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This motion requires you to respond. Please see the Notice to Responding Party.

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, AMERICAN BIRD CONSERVANCY, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and UTAH RIVERS COUNCIL,

Plaintiffs,

v.

UTAH DEPARTMENT OF NATURAL RESOURCES; UTAH DIVISION OF WATER RIGHTS; and UTAH DIVISION OF FORESTRY, FIRE AND STATE LANDS,

Defendants.

UTAH DIVISION OF WATER RIGHTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER U.R.C.P. 12(b)(6)

and

JOINDER IN CO-DEFENDANTS' MOTIONS TO DISMISS

(Hearing Requested)

Case No. 230906637

Judge Laura Scott

TABLE OF CONTENTS

MOTION.....	1
JOINDER.....	1
MEMORANDUM IN SUPPORT.....	1
INTRODUCTION	1
BACKGROUND AND RELEVANT FACTS	3
STANDARD OF REVIEW	5
ARGUMENT.....	5
I. Utah’s Constitution Does Not Provide the Relief Claimed by Plaintiffs.	6
A. The Public Trust Doctrine is a Matter of State Law Framed by the State Constitution and the Legislature.....	6
B. The Utah Constitution Enshrines the Doctrine of Prior Appropriation as the Law Governing Water Rights in the State.....	8
C. A Plain Reading of the Utah Constitution Means Both the Public Trust Doctrine and Prior Appropriation Doctrine are Fundamental, and Neither is Subordinate to the Other.	11
II. Utah Law Protects Water Rights and Limits Utah’s Public Trust Doctrine the Disposal of Lands Under Navigable Waters.....	13
A. Utah Statutes Limit the Public Trust Doctrine to Protection of Sovereign Land.	13
B. Utah Law Confirms the State’s Strong Interest in Promoting and Protecting Appropriative Water Rights.	17
CONCLUSION AND REQUEST FOR RELIEF	23

TABLE OF AUTHORITIES

Cases

<i>1600 Barberry Lane 8 LLC v. Cottonwood Residential OP LP</i> , 2019 UT App 146.....	5
<i>Adams v. Portage Irrigation, Reservoir & Power Co.</i> , 72 P.2d 648 (Utah 1937).....	19
<i>Arave v. Pineview W. Water Co.</i> , 2020 UT 67.....	20
<i>Arizona v. California</i> , 373 U.S. 546 (1963).....	19
<i>Berry v. Beech Aircraft Corp.</i> , 717 P.2d 670 (Utah 1985)	12
<i>Bishop v. Duck Creek Irrigation Co.</i> , 241 P.2d 162 (1952)	10
<i>California Oregon Power Co. v. Beaver Portland Cement Co.</i> , 295 U.S. 142 (1935).....	9
<i>Calsert v. Est. of Flores</i> , 2020 UT App 102.....	5
<i>Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.</i> , 1999 UT 18.....	12
<i>Crane v. Winsor</i> , 2 Utah 248 (1877-1880 term).....	9
<i>Delta Canal Co. v. Frank Vincent Fam. Ranch, LC</i> , 2013 UT 69	21
<i>EnerVest, Ltd. v. Utah State Eng'r</i> , 2019 UT 2.....	2, 20
<i>Grand Cnty. v. Emery Cnty.</i> , 2002 UT 57	11
<i>Green River Canal Co. v. Thayn</i> , 2003 UT 50.....	21
<i>Illinois Cent. R. Co. v. State of Illinois</i> , 146 U.S. 387 (1892).....	7
<i>In re Water Rights of Escalante Valley Drainage Area</i> , 348 P.2d 679 (1960)	19
<i>J.J.N.P. Co. v. Division of Wildlife Res.</i> , 655 P.2d 1133 (Utah 1982)	2, 17
<i>Longley v. Leucadia Fin. Corp.</i> , 2000 UT 69	2, 20
<i>Marks v. Whitney</i> , 491 P.2d 374 (1971)	21
<i>Matter of Utah Lake and Jordan River</i> , 2018 UT App 109	10
<i>Mineral County v. Lyon County</i> , 473 P.3d 418 (Nev. 2020)	22, 23
<i>Nat'l Audubon Soc'y v. Superior Court</i> , 658 P.2d 709 (Cal. 1983)	22
<i>PPL Montana v. Montana</i> , 565 U.S. 576 (2012)	2, 7
<i>Salt Lake City Corp. v. Haik</i> , 2020 UT 29	11
<i>Second Big Springs Irrigation Co. v. Granite Peak Properties LC</i> , 2023 UT App 22	19, 20
<i>Shively v. Bowlby</i> , 152 U.S. 1 (1894).....	7
<i>Stowell v. Johnson</i> , 26 P. 290, 291 (Utah 1891).....	10, 21
<i>Utah State Rd. Comm'n v. Hardy Salt Co.</i> , 486 P.2d 391 (1971)	3
<i>Utah Stream Access Coal. v. VR Acquisitions, LLC</i> , 2019 UT 7, 439 P.3d 593.....	8, 11, 12, 13
<i>Utah v. United States</i> , 403 U.S. 9 (1971).....	4
<i>White Bear Lake Restoration Ass'n ex rel. State v. Minnesota Dept. of Natural Resources</i> , 946 N.W.2d 373, 386 (Minn. 2020).....	22
<i>Wrathall v. Johnson</i> , 40 P.2d 755 (1935)	12

Constitutional Provisions

Utah Const. art. XI, sec. 6.....	9, 11, 12
Utah Const. art. XVII, sec. 1.....	8, 10, 11, 12
Utah Const. art. XX, sec. 1	passim

