

2015

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STREAM ACCESS COALITION,
a Utah Non-Profit Corporation,

Plaintiff/ Appellee/Cross-Appellant,

vs.

VR ACQUISITIONS, LLC, a Delaware
Limited Liability Company; and STATE
OF UTAH,

Defendants/Appellants/Cross-
Appellees.

No. 20151048-SC

**REPLY BRIEF OF APPELLANT AND RESPONSE BRIEF OF
CROSS-APPELLEE THE STATE OF UTAH**

On Appeal from a Final Judgment in the Fourth Judicial District Court
Case No. 100500558, The Honorable Derek P. Pullan presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
I. The Act Does Not Violate Article XX, Section 1.....	1
A. The Act does not “dispose of” any public resource.....	1
B. Even if article XX, section 1 applies, the Act comports with it.....	4
1. Any disposition by the Act was “provided by law”.....	4
2. The Act disposes of the public easement consistent with the respective purposes for which it was acquired	4
C. The Act does not substantially impair the remaining waters.....	10
II. USAC Has Failed to Satisfy its Burden, Not the State.....	13
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1).....	15
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

Cases

<i>B.A.M. Dev. L.L.C. v. Salt Lake Cty.</i> , 2012 UT 26, 282 P.3d 41	12
<i>Baker v. Matheson</i> , 607 P.2d 233 (Utah 1979).....	7, 10
<i>Conatser v. Johnson</i> , 2008 UT 48, 194 P.3d 897	13
<i>Connolly v. Pension Ben. Guar. Corp.</i> , 475 U.S. 211 (1986).....	6
<i>In re Estate of S.T.T.</i> , 2006 UT 46, 144 P.3d 1083	14
<i>In re Uintah Basin</i> , 2006 UT 19, 133 P.3d 410	5
<i>J.J.N.P. Co. v. State</i> , 655 P.2d 1133 (Utah 1982).....	passim
<i>Merrill v. Utah Labor Comm’n</i> , 2009 UT 26, 223 P.3d 1089	14
<i>National Parks and Conservation Ass’n v. Bd. of State Lands</i> , 869 P.2d 909 (Utah 1993).....	8, 9
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	6
<i>State v. Angilau</i> , 2011 UT 3, 245 P.3d 745	14
<i>State v. Packer Corp.</i> , 77 Utah 500, 297 P. 1013 (1931).....	7

<i>State v. Thomas</i> , 961 P.2d 299 (Utah 1998).....	12
<i>Tanner v. Bacon</i> , 103 Utah 494, 136 P.2d 957	6
<i>Tribe v. Salt Lake City Corp.</i> , 540 P.2d 499 (Utah 1975).....	7
<i>Utah Housing Fin. Agency v. Smart</i> , 561 P.2d 1052 (Utah 1977).....	7
<i>Utah Sav. & Trust Co. v. Salt Lake City</i> , 44 Utah 150, 138 P. 1165 (1914).....	7
<i>Utah Tech. Fin. Corp. v. Wilkinson</i> , 723 P.2d 406 (Utah 1986).....	10

Constitutions

Utah Const., art. XX, § 1.....	passim
--------------------------------	--------

Statutes

Utah Code § 73-1-1 (1)	12
Utah Code § 73-29-103	9
Utah Code § 73-29-103(6)	5
Utah Code § 73-29-201	9
Utah Code § 73-29-202(2)	10
Utah Code § 73-3-8.....	5

ARGUMENT

The district court concluded that the Public Waters Access Act violates article XX, section 1 of the Utah Constitution. The State, VR Acquisitions, LLC (VRA), and amicus curiae have shown that the district court erred. Evidently also concerned about the district court's holding, Utah Stream Access Coalition roams far and wide through natural law, common law, and other constitutional provisions searching for anything to save the decision below.¹ But none of USAC's arguments justify striking down the Act, which is presumed constitutional. USAC has failed to show that the Act clearly violates article XX, section 1 (or any other provision). The district court's judgment must be reversed.

I. The Act Does Not Violate Article XX, Section 1.

A. The Act does not “dispose of” any public resource.

The district court erroneously interpreted “disposed of” to mean manage, regulate or control something. Final Judgment at 41. Based on *Black's Law Dictionary*, context, relevant United States and Utah Supreme Court case law, other state and federal constitutional provisions, and analogous statutes, the State demonstrated that “disposed of” actually means to alienate, sell or otherwise relinquish some protected property interest. State Br. at 14-21.

¹ VR Acquisitions, LLC's reply and response brief addresses USAC's various arguments. In general, the State agrees with and adopts VRA's arguments and will not repeat them here. Utah R. App. P. 24(i). The State focuses primarily on responding to the district court's and USAC's article XX, section 1 arguments.

