that Physicians have not sought judicial review under UAPA; instead, Physicians have brought a public trust claim. UAPA itself makes clear that its exhaustion requirements do not apply to those who avail themselves of another legal remedy, such as a public trust cause of action. Therefore, Physicians are not bound by the exhaustion requirements imposed by UAPA. Nor must Physicians petition FFSL.

A. UAPA's Exhaustion Requirements Do Not Apply

The State's argument that Physicians have neglected to exhaust administrative remedies fails to withstand scrutiny. Under Utah law, "[w]here the legislature has imposed a specific exhaustion requirement . . . [courts] will enforce it strictly." *Patterson v. Am. Fork City*, 2003 UT 7, ¶ 17, 67 P.3d 466. Here, however, *no* administrative exhaustion requirement applies because no state law specifies that plaintiffs bringing a public trust claim must exhaust any administrative remedies. To the contrary, plaintiffs may "proceed independently of the review procedures mandated by" procedural statutes. *Juliana*, 947 F.3d at 1167–68 (for plaintiffs proceeding independently of the federal Administrative Procedure Act); *see also Mono Lake*, 658 P.2d at 729 (holding that public trust plaintiffs have no need to "exhaust their administrative remedies before the Water Board prior to filing suit in superior court" because the plaintiffs "expressly disclaim any intent to [utilize a Water Board remedy], and announced instead their intent to found their

action solely on the public trust doctrine"); *Parsons v. Walker*, 328 N.E.2d 920, 925–27 (Ill. Ct. App. 1975) (holding that plaintiffs' public trust claim does not require exhaustion, i.e., a petition pursuant to the state's environmental protection statute).

Nevertheless, the State asks this Court to dismiss the case because Plaintiffs did not follow the exhaustion requirements that apply to those challenging individual water appropriation decisions. *See* DNR Mot. at 29–30. According to the Utah water code, a "person aggrieved by an order of the state engineer may obtain judicial review in accordance with the requirements of [UAPA]," Utah Code Ann. § 73-3-14(1)(a), which allows a party to "seek judicial review only after exhausting all administrative remedies available." *Id*. § 63G-4-401(2). Yet those requirements are inapplicable as Physicians are not seeking "judicial review of applications to appropriate approved by the State Engineer," contrary to the State's mischaracterization. DNR Mot. at 30. Rather, Physicians are challenging the State's failure to *supervise* water appropriations throughout the Great Salt Lake basin, which are held subject to the public trust in the first instance. The case thus concerns the State's widespread failure (and adamant refusal) to identify and supervise water appropriations that are imperiling Great Salt Lake—a breach of its public trust obligations.[38] For this reason, Physicians are not bound by the exhaustion requirements applicable to those challenging an individual appropriation decision.

The State's attempt to impose such inapplicable exhaustion requirements is contrary to the text of UAPA and the Utah water code. By its terms, UAPA "does not affect a legal remedy

[38] Given this framing, the State's citation to *HEAL Utah v. Kane County Water Conservancy District*, 2016 UT App 153, 378 P.3d 1246, is sorely misplaced. *See* DNR Mot. at 30 n.134. That case involved a challenge to the State Engineer's decision to approve a change-in-use application on the grounds that it violated the statutory criteria set forth in the Water Code. It had nothing to do with the State's failure to supervise water appropriations, as required by the public trust doctrine.

otherwise available to . . . compel an agency to take action," Utah Code Ann. § 63G-4-102(3)(a), meaning it imposes no procedural obligations on those who avail themselves of a separate legal remedy, such as a public trust cause of action. Nor can Defendants impose UAPA's requirements by reference to the water code, as Plaintiffs are not challenging any individual water appropriation.[39] Even assuming the water code's procedural demands had relevance to this action, which they do not, the code states that UAPA's exhaustion requirements "are *not* a prerequisite to filing a judicial action for . . . declaratory, injunctive, or other relief, based on the use of water under an existing water right." Utah Code Ann. § 73-3-32 (emphasis added). This too defeats the State's argument about this case, which seeks declaratory and injunctive relief for the State's failure to modify existing diversions.

Casting about for an alternative basis to exclude Physicians' public trust claim, the State cites inapposite precedent holding that "the mere introduction of a constitutional issue does not obviate the need for exhaustion of remedies." DNR Mot. at 31 (quoting *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 16, 34 P.3d 180). Such a rule has no relevance here despite the constitutional basis of Physicians' claims. *See supra* pt. I.C. The court in *Nebeker* held that "parties must exhaust *applicable* administrative remedies as a prerequisite to seeking judicial review," 2001 UT 74, ¶ 14, 34 P.3d at 184 (emphasis added), but here, for the reasons already stated, there is no applicable administrative remedy that Physicians need exhaust to obtain the relief they seek.

[39] Courts have clarified that the term "aggrieved" as used in the water code (and echoed by DNR) refers to "a party . . . in the proceeding sought to be reviewed." *Utah Alunite Corp. v. Jones*, 2016 UT App 11, ¶ 7, 366 P.3d 901. Because Plaintiffs were party to *no* appropriation proceedings—and are seeking review of *no* appropriation proceedings—they are not "aggrieved" within the meaning of the water code, further underscoring the inapplicability of UAPA's requirements regarding such proceedings.

Tellingly, the Utah Supreme Court has rejected the State's argument in the sole constitutional public trust case in which it considered this question. *See VR Acquisitions*, 2019 UT 7, ¶ 46, 439 P.3d at 604. While a "settled, narrow principle of administrative law—the rule of administrative exhaustion . . . requires plaintiffs to exhaust their remedies in an administrative proceeding as a prerequisite to a constitutional challenge in court," that rule "has no application here." *Id*. Because no administrative procedures are "necessary predicates to" to constitutional public trust claims, plaintiffs choosing to litigate those claims need not exhaust any administrative remedies before seeking judicial review. *Id*. ¶ 47, 439 P.3d at 604.

Even assuming exhaustion were a prerequisite (which it is not), there are multiple reasons this Court should not enforce such a requirement in this case. *See Salt Lake City Mission v. Salt Lake City,* 2008 UT 31, ¶ 11, 184 P.3d 599 (identifying exceptions to exhaustion requirement). First, exhaustion would be futile given that the State Engineer has expressly disclaimed any public trust responsibilities and stated that she does not (and, indeed, cannot) consider the public trust in managing *any* water appropriations. *See* DWR Mot. at 17–23. Requiring Physicians to challenge individual appropriations so that the State could reaffirm its denial of the public trust would "serve no purpose" other than to delay resolution of the crucial public trust issues squarely presented in this case. *Salt Lake City Mission*, 2008 UT 31, ¶ 11, 184 P.3d at 602; *see also Walker Bank & Trust Co. v. Taylor*, 390 P.2d 592, 595 (Utah 1964) ("The question here involved, being strictly one of law, is for the courts and an appeal to the board of examiners would have been futile and useless."). Second, exhaustion would delay judicial relief, imperiling the Great Salt Lake, which is on the precipice of environmental collapse. Courts have thus refused to require exhaustion where, as here, it would cause "irreparable injury." *Salt Lake City Mission*, 2008 UT 31, ¶ 11, 184 P.3d at 602. Third, and relatedly, a "likelihood that some oppression or

injustice is occurring" is present here—as State actors daily hasten an environmental and public health catastrophe—"such that it would be unconscionable not to review the alleged grievance." *State Tax Comm'n v. Iverson*, 782 P.2d 519, 524 (Utah 1989).

B. Physicians Are Under No Obligation to Petition FFSL Prior to Filing Suit

FFSL's exhaustion argument is equally inapposite. FFSL echoes DNR in claiming that UAPA "governs" this case, meaning UAPA's exhaustion requirement renders Physicians' claim premature. FFSL Mot. at 20. Yet, as noted above, Physicians have not sought judicial review under UAPA, and UAPA itself states that its requirements do "not affect a legal remedy otherwise available to . . . compel an agency to take action," e.g., a public trust claim. Utah Code Ann. § 63G-4-102(3)(a). For this reason alone, FFSL's exhaustion argument fails.

Nevertheless, Physicians address the details of FFSL's argument to dispel any misunderstanding. FFSL claims that its Administrative Code "provides a mechanism for any person to seek declaratory relief to determine the 'rights, status, and other legal relations under a statute, rule, or order.'" FFSL Mot. at 21 (quoting Utah Admin. Code R652-7-200(4)).[40] It thus concludes that "Plaintiffs could have, and should have, petitioned FFSL for a declaratory order to determine whether Utah Code 65A-10-203, requiring FFSL to develop strategies to manage a fluctuating Lake level, directs FFSL to establish or maintain a minimum Lake level." *Id*.

This argument fails on multiple levels. The Administrative Code provision quoted by FFSL sets forth (and is titled) "Definitions"; it does not establish a mandatory remedy. The full quotation is as follows: "declaratory order: an administrative order arising from an applicability determination that establishes rights, status, and other legal relations under a statute, rule, or

[40] FFSL claims to be quoting Utah Admin. Code R652-7-200(3), *see* FFSL Mot. at 21, but in fact the quotation comes from R652-7-200(4). Elsewhere, FFSL claims to be quoting R652-8-100, *see* FFSL Mot. at 23, but in fact the quotation comes from R652-9-100. Physicians cite to the correct provisions in the body of this brief to avoid confusion.

order." Utah Admin. Code R652-7-200(4). While the Administrative Code does state that a person "*may* petition for a declaratory order," Utah Admin. Code R652-7-300(1) (emphasis added), it imposes no obligation to do so; indeed, the same provision states that a person "may seek information on agency policies or positions without a formal request for a declaratory order." *Id*. No court has ever interpreted this permissive provision to create a mandatory exhaustion requirement, a point FFSL does not (and cannot) contest.[41] Additionally, Plaintiffs need not petition FFSL to determine whether Title 65A "directs FFSL to establish or maintain a minimum Lake level," FFSL Mot. at 21, because Utah's public trust obligations are an attribute of sovereignty itself, grounded in the Utah Constitution and common law. It is the judiciary, not an administrative agency like FFSL, that is suited to interpret such a legal concept. That is especially true where, as here, FFSL has adamantly denied its public trust obligations in its briefing to this Court. Plaintiffs' only option is to seek relief from this Court.[42]

FFSL points for support to *Friends of Great Salt Lake v. Utah Department of Natural Resources*, 2017 UT 15, 393 P.3d 291, claiming that this case "specifically foreclosed a party's ability to bring a claim for declaratory relief without first bringing that request before FFSL at the administrative level." FFSL Mot. at 21–22. However, any implication that this decision established a precedent *requiring* any party suing FFSL to petition the agency first is false and

[41] Indeed, FFSL itself even notes the permissive nature of the petitioning process before nonetheless claiming this process to be mandatory. *Compare* FFSL Mot. at 22 ("Both FFSL's administrative rules and UAPA *authorize and provide* procedures for declaratory orders from the agency" (emphasis added)) *with id*. at 23 ("Plaintiffs were *required* to first follow the administrative procedures for declaratory relief with FFSL" (emphasis added)).

[42] Furthermore, FFSL's arguments are premised on the false assumption that the State's trust obligations are limited to FFSL. That is wrong: *both* FFSL and the State Engineer, acting under the supervision of DNR, have an obligation to carry out the State's trust obligations. Seeking a declaratory order from FFSL or petitioning for consistency review would not resolve the scope of these trust obligations.

misleading. The plaintiffs in *Friends of Great Salt Lake* sought "judicial review under UAPA," so that statute's exhaustion requirement obviously applied. 2017 UT 15, ¶ 59, 393 P.3d at 303. The plaintiffs' "action was *accordingly* limited to review of the administrative action," the court continued, meaning that this limitation was due to the plaintiffs' decision to bring suit under UAPA. *Id*. (emphasis added). Here, Physicians have not sought judicial review under UAPA, so its exhaustion requirement does not apply.[43]

Finally, FFSL argues in the alternative that Physicians "could have filed a petition for consistency review with FFSL to determine whether the agency's actions in managing the lake level of Great Salt Lake are consistent with governing law." FFSL Mot. at 23. Once again, FFSL itself acknowledges that such a remedy is permissive, not mandatory. *See id*. ("could have"). This fact is reflected in the text of the Administrative Code. *See* Utah Admin. Code R652-9-100 (establishing a procedure through which a party "may petition" the executive director of DNR). As with the declaratory order provision, no court has ever interpreted this permissive consistency review provision to create a mandatory exhaustion requirement, a point FFSL does not (and cannot) contest. Additionally, the Administrative Code states that consistency review is appropriate for FFSL actions "directly determining the rights, obligations, or legal interests of specific persons outside of the division." Utah Admin. Code R652-9-200(1). Yet Plaintiffs are challenging basin-wide trust resource management by the State (including FFSL, DWR, and

[43] FFSL also cites *Lake Restoration Solutions, LLC v. Utah Division of Forestry, Fire and State Lands*, No. 230400049 (Utah Dist. Ct. June 2, 2023), claiming that this recent district court order "determined the plaintiff did not properly exhaust administrative remedies when it failed to include its request for declaratory relief within its initial petition for consistency review during the underlying administrative proceedings." FFSL Mot. at 22. This precedent is inapposite for the same reason: the plaintiffs in *Lake Restoration Solutions* sought judicial review under UAPA. The plaintiffs here have not.

DNR), not any *direct* FFSL determination of the rights, obligations, or interests of "specific persons." For this reason as well, FFSL's exhaustion argument fails.

Even assuming these provisions imposed mandatory exhaustion requirements (which they do not), it would be "futile" to require Plaintiffs to seek a declaratory order or consistency review, *Salt Lake City Mission*, 2008 UT 31, ¶ 11, 184 P.3d at 602, because FFSL has categorically disclaimed any obligation to protect the public trust in *water*. *See* FFSL Mot. at 8–14. Requiring exhaustion in this circumstance would therefore be obliging Plaintiffs to engage in an administrative process that the agency itself has stated cannot deliver them the relief they seek. *See Hatton-Ward v. Salt Lake City Corp*., 828 P.2d 1071, 1072–74 (Utah Ct. App. 1992) (applying the futility exception where the petitioner sought damages, fines, and attorney fees, but where the administrative appeal process, by statute, only allowed a single remedy: reinstatement).[44]

IX. The Intervenors' Policy Arguments Do Not Warrant Dismissal

The Water Users briefly claim that "Plaintiffs' theory creates impossible conflicts among state agencies," apparently because the requested relief could interfere with state loans "typically secured" by water appropriations, thereby putting the named state agencies "at cross-purposes"

[44] Because the State's exhaustion arguments fail, so too do its jurisdictional arguments. Both DNR and FFSL rest their jurisdictional arguments exclusively on their exhaustion arguments. *See* DNR Mot. at 29 ("[T]his Court lacks subject matter jurisdiction to reassess [appropriation decisions] because Plaintiffs failed to exhaust administrative remedies."); FFSL Mot. at 21 ("Plaintiffs did not exhaust administrative remedies; therefore, this Court lacks subject matter jurisdiction and must dismiss Plaintiffs' request for declaratory relief[.]"); *id*. at 24 ("Because Plaintiffs failed to exhaust administrative remedies, this Court does not have subject matter jurisdiction over Plaintiffs' request for declaratory relief[.]"). As explained above, these exhaustion arguments fail, so Defendants' jurisdictional arguments necessarily fail as well. No Defendant challenges the basis for subject matter jurisdiction that Plaintiffs pleaded in their complaint: "This Court has jurisdiction over this action pursuant to Utah Const. art. VIII, § 5, and Utah Code § 78A-5-102(1), which provides district courts with original jurisdiction over all civil and criminal matters except as set forth in the constitution or statute." Compl. ¶ 17.

with other state agencies. Water Users' Mot. at 22–23; *see also* Water Resource Authorities' Mot. at 2–4 (claiming that the requested relief runs contrary to "the legislature's policy decisions" to finance water resource projects). This policy argument is unmoored from any basis to dismiss under Rule 12. *See Maxum Indem. Co. v. Wagon Wheel Flea Mkt., Inc.*, No. 8:16-CV-785-MSS-AEP, 2016 WL 9525227, at *4 (M.D. Fla. Oct. 28, 2016) ("public policy arguments have no place in a motion to dismiss and, thus, the Court disregards them outright"). Even assuming the Court considered the argument, it is both premature and meritless.

First, the Water Users' underdeveloped argument comes far too early for this Court to consider. An issue is "unripe for adjudication" where it asks the court to consider the "hypothetical application" of state power "to a situation in which the parties might, at some future time, find themselves." *Redwood Gym v. Salt Lake Cnty. Comm'n*, 624 P.2d 1138, 1148 (Utah 1981); *see also Salt Lake Cnty. v. State*, 2020 UT 27, ¶ 19, 466 P.3d 158 ("[C]ourts should resolve legal issues only where the legal determination can be applied to the facts attendant to a specific controversy."). Here, the Water Users argue that "Plaintiffs' theory" may one day lead to state action that interferes with state loans, Water Users' Mot. at 23, but this is entirely hypothetical. In fact, it is speculative to presume that any particular loan might be impacted by the relief that Physicians seek. Physicians request that the State identify and, where necessary, modify water usage that is harming the public trust; no appropriations have been identified, much less modified. The Water Users acknowledge this uncertainty, noting that "[d]evalued security *could* lead to deficiency judgments," *id*. at 23 n.8 (emphasis added), but they do not allege that *any* security has been devalued or that *any* deficiency judgments have issued. Nor do the Water Resource Authorities provide the necessary evidence of interference, even though they are tasked with administering the loan program.

Such an argument is therefore unripe for adjudication. In *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141, for instance, Lehi City voters sought to place on the municipal ballot certain initiatives regulating the salaries and residency requirements for city employees; the City claimed that the ballot initiatives were unconstitutional in part because they would "impair[] the obligation of contracts." *Id*. ¶ 92, 269 P.3d at 163. The Utah Supreme Court concluded that this argument, "advanced not only prior to the enforcement of the proposed initiatives, but prior to their enactment," was not ripe for review. *Id*. ¶ 93, 269 P.3d at 163. The same is true here—not only has the relief that the Water Users claim will interfere with state loans not yet been implemented; it has not even been ordered. *Cf. Robinson v. Ariyoshi*, 887 F.2d 215, 219 (9th Cir. 1989) (holding that a controversy was not ripe where "the State has not interfered in any way with the parties' use or diversions of the waters of the Hanapepe and its tributaries"). Furthermore, even when the State takes action to comply with its trust duties, it can take any valid concerns about loan security into account when determining *feasible* means of complying with public trust obligations. *See* Compl. 28–29, ¶¶ 1(c), 2(b) (requesting that the Court order Defendants to determine and implement "*feasible* means" of public trust compliance (emphasis added)). This provides an additional reason—a "double barrier"—that "compels" application of "the ripeness doctrine here," as it did in *Carter*, 2012 UT 2, ¶ 94, 269 P.3d at 164.

Second, the Water Users' argument is based on the false premise that "[i]f quantity is cut to benefit GSL, the water right will not 'cover the land' it previously irrigated. It will not be the same right it was when pledged as loan security." Water Users' Mot. at 23. Yet this misunderstands the nature of water appropriations. Water users are *never* guaranteed a set amount of water; rather, an "appropriator has a right to use a given quantity of water each year *when the supply is available in the source* according to his priority." *In re Escalante Valley*, 348

P.2d 679, 683 (Utah 1960). The appropriations that form security for loans are never guaranteed to "cover the land," since junior water users are always vulnerable to a dry year. Further, water rights are held subject to the public trust in the first instance. *See supra* pt. I.D. The relief that Plaintiffs seek would not therefore entail the State modifying water rights; it would be modifying water *usage*. That does not impair the collateral, since the right would be unchanged.

Finally, the Water Users' argument is speculative as it is not always the case that reducing water usage reduces the amount of effective irrigation. Improvements in irrigation technology and farming practices can maintain crop yields while reducing water use. The State's own agricultural optimization program attests to this fact. The Water Users' and Water Resource Authorities' policy argument is not therefore a basis for dismissal.

X. Water Users' Takings Arguments Are Not a Basis for Dismissal

The Water Users claim that the proposed remedy would constitute a taking of private property. *See* Water Users' Mot. at 19. The argument is meritless. Because the Water Users acquired their rights subject to the public trust, no taking can occur as a result of Physicians' requested relief, a conclusion that sister courts *all across the country* have reached. Further, the Water Users' takings argument misunderstands the relief Physicians are seeking, and in any event such an argument is fatally premature.

First, the Water Users' argument fails because, as noted above, *see supra* pt. I.D, water rights are held subject to the public trust in the first instance. For this reason, state action to protect the public trust does not amount to a "taking" of an appropriator's water rights; rather, such action merely prevents water users from harming the trust res. It is well-established "that the state may without compensation regulate and restrain the use of private property when the health, safety, morals, or welfare of the public requires or demands it," *Bountiful City v. De Luca*, 292 P. 194, 199 (Utah 1930), even if that state regulation "may have a significant impact on the

utility or value of property." *Colman*, 795 P.2d at 627. This is because an owner "holds his property and the use and enjoyment of it subject to a reasonable and lawful exercise of the police power." *Bountiful City*, 292 P. at 199. For instance, a property-owner's right to access public highways is always "subject to reasonable restrictions under the police power of the State in protecting the public and facilitating traffic." *Hampton v. State ex rel. Rd. Comm'n*, 445 P.2d 708, 711 (Utah 1968) (citation omitted).

Likewise, appropriators hold water rights subject to the State's inherent power to "preserve" navigable waters "for the general public for uses such as commerce, navigation, and fishing." *Colman*, 795 P.2d at 635. The public trust doctrine empowers (and obliges) the State to regulate the use of water to prevent damage to the trust corpus and substantial impairment to trust uses. The doctrine is thus precisely the kind of "background principle" of state law that the U.S. Supreme Court has recognized as permissibly limiting an owner's property rights and thereby foreclosing takings liability. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).[45] For this very reason, courts across the United States have *resoundingly* rejected the applicability of takings claims in the public trust context. In *Waiahole Ditch*, for instance, the Hawaii supreme court rejected a takings challenge because "[t]he state is not 'taking' something

[45] An analogous servitude accompanies the franchises held by utility companies. As the Utah Supreme Court long ago concluded, such companies know "that the franchises were granted and accepted with knowledge that they were subject to the exercise of the police power of the state. Among the unwritten provisions, then as now, was that overarching one to comply with the law at all times. What that law would be from time to time, no one knew. What specific acts or other considerations would be required of the utilities was just as unpredictable . . . . When a change in use of the street necessitated adjustment with respect to use by the utilities and a demand for action on the part of the utilities was made, then and only then would an obligation arise and the requirements imposed by the obligation become known. If the law had changed or street uses now unknown were contemplated, the requirements would be affected accordingly. The utilities assumed that risk to their advantage or disadvantage." *State Rd. Comm'n v. Utah Power & Light Co.*, 353 P.2d 171, 177 (Utah 1960).

belonging to an owner, but is asserting a right it always held as a servitude burdening owners of water rights." 9 P.3d at 494–97 (citation omitted); *see also Glass*, 703 N.W.2d at 78; *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 (S.C. 2003); *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 985–86 (9th Cir. 2002); *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 788–89 (Wis. 2001); *Nat'l Ass'n of Home Builders v. N.J. Dep't Env't Prot*., 64 F. Supp. 2d 354, 357–58 (D.N.J. 1999); *Wilson v. Commonwealth*, 583 N.E.2d 894, 901 (Mass. Ct. App. 1992); *Orion Corp. v. State*, 747 P.2d 1062, 1082–83 (Wash. 1987); *State v. Slotness*, 185 N.W.2d 530, 532–33 (Minn. 1971); *see further Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984). Similarly, in California, the State Water Resources Control Board has invoked the public trust doctrine to reject "arguments for financial compensation by water users whose water licenses were modified by the Board to provide improved protection for trust resources." John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 954 (2012). The relief that Physicians' seek would require no taking; it would simply direct the State to take action consistent with the public trust servitude that accompanies all water rights.[46]

[46] For this reason, the Water Users' suggestion that Physicians are asking the Court to "order [state agencies] to commence eminent domain proceedings" is inapt. Water Users' Mot. at 20. "The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. What distinguishes eminent domain from the police power is that the former involves the taking of property because of its need for the public use while the latter involves the regulation of such property to prevent its use thereof in a manner that is detrimental to the public interest. The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare. The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of the public health, safety, morals and general welfare." *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 199 (N.C. Ct. App. 2015) (internal quotation marks omitted)).

Second, even if this Court were to break with sister states and conclude that Physicians' proposed remedy could result in a taking, the Water Users err in asserting that *this Court* would be the body doing the taking. *See* Water Users' Mot. at 21 ("Plaintiffs expect this Court to overstep its authority by ordering condemnation of publicly used property[.]"). Fundamentally, this misunderstands the relief Physicians are seeking (and, indeed, the way relief works in litigation against state agencies). Physicians ask this Court to order Defendants to "take action" consistent with the public trust doctrine, including the "review [of] all existing water diversions from the Great Salt Lake watershed" and the "modif[ication of] any diversions that are inconsistent" with the public trust. Compl. at 28–29, ¶ 2(a)–(b). Significantly, Physicians' requested relief leaves the details of implementation to the agency. *See id*. at 29, ¶ 2(b) ("Defendants must . . . determine feasible means to ensure compliance with their mandatory public trust duties."). Physicians do *not* ask the Court to "dictate to the state what takings are necessary," Water Users' Mot. at 21, which is a determination suitable to the agencies (assuming it were required in a future proceeding).

The Water Users therefore err in suggesting that Physicians ask the Court to "direct the exercise of judgment or discretion *in a particular way*." Water Users' Mot. at 20 (quoting *Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶ 11, 207 P.3d 1221) (emphasis in original). Indeed, the language they quote from *Hogs R Us* is inapposite, as it concerns what a court can order pursuant to a petition for extraordinary relief under Utah Rule of Civil Procedure 65B, but that case also repeats the unquestioned rule that this Court has the power "to direct the exercise of

discretionary action." 2009 UT 21, ¶ 11, 207 P.3d at 1225. It is no taking for this Court to order State agencies to abide by the law.[47]

Third, even if it potentially had merit, the Water Users' takings argument is premature: it is speculative to presume that any particular water appropriation would be impacted by the relief that Physicians seek in this case. The Complaint requests that the State identify and, where necessary, modify water appropriations that are harming the public trust; no water appropriations have been identified, much less modified, so no "taking" of those rights can have occurred. It is unquestioned that a takings claim "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property] in question." *Anderson v. Alpine City*, 804 F. Supp. 269, 273 (D. Utah 1992) (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)); *see also Robinson*, 887 F.2d at 219. Indeed, in a recent decision, the California court of appeal declared that the issue of "unlawful takings" was "not ripe for our consideration" where the court was deciding the threshold question of the applicability of the public trust doctrine to groundwater. *Env't L. Found.*, 237 Cal. Rptr. 3d at 396–97 & n.3.[48]

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[47] Indeed, the Water Users are apparently arguing that Physicians' requested relief would amount to a judicial taking, but the judicial takings doctrine does not appear to exist under Utah law. The New Mexico supreme court recently rejected the applicability of this doctrine in a decision grounded in the public trust doctrine. *See Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 57–58 (N.M. 2022).

[48] This prematurity also defeats the Water Users' passing suggestion, *see* Water Users' Mot. at 19, that Physicians' requested relief amounts to a physical taking. *See Robinson*, 887 F.2d at 219 ("[W]e reject appellees' argument that their claim is analogous to a physical takings claim. In the case of a physical invasion, the extent of the injury is known at the moment of the invasion. Further, the property owner incurs actual injury even if the government subsequently rescinds its action. By contrast, without a final judgment, and therefore the certainty of *res judicata* or the effect of collateral estoppel, we cannot know the extent of the injury suffered by the private owners.").

For all these reasons, the Water Users' takings argument is not a viable basis for dismissal of this case.

XI. Rule 19 Does Not Require Dismissal of this Public Trust Lawsuit Against the State

The State and Water Districts move to dismiss the case on the grounds that Rule 19 requires compulsory joinder of all water users in the Great Salt Lake basin. *See* DNR Mot. at 31–33; Water Districts' Mot. at 26–34. The argument fails for two reasons. First, Defendants have not satisfied the Rule 19 criteria for compelling joinder of those non-parties, let alone dismissal of this case. Second, even if they could satisfy those criteria, which they have not, this public -trust lawsuit falls squarely within the public-interest exception to Rule 19.

A. Defendants Fail to Demonstrate that Rule 19 Requires Compulsory Joinder of Absent Water Users

Defendants bear the burden of demonstrating that Rule 19 compels joinder of all absent water users in the Great Salt Lake basin. *See Grand Cnty. v. Rogers*, 2002 UT 25, ¶ 29, 44 P.3d 734. They must therefore prove that (1) absent water users are necessary parties, Utah R. Civ. P. 19(a), (2) it is not feasible to join them, *id.*, and (3) the court cannot proceed in equity and good conscience in their absence (i.e., that they are indispensable parties). *Id.* at 19(b). Because Defendants have not demonstrated that absent water users are necessary parties under the first prong of Rule 19, the inquiry ends there. *Landes v. Cap. City Bank*, 795 P.2d 1127, 1132 (Utah 1990). In fact, the State does not even attempt to establish the remaining Rule 19 factors. Even assuming the Court addressed these additional factors (as urged by the Water Districts), they confirm that dismissal is *not* warranted under Rule 19 because the Court can proceed in equity and good conscience.