Statutes

1897 Utah Laws, ch. 52, §§ 1-30 10
43 U.S.C. § 9..... 9
Utah Code § 65A-10-1 14
Utah Code § 65A-10-202..... 14, 15
Utah Code § 65A-10-203..... 15
Utah Code § 65A-10-204..... 15
Utah Code § 65A-10-205..... 15, 17
Utah Code § 65A-1-1 14
Utah Code § 65A-1-4..... 14, 18
Utah Code § 65A-16-201 15
Utah Code § 65A-3-1 14
Utah Code § 73-1-1..... 10, 17, 19
Utah Code § 73-1-21..... 20, 21
Utah Code § 73-1-3..... 3, 17, 21
Utah Code § 73-1-5..... 17, 22
Utah Code § 73-2-1.1..... 18
Utah Code § 73-3-1..... 21
Utah Code § 73-3-16..... 18
Utah Code § 73-3-17..... 18
Utah Code § 73-32-201..... 16
Utah Code § 73-32-202..... 16
Utah Code § 73-32-203..... 16, 17, 18
Utah Code § 73-3-3..... 18
Utah Code § 73-3-30..... 20
Utah Code § 73-3-8..... 18
Utah Code § 73-5-3..... 18, 19
Utah Code §§ 65A-10-201 to -205 4, 16
Utah Code §§ 65A-16-101 to -301 4, 16
Utah Code §§ 73-32-101 to -304 4, 16

Rules

U.R.C.P. 12(b)(6) 1, 5, 23

Other Authorities

Robin Kundis Craig, *A Comparative Guide to Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53 (2010)..... 22, 23
Robert W. Swenson, *A Primer of Utah Water Law: Part I*, 5 *J. ENERGY L. & POL’Y* 165 at 166-173 (1984)..... 9

MOTION

The Utah Division of Water Rights (“State Engineer”), by and through undersigned counsel, files this Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted under Utah Rule of Civil Procedure (“U.R.C.P.”) 12(b)(6). For the reasons stated below, this Court should dismiss the Complaint in this matter because the Plaintiffs have failed to state a claim upon which relief can be granted under Utah law.

JOINDER

The State Engineer’s Co-Defendants, the Utah Department of Natural Resources (“DNR”) and the Utah Division of Forestry, Fire and State Lands (“FFSL”) (collectively, “Defendants” or the “State Defendants”) have filed separate, concurrent Motions to Dismiss in which the State Engineer joins. The State Engineer incorporates by reference and adopts DNR’s and FFSL’s motions.

MEMORANDUM IN SUPPORT

INTRODUCTION

Great Salt Lake is a critical resource that the State of Utah has a demonstrated interest in preserving for the wellbeing of its citizens and the many values the Lake supports. While Plaintiffs raise valid concerns regarding the potentially negative impact of low lake levels on air quality, recreation, economic output, and the health of the residents of the Wasatch Front, this Court cannot order the relief Plaintiffs seek. Plaintiffs’ claim rests on this Court recognizing an expansion of Utah’s public trust doctrine; one that not only has not been previously recognized in Utah but is in contradiction with the constitution and laws of the State. Additionally, Plaintiffs seek to expand the State’s public trust obligation and ask the Court to create a new remedy that requires the State to modify existing, vested water rights, limiting or curtailing their use for the

purpose of increasing flows into and raising the elevation of Great Salt Lake. Utah law does not allow or require the State to modify or curtail existing water rights to maintain a certain lake level, and therefore, the Plaintiffs cannot be granted the relief sought.

The State of Utah has adopted its unique version of the public trust doctrine that reflects the values and needs of its populace. *See PPL Montana v. Montana*, 565 U.S. 576, 604, (2012) (“States retain residual power to determine the scope of the public trust over waters within their borders”). As the one of the driest states in the country, Utah’s population and economy rely on certainty in the appropriation and beneficial use of water. Water is “a scarce and essential resource . . . [that] is indispensable to the welfare of all the people.” *J.J.N.P. Co. v. Division of Wildlife Res.*, 655 P.2d 1133, 1136 (Utah 1982). “Water, in an arid state like Utah, is its life-blood, measured in currency represented by survival itself . . . This court has likened a drop of water [to] a drop of gold.” *EnerVest, Ltd. v. Utah State Eng’r*, 2019 UT 2, ¶ 1 (quoting *Longley v. Leucadia Fin. Corp.*, 2000 UT 69, ¶ 15). Likewise, Utah’s constitutional framers sought to encourage the appropriation and beneficial use of water, while respecting the public trust doctrine by protecting the lands lying below navigable waters.

The Utah legislature, consistent with the Utah constitution, has completely separated the doctrines of public trust and prior appropriation. Utah law vests FFSL with the management of the State’s public trust resources—the beds and banks of navigable waters—and the State Engineer with the administration of the public’s beneficial use of water. The legislature is clear that FFSL’s responsibilities end at the beds and banks of navigable waterways, consistent with the constitution, and do not apply to the regulation or administration of water rights. Conversely, as to all water, including water flowing across or resting on those lands, the legislature has determined that the “state engineer [is] responsible for the . . . supervision . . . and the

measurement, appropriation, apportionment, and distribution of those waters” to fulfill the public’s interest in the “[b]eneficial use . . . of water in this state.” Utah Code §§ 73-2-1(3)(a) and 73-1-3. As agencies of the State, Defendants are bound by their statutory directives and are strictly prohibited from going beyond them.

Plaintiffs argue that the Court should ignore these constitutional and statutory mandates. Specifically, Plaintiffs’ claim for relief would require this Court to insert the public trust doctrine into Utah’s appropriative water rights system, which has existed since before statehood, and 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.¹ Plaintiffs also ask this Court to create a remedy that requires the State to curtail water rights without any clear mechanism of how curtailment should be administered. This request goes beyond Great Salt Lake; the relief sought by Plaintiffs could affect water rights in all tributaries to navigable waters of the state. This Court should not expand Utah law beyond what the constitution and statutes allow and should dismiss the case with prejudice.

