2015

Utah Stream Access Coalition, a Utah Non-Profit Corporation, Plaintiff/Appellee, vs. Vr Acquisitions LLC, a Delaware Limited Liability Company, Et Al., Defendants/Appellants

Utah Supreme Court

THE UTAH SUPREME COURT

UTAH STREAM ACCESS COALITION, a Utah non-profit corporation, Plaintiff/Appellee, vs. VR ACQUISITIONS LLC, a Delaware limited liability company; et al., Defendants/Appellants.	Appellate Case No. 20151048-SC

REPLY BRIEF OF CROSS-APPELLANT UTAH STREAM ACCESS COALITION

Appeal from the Fourth Judicial District Court – Wasatch County
Hon. Derek Pullan – Case No. 100500558

Eric P. Lee
Nathan D. Thomas
Elizabeth M. Butler
JONES WALDO HOLBROOK & MCDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, UT 84101
Attorneys for Defendant/Appellant/Cross-Appellee VR Acquisitions, LLC

Thomas D. Roberts
Stanford E. Purser
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0857
Attorneys for Defendant/Appellant/Cross-Appellee State of Utah

Craig C. Coburn
Zachary E. Peterson
RICHARDS BRANDT MILLER NELSON
299 South Main Street, 15th Floor
Salt Lake City, UT 84111

John L. Young
YOUNG HOFFMAN, LLC
170 South Main Street, Suite 1125
Salt Lake City. UT 84101

W. Cullen Battle
FABIAN VAN COTT
215 South State Street, Suite 1200
Salt Lake City, UT 84111

Attorneys for Plaintiff/Appellee/Cross-Appellant Utah Stream Access Coalition

Additional Counsel

Michael D. Zimmerman
John J. Hurst
ZIMMERMAN JONES BOOHER
341 South Main Street, 4th Floor
Salt Lake City, UT 84111
Attorneys for Amicus Curiae
Utah Alliance to Protect Property Rights

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other

ARGUMENT

THE PUBLIC TRUST RESOURCE AT ISSUE IS THE EASEMENT AND THE PUBLIC WATERS SUBJECT TO THE EASEMENT[1]

VRA prefaces its opposition to USAC's cross-appeal on the proposition that "the public trust doctrine proves inapplicable to non-public resources, such as an easement to use privately-owned streambeds." *Reply Brief of Cross-Appellant and Brief of Cross-Appellee VR Acquisitions, LLC* (VRA Brief) at 24. Preliminarily, the Easement is not one to "use privately-owned streambeds." It is rather, a right to reasonably touch private streambeds incident to public use of public waters.[2] More importantly, as demonstrated in USAC's principal brief, VRA's proposition is simply wrong, as the public trust can and often does encompass public rights affecting private property. USAC's *Brief of Appellee/Cross-Appellant* (USAC Brief) at 21-33.[3]

---

1 As the State and VRA point out, in 2012 USAC characterized the public trust at issue as "Utah's public waters." (R.783) However, in 2014, having gained a better understanding of the public trust doctrine and the Act's purported and actual reach, USAC revised its argument to that presented on appeal and the district court's rejection of that argument is presented on cross-appeal. (R.1580-1583; 2013-2018)

2 *Conatser v. Johnson,* 2008 UT 48,123, 25, 30, 194 P.3d 897, 902-03, citing *J.J.N.P. Co. v. Utah*, 655 P.2d 1133, 1136 (Utah 1982). While the Court in *Conatser* and *J.J.N.P.* suggested that the Easement existed irrespective of bed ownership, in both cases it was addressing public access to public waters traversing or impounded on private streambeds and its suggestion that the Easement applied to all public waters was *dicta*. As discussed *infra*, the Easement as a matter of law cannot and does not exist on public waters that traverse or are impounded on, *inter alia*, federally-owned streambeds and, for these same reasons, the Act cannot and does not exist on public waters that traverse or are impounded on, *inter alia*, federally-owned streambeds.