1. Absent Water Users Are Not Necessary Parties to This Case, Which Challenges the State's Breach of its Public Trust Obligations

"Compulsory joinder is an exception to the common practice of allowing the plaintiff to decide who should be parties to a lawsuit." *Bank of Keystone v. Wagensen*, 152 F.R.D. 644, 646 (D. Wyo. 1994). Under Rule 19(a), a person is a necessary party in only three situations. First, a person is necessary if in the person's "absence complete relief cannot be accorded among those already parties." Utah R. Civ. P. 19(a)(1). Second, a person is necessary if she claims an interest in the action and her absence would "impair or impede [that person's] ability to protect that interest." *Id*. 19(a)(2)(i). Third, a person is necessary if she claims an interest in the action and her absence would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." *Id*. 19(a)(2)(ii). Defendants have not shown that absent water users fit into any of these categories.

a. Physicians Can Obtain Complete Relief Against the State on their Breach of Trust Claim

The first test set forth in Rule 19(a)(1) focuses on whether Physicians can obtain complete relief "among those already parties." The answer is clearly yes. This case focuses on the State's obligations under the public trust doctrine. Accordingly, the only party that will be bound, and the only party that Physicians seek to bind, is the State. Thus, Physicians can obtain complete relief in this action against the three named State agencies with the trust responsibility to protect the Great Salt Lake. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) (holding that absent tribes were not necessary parties in case that "focuses solely on the propriety of the Secretary's determinations"). The State does not dispute this point, effectively conceding that Physicians can obtain complete relief within the meaning of Rule 19(a)(1). *See* DNR Mot. at 31-32.

The Water Districts, however, argue that absent water users are necessary parties where there is a general adjudication to establish the relative priority of competing claims. *See* Water Districts' Mot. at 28 (citing *In re Green River Drainage Area*, 147 F. Supp. 127, 147 (D. Utah 1956)). But Physicians are not seeking an adjudication of competing claims, as explained in detail above. *See supra* pt. VII.A. The argument is thus misplaced. *See Wheeler Peak, LLC v. L.C.I.2, Inc.*, No. CIV07-1117JB/WDS, 2009 WL 2982817, at *8 (D.N.M. Aug. 15, 2009) ("[Federal R]ule 19(a)(1)(A) [(which also looks to the court's ability to accord complete relief among parties)] is concerned with the *claims in a case* rather than those claims that other parties might assert.") (emphasis added).

For the same reasons, this case is readily distinguishable from *Bonneville Tower Condominium Management Committee v. Thompson Michie Associates., Inc.*, 728 P.2d 1017, 1018–19 (Utah 1986). *See* DNR Mot. at 32. The *Bonneville* plaintiff asked the court to "adjudicate the property rights" of absent purchasers; accordingly, those absent purchasers were deemed necessary parties for complete relief under Rule 19(a)(1). *Bonneville Tower Condo. Mgmt. Comm.*, 728 P.2d at 1019–20. But Physicians are not asking this Court to adjudicate the water rights of absent water users; *Bonneville* is thus inapposite.

Equally misplaced is the Water Districts' argument that the Bureau of Reclamation needs to be a party to this case because of "its . . . water rights." Water Districts' Mot. at 32. Physicians are not, however, seeking to adjudicate Reclamations' rights, even assuming it had anywhere near as many as the Water Districts aver. *See supra* pt. VII.B. Nor would Reclamation be bound by any ruling in this case. Therefore, Reclamation is not a necessary party to this case under Rule 19(a)(1). *See Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260, 1271 (W.D. Wash. 2005) (finding that court could "provide complete relief among those

already parties to [the] suit" given that the absent party "would not be bound by a decision in Defendants[']] favor").

The Water Districts' argument also ignores the relief sought in this case—a remand to the State agencies to assess and, where necessary, modify water usage to protect trust uses. It is thus speculative at this point whether the State will take action that impairs any interest of Reclamation. Furthermore, the State can take into consideration the nature of Reclamation's interests in future proceedings, including the fact that the Reclamation laws "did not vest in the United States ownership of any water rights." *See supra* pt. VII.B (quoting *Grey*, 21 Cl. Ct. at 295). The State can also consider the Water Districts' contracts with Reclamation (some of which it submitted with its motion to dismiss) in light of the foundational principle that Reclamation "is obliged to 'proceed in conformity with [state] laws ... relating to the control, appropriation, use, or distribution of water.'" *In re Uintah Basin*, 2006 UT 19, ¶ 32, 133 P.3d at 420 (quoting 43 U.S.C. § 383). Based on that assessment, the State can determine feasible measures to protect the Great Salt Lake, as required by the public trust. Compl. at 28–29, ¶¶ 1(c), 2(b) (requesting that the Court order Defendants to determine and implement "*feasible* means" of public trust compliance (emphasis added)). No other entities need be made parties for Physicians to obtain complete relief against the State under Rule 19(a)(1). *See* 3A James Wm. Moore et al., Moore's Federal Practice ¶ 19.07–1[1], at 19–128 (2d ed.1980) ("'Complete relief refers to relief as between the persons already parties, not as between a party and the absent person whose joinder is sought.").

b. A Ruling on the State's Public Trust Obligations Does Not Impair Absent Water Users' Ability to Protect Their Interests

The second test in Rule 19(a) focuses on whether a non-party claims an interest in the action such that their absence would "as a practical matter impair or impede [that person's]

ability to protect that interest." *Id.* at 19(a)(2)(i). To be clear, "[i]t is not enough under Rule 19(a)(2)(i) for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 387 (2d Cir. 2006). Rather, Rule 19(a) requires "only those parties whose ability to protect their interests would be impaired *because of* that party's absence from the litigation." *Id*. (emphasis in original).

Here, Physicians seek relief against the State for breaching its public trust duties. Indeed, a public trust "action *must* be brought against the appropriate representative of the *state* as the trustee of the public trust." *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 602 (emphasis added). Accordingly, Physicians brought this case against the State agencies that have breached their trust obligation to protect the Great Salt Lake, not against absent water users who have no trust obligations. *Id.* Defendants' attempt to require joinder of absent water users thus fails. *See Cassidy v. Salt Lake Cnty. Fire Civ. Serv. Council*, 1999 UT App 65, ¶ 13–14, 976 P.2d 607 (rejecting joinder where plaintiff brought claim against proper defendant, as instructed by the law).

Furthermore, the Court can resolve the case without making any "determination of the rights of any other persons regarding the [] Lake[]." *Johnson v. Higley*, 1999 UT App 106, ¶ 28, 977 P.2d 1209. In fact, the State's breach of its trust responsibilities is complete: the Great Salt Lake has declined to levels that impair trust uses. Yet, the State has failed, indeed refuses, to undertake any analysis of existing water usage—a wholesale abdication of its duties as trustee. Joinder of water users is not warranted to resolve the State's liability or fashion a remedy. *See Cruz-Guzman*, 916 N.W.2d at 14 (holding that school districts were not necessary parties where

plaintiffs sought "remedies from the State, not individual school districts or charter schools.") (internal quotation marks omitted).

The State and Water Districts nonetheless contend that water users could be harmed because they "will be exposed to curtailment" of their water rights by this Court. *See* DNR Mot. at 32; Water Districts' Mot. at 28–29. There are three flaws in that argument. First, it misses the mark as Physicians do not ask the Court to curtail or adjudicate any water rights. Rather, the case focuses on the State's obligations as public trustee and its failure to comply with those duties. "The suit, then, does not directly deal with the absent parties' property rights," defying Defendants' attempt to turn this action against State agencies into a property dispute. *Sierra Club v. Watt*, 608 F. Supp. 305, 322 (E.D. Cal. 1985).

Second, neither the State nor Water Districts present any evidence that water users are harmed by the relief sought against the State in this case. *See Conner v. Burford*, 848 F.2d 1441, 1461 (9th Cir. 1988) ("The legally protected interests of the lessees are barely affected until the government decides that no development and production of the oil and gas reserves will be allowed, and even then they may have claims for damages against the government."). Instead, their argument "prematurely speculates about hypothetical remedies" the State may take in response to this litigation. *Cruz-Guzman*, 916 N.W.2d at 14. But those "possible effects" are not enough to require that all water users "be joined as necessary parties" to this case. *Id*. Indeed, the State and Water Districts are unable to identify which water diversions would be modified, demonstrating that their arguments about future harms to water users are speculative and depend on what actions the State takes in future proceedings. *See Cent. Utah Water Conservancy Dist. v. Upper E. Union Irrigation Co.*, 2013 UT 67, ¶ 62, 321 P.3d 1113 (rejecting joinder of absent

water users because "there is nothing to suggest that failure to join [them] will lead to the deprivation of their rights").

Third, water users will have multiple opportunities to protect their interests before the State takes any future action on remand—a point the State and Water Districts overlook, but which goes to the heart of the Rule 19 inquiry. *See* DNR Mot. at 32; Water Districts' Mot. at 28 (inaccurately claiming that the State will modify water usage "without the actual owners' notice, involvement, or input."). Before any water appropriations could be affected, the State must provide public notice and comment in the identification and implementation of steps to protect the Lake. *See* Compl. at 29, ¶ 2(d); *see also Anderson v. Pub. Serv. Comm'n of Utah*, 839 P.2d 822, 825 (Utah 1992) ("[N]otice must be 'reasonably calculated under all the circumstances' to give interested parties an opportunity to protect their interests.") (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950)). Thus, water users will have an opportunity to challenge any future actions by the State that could affect their water appropriations. *Conner*, 848 F.2d at 1461 ("We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government.").[49] Indeed, the State Defendants *promise* that water users will bring "waves of litigation" against the State, DNR Mot. at 33, as confirmed by the Water Users. *See* Water Users' Mot. at 15 (confirming Water User's history of "internecine disputes"). But that does not demonstrate that water users are necessary parties to this proceeding. *See* 4 James Wm. Moore et al., Moore's Federal Practice § 19.03[2][b], at 19–39 to 19–41 (Matthew Bender 3d. ed. 2023) ("The fact that the absentee

[49] As courts have recognized, an outsider is not bound by a judgment to which they are not a party. *See Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.").

might later frustrate the outcome of the litigation does not by itself make the absentee necessary for complete relief."). Rather, that demonstrates that water users' interests are protected by future proceedings on remand. *See Ludlow v. Salt Lake Cnty. Bd. of Adjustment*, 893 P.2d 1101, 1104 (Utah Ct. App. 1995) (absent landowner was not a necessary party because she would be able to "protect" her interests in a challenge to the Board's decision on remand); *Ching*, 449 P.3d at 1169 (holding that the United States was not a necessary party due to its "ability to defend itself against any such speculative future claim"). Forcing all absent water users to join the case is unwarranted under Rule 19 and would not achieve any efficiencies. *See Champagne v. Kansas City*, 157 F.R.D. 66, 68 (D. Kan. 1994) ("The court does not believe that substantial cost savings would be effected by forcing these individuals into this case.").

Even so, the State contends that absent water users should be joined so that they have "the opportunity to present their arguments as to the merits of Plaintiffs' theories." DNR Mot. at 32. But an absent party's desire to present legal arguments in a case does not compel joinder of that party absent proof, missing here, that their "interests would be impaired because of [their] absence from the litigation." *MasterCard Int'l Inc.*, 471 F.3d at 387. Furthermore, absent water users are adequately represented by the State and the allied Intervenors, who have zealously denied the merits of Plaintiffs' theories. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) ("[A]n absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit."). The Intervenor Water Users encompass "water users of every variety," Salt Lake City Corp.'s Mot. to Intervene at 3 (Dec. 13, 2023), while the Water Districts highlight their role in protecting the Bureau of Reclamation's interests in particular. *See* Water Districts' Mot. at 12–14, ¶ 36. All of the Intervenors, including the State Defendants, deny any public trust obligations over water and

assert that water rights are absolute. Their interests, as confirmed by these arguments, are functionally aligned with absent water users. *See Sac & Fox Nation*, 240 F.3d at 1259−60 (holding that an absent party was not necessary or indispensable where the defendant's interest was "[a]s a practical matter . . . 'virtually identical' to the interests" of the absent party) (internal citation omitted). Notably, absent water users have not appeared in this well-publicized litigation, underscoring the fact that their rights are not impaired by this case and that they are adequately represented by existing parties. *See Ching*, 449 P.3d at 1170 ("'[I]t would turn [Federal] Rule 19 analysis on its head to argue that the [United] States' interests are now impaired because [it] declined to participate in this much-publicized case.'") (quoting *Sch. Dist. of Pontiac v. Sec'y of U.S. Dept. of Educ.*, 584 F.3d 253, 266 (6th Cir. 2009)).

c. The State Would Not be Subject to Inconsistent Obligations in the Absence of Water Users

The third test in Rule 19(a) focuses on whether a party's absence would "leave [an existing party] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of" the absent party's claimed interest. Utah R. Civ. P. 19(a)(2)(ii). Inconsistent obligations only occur when a party is "unable to comply with one court's order without breaching another court's order concerning the same incident." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 976 (9th Cir. 2008) (internal quotation and citation omitted). Therefore, Rule 19 is *not* triggered by the threat of inconsistent *results* in separate actions involving separate claims. *See Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) ("[T]he mere possibility of inconsistent results in separate actions does not make the plaintiff in each action a necessary party to the other."); *see also Boone v. Gen. Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir. 1982) (the threat of inconsistent obligations, not multiple litigations, informs Fed. R. Civ. P. 19(a) considerations).

Here, the State foresees "waves of litigation" brought by absent water users challenging how it complies with its public trust obligations in the event Physicians prevail. DNR Mot. at 33. But such speculation fails to establish a substantial risk of inconsistent obligations. The reason is straightforward: any future litigation by water users would challenge future actions taken by the State based on different facts, theories, and causes of action. Those future cases do not present a risk of inconsistent obligations. *See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1040 (11th Cir. 2014) ("[W]here two suits arising from the same incident involve different causes of action, defendants are not faced with the potential for double liability because separate suits have different consequences and different measures of damages."); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983) (explaining that the "complete relief" factor is concerned "with precluding multiple lawsuits on the *same cause of action*") (emphasis added). The risk of future litigation does not therefore render absent water users necessary parties in this case. *See MasterCard Int'l Inc.*, 471 F.3d at 385 ("While there is no question that further litigation [involving an absent party] is inevitable if MasterCard prevails in this lawsuit, [Federal] Rule 19(a)(1) is concerned only with those who are already parties.").

Nor have the Water Districts identified a "substantial risk" of incurring any "inconsistent obligations" within the meaning of Rule 19. They appear to speculate about their ability to meet their "contractual relationships" with Reclamation and other water users. Water Districts' Mot. at 29, 32. But this case does not impose any trust obligations on the Water Districts, let alone seek to alter their contracts with Reclamation. Nor do the Water Districts argue that they would be subject to an inconsistent obligation in any other case. Rule 19 is thus inapplicable. *See Winn–Dixie Stores*, 746 F.3d at1040 ("Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident.").

Even assuming the Water Districts were unable to meet their contractual obligations in the future, and even assuming they faced subsequent litigation over those contracts, that future litigation would involve different parties with distinct "causes of action, with different consequences and different measures of damages." *In re Torcise,* 116 F.3d 860, 866 (11th Cir. 1997). There is thus no risk of the Districts facing an inconsistent obligation due to a ruling against the State in this case. *See Delgado*, 139 F.3d at 3 ("[D]efendants are not faced with the potential for double liability because separate suits have different consequences and different measures of damages."). Absent water users are not necessary parties to this proceeding, and the Rule 19 inquiry ends there. *Landes*, 795 P.2d at 1130.

2. Defendants Have Not Demonstrated that Joining Absent Water Users is Infeasible

Even assuming absent water users are necessary parties, it is the Defendants' obligation to demonstrate that their joinder is infeasible. Utah R. Civ. P. 19(a). This second prong of Rule 19 focuses on whether the absent party is "subject to service of process and that his joinder will not deprive the court of jurisdiction." *LePet, Inc. v. Mower*, 872 P.2d 470, 474 n. 8 (Utah Ct. App. 1994) (citing Utah R. Civ. P. 19(a)). Yet the State does not even attempt to make the requisite showing, foreclosing its attempt to urge the Court to dismiss. *See* DNR Mot. at 33. Indeed, the very cases cited by the State rejected such a "harsh" remedy, and instead recognized that the "rules of procedure are intended to encourage the adjudication of disputes on their merits," not insulate the State from judicial review. *Bonneville Tower Condo. Mgmt. Comm.*, 728 P.2d at 1020.

The Water Districts misstate the caselaw, claiming that dismissal is required whenever a court is faced with a substantial number of parties. Water Districts' Mot. at 30 & n.15. But none

of their cases impose such a bright line rule.[50] While the Water Districts argue that the United States' sovereign immunity would bar joinder of Reclamation, that does not warrant dismissal as Reclamation is not a necessary party (as discussed above), or an indispensable party (as discussed below). *See Ching*, 449 P.3d at 1169 n.38 ("dismissal would not be warranted even if the United States were to be considered a necessary party")

3. The Court Can Proceed in Equity and Good Conscience Without All Water Users

Even assuming absent water users were necessary, and their joinder were infeasible, Defendants must still demonstrate that the Court should not proceed in equity and good conscience (i.e., that the absent parties are indispensable). The four-factor analysis in Rule 19(b), however, cuts exactly the opposite direction, demonstrating that the Court can and should resolve this crucial case of public importance. Notably, the State does not make any arguments to the contrary, effectively conceding the point.

A necessary party may be considered an indispensable party only if, "in equity and good conscience," a court should not allow the action to proceed in the party's absence. *Sac & Fox Nation*, 240 F.3d at 1259 (internal quotation marks and citation omitted). To make this determination, courts assess four factors set forth in Rule 19(b):

> first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[50] The Water Districts cite one case for the proposition that joinder "may not be feasible" where there are a large number of parties. *See* Water Districts' Mot. at 30, n.15 (quoting *Jeld-Wen, Inc., ex rel. Cardinal IG Co. v. Nebula Glass Int'l, Inc.*, No. 07-22326-CIV, 2008 WL 2359747, at *10 (S.D. Fla. June 5, 2008)). But that court did not dismiss the case; rather, it relied on "protective measures" to avoid any prejudice to the absent parties. *Id.*; *see also Ching*, 449 P.3d at 1169 n.38 (refusing to dismiss case given court's obligation to consider "protective provisions" to avoid prejudice to absent parties).

Utah R. Civ. P. 19(b). Here, all four factors counsel in favor of resolving this public trust case against the State, notwithstanding the absence of water users.

First, the case seeks relief against the named State agencies and does not involve any determination of any water users' rights. Defendants have thus failed to identify a harm that demands compulsory joinder of absent water users. *See Jackson v. Colorado*, 294 F. Supp. 1065, 1073 (D. Colo. 1968) ("A decision for or against the plaintiff might indirectly affect the interests of all water users, but could not alter vested legal rights so as to raise the water users to the status of indispensable parties.").

Furthermore, absent water users are adequately represented by existing Defendants—that is, both the State agencies and the multitude of intervenor water users—thereby eliminating any prejudice from proceeding in their absence. *See Rishell v. Jane Phillips Episcopal Mem'l Med. Cent.*, 94 F.3d 1407, 1412 (10th Cir. 1996) ("[T]he prejudice to the relevant party's interest may be minimized if the absent party is adequately represented in the suit.") (internal quotation and citation omitted). The State flatly denies the public trust in water, thus aligning its interests with those of absent water users. *See id.* ("prejudice to the absent parties is not a concern here because of the identity of interests"). Furthermore, the Intervenors represent "water users of every variety," Salt Lake City Corp.'s Mot. to Intervene at 3 (Dec. 13, 2023), and repeatedly argue that *all* water appropriations are absolute and beyond the public trust. "This shared interest reduces the potential prejudice . . . that might result from a judgment in [their] absence." *Ambac Assurance Corp. v. Fort Leavenworth Frontier Heritage Cmties.*, 315 F.R.D. 601, 610 (D. Kan. 2016); *see also Sac & Fox Nation*, 240 F.3d at 1260.

The absence of water users does not prejudice Physicians' ability to obtain complete relief either, contrary to the Water Districts' arguments. *See* Water Districts' Mot. at 31. As courts

have recognized, "where a plaintiff makes no claims against [the unjoined party,] it is clear [under Rule 19] that complete relief can be granted in its absence." *White v. Jeppson*, 2014 UT App 90, ¶ 16, 325 P.3d 888 (alterations in original) (internal quotations and citations omitted). Such is the case here. Plaintiffs seek relief against the named State Agencies, requiring them to assess and, where necessary, modify water appropriations impairing the public trust. Complete relief is available. There is thus no proof of prejudice to absent water users or Physicians, meaning that the first Rule 19(b) factor weighs in favor of proceeding.

Second, there is no need to shape the judgment to lessen prejudice to absent water users, because none exists. *See Sac & Fox Nation*, 240 F.3d at 1260 ("Because the potential for prejudice is minimal, 'we need not be concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice.'") (quoting *Rishell*, 94 F.3d at 1412). Even if prejudice were a concern, the Court could shape its judgment to reduce prejudice by, for example, ordering a public process for the State to identify and implement measures to protect trust uses of the Great Salt Lake's trust resources. *See Ching*, 449 P.3d at 1170 (recognizing that "in an equitable action, a court has broad discretionary power to . . . craft remedies to preserve equity.") (internal quotations and citations omitted). This second factor thus weighs in favor of proceeding.

Third, relief against the State would be adequate from the perspective of the court and the public trust. The concern underlying this factor is that of "the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111. This case presents an issue of crucial public import—the State's obligation to comply with its public trust duty to protect the navigable waters and underlying lands of the Great Salt Lake. The State refuses to do so based on the misplaced contention that the public

trust applies only to the lands of the Great Salt Lake, not the waters. Unless the Court resolves this issue, the State will not comply with its trust obligation, even as the Lake faces ecological collapse and poses a public health crisis. Water users are not necessary to resolving this public trust case, demonstrating that the third factor weighs in favor of proceeding.

Fourth, and most importantly, dismissal of this case would strip Physicians of any forum to enforce the public trust—an outcome that "would weigh heavily, if not conclusively against dismissal." *Rishell*, 94 F.3d at 1413; *Sac & Fox Nation*, 240 F.3d at 1260 (citing *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (noting that a court should be "extra cautious" before dismissing an action pursuant to Rule 19(b) if no alternative forum exists)). That concern is especially relevant because the public trust doctrine exists only insofar as its beneficiaries can enforce its obligations against the trustee—the State. Rule 19 dismissal, however, would render the public trust unenforceable, thereby giving the State a free pass to breach its trust obligations to the Great Salt Lake. That would eviscerate the public trust and cement the fate of the Great Salt Lake. "Such a result is contrary to all principles of equity and shocking to the conscience of the court." *Kapiolani Park Pres'n Soc.* 751 P.2d at 1025.

The Water Districts' remaining arguments only underscore the lack of an alternative forum for resolving the State's public trust obligations. They suggest that Physicians can undertake "State water policy efforts" in the legislature. Water Districts' Mot. at 31–32 & n.16. But Rule 19(b) focuses on whether there is an alternative *judicial* forum in which Plaintiffs' claims can be heard. *See, e.g., Sac & Fox Nation*, 240 F.3d at 1260. The legislature is not a judicial forum, nor is it a substitute for this Court's duty to interpret the public trust. Furthermore, none of the legislation cited by the Water Districts include *any* cuts to diversions. *See supra* Background. Rather, that legislation perpetuates the fundamental error that has pushed

the Great Salt Lake to the precipice of disaster—the State's refusal to even consider modifications to address the source of the problem: unchecked water diversions. This court is thus the only forum for instructing the State on its public trust obligations. The fourth Rule 19(b) factor thus counsels heavily, if not conclusively, in favor of proceeding in equity and good conscience.

B. This Public Trust Case Falls Squarely Within the Public Rights Exception to Rule 19

This public trust case is exempt from Rule 19, even assuming the State could satisfy all of Rule 19's requirements. The Supreme Court first articulated a "public-rights exception" to federal Rule 19 in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). It recognized that in cases "narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id*. at 363. Subsequent courts have thus refused to require joinder of all parties affected by public rights litigation—even when those affected parties have property interests at stake—because the tight constraints of traditional joinder rules could effectively "sound[] the death knell for any judicial review of executive decisionmaking." *Conner*, 848 F.2d at 1459-60 (collecting cases). This public-rights exception applies in cases that (1) "transcend the private interests of the litigants and seek to vindicate a public right," and (2) do not "destroy the legal entitlements of the absent parties." *Kescoli*, 101 F.3d at 1311(internal quotation and citations omitted). Both prerequisites are satisfied here.

First, Physicians seek to "vindicate a public right" by ensuring the State complies with its public trust obligations to the Great Salt Lake. This is squarely an issue of public importance—at stake is the public trust doctrine, as well as the ecological health of the Lake and the public health of millions of people.

Second, the case does not seek to adjudicate, let alone destroy, the rights of existing water users. Rather, Physicians seek relief against the State, requiring it to take future action consistent with its trust obligations. The public-rights exception thus applies, just as it did in *Conner* where the plaintiffs sought to ensure the government complied with its legal obligations in issuing oil and gas leases. *See Conner*, 848 F.2d at 1460 (reasoning that the "litigation against the government does not purport to adjudicate the rights of current lessees; it merely seeks to enforce the public right to administrative compliance with the environmental protection standards" set forth in federal laws).

At most, Intervenors speculate that the State might, in future proceedings, modify their water usage. But that future risk does not foreclose the public-rights exception. In fact, courts have held that the exception applies in cases that directly impaired the absent party's property interest. For example, in *Conner*, the court enjoined the government from approving any surface activity on oil and gas leases until it completed the requisite environmental analysis. *Conner*, 848 F.2d at 1461. Even though that relief prevented the leaseholders from drilling on their leases—a limitation on their property rights—that was "insufficient to make the lessees indispensable to this litigation." *Id.* Likewise, in *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 967–68, 970 (10th Cir. 2008), the Tenth Circuit relied on the public-rights exception in a challenge to the Bureau of Land Management's (BLM) issuance of leases on parcels of land in Utah. Although the district court's finding that BLM violated federal law effectively "froze" the leases pending compliance, the lessees were still not indispensable parties. *Id*. at 969 & n.2. Those cases apply with even more force to this case, which does not impair water rights. *See Conner*, 848 F.2d at 1461 ("We enjoin only the actions of the government; the lessees remain free to assert whatever claims they may have against the government."). Thus, even assuming

Defendants could satisfy all the requirements of Rule 19, which they cannot, dismissal is not warranted as this case falls squarely within the public-rights exception.

XII. This Case Satisfies the Requirements of the Utah Declaratory Judgment Act

The Utah Declaratory Judgment Act grants courts broad authority "to issue declaratory judgments determining rights, status, and other legal relations" within their jurisdiction. Utah Code Ann. § 78B-6-401(1). That procedure provides courts with "a means for resolving uncertainties and controversies before trouble has developed or harm has occurred, and in order to avoid future litigation." *Salt Lake Cnty. v. Salt Lake City*, 570 P.2d 119, 120–21 (Utah 1977). Courts will therefore entertain declaratory judgment actions when faced with a "genuine justiciable controversy," especially where "there is a substantial public interest to be served by the settlement of such an issue." *Id*.

This case satisfies all "four threshold elements" warranting declaratory relief, especially given the important public issues at stake. *Williamson v. Farrell*, 2019 UT App 123, ¶ 11, 447 P.3d 131 (quoting *Miller v. Weaver*, 2003 UT 12, ¶15, 66 P.3d 592). First, there is "a justiciable controversy" regarding the scope of the public trust and the State's obligations as trustee. *Id.* Second, the parties' interests are "adverse" given the State categorically denies its trust obligation to the waters of the Great Salt Lake. *Id.* Third, the Plaintiffs, as beneficiaries of the public trust, have "a legally protectible interest," in resolving this issue. *Id.* Fourth, the issue is "ripe for judicial determination," as made clear by the State's refusal to comply with its trust obligations and the resulting impairment of the Lake. *Id.*, 447 P.3d at 135.

The State does not dispute the fact that Physicians satisfy all four threshold elements for this Court to grant declaratory relief. Nonetheless, it seeks to dismiss the case based on two mistaken arguments. First, the State asks this Court to withhold review of the State's unduly constrained view of the public trust, effectively giving the State a free pass to breach its trust

obligations. *See* DNR Mot. at 34-35. Second, the State argues that the Court cannot grant declaratory relief against the State, absent joinder of all water users. *Id.* at 33. The first argument contravenes the Court's obligation to provide declaratory relief that would resolve this proceeding. The second argument is merely a repackaging of the spurious Rule 19 argument.