BACKGROUND AND RELEVANT FACTS

Great Salt Lake is a unique body of water unlike any in the United States. It is the largest terminal saline lake in North America, where several rivers terminate without an outlet. *Utah State Rd. Comm’n v. Hardy Salt Co.*, 486 P.2d 391 (1971); Compl. at 1. The levels of Great Salt Lake have fluctuated substantially throughout history, a fact noted by both the Utah and United State Supreme Courts. *See Hardy Salt Co.*, 26 Utah 2d at 145 (“There have been wide

¹ While not seeking an actual water right, the relief requested, including “the reduction of unsustainable upstream diversions” and “modify[ing] water allocations based on new information,” is no different than a water right with no priority date. *See* Compl. Request for Relief ¶¶ 1.c and 1.d.

fluctuations of the elevation of the lake since it was first surveyed in 1850.”); *see also Utah v. United States*, 403 U.S. 9, 12 (1971).² Recently, the lake has reached historically low water levels, due in part to upstream diversion. Compl. at 1.

In response to the reduction in lake elevation, the Utah Legislature has enacted a host of statutory schemes specifically directed at improving the health of Great Salt Lake. *See, e.g.*, Utah Code §§ 65A-10-201 to -205; 65A-16-101 to -301; 73-32-101 to -304. The new legislation primarily tasks FFSL and the newly created Great Salt Lake Commissioner with the responsibility to implement programs to study and address issues surrounding the Lake but does not include the administration or regulation of existing water rights, a fact conceded by Plaintiffs. Compl. at 17. Additionally, Governor Spencer Cox, at the recommendation of the State Engineer, issued a proclamation suspending nearly all new appropriations of water rights in the Great Salt Lake Basin to address the water level of Great Salt Lake. 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” (November 3, 2022) (available at <https://rules.utah.gov/wp-content/uploads/Utah-Proclamation-No.-2022-01.pdf>).

Despite these efforts from the State’s lawmakers, governor, and agencies, Plaintiffs claim that the State Defendants have breached a trust obligation that not only does not exist in Utah law but is completely contrary to the law established by our constitution, legislature, and courts. Specifically, Plaintiffs claim that “[u]pstream water diversions are subject to the public trust

² In fact, in the United States Supreme Court’s determination that Great Salt Lake was navigable for the purposes of title, the United States contended that on the date of statehood the lake had receded to the point that it was no longer navigable. *Utah v. United States*, 403 U.S. at 12.

doctrine” and the State Defendants have a trust obligation to “modify upstream diversions” to protect what would be a new riparian right to a certain lake elevation. Compl. at 3.

Even accepting as true all Plaintiffs’ many wide-ranging factual allegations about the chemistry, hydrology, and ecology of Great Salt Lake, this Court cannot grant Plaintiffs’ claim for relief because Utah law does not allow for the remedy of “modification of diversions” for any reason outside the priority system.

STANDARD OF REVIEW

Rule 12(b)(6) of the U.R.C.P. permits dismissal for “failure to state a claim on which relief can be granted.” “A district court should grant a Rule 12(b)(6) motion when, assuming the truth of the allegations that a party has made and drawing all reasonable inferences therefrom in the light most favorable to that party, it is clear that [the party] is not entitled to relief.” *Calsert v. Est. of Flores*, 2020 UT App 102, ¶ 9, (quotations and citations omitted). While accepting the well pled facts as true, the court does not need to accept the legal conclusions contained therein. “A Rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges Plaintiff’s right to relief based on those facts. Accordingly, we accept Plaintiff’s description of facts alleged in the complaint to be true, but we need not accept extrinsic facts not pleaded, nor need we accept legal conclusions in contradiction of the pleaded facts.” *1600 Barberrry Lane 8 LLC v. Cottonwood Residential OP LP*, 2019 UT App 146, ¶ 9 (quotations omitted).

ARGUMENT

Plaintiffs assert only one claim for relief: “Breach of Trust to Undertake Feasible Means of Achieving a Lake Level Consistent with Continued Trust Uses” pursuant to the public trust doctrine. *See* Memo. Decision and Order Granting Req. for Appointment of Water Judge at 2 (citing Compl. at ¶¶ 106-111; Utah Const. art. XX, § 1). Plaintiffs want the Court to declare that

the public trust doctrine imposes a duty on the State to maintain a minimum lake elevation of 4,198 feet above sea level and that this duty requires the State to engage in certain actions, including the curtailment of existing water rights, to maintain that level. *See* Compl. at 28. Plaintiffs request that the Court order the State to “review all existing water diversions from the Great Salt Lake watershed and . . . modify any diversions that are inconsistent with [maintenance of the minimum lake level].” *Id.* at 29. This Court should dismiss this claim for relief as it (1) is in conflict with the constitution’s separate recognition of the public trust and the prior appropriation; (2) exceeds the contours and authority of Utah’s public trust doctrine delegated to FFSL as trustee of Utah’s sovereign lands; and (3) would violate the doctrine of prior appropriation that has served and governed Utahns since before statehood.

I. Utah’s Constitution Does Not Provide the Relief Claimed by Plaintiffs.

Plaintiffs’ claim for relief fails as a matter of law because it is unconstitutional. 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, as claimed in the Complaint. Utah’s constitution declares that the State’s public trust doctrine protects only the banks and beds of navigable waters from disposition to private parties in most circumstances. The constitution also recognizes the significant public interest and benefit afforded by appropriated water rights by recognizing and confirming rights that existed at the time of statehood. Granting the relief requested by Plaintiffs would require this Court to go beyond the plain language of the constitution. This Court should decline to rewrite the constitution and dismiss this case, with prejudice.