For the most part, USAC never addresses the State’s arguments and authorities on this issue. Instead, USAC initially defends the district court by emphasizing the “first three senses ascribed to the word ‘dispose’” in an 1886 dictionary. USAC Br. at 53. The district court also noted the fact that it used the “first definition” in the Oxford English Dictionary. Final Judgment at 41. But just because a dictionary lists a particular definition first does not mean that definition was the most commonly understood meaning at the relevant time period, much less that it best fits the particular context in which the defined word is used. Indeed, USAC’s chosen dictionary tries to list a word’s definitions “in order of their actual growth and history, beginning, if possible, with the primitive signification.” *Webster’s Complete Dictionary of the English Language* at vi (1886).² At most, USAC shows that its preferred definitions of “dispose” are likely the oldest, not the most relevant. If anything, USAC’s dictionary supports the State’s position. It gives a second, and presumably more recent, definition of “to dispose of” as “[t]o exercise finally one’s power of control over; to pass over into the control of some one else; to alienate; to bestow; to part with; to get rid of; as, to *dispose of* a house . . .” *Id.* at 390.³

USAC then mistakenly argues, like the district court, that the State’s definition of “dispose of” renders article XX, section 1 non-sensical. USAC Br. at

² Available at <https://archive.org/stream/websterscomplete00webs#page/n15/mode/2up>.

³ Available at <https://archive.org/stream/websterscomplete00webs#page/390/mode/1up>.

54 (“How can one read Article XX as requiring the State to both ‘hold’ and ‘alienate’ the Easement?”). That misreads the provision’s text. Section 1 states that the public lands “acquired” as described therein “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 . . . acquired.” Utah Const. art. XX, § 1. Properly read, the section says merely that once “acquired” public lands are held by the State for the people. Acquisition triggers the State’s duties, not disposition. The provision then goes further to require that if these public lands are “disposed of”—e.g., sold or otherwise alienated—it must be done as “provided by law” and “for the respective purposes for which the [lands] have been or may be . . . acquired.” Reading article XX, section 1 correctly, the State’s plain language definition of “disposed of” makes complete sense.

Moreover, and contrary to USAC’s arguments, defining “disposed of” this way does not mean the State can do whatever it wants with public resources up until they are disposed. USAC Br. at 41-42. As explained below, the State must still manage the public waters and easement for the benefit of all of the people of Utah.

Properly understood, the Act never “disposed of” the public easement over public waters. The district court’s holding that the Act violates article XX, section 1 should be reversed.

B. Even if article XX, section 1 applies, the Act comports with it.

The State argued that even assuming article XX, section 1's requirements apply to the Act, it passes that constitutional test because any disposition occurred (1) "as may be provided by law," and (2) "for the respective purposes for which [the property] ha[s] been or may be . . . otherwise acquired." State Br. at 21-29. USAC's arguments do not prove otherwise.

1. Any disposition by the Act was "provided by law."

Neither USAC nor the district court argue that the Act's alleged disposition failed the "as may be provided by law" element. Accordingly, the State will not address this point further. State Br. at 21-23.

2. The Act disposes of the public easement consistent with the respective purposes for which it was acquired.

Like the district court, USAC argues that the public easement was acquired solely for "public access to public waters" but instead serves only private property owners. *See, e.g.*, USAC Br. at 38, 52, 54. And in a similar vein, USAC also argues that the Act improperly benefits private landowners contrary to a specific public trust imposed by article XX or the common law. USAC Br. at 36-56.

These arguments are wrong for at least two related reasons.

First, USAC's arguments understate the full scope of the public easement and the Legislature's purposes in managing public waters. State Br. at 23-30.

The public easement (and any acquisition thereof) flows directly from the public's

ownership of state waters. *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1136 (Utah 1982).

Public ownership of the waters and easement means that the State assumes the responsibility to manage those resources for the welfare and benefit of all the people of the State. *Id.*; see also *In re Uintah Basin*, 2006 UT 19, ¶ 34, 133 P.3d 410. The easement and the State's duty to manage the public's waters on behalf of all people are thus inseparably intertwined. Consequently, the public easement's purposes and the State's duties go well beyond just promoting access to and use of the waters. The State must balance, and the easement necessarily accommodates, various public policies and the needs and sometimes competing water rights and interests of all its citizens. See generally State Br. at 24-25; Utah Code § 73-3-8.