A. The Court Should Not Abdicate Its Obligation to Provide Declaratory Relief

"Courts generally have the duty and obligation to adjudicate all of the cases that come before them." *Williamson*, 2019 UT App 123, ¶ 9, 447 P.3d 131, 134. The Declaratory Judgment Act permits judges to withhold review in "only one narrow situation: when entry of the sought-after declaration 'would not terminate the uncertainty or controversy giving rise to the proceeding.'" *Id.* ¶ 14, 447 P.3d at 135 (quoting Utah Code Ann. § 78B-6-404). This circumstance is narrow because the "term 'proceeding' is used here in the singular, indicating that it refers to the specific declaratory judgment action at hand, and not to any larger web of disputes between the parties[.]" *Id.*

Here, Physicians seek a declaratory judgment to resolve concrete legal issues giving rise to the specific "proceeding" pending before the Court. The case focuses on the State's refusal to comply with its public trust obligations based on the erroneous contention that all waters are excluded from the scope of the public trust. Physicians thus seek a declaration to correct that foundational error and instruct the State on its trust obligations to protect the Great Salt Lake, which it has thus far abdicated. Courts routinely provide just such declaratory relief, which would resolve the uncertainties giving rise to the proceeding. *See Min. Cnty.*, 473 P.3d at 425 ("we clarify that the public trust doctrine applies to all waters of the state"); *supra* pt. IV.A (collecting cases resolving public trust disputes).

The State has not provided a legitimate basis for Court to withhold relief in this proceeding. It contends that declaratory relief could "raise more issues" for the State when it

complies with its trust obligations in future proceedings. DNR Mot. at 35. But the question is not whether this case would resolve *all* future issues, but rather whether it would resolve the issues "giving rise to the specific lawsuit pending in the judge's court"—that is, the State's breach of its trust obligations based on a misreading of the law. *Williamson*, 2019 UT App 123, ¶ 15, 447 P.3d at 135. The State's arguments are thus misplaced. For example, the State asks the Court to withhold relief because it could be difficult for the State to "pick winners and losers" in future proceedings. DNR Mot. at 35. But that would be an erroneous basis for the Court to withhold review here. *See Williamson*, 2019 UT App 123, ¶¶ 15 & 23, 447 P.3d at 135, 137 (reversing a district court that withheld declaratory relief based on the erroneous excuse that "a judgment in this case would not conclude the litigation *in the other cases*") (emphasis added). The State's remaining arguments are even further misplaced. The State raises concerns about whether it would have to "offer just compensation" in future proceedings with water users. DNR Mot. at 35. But those hypothetical proceedings are not this case, which focuses on the State's breach of its trust obligations. In any event, the arguments are misplaced. *See supra* pt. X (takings section). In addition, the State wonders what to do about "Idaho and Wyoming water rights in the Bear River"—a speculative (and unripe) concern given that the State has refused to even assess water appropriations and one that is not at issue in this proceeding, which focuses on scope of the public trust over the navigable waters and the State's obligation, where necessary, to modify water usage to protect the Great Salt Lake.[51] DNR Mot. at 35. Finally, the State tries to shift the

[51] Once the waters of an interstate water source are equitably apportioned between the states—as has occurred here on the Bear River—then state law divides whatever water that state is entitled to amongst its citizens. *See Nebraska v. Wyoming*, 325 U.S. at 627 ("The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State."). The issue in this case is not therefore the equitable apportionment of

blame onto Physicians for their allegedly "myopic focus on the elevation level of the Great Salt Lake." *Id.* But the problem here is the State's refusal to consider the public trust whatsoever in supervising water appropriations. Physicians thus seek declaratory relief to ensure the State considers—not ignores—the Lake's minimum healthy elevation, as required by the public trust.

The State's own case confirms that declaratory relief is warranted to resolve this controversy. It cites *Miller*, 2003 UT 12, 66 P.3d 592, where the court refused to declare that a teacher was violating the law. DNR Mot. at 34, n.146. The reason was simple: the case sought relief against the wrong defendant—the teacher, rather than the State Board of Education (which had authority to fire the teacher). *Miller*, 2003 UT 12, ¶ 27, 66 P.2d at 600. Thus, the court explained that "plaintiffs must ask the court to compel the Board to act—not to act in the Board's stead." *Id.* No such problem arises here where Physicians brought this case against the State for breaching its public trust obligations. It is this Court's duty to declare the scope of those duties and remand to the State to comply with those duties. *See Waiahole Ditch*, 9 P.3d at 455 ("[T]he ultimate authority to interpret" the public trust doctrine "rests with the courts of this state.").

The State also relies on *Hillman v. Hardwick*, 28 P. 438 (Idaho 1891), but its reasoning only highlights the State's refusal to confront hydrologic reality. DNR Mot. at 35 n.147. There, a court overappropriated waters to a stream, ignoring hydrological reality and distributing the waters of a stream with "beneficent recklessness." *Hillman*, 28 P. at 439. But this Court faces no such risk as Physicians do not ask this Court to adjudicate any rights (much less appropriate rights to water directly); rather, Physicians ask this Court to declare that the State is breaking the

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waters among states, but rather the State of Utah's wholesale refusal to consider the public trust over the navigable waters of the Great Salt Lake within Utah. Furthermore, as noted above, even when the State takes action to comply with its trust duties, it can take any valid concerns about interstate water compacts into account when determining *feasible* means of complying with public trust obligations.

law in its water management and order the State to cease doing so. The problem at the heart of this case is the State's wholesale refusal to take the public trust into consideration—a reckless position that has driven the Great Salt Lake to the precipice of ecological collapse. Yet the State ignores the problem; indeed, it even attempts to *deny* the problem, suggesting that these declines are due not to water diversions but "factors, mostly environmental." DNR Mot. at 34. That denialism is defied by the State's own experts, who identified excessive diversions as the principal cause of the Lake's decline. Declaratory relief is warranted to correct the State's erroneous refusal to consider the public trust.

B. The Utah Declaratory Judgment Act Does Not Compel Joinder of Absent Water Users in this Public Trust Case Against the State

The State briefly argues that Physicians must join all water users in the Great Salt Lake Basin. *See* DNR Mot. at 33. The argument fails under the Utah Declaratory Judgment Act, just as it failed under Rule 19.

Section 403 of the Utah Declaratory Judgment Act provides that "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and a declaration may not prejudice the rights of persons not parties to the proceeding." Utah Code Ann. § 78B-6-403(1). Based on that provision, the Utah Supreme Court recently *rejected* an argument that a plaintiff had to name hundreds of non-parties in a declaratory judgment action. *See Bell Canyon Acres Homeowners Ass'n v. McLelland*, 2019 UT 17, ¶¶ 11–14, 443 P.3d 1212. There, the plaintiffs sought declaratory relief against four homeowners regarding the scope of a restrictive covenant covering a residential community. *Id*. ¶ 3, 443 P.3d at 1214. The district court denied entry of summary judgment on the grounds that the plaintiffs failed to name all the other homeowners in the community (potentially hundreds) affected by the covenant. *Id*. ¶ 4, 443 P.3d at 1214.

The Utah Supreme Court refused to require joinder under Section 403 for two reasons. *Id.* ¶ 20, 443 P.3d at 1217. First, it recognized that the plaintiffs "have not sought a declaration that purports to affect the interests of any outsider." *Id.* ¶ 13, 443 P.3d at 1215-16. Second, even if they had, "that declaration would have no legal effect on the outsiders unless they were joined in the action or were privies to a party joined in the action—neither of which is satisfied here." *Id.* Section 403 was thus "no barrier" to declaratory relief between the parties. *Id.* ¶ 14, 443 P.3d at 1216.

That same reasoning applies to this public trust case between Physicians and the State. First, Physicians seek a declaration regarding the *State's* authority and duties as trustee of the Great Salt Lake. They do not seek a "declaration that purports to affect the interests of any outsider." *Id.* ¶ 13, 443 P.3d at 1215. Second, a declaration against the State would "have no legal effect" against absent water users. *Id.*; *see also* Utah Code Ann. § 78B-6-403(1) ("a declaration may not prejudice the rights of persons not parties to the proceeding."). Water users will have their day in court, should the State take action to modify their water usage consistent with the public trust. *See Bell Canyon*, 2019 UT 17, ¶ 12, 443 P.3d at 1215 (recognizing that "outsiders not joined in a proceeding (and not in privity with someone who was joined) must be able to have their day in court."). Joinder is not therefore required under the reasoning of *Bell Canyon*.

To require joinder would not only contravene the Utah Declaratory Judgment Act; it would frustrate the public trust doctrine. Under the State's theory, Plaintiffs would have to join every water user in the Great Salt Lake Basin, driving up the cost of litigation to the point of being prohibitory. That would insulate the State against any declaratory relief regarding its public trust duties, an outcome at odds with the trust itself, which imposes enforceable requirements on the State. The Utah Supreme Court rejected a similar outcome in *Bell Canyon. Id.*, ¶ 12, n.6, 443

P.3d at 1216 (refusing to require joinder where it would "frustrate" legal obligations and render them "unenforceable"). So too, here, the Court should reject such an outcome, which is not warranted by Section 403 and undermines the public trust.

XIII. Res Judicata Does Not Bar This Public Trust Suit Against the State

Next, the State argues that Physicians' claim is barred by res judicata. *See* DNR Mot. at 27–28. This argument misses the mark because the State is again confusing the present action—a public trust suit against the State—with a general adjudication "for the determination of relative rights in a river system." *Id*. at 27 (quoting *Second Big Springs*, 2023 UT App 22, ¶ 16, 526 P.3d at 1271). But the present case simply is not one to establish the relative priority of water rights, as explained above. Rather, it is a challenge to the State's failure to manage all water appropriations in the Great Salt Lake basin consistent with its obligations and responsibilities as public trustee. Even on its own terms, the State's argument fails because it does not identify any general adjudication that would have a preclusive effect.

Furthermore, the State's argument is undeveloped, unfounded, and unavailing. To begin, the State does not clarify if its argument is founded on claim preclusion or issue preclusion, even though the two are distinct doctrines with distinct requirements. *See Mack*, 2009 UT 47, ¶ 29, 221 P.3d at 203 ("The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion.") (internal quotation marks and citation omitted).

Due to that fundamental oversight, the State fails to demonstrate that either doctrine applies here. The doctrine of claim preclusion applies *only* when three elements are satisfied:

> First, both cases must involve the same parties or their privies.[52] Second, the claim that is alleged to be barred must have been presented in the first suit or be one that

[52] "The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right." *Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978).

> could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Id. *All* three of these elements must be satisfied for a claim to be precluded. *State, ex rel. D.A. v. State*, 2009 UT 83, ¶ 36, 222 P.3d 1172, 1179. Here, the State fails to argue that Physicians were parties to any general adjudication, which would allegedly bar this public trust suit, so the State's argument fails at the first element. *See Krejci v. Saratoga Springs*, 2013 UT 74, ¶ 16, 322 P.3d 662 ("No rule of preclusion forecloses outsiders not joined in a proceeding (and not in privity with someone who was joined) from having their own day in court."); *see also Bell Canyon*, 2019 UT 17, ¶ 12, 443 P.3d at 1215. Even where "petitioners *could have* intervened" in earlier proceedings, where they did not, in fact, "seek to intervene," their preclusion "would run afoul of a core principle of due process." *Krejci*, 2013 UT 74, ¶¶ 16–17, 322 P.3d at 665–66 (emphasis in original). This is especially so where the defendants did not "seek to join them—a move that could have required an appeal, and thus foreclosed" a subsequent claim. *Id*. ¶ 17, 322 P.3d at 666.

Additionally, the State's argument fails at the second element of claim preclusion, because the State itself has asserted that adjudications are narrow proceedings that settle only relative rights among water users within a single system. *See* DNR Mot. at 27; *see also In re Bear River*, 271 P.2d at 848 (holding that the "purpose" of a general adjudication is "the determination of water rights" in a system). According to the State's own argument, then, Physicians *could not have* raised public trust arguments—or any arguments concerning the management of appropriations basin-wide—in any adjudication, as the State maintains that adjudications are not appropriate fora to resolve any subject other than relative rights. *See* Brief of Amicus Curiae Utah State Engineer in Support of Appellants, *Second Big Springs*, 2021 WL 9666506, at *11–12 ("[T]he general adjudication does not determine water availability. While a

general adjudication will quantify all water rights within a defined area and that data may inform decisions about appropriation policies, the governing statutes do not direct or permit the court to determine whether water is available for appropriation. Rather, the State Engineer, not the district court, is responsible for administering the appropriation of waters within the State[.]") (citations omitted). The State's reliance on claim preclusion is thus nothing more than an attempt to place Physicians in a bind. On the one hand, the State argues that Physicians cannot bring public trust claims because they failed to do so during a general adjudication, but on the other hand the State's position in such adjudications would prevent Physicians from raising public trust claims. That catch-22 would effectively negate the public trust doctrine, preventing the public from ever being able to challenge the State's abdication of its trust obligations.

The doctrine of issue preclusion (or collateral estoppel) is likewise inapplicable. It "prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Jensen*, 2011 UT 17, ¶ 41 250 P.3d at 476–77 (cleaned up). This doctrine applies *only* when four elements are satisfied:

> (i) the party against whom issue preclusion is asserted [was] a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication [was] identical to the one presented in the instant action; (iii) the issue in the first action [was] completely, fully, and fairly litigated; and (iv) the first suit . . . resulted in a final judgment on the merits.

Id. (citation omitted). *All* four of these elements must be satisfied for an issue to be precluded. *Moss v. Parr Waddoups Brown Gee & Loveless*, 2012 UT 42, ¶ 25, 285 P.3d 1157. Once again, though, the State's argument fails at the first element, as the State has failed to identify any general adjudication in which Physicians participated. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found*., 402 U.S. 313, 329 (1971) (due process requires that "litigants . . . who never appeared in a prior action . . . may not be collaterally estopped without litigating the issue").

Indeed, in *In re Utah Lake & Jordan River*, 1999 UT 39, ¶ 13, 982 P.2d 65, a city in a general adjudication among water rights-holders invoked res judicata because a "previous adjudication" had adjudicated water rights between one holder and the city. The Utah Supreme Court concluded that neither claim preclusion nor issue preclusion could apply to all those who were not parties in the "previous adjudication." *Id*. Likewise, Physicians cannot be precluded here. Furthermore, the State's argument fails at the second element because the State itself argues that Physicians *could not have* raised public trust arguments—or any arguments concerning the management of appropriations basin-wide—in a general adjudication. Physicians cannot, therefore, be precluded from raising those arguments now in this public trust suit.

The precedent on which the State relies is not to the contrary—in fact, it is irrelevant. Defendant DNR quotes *EnerVest, Ltd. v. Utah State Eng'r*, 2019 UT 2, 435 P.3d 209, for the proposition that a "party who fails to timely file a claim 'shall be forever barred and estopped from subsequently asserting any rights, and shall be held to have forfeited all rights to the use of the water theretofore claimed by him.'" DNR Mot. at 27 (citing *EnerVest*, 2019 UT 2, ¶ 5, 435 P.3d 213 (quoting *Utah State Eng'r v. Johnson*, 2018 UT App 109, ¶ 19, 427 P.3d 558, 564)). Yet this precedent only applies to "water rights holders" and "claimants" seeking to assert water rights. *Johnson*, 2018 UT App 109, ¶ 19, 427 P.3d at 564. The State's reliance on res judicata is misplaced where, as here, Physicians neither hold nor claim any water rights.

XIV. Laches Does Not Bar This Public Trust Suit Against the State

Finally, the State argues that Physicians' claim is barred by laches. *See* DNR Mot. at 28–29. This argument, too, is underdeveloped—just eight sentences long—and it fails for similar reasons. As with the State's res judicata argument, the State's laches argument rests on the assumption that Physicians are seeking to *claim* water rights for themselves. Yet Physicians assert no water rights; instead, Physicians challenge the State's failure to manage the entire basin

consistent with its trust obligations. Because the State's trust authority is *continuing*—as is its breach of its trust responsibilities—the doctrine of laches is inapplicable.

At the outset, the State's argument fails because it improperly seeks to reframe the present suit as a dispute among putative water-rights holders. Defendant DNR quotes *United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, 79 P.3d 945, for the assertion that a plaintiff that "failed to timely contest [claims to water] . . . took on the status of a defaulting party in the general adjudication . . . [and] cannot defeat this [water] right through a collateral attack in a separate lawsuit." DNR Mot. at 29 (quoting *U.S. Fuel*, 2003 UT 49, ¶ 20, 79 P.3d at 950). Yet this precedent concerned only the claims of "water claimants," i.e., those seeking to divert from the same stream. *U.S. Fuel*, 2003 UT 49, ¶ 16, 20, 79 P.3d at 949, 950. In *U.S. Fuel Company*, the Utah Supreme Court held that "a *water right claimant* who fails to object to a proposed award" during a general adjudication cannot subsequently bring an action contesting the defendant's water right because the plaintiff, "by his silence," "was similar to . . . a defaulting party in a lawsuit." *Id*. ¶¶ 17–19, 79 P.3d at 949–50 (emphasis added) (internal quotation marks and citation omitted). This precedent is inapplicable to the present case because Physicians are not claimants challenging Defendants' or Intervenors' water rights; they are challenging the State's failure, as public trustee, to abide by its trust obligations.

Indeed, courts across the United States have especially "disfavored" the doctrine of laches in public trust suits, since plaintiffs in such suits are "attempting to protect a substantial public interest." *Lake Mich. Fed'n v. Army Corps of Eng'rs*, 742 F. Supp. 441, 446–47 (N.D. Ill. 1990). In *State v. Central Vermont Railway*, for instance, the State of Vermont and City of Burlington brought a public trust suit challenging the Central Vermont Railway's effort to sell a strip of waterfront land to a real estate developer. 571 A.2d at 1129. The Railway argued that the

suit was barred by laches. *Id.* at 1130, 1136. The state supreme court squarely rejected this argument, noting that the State "acts as administrator of the public trust and has a continuing power that 'extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.'" *Id*. at 1136 (quoting *Mono Lake*, 658 P.2d at 723). Because the State's trust authority is continuing—and all water use is granted subject to the public trust in the first instance—an argument under the doctrine of laches must fail. *See also Defenders of Wildlife v. Hull*, 18 P.3d 722, 726 n.1 (Ariz. Ct. App. 2001) ("[N]either doctrines of laches, nor statutes of limitations of actions can be allowed to defeat the state's sovereign title to trust lands.") (internal quotation and citations omitted).

Laches is additionally inappropriate in this case because the State's failure to manage water appropriations consistent with its trust obligations amounts to a *continuing* breach of the public trust. The breach that Physicians have alleged is akin to a "continuing tort"[53]—that is, where a "tortious act is continuous," *Pinder v. Duchesne Cnty. Sheriff*, 2020 UT 68, ¶ 75, 478 P.3d 610 (cleaned up), and "may be discontinued at any time," *Bingham*, 2010 UT 37, ¶ 57, 235 P.3d at 745. Utah courts have recognized as continuing torts a defendant's "ongoing pumping of wells," *Pinder*, 2020 UT 68, ¶ 75, 478 P.3d at 626 (cleaned up), and a city's failure to prevent the ongoing leaking of a municipal water system. *Orosco v. Clinton City*, 2012 UT App 334, ¶ 4, 292 P.3d 705. Where the government's breach of the public trust doctrine amounts to a "continuing wrong," the "doctrine of laches has no application." *Capruso v. Vill. of Kings Point*, 16 N.E.3d

[53] A trustee's breach of fiduciary duty is a tort. *See* Restatement (Second) of Torts § 874 (1979); *see also Twin Chimneys Homeowners Ass'n v. J.E. Jones Constr. Co*., 168 S.W.3d 488, 501–02 (Mo. Ct. App. 2005) (recognizing the "continuing wrong doctrine" in a suit for breach of fiduciary duty); *Babb v. Graham*, 660 S.E.2d 626, 637 (N.C. Ct. App. 2008) (same).

527, 531–33 (N.Y. Ct. App. 2014).[54] Thus, Physicians cannot be barred from challenging the State of Utah's *continuing* failure to regulate water use consistent with its responsibilities as trustee.[55] That is particularly apparent here, where the Great Salt Lake's elevation has recently hit record lows and ecological collapse appears imminent. The State's continuing failure to prevent this looming catastrophe is a paradigmatic case of laches being *inappropriate*, because the State's failure is not the result of a single discrete act, but rather the State's continuing and unlawful abdication of its trust responsibilities.

CONCLUSION

Physicians seek relief from this Court to correct the State's abdication of its public trust duties, which are embedded in fundamental principles of sovereignty, the Utah Constitution, and Utah common law. Enforcing the public trust is both a classic judicial function and essential to prevent the loss of an irreplaceable trust resource—the Great Salt Lake—and to protect the health of millions of Utahns. For the reasons set forth in this opposition brief, Physicians respectfully request that the Court deny the motions to dismiss.

DATED this 26th day of April, 2024.

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[54] A continuing tort also "tolls the statute of limitations while tortious conduct continues unabated," *Pinder*, 2020 UT 68, ¶ 75, 478 P.3d at 626 (cleaned up), so any statute of limitations argument must also fail. *See Cal. Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 210–12 (Cal. Ct. App. 1989). Here, neither the State nor Intervenors raised a statute of limitations argument in their motions to dismiss, so they have waived any such arguments. *See Barnard & Burk Group, Inc. v. Labor Comm'n*, 2005 UT App 401, ¶ 6, 122 P.3d 700; *see also Brown & Root Indus. Serv. v. Indus. Comm'n of Utah*, 947 P.2d 671, 677 (Utah 1997).

[55] In the seventh sentence of its eight-sentence argument, DNR claims in passing that Plaintiffs "seek to collaterally attack water rights established through those adjudications that have created reliance interests." DNR Mot. at 29. This argument fails for the reasons articulated in Pt. I.D, i.e., water rights are held subject to the public trust in the first instance.

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Appendix A

The following research demonstrates that the State of Utah's assertion that the common law public trust doctrine covers only lands and does not cover waters is contrary to the doctrine as it exists in every other state in the country. Courts in most states have explicitly held that the public trust doctrine covers waters *and* lands. In a handful of states, courts have not addressed this specific question. While the doctrines of some states are clearer or better articulated than those of others, it is undeniable that *no court in the country* has concluded as the State of Utah is urging this Court to do and excluded all waters from the public trust.[56]

Courts in at least 41 states have held that their public trust doctrines cover not merely submerged lands but also waters. These include the following:

State	Source
Alabama	*State v. Ala. Power Co.*, 58 So. 462, 463 (Ala. 1912) ("In Alabama, the legal title to the beds *and waters* of navigable ways is lodged in the state in trust for public purposes." (emphasis added)); *see also City of Mobile v. Eslava*, 9 Port. 577, 590, 601 (Ala. 1839), *aff'd*, 41 U.S. 234 (1842)
Alaska	*Williams Alaska Petroleum, Inc. v. State*, 529 P.3d 1160, 1187 (Alaska 2023) ("The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and *water rights*) in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary . . . . '*Waters*' comprising the public trust are broadly defined. Besides navigable waters, this includes 'public water,' which is defined as 'all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility.'" (emphasis added) (cleaned up)); *Brooks v. Wright*, 971 P.2d 1025, 1031 (Alaska 1999) ("[T]he state holds natural resources such as fish, wildlife, *and water* in 'trust' for the benefit of all Alaskans." (emphasis added))
Arizona	*Ariz. Ctr. for Law in Public Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. Ct. App. 1991) ("Our supreme court long ago acknowledged the [public trust] doctrine. '*Navigable waters* were, under the common law, considered as under the exclusive control of the government, in trust for the general public[.]'" (emphasis added) (quoting *Maricopa Cnty. Mun.*

[56] To be sure, some states have considered the public trust in land more often than they have addressed the public trust in water. But this is simply because the cases presented to these courts concerned the public trust in land, rather than the public trust in water. *See Butler ex rel. Peshlakai v. Brewer*, No. 1 CA–CV 12–0347, 2013 WL 1091209, at *6 (Ariz. Ct. App. Mar. 14, 2013) ("The fact that the only Arizona cases directly addressing the Doctrine did so in the context of lands underlying navigable watercourses does not mean that the Doctrine in Arizona is limited to such lands. Any determination of the scope of the Doctrine depends on the facts presented in a specific case.").

	Water Conservation Dist. No. 1 v. Sw. Cotton Co., 4 P.2d 369, 372 (Ariz. 1931)))
Arkansas	*Ark. River Rts. Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 743 (Ark. Ct. App. 2003) ("If a *body of water* is navigable, it is considered to be held by the State in trust for the public." (emphasis added))
California	*Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 596 (Cal. Ct. App. 2008) ("[T]he state holds tidelands and *navigable waters* not in its proprietary capacity but as trustee for the public[.]" (emphasis added) (internal quotation marks omitted)); *see also Nat'l Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 718 (Cal. 1983)
Connecticut	*Leydon v. Greenwich*, 777 A.2d 552, 564 n.17 (Conn. 2001) ("[The] state holds in trust for public use title in *waters* and submerged lands[.]" (emphasis added))
Florida	*Brannon v. Boldt*, 958 So.2d 367, 372 (Fla. Ct. App. 2007) ("The public has the right to use *navigable waters* for navigation, commerce, fishing, and bathing and other easements allowed by law. . . . The public's right to use navigable waters or the shore derives from the public trust doctrine." (emphasis added))
Hawaii	*In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) ("[T]he public trust doctrine applies to *all water resources* without exception or distinction." (emphasis added)); *see also In re Wai'ola O Moloka'i, Inc.*, 83 P.3d 664, 692 (Haw. 2004)
Illinois	*Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. 1984) ("The 'public trust' doctrine provides that certain types of public property, for example, *navigable waters*, are held 'in trust' by the State for the benefit of the public." (emphasis added))
Iowa	*Witke v. State Conservation Comm'n*, 56 N.W.2d 582, 584 (Iowa 1953) ("[T]he state holds title to *navigable waters* within its boundaries in trust for the public . . . and it may not deny the right of every member of the public to enjoy the use of such waters so long as such use does not interfere with the right of others to like enjoyment." (emphasis added))
Louisiana	*Save Ourselves, Inc. v. La. Env't Control Comm'n*, 452 So.2d 1152, 1154 (La. 1984) (noting that the "public trust doctrine" includes "air and *water* as natural resources, commands protection, conservation and replenishment of them insofar as possible and consistent with health, safety and welfare of the people[.]" (emphasis added)); *see also* La. Rev. Stat. Ann. § 9:1107 ("It has been the public policy of the State of Louisiana at all times since its admission into the Union that *all navigable waters* and the beds of same within its boundaries are common or public things and insusceptible of private ownership[.]" (emphasis added))
Maine	*State v. Lemar*, 87 A.2d 886, 887 (Me. 1952) ("[T]his state . . . owns the bed of all tidal waters within its jurisdiction *as well as such waters themselves* so far as they are capable of ownership, and has full power to regulate and control fishing therein for the benefit of all the people." (emphasis added)); *see also Flood v. Earle*, 71 A.2d 55, 57 (Me. 1950)("Ponds containing more than ten acres are known as 'great ponds.'