A. The Public Trust Doctrine is a Matter of State Law Framed by the State Constitution and the Legislature.

The public trust doctrine establishes that states hold title to the beds under navigable waters in trust for the public and prevents dispositions of “parcels of lands under navigable

waters” if they substantially impair the trust resources. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452, 459 (1892) (“The soil under navigable waters [is] held by the people of the state in trust for the common use ...”); *See also Shively v. Bowlby*, 152 U.S. 1, 13 (1894). At English common law, the public trust doctrine only granted title to the Crown for waters affected by the ebb and flow of the tide, but “while perhaps appropriate for England’s dominant coastal geography, [the English public trust doctrine] was ill suited to the United States with its vast number of major inland rivers upon which navigation could be sustained.” *PPL Montana, LLC v. Montana*, 565 U.S. at 590 (internal citations omitted). Eventually, to accommodate the unique geography of the country, American states adopted a prevailing understanding that the states retained sovereign title to the beds under waterways that were navigable at statehood. *Id.*

Following *Illinois Central*, American courts have examined and refined the public trust doctrine. The United States Supreme Court has consistently held that “the States retain residual power to determine the scope of the public trust over waters within their borders.” *PPL Montana*, 565 U.S. at 604. This deference to individual states allows each state to define the public trust doctrine according to its individual population, resources, geography, and economy. The Utah legislature has established the State’s public trust doctrine and its relation to appropriative water rights in the State’s constitution and various statutes. A survey of this controlling law establishes that the extent of the public trust doctrine in Utah is limited to disposition of sovereign lands. Accordingly, Plaintiffs’ request to impose a duty to maintain a certain water level at Great Salt Lake is not founded in any law and must be dismissed.

The Utah Supreme Court has considered but never articulated a clear constitutional basis for the public trust doctrine. However, Article XX, section 1 provides a potential basis for the doctrine to apply to certain lands of the state. Article XX, section 1 states:

All **lands** of the State that have been, or may hereafter be granted to the State by Congress, and all **lands** acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public **lands** of the State; and 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.

Utah Const. art. XX, § 1 (emphasis added). In 2019, the Utah Supreme Court examined this constitutional provision as to whether a contemplated “disposal” of state lands would run afoul of the constitutional protections afforded sovereign lands but stopped just short of holding that the provision provides a constitutional basis for the public trust doctrine. *See Utah Stream Access Coal. v. VR Acquisitions, LLC*, 2019 UT 7, ¶¶ 72-78, 439 P.3d 593. The Court grappled with the scope of the public trust doctrine under Article XX, section 1 in dicta but declined to announce a holding on the issue. *See id.* at ¶ 78. To the extent the Court held that there was a constitutional basis for the public trust doctrine, it limited its analysis to the disposition of sovereign lands. *Id.* at ¶ 73-78.

B. The Utah Constitution Enshrines the Doctrine of Prior Appropriation as the Law Governing Water Rights in the State.

The Utah Constitution includes two provisions relating to water rights. First, it protects all water rights existing at the time of statehood: “All 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, sec. 1. Second, the Utah constitutional framers included strong protections for municipal appropriative water rights:

No municipal corporation shall directly or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned or controlled by it; but all such waterworks, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, That nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water-rights,

or sources of water supply; for other water-rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants.

Utah Const. art. XI, § 6.³

The early history of Utah water law is important to understanding the context and basis for Utah's two constitutional provisions relating to water rights. The early development of water law in pre-statehood Utah was not a straight line from arrival of settlers to prior appropriation; however, over the course of the decades between the pioneers' arrival in 1847 and statehood in 1896, a system of water allocation evolved in the territory that declared the senior water right owner to have the primary right. *See* Robert W. Swenson, *A Primer of Utah Water Law: Part I*, 5 J. ENERGY L. & POL'Y 165 at 166-173 (1984). In 1877, Congress passed the Desert Land Act, 43 U.S.C. § 9 (repealed), which granted western states the right to abrogate common law riparian principles and establish their own water law systems, recognizing that "the public interest in such state control [of the appropriation of water] in the arid land states is definite and substantial." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164-163 (1935).⁴ While the early settlers did not always conform to a system that allocated water rights purely by priority, the Territorial Supreme Court maintained that prior appropriation was always the law in Utah. *See* Swenson at 173; *see also Crane v. Winsor*, 2 Utah 248, 253 (1877-1880 term) ("The Plaintiffs, as the owners or tenants in common of the water ditch and the water flowing therein, by virtue of their prior appropriation, and the corruption of the water by the defendants is a

³ While this section of the constitution has been amended, the protection of water rights has remained unchanged since statehood.

⁴ The riparian water rights doctrine entitles a landowner adjacent to a stream or lake to a reasonable use of water to the extent it continues undiminished in quantity or quality, without any consideration of beneficial use or priority. *See Stowell v. Johnson*, 26 P. 290, 291 (Utah 1891).

private nuisance.”). In 1891, the Territorial Supreme Court disclaimed the riparian system and declared that prior appropriation had always existed. *See Stowell v. Johnson*, 26 P. 290, 291 (Utah 1891) (“Riparian rights have never been recognized in this territory . . . ; for the appropriation of water for the purpose of irrigation is entirely and un-avoidably in conflict with the common-law doctrine of riparian proprietorship.”).