3 *See also, e.g., Glass v. Goeckel*, 703 N.W. 2d 58, 65 (Mich. 2005) (public trust doctrine ensured public access rights on privately owned lands along the Great Lakes below the mean high water mark); *The Public Trust Doctrine and Private Property: The*

The district court, in concluding that the Act violated the public trust, found that the Act (a) regulated an interest protected by the public trust (*i.e.*, the Easement), (b) effectively disposed of the Easement for purposes contrary to the Easement's purpose (*i.e.*, private property interests, not public access) and (c) substantially impaired the public's interest in what remained of the Easement.

Answering the question of whether the Act substantially impaired the public's interest in what remained of the Easement necessarily required the district court to determine what public waters were subject to the Easement. Prior Court decisions recognizing the Easement stated that the Easement applied to public waters irrespective of bed ownership; that the Easement existed on all public waters in Utah. *See e.g.*, *J.J.N.P. Co. v. Utah*, 655 P.2d 1133, 1136 (Utah 1982). Similarly, the Act purports to address public access to all public waters in Utah. In short, in both instances 'all public waters' arguably included public waters on federally-owned beds.

USAC argued below and argues here that, based on fundamental principles of federalism and related jurisdictional and ownership principles, the Easement cannot as a matter of law apply to non-navigable public waters that traversed or were impounded on streambeds owned by the federal government. The district court disagreed with USAC and concluded that the Easement applied to all public waters, including those on federally-owned beds. Nonetheless, the district court held that the Act, by disposing of the Easement on 2,700 miles (42%) of Utah's estimated 6,400 miles of fishable rivers and

---

Accommodation Principle, Blumm, Michael C., Pace Environmental Law Review, Vol. 27, Issue 3 at 649, 658-659 (2010).

streams because those 2,700 miles traversed private streambeds, pushed the angling public onto and substantially impaired its interests in the remaining 3,700 miles (58%) of fishable streams traversing or impounded on public beds.)

While the district court correctly concluded that, *inter alia,* the percentages warranted a finding of substantial impairment, it erred in its initial determination that the Easement, the relevant public trust resource, exists on federally-owned beds. As a matter of law, public access to public waters traversing or impounded on federally-owned beds in Utah is a matter of federal law, not Utah law. Thus, that the Act purports to apply to all public waters in Utah[4] is meaningless and of no legal import as to non-navigable waters on federal lands (*i.e.*, public waters on federally-owned beds). Similarly, that the Act recognizes public right of access on all public waters that are "on public property"[5] is irrelevant and of no legal import as to non-navigable waters on federal lands. And, USAC respectfully submits, this Court's prior holdings that the Easement applied to all public waters in Utah "regardless of who owns the water beds beneath" cannot and does not extend to federally-owned streambeds. See e.g., *J.J.N.P.*, 655 P.2d at 1136. The State of Utah simply does not have legal authority to impose, dispose of or otherwise regulate public access to public waters traversing or impounded on federally-owned beds. However these public access rights might be characterized and wherever they might

4 *Cf.*, Utah Code Ann. 73-29-102(8)(a) and 73-1-1(1).

5 *Cf.*, Utah Code Ann. 73-29-201(1)(a)(ii).

exist, they are not part of the Easement, a public right of access recognized solely under state law and applicable only to waters where access is a matter of state law.

In ruling that the public trust resource at issue was all public waters in the state, the district court reasoned that "[t]o define the public trust resource as the part disposed of – as the Coalition argues – would mandate a finding of substantial impairment of the trust resource in every case." (*See* R. 2015) As demonstrated, *supra*, and in its principal brief, USAC did not and does not contend that the public trust resource at issue is, in its entirety, the resource disposed of. It contends, rather, that public access rights to public waters on federal streambeds are not encompassed by the Easement or part of the trust resource at issue. It further contends, as explained further below, that with the public trust resource properly defined (*i.e.*, where the Easement actually exists in law and fact), the Act effectively disposed of the Easement on all public waters where it exists.