	They are public ponds. The state holds them and the soil under them in trust for the public.")
Maryland	*Dep't of Nat. Res. v. Mayor & Council of Ocean City*, 332 A.2d 630, 633 (Md. App. 1975) ("It has long been held that *navigable water* and the land under it is held by the State, for the benefit of the public." (emphasis added))
Massachusetts	*Michaelson v. Silver Beach Improvement Ass'n, Inc.*, 173 N.E.2d 273, 275 (Mass. 1961) ("'The *waters* and the land under them beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public.'" (emphasis added) (quoting *Home for Aged Women v. Commonwealth*, 89 N.E. 124, 125 (1909)); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 360 (Mass. 1979) ("'[I]t is an unquestionable principle of the common law, that all *navigable waters* belong to the sovereign, or, in other words, to the public[.]'" (emphasis added) (quoting *Commonwealth v. Inhabitants of Charleston*, 1 Pick. 180, 190 (Mass. 1822))).
Michigan	*Glass v. Goeckel*, 703 N.W.2d 58, 64–65 (Mich. 2005) ("[U]nder longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the *waters* of the Great Lakes and the lands beneath them for the public. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources." (emphasis added) (internal citations omitted))
Minnesota	*Larson v. Sando*, 508 N.W.2d 782, 787 (Minn. Ct. App. 1993) ("The state owns *navigable waters* and the lands under them for public use, as trustee for the public, and not as a proprietor with right of alienation." (emphasis added)); *see also Pratt v. Dep't of Nat. Res.*, 309 N.W.2d 767, 771 (Minn. 1981)
Mississippi	*Cinque Bambini P'ship v. State*, 491 So.2d 508, 511–12 (Miss. 1986) (holding that the public trust includes "the tidelands and *navigable waters* of the state together with the beds and lands underneath same. . . . The public purposes to which these lands and *waters* placed in the public trust may be devoted . . . include navigation and transportation, commerce, fishing[.]" (emphasis added) (internal citations omitted))
Montana	*Mont. Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 185 (Mont. 2011) ("The State of Montana became trustee of the public trust over the navigable streambeds and the *waters* of this State upon achieving statehood[.]" (emphasis added)); *see also Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 1984)
Nebraska	*Crawford Co. v. Hathaway*, 93 N.W. 781, 789 (Neb. 1903), *overruled on other grounds by Wasserburger v. Coffee*, 141 N.W.2d 738 (Neb. 1966) ("As to navigable streams, the doctrine seems to be that the *water* and the soil thereunder belong to the state, and are under its sovereignty and domain, in trust for the people, and cannot, therefore, be the subject of a

	claim of property therein, or the right to the use thereof by an adjoining landowner. When the government . . . classif[ies] the stream as navigable . . . the *waters* thereof and the bed thereunder would belong to the state, and [must] be held by it in trust for the people." (emphasis added)); *see also Kinkead v. Turgeon*, 109 N.W. 744, 748 (Neb. 1906) ("The interest of the public in the *waters* and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement." (emphasis added))
Nevada	*Min. Cnty. v. Lyon Cnty.*, 437 P.3d 418, 423 (Nev. 2020) ("The public trust doctrine establishes that the state holds its *navigable waterways* and lands thereunder in trust for the public." (emphasis added))
New Hampshire	*St. Regis Paper Co. v. N.H. Water Res. Bd.*, 26 A.2d 832, 837–38 (N.H. 1942) ("[I]n this state *lakes, large natural ponds, and navigable rivers* are owned by the people, and held in trust by the state in its sovereign capacity for their use and benefit[.]" (emphasis added))
New Jersey	*Mayor & Municipal Council of City of Clifton v. Passaic Valley Water Comm'n*, 539 A.2d 760, 765 (N.J. Sup. Ct. 1987) ("While the original purpose of the public trust doctrine was to preserve the use of the *public natural water* for navigation, commerce and fishing, *Arnold v. Mundy*, 6 N.J.L. 1, 69–78 ([N.J.] Sup. Ct. 1821), it is clear that since water is essential for human life, the public trust doctrine applies with equal impact upon the control of our drinking water reserves." (emphasis added)).
New Mexico	*State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421, 426 (N.M. 1947) ("[T]he bed *and waters* of a navigable stream are the property of the public[.]" (emphasis added)); *Adobe Whitewater Club of New Mexico v. New Mexico State Game Comm'n*, 519 P.3d 46, 53 (N.M. 2022) ("[T]he scope of public trust to *waters* in New Mexico includes fishing and recreation." (emphasis added))
New York	*People ex rel. Howell v. Jessup*, 54 N.E. 682, 684 (N.Y. 1899) ("When the Revolution took place the people of each state became themselves sovereign, and in that character held the absolute right to all the *navigable waters* and the soils under them that were previously thereto held by the English government in trust for the people; and generally speaking, therefore, it is true, as has often been said by the courts of this and other states, that the state has succeeded to all the rights of both crown and parliament in the *navigable waters* and the soil under them." (emphasis added)); *see also Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201, 203 (N.Y. 1997)
North Carolina	*Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 824 (N.C. Ct. App. 2009) ("Under the public trust doctrine, *navigable waters* are held in trust

	for the public based on 'inherent public rights in these lands and waters.'" (emphasis added) (internal citation omitted))
North Dakota	*United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d 457, 461 (N.D. 1976) ("The State holds the *navigable waters*, as well as the lands beneath them, in trust for the public." (emphasis added))
Ohio	*State ex rel. Squire v. Cleveland*, 82 N.E.2d 709, 720 (Ohio 1948) ("The ownership of the *waters* of Lake Erie, and of the land under them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot, by acquiescence or otherwise, abandon the trust property or permit a diversion of it to private uses different from the object for which the trust was created." (emphasis added) (quoting *State v. Cleveland & Pittsburgh R. Co*., 113 N.E. 677, 678 (Ohio 1916)); *Thomas v. Sanders*, 413 N.E.2d 1224, 1228 (Ohio Ct. App. 1979) ("The title to the *waters* and the land beneath the waters of Sandusky Bay is now and always has been held by the state in trust." (emphasis added)); *State ex rel. Brown v. Newport Concrete Co*., 336 N.E.2d 453, 455-457 (Ohio Ct. App. 1975) ("[T]he state of Ohio holds the *waters* of the Little Miami River in trust for the people of Ohio." (emphasis added))
Oklahoma	*Tulsa v. Comm'rs of Land Office*, 101 P.2d 246, 248 (Okla. 1940) ("It was settled long ago that the ownership of the *navigable waters* and the soil under them in all the Territory embraced in the Louisiana Purchase was held in trust by the Federal Government, and as each of the states was created, such ownership within the boundaries of such state passed, to it[.]" (emphasis added))
Oregon	*Chernaik v. Brown*, 475 P.3d 68, 76–77 (Or. 2020) ("[T]he public trust doctrine applies to 'navigable' waterways and the lands underlying those waterways . . . . In addition to the land underlying bodies of water that meet the federal test for navigability, the *navigable waters* themselves are a public trust resource." (emphasis added))
Pennsylvania	*Hunt v. Graham*, 15 Pa. Super. 42, 46–47 (Pa. Super. Ct. 1900) ("[T]he soil and the *water* found between the lines that describe low water mark [are] maintained as eminent domain for the use of all citizens … It is unquestioned that the *waters* of our public streams are public property, and that their use by a riparian landowner is subject to the public right … There can be no such thing as ownership in flowing water." (emphasis added) (internal citations omitted))
Rhode Island	*Cavanaugh v. Town of Narragansett*, 1997 WL 1098081, at *9 (R.I. Super. Ct. Oct. 10, 1997) ("In general, the public trust doctrine established that title to tidal and *navigable waters*, and the lands beneath these waters, is vested in the State for the benefit of the public." (emphasis added)); *see also* R.I. Const. Art. I, § 17 ("The people . . . shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, *water*, plant, animal, mineral and other natural resources of the state, and

	to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state." (emphasis added))
South Carolina	*Sierra Club v. Kiawah Resort Assocs*., 456 S.E.2d 397, 402 (S.C. 1995) ("The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, *water* (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks." (emphasis added) (internal quotations and citation omitted)); *see also id*. (describing "public trust lands *and waters*" (emphasis added)); *State v. Head*, 498 S.E.2d 389, 392 (S.C. Ct. App. 1997) ("These constitutional and statutory provisions expressly sanction the preexisting common-law rights of the public in navigable watercourses. The state holds tidal *navigable watercourses* subject to a public trust, and the state's ownership of public trust resources is generally not alienable." (emphasis added) (internal citation omitted))
South Dakota	*Parks v. Cooper*, 676 N.W.2d 823, 838-39 (S.D. 2004) ("All *waters* within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public." (emphasis added))
Tennessee	*State v. W. Tenn. Land Co.*, 158 S.W. 746, 753 (Tenn. 1913) ("The state not having parted with its title to the land before the lake was formed, it thereafter held the *waters* of the lake and the lands under them in trust for all the people, and could not grant them away." (emphasis added)); *see also The Point, LLC v. Lake Mgmt. Ass'n, Inc.*, 50 S.W. 3d 471, 476 (Tenn. Ct. App. 2000)
Texas	*Cummins v. Travis Cnty. Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 49 (Tex. Ct. App. 2005) ("[T]he State maintain[s] title to the beds and *waters* of all navigable bodies . . . to protect the public's interest in those scarce natural resources. . . . [T]he State, as trustee, is entitled to regulate those *waters* and submerged lands to protect its citizens' health and safety and to conserve its natural resources." (emphasis added))
Utah	*Colman v. Utah State Land Bd.*, 795 P.2d 622, 635 (Utah 1990) ("The essence of this [public trust] doctrine is that *navigable waters* should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing." (emphasis added))
Vermont	*Montpelier v. Barnett*, 49 A.3d 120, 127 (Vt. 2012) ("According to the public trust doctrine, the State of Vermont holds Berlin Pond in trust as a *navigable public water*[.] . . . State trusteeship over *navigable waters* has

	a lengthy and somewhat mythic pedigree dating back to Roman and English law." (emphasis added)); *see also Hazen v. Perkins*, 105 A. 249, 251 (Vt. 1918) ("[T]he General Assembly cannot grant to private persons for private purposes the right to control the height of the water of the lake, or the outflow therefrom, by artificial means, for such a grant would not be consistent with the exercise of that trust which requires the state to preserve such *waters* for the common and public use of all." (emphasis added))
Virginia	*James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 122 S.E. 344, 346 (Va. 1924) ("[T]here are certain public uses of navigable waters which the state does hold in trust for all the public, and of which the state cannot deprive them, such as the right of navigation[.] … [T]he Legislature has the power to dispose of such beds and the *waters* flowing over them subject to the public use of navigation, and such other public use, if any, as is held by the state for the benefit of all the people." (emphasis added)); *see also Morgan v. Commonwealth*, 35 S.E. 448, 449 (Va. 1900) ("The *navigable waters* of the state and the soil under them within its territorial limits are the property of the state for the benefit of its own people, and it has a right to control them as it sees proper[.]" (emphasis added))
Washington	*Lake Union Drydock Co., Inc. v. State Dept. of Nat. Res.*, 179 P.3d 844, 851 (Wash. Ct. App. 2008) ("According to the public trust doctrine, the State holds state shorelines and *waters* in trust for the people of Washington, and the state can no more convey or give away this jus publicum interest than it can abdicate its police powers in the administration of government and the preservation of the peace." (emphasis added) (cleaned up))
Wisconsin	*Lake Beulah Mgmt Dist. v. State Dep't of Nat. Res.*, 799 N.W.2d 73, 84 (Wisc. 2011) ("[T]he State holds the *navigable waters* and the beds underlying those waters in trust for the public. This 'public trust' duty requires the state not only to promote navigation but also to protect and preserve its *waters* for fishing, hunting, recreation, and scenic beauty." (emphasis added) (internal citations and quotation marks omitted)); *see also Clean Wis., Inc. v. Wis. Dep't of Nat. Res*., 961 N.W.2d 611, 615–18 (Wis. 2021)
Wyoming	*Day v. Armstrong*, 362 P.2d 137, 145 (Wy. 1961) ("This court has interpreted the State's title to the waters to be one of trust for the benefit of the people. . . . No one seriously disputes that the waters themselves belong to the State and are held in trust by it for the benefit of the public."); *id*. at 151 ("[T]he waters of the river are the property of the State and are held by it in trust for the equal use and benefit of the public[.]")

In two other states, courts have not squarely addressed the common law public trust in water, but it has been confirmed by statute. These are Georgia, *see* Ga. Code Ann. § 52-1-2 ("[T]he State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and

enjoy all *tidewaters* which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine." (emphasis added)), and Indiana, *see* Ind. Code § 14-26-2-5(c)–(d) ("The . . . public of Indiana has a vested right in the . . . preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state. . . . The state . . . has full power and control of all of the public freshwater lakes in Indiana both meandered and unmeandered; and holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes." (cleaned up)).

In five other states, courts have not squarely addressed the public trust in water. But in none of these states has a court ever held that public trust doctrine does *not* cover waters:

State	Source
Delaware	*Bickel v. Polk*, 5 Harr. 325, 326 (Del. Super. Ct. 1851) ("In all *navigable rivers*, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark; though it be over private soil." (emphasis added))
Kansas	*Winters v. Myers*, 140 P. 1033, 1037 (Kan. 1914) ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." (quoting *Ill. Cent.*, 146 U.S. at 453))
Kentucky	*Pierson v. Coffey*, 706 S.W.2d 409, 411–12 (Ky. Ct. App. 1985) (holding that the rights of "riparian property owners" are "subordinate, however, to the public's right to utilize navigable waters[.] . . . The 'public right of navigation' includes the right to navigate the waterways in the strictest sense, that is, for travel and for transportation. The right also includes the right to use the public waterways for recreational purposes such as boating, swimming, and fishing." (internal citations omitted))
Missouri	*Bollinger v. Henry*, 375 S.W.2d 161, 165 (Mo. 1964) ("[T]he owner of land through which a nonnavigable stream flows is 'subject to the burdens imposed by the river,' and is subject to certain limitations imposed in the public interest in the use of the water and the control of the land constituting the bed and banks of the stream." (internal citation omitted))
West Virginia	*Gaston v. Mace*, 10 S.E. 60, 64 (W.Va. 1889) (holding that "floatable streams . . . while they are the private property of the riparian owners, yet the public has a right to use them as public highways to float their lumber and other products of their land to mill or market, and the riparian proprietor cannot so use these streams as unreasonably to incommode and hinder the public from using them for such floating purposes.")

In Colorado, the judiciary has uniquely limited its public trust doctrine by holding that virtually all of the waters of that state are not "navigable." *See Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912) ("[T]he natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and . . . no stream of any importance whose source is without those boundaries, flows into or through this state."). Because the public trust doctrine in Colorado is tied to the navigability of waters, the

doctrine thus has little practical relevance under Colorado law. *But see Aspect Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1260 (Colo. 1995) ("The Conservation Board has a unique statutory fiduciary duty to protect the public in the administration of its water rights decreed to preserve the natural environment."). However, no Colorado court has ever held that the doctrine itself does *not* cover waters.

Legislatures in at least two states have attempted to remove waters from the ambit of the public trust doctrine. In Arizona, the state legislature in 1995 "declare[d] that it [did] not intend to create an implication that the public trust doctrine applies to water rights in this state." *See* 1995 Ariz. Sess. Laws ch. 9, § 25(B); *see also* Ariz. Rev. Stat. § 45-263(B) (1995) ("The public trust is not an element of a water right in an adjudication proceeding held pursuant to this article[.]"). However, the Arizona supreme court struck this down in no uncertain terms. *See San Carlos Apache Tribe v. Superior Ct. ex rel. Cnty. of Maricopa*, 972 P.2d 179, 215 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation . . . . The Legislature cannot order the courts to make the doctrine inapplicable . . . . That determination depends on the facts before a judge, not on a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts.").

In Idaho, by contrast, after the state supreme court held that "[t]he public trust doctrine takes precedent even over vested water rights," *Kootenai Env't All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983); *see also Idaho Conservation League v. State*, 911 P.2d 748, 750 (Idaho 1995) ("proprietary rights to use water . . . are held subject to the public trust"), the legislature passed a law stating that "the public trust doctrine shall not apply to . . . [t]he appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights[.]" Idaho Code Ann. § 58-1203(2)(b). The constitutionality of this statute does not appear to have been challenged, and the Idaho supreme court recently affirmed that *Kootenai* "is still good law." *Newton v. MJK/BJK, LLC*, 469 P.3d 23, 29 (Idaho 2020). While a future Idaho court may rule as courts in Arizona and other states have, *see Gunderson v. State, Ind. Dep't of Nat. Res*., 90 N.E.3d 1171, 1182–83 (Ind. 2018) (holding that Lake Michigan falls under the common law public trust despite a statute excluding it), at present Idaho has statutorily limited its public trust in water. Nonetheless, no Idaho court has ever held that the common law public trust doctrine does not cover water, as the State is currently urging this Court to hold.

CERTIFICATE OF SERVICE

I hereby certify that on the 26th of April, 2024, the foregoing **COMBINED OPPOSITION IN RESPONSE TO MOTIONS TO DISMISS** was filed via the court's electronic filing system on the following:

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Exhibit 1

Brief of State Respondents, Colman v Utah State Land Bd (Jan. 14, 1987)

Original

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

BRIEF OF STATE RESPONDENTS

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

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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

BRIEF OF STATE RESPONDENTS

ISSUES PRESENTED FOR REVIEW

1. Does Sovereign Immunity Bar Plaintiff's Action?

2. Irrespective of Sovereign Immunity, is Plaintiff's Alleged Injury Compensable?

DETERMINATIVE PROVISIONS

1. The Utah Governmental Immunity Act, Section 63-30-3, U.C.A. 1953, states in relevant part:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function * * *.
>
> 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. The Great Salt Lake Causeway Act (H.B. 30, 1984 Budget Session), 1984 Utah Laws, Ch. 32, is reproduced as Appendix A of Colman's Brief; see also R. 373.

STATEMENT OF THE CASE

Plaintiff Colman appeals the District Court's Order granting the Defendants' respective Motions to Dismiss. Colman alleged his open, submerged ditch would be damaged when the State breached the Southern Pacific Causeway. The Causeway, which separates the Great Salt Lake into north and south arms, was breached August 1, 1984, pursuant to the Great Salt Lake Causeway Act of 1984, House Bill No. 30 (hereinafter sometimes "H.B. 30"), 1984 Utah Laws, Ch. 32. See Colman's Appendix A.

Breaching the Causeway was necessary to alleviate flooding caused by extremely heavy runoff into the Lake in recent years. To illustrate the magnitude and urgency of the problem: between the fall of 1982 and summer of 1983, the level of the south arm rose 5.2 feet, which was the greatest seasonal rise in the Lake's recorded history. R. 134. The flooding problems continued to compound when in 1984 the already-swollen Lake peaked 4.95 feet higher than in 1983. R. 134. That was an increase of about ten feet in less than two years. And the National Weather Service was predicting the Lake would peak an additional one to two feet higher in 1985. R. 131, 134.

Most of the Lake's tributary water enters its south arm. The Causeway was restricting that water from flowing into the north

arm, R. 173, causing the water level on the south side of the Causeway to be (in 1984) approximately 3.6 feet higher than on the north side. R. 176. Severe flooding of public and private properties was occurring around the southern side of the Lake. To salvage public improvements, including Interstate-80, extensive and expensive work was required. R. 164. The disproportionate south-side flooding could be mitigated by breaching the Causeway, which would nearly equalize the water levels in each arm of the Lake. (See Judge Aldon J. Anderson's discussion of the need for the breach, post at n. 16.)

The Legislature recognized and expressly found that the Lake was experiencing "extraordinary flooding conditions resulting in substantial damage to public and private facilities," which conditions "pose 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." H.B. 30. The Legislature found that the breach would alleviate existing and anticipated flooding, and that it would be "in the public interest and a public purpose." H.B. 30. So, the Legislature passed H.B. 30 to authorize the Respondent Division of State Lands to go forward with the project.

After securing a necessary federal permit (U.S. Army Corps of Engineers Section 404 Dredge and Fill Permit), the State engaged Southern Pacific Transportation Company ("SP") to act as general

contractor of the project. The State's contract with SP was executed March 29, 1984, the day H.B. 30 became law, and work began immediately, culminating in the actual breach on August 1, 1984.

Colman filed both his motion to enjoin the breach and his complaint on July 20, 1984. The complaint sought injunctive relief and damages for the pending breach, which he alleged would damage a portion of his underwater brine-diversion-ditch located in the north-arm bed of the Great Salt Lake. The ditch (i.e., the location at which Colman alleges a ditch existed on his right-of-way) was approximately 1700 feet north of, and roughly parallel to, the Causeway. R. 30, 547-48. The court denied Colman's motion for injunctive relief on July 31, 1984, after an evidentiary hearing, briefs and oral argument.

Because of the litigation surrounding the motion for preliminary injunction, the court already had had the benefit of considerable evidence and deliberation by the time Defendants' Motions to Dismiss came on for hearing. After taking the Motions to Dismiss under advisement, Judge Jay E. Banks granted them, dismissing the complaint with prejudice. See Order dated May 2, 1986, Appendix 1; R. 461-463. It is from that Order that Colman now appeals.

The court based its Order on the following legal conclusions: (1) The Utah Governmental Immunity Act, Section 63-30-3, as amended in 1984, absolutely immunizes governmental entities from suit for any injury or damage resulting from their management of

flood waters or their construction, repair or operation of flood and storm systems; (2) Colman's claims are otherwise barred by the Utah Governmental Immunity Act; (3) Defendant SP is protected under the State's immunity since SP was acting as the State's contractor on the breach project; (4) the breaching of the Causeway, as specifically authorized by the Utah Legislature, was valid and proper under the State's police powers and the Public Trust Doctrine; (5) there was no compensable taking of a property interest; and (6) the complaint otherwise fails to state a cause of action against the Defendants. R. 461-463.

Colman has a right-of-way[1] on which he was entitled to maintain a ditch on the lakebed, R. 489, but the evidence (from the hearing on the injunction motion) shows that immediately before the breach Colman did not have a functional ditch located on his right-of-way opposite (a quarter-mile from) the breach site. R. 184. Moreover, Colman did not have the right to divert water or

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1. On January 15, 1979, the State Land Board approved Colman's request for "a right-of-way covering an existing canal[, to] be added to his [mineral] lease." Board's Minutes; Pl. Ex. 2; R. 170, 489. As is clear from that document, and as Colman's counsel suggested below, the right-of-way was adjunct to the mineral lease Colman had received from the State Land Board on October 12, 1978. ML 29864; Pl. Ex. 1; R. 170, 489. (Colman also had executed a royalty agreement in connection with the mineral lease.) The right-of-way had no purpose independent of the lease, and both the lease and right-of-way became unusable when, before the breach, Colman lost the right to divert water or brines from the Lake. R. 501.

brines from the Lake.[2] R. 501. Colman legally could not have operated his business at the time of the breach, and the breach did not damage Colman's property. And even if Colman had a going operation, he cannot prevail for the reasons set forth in the district court's Order.

SUMMARY OF ARGUMENT

There are several reasons to affirm the lower court's dismissal of Colman's complaint. First, his claims for compensation are all barred by sovereign immunity. The Legislature has waived immunity for none of Colman's claims, and without an appropriate, clearly-expressed waiver, no claim for compensation can be pursued against the State.

Besides the lack of any waiver, immunity must obtain here because of the Utah Governmental Immunity Act, Section 63-30-3. Language was added to that Section in 1984 (as companion legislation to the Great Salt Lake Causeway Act) that expressly affirmed pre-existing immunity for floodwaters-management.

Assuming Colman could overcome sovereign immunity, he still could not prevail here because the Causeway breach did not "take" his right-of-way or ditch. Work on the breach did not physically invade or occupy his property and did not deprive him of his property. And the evidence shows Colman had no functional ditch,

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2. Section 73-3-8 required Colman to have an application approved by the State Engineer to divert water or brines from the Lake. This right had lapsed before the date of the breach. R. 501.

anyway. Moreover, the breach project was a valid exercise of the State's police power and the Public Trust Doctrine, and it was a public necessity. Colman has no basis for compensation.

Even if Colman's property had been destroyed by the breach, it was a reasonable act taken in public necessity to avert great property destruction, so the act was legally justified and requires no compensation.

The Public Trust Doctrine holds that the State must manage its navigable waters and their beds (like the Great Salt Lake) for the public good. Colman's position would essentially nullify that principle and would undermine both the State's public-trust authority and initiative in dealing with natural disasters.

Colman's state mineral lease (to which his right-of-way is adjunct) does not take precedence over the State's public prerogative of breaching the Causeway to mitigate emergency flooding. In fact, just the opposite is true: contract rights must yield to the valid exercise of the police power. Every contract is made subject to the implied and necessary condition that its fulfillment may be frustrated by the police power. The State has breached no covenant (implied or otherwise) of Colman's lease.

Colman's argument that H.B. 30 is unconstitutional special legislation is wrong. That act in no way violates the Constitutional requirement that "No private or special law shall be enacted where a general law can be applicable." Utah Const., art. VI, sec. 26.

Colman's other arguments also lack merit. The State appropriately hired SP as an independent contractor to perform the Causeway breach, and SP comes within the State's immunity for the project.

And Colman's argument that the Causeway is a nuisance is convoluted, confusing and flawed, and affords him no remedy in this case.

Colman located his business around a natural lake that is subject to the vagaries of Nature, and he located there long after the Causeway had been established in the Lake. And immediately before the breach, his right-of-way and ditch were under 10 feet of water. He has no viable complaint against the State's action in breaching the Causeway to prevent flooding of vital public facilities and other public and private properties. The lower court should be affirmed.

ARGUMENT

I. APPELLANT'S ACTION IS BARRED BY SOVEREIGN IMMUNITY.

Essentially, Colman claims his already-submerged brine ditch would be damaged by water released through the breach of the Causeway. Although the evidence shows that before the breach there was no functional ditch at all, sovereign immunity bars the claim even if a ditch were assumed.

This Court has "consistently and historically" upheld the Doctrine of Sovereign Immunity: "the State may not be sued without its consent * * *." Fairclough v. Salt Lake County, 10 Utah

2d 417, 354 P.2d 105, 106 (1960). The Utah Governmental Immunity Act states all waivers of the State's immunity.[3] That Act is to be "strictly applied to preserve sovereign immunity," and immunity is waived only as "clearly expressed therein." Holt v. State Road Comm'n, 30 Utah 2d 4, 511 P.2d 1286, 1288 (1973).

The State's inherent immunity for managing floodwaters has long been recognized, Wilkinson v. State, 42 Utah 483, 134 Pac. 626, 630 (1913), and has never been waived. In its 1984 session, the Utah Legislature expressly reaffirmed that immunity by enacting, as companion legislation to the Great Salt Lake Causeway Act, the following addition to Section 63-30-3 of the Utah Governmental Immunity Act:

> The management of flood waters* 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.

That immunity is stated absolutely.[4] The Legislature clearly intended that the State have unassailable immunity in its

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3. Epting v. State, 546 P.2d 242, 244 (Utah 1976). The Utah Governmental Immunity Act is at Section 63-30-1 et seq.

*In 1985 the Legislature inserted "and other natural disasters" at the point of the asterisk.

4. Several district court judges who have had occasion to rule on the 1984 legislation have construed it as giving absolute immunity. E.g., Palmer v. State Farm Ins. Co. (Millard County Civil No. 7732, Judge David Sam); Fairchild v. State (Millard County Civil No. 7733, Judge J. Robert Bullock); Reinert v. Home Insurance Co. (Millard County Civil No. 7894, Judge George E. Ballif); and Mendenhall v. University Mall, Inc. (Utah County Civil No. 62597, Judge George E. Ballif).

efforts to deal with flooding.[5]

Even without the 1984 legislation, sovereign immunity bars Colman's complaint. There simply has been no applicable affirmative waiver of immunity. Wilkinson, Fairclough, and Holt, all supra, and Hurst v. Highway Department, 16 Utah 2d 153, 397 P.2d 71, 73 (1964).

Under none of Colman's theories can he maintain this suit to get money from the State for breaching the Causeway. His inverse

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5. Colman argues (Brief 16) the Great Salt Lake Causeway Act (H.B. 30) did not concern floodwaters and was not for flood control for purposes of the express immunity of Section 63-30-3. Colman is patently wrong. H.B. 30, beginning with its first paragraph and then extensively throughout, itself expressly declares that the Causeway must be breached because of "extraordinary flooding conditions." There is no doubt that H.B. 30 was for flood control, and no reason to except the Causeway breach from "floodwaters" immunity.

And what Colman calls a reference in H.B. 30 to "eminent domain as the means of redressing injury to private property" is hardly so clear or pertinent as Colman suggests. Indeed, Section 2 of H.B. 30 merely states that the Division "may take all actions provided in Section 65-1-75 to accomplish" the breach. Section 65-1-75 gives the State Land Board certain authority to prevent floods. Incident to its power under that general statute to construct control works, the Board "may acquire any additional lands either by purchase, exchange, lease, condemnation, or gift necessary for the control or prevention of the floods." So, H.B. 30 does not refer to eminent domain at all, except by way of cross-reference to Section 65-1-75. And the latter Section simply lists condemnation as a discretionary option, but only for property acquisitions (Colman's was not acquired) and only as that property is necessary to the control work (again contrary to Colman's situation).

It is inconceivable (and illogical to argue) that the Legislature intended anything less than immunity for the Causeway breach. The Legislature expressly restated the State's immunity for floodwaters (63-30-3) and in the same legislative session passed the companion legislation to breach the Causeway, which was the largest flood-control project in the State.

condemnation claim is not accorded special treatment; like the others, it is barred because the State's immunity has not been waived for it. Walton v. State, 558 P.2d 609, 611 (Utah 1976); Fairclough, supra. (We emphasize that there was no "taking" here in any event; see post at 16.) In Fairclough the State Road Commission was sued in inverse condemnation for constructing a highway project that adversely impacted the plaintiff's property. This Court upheld the State's sovereign immunity, declaring that article I, section 22, of the Utah Constitution[6] is not self-executing and does not authorize actions against the State without the State's consent:

> consistently and historically we have ruled that the State may not be sued without its consent; taken the view that Art. I, Sec. 22 of our Constitution is not self-executing, nor does it give consent to be sued, implied or otherwise; and that to secure such consent is a legislative matter, a principle recognized by the legislature itself. Other states and federal courts have agreed. [citing authority]

354 P.2d at 106. Quoting from Lynch v. U.S., 292 U.S. 571, 580-82 (1934), Fairclough stated:

> The rule that the [sovereign] may not be sued without its consent is all-embracing * * *. For consent to sue the [sovereign] is a privilege accorded, not the grant of a property right protected by the Fifth Amendment. * * *
>
> The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress,

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6. "Private property shall not be taken or damaged for public use without just compensation."