When Utah became a state in 1896, the framers of the constitution enshrined provisions protecting existing water rights from impairment by future appropriations and enacted the important public policy that municipalities should hold their water rights in perpetuity for the benefit of their residents. Following quickly on the heels of statehood, the newly formed state legislature passed the 1897 Water Act, validating existing appropriations and declaring that those appropriations along with others made in the future “shall be deemed to be equal in rights . . . according to their vested rights.” 1897 Utah Laws, ch. 52, §§ 1-30 at 219. In 1903, the administrative appropriation system, now enacted in Title 73, Chapter 3 of the Utah Code, became the exclusive method to obtain a new surface water appropriation in the State of Utah.⁵ Consistent with Article XVII, Section 1 of the constitution, water rights acquired prior to 1903, “diligence rights,” are valid, vested water rights under Utah law. *See, e.g., Matter of Utah Lake and Jordan River*, 2018 UT App 109, ¶ 17; *Bishop v. Duck Creek Irrigation Co.*, 241 P.2d 162 (1952). The history of the development of Utah water law and the plain language of the Utah constitution affirm that prior appropriation is the constitutional water law system of Utah.

⁵ The legislature applied the water code to the appropriation of groundwater in 1935. *See* 1935 Utah Laws ch. 105, § 100–1–1 (now codified at Utah Code § 73-1-1).

C. A Plain Reading of the Utah Constitution Means Both the Public Trust Doctrine and Prior Appropriation Doctrine are Fundamental, and Neither is Subordinate to the Other.

Basic tenets of statutory construction support the principle that the framers of Utah's constitution sought to protect water rights and did not intend the State's public trust obligation to impair these rights. As discussed below, the relief sought by Plaintiffs lacks any statutory or state common law basis; therefore, unless there is a constitutional basis to grant the requested relief, Plaintiffs' claim fails as a matter of law. Though the full scope of Utah's public trust doctrine is a question of first impression, the plain language of the relevant constitutional provision applies only to lands of the state. *Utah Stream Access Coal.*, 2019 UT 7, ¶ 63, 439 P.3d 593. Plaintiffs are unable to establish a constitutional basis for their claims because the plain language of Utah's constitution provides that the State's public trust doctrine prevents disposals of land under navigable waters but does not impair appropriative water rights. *See* Utah Const. art. XX, sec. 1; *see also Utah Stream Access Coal.*, 2019 UT 7, ¶ 29, 439 P.3d 593. On the other hand, Utah's constitution explicitly protects appropriative water rights in multiple sections. *See* Utah Const. art. XVII, sec. 1; art. XI, sec. 6.

The Court must look to the plain language of the constitutional provisions to determine whether Plaintiffs' constitutional claim has a legal basis. *Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 15 ("In matters of constitutional interpretation, [the court's] job is first and foremost to apply the plain meaning of the text. Therefore, [the] starting point in interpreting a constitutional provision is the textual language itself." (quotations and citations omitted)). The Court "need not inquire beyond the plain meaning of the [constitutional provision] unless we find it ambiguous." *Grand Cnty. v. Emery Cnty.*, 2002 UT 57, ¶ 29 (quotations omitted). The plain language of Article XX, section 1 only applies trust protections to land, and no Utah court has ever extended

this provision to include water rights or other forms of real property. *See Utah Stream Access Coal.*, 2019 Utah 7, ¶ 89, 439 P.3d 593 (“Article XX , Section 1 ... “protects ‘lands of the State.’”) Without a constitutional basis to attach the trust obligations to water rights, the claims and requests for relief brought by Plaintiffs lack a legal basis and must be dismissed.

The Utah constitution specifically recognizes and protects appropriative water rights in Article XVII, section 1; art. XI, section 6. “The framers of the Constitution of the state thought that the rights to the use of water in the state, by whatever method of procedure acquired, were of such gravity and importance that the [Article XVII, section 1] was inserted in the Constitution.” *Wrathall v. Johnson*, 40 P.2d 755, 768 (1935) (superseded by statute on other grounds). Plaintiffs would have this Court subordinate the provisions in the constitution enshrining prior appropriation of water rights to the provision recognizing a trust relationship that only applies to the State’s sovereign lands. Though the constitution may recognize each doctrine, it does not connect the public trust doctrine with appropriative water rights or subordinate water rights to considerations of the public trust.

While “constitutional rights must be weighed against and harmonized with other constitutional provisions,” *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 74 (Stewart, J., concurring) (quoting *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985)), here, the two provisions are not in conflict. Article XX, Section 1, to the extent it even applies to water, is not paramount, nor does it sweep away all other rights enshrined in the constitution. A plain reading of the constitution clearly and unambiguously does not permit the State to curtail water rights to satisfy public trust obligations over sovereign lands. Accordingly, this Court should hold that Plaintiffs’ claim for relief is unconstitutional as a matter of law and dismiss the case with prejudice.

II. Utah Law Protects Water Rights and Limits Utah’s Public Trust Doctrine the Disposal of Lands Under Navigable Waters.

The Legislature has enacted statutes to harmonize and delegate constitutional authority to two state agencies: FFSL over sovereign lands and the State Engineer over water rights. These two state agencies work in tandem to effectuate the two separate doctrines – prior appropriation and the public trust. Because the basis of Plaintiffs’ claim for relief is both unconstitutional and contrary to statute, neither agency has the authority to curtail water rights to maintain a specific lake level in Great Salt Lake.

A. Utah Statutes Limit the Public Trust Doctrine to Protection of Sovereign Land.

Plaintiffs accurately represent that, “[FFSL] is the executive authority for the management of sovereign lands, with sovereign lands defined as those lands lying below the ordinary high-water mark of navigable bodies of water at the date of statehood and owned by the State by virtue of its sovereignty. [FFSL] is thus responsible for managing the bed of Great Salt Lake, which is protected by the public trust doctrine.” Compl. 9, ¶ 30. However, to the extent that there is a constitutional basis for the public trust doctrine in Utah under Article XX, Section 1, the provision only “protects lands of the State,” *Utah Stream Access Coal.*, 2019 Utah 7, ¶ 63, 439 P.3d 593, and FFSL is only required to serve as trustee of these lands without regard to water rights.