Likewise, the Act's purposes go well beyond merely protecting private property interests. The State regulation of public waters considers the public's various interests, including recreation, conservation, ecology, private ownership, public welfare, and beneficial use, among others. See generally State Br. at 26-30. At the very least, the Act explicitly confirms its purpose to accommodate both recreational users and private property owners. Utah Code § 73-29-103(6).

Understanding the true scope of the public easement and the Act makes clear that the Act manages the public easement consistent with the broad public purposes for which the easement exists.

Second, USAC's trust arguments make too much of the fact that the Act may benefit some private landowners. USAC Br. at 52-56. Again, the argument misconstrues the source and scope of the State's duties to manage public waters. The "State regulates the use of the water, *in effect*, as trustee for the benefit of the people." *J.J.N.P.*, 655 P.2d at 1136 (emphasis added) (citing *Tanner v. Bacon*, 103 Utah 494, 516, 136 P.2d 957, 966-67 (Larson, J., concurring)). But the State's obligations don't derive from common law or constitutional trusts. Rather, because the waters are publicly owned "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." *J.J.N.P.*, 655 P.2d at 1136. In other words, "[t]he 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." *Id.* The people have multiple, and sometimes competing, interests that the State must accommodate and balance. And the "guardians of the public welfare" must be given "a large [amount of] discretion in such matters." *Tanner*, 136 P.2d at 967 (Larson, J., concurring).

Unavoidably, regulating public waters will often benefit some more than others. That's a "practical necessity" of most laws. *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223 (1986) ("Congress routinely creates burdens for some

that directly benefit others.”). Thus, subject to other constitutional constraints on government action, the real question is whether the State’s water regulation plausibly promotes a legitimate public interest, not whether private individuals or groups may benefit. *See, e.g., J.J.N.P.*, 655 P.2d at 1137-38 (applying rational basis test to equal protection challenge to statute regulating fish installations on natural waters).⁴ Otherwise, water management (and many other forms of government regulation for the public good) would be nearly impossible if no private citizens could benefit more than any others.⁵ *See, e.g., Baker v. Matheson*, 607 P.2d 233, 242 (Utah 1979) (“it is impossible . . . to preclude government from acting in a fashion which benefits individuals directly in the interest of solving large public problems. Such a preclusion would render government impotent to

⁴ *Utah Sav. & Trust Co. v. Salt Lake City*, 44 Utah 150, 138 P. 1165, 1168 (1914) (because city owned waterworks for the use and benefit of taxpayers and water users, the “Legislature may, therefore, by any *reasonable regulation*, protect and guard the rights and interests of the taxpayers and water users.”) (emphasis added); *see also State v. Packer Corp.*, 77 Utah 500, 297 P. 1013, 1016 (1931) (“The act must be upheld and enforced unless it manifestly bears no relation to public health, morals, welfare, or other legitimate object of the police power.”).

⁵ The fact that private individuals may benefit from legislation does not negate the overall public purpose of a statute. *Cf. Utah Housing Fin. Agency v. Smart*, 561 P.2d 1052, 1055 (Utah 1977) (“While it is improper to spend public funds for private purposes, such private benefits incidental to a dominant public purpose do not detract from the constitutionality of the legislation.”); *Tribe v. Salt Lake City Corp.*, 540 P.2d 499, 504 (Utah 1975) (“ . . . the constitutionality of the statute requiring the use of public funds is whether the statute is designed to promote the public interest, as opposed to the furtherance of the advantage of individuals; and such a statute should not be declared unconstitutional because of the fact that, incidental to the main purpose, there results an advantage to individuals.”).

solve some of the most troublesome, pressing problems of society which can best, and sometimes only, be solved by direct assistance to individuals.”).

Yet that’s essentially the standard USAC wants to impose on the State: the Act must be invalid because it does not solely benefit the entire public; rather it helps landowners and limits where USAC members can fish. USAC Br. at 39-40, 44, 52-56.⁶ But the cases USAC relies on do not support its trust theory. First, Justice Larson’s lone concurrence in *Tanner* is just that, a lone concurrence, not binding precedent. USAC Br. at 39. Moreover, this Court has cited that concurring opinion for the principle that the State regulates public waters “*in effect*, as trustee for the benefit of the people.” *J.J.N.P.*, 655 P.2d at 1136 (emphasis added). That hardly establishes an express, specific trust.

USAC’s reliance on *National Parks* is similarly misplaced. That decision outlines the State’s obligations towards school trust lands, which the Court held were part of an express and specific trust meant exclusively to benefit public schools. *National Parks and Conservation Ass’n v. Bd. of State Lands*, 869 P.2d 909, 917-20 (Utah 1993). The Court made clear that the trustee responsibilities outlined for the school lands were markedly different than the type of trust that

⁶ The Act does not delegate the State’s responsibilities to private landowners. USAC Br. at 55-56. The Act defines the public easement to use public waters over public and private lands. Landowners may then decide whether to let others use more of their property than the easement otherwise allows. But landowners are not deciding who can use the statutorily defined easement or to what extent it can be used.