> * * * and to those arising from some violation of rights conferred upon the citizen by the Constitution * * *. For immunity from suit is an attribute of sovereignty which may not be bartered away.

354 P.2d at 106-107 (emphasis in Fairclough; some ellipses omitted).

The Constitution respects the Legislature's decision regarding sovereign immunity. Where, as here, the Legislature has not clearly waived immunity,[7] section 22 of article I avails Colman nothing. Id.

Colman attempts to distinguish Fairclough, supra, and Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960), which fully support the State's position. Those cases show that the Constitutional principles "that the State may not be sued without its consent * * * [and] that Art. I, Sec. 22 of our Constitution is not self-executing," Fairclough at 106, apply to all governmental "takings" claims. Nothing in those cases suggests the Constitutional principle changes upon the distinction Colman alleges (see App. Brief 9-10). Indeed, Lynch v. U.S., supra, quoted with approval in Fairclough, reaffirms that the principle of sovereign immunity is "all-embracing."

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7. Holt, supra, at 511 P.2d 1288 (sovereign immunity is waived only as "clearly expressed" in the Governmental Immunity Act); Hurst v. Highway Department, supra, at 397 P.2d 73 (1964) (sovereign immunity bars negligence and nuisance actions alike); Anderson Investment Corp. v. State, 28 Utah 2d 379, 503 P.2d 144 (1972). Wilkinson v. State, 42 Utah 483, 134 Pac. 636 (1913); State Road Commission v. Fourth District Court, 94 Utah 387, 78 P.2d 502 (1937); Campbell Building Co. v. State, 95 Utah 242, 70 P.2d 857 (1937).

Colman also incorrectly assumes Fairclough's holding about section 22 of article I (that it is not self-executing) means only that "the legislature has an obligation to provide a statutory mechanism for taking private property." App. Brief 9 n. 1. That is not what Fairclough means at all. The eminent domain statutes had existed long before Fairclough was decided, and the State was immune in that case despite those statutes. Eminent domain legislation does not diminish the State's immunity. Fairclough held (and other cases agree) that the Constitutional provision and eminent domain legislation alone cannot override sovereign immunity; only an express legislative waiver of immunity could allow Colman to pursue his claim.

Colman has not addressed such cases as Walton v. State, 558 P.2d 609, 611 (Utah 1976), and those cited in our footnote 7. All those cases support the State's position here, and at least one of them involved a physical invasion like Colman alleges. Hurst v. Highway Department, 16 Utah 2d 153, 397 P.2d 71, 72 (1964) (plaintiffs alleged the gravel processing plant was very noisy and produced a great deal of dust and smoke, which went onto their property). The cases show that sovereign immunity remains inviolable until the Legislature changes it. Hurst, 397 P.2d at 73.

Nothing in State v. Williams, 22 Utah 2d 331, 452 P.2d 881 (1969), requires a contrary conclusion. Indeed, Colman makes far too much of that case. He quotes dictum and draws inferences

(App. Brief 10) that do not jibe with the result and issues in that case (Williams did not prevail against the State nor was sovereign immunity even raised).

Nor is Dean v. Rampton, 556 P.2d 205 (Utah 1976), apposite. That case concerned an irrelevant part of the Utah Constitution (art. VII, sec. 13, relating to the Board of Examiners), did not involve any alleged taking of property or a natural flood emergency, and sovereign immunity was not an issue. The case held only that individual members of the Legislature could not avoid the Board of Examiners for travel-reimbursement claims. And the Court expressly noted that its narrow holding did not change "the prerogative of the full legislature to act upon these claims subsequent to action upon them by the Board of Examiners."[8/] 556 P.2d at 208 n. 6. That case hardly goes in Colman's favor.

The Legislature's decision to retain immunity in cases like this is, first, within its discretion and, second, clearly justified. Governmental functions like the breach project need immunity so as to allow sound public policy and the maintenance of the integrity of our system of government. Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440, 444 (1965); Dalehite v. U.S., 346 U.S. 15 (1953).

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8. The Court cited Wood v. Budge, 13 Utah 2d 359, 374 P.2d 516, 519 (1962), for that proposition. That case stated that that provision of the Constitution "plainly indicates that the action of the Board was not intended to be so final and absolute as to preclude other action by the Legislature." 347 P.2d at 518.

"[I]t is well to have in mind that the legislature has recognized the necessity of immunity as essential to the protection of the state in rendering the many and ever increasing number of governmental services. * * * [W]here there is thus a general preservation of governmental immunity, any exception must be found to be clearly stated within the provisions of the act." Epting v. State, 546 P.2d 242, 243-44 (Utah 1976). There has been no waiver of immunity for Colman's claims, and the dismissal of his complaint should be affirmed.9/

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9. Colman makes a very quick reference to Section 63-30-5 (waiver of immunity for contracts generally). However, we show below that the underlying contract (the mineral lease) on which Colman relies for this argument itself must yield to the State's actions in this case. See post at 30-32. Since the underlying contract gives Colman no remedy against the State, Section 63-30-5 cannot apply.

Moreover, while it waives immunity for contracts generally, Section 63-30-5 must be read in the context of the entire statutory statement of immunity. It cannot be read apart from the specific "flood waters" immunity of Section 63-30-3, which, because it is more specific and recent, must prevail (as a matter of statutory construction and common sense) over the earlier and very general waiver for contracts. Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980); Pacific Intermountain Exp. Co. v. State Tax Comm'n, 7 Utah 2d 15, 316 P.2d 549, 551 (1957); Bateman v. Board of Examiners, 7 Utah 2d 221, 322 P.2d 381, 388-89 (1958).

The controlling consideration here is that the Legislature has given governmental entities full authority and immunity for floodwater management, and Section 63-30-5 cannot contradict that.

II. BECAUSE THERE WAS NO "TAKING" OF COLMAN'S PROPERTY, HE IS NOT ENTITLED TO COMPENSATION.

Assuming Colman could overcome sovereign immunity, he still could not prevail here. Contrary to Colman's allegation, the causeway breach did not "take" his ditch. His complaint, filed before the breach occurred, alleged that the breach would "result in the total destruction" of part of his ditch. Complaint, para. 8, R. 6. Allegedly, the water released through the breach would cut through the ditch banks and create turbidity that would fill the ditch with sediment. Id. This "destruction," he alleged, would constitute a taking under article I, section 22, of the Utah Constitution. Id., para. 10.

As a matter of law there has been no taking in this case. First, no "taking" occurs unless there is an effective deprivation of property ownership. Second, the breach project was a valid exercise of the State's police power and the Public Trust Doctrine, and was a public necessity, so there was no taking and no basis for compensation.

A. Colman has not been Deprived of Ownership or Use of His Property.

Colman's property has not been taken. He still owns his right-of-way and whatever ditch he had, and may use them (to the extent the law will allow (see ante at 5 and nn. 1, 2)). The causeway breach benefited the public without taking Colman's property rights. The Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088, 1093 (Mont. 1984) (inverse condemnation

claim was rejected because "[p]ublic use of the waters and the bed and banks of the [navigable water] * * * was determined, not title").

A taking occurs, and compensation is appropriate, only where the government permanently appropriates private property. Sanguinetti v. U.S., 264 U.S. 146 (1924). In Sanguinetti, the United States was sued for inverse condemnation when lands were flooded by an overflowing federal irrigation canal. The Court held that the flooding did not amount to a taking: "[I]n order to create an enforceable liability against the government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property." 264 U.S. at 149 (emphasis added). That necessarily requires more than a temporary, repairable effect on one's property. Dudley v. Orange County, 137 So.2d 859, 863 (Fla. Dist. Ct. App.), cert. denied, 372 U.S. 959 (1962), citing authorities.

The United States 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 Sanguinetti and others.

Breaching the Causeway and lowering the south arm was a one-time occurrence, with little, if any, impact on Colman's property. There was no physical invasion or occupation of Colman's right-of-way during the construction of the breach. And the evidence is that Colman's "ditch" could not have been damaged or taken, for it did not exist at the time of the breach. Colman's right-of-way remains his property, and the breach appropriated nothing.

Substantial evidence in the form of affidavits and live testimony, adduced at the time Colman's pre-breach motion for injunctive relief was heard, shows that Colman's "takings" claim cannot withstand the law:

> Mr. Allen [Counsel for Colman]: The ditch itself is a ditch which was dug with a dragline, your honor. Perhaps it would be * * *
>
> The Court: It is not encased?
>
> Mr. Allen: No, it is not encased. It is simply an open ditch that was created by a dragline. At the time it was dug or trenched, the major part of the ditch was above water. At the present time it is under water * * *."

R. 510-11. The "ditch" is located about 1700 feet from the Causeway. R. 547. Colman testified that the ditch originally was constructed between 1967 and 1969, and that, in the area opposite the breach site, the ditch had not been dredged for

several years, R. 495, certainly more than four years. Id. Opposite the breach site, if the ditch existed it would have been in water about 10 feet deep. R. 183.

One affiant was Paul A. Sturm, an employee of Utah Geological and Mineral Survey responsible for certain state monitoring programs on the Great Salt Lake. He testified about several measurements he took of the lakebottom eight days before the breach. R. 180-81. His testimony is uncontradicted.

Sturm found that in the ditch area just west (shoreward) of the breach site "the bottom of the ditch was no more than 1.0 feet below the natural lake bottom [and] could be level with the lake bottom." Also, "the dikes or berms on either side of the ditch were no more than 1.4 feet above the lake bottom. Thus, at [this point], the maximum possible conduit capacity of the ditch would be 2.4 feet and could be as little as 1.4 feet." R. 183.

Sturm then moved his boat and instruments from where the ditch was last observed, to search for the ditch in the area "directly across from the breach site." Between the point where signs of the ditch had last been observed and the area opposite the breach, "there was no discernible dredged ditch, [n]or dikes or berms." R. 184. He made several checks of this area, and never found the "ditch." Id.

"Based on my fathometer readings, lead line soundings and my calculations," he concluded that where the ditch should have been, at the point "immediately north of and in line with the

breach site * * * the berm has been completely eroded away and the ditch silted in, and * * * is presently unusable as a brine conduit." Id. While "some remnants of the ditch do exist" shoreward from the area opposite the breach site, id., the capacity of even that part of the ditch already had been "to a significant degree, diminished by erosion and sedimentation." Id.[10]

The uncontradicted evidence, then, is that eight days before the breach there was no ditch directly across from the breach site. The State cannot be liable for damaging a ditch that does not exist, and cannot be liable in inverse condemnation.

Another witness, Norman E. Stauffer, PhD, an expert in fluid mechanics and hydraulics, testified that "initially following the breach, the water velocity through the 300-foot wide breach [i.e., at the actual point of the breach, where the released water flows from south to north] will be approximately 10 feet per second. * * * By the time the flows reach [Colman's] ditch (* * * approximately 1700 feet north of the breach site), the velocity will be only 1.2 feet-per-second, which is a relatively low velocity." R. 119.

He continued, "[W]hile the flow velocities stated above will occur, they will not prevail from the water surface to the bottom of the Lake after the water moves away from the breach. * * *

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10. Colman's consultant, Dr. Clark Lin, testified that the ditch could have been eroded by wave action as the lake level rose over the past several years. R. 515.

Therefore, at the ditch location, there may be little, if any, water velocity flowing near the bottom of the Lake." R. 120.

While initially the "breach will result in at most a flow velocity of no more than approximately 1.2 feet-per-second in the vicinity of [Colman's] ditch, * * * it is very unlikely there will be any lake-bottom water movement at the ditch site." Id. Even flow velocities of 1.2 feet-per-second would not cause "significant erosion or damage to the ditch." Id.

Dr. Stauffer testified that about 30 days after the breach the two arms of the Lake would nearly equalize and the flows would "significantly" slow because of less head-pressure from the south. R. 121-122. By that time, the flows over the "ditch" at lake surface would be only about 0.8 feet-per-second, and at lakebottom only 0.3 feet-per-second, "which is not enough velocity to cause erosion." R. 123.

"In conclusion, * * * 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.

Dr. Stauffer's testimony was based on his 13 years of studying the Great Salt Lake, including the effects of the Causeway and its breaching. R. 117. He personally was familiar with conditions in the Lake and with construction techniques and materials going into the breach project. R. 117, 121. His testimony was not contradicted. Indeed, Colman's witness, Dr. Lin,

would not disagree with Dr. Stauffer's conclusions about the water's movement through the breach,[11] R. 509, 517, and also could not contradict Mr. Sturm's finding that no ditch existed in the area opposite the breach site. R. 513.

There was no ditch to be affected by flows from the breach, and those flows would not harm such a ditch, anyway. The breach caused no permanent appropriation of property[12] and is no basis for Colman's inverse condemnation claim. Sanguinetti, supra; and Miller v. U.S., 583 F.2d 857 (6th Cir. 1978).

That conclusion is supported by many cases. One example is Accardi v. U.S., 599 F.2d 423 (Ct. Cl. 1979), where the plaintiffs asserted their riverside properties had been "taken" by flooding from a government-operated dam. The court dismissed the action for reasons that are equally compelling here.

"Where a claim of taking of private property for a public use is founded upon interference with land due to flooding, the burden of proving the claim consists of more than a mere showing that governmental action has 'interfered with property rights.'" Id. at 429 (citations omitted). (Colman's claim is certainly no

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11. Dr. Lin did not disagree with Dr. Stauffer's analysis of the mechanics of the movement of water through the breach. All he did was hypothesize about special wind factors. Lin had not looked at the breach site and was otherwise rather unfamiliar with particulars about the breach project. R. 513, 517, 522.

12. At the time of the breach, Colman did not have a water right from the State Engineer to divert water from the Lake. As he admitted on cross-examination, whatever right he had had to divert had since "lapsed." R. 501.

more than that.) "[W]here no permanent flooding of the land is involved, proof of frequent and inevitably recurring inundation due to governmental action is required." Id., citing several cases. Colman's "ditch" was already flooded, and the uncontradicted evidence is that allowing the two arms of the Lake to equalize, through the breach, would not adversely impact the ditch.

"There is another insuperable barrier to plaintiffs' recovery here. While plaintiffs' property undoubtedly suffered some damage during the * * * flood, it is clear that defendant 'does not owe compensation * * * to every landowner which it fails to or cannot protect.'" Id., citing U.S. v. Sponenbarger, 308 U.S. 256, 265 (1939), and others. The Constitutional provision for just compensation does not make the government "'an insurer that the evil of floods be stamped out universally before the evil can be attacked at all,' by way of a flood control project." Accardi at 429, quoting Sponenbarger, supra, 308 U.S. at 266. "Nor does it require that defendant be a guarantor against all future flooding in connection with the construction of projects having other purposes." Accardi at 429, citing Hartwig v. United States, 485 F.2d 615, 620 (Ct. Cl. 1973).

The court also made the following point, which we analogize to the breach: "[P]laintiffs have wholly failed to show that

* * * [breaching the Causeway] subjected their lands to any additional flooding above what would have occurred * * * had [the breach not occurred] at all." Accardi at 429-30.

"In these circumstances, there has been no taking of plaintiffs' property. United States v. Sponenbarger, [308 U.S. 256 (1939)] * * *. This too is a case of * * * little injury in comparison with far greater benefits conferred." Id. at 430 (internal quotation marks omitted).

The weight of authority is overwhelming: a "taking" is more than mere damage to property. Without a permanent deprivation of property, the doctrine of eminent domain does not apply.13/ Even if the breach had disturbed the waterflows around the ditch for a while, government "may temporarily inconvenience citizens and property owners by the construction of public improvements," Oldfield v. City of Tulsa, 170 Okla. 329, 331, 41 P.2d 71, 72 (1935), quoted in Lewis v. Globe Const. Co., 6 Kan. App.2d 478, 630 P.2d 179, 183 (1981), and no right to compensation arises.

13. State v. Sawyers, 148 W.Va. 130, 133 S.E.2d 257, 261 (1963) (under a constitutional provision similar to the relevant one in the Utah Constitution, held that the flooding of land was not a taking); U.S. v. Dickinson, 331 U.S. 745 (1947); Hartwig v. U.S., 485 F.2d 615 (Ct. Cl. 1973); National By-Products, Inc. v. U.S., 405 F.2d 1256, 1272-74 (Ct. Cl. 1969); U.S. v. Cress, 243 U.S. 316 (1917); Key Sales Co. v. South Carolina Electric and Gas Co., 290 F.Supp. 8 (D.S.C. 1968), aff'd, 422 F.2d 389, 390 (4th Cir. 1970); Fromme v. U.S., 412 F.2d 1192, 1196 (Ct. Cl. 1969) ("one flooding * * * or two floodings * * * cannot be regarded as a taking of a permanent interest in the affected land"); Hayashi v. Alameda County Flood Control, 167 Cal. App. 2d 584, 334 P.2d 1048, 1053 (Cal. Ct. App. 1959) (allegations of negligence do not give rise to a claim for inverse condemnation).

Colman has not sustained a "taking." He has at best alleged a tort, and a weak one at that. The critical distinction between torts and takings was observed in Miller v. U.S., supra:

> Another way courts have limited the Government's liabilities under the Constitution is through the elaboration of a distinction between takings and "mere" torts. Flooding cases provide some examples. When the Government deliberately raises the water level by impounding water behind a dam, the permanent takeover of land by water is a taking.
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> * * * *
>
> In other cases, however, as when a landowner is damaged by release of water through a dam or a change in flooding patterns is caused by construction of levees, courts have frequently denied compensation, saying that the flooding involves at most a tort, not a taking or an implied contract claim. Often the reason is that the Government's action has only resulted in temporary rather than permanent or recurrent flooding. Courts have also relied on the explanation that the loss is not a "direct" appropriation of land but merely a "consequential and incidental" result of the Government's actions.

583 F.2d at 863 (emphasis added and citations omitted).[14/]

Colman's claim that his property has been taken, whether phrased in terms of inverse condemnation or otherwise, fails as a matter of law. That would be true even if we assumed a ditch and further assumed that it was damaged by breach-created water flows. Colman's ditch was constructed in 1967, R. 494, with the Causeway (built in the 1950's) in plain view. The ditch likely was located there because of the sheltering effect of the Causeway, R. 513, and the rich north-arm brines it caused.

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14. This reasoning is in accord with general principles set forth by this Court. See post at pp. 28-29.

Colman cannot demand that the Causeway be maintained for his benefit while the public interest and general lake-management suffer.[15] He had no "vested right in having it maintained in [its] original condition." Ireland v. Henrylyn Irrig. Dist., 133 Colo. 555, 160 P.2d 364, 365-66 (1945); Stouder v. Dashner, 242 Iowa 1340, 49 N.W.2d 859, 864 (1951). The State necessarily released floodwaters from one side of the Lake to the other, to restore the Lake to its pre-Causeway equilibrium, and if Colman were damaged, it is not compensable. Ireland, 160 P.2d at 367 (no compensable damage when floodwater was released from a dam); Stouder, supra.

As a member of the business community around the Lake, Colman assumed the risks of the Lake's vagaries. The Lake fluctuates with Nature, and the best anyone can do is react in a reasonable way. SP and the State, as the respective owners of the Causeway and the Lake, had the right to breach the Causeway to relieve flood pressures; and it was both reasonable and efficacious. If Colman could prevail in a case like this, government might be less eager to undertake to mitigate natural disasters.

As a matter of sound public policy, Colman's claim cannot survive. "[T]he use of inverse condemnation with its imposition

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15. See post at 36, where Morton International, Inc. v. Southern Pacific Trans. Co., 27 Utah 2d 256, 495 P.2d 31, cert. denied, 409 U.S. 934 (1972), is discussed.

of money damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power." Agins v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25, 32 (1979), aff'd, 447 U.S. 255 (1980) (land use planning case).

B. This Was A Proper Exercise of the Police Power and of the Doctrine of Public Necessity.

Breaching the Causeway was necessary to mitigate a natural emergency, and it was in accordance with the State's police power. In an ordered society like ours, every citizen necessarily holds his property subject to the valid exercise of the police power. State Road Comm'n v. Utah Power, 10 Utah 2d 333, 353 P.2d 171, 177 (1960) (quoting State v. Austin, 160 Tex. 348, 331 S.W.2d 737, 742 (1960)); State v. Meier, 388 S.W.2d 855 (Mo. 1965).

The State's eminent domain powers and its police powers are fundamentally distinct. Nichols on Eminent Domain, Third Edition, Vol. I, Section 1.42(2). "Under the police power the [private] property is not, as a general rule, appropriated to another use, but is destroyed or its value impaired, while under the power of eminent domain it is transferred to the state to be enjoyed and used by it as its own." Id., quoted in Dudley v. Orange County, supra, 137 So.2d at 862.

Colman's property was not taken or transferred to the State; at worst it was merely impacted by the necessary and proper release of water from one side of the Lake to the other.

"A proper exercise of the police power by the sovereign does not require the payment of compensation." Nichols on Eminent Domain, supra. Where the State acts pursuant to statutory authority to protect the public's health, safety or welfare, and property is thereby injured, there is no "damaging or taking of property without just compensation within the meaning of the law of eminent domain." Id. The Constitutional provision for just compensation is an eminent domain concept that does not apply to the police power. Id. "[W]ithin the limits of the police power some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community." HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237, 242 (1975), cert. denied, 425 U.S. 904 (1976), (citations and internal quotation marks omitted).

In Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157, 158 (1960), this Court stated that, as here, "if the sovereign exercises its police power reasonably and for the good of all people, * * * consequential damages such as those alleged here, are not compensable." Also, "any damage provable here must yield without compensation in view of the obvious and admitted necessity" of the Causeway breach. 349 P.2d at 159. See also [redacted]st v. Highway Department, supra; Hjorth v. Whittenburg, 121

Utah 324, 241 P.2d 907 (1952); and Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286 (1973). Any resulting injury is necessarily "damage without legal injury." Meier, supra, 388 S.W.2d at 857.

The alleged governmental intrusion in this case is far less than occurred in Emery v. State, 297 Or. 755, 688 P.2d 72, 79 (1984), yet even there the Oregon Supreme Court could find no "taking." Emery's pickup truck was seized on a warrant and used by the state as evidence. The state crime laboratory dismantled the truck, including the roof, headliner and door panels. The truck was returned to Emery dismantled, and he sued in inverse condemnation. 688 P.2d at 74.

The court held that "[t]he damage suffered by the plaintiffs' pickup truck while it was in the custody of the defendants simply was not [a] 'taking.'" Id. at 79-80. A fortiori there was no taking in the instant case.

H.B. 30 was a valid exercise of the State's police power. In a case involving these very parties, United States District Judge Aldon J. Anderson refused to halt the breach, and reached that decision in substantial part because of the police power.16/

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16. The plaintiffs' purpose in Great Salt Lake Minerals & Chemicals Corp. v. Marsh, 596 F.Supp. 548 (D.Utah 1984), was an injunction against breaching the Causeway. Colman was a party-plaintiff and the State and SP were defendants. Judge Anderson refused to enjoin the project. The following excerpt, from 596 F.Supp. at 557-58, relates to Judge Anderson's view of the importance of respecting the police power as exercised in this project:

Colman's mineral lease and ditch right-of-way did not abrogate the State's power to breach the Causeway for the public's welfare. Quite the opposite. When exercise of the police power conflicts with an existing contract, "the contract must yield."

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16. (cont'd.)

> The decision to breach the Southern Pacific Railroad Causeway was a result of the exercise of the sovereign power of the State of Utah to undertake emergency flood control measures to attempt to meet, not only the threat of imminent flooding in the areas surrounding the Great Salt Lake, but also the possibility of continued catastrophic rises in the level of the lake. In the wake of unparalleled rapid rises in the South Arm of the lake, the State understandably acted rapidly to attempt to counter the threat.
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> The record indicates that each one foot rise in the level of the lake would inundate vast areas of surrounding land because of the shallow rise in the valley floor. For example, the 5.2 foot increase in the level of the lake from September, 1982, to July, 1983, inundated about 171,000 acres or 276 square miles. (R. 8466 at 1043.) Each additional foot of rise would translate into millions of dollars of damage. (R. 8466 at 1068.) Lakeside industries, highways, railroads, public facilities, homes, waterfowl management areas and recreation areas would sustain significant damages. (R. 8466 at 1068.) At higher lake elevations, the breach would yield substantial benefits and prevent even more significant damage. (R. 8466 at 553.)
>
> * * * * *
>
> The breach of the causeway is the announced public policy of the State of Utah as declared by the Legislature and approved by the Governor. The legislation to breach the causeway was passed after considerable study and debate. The Legislature expressly declared that it was in "the public interest and a public purpose" to breach the causeway because of the "importance of counteracting the anticipated threat to life, health and property in general and to public lands, major transportation routes and other public facilities." (R. 8466 at 998-999.) Thus, the public interest has been expressed by the representative of the public, the State Legislature.

Retan v. Salt Lake City, 63 Utah 459, 226 Pac. 1095, 1097 (1924); United States Trust Co. v. New Jersey, 431 U.S. 1, 23-24 and n. 21 (1977).

It is axiomatic that "every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power * * *." Anderson v. Brand, 303 U.S. 95, 108-09 (1938). As this Court stated in George v. Oren Limited & Associates, 672 P.2d 732, 737-38 (Utah 1983):

> It is well settled that in the exercise of its police power, a state can enact regulations or laws reasonably necessary to secure the health, safety, morals, comfort or general welfare of the community regardless of whether such laws or regulations affect contracts incidentally, directly or indirectly. Furthermore, we are in agreement with the principle that: The right of the Legislature to act under the police power of the state is a part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law a part of the contract. [Footnotes and indication of quotation omitted; emphasis added.]

Contract terms cannot be allowed to limit the police power. In a case involving a municipality, Retan v. Salt Lake City, 226 Pac. 1095, 1096 (Utah 1924), this Court stated (quoting McQuillan, Municipal Corporations, Section 1169) that the governmental entity does not have power to make a contract that would "embarrass and interfere with its future control over the matter, as the public interests may require." Contracts are "subject at all times to the free and full exercise by the city of its police power in the public interest." Retan at 1096. See also Butcher's Union Co. v. Crescent City Co., 111 U.S. 746, 752 (1884) (the legislature cannot by any contract divest itself of

the power to provide for the protection of the lives, health, and property of its citizens, and the preservation of good order); and Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 436 (1934) (every contract is made in subordination to the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong). "Contract rights, like other property rights, may be altered by the exercise of the state's inherent police power to safeguard the public welfare." U.S. v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 227 Cal. Rptr. 161, 199 (Cal. Ct. App. 1986) (citation omitted). The State has breached no implied covenant of quiet enjoyment in Colman's lease.

Breaching the Causeway was valid and proper, and would have been so even without the legislative authorization of H.B. 30. Indeed, "to avert an overwhelming destruction of property, any individual" (not just the State with its police powers) "may lawfully enter another's land and destroy his property, real or personal, providing he acts with reasonable judgment. * * * The right is a natural one and requires no statutory sanction." Nichols on Eminent Domain, supra, Sec. 1.43. That doctrine of "public necessity," under which Colman has no right to compensation, specifically encompasses the "danger of flood." Id.

As this Court stated in a disaster-related case:

> It is indeed regrettable that such damages did result to the plaintiff's property. But the flood itself was a great misfortune to everyone concerned. It must be expected in an organized society that collective efforts to cope with adversities may result in serious

> damage or sacrifice to the property of some, or that other onerous burdens must be borne, even to the extent of sacrificing the lives of some individuals for the common welfare * * *.

McKell v. Spanish Fork City, 6 Utah 2d 92, 97, 305 P.2d 1097, 1100 (1957).

The Causeway breach was a valid exercise of the police power, and was also proper under the doctrine of public necessity. The State is therefore fully insulated from Plaintiff's inverse condemnation and damage claims.

III. COLMAN'S LEASE ON THE BED OF THE GREAT SALT LAKE IS SUBJECT TO THE PUBLIC TRUST.

Colman's action against the State must be dismissed for yet another reason. His lease and right-of-way involve the waters and bed of a navigable lake,[17] and therefore are subject to the Public Trust Doctrine. That Doctrine, whose origin and development are discussed in the margin,[18] requires the State to manage

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17. The Great Salt Lake is a navigable body of water, and the State gained title to it at statehood under the Equal Footing Doctrine. Both the United States Supreme Court and the Utah Supreme Court have confirmed Utah's ownership to the lakebed, brines, waters and other natural resources of the Lake. Utah v. U.S., 403 U.S. 9 (1971), 406 U.S. 484 (1972), 420 U.S. 304 (1975), 427 U.S. 461 (1976); Utah State Road Comm'n v. Hardy Salt Co., 26 Utah 2d 143, 486 P.2d 391 (1971); Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946); Morton International, Inc. v. Southern Pacific Transportation Co., 27 Utah 2d 256, 495 P.2d 31, cert. denied, 409 U.S. 934 (1972).