Consistent with the limited scope of the public trust doctrine, the legislature has promulgated statutes concerning the management of Great Salt Lake and other public trust assets that specifically avoid affecting appropriative water rights. A brief survey of these statutes and their lack of authority to curtail water rights, as requested by Plaintiffs, follows below.

1. FFSL Has General Statutory Authority to Manage Sovereign Lands.

The Utah Legislature established FFSL as the executive authority for the management of sovereign lands, public trust assets, and other state lands. Utah Code § 65A-1-4; Utah Code § 65A-1-1. This authority tasks FFSL with managing Utah’s sovereign lands “for the purposes as serve the public interest and do not interfere with the public trust.” Utah Code § 65A-10-1(1). Throughout this grant of authority, the legislature abstains from extending this authority to affect water rights and limits this authority only to land resources, consistent with Article XX, section 1.⁶ Because FFSL is the trustee of the public trust resources and these resources do not include water rights, Plaintiffs’ argument that water rights be regulated in accordance with the public trust goes beyond the authority of FFSL and what the legislature has determined Utah’s public trust encompasses.

2. The Legislature Delegated FFSL Specific Great Salt Lake Management Responsibilities Under Title 65A, Chapter 10.

In 2023, as part of its recent efforts focusing on improving the health of Great Salt Lake, the Utah legislature codified specific management responsibilities for Great Salt Lake but again refrained from affecting appropriative water rights. The legislature addressed Great Salt Lake as a “critical resource owned and managed by the state.” Utah Code § 65A-10-202. And FFSL, “as the manager of sovereign lands, has a duty to serve the public interest in managing Great Salt Lake.” *Id.* The legislature further determined that “the lake levels of Great Salt Lake have reached historic lows, requiring action by the state to address significant risks and minimize dangers to protect the ecological integrity of Great Salt Lake, the state’s environment in general,

⁶ The legislature has recognized that these resources may at times be exposed lakebeds and has granted FFSL the authority to manage these dry lakebeds. *See* Utah Code § 65A-3-1.

and the welfare of the state’s citizens.” *Id.* The actions authorized by the legislature to promote the “healthy physical and ecological condition” of Great Salt Lake are specifically tailored to management according to a limited set of public trust values and public interest benefits and policies that do not concern overall lake levels or affect existing water rights. Utah Code § 65A-10-203.

However, FFSL’s actions are limited to completing a comprehensive management plan, employing personnel, initiating studies, and accepting funds to accomplish these responsibilities. *Id.* Additionally, in limited circumstances, FFSL may construct or modify the existing or new berms on the lake to address salinity concerns in the north arm of the lake. Utah Code § 65A-10-204. These management responsibilities specifically do not “override, supersede, or modify any water right within the state, or the role and authority of the state engineer.” Utah Code § 65A-10-203(16). The only authority that FFSL has been delegated that relates to water rights is that in emergency situations the agency may require mineral producers on Great Salt Lake to alter their operations to prevent a net depletion of water; however, this authority is based on mineral contracts and not on any control over water rights. Utah Code § 65A-10-205(5).

3. FFSL Operates the Great Salt Lake Watershed Enhancement Program to Increase Flows to Great Salt Lake.

In the 2022 General Session, the Utah legislature enacted the Great Salt Lake Watershed Enhancement Program. Utah Code § 65A-16-201. The essence of this program is to create a trust to receive and administer funds to implement projects, programs, or voluntary arrangements to “retain or enhance water flows to sustain the Great Salt Lake and the Great Salt Lake’s wetlands and improve water quality and quantity for the Great Salt Lake within the Great Salt Lake watershed” along with a host of other projects, programs, or voluntary arrangements directed at improving the health of the Lake. *Id.* Like all other legislation administered by FFSL, the Great

Salt Lake Watershed Enhancement Program does not allow FFSL to modify existing appropriative water rights, but instead establishes programs (notably water trusts), that work within the existing water rights regime administered by the Division of Water Rights to secure water rights to increase flows to Great Salt Lake. Utah Code §§ 65A-16-101 to -301.

4. The Legislature Created the Great Salt Lake Commissioner in 2023.

In another action to address the health of Great Salt Lake, the 2023 Utah legislature created the position of the Great Salt Lake Commissioner. Utah Code § 73-32-201. The Commissioner has a number of duties, including creating and overseeing a strategic plan for the long-term health of Great Salt Lake, consulting with FFSL and other state agencies, and informing the governor and legislative leadership on the plan. Utah Code § 73-32-202. Perhaps most importantly, the Commissioner is granted broad power to “require a state agency to take action or refrain from acting to benefit the health of the Great Salt Lake to comply with the strategic plan.” Utah Code § 73-32-202(2). While the authorizing legislation is broad, the Commissioner does not have the power to “override, substitute, or modify a water right within the state or the role and authority of the state engineer.” Utah Code § 73-32-203(3).

5. Statutes Regarding Management of the Public Trust and Sovereign Lands Pertain Only to Sovereign Lands and Not Water Rights.

In sum, the body of statutes framing Utah’s public trust doctrine and the management of sovereign lands has evolved over time, most recently in ways that are aimed at improving the long-term health of Great Salt Lake, but has never expanded these efforts to affect vested water rights or the authority of the State Engineer. *See* Utah Code §§ 65A-10-201 to -205; 65A-16-201 to -301; 73-32-101 to -304. Legislation has remained consistent with the constitution’s plain language that Utah’s public trust doctrine concerns sovereign lands and nothing else. In fact, the legislature has consistently and explicitly avoided impacting the appropriation or administration

of water rights when enacting public trust and sovereign lands laws, appropriately leaving those important regulatory tasks to the State Engineer. Utah Code § 65A-10-205(5); Utah Code § 73-32-203(3).