USAC wants to impose here. In particular, the Court distinguished the school lands trust from the public trust doctrine: “the beneficiaries and the purposes of the public trust and the school land trust are different.” *Id.* at 919. More generally, the Court also noted that school land “trust beneficiaries do not include the general public or other governmental institutions, and the trust is not to be administered for the general welfare of the state.” *Id.* Because public waters must be administered for the general public, *National Parks* does not apply.

Even if the State held public waters and the easement in some sort of trust, USAC’s proposed tests are wrong and should be rejected. The State must regulate those resources for the benefit of all people considering their varying interests. The Act does that. At a minimum, it balances the competing public policies and interests at stake given the public’s easement on waters running over both public and private lands, *see, e.g.*, Utah Const. art. I, § 1 (“All men have the inherent and inalienable right . . . to acquire, possess and protect property.”), and the State’s duty to manage public waters on behalf of all people. *See, e.g.*, Utah Code § 73-29-103. The Act essentially codified the so-called “*Conatser* easement” allowing the public to use and touch streambeds incidental to the public easement’s use on publicly-owned waters flowing over public land, Utah Code § 73-29-201, which constitute the vast majority of publicly-owned waters. For publicly-owned waters over privately-owned ground, the Act codified the public’s pre-*Conatser* customs,

allowing floating (and fishing while floating) on public water with the right to incidentally touch the streambed as required for safe passage and continuous movement. *Id.* § 73-29-202; State Br. at 4-5. The Act also granted an extended and expanded right of portage, including necessary use of the private property. Utah Code § 73-29-202(2). And with the permission of the private landowner, the public can use the water for any lawful purpose. *Id.* § 73-29-201(2).

There is no basis to upend the Legislature’s careful balancing of the public interests reflected in the Act. “[E]xcept in egregious cases, it is for the legislature, and not the judiciary, to determine what serves a public purpose.” *Baker*, 607 P.2d at 242; *see also Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d 406, 412-13 (Utah 1986) (“It is only when a legislative determination of public purpose is so clearly in error as to be capricious and arbitrary that the judiciary should upset it.”).

C. The Act does not substantially impair the remaining waters.

Despite properly concluding that the Act did not substantially impair the remaining waters by causing overcrowding, the district court held that the Act’s scope—affecting 43% of fishable rivers and streams—nonetheless substantially impaired the remaining waters. Final Judgment at 45-56.⁷ The court’s scope

⁷ This district court acknowledged that article XX, section 1 does not expressly require a substantial impairment analysis but reasoned that constitutional trust duties can be informed by the common law public trust doctrine. Final Judgment at 45, 48. Even if the court is correct, the State argues the Act does not substantially impair the remaining waters.

analysis was wrong for multiple reasons: (1) it focuses on the wrong end of the impairment inquiry—what was affected rather than what remains; (2) it narrowly focuses on fishable streams rather than all public waters; (3) it never meaningfully considers the Act’s impact on recreational pursuits other than fly-fishing; and (4) it resorts back to relying on the unproven overcrowding theories. State Br. at 32-39.

USAC fails to rehabilitate the district court’s holding. Attempting to show the district court relied on something other than mere scope or the “numbers,” USAC notes the court’s observation that “every reach of public water is unique” and being able to recreate at a non-preferred location “would be little consolation.” USAC Br. at 58; Final Judgment at 58. But one’s subjective feelings about a favorite fishing spot compared to other fishable locations cannot be and is not the test for substantial impairment. Otherwise, virtually any impairment to any property would be substantial.

USAC also essentially argues that while the district court rejected the overcrowding argument as a factual matter, the evidence still showed a crowding problem. USAC Br. at 45-48, 58-59. This only highlights the problem with the district court’s holding—even USAC can’t articulate a substantial impairment argument without resorting to the rejected overcrowding theory and the misguided scope percentages. *Id.*

Finally, USAC doubles down on the scope argument by asserting that the actual public easement trust resource the Act regulates includes only “rivers and streams traversing private streambeds” rather than all public waters. USAC Br. at 58-59.⁸ Reducing the public easement this way would necessarily increase the Act’s alleged scope, which USAC uses to argue the Act completely or substantially impairs all of the trust resource. *Id.*

The district court—which itself failed to consider the public easement’s full reach in its scope analysis—properly rejected USAC’s overly narrow trust resource premise. R. 2015 (“To 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.”). USAC also admitted below that the “[t]he trust resource at issue here is Utah’s public waters.” R. 783. That’s consistent with both the Act and this Court’s precedent.