18. In England, the Crown and Parliament held in public trust all rights (proprietary and governmental) in all navigable waters and the lands beneath those waters. Shively v. Bowlby, 152 U.S. 1 (1894). As a result of the American Revolution, the thirteen colonies succeeded to all rights of both the Crown and Parliament in and to navigable waters, their beds, and adjacent shores.

the Lake and its resources in the public's best interest.19/ Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

The breach project was the best that could be done for those affected by the rising Lake, and the State's discharge of that responsibility precludes Colman's claims. The cases "demonstrate that the courts have been extraordinarily deferential to state action designed to further the purposes of the public trust, even though such action results in significant economic injury to individuals." Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 172, 212 Cal. Rptr. 578, 593, (Cal. Ct. App. 1985).

Colman's position would require that the public weal yield to his peculiar self-interest, even in the face of a public

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18. (cont'd.)
When the colonies became the original States, they retained those rights and powers, while granting the federal government certain other powers under the Constitution. U.S. Const., art. I, sec. 8, para. 3 (the "commerce" clause); Martin v. Waddell, 16 Pet. 367 (1842); Gibbons v. Ogden, 22 U.S. 1 (1824); and Illinois Central R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 112 (1892).

All States, as a matter of constitutional "equal footing," enjoy the same proprietary and regulatory powers in their navigable waters and beds as the original States. Pollard v. Hagan, 3 How. (44 U.S.) 212, 229 (1845); Shively v. Bowlby, supra. The States, having assumed all incidents of ownership of their navigable waters and beds, continue to hold them in public trust.

19. Colman's royalty contract for the extraction of brines (R. 501) is expressly subject to Section 65-1-15(3), which states in part: "all such contracts shall be subject to the use of the waters for public purposes * * *." That Section reflects the Public Trust Doctrine, but, of course, is not the only basis for the Doctrine in this case.

disaster. That cannot be. Utah holds title to the lakebed "in trust for the enjoyment of certain public rights." Smith v. Maryland, 18 How. 71 (1855). 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." Id.

Under the Public Trust Doctrine, all private interests in navigable waters and their beds are subject to a governmental servitude. The State cannot be made liable for enforcing that servitude against private interests.

In Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110 (1892), the United States Supreme Court held that a State, as administrator of the public trust in navigable waters, cannot benefit a private party in derogation of that trusteeship. 13 S.Ct. at 118. Like its police powers, a State's trust responsibilities can never be abdicated. The trust exists perpetually for the benefit of the public. Id.

In Illinois Central, part of the state-owned bed of Lake Michigan was granted away, but the grant was later revoked. The Court upheld the revocation of the grant, stating that the State's title to the lakebed "is a title held in trust for the people of the state." Id. Because of the public trust, "lands

under navigable waters * * * cannot be placed entirely beyond the direction and control of the state." Id.

This Court already has recognized the dominance of the public interest in lake management. Morton International, Inc. v. Southern Pacific Transportation Co., 27 Utah 2d 256, 495 P.2d 31, cert. denied, 409 U.S. 934 (1972), involved an unsuccessful effort to force a breach of the Causeway. The plaintiff's case was based in part on its State contract that allowed it to extract brines from the Lake. The Court concluded that the plaintiff's rights in the Lake were non-exclusive, and that the plaintiff had no right to demand that the Lake be managed so as to afford any particular brine concentration. The Court stated:

> [Plaintiff's] theory would contemplate * * * that the public, state-owned waters of Great Salt Lake, could be used for no purpose whatever, affecting the public weal, for private contract, leasing to others, regulation of traffic thereon by Congress, or otherwise, if the result threatened the dilution of the waters that plaintiff chooses to divert in its business. We are of the opinion that the plaintiff could not contend that the considerable rise in the lake level that has occurred in the past few years which would appear also to be dilutive of the salt water, would give rise to a compensable claim against the State.

27 Utah 2d at 259-60, 495 P.2d at 33-34.

Colman's position is contrary to law and common sense. Adopting his position would mean that once a State had allowed an easement or other interest on the bed of a navigable lake, the State could take no action to manage, control or develop the lake if such action would in any manner interfere with that easement. Such a result would eviscerate the State's power to carry out its

public trust responsibility, which the U.S. Supreme Court in Illinois Central, supra, has said cannot be abdicated.

Colman's lease was subject to the "public trust,"[20] and to

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20. In Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1096 (1983), an environmental group challenged a decision by the Idaho Department of Lands to lease a small portion of a navigable lake to a private yacht club for a boat marina. The plaintiffs claimed the lease violated Idaho's duty under the Public Trust Doctrine. The court held that, based on the evidence, the lease presently did not violate the public trust. However, the court emphasized the lease is subject to the Public Trust Doctrine, and can be revoked whenever it appears to be incompatible with the State's public trust responsibilities. The court adopted the rule that:

> Grants, even if purporting to be in fee simple, are given subject to the trust and to action by the state necessary to fulfill its trust responsibilities. Grants to individuals of public trust resources will be construed as given subject to the public trust doctrine unless the legislature explicitly provides otherwise.
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> * * * * *
>
> The Department of Lands has determined that the use of the public trust property by the yacht club for the purpose of constructing sailboat slips does not violate the public trust in the resource at this time * * * . However, the grant remains subject to the public trust. * * * [T]he state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance. [671 P.2d at 1094; emphasis added.]

See National Audubon Society v. Superior Court, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, cert. denied, 464 U.S. 977 (1983); Colberg, Inc. v. State of California, 67 Cal. 2d at 408, 432 P.2d 3 (1967), cert. denied, 390 U.S. 949 (1968); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980); People v. California Fish Co., 166 Cal. 576, 138 Pac. 79 (Cal. 1913); and Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).

permit any of Colman's claims[21] would be to weaken the State's authority and responsibility in lake management. Illinois Central, supra. As the California Supreme Court has stated, "The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters." Marks v. Whitney, 6 Cal. App. 3d 251, 98 Cal. Rptr. 790, 491 P.2d 374, 380 (Cal. Ct. App. 1971) (citations

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21. Apparently, Colman's suit sought in part to maintain his advantaged opportunity to take undiluted north-arm brines (Complaint, para. 3, R. 3), for he has no need for or interest in the ditch but as a brine conduit. (The breach, of course, sent fresher south-arm water into the north-arm, diluting the more saline north-arm brines.) But the courts have already expressly and firmly rejected claims of right or preference in the brines. See Morton, supra; Hardy Salt Company v. Southern Pacific Transportation Co., 501 F.2d 1156 (10th Cir.), cert. denied, 419 U.S. 1033 (1974); and Solar Salt Company v. Southern Pacific Transportation Co., 555 P.2d 286 (Utah 1976).

Also, Colman suggests the Public Trust Doctrine does not apply because he alleges the record does not establish whether the ditch "was located below or above what is recognized as 'lakebed.'" App. Brief 14. That is not true. The right-of-way granted by the Land Board clearly describes the land below the meander line. See Plaintiff's Exhibit 2, R. 170, 489. In any event, we cannot fathom Colman's argument, for if the easement was not on the lakebed, what need was there to obtain the easement from the State at all?

Colman's other arguments (Brief 14) against the Public Trust Doctrine are also either arrantly wrong or immaterial. For example, we have never claimed his ditch constituted an impediment to the public's full enjoyment of navigable waters. But, so what? We have never said he cannot have his ditch, but only that his ditch cannot supersede the State's public-trust action.

omitted). See also State Water Res. Cont. Bd., supra, 227 Cal. Rptr. 161, 202; United Plainsmen Ass'n v. N.D. State Water Cons. Comm'n, 247 N.W.2d 457, 460-63 (N.D. 1976). So must Utah's public-trust power remain absolute.

IV. H.B. 30 WAS NOT UNCONSTITUTIONAL SPECIAL LEGISLATION.

Colman asserts that H.B. 30 (which expired by its own terms December 31, 1984) is unconstitutional special legislation. That assertion lacks merit.

Statutes are presumed to be constitutional. Greaves v. State, 528 P.2d 805, 806-07 (Utah 1974). "[T]hey should not be declared unconstitutional if there is any reasonable basis upon which they can be found" constitutional; and "a statute will not be stricken down as being unconstitutional unless it appears to be so beyond a reasonable doubt." Id. Colman cannot overcome that heavy burden.

The provision of the Utah Constitution raised by Colman, article VI, section 26, states: "No private or special law shall be enacted where a general law can be applicable."22/ H.B. 30 did not violate that provision. Its aim and effect were to benefit the public's "life, health and property." It clearly was public in scope and in nature, and was not special or private

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22. Colman improperly quotes (Brief 20) language that was removed from the Constitution in 1972. (The State would not be afoul of even that language.) The relevant section of the Constitution that is now in force is as we have quoted it.

legislation.[23] H.B. 30 is constitutional and this cause of action should be dismissed with the others.

V. COLMAN'S ARGUMENTS AGAINST SOUTHERN PACIFIC LACK MERIT.

Colman's "Point II" (App. Brief 16-19) makes various arguments that lack merit. We address them briefly.

First, the State definitely may (and in this case did) hire an independent contractor (SP) to perform the project, and SP comes within the State's immunity for the project. Under the general rule, as stated in Annot., 9 A.L.R.3d 382, 386 (1966), a governmental entity's contractor is immune from damage claims arising from the inherent nature of the project, although he is not immune for negligence in performing the work. Colman alleges

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23. Southern Pacific is specifically addressed in H.B. 30, and necessarily so--it is SP's Causeway. But the purpose and benefit of the Act go to the general public, to mitigate flooding. "[M]ere proof that an enactment benefited or affected one individual is not indicative of a violation of this constitutional proscription." Hulbert v. State, 607 P.2d 1217, 1223 (Utah 1980).

The decision to indemnify SP reflects the urgency of the flood emergency. The breach required many preparations and SP's cooperation. There was no time to negotiate at length with SP or to condemn SP's interests in the Causeway. The mutual solution was to indemnify SP, and H.B. 30 simply made certain that Respondent Division of State Lands and Forestry had that authority.

Provisions of H.B. 30 that mention or protect SP were necessary under the circumstances of the emergency. Legislation, to be effectual, must reflect the necessities and realities of the situation. Hulbert, supra, at 1223. The purpose and effect of H.B. 30 have been to benefit the public, and if the State's contractor received special attention, it was only incidental, and not unconstitutional. Board of Medical Exam. v. Blair, 57 Utah 516, 196 Pac. 221, 223 (Utah 1921).

no negligence, and SP is not liable for performing its contract. Valley Forge Gardens, Inc. v. James D. Morrissey, Inc., 385 Pa. 477, 123 A.2d 888, 890 (1956).

Colman's allegations that the Causeway is a nuisance also are unwarranted and confusing. He complains that it must be a nuisance "because the impounded waters eventually threatened to inundate public roads and private homes" (Brief 17-18); but, inconsistently, he sued because the State and SP were about to breach the Causeway to mitigate the flooding.

This Court and the Tenth Circuit have already rejected the nuisance theory. Hardy Salt Co. v. Southern Pacific Trans. Co., 501 F.2d 1156 (10th Cir. 1974), and Solar Salt Co. v. Southern Pac. Trans. Co., 555 P.2d 286 (Utah 1976). (In those cases, private parties unsuccessfully alleged the Causeway to be a nuisance, and they wanted it breached.) But the State breached the Causeway irrespective of those cases or of any consideration that it was or was not a nuisance. It would not have been breached but for the extraordinary floodwaters. (Besides, the Causeway was there before Colman chose to establish his business near it.) And the nuisance claim is barred by sovereign immunity, anyway. Hurst, supra, 397 P.2d at 73.

Colman suggests (at 17 and 19) that the floodwaters let loose through the breach were "released in a manner to cause injury which would not have occurred under natural conditions." And, "no one has a right to project on adjoining lands, without the

owner's consent, waters that would not otherwise have flowed thereon." Whether arguable or not, those propositions simply do not belong in this case. Colman's "ditch" (if it existed) and right-of-way were already under 10 feet of water before the breach occurred. The authorities he cites certainly did not contemplate these circumstances, and are not apropos.

CONCLUSION

The lower court's judgment should be affirmed.

Respectfully submitted this 14th day of January, 1987.

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CERTIFICATE OF SERVICE

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APPENDIX 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WILLIAM J. COLMAN, Plaintiff, 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.	ORDER AND JUDGMENT Civil No. C84-4325 Honorable Jay E. Banks

Defendants' respective Motions to Dismiss came on for hearing on February 10, 1986. Plaintiff is represented by Frank J. Allen. The Utah State Defendants are represented by Dallin W. Jensen and Michael M. Quealy and R. Douglas Credille. Defendant Southern Pacific Transportation Company is represented by L. Ridd Larson and Thomas L. Kay.

The Court having heard arguments of counsel, and having reviewed the entire file, including the pleadings and memoranda

submitted by the Parties and being fully advised in the premises, concludes that Utah Code Annotated Section 63-30-3, as amended in 1984, provides absolute immunity to governmental entities from suit for any injury or damage resulting from management of flood waters and the construction, repair and operation of flood and storm systems by governmental entities and Plaintiff's claims are otherwise barred by the Utah Governmental Immunity Act; the Court concludes that Defendant Southern Pacific Transportation Company was acting as the State of Utah's contractor on the causeway breach project and is therefore protected by the State's immunity; the Court concludes that the breaching of the causeway, as specifically authorized by the Utah Legislature, was a valid and proper exercise of the State's police powers and in furtherance of the State's public trust responsibilities on the Great Salt Lake and that there otherwise has been no compensable taking of a property interest; the Court further concludes that Plaintiff's Complaint otherwise fails to state a cause of action against the Defendants.

Now, therefore, it is ORDERED that:

The respective Motions to Dismiss of the Utah State Defendants and Defendant Southern Pacific Transportation Company should be, and are hereby granted.

Based thereon, it is hereby ORDERED, ADJUDGED and DECREED that:

Judgment be, and is hereby entered against Plaintiff dismissing with prejudice Plaintiff's Complaint against the above named Defendants.

DATED this 27 day of May, 1986.

BY THE COURT:

Jay E. Banks
District Judge

filed unsigned
pltfs order signed

Approved as to form prior to signature and entry by the Court:

Frank J. Allen
Attorney for Plaintiff

Michael M. Quealy
Attorney for Utah State Defendants

L. Ridd Larson
Attorney for Defendant
Southern Pacific Transportation Co.

This order and judgment is the one court intended to sign other than ~~Defendants~~ Pltfs order and judgment
6-30-86
Jay E Banks

Exhibit 2

Declaration of Annie Payne

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**Admitted Pro hac vice*

Attorneys for Plaintiffs Utah Physicians for a Healthy Environment, American Bird Conservancy, Center for Biological Diversity, Sierra Club & Utah Rivers Council

THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, *et al.*, Plaintiffs, v. UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*, Defendants, and CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.* Intervenors.	**DECLARATION OF ANNIE PAYNE** (Tier 2) Case No. 230906637 Honorable Judge Laura Scott

DECLARATION OF ANNIE PAYNE

I, Annie Payne, declare as follows:

1. I live in Salt Lake City, where I have spent most of my life. I grew up in Salt Lake City and have lived here since 2000.

2. I am a member of the Utah Rivers Council ("URC"), which is a nonprofit organization dedicated to protecting Utah's watersheds. I first joined when URC incorporated in the early 1990s. A few years ago, I served on URC's board.

3. When I was a kid, I went on field trips to the Great Salt Lake and camped at Antelope Island with my family. After I returned to Salt Lake City in 2000, I started going out onto the Lake with a friend who had a sailboat, but I didn't really start to understand the immense value of the Lake as a navigable waterbody until my son joined Utah Crew in 2017.

4. When my son was in eighth grade, he started rowing regularly on the Great Salt Lake with Utah Crew. The Great Salt Lake is the only navigable waterbody where the team can row for extensive distances. The team has an intensive training schedule, with the rowers often practicing on the water five times per week.

5. My son rowed with Utah Crew from eighth grade through his senior year of high school, which ended in June 2023. My daughter also rowed with Utah Crew during her freshman and sophomore years of high school.

6. I was my son's primary mode of transportation to and from the Lake, which was 25 or 30 minutes from his school. Because of the distance I had to drive, it didn't make sense for me to return home and then come back to the Lake at the end of practice, so I started spending a lot of time at the Lake while my son rowed. I came to enjoy the hours I spent at the Lake, taking photographs, walking my dog, running along the beach, and ultimately rowing myself. A few

other parents would often stay at the Lake as well, and we would sometimes sit together in the sand or on beach chairs along the shoreline and watch our kids practice.

7. As a result, I have been regularly visiting the Great Salt Lake since 2017—probably 20 to 50 times per year.

8. In 2017, I joined the board of directors of Utah Crew. In this position, and during my regular visits to the Lake, I started noticing the consequences of the Lake's declining elevation. Based on my observation and understanding, the Lake's average water level has been dropping for several years, due in large part to upstream diversions.

9. I learned that many of the rowing and yachting clubs in Utah previously used other marinas further north along the lakeshore, but one by one all of those marinas dried up. By the time my son joined, most of the clubs were using the Great Salt Lake marina, which is the deepest.

10. In 2019 or so, the Lake's elevation dropped so much that even the Great Salt Lake marina began to dry up. The docks started to fall into shallower water, and the water became so low in places that our team had to relocate boats in order to prevent damage.

11. Due to the dropping Lake level, the board of Utah Crew (myself included) was forced to find a different place where the team could practice during periods of low elevation. Ultimately, the team spent $50,000 to improve practice space at the California Avenue Rowing Center, which is along the Jordan River Surplus Canal. Many other clubs started using this space around the same time. Over this year and the next, Utah Crew will have to spend an additional $120,000 on the California Avenue site, constructing racks to store boats, installing lighting, and installing a culinary water line (so kids have access to drinking water).

12. I was unhappy with the move, in part because the water in the Great Salt Lake is very salty, and thus heavier and denser, which means that practicing on that water makes our rowers stronger; this is part of the reason Utah Crew has been so successful when competing against teams from other places. Further, the Jordan River's elevation can sometimes get too high or low, and it has a strong current. Thus, even after paying for space along the Jordan River Surplus Canal, we hoped to return to the Lake—where we have always practiced—whenever possible.

13. In 2020, when the COVID-19 pandemic hit, Utah Crew asked for donations. My husband and I purchased a single sculling boat, which we have allowed Utah Crew to use, though we still own the boat.

14. In 2021, the Lake's elevation dropped so much that we couldn't launch any boats from the Great Salt Lake marina at all, so we had to temporarily relocate entirely to the Jordan River Surplus Canal. The water dropped so much that the shoreline receded significantly, perhaps a mile, and cranes had to remove yachts from the dried-up marina.

15. In the summer of 2022, we again returned to the Jordan River Surplus Canal, but water levels were so low across the basin that the team couldn't practice at all in July. By the time we returned in September, it remained difficult to find water deep enough to practice, and the board had to look for alternative places to practice.

16. In early 2023, I went out to take videos of the Lake four or five times, assessing its suitability for rowing, including for the team. Once, I took a paddle board out onto the Lake to assess its depth. The water was so shallow that the paddle board barely floated. There is no way I could have taken our boat out on the water (or lack thereof).

17. Serving on the board of Utah Crew as the Lake level has continued to drop has been an immensely stressful experience. It's hard to be a crew team where there isn't enough water! Other board members and I have put hundreds or thousands of hours into locating practice sites that aren't on the Lake, but we have yet to find an ideal replacement. Our team belongs on the Lake.

18. It is my understanding that the State has a duty to protect the Lake—a navigable waterbody—for its beneficiaries. Yet, it has failed to take the necessary steps to maintain a minimum lake elevation, such as by ensuring more flows reach the lake each year. That is impairing my use of the Lake for recreation, and enjoyment.

19. These harms would be ameliorated if the State of Utah abided by what I understand to be its legal obligations and ensured that sufficient water made it to the Lake so that it was sustained at a sufficient depth for rowers to consistently return. Further, I believe my aesthetic interest in the Lake—my love of using it for running, nature-watching, photography, and other recreational activities—would be safeguarded if the State were to ensure that enough water made it to the Lake to sustain a minimum viable elevation.

20. I have concrete plans to return to the Lake in the near-future. Even after my son goes off to college, I plan to continue visiting the Lake for the recreational activities that I love, including running along its shoreline, communing with nature, and rowing.

21. In fact, my husband and I have long been considering buying a tandem boat. We would like to take this boat out on the Great Salt Lake, but we are concerned that the Lake's declining elevation would make this impossible. Thus, if the State were to ensure that enough water got to the Lake, my concern in this respect would lift, and my husband and I could buy this boat and use it without worry.

I certify, under penalty of perjury, in accordance with the laws of the State of Utah, and to the best of my knowledge, that the foregoing is correct and true.

Executed on Nov. 7, 2023, in Salt Lake City, Utah.

Annie Payne

Exhibit 3

Declaration of Chandler Rosenberg

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THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, *et al.*,

Plaintiffs,

v.

UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF CHANDLER ROSENBERG

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF CHANDLER ROSENBERG

I, Chandler Rosenberg, declare as follows:

1. I live in the Capitol Hill neighborhood of Salt Lake City, Utah. I grew up in the suburbs of Salt Lake City, so—other than the years when I was gone for college—I've lived in the region my entire life. When the air is sufficiently clear, I can see the Great Salt Lake from my current apartment.

2. I am a member of the Sierra Club. I have been interested in environmental issues and climate change since I was a child, and I appreciate the Club's advocacy on behalf of the environment and communities enduring environmental injustice.

3. For most of my childhood, I didn't have much of a connection to the Great Salt Lake. But in my senior year of high school, I started rowing crew for my high school team. We practiced on the Lake (as well as on a canal of the Jordan River, which empties into the Lake). This brought me out onto the Lake for the first time and I realized that the Lake was a beautiful place—vast and peaceful.

4. In 2021, I heard a podcast that discussed the crisis facing the Great Salt Lake. From this podcast episode, and subsequent research that I undertook, I learned that the Lake's water levels have been declining sharply in recent years—and that, if current water usage continues (which reduces flows into the Lake), the Lake's elevation and surface area will continue to drop. Based on my understanding, this is already exposing microbialites, which are the foundation of the Lake's ecosystem feeding brine flies, brine shrimp, and hundreds of migratory bird species. It is also increasing salinity levels, threatening the ecological integrity of the lake and the food source for millions of migratory birds (not to mention the brine shrimp industry). Losing even a few inches also exposes a large amount of the lakebed, which contains

arsenic, pesticides, mercury, and other chemicals from industry. As Utah's prevailing winds sweep across this newly exposed lakebed, it causes toxic dust storms—the more lakebed is exposed, the deadlier these storms are.

5. What I learned about the Great Salt Lake alarmed me greatly, and this feeling motivated me to co-found a community organization called Save Our Great Salt Lake ("SOGSL"). SOGSL is a collective of organizers, artists, business owners, and concerned citizens that seeks to mobilize individuals to take action to prevent the collapse of the Lake's ecosystem.

6. SOGSL's first priority was to raise awareness about the crisis facing the Great Salt Lake. The other members of SOGSL and I felt that local environmental groups could be using social media more effectively, so we used a petition to the state legislature as a springboard to launch a social media campaign. We want our leadership to treat this crisis like the emergency that it is. Accordingly, we organized a rally to coincide with the start of the legislative session. To organize this rally, we put up posters all over town, held events to build a following, and did individual and group outreach. Over 600 people showed up to our online rally (due to COVID) in January 2022. The next year, in January 2023, over 600 people showed up to an in-person rally at the Capitol.

7. SOGSL has also partnered with local artists to create work about the Great Salt Lake. I believe there is tremendous power in harnessing creativity and artistry to achieve social change; art can spur people to think about their connection to a place, such as the Lake.

8. Accordingly, I've begun creating my own photography to document the beauty of the Lake and the threats imperiling it. I have long loved photography—I studied it in high school—and the Lake struck me as a meaningful subject for my own artwork. After I started

SOGSL, I decided to photograph the Lake and our activism to protect it. Most of the photography on SOGSL's is mine, and the group has used many of my photographs in its social media, in creating infographics, etc.

9. I also intend to display my photographs of the Lake publicly. I hope to have a public exhibition in the Spring of 2024 and have been in touch with a few potential venues and a printing shop, Atelier Printing.

10. In taking these photographs, and in undertaking my other activism to protect the Lake, I have spent significant time around the Lake over the last several years. I now go to the Lake at least monthly. I visit the Lake to watch sunsets, hike, look for birds and bugs, and photograph much of this. The Lake is an extraordinary place—going out there, and looking at the city from that vantage point, is powerful; it reminds me that, even in an urban place, so much natural environment remains.

11. In my many visits to the Lake, I've noticed that the Lake's elevation has gotten lower. I've noticed times when the water was so low that no boats were out on the Lake and the marina—and both sides of the causeway—were dry. This spring, due to the considerable precipitation we recently received, the Lake's elevation is temporarily higher, so I'm trying to spend as much time at the Lake as possible while it feels so alive. But, based on information that I've read, the Lake's elevation will drop again, impairing my ability to visit the Lake for personal recreation and photography. In fact, the Lake elevation is already on a downwards trajectory, dropping below 4,194 feet earlier this summer and exposing more and more lakebed.

12. In my understanding, the State of Utah is directly responsible for the Lake's falling elevation. The State is responsible for managing water appropriations in a way that ensures that upstream diversions don't cause the Lake's elevation to fall below a viable level.

Yet the State is failing in its management of the Lake, and as a result upstream diversions are taking so much water away from the Lake that its ecological health is at risk.

13. I believe that if a court were to order the State of Utah to take affirmative action to protect the Great Salt Lake by ensuring the maintenance of a viable Lake elevation, my ability to continue visiting the Lake for photography and other recreation would be improved and protected.

I certify, under penalty of perjury, in accordance with the laws of the State of Utah, and to the best of my knowledge, that the foregoing is correct and true.

Executed on November 7th, 2023, in Salt Lake City, Utah.

Chandler Rosenberg

Exhibit 4

Declaration of Colton Fonnesbeck

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THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, *et al.*,

Plaintiffs,

v.

UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF COLTON FONNESBECK

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF COLTON FONNESBECK

I, Colton Fonnesbeck, declare as follows:

1. I am a professional outfitter who leads boating tours on the Great Salt Lake. I live in Salt Lake City.

2. I joined the Sierra Club because I am passionate about the environment, including the Great Salt Lake, which I rely upon for a living.

3. Since 2012, I have worked for Exclusive Excursions, an outdoor adventure company that leads boating tours on the Great Salt Lake (among other things). Starting summer of 2021, I began leading tours on the Lake with the company's owner and founder, Jeff Manwaring.

4. The Great Salt Lake is truly a magical and unique world destination. As the largest salty body of water in the Western Hemisphere, it attracts visitors from all around the globe, who want to experience the Lake's waters, wildlife, and stunning landscape. We offer clients a series of different trips on the Lake from a short 45-minute boat ride, to a longer-two-hour swimming trip, to spectacular sunset cruises.

5. Our tours start at the Great Salt Lake marina, which is one of the busiest marinas in the State and home to the country's longest running yacht club. The company owns two pontoon boats (a 20-foot and a 25-foot pontoon), which it moors at the marina during the summer season.

6. On a typical day, I will lead a series of 45-minute boat tours that depart from the Marina from 10:00 AM to 3:00 PM. During the tour, we often stop to do a few demonstrations about the salt water, local aquatic life and of course have time for a good picture or two. Since the tours are only 45 minutes and the lake is so big and wide, we do not venture far from the

marina. Our clients, who come from all walks of life, are often struck by the vast expanse of the Lake, the feeling of remoteness on its waters, and the sweeping panoramas.

7. I also lead 2-hour tours where clients (and myself) have an opportunity to jump in the Great Salt Lake and experience its salty waters. On these tours, we usually make two stops out on the Lake for a 20-30 minute float break. Everyone enjoys bobbing like a cork and feeling total weightlessness in the Lake's salty waters. It is a joy to share this experience with tourists and locals, alike. Some days, I also lead private one-hour sunset cruises where clients enjoy the breathtaking views of our inland ocean and learn the history and stories of this unique area. I too am mesmerized by the gorgeous sunsets reflecting on the Lake's waters.

8. In recent years, though, the Lake elevation has declined to record low levels, adversely impacting my ability to lead boat tours. The water levels have dropped so low that some months we have had difficulty getting our boats in and out of the marina. This forced us to run our tours at half-capacity so that our boats were lighter and would not run aground. Even then, it was difficult to scrape our way out of the marina, limiting our time to tour the Great Salt Lake. By August of 2022, all of the sailboats had been taken out of the Marina. Although the marina has 300 slips, there were only four boats in the whole marina—our two pontoons and two boats owned by the State Parks' department. Ultimately, we too craned our boats out and stored them at the marina.