B. Utah Law Confirms the State’s Strong Interest in Promoting and Protecting Appropriative Water Rights.

Utah case law and statutes show the importance of appropriative water rights to the State and provide no authority for the public trust doctrine to undercut appropriative water rights. Through their authority to define Utah’s public trust doctrine, the legislature and courts have determined that the public’s interest in water is best served through the beneficial use of appropriative water rights, even if it may be inconsistent with public trust doctrine protections adopted by other states.

1. The State Engineer Administers and Distributes the Waters of the State of Utah Consistent with Statute.

Utah’s water code enacted in 1903 did more than establish a permit system; it codified the State’s policy regarding water and the constitutional system of prior appropriation. “All waters in this state . . . are hereby declared to be the property of the public, subject to all existing rights to the use thereof.” Utah Code § 73-1-1(1). The code establishes beneficial use as “the basis, the measure, and the limit of all rights to the use of water in this state.” Utah Code § 73-1-3. And Utah Code § 73-1-5 provides, “[t]he use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use.” The principal of public ownership of water is “founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people.” *J.J.N.P. Co.*, 655 P.2d at 1136 (Utah 1982).

The Utah Water Code creates the office of the State Engineer, which is charged with the administration and protection of this system of water allocation. The State Engineer is head of

the Division of Water Rights, which is “the water authority of the state of Utah and is vested with such powers and required to perform such duties as are set forth in law,” Utah Code § 73-2-1.1, including, “the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters.” Utah Code § 73-2-1(3). To acquire a water right, an appropriator must file an application with the State Engineer, *see* Utah Code § 73-3-3, who then must approve the application if there is reason to believe that it conforms with the criteria in Utah Code § 73-3-8(1)(a). To receive a perfected water right, applicants must submit proof of beneficial use to the State Engineer and request a certificate pursuant to Utah Code §§ 73-3-16 and 73-3-17. Once perfected, a water right is subject to distribution by priority. Statute requires the State Engineer to “divide water among several appropriators entitled to the water in accordance with the right of the appropriator.” Utah Code § 73-5-3(2)(a).

No other agency has authority to administer and distribute the waters of the state among appropriators and in accordance with their priority. As discussed above, 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. *See* Utah Code § 65A-1-4(1)(b). The Great Salt Lake Commissioner likewise has broad authority over Great Salt Lake, but that mandate explicitly carves out the administration and distribution of waters by priority, as those are the sole purview of the State Engineer. *See* Utah Code § 73-32-203(3).

2. The State Engineer Lacks the Legal Authority to Curtail Water Rights to Maintain Lake Levels.

Plaintiffs’ request for an order from this Court requiring the State to “modify any diversions that are inconsistent with the restoration and maintenance of the Lake...” is not a

remedy available under Utah law and must be dismissed. Compl. at 29.⁷ The remedy under state law to modify diversions as requested by Plaintiffs is curtailment of the right. Curtailment is only available under state law when a junior water right (water right with a later priority) is impairing the quantity or quality of a senior water right (water right with an earlier priority).⁸ See *Second Big Springs Irrigation Co. v. Granite Peak Properties LC*, 2023 UT App 22, ¶ 7, n. 6; *In re Water Rights of Escalante Valley Drainage Area*, 348 P.2d 679, 683 (1960). As the office charged with distribution of water rights, the State Engineer has authority to determine when curtailment of water rights is appropriate. See Utah Code § 73-5-3(2)(a) (“The state engineer shall divide water among several appropriators entitled to the water in accordance with the right of the appropriator.”). However, without a valid senior water right making a call for water, the State Engineer has no authority to curtail junior water rights. See *Second Big Springs Irrigation Co.*, 2023 UT App 22, ¶ 37, n. 16. (“[C]urtailment presupposes the existence of a water right. Thus, when a court orders a water user to curtail its use by some quantity, the court is not creating, but instead enforcing, a water right.” (emphasis removed)). In this case, there is no water right for

⁷ Plaintiffs cite *Adams v. Portage Irrigation, Reservoir & Power Co.*, 72 P.2d 648, 654 (Utah 1937), as giving the State Engineer authority to “modify water appropriations if the use of water pursuant to such an appropriation operates in a manner that impairs trust resources.” Compl. at 22. Nothing in *Adams* stands for such a proposition. The case involved a private interference action where the State Engineer was not a party and was hardly mentioned. The “crux of the case” was whether a sheep grazer could “acquire a right in a stream or spring . . . without actually diverting the water or interfering with its flow other than by consuming part of it[.]” *Adams*, 72 P.2d at 652. The outcome of the case turned on the public ownership of water, which is codified at Utah Code § 73-1-1(1), and the court held that public use is a privilege that must cede when a lawful appropriation is made. *Id.* at 652–54.

⁸ The only other situation where water right curtailment is available is through equitable apportionment of rights to interstate waters under United State Supreme Court’s original jurisdiction, usually governed through interstate compacts. See, e.g., *Arizona v. California*, 373 U.S. 546 (1963).

maintenance of a certain elevation level of Great Salt Lake, and granting the relief sought by Plaintiffs would require this Court to create the equivalent of a new riparian water right for the Lake, overriding existing appropriated rights, which is not provided for under Utah law.⁹

Outside of the State Engineer’s authority to curtail junior water rights, the other cause of action that can be brought under state law to curtail a water right is known as an interference action. An interference claim is a private tort action brought when a junior appropriator’s water use diminishes the quantity or quality of the senior appropriator’s existing water right. *See Arave v. Pineview W. Water Co.*, 2020 UT 67, ¶ 30. These private actions are, however, outside of the statutory powers of the State. *See Second Big Springs Irrigation Co.*, 2023 UT App 22, ¶ 41 (interference actions are private actions that begin and end with the parties). Since there is not a water right at issue, Plaintiffs cannot seek curtailment based on an interference cause of action.