It is perhaps understandable that the district court mistakenly took the view it did. Like most public waters in Utah, almost all of the 3,700 miles of fishable rivers and streams unaffected by the Act – that is, the 3,700 miles of non-navigable public waters "on public property"[6] – traverse or are impounded on streambeds owned or administered by the federal government (*e.g.*, Bureau of Land Management, the U.S. Forest Service (Ashley, Dixie, Fishlake, Manti-La Sal and Uinta-Wasatch-Cache National Forests), or the National Park Service).[7]

---

6 Utah Code Ann. 73-29-201(1)(a)(ii).

7 *See,* Stipulated Trial Exhibit 1 (R.2432)– the online Stream Access Map (no longer available online; *see*, Image 1 in attached Addendum) published by the State following

As the Easement does not apply to these public waters, neither these waters nor any public right of access to these waters are part of the public trust resource at issue and should not have been considered as part of the trust resource that remains.[8] Once these waters are properly excluded from the trust resource, the only public waters to which the Easement applied were public waters traversing or impounded on streambeds owned by the State (*e.g.*, navigable waters or waters on SITLA ground), local governments, if any (*e.g.*, counties, municipalities, special districts), and private interests. When the Act disposed of the Easement on all public waters traversing or impounded on privately-owned streambeds, including some 2,700 miles of fishable waters, the only remnant of Easement left was a limited right to float no more than 469 miles of these fishable waters if and when floatable, and to access and use public waters traversing or impounded on streambeds owned and deemed publicly-accessible by the State and local governments.[9] In short, the Act in fact disposed of most but not quite all of the Easement.

---

passage of the Act, wherein the State identified and delineated where Utah's fishable rivers and streams traverse private streambeds (red) and public streambeds (yellow).

When compared to the State's Utah Land Ownership Map (R.2433) – http://gis.utah.gov/data/sgid-cadastre/land-ownership/; *see*, Image 2 in attached Addendum), it is clear that the vast majority of the 3,700 miles of fishable rivers and streams 'on public property' (in yellow on Image 1) are on streambeds owned by the federal government, primarily those of U.S. Forest Service and the Bureau of Land Management.

8 Such waters include, *inter alia*, the upper reaches and tributaries of the Bear, Blacksmith Fork, Duchesne, Green, Logan, Price, Provo, Strawberry, Sevier, and Virgin Rivers and Lake Powell, Fish Lake, and Flaming Gorge, Deer Creek, Jordanelle, Starvation and Strawberry Reservoirs.

9 Such waters include some 407 miles of river adjudicated to navigable included in the

Tellingly, neither the State nor VRA address USAC's argument that the State has no authority to impose, dispose of or otherwise regulate public access rights to public waters on federally-owned streambeds. They simply argue that the Act says what it says and the Court said previously what it said, end of discussion. *Cf.* State Brief at 12-13, VRA Brief at 24-26. As demonstrated, *supra*, their reliance on legislative declarations and *dicta* is misplaced.

Similarly, they contend that USAC is asking the Court to review a specific application of the Act instead of the Act as a whole. In fact, because the State has no authority to impose, dispose of or otherwise regulate public access rights to public waters on federally-owned streambeds, USAC is asking the Court to review the Act and its impact everywhere where, as a matter of law, the Act can and does apply.

This perspective is entirely consistent with every case cited on this issue,[10] including the one case that VRA cites in opposition to USAC's cross-appeal. Specifically, VRA accurately cites *Caminiti v. Boyle*, 107 Wash. 2d 662, 672-73, 732 P.2d 989, 995-964-95 (Wash. 1987)[11], for the proposition that when a statute having

---

3,700 miles on publicly-owned streambeds. (R. 2435-36, 2612-14, 4440-42).