9. This past winter, we were blessed by a record high snowpack, which raised the lake level a few feet and allowed us to continue offering boat tours this year. I am truly thankful for this brief respite. Without it, boating on the lake would have been difficult, if not impossible. While the lake levels did rise, they have once again started declining due to all of the upstream diversions. I expect that I will be able to lead boat tours in the spring of next year, but the future

looks bleak unless steps are taken to ensure enough water reaches the Lake to restore the lake levels.

10. It is my understanding that the State of Utah has a duty to protect the Lake—a navigable waterbody—for its beneficiaries, like myself. Yet, the State has failed to take the necessary steps to maintain a minimum lake elevation, such as by ensuring adequate flows reach the lake each year to return the Lake to a minimum viable elevation. That has led to the record low lake levels, which are impairing my use of the lake for boating and threatening my livelihood as a professional outfitter.

11. These harms would be ameliorated if the State of Utah abided by what I understand to be its legal obligations and ensured that sufficient water makes it to the Lake to sustain its minimum viable elevation. If the State were to ensure that enough water got to the Lake, I would be able to continue boating on the Lake and leading tours on this spectacular waterbody, which is my passion and job.

I declare under criminal penalty under the law of Utah that the foregoing is true and correct.

Signed on the 11th day of October, 2023, at Salt Lake City, Utah.

Colton Fonnesbeck

_____

Colton Fonnesbeck

Exhibit 5

Declaration of Craig Provost

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Attorneys for Plaintiffs Utah Physicians for a Healthy Environment, American Bird Conservancy, Center for Biological Diversity, Sierra Club & Utah Rivers Council

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Plaintiffs,

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UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF CRAIG PROVOST

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF CRAIG PROVOST

I, Craig Provost, declare as follows:

1. I live in the Upper Avenues neighborhood of Salt Lake City, Utah. I have lived in Salt Lake City since 2014, and I have been visiting regularly since 2000 or 2001, when my son moved here.

2. I have been a member of the Sierra Club for approximately ten years. I joined the Sierra Club because I care deeply about the environment. I grew up in Port Arthur and Beaumont, Texas, which are refinery towns; the environmental degradation I witnessed as a young person instilled in me an ecological awareness, which led me to participate in the first Earth Day in 1970.

3. Ever since I was in high school in Texas, I have loved birding, which involves searching for birds and recording what you see. Birding is a way to enjoy nature—often visiting untrammeled places—without hunting and killing. You can "collect" new birds without interfering with their lives or bringing them home. When I was young, I recorded the birds that I saw on 3-by-5 notecards and small notebooks; for many years now, I've used the eBird electronic database, which is managed by the Cornell Lab of Ornithology and National Audubon Society. By using eBird, I contribute to citizen science projects that help track bird populations (which are dwindling) and migratory patterns.

4. The Great Salt Lake is a spectacular site for birding. Millions of migrating birds stop at the Lake each year, and many others dwell there for entire seasons.

5. Since moving to Salt Lake City, I've regularly visited the Great Salt Lake for birding. Among my favorite Lake locations for birding are Antelope Island, Farmington Bay, Willard Bay, and the Great Salt Lake Marina. At the Lake, I've seen a marvelous variety of birds,

including Wilson's phalaropes, northern shovelers, mallards, long-billed curlews, eared grebes, horned grebes, and burrowing owls.

6. One of the joys of birding is that it can be a social hobby. My wife, Dale, often accompanies me on birding trips. We've had friends visit from Norway, whom we brought birding at the Great Salt Lake. We've also had friends visit from Arkansas to bird at the Lake; they wanted to see a hundred birds in Utah, and—due to the profusion of birds at the Lake—we managed this in just three days. I've also taken my grandson (then thirteen years old) birding, which was very meaningful to me. We looked for—and found—burrowing owls.

7. I'm concerned that, if the State of Utah continues to permit the Great Salt Lake's elevation to decline and surface area to contract, the birds that depend on the Lake will be harmed. Based on my understanding, when water levels drop, salinity levels rise, and this has negative impacts on brine flies and brine shrimp; because many birds depend on brine flies and brine shrimp for sustenance, this harms birds' ability to find food at the Lake. Further, when the Lake's surface area contracts, areas that have historically been islands get connected to the mainland by land bridges, which exposes birds to unfamiliar predators, further endangering birds. For instance, I understand that Gunnison Island is no longer consistently an island, so coyotes are predating American White Pelicans. Recent news articles have stated that the American White Pelicans have abandoned their nesting sites at Gunnison Island.

8. Not only does the decline of the Great Salt Lake harm birds, but it also harms my ability to go birding there. The shorelines have receded as the Lake's surface area has contracted, and now I sometimes have to walk very far—several miles—to get to areas where I can see birds (if I'm lucky enough to see them at all). At one of my favorite birding sites, Antelope Island, there used be thousands of birds on a causeway crossing the water; now, that causeway crosses

sand, and the birds that used to be near the causeway (phalaropes, avocets, etc.) are much further out. They're harder to see, even with a birding scope—they're just dots on the horizon. I am concerned that, as the Lake's level continues to drop, birding there will become even more difficult and less fulfilling. Worse yet, I'm concerned that bird populations will continue to decline due to impairment of their food web due to the declining lake levels and increasing salinity.

9. An additional factor that has already harmed my ability to go birding at the Great Salt Lake is the increase in air pollution that results from the contraction of the Lake's surface area. Based on my understanding, as the Lake's surface area contracts, more and more lakebed is exposed, and thus more and more dust and particulate matter is picked up from the lakebed by wind and blown into populated areas. This is a particular concern to me because Dale, who often accompanies me birding, has asthma and pulmonary emboli, both of which make breathing more difficult and are adversely affected by air pollution.

10. I've already noticed the air quality getting worse in Salt Lake City, especially near the Lake. These days, Dale and I usually check a website called Purple Air to monitor the quality of the air, and we often have to wear masks to get near the Lake. There have been many times when we wanted to go birding, but we couldn't due to increased air pollution. Once, about three years ago, we were visiting Antelope Island and the air quality was so bad that we had to leave early. I'm concerned that, if the State of Utah continues to permit the Great Salt Lake's surface area to contract, even more lakebed will be exposed, further worsening air quality and further hampering my ability to go birding (and, indeed, to go outside at all).

11. I plan to continue birding at the Great Salt Lake, and I have concrete plans to do so in the coming weeks. In August, I intend to visit the Lake to see migrating northern birds, and in the fall I intend to see other migrating birds.

12. Yet my ability to use the Lake for birding has already declined markedly due to the decline of the Great Salt Lake. For many years, I visited Antelope Island at least four times per year, but in recent years I've only gone once or twice per year. This decline is largely because of the increasing particulate matter in the air and the increasing distances I have to walk to be able to see birds.

13. I believe that if the State of Utah abided by its legal obligations and ensured that more water made it to the Great Salt Lake, the Lake's elevation and surface area would be higher. This would reduce the harmful dust and particulate matter in the air and reduce the distance I have to walk to go birding. It would make the air that my family and I breathe less hazardous, reducing the negative health impacts that we suffer.

14. Thus, if the State took action to protect the Great Salt Lake, my ability to go birding would increase. Further, State action would lessen the restrictions the air pollution has imposed on my life and make my community safer and more livable. For these reasons, I hope a court will compel the State of Utah to abide by its legal obligations.

I declare under criminal penalty under the laws of Utah that the foregoing is true and correct.

Signed on the 31st day of August, 2023, at Salt Lake City, Utah.

Craig Provost

Exhibit 6

Declaration of Geoff Hardies

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**Admitted Pro hac vice*

Attorneys for Plaintiffs Utah Physicians for a Healthy Environment, American Bird Conservancy, Center for Biological Diversity, Sierra Club & Utah Rivers Council

THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, *et al.*,

Plaintiffs,

v.

UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF GEOFF HARDIES

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF GEOFF HARDIES

I, Geoff Hardies, declare as follows:

1. I live in Holladay, Utah, where I have resided for the past 28 years.

2. I am a member of the American Bird Conservancy (ABC) and have been a member for about five years. I joined ABC because of my interest in the welfare and long-term flourishing of birds.

3. I have enjoyed visiting the Great Salt Lake over the past 20 years, participating in birding trips, photography trips, hiking and biking trips. I have visited the Great Salt Lake Marina State Park, Farmington Bay, various private duck clubs, Antelope Island State Park, Willard Bay State Park, the Nature Conservancy's Great Lake Shoreland Preserve, the Audubon's Society's Gilmore Sanctuary and the Bear River Migratory Bird Refuge, as well as other lesser-known spots. I get out to the Lake more in the spring during migration, but visit the Lake at least every other month during the rest of the year.

4. Over the last two decades, I have regularly visited the Lake for organized birding expeditions and events. For several years, I was part of the Salt Lake Birders organization, which led regular field trips to the Lake for birding. I was part of this organization until it disbanded about ten years ago. I have also participated in a number of the Great Salt Lake Bird Festivals, which are ongoing birding events organized by Davis County. Further, I have worked with the Tracy Aviary on their Breeding Bird Survey.

5. My primary interest in the Lake has been for birding. I started getting more serious into birding approximately 20 years ago and have participated in numerous field trips to the Lake for the purpose of seeing birds and discovering more about the bird life. I learned the Lake was an internationally recognized important bird area, playing a vitally important role as

part of the flyway for migrating birds. As I understand it, the Lake provides a vital stopover place for migrating birds, receiving the largest percentage of the world's population of migrating Eared Grebes and large percentages of migrating Wilson's Phalaropes, American Avocets and Black-necked Stilts. I have delighted in seeing these birds pass through, and also marveled at the nesting Avocets and Stilts with their small chicks. I feel privileged to live so close to such a wonderful place.

6. In my earlier birding years, I spent days out on the Antelope Island Causeway scoping for migrating shorebirds. I bought a spotting scope so I could see the birds further out and work on identifying them. Sadly, in more recent times, the Lake has receded to the point where those birds are too far away to see well, and I spend less time in the spring going out to see them.

7. Since retiring from full-time employment, I started purchasing an annual state park pass primarily for visiting Antelope Island State Park. As I pursued my photography hobby, I spent more time out at the park photographing sunrises, sunsets, bison, coyotes, pronghorn antelope and of course birds. The island is like a little Yellowstone with its wildlife, but the bird life there is even more amazing! The shorebirds and ducks along the causeway, the warblers that stopover at Garr Ranch, and then the owls. I have been privileged to see Burrowing Owls, Great Horned Owls, Barn Owls and Long-eared Owls there.

8. I hike at Antelope Island and am particularly taken with Frary Peak. It is a favorite hike of my wife's, and several friends and I really enjoy hiking it in the winter when the area is covered with snow. Unfortunately, as the Lake's elevation has fallen, the views I enjoy during these hikes have gotten worse.

9. I have long been looking forward to going with a friend to sail on the Lake and kayak along its shores, but now I worry I may not have such an opportunity, due to the declining Lake level. As the Lake level drops, many of the best places for paddling are drying up, and accessing the Lake is becoming more difficult.

10. I am greatly concerned about the declining Lake level and the negative impacts it has on the birds, the environment, recreation, our air and snow and the businesses that depend on the Lake.

11. I have already personally experienced the decline in the water levels and it has impacted my recreational opportunities, making it more difficult to watch the birds. The lower water levels mean that the birds are now further away from accessible viewing locations. I was quite pleased to see the Lake rise this spring due to the high snow levels we had, but the water level is again dropping and not insignificantly!

12. I have concrete plans to continue visiting the Lake for birding and other recreation, even though these things that I so enjoy have become harder with the Lake's decline. I will definitely return to the Lake in the spring, which is my favorite season for birding and the one during which I always visit the Lake repeatedly for birding. I will also return this winter, as I've been using the Lake for nature photography for the last several winters.

13. If the State of Utah does not intervene by making more available for the Lake, I am greatly concerned that the Lake will reach a tipping point from which it cannot be restored. Not only will this affect recreation around the Lake, but it will have an impact on the snow in the mountains and our air quality. Based on my understanding, as more of the lakebed is exposed, winds will pick up more of the dried surface and distribute the dust and minerals it contains across the valley and have a harmful effect on the air quality and our health. With diminished

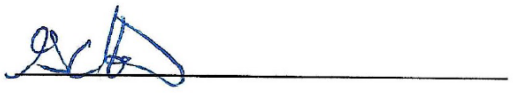
recreational opportunities (I am also a skier) and worsening air, I would have to seriously examine my desire to continue living here. If these things happen, I believe real estate values would decrease, providing further injury to myself.

14. I believe that the State of Utah is failing in its responsibility to protect one of the state's most valuable assets, and the health and wealth of its citizens. This is not an issue that just surfaced, but one that has been talked about for years.

15. If, however, a court were to compel the State to comply with its trust obligations and ensure that more water reaches the Great Salt Lake, I believe the multiple injuries that I have suffered—and that the Lake has suffered—would be remedied. Specifically, I believe I would be able to use the Lake for birding more often and more easily; I would be able to continue recreating at the Lake; and my health and other interests would be safeguarded.

I certify under penalty of perjury, in accordance with the laws of the State of Utah, and to the best of my knowledge, that the foregoing is correct and true.

Executed on November 9, 2023, in Holladay, Utah.



Geoff Hardies

Exhibit 7

Declaration of Jim Hopkins

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THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

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Defendants,

and

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Intervenors.

DECLARATION OF JIM HOPKINS

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF JIM HOPKINS

I, Jim Hopkins, declare as follows:

1. I am a long-time resident of Salt Lake City, where I own a home. Each year, I live there from mid-November through mid-May; I spend the rest of the year in the Pacific Northwest. I have been splitting my time in this way for the last twenty years.

2. I am a member of Utah Rivers Council.

3. I first came to Utah in 1987. At the time, I was in college at Washington State University, and a friend was moving to Utah for a job at Snowbird ski resort. This friend invited me to join him, and I did so. I've been in continual winter employment at Snowbird for the past 35 years. For the last 27 years, I've been part of Snowbird's snow safety patrol to mitigate avalanche danger.

4. In 1997, a friend who worked in the brine shrimp industry called me and asked if I could assist—his company had just lost one of their employees. I agreed, and my work as a brine shrimper helped me purchase a house in Salt Lake City.

5. In the years that followed, I began working for the Great Salt Lake Brine Shrimp Cooperative. I worked as a brine shrimper between the time that I arrived in Salt Lake City each year through the end of January, and the rest of my time in town I worked for Snowbird.

6. I began working on a skiff, learned the brine shrimp trade, and then got promoted to be the captain of a speedboat. My role is to get to a streak of brine shrimp egg on the surface of the Lake first, which is a "claim" that allows the harvesters with whom I work to collect thousands of pounds of egg.

7. For many years, this was dependable, profitable work, but the Lake's decline has begun to impact brine shrimping. Based on my understanding, as the Lake's elevation drops, the

salinity level rises, which harms the ability of brine shrimp to survive. Further, as the Lake level drops, the areas that my boat navigates become shallower, increasing my risk of running up on a reef.

8. In addition, both of the private harbors that my company and I have used have dried up as the Lake's elevation has fallen. This has resulted in the Co-Op spending millions of dollars to dredge these harbors. Also the water level at the marina at Great Salt Lake State Park has become so low in recent years that it's frequently become unusable; the harbor at the north end of Antelope Island has likewise dried up, rendering it unusable for the last ten years or so.

9. This harmed my quality of life and my ability to continue working as a brine shrimper. Because I work in the southern part of the Lake, for many years I could usually disembark at the marina at Great State Lake State Park, which was only about four miles from where I was working. I left a car in the parking lot at that marina, so it made it easy and convenient for me to return home from work. Once that marina dried up, however, I had to travel considerably longer distances to other marinas, such as the one at Promontory Point (about 30 miles from where I work). This increased my commute significantly.

10. The situation became so bad that in 2022, I quit brine shrimping. If the Lake's elevation hadn't been dropping, I likely would have continued brine shrimping for at least one more season.

11. Brine shrimping does not define the extent of my interest in and reliance on the Great Salt Lake. I also use the Lake for stand-up paddle boarding. For several years, I have paddle-boarded in the Lake to accompany a friend who uses the Lake for long-distance swimming. From my paddle board, I serve as his lifeguard.

12. I intend to continue using the Lake for paddle boarding with my friend as soon as my friend invites me to do so again. As the Lake's elevation drops, however, the distance my friend and I have to walk to reach the water has increased.

13. Additionally, I have been working in snow safety patrol at Snowbird since the late 1990s.

14. The skiing at Snowbird is excellent. I've heard the saying that Utah's has some of the world's greatest snow for skiing—in part, I believe, due to "lake effect," whereby the temperature and salinity of the Great Salt Lake increase precipitation—but I think a lot of places have great snow; to me, what's special about Snowbird is that it gets *more* snow than most other places.

15. I am concerned, however, that the declining water elevation of the Great Salt Lake will have negative impacts on the skiing at Snowbird—and, by extension, my ability to continue working there. Based on my understanding, as the Lake's elevation falls, its surface area decreases and its salinity increases, which could diminish the "lake effect" snow for which Utah is famous (and which requires mitigating avalanche risk).

16. Further, based on my understanding, as the Lake's elevation falls, more lakebed is exposed; the lakebed contains sediments that are picked up by winds and deposited as dust on nearby snowpack, something I've witnessed, particularly in recent years. These particles absorb more solar radiation, which causes earlier and faster snowmelt. Thus, based on my understanding and experience, the Lake's decline will harm skiing in the Wasatch Front—including at Snowbird.

17. Currently, Snowbird stays open later than most ski resorts—historically, it has stayed open until July 4. But, with more dust falling on the snow, causing the snow to melt

earlier, the resort will have to close earlier. Further, with the snow absorbing more solar radiation, it will get wetter—"stickier," in the parlance of skiers—which will reduce the quality of the skiing.

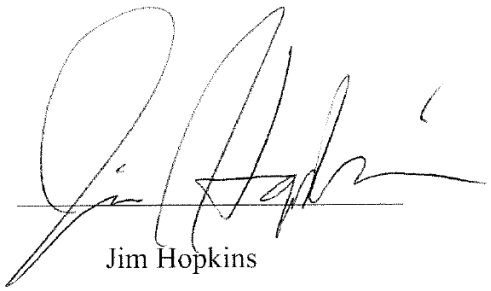
18. I believe this will harm my ability to enjoy skiing at Snowbird. Further, it will harm my livelihood, since I depend on Snowbird (and the quality of skiing it provides guests) for much of my income.

19. These harms are a direct result of the State of Utah's mismanagement of the Great Salt Lake—a public resource it has an obligation to protect. The State has failed to ensure that enough flows reach the lake to maintain a minimum viable elevation needed for boating, brine shrimping, and mitigating dust storms.

20. But, in my understanding, if this court were to order the State of Utah to abide by its trust obligations and ensure that sufficient water made it to the Lake to restore the Lake to a healthy elevation, such harms would not befall me or other beneficiaries of this tremendous resource.

I declare under criminal penalty under the laws of Utah that the foregoing is true and correct.

Signed on the 29th day of August, 2023, at Hood River, OREGON



Jim Hopkins

Exhibit 8

Declaration of Jonny Vasic

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SALT LAKE COUNTY, STATE OF UTAH

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Intervenors.

DECLARATION OF JONNY VASIC

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF JONNY VASIC

I, Jonny Vasic, declare as follows:

1. I live in the Sandy City neighborhood of Salt Lake City, Utah.

2. I have been employed full-time by Utah Physicians for a Healthy Environment ("UPHE") since 2018, as executive director. UPHE is 501(c)(3) non-profit. In my position at UPHE, I direct all aspects of the non-profit including our advocacy and education work.

3. As a member of UPHE, I receive weekly newsletter updates. I trust UPHE to represent my interests in protecting the Great Salt Lake.

4. The Great Salt Lake has been a site of profound meaning and significance for my entire conscious life. When I was five-years-old, in 1973, my mother—a Salt Lake City native—moved my siblings and me to Salt Lake City. Initially, we lived in the Holliday neighborhood, but throughout my childhood we moved around frequently, all to places on the city's east side. I attended Salt Lake City public schools from kindergarten through high school.

5. Throughout my childhood, my mother took us to the Great Salt Lake very often. We would spend hours there, picnicking and playing in the water and on the shore. My family was pretty poor—a single mom with six kids, relying on church welfare—but the Great Salt Lake was a wonderful, free way to spend a summer day.

6. Among some people, the Great Salt Lake has a reputation as a stinky, brine fly-infested lake, but to me it was always a beautiful and fun place. As a child, I loved running through the clouds of brine flies; I loved walking along the Lake's sandy shores; I loved floating on the Lake, marveling at how the saline water would keep my body buoyant. It astounded me how far I could walk into the Lake without getting too deep. I enjoyed spending time with my family there.

7. As I got older, I went on several school trips to the Lake. I recall spending a day visiting Antelope Island—with a science class in about eighth grade, as I recall—and finding the island very cool and interesting.

8. I stopped going to the Great Salt Lake as often once I entered high school, but my regular trips resumed when I was in college at the University of Utah. My then-girlfriend (now my wife) had access to a boat that was harbored at the Lake's marina—it belonged to her mother's boyfriend—and we would regularly go out sailing on the Lake. These were evening sails on a small Catalina sailboat, and they were always joyful experiences. I recall great conversations, eating food while on the water, enjoying the breeze, and taking in the spectacular sunsets. These were magical trips.

9. After I graduated from the University of Utah in 1994, I moved away from Salt Lake City. Over the next two decades, I lived in Michigan, Los Angeles, Washington State, and Australia. I directed and produced television and films and worked in nonprofits. In the spring of 2016, my wife and I moved back to Salt Lake City, in part to assist my mother. For the first year-and-a-half after my return, I remained with my previous job, but in August 2018 I joined UPHE as executive director, a position I have held ever since.

10. I was motivated to work for UPHE in large part because of the unhealthy air quality in Salt Lake City, a situation greatly exacerbated by the deterioration of the Great Salt Lake. Bad air quality and regular inversions have long been a hallmark of living in Salt Lake City, but after returning to town I was surprised to discover that air quality had not improved; if anything, it was gotten worse. In spite of the claims of state officials, air pollution remains a consistent problem in Salt Lake City.

11. Shortly before I joined UPHE, I began to recognize the connection between bad air quality and the diminished state of the Great Salt Lake. Not long after returning to Salt Lake City, my wife and I went for a hike around Antelope Island. I noticed that the walk from the beach to the Lake's shores had gotten really long; previously, it had been only a short stroll. I noticed that the marina at Antelope Island was dry, largely devoid of water. The boats that had once floated there were gone. Shortly thereafter, my wife and I took a trip to Great Basin National Park; along the way, we visited the Lake and were again struck by the absence of boats in the water. I was alarmed by this change in the Lake that I remembered.

12. During this time, I was learning more and more about the Lake, the reasons for its decline, and the consequences of the Lake's diminished state. As I understand it, the Lake's decline is largely tied to excessive water use in the area, especially water diverted for agriculture. For decades, the State of Utah has declined to do anything to ensure that water is used in an environmentally sustainable or safe way, and as a result the Lake's level has dropped precipitously compared to when I was a kid. I learned that, as the Lake's elevation shrinks, more and more lakebed is exposed. Dangerous sediments that are stored in the Lakebed are then unsettled by wind and blown into surrounding communities, harming air quality and posing a grave risk to human health.

13. In the years that followed, I continued to hike around the Lake and ride my bike out into the Lake's wetlands. I was disturbed by the decline that was apparent not only in the Lake itself but in these wetlands, huge swaths of which have dried up as the Lake's shores have receded.

14. About two years ago, in July of 2021, I decided to make a documentary film about the Great Salt Lake and its decline. As part of my position with UPHE, I have made more

than dozen short films for the organization, and I realized that the Lake would be an appropriate subject, given its profound importance for the health of Utahns. Initially, I went looking for a good film on the Lake, but—while I came across a number of news and nature pieces—I did not find an all-encompassing film, covering not only the Lake's beauty and ecological and economic benefits, but also the issues facing the Lake, why the Lake and its decline are so important.

15. I proposed making a feature documentary about all of this to UPHE's board, and the board approved my involvement in the project. I informed the board that my goal was to make a film that would educate people about the beauty of the Lake, the Lake's benefits, the Lake's decline, why this decline is bad for the health of people who live along the Wasatch Front, bad for animals and bad for the broader environment. I hope the documentary will educate people about these issues and what we can do to save the Great Salt Lake. The Lake isn't just some stinky place; it's beautiful and important.

16. After gaining UPHE board approval, I started visiting the Lake even more frequently than before, scouting locations for filming. In December of 2021 I started actively shooting footage for the documentary, visiting Antelope Island and for video and still photographs. I interviewed Westminster Professor Bonnie Baxter on October 12, 2022, speaking with her about the Lake's decline and its consequences. This is one of over a dozen interviews I have recorded so far. I have shot film at the Lake itself and its surrounding wetlands several times, including drone shots to show the enormity of the Lake's shrinkage and the development encroaching on its wetlands. I have shot video at Antelope Island Marina as recently as July 6, 2023.

17. I have concrete plans to return to the Lake for more filming in a kayak and expect to be at the lake filming more than a dozen times in the next 12 months.

18. Compared to when I was a kid—or even since I returned to Salt Lake City in 2016—it has gotten harder and harder to use the Lake for recreation. It has been some time since I've done a purely recreational hike at the Lake, because I'm so disturbed by its diminished state. Now, it takes a very long time to get out to the water, which has greatly reduced my enjoyment of the Lake and its surroundings; it's much harder to walk along the Lake's shore, enjoying both the wetlands and the water. I would like to go out on a boat again in the Lake, as I did when I was a young adult, but it's gotten much harder to do so, as the Lake's volume has shrunk and many marinas have dried up.

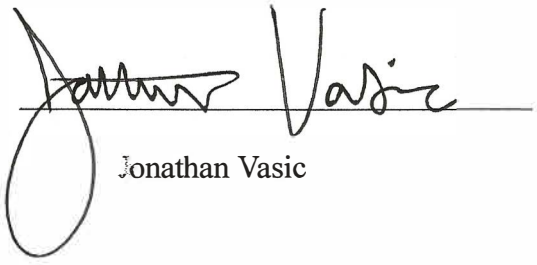
19. I have many nieces and nephews, and I would like to take them to the Lake, so they could have the same wonderful experiences I had as a child. But accessing the Lake is much more difficult. It now takes so much time to walk to the water, and in many places it's very hard to access the water at all. In addition, there are a lot more dust storms coming off the Lake. As a result, the air quality in the valley is much worse and now there are many days when it's so bad that you can't safely go outside.

20. This sorry state of affairs is the direct result of the State of Utah's refusal to take steps necessary to restore and maintain the Great Salt Lake. As I understand it, Utah could ensure that water is diverted upstream in a sustainable manner, but state officials have instead given upstream diverters free rein. By shirking their duty to manage upstream diversions and ensure that the public's water is used in a beneficial manner, the State has harmed me, my family, and all residents of the Wasatch Front.

21. If this Court were to force the State to comply with its legal obligations and manage upstream diversions in a way that ensured an adequate amount of water made it to the Great Salt Lake, the air quality in my community would improve. The Lake's wetlands might still be saved, and the Lake's elevation would rise, making it possible for me to again go out in a boat and enjoy the surrounding environment. A higher Lake elevation would also reduce the time it takes to hike out to the water, increasing my ability to recreate at the Lake and making it possible for me to take my nieces and nephews to the Lake. I so hope that I can share with them some sense of the wonder that I felt as a child, encountering the natural marvel that is—or was—the Great Salt Lake.

I certify under penalty of perjury, in accordance with the laws of the State of Utah, and to the best of my knowledge, that the foregoing is correct and true.

Executed on 12/12, 2023, in Salt Lake City, Utah.



Jonathan Vasic

Exhibit 9

Declaration of Matthew Berry

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Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF MATTHEW BERRY

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF MATTHEW RAYMOND BERRY

I, Matthew R. Berry, declare as follows:

1. I live in the East Central neighborhood of Salt Lake City, near the University of Utah. I have lived there since January 2023.

2. I have been employed full time by the Utah Rivers Council ("URC") since January 2023 as a Water, Fiscal, and Conservation Policy Specialist. URC is a 501(c)(3) non-profit, working to protect Utah's rivers and the ecosystems and communities they support. In my position at URC, I analyze water policy, engage with the public, lobby for water conservation at the State Legislature, give presentations to stakeholders, assist in social media and press releases, write articles for newsletters, work as an advocate for more sustainable water policies, and work alongside partner organizations on a myriad of environmental issues.

3. As a member of URC, I am kept well-informed on water related issues in the state of Utah, as URC has worked in this realm for 29 years.