The Act expressly applies to all public waters, including “[a]ll waters in this State, whether above or under the ground,” Utah Code § 73-1-1 (1), that are “flowing or collecting on the surface: (A) within a natural or realigned channel; or

⁸ At an earlier point in its brief, discussing its cross-appeal issue, USAC described the relevant trust resource—the public easement—differently, as including both public waters over private *and* State-owned, non-federal public streambeds. See USAC Br. at 34-36; see also *id.* at 46-47. As far as the State can tell, USAC never takes the necessary next step by explaining why this formulation matters, and how it applies specifically to the case at hand. By leaving the Appellants or the Court to complete the otherwise abstract argument, USAC has failed to adequately brief the issue. *B.A.M. Dev. L.L.C. v. Salt Lake Cty.*, 2012 UT 26, ¶ 35 n.8, 282 P.3d 41; *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998).

(B) in a natural lake, pond, or reservoir on a natural or realigned channel,” *id.* § 73-29-102 (8).

In *Conatser*, the Court recognized the same expansive scope for the easement: (1) by statute, the public owns all waters in the State; (2) this statutory-based public ownership created a public easement over those waters; and (3) state policy recognized a public interest in using these waters for recreational purposes. *Conatser v. Johnson*, 2008 UT 48, ¶ 8, 194 P.3d 897; *see also J.J.N.P.*, 655 P. 2d at 1136-37.

In short, neither the Act nor the public easement over public waters are limited to waters “traversing private streambeds.” USAC Br. at 58. USAC’s impairment arguments must be rejected.

II. USAC Has Failed to Satisfy its Burden, Not the State.

USAC argues the State (and VRA) failed to marshal evidence and failed to show why the Court’s precedents should be overruled. USAC Br. at 59-62. Neither argument has merit. First, the State never really challenges any district court fact findings. At most, the State argues that the court misapplied the facts in arriving at its 43% scope conclusion. State Br. at 34-35. And even if that argument implicates the marshalling requirement, the State complied by rehearsing the facts the district court relied on to reach its decision. *Id.* at 34-38.

Second, the State's arguments do not require the Court to overrule any of its decisions. To the contrary, the State's arguments rely on the Court's holdings as written.

USAC, on the other hand, has not met its burden of persuasion. The Act is presumed constitutional and any reasonable doubts about its validity are resolved in favor of constitutionality. Accordingly, the Act must clearly violate a constitutional provision before it can be invalidated by this Court. *See generally State v. Angilau*, 2011 UT 3, ¶ 7, 245 P.3d 745; *Merrill v. Utah Labor Comm'n*, 2009 UT 26, ¶ 5, 223 P.3d 1089; *In re Estate of S.T.T.*, 2006 UT 46, ¶ 26, 144 P.3d 1083. USAC has failed to show that the Act clearly violates article XX, section 1 (or any other constitutional provision).

CONCLUSION

For the foregoing reasons, and those stated in the Appellants' briefs, the district court's decision and judgment should be reversed and remanded with instructions to enter judgment in favor of Appellants.

Respectfully submitted,



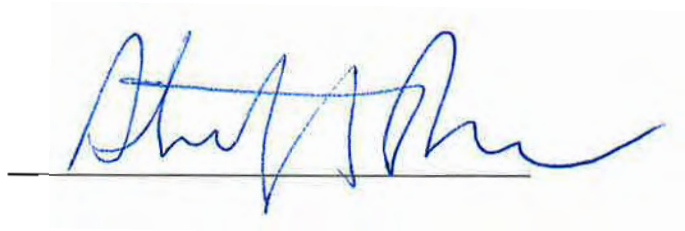
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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This brief complies with the type-volume limitations of Utah R. App. P. 24(f)(1) because:
 - this brief contains 3,556 words, excluding the parts of the brief exempted by Rule 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:
 - this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.



CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2016, a true, correct and complete copy of the foregoing Reply Brief of Appellant and Response Brief of Cross-Appellee the State of Utah was filed with the Court and served via United States mail and/or electronic mail as follows:

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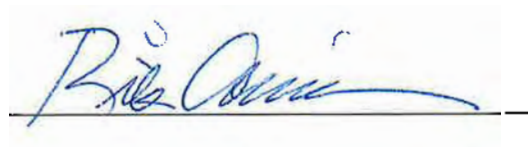
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A handwritten signature in blue ink, appearing to read "Bill Amis", is written over a horizontal line.