10 *See, e.g., Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085, 1095-96 (1983) (public trust evaluation of the impact of a private lease of a small bay on Lake Coeur d'Alene confined to Lake Coeur d'Alene); *Owsichek v. State*, 764 P.2d 488, 495–96 (Alaska 1988) (trust resource is wildlife management area at issue, not all of Alaska or every wildlife management area); *Weden v. San Juan County*, 958 P.2d 273, 283-84 (public trust evaluation of county ordinance barring personal water craft on county's marine waters confined to those waters, not marine waters under jurisdiction of adjacent counties).

.

11 While VRA also cites *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wash. App.

statewide application is challenged under the public trust doctrine, the impact of the statute must be examined statewide, not just in regard to its particular application is specific instance. Here, as a matter of law and fact, the Act cannot and does not apply to public access to public waters traversing or impounded on federally-owned streambeds. In short, USAC is asking the Court to review the Act statewide where, as a matter of law and fact, it can and does apply – that is, public waters where they traverse or are impounded on streambeds owned by the State, local governments and private interests.

CONCLUSION

As a matter of law, both the public trust resource at issue, the Easement, and the Act are confined to public waters that traverse or are impounded on streambeds owned by the State, local governments, and private interests. As such, by disposing of the Easement on all public waters on private beds, save for a limited right to float some of these waters if and when floatable, and leaving it in place on the few public waters on beds owned by the State or local governments, the Act substantially impaired the public's interests in what remained of the Easement.

//

//

//

//

478, 378 P.3d 222 (Wash. App. 2016) for this proposition, *Chelan* merely parrots *Caminiti* on this point and adds nothing to the discussion.

DATED this 14th day of November, 2016.

RICHARDS BRANDT MILLER NELSON

/s/ Craig C. Coburn
Craig C. Coburn
Zachary E. Peterson

YOUNG HOFFMAN, LLC

/s/ John L. Young
John L. Young

FABIAN VAN COTT

By: /s/ Craig C. Coburn
W. Cullen Battle
Attorneys for Plaintiff/Appellee/Cross-Appellant Utah Stream Access Coalition

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

I, Craig C. Coburn, certify that the Reply Brief of Cross-Appellant Utah Stream Access Coalition complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure and the typeface requirements of Rule 27(b) of the Utah Rules of Appellate Procedure. Specifically, the Reply Brief of Cross-Appellant contains 1,758 (according to the word count feature in Microsoft Word 2013), exclusive of the cover page, table of contents, table of authorities and the addendum.

DATED this 14th day of November, 2016.

RICHARDS BRANDT MILLER NELSON

/s/ Craig C. Coburn
Craig C. Coburn
Zachary E. Peterson
Attorneys for Plaintiff/Appellee/Cross-Appellant Utah Stream Access Coalition

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 14, 2016, two true and correct copies of the foregoing ***Reply Brief of Cross-Appellant Utah Stream Access Coalition*** was served via first-class U.S. mail, postage prepaid, on the following:

Eric P. Lee
JONES WALDO HOLBROOK & MCDONOUGH
1441 West Ute Boulevard, Suite 330
Park City, UT 84098

Nathan D. Thomas
Elizabeth M. Butler
JONES WALDO HOLBROOK & MCDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, UT 84101
Attorneys for Defendant/Appellant/Cross-Appellee
VR Acquisitions, LLC