4. The Great Salt Lake holds intrinsic and tangible value to me as a location at which I love to recreate and enjoy a hydrological wonder that provides so much to this area. As part of my job with URC, I have visited the Lake more than a dozen times since moving to Salt Lake City. I especially enjoy using the Lake for birding. I'm amazed by the diversity and sheer number of birds that visit the Lake and rely on it for refuge. But these birds depend on the Lake's water levels to provide food sources, habitat, and protection. As lake levels decline, it is harder to see birds—their habitat and food sources recede with the Lake. I experienced this at the outset of the year, where lake levels were so low—hitting a record low, even—that there was concern about an ecological collapse. You could walk along the shores and see piles of dead birds along the water.

5. I am a passionate snowboarder and backcountry split-boarder, which is intimately connected to healthy lake levels due to the lake-effect snow which blanket the Wasatch mountains in the winter near my home.

6. On October 4, 2022, I was diagnosed with well-differentiated Squamous Cell Carcinoma of the tongue, which has been directly correlated to my toxic burn pit exposures when I was a U.S. Army infantryman deployed overseas in the East African theater of Operation Enduring Freedom in 2014 and 2015. Congress recognized this presumptive correlation in the Honoring Our PACT Act of 2022, 38 U.S.C. §§ 1119–20.

7. My cancer, diagnosed when I was 27, was caused by breathing air filled with known carcinogens. I have vivid memories of conducting an Army Physical Fitness Test and running our two-mile timed run around the forward operating base, coughing from breathing in fumes from our base's massive incinerator, which was constantly burning our battalion's waste. I have memories of my platoonmate on that run, who cynically joked between coughs, "Man, in ten years we're all going to have cancer!"

8. Because of my medical condition, my oncology, ENT, and primary care team have indicated that I am predisposed to other early onset cancers, as my body's cells have already mutated once due to carcinogen exposure. I am disproportionately vulnerable to carcinogenic pollutants in the air. It is for this reason that I am most alarmed by the Great Salt Lake's decline and the consequences this decline has had and will continue to have for the air quality of the place I call home.

9. The bed of the Great Salt Lake is known to contain high levels of arsenic, mercury, other heavy metals, and numerous organic contaminants, many of which are known carcinogens. As the Great Salt Lake continues to shrink—due to the State of Utah's failure to

ensure sufficient inflows to sustain a minimum viable lake level—wind can pick up the particulates in the dust, exposed by the Great Salt Lake's receding shoreline, and blow them to where I live in Salt Lake City. These particulates can remain suspended in the air for upwards of two weeks or until the next rainfall following a wind event.

10. Even in the relatively short time that I have lived in Salt Lake City, I have witnessed immense dust storms. The dust literally browns out the sky and makes it impossible to see the trees. As recently as June 19, 2023, my girlfriend and I were driving through Salt Lake City, hoping to enjoy a warm holiday outing with my dog at Liberty Park in central Salt Lake City, when the abysmal air quality made it difficult to see the road in front of us. We were so concerned about the air quality that we opted to return to my apartment and stay inside for the rest of the sunny summer day until the winds died down late into the evening.

11. According to my physicians, the increase in particulate matter (such as dust) due to the Lake's decline will increase the risk of my cancer recurring, threatening my health, livelihood, and life. Physicians cannot predict the future, but they reasonably assess that since I have breathed toxic air on my deployment (Combined Joint Task Force – Horn of Africa (CJTF-HOA) / Task Force Rangers – 2014-2015) and was subsequently diagnosed with cancer, it is quite reasonable to assess it can happen again when breathing air filled with known carcinogens. For this reason, I'm worried that the worsening air pollution in Salt Lake City will cause my cancer to return, perhaps of a different kind or in a different location in my body. The thought of a metastasizing cancer deep in my lungs chills me to my core. This prospect has caused me considerable anxiety and am forced to undergo therapy and treatment to support my mental health. I am certain this fear—and the underlying physical effects of the dust itself—will

continue as more and more dust and other particulate matter gets blown from the exposed lakebed and into the air that I breathe.

12. The impacts to my health and use of the lake are a result of the State's failure to use its powers to protect the Great Salt Lake and take necessary actions to raise the Lake to its minimum viable elevation. Experts have said consistently and repeatedly that the most effective means of reducing the potential for dust storms following wind events is to ensure the dust is covered with water. This is only practically possible by maintaining sufficiently high Great Salt Lake levels.

13. On February 1, 2023, I testified in support of Senate Concurrent Resolution 6 ("SCR 6"), Great Salt Lake Target Elevation Levels, to the Utah Senate Natural Resources, Agriculture and Environment Committee. SCR 6 would have had the State of Utah set an official goal to raise the levels of the Great Salt Lake to the minimum healthy level of at least 4,198 feet.

14. I articulated to the senators on the committee that I am a disabled United States Army non-commissioned officer who is surviving cancer that was acknowledged by the Department of Veterans Affairs as being service-connected due to my toxic air exposures on my deployment. I stated that my experiences - which have included a lymph node dissection with 23 nodes removed from under my jaw as well as a partial glossectomy in which a chunk of my tongue was surgically removed - have been incredibly unpleasant and that it would not be fair to other residents of the Wasatch Front who could receive an early onset cancer diagnosis such as mine.

15. Upon sharing my testimony, the committee room was entirely silent.

16. The Utah Senate Natural Resources, Agriculture and Environment Committee shortly after voted 4-2 to not move SCR 6 to a full Senate vote, abdicating their duty to their

citizenry by refusing to set an official goal for the State of Utah to raise the level of the Great Salt Lake to its healthy minimum level. Later in February, the Governor of Utah, Spencer Cox, stated that establishing a target goal for the Great Salt Lake was "a dumb thing."

17. The increased risk of cancer that I face could be remedied by the State taking action to restore the Great Salt Lake to the necessary water levels that would reduce the potential of toxic dust blowing toward the State's highest density population area, thereby reducing my potential for a subsequent recurrence.

18. I have come to love Salt Lake City. I find that the location, the people, the community, and the local opportunities to be stellar. I would like to continue to reside here, yet I am worried about what will happen to my health if I remain. I am currently renting an apartment but would like to buy a permanent home here, yet I am worried about property values collapsing if air quality in the area continues to get worse.

19. In sum, I believe if this lawsuit is successful, and the State is directed to abide by its trust obligations, the lake level would rise, meaningfully reducing the risk that my cancer would recur and increasing my opportunities to enjoy Salt Lake City and use the Great Salt Lake for birding and other recreation.

I declare under criminal penalty under the laws of Utah that the foregoing is true and correct.

Signed on the 30th day of August, 2023, at Salt Lake City, Utah.

Matthew Raymond Berry

Exhibit 10

Declaration of Michael Olsen

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THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, *et al.*,

Plaintiffs,

v.

UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF MICHAEL OLSEN

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF MICHAEL OLSEN

I, Michael Olsen, declare as follows:

1. I live in Salt Lake City, where I have spent most of my life. I grew up in Salt Lake City and now live in Sandy, Utah.

2. I joined Utah Rivers Council because I care deeply about our environment, including the Great Salt Lake. I am an active member of Utah Rivers Council and served on and chaired the board of directors from 2000-2011.

3. The Great Salt Lake is the largest saline lake in the Western Hemisphere and a navigable waterbody. When the lake level is at 4,198 feet, it spans a total surface area of approximately 924,415 acres. The average depth is approximately 15 feet, with a maximum depth of 31 feet. At this level, the Lake is largely free of navigation obstructions.

4. I started sailing on the Lake in 2007 when I went out in a sailboat with two friends at sunset. I was immediately captivated by the Lake. A month later, I purchased a 25-foot Catalina sloop with a four-foot draft and leased a slip at the Great Salt Lake Marina. Because the Lake rarely freezes over in the winter, I was able to leave my boat in the water throughout the year.

5. For the next fourteen years, I routinely sailed on the Lake with friends and family. The sailing season runs from about April to October, and I would often sail once a week, venturing miles out into the lake. The learning curve was steep at first, but over time I learned the nuances of the Lake, its salinity, and the winds (particularly the gusts that can keel a boat over in a moment).

6. Sailing out on the Lake, you can feel the wind propelling you across the water and the engineering of the sailboat. It can also be an adventure. On one occasion, I was caught in

fierce storms with six-foot waves. On another occasions, my boat almost keeled over due to a downdraft wind. There are also multiple islands in the Lake that sailors can visit, such as Antelope Island.

7. In recent years, though, the Lake elevation has declined due in large part to upstream diversions of water. As the Lake drops, there are various hazards to navigation. For example, I have to be particularly careful when I exit the marina due to a relatively shallow reef that can ground a boat like mine in shallow water years. There are also various sand bars throughout the Lake that can pose a risk of running aground at low lake elevations.

8. Last November, the Lake reached its lowest water level ever recorded: 4,188.5 feet. Due to the declining Lake levels, the harbormaster ordered everyone to take their boats out of the marina due to the risk that the boats would list and cause damage to the slips. On two separate occasions, I have paid to crane my boat out of the water and store it on stands. By August, the last of the marina's boats were pulled as the lake's water continued receding to unprecedented levels. I still own my Catalina 25, which is resting on stands at the Great Salt Lake Marina parking lot.

9. It is my understanding that the State of Utah has a duty to protect the Lake—a navigable waterbody—for trust uses, like boating. Yet, the State has failed to take the necessary steps to ensure adequate flows reach the lake each year to sustain the Lake at its minimum viable elevation. That has led to record low lake levels, which are impairing my use of the lake for boating.

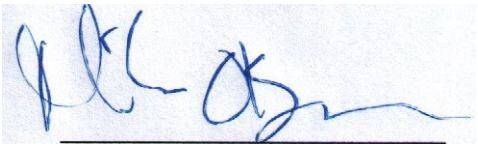
10. This past year was a banner snow-year, resulting in increased runoff that reached the Lake and raised the water level. Unlike some others, I decided not to put my boat back in the water due to the reality that the Lake will continue to decline, absent intervention by the State.

In fact, the Lake has already declined from its springtime high and will continue on that downward trajectory through the Fall.

11. These harms would be ameliorated if the State of Utah abided by what I understand to be its legal obligations and ensured that sufficient water made it to the Lake to sustain its minimum viable elevation. If the State were to ensure that enough water got to the Lake, I would put my boat back into the Lake, lease a slip at the marina (likely with power and water this time!), and continue sailing on a weekly basis, which has been my passion for the last 15 years.

I declare under criminal penalty under the law of Utah that the foregoing is true and correct.

Signed on the 31st day of August, 2023, at Sandy, Utah.



Michael Olsen

Exhibit 11

Declaration of Muskan Walia

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SALT LAKE COUNTY, STATE OF UTAH

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Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF MUSKAN WALIA

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF MUSKAN WALIA

I, Muskan Walia, declare as follows:

1. I am a 21-year-old Punjabi-American. I go to college in Salt Lake City, at the University of Utah, where I'm currently a rising senior. I grew up and still live in the Salt Lake Valley, in the town of Woods Cross.

2. I am a member of the Sierra Club. For the past three years, I've been a Sierra Club volunteer. I joined Sierra Club, and began volunteering for them, because I share the Club's vision of community-led environmental advocacy. In particular, I admire the Club's commitment to empowering young people.

3. When I was a kid, I rarely thought about the Great Salt Lake. I visited the Lake a few times as a child, but it always seemed like something pretty distant from my life.

4. Although the Lake was not initially a significant part of my world, I had an environmental awareness from a young age. When I was young, my mother taught me to pick herbs and vegetables in our backyard; although we didn't use these terms, she was cultivating in me an ethic of backyard sustainability.

5. Still, I lacked the vocabulary or context to fully understand environmental concerns. When I was a junior in high school, I recall that my biology teacher initially allocated a week of class-time to discuss climate change, but by the time we reached that week we were too far behind the prescribed curriculum, so we skipped the unit on climate change. As a result, I didn't know much about climate change before college and assumed it wasn't important to my science education if my teacher felt comfortable leaving it out of the curriculum.

6. After I arrived at the University of Utah for college, I started talking to my peers about environmental issues. When I was a freshman, one professor taught me the meaning of the

term “environmental justice”—the idea that poor people, people of color, and otherwise marginalized people are disproportionately exposed to pollution and other environmental ills, so the fight for justice must be one that strives to ensure clean air, safe water, and uncontaminated space for all.

7. Around the same time, my mother started developing this deep, frightening cough. Eventually, she was told by a doctor that she had chronic obstructive pulmonary disease (COPD), a lung disease. It was another professor who helped me see the environmental justice implications of my mother’s diagnosis. My childhood home had been located very close to a number of refineries—you could always hear them running—but we didn’t understand that this could have consequences for our health until after my mother’s illness.

8. All of these realizations motivated me to get involved in environmental justice organizing. Starting in the summer of 2020, during a pre-college summer class, I started volunteering with the Sierra Club to advocate for a clean energy commitment from my former school district, the Davis School District. I helped to organize young people (sixth grade through college); met with school board members, facilities directors, and the superintendent; did research on the school district’s energy use; and ultimately helped rewrite the Davis School District’s energy policy in late 2022, which attracted national recognition from the federal government.

9. As a result of this organizing, I got to know several members of Utah Youth Environmental Solutions (UYES), a youth-led environmental and climate advocacy organization. In 2021, I became involved with a UYES effort to educate local high school students on the tenets of environmental justice and advocacy to remedy environmental injustice. Other members of UYES and I developed an environmental justice curriculum. We decided to focus on the Great

Salt Lake largely because of concerns about air quality. The decline of the Lake is the environmental crisis that most affects, and will continue to most affect, young people living in the Salt Lake Valley, including myself. Air quality issues in the Salt Lake Valley, which have already personally affected me and my family, will only worsen if the Great Salt Lake dries up. Creating this curriculum was an opportunity to mobilize youth around this pressing problem and the solutions that directly affect our future.

10. In the fall of 2022, we held the first Environmental Justice Training Program for high schoolers. This was a four-week educational program, undertaken in partnership with the Sierra Club. During the first week, I camped along with the students at the Great Salt Lake. There, we discussed the Lake's declining water level, the effects this will have on the ecosystem and all of our air quality, and what this means for young people.

11. This was the first time I spent a significant amount of time at the Lake. The students and I spent two full days there, hiking around the Lake, taking a full tour. This was the summer, and I was surprised by how dry and barren the Lake seemed; its water struck me as very low. In fact, it was difficult to even access the water, as it had receded so far in places that we had to walk long distances past bodies of dead birds to reach the water line.

12. The students decided that they wanted to engage in activism at the Lake itself, to draw attention to this crisis and highlight its ramifications for young people. They decided to organize a "die-in"—an illustration of what will ultimately happen to living things if those in positions of power (especially elected and appointed officials within the Utah government) fail to exercise their legal power and ensure that more water gets to the Lake. For weeks, I worked with the students to plan this action.

13. On September 3, 2022—one of the hottest days of the summer—I gathered along with the students at the Lake for the "die-in." Many youth, including some little kids, brought hand-made gravestones, and together we held a mock funeral for the Lake. I read a eulogy for the Lake, and one by one the young people began laying down as if they were dead.

14. Around 100 people participated in the die-in, and many local, regional, and national press outlets covered our action. Our goal was to send a message to the State of Utah that a healthy Great Salt Lake is absolutely imperative to our community and our future, and the State must take action to get more water to the Lake before it is too late.

15. This year, we had even more participants in the Environmental Justice Training Program, who learned about the Lake from scientists, Indigenous leaders, and activists. Over the course of two months, we planned a countdown demonstration to illustrate that time is running out to protect the Great Salt Lake.

16. Protestors gathered on the lakebed and marched to an art installation of a clock that was numbered with important years in the Great Salt Lake's future: 2023, 2027, 2030, and 2040. At each of these intervals, youth speakers described what a future without the Great Salt Lake would mean for their lives, health and opportunities.

17. As part of my work with UYES, I've visited the Lake multiple times for research and as part of my activism. In April 2023, for instance, I visited the Lake to see what it looked like during the "wet" season. The water level did indeed seem higher, and I saw a number of tourists. I spoke to people from all over who were there to visit the Lake. I visited the Lake in August 2023 for the UYES training program. We helped a scientist conduct brine fly research, we hiked along the shoreline and saw migratory birds including Wilson's phalaropes, and students floated in the water and shared childhood memories of visiting the Lake with their

families. I saw firsthand that the Lake levels have already started declining again since my last visit.

18. I plan to continue visiting the Lake as part of my advocacy.

19. The crisis facing the Great Salt Lake is really frightening to me, not only because I love to hike at and swim in the Lake, but because I recognize that the Lake's future is central to my future in the Salt Lake Valley. A Lake whose water level is declining is one that will leave a significant amount of lakebed exposed, which in my understanding means that more and more toxic dust will be blown into the air of the Valley, impairing my health and the public's health. A Lake that is in structural decline is one that cannot support tourism or the ski industry. A Lake that is past the point of ecological collapse is one from which people will flee (if they can) for very real reasons, such as public health.

20. The State has failed to manage the lake to a minimum viable elevation that would support ecological health and ensure my future as a young person living in the Salt Lake Valley. The State has a responsibility to protect essential resources for the public good, yet they have prioritized development and misappropriated water at my and other young peoples' expense.

21. I am concerned that, if the State of Utah continues to avoid implementing policies sufficient to get more water to the Lake, the Lake will decline to the point that property values in the Salt Lake Valley collapse and young people like myself won't be able to get jobs or continue to live here. The Lake has put a big question mark on whether I can continue to live in this Valley. When I think about the decline of the Lake, I feel anger, sadness, and a profound sense of unfairness.

22. I believe that if a court were to order the State of Utah to fulfill its obligations and take actions sufficient to ensure enough water reaches the Lake to maintain a minimum viable elevation, my concerns about air quality, ecology, and economics would be ameliorated.

I declare under criminal penalty under the laws of Utah that the foregoing is true and correct.

Signed on NOV. 12, 2023, at Salt Lake City, Utah.

Muskan Walia

Muskan Walia

Exhibit 12

Declaration of Nan Seymour

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Intervenors.

DECLARATION OF NAN SEYMOUR

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF NAN SEYMOUR

I, Nan Seymour, declare as follows:

1. I am a poet and writing facilitator from Salt Lake City. In 2015, I founded a writing practice known as River Writing which has become the core of a vibrant, value-based community. I am also a member of Center for Biological Diversity, which advocates on behalf of Great Salt Lake.

2. In September of 2021, I listened to a previously broadcast program on RadioWest and heard Dr. Bonnie Baxter—one of the foremost experts on saline ecosystems—describe the imperiled state of the lake. Like many listeners, I was shocked to learn that we were at the precipice of an ecological collapse. As a poet and citizen, I felt called to give the lake my full attention.

3. During both winters of 2022 and 2023, I led a day and night vigil on Antelope Island for seven weeks, parallel to the Utah State legislative sessions. I lived in a borrowed camper at site 56 on Bridger Bay. The campsite sits on a gentle slope facing the bay which frames Fremont Island, no longer actually an island due to the receding shores, and beyond that Promontory Point. The cold was bracing, but less painful to bear than the stench of hundreds of dead birds or the view of the disappearing bay scarred by dying saline reefs due to the declining lake elevation. I took my solace in the many beauties of the wave-made world; bison neighbors, wild skies mirrored by the water, and meadowlarks filling the entire island with song.

4. I wrote about the lake daily for months, and began dreaming about the water as well. While writing and even dreaming, I also listened just in case the lake had anything to tell me. At first, fragments of lake-facing lyrics flowed from the dreams, and eventually I received an entire poem almost intact. The lines detailed a vision of the Lake's restoration:

when praise began to flow
we watched the water rise
along both sides of the causeway
eleven islands recovered
their autonomy. microbialites sighed
with relief. when praise began to flow
the dust subsided. metals resettled
on the seafloor, arsenic and mercury
were lulled back to sleep
blanketed once more
by the great weight of water

5. During the two vigils, over one thousand people joined me on the receding shoreline to write, read poetry, sing together, drum, make art, and walk to the water. We were anchored by explicitly stated values of reverence, repair, and reciprocity. Together, we wrote a poem titled "irreplaceable," a chorus of praise swelling with love for our Great Salt Lake. Our goal was to write at least 1,700 lines, corresponding with the minimum size of a viable lake (in square miles). As it stands, there are 432 voices and 2,580 lines in this poem—a prayer for Great Salt Lake's *full* restoration. Over a hundred folks read the first 1,706 lines of the poem aloud to the lake as an offering to Great Salt Lake on February 19th, 2022 on Antelope Island. Our reading was captured in a PBS documentary that aired in May.[1]

6. During the first vigil, I made it a point to show visitors microbialites. I had learned about them by listening to Dr. Bonnie Baxter on RadioWest. Before that I had been oblivious to these ancient forms making light into life throughout the shallows of the lake. Microbialites are the platform of life for all of the brine shrimp and brine flies who in turn provide essential sustenance for over ten million migratory birds. They are as essential to this ecosystem as coral reefs are to the oceans. These miraculous living rocks lit up my poet heart. I couldn't stop myself from writing an ode.

[1] The PBS documentary is available at https://www.pbs.org/video/irreplaceable-jd2yrn/.

7. During the second vigil, we worked harder to communicate with lawmakers. In a brilliant collaboration published by Brigham Young University, scientists outlined a clear directive on emergency measures necessary to rescue Great Salt Lake. We wrote hundreds of letters in support of their recommendations to maintain a minimum viable lake elevation of 4,198 feet above sea level.

8. During the 2023 session, I testified in support of Senate Concurrent Resolution 6 which would have established an official lake level goal at 4,198 above sea level, the lowest mark in a range that would rebalance the lake's salinity and keep vital microbes submerged. I was devastated when the committee rejected this simple but necessary non-partisan measure. I felt again a sensation I once had in my body just before a serious car accident, helpless as we slid rapidly towards an embankment.

9. The declining lake levels have impaired my access to Great Salt Lake. During my two vigils on Antelope Island, it became increasingly difficult to walk to the water, which is continuing to recede.

10. The receding lake level also threatens my health by exposing thousands of square miles of the lakebed, which is becoming poisonous dust. Just the other day, I looked up to see a thick grey curtain nearly as tall as the mountains closing in from the direction of the exposed lakebed. I took refuge in my car which was parked high in the foothills and watched as entire houses, schools, parks, and buildings disappeared. I watched the toxic dust swallow the neighborhood I grew up in. It settled in a heavy band across the Wasatch front, obscuring all but the highest peaks. I took increasingly shallow breaths as I thought about the people, birds, and animals who have no home or car to hide in.

11. This past year was a banner snow-year, resulting in increased runoff that raised the Lake level. This good snow year may be a miracle but it is also merely a stay of execution. The Lake is already declining as essential flows are diverted away from the Lake. Overall, even a record run of similar seasons will not save us if we do not cease to do harm and take affirmative steps to restore the lake to a minimum viable elevation.

12. It is my understanding that the State of Utah has a duty to protect the integrity of the Lake. Yet, the State has failed to take the necessary steps to maintain a minimum lake elevation, such as ensuring adequate flows reach the lake each year. The resulting record low lake levels are threatening my ability to gather people at the lake for the purposes of teaching, writing, and facilitating. The low lake levels also imperil my health. These harms would be ameliorated if the State of Utah would fulfill its legal obligations to protect the lake. It is the State of Utah's moral and legal imperative to ensure there is enough water to sustain a minimum viable elevation for Great Salt Lake. Our lives in this place depend on the vitality of the Lake which is inseparable from our own.

I declare under criminal penalty under the law of Utah that the foregoing is true and correct.

Signed on the 17th day of October, 2023, at Salt Lake City, Utah.

Nan Seymour

Exhibit 13

Declaration of Robert Weir

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THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, *et al.*,

Plaintiffs,

v.

UTAH DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al.*

Intervenors.

DECLARATION OF ROBERT WEIR

(Tier 2)

Case No. 230906637
Honorable Judge Laura Scott

DECLARATION OF ROBERT WEIR

I, Robert Weir, declare as follows:

1. I live in Millcreek, which is a community in Salt Lake County and part of the Salt Lake City metropolitan area. I have lived here since 2021. I can see the Great Salt Lake from my home—I look at it every day.

2. I am a neurologist and psychiatrist, and I moved to Utah for work. I now work at St. Mark's Hospital in Millcreek, where my work runs the gamut of brain health. I treat strokes, dementia, seizures, depression, anxiety, psychosis, etc.

3. I am a member of Utah Physicians for a Healthy Environment (UPHE). I joined UPHE shortly after moving to the Salt Lake City area, due to my interest in my health, my family's health, and the health of my broader community.

4. After moving to the Wasatch Front, I learned about the health issues impacting its people, especially the poor air quality. Based on my understanding and experience, the Salt Lake Valley endures regular air "inversions." Meanwhile, broader air quality is declining as more of the Great Salt Lake's bed is exposed and winds blow particulate matter and toxic contaminants from the exposed lakebed into the lungs of residents. Based on my understanding, many of these contaminants are neurotoxins, meaning that they adversely affect the brain health of those exposed to them.

5. As a medical doctor and healthcare professional, I felt an obligation to improve the quality of life in my new community, so I joined UPHE. UPHE helps me be involved in advocating for better health conditions in Utah by sending regular email updates, informing members of ways to get involved, enabling members to submit comments, attend a summit, etc. Since joining UPHE, I've submitted comments to public agencies, attended public

meetings/summits on subjects related to health/air quality, and sent messages to state representatives. I reached out to my local schools to educate officials about a free air purifier project supported by a federal grant, and as a result of that effort one facility equipped itself with air purifiers.

6. I am the father of three small children. My kids are 4 years old, 1 year old, and a few weeks old. I am greatly concerned about the impacts that declining air quality will have on my children, my wife, and myself. Based on my understanding, poor air quality can lead to cognitive issues including decreased academic performance, early pathophysiological hallmarks of dementia and neuroinflammation, psychiatric problems (including psychotic symptoms), and anxiety—and children are especially vulnerable to poor air quality.

7. In my medical practice, I have already seen a number of patients with anxiety about climate change. I worry that the psychiatric outlook for these individuals (and others) will decline as the situation at the Great Salt Lake becomes more dire.

8. I am also a lover of the outdoors, and my family and I spend significant time at the Great Salt Lake. In fact, the very first week that I interviewed in Utah, my wife and daughter visited the Lake. It has been an attraction for our family ever since we moved here. My family regularly goes to Great Salt Lake State Park, spends time in the water, observes the wildlife, and generally communes with the Lake's environment.

9. As the Lake's elevation has fallen, our ability to visit it—and be outside in general—has been negatively impacted. Due to the falling Lake elevation, Antelope Island is more of a peninsula now, and based on my understanding that causes the wildlife that we love to observe to flee or risk predation. As my kids get older, I would like to take them kayaking, but a

lot of the places where kayak tours would ordinarily happen are now exposed or too low for recreation.

10. Further, the declining air quality that has resulted from more and more exposed lakebed has negatively impacted my family and myself. My wife and I try to be very attentive to the air that we and our children breathe, and we have already noticed air quality getting worse. My wife and I check the air quality index before leaving the house, and there have been several times when we didn't feel we could safely take our kids outside due to the state of the air. Instead, we were forced to stay inside and rely on air purifiers.

11. I plan to continue visiting the Lake with my family, even though our opportunities to safely do so have been diminished. My daughters love to splash and walk around in the water of the Lake while looking at the brine shrimp and brine flies. We even have upcoming plans to do a boat tour of the Lake when our newborn is old enough.

12. The declining state of the Great Salt Lake has had significant effects on my physical and mental wellbeing. Not a day goes by when I don't wonder whether this place that I now call home will be livable. In the short-term, I worry that I'll see a greater number of patients suffering the consequences of poor air quality; I also worry my own family will be affected, especially with three small brains in the critical, early stages of neurodevelopment. In the long-term, I worry that people will start fleeing the Salt Lake Valley if the air gets too toxic; our property values will decline, and no one will want to visit. The Lake's decline is the most stressful thing in my life—I am worried this Valley will become too toxic for me to raise my kids here.

13. My profound concern about the Lake is not simply tied to my interest in recreation and the wellbeing of my family and my patients. It is tied to the Hippocratic Oath I

took when I became a doctor—especially to "First, do no harm." The decline of the Lake is a public health crisis, and it is one that will affect everyone, irrespective of partisanship, religion, or background.

14. In my understanding, the State of Utah is largely responsible for the Lake's structural decline over the past decade. It holds the Lake in trust for the public and so has an obligation to protect the Lake by ensuring enough water reaches the Lake to sustain a minimum viable elevation. But it has not done so, resulting in a crisis situation that impairs my uses of the Lake, my family's uses, and our even our health.

15. I believe that if the State of Utah took action sufficient to get more water to maintain a viable Lake elevation, the Lake that I visit would retain its ecological integrity and the air that my children and I breathe would be cleaner and safer. If, in other words, Utah officials complied with their legal obligations and ensured sufficient water for the Lake, my community would remain a livable one.

I declare under criminal penalty under the laws of Utah that the foregoing is true and correct.

Signed on the 29th day of August, 2023, at Millcreek, Utah.

Robert Weir