3. Inserting Water Rights into Utah’s Public Trust Doctrine Goes Against the Long-Standing Water Public Policy of the State.

Utah courts have repeatedly recognized that “[w]ater rights in the State of Utah are of utmost public concern. Water, in an arid state like Utah, is its life-blood, measured in currency represented by survival itself This court has likened a drop of water [to] a drop of gold.” *EnerVest, Ltd.*, 2019 UT 2, ¶ 1 (quoting *Longley*, 2000 UT 69, ¶ 15). The Utah Legislature has codified the State water policy in Utah Code § 73-1-21, which begins by recognizing that “Utah

⁹ Certain state agencies, including FFSL, can acquire and file for a change application on an existing water right for use on sovereign lands. *See* Utah Code § 73-3-30(2)(a). However, such a right can only be used pursuant to an approved change application, for the uses described in Utah Code § 73-3-30, and subject to priority. Such rights do not constitute an entitlement to curtail other water rights out of priority for the purpose of maintaining a specific lake level. Plaintiffs have not alleged that any existing water rights held under this statutory system for the Great Salt Lake is being interfered with outside of the priority system.

is one of the most arid states in the nation and as such, there is, and will continue to be, a need to ensure Utah's finite water resources are used beneficially." This policy reflects the longstanding recognition that Utah's "statutory and decisional law have been fashioned in recognition of the desirability and of the necessity of insuring . . . the most continuous beneficial use of all available water with as little waste as possible." *Delta Canal Co. v. Frank Vincent Fam. Ranch, LC*, 2013 UT 69, ¶ 24 (quoting *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 34) (citations omitted). The statutory policy includes a desire to promote "the study and development of strategies and practices necessary to address declining water levels and protect the water quality and quantity of the Great Salt Lake, Utah Lake, and Bear Lake" but also promotes "respect for water rights." Utah Code § 73-1-21.

Utah law establishes that there is no right to water based solely on ownership of the surrounding land. *See Stowell*, 26 P. at 291 (Utah 1891). Plaintiffs' claim to a new quasi-riparian water right for Great Salt Lake ignores the fundamental basis of a water right in Utah (beneficial use) and circumvents the process for appropriating a water right (by applying for one with the State Engineer). *See* Utah Code § 73-1-3 ("Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this state."); *and* Utah Code § 73-3-8(1)(a). *See also*, *J.J.N.P. Co.*, 655 P.2d at 1137 (citing Utah Code § 73-3-1) ("To permit the acquisition of water rights [outside of the Utah Water Code] would violate the public ownership doctrine and the state statutes regulating appropriation. State water law excludes every means of appropriation except by application to the State Engineer."). Utah's constitution, legislature, and courts have consistently determined that the system of prior appropriation is in the best interest of the people of Utah. *Id.* at 1136 (citing *Marks v. Whitney*, 491 P.2d 374 (1971) ("Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is

indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole. The doctrine of public ownership is the basis upon which the State regulates the use of water for the benefit and well-being of the people.”). This court should not disrupt this important public policy determination by injecting the public trust doctrine into water rights.

Other states have recognized the importance of appropriation and the beneficial use of water and have confirmed that their public trust doctrines do not tread on these uses of water. The Nevada Supreme Court recently examined the relationship between the public trust doctrine and appropriative water rights and determined that their public trust doctrine does not permit the reallocation or curtailment of adjudicated water rights. *See Mineral County v. Lyon County*, 473 P.3d 418 (Nev. 2020); *see also White Bear Lake Restoration Ass’n ex rel. State v. Minnesota Dept. of Natural Resources*, 946 N.W.2d 373, 386 (Minn. 2020) (declining to extend the public trust doctrine to apply to water rights).¹⁰

Specifically, the Nevada Supreme Court held that the state’s appropriative water right system is consistent with their public trust doctrine because (1) water rights are based on beneficial use, which the Nevada legislature has declared a public use (same in Utah, Utah Code § 73-1-5); (2) the state receives fair consideration for appropriating public water because it allows residents to receive drinking water and electricity, grow and purchase food, and expand

¹⁰ Other states have interpreted their public trusts differently. For example, California, a state that recognizes some riparian water rights, has uniquely interpreted its state public trust as “impos[ing] a duty of continuing supervision over the taking and use of the appropriated water.” *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983) (holding that no vested rights bar reconsideration of the allocation of waters flowing in the Mono Basin into Mono Lake). For a comparison of other states’ public trust doctrines, *see generally* Robin Kundis Craig, *A Comparative Guide to Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53 (2010).

the industry and economy which have been essential to the “prosperity and progress” of the state; and (3) the system maintains the trust for the use and enjoyment of present and future generations because water rights are limited to beneficial use, subject to forfeiture, and new permits can be rejected if they are unnecessary or against the public interest, which ensures preservation of water for the future. *Id.* at 516-517. Utah’s water code, public trust doctrine, and geography closely mirror that of Nevada and these same principles apply to this case.¹¹ Given these important considerations recognized by other states, and the lack of any legal basis for Plaintiffs’ claims, this Court should dismiss the case, with prejudice.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons identified herein, the State Engineer respectfully requests this Court dismiss Plaintiffs’ complaint, in its entirety, with prejudice, pursuant to U.R.C.P. 12(b)(6). The State Engineer also requests a hearing on this motion.

¹¹ In contrast, California’s water code, public trust doctrine, availability of water, and geography are quite different from Utah’s. For example, California water law recognizes some riparian rights and deals with marine and tidal water issues that do not exist in Utah. *See Craig, supra* note 9, at 104.

Dated this 20th day of December 2023.

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CERTIFICATE OF SERVICE

I certify that on this 20th day of December 2023, I served the foregoing *Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Under U.R.C.P. 21(b)(6)* via electronic filing and/or electronic mail on the following:

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