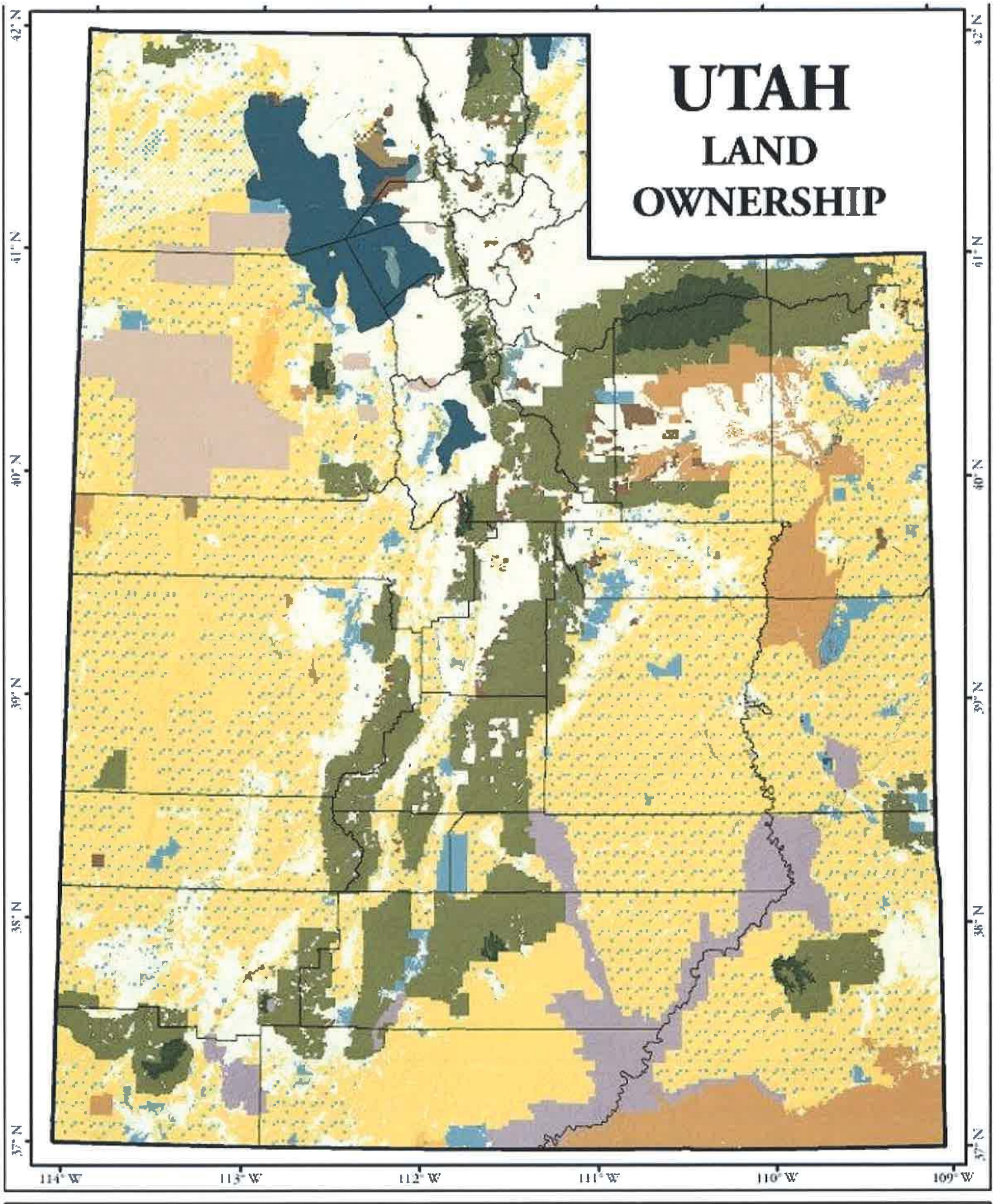
Thomas D. Roberts
Stanford E. Purser
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0857
Attorneys for Defendant/Appellant/Cross-Appellee
State of Utah

Michael D. Zimmerman
John J. Hurst
ZIMMERMAN JONES BOOHER
341 South Main Street, 4th Floor
Salt Lake City, UT 84111
Attorneys for Amicus Curiae
Utah Alliance to Protect Property Rights

/s/ Craig C. Coburn

ADDENDA


Logan
Ogden
Salt Lake City
Provo
Utah
Cedar City



DATA SOURCES: UTAH AUTOMATED GEOGRAPHIC REFERENCE CENTER AND UTAH TRUST LANDS ADMINISTRATION - MAY 2000