

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

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UTAH STREAM ACCESS COALITION, a
Utah non-profit corporation,

Appeal No. 20151048-SC

VR ACQUISITIONS LLC, a Delaware
limited liability company; et al.

REPLY BRIEF OF CROSS-APPELLANT AND BRIEF OF CROSS-APPELLEE
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INTRODUCTION

In ruling on this appeal, the Court need not decide whether the public owns the corpus of the waters in the State. And the Court need not decide whether the public has a right to float those waters. Instead, the issues this appeal presents are whether the easement to use privately-owned streambeds below non-navigable waters is a constitutional right and whether the Legislature, in passing the Stream Access Law codified at [Utah Code Ann. § 73-29-101](#) *et seq.* (the “Act”), violated the public trust doctrine by enabling landowners to exclude the public from the privately-owned beds of non-navigable waters. The trial court answered each of these questions with the affirmative. But it erred in so doing. The easement is a legislative construct, not a constitutional right. And not only did the trial court lack any basis on which to apply the public trust doctrine, but also even if this matter implicated the doctrine, the trial court misapplied it. The opposition of the Utah Stream Access Coalition (“USAC”) does not change this conclusion.

As set forth in the opening briefs of VR Acquisitions, LLC (“VRA”), the State, and *amicus*, the trial court applied the public trust doctrine through application of [Article XX](#) of the Constitution. It did so upon the early and mistaken conclusion that the “easement” allowing the public to touch the privately-owned beds of non-navigable waters articulated in *Conatser* derived from rights recognized and confirmed by [Article XVII of the Constitution](#). Article XVII, however, recognized no such right.

USAC does not address the framers’ statements that the sole intent of [Article XVII](#) was to protect previously-appropriated rights and leave all other administration of the waters in the State to the legislature. Rather, USAC contends that the public ownership of water and an attendant right to touch the privately-owned beds of non-navigable

waters is a matter of “natural law” that has existed since the time of Justinian, survived – despite never being mentioned – through the development of English common law, and moved across the plains of the United States finally to be recognized by the Utah Supreme Court in 2008. This argument suffers a host of defects.

Even if “natural law” embodied the principles that USAC contends, it is not a basis on which to invalidate the actions of a duly-elected legislature; such actions are measured only against the express rights of the Constitution. And [Article XVII](#) recognized and confirmed only then-extant rights to the use of water. Neither the public ownership of water nor any right to touch the beds of non-navigable streams was among these rights.

In 1891, the United States Supreme Court recognized the tradition of private ownership of fisheries and the rights of landowners to assert trespass against those who invaded them. In 1894, the United States Supreme Court acknowledged the right of the States – and their legislatures – to determine the scope and extent of riparian ownership. Consistent with this law, the framers of Utah’s Constitution deferred to the legislature. The Utah Legislature then conferred public ownership and the Utah Supreme Court, in 2008, for the first time interpreted then-current legislation to encompass an easement that permitted the public to touch the privately-owned beds of non-navigable streams.

As a product of legislation, this “right” is subject to amendment and modification by the legislature. The Act epitomizes just such a modification. There is no constitutional basis for the “right” in question.

Furthermore, and contrary to USAC’s assertion, the property at issue is not properly the subject of a public trust analysis. The Act applies to all waters of the State. Importantly, however, it restricts access only to the beds of non-navigable waters. This is

private property. This is not the type of property to which the public trust applies. Equally important, the Legislature could change the law tomorrow. For this reason alone, the public trust is inapposite. The Legislature has not abdicated any control it has over this property. No case cited in the course of this litigation holds that the public trust is violated when such control is retained. The trial court is, for all intents and purposes, the first to hold as much. In doing so, it threatens any number of unintended consequences restricting and impairing the ability of the Legislature to do its duty in the administration of public resources and public lands.

Still, even if USAC had overcome these hurdles, which it did not, it failed to meet its burden to prove that the Act substantially impaired the public's interest in the lands and waters remaining *after* the Act. Misguided by the limited evidence USAC presented, the trial court improperly limited its analysis to the number of "fishable" miles that *might* be restricted under the Act. The purported impairment on this small subsection proves insufficient to justify an order striking duly-enacted legislation.

USAC attempts to skirt its failures by claiming the trial court should have considered only those lands impacted by the Act, despite the fact that such a rubric is both impractical and contrary to established law. USAC attempts to substantiate this argument, claiming overcrowding and any number of other impediments to an angler's preferred experience are attributable to the Act. But the trial court rejected this argument; so, too, should this Court.

Ultimately, there was no reason for the trial court to apply the public trust doctrine through [Article XX](#) or the common law. This "easement" to touch the privately-owned beds under non-navigable waters is not a public interest in land subject to [Article XX](#) or the common law public trust. It is nothing more than a product of legislation, impacted –

if at all – by subsequent legislation that can be changed at any time. In the meantime, the public maintains the ability to fish, boat, watch birds, trap, and otherwise enjoy the waters in the State. For these reasons, as set forth more fully herein, the judgment of the trial court must be reversed with direction to enter judgment in favor of VRA and the State.

STANDARD OF REVIEW & APPELLANTS’ BURDEN TO MARSHAL

In its Brief of Appellee and Cross-Appellant (the “Opposition”), USAC argues that the Court is obligated to defer to the determinations of the trial court on constitutional issues and also asserts that VRA and the State failed to marshal the evidence necessary to support their appeals. Both contentions are wrong.

A. This Court Reviews Interpretations of Constitutional Provisions for Correctness.

In its Brief of Appellant (“VRA Brief”), VRA frames its first issue on appeal as whether the trial court erred in concluding that [Article XVII](#) of the Utah Constitution confirmed an easement permitting the public to touch privately-owned beds of non-navigable streams. (VRA Brief at p. 1). USAC labels this as a mixed question of law and fact, but does so by placing the emphasis on the nature of the easement at issue rather than the meaning of the constitutional provision. (Opposition at pp. 2 & 22).

VRA’s appeal of this issue presents only a question of constitutional interpretation, namely an investigation into what [Article XVII](#) confirmed and recognized. “[B]ecause interpreting the Utah Constitution presents a question of law, [the appellate court] review[s] the trial court's determination for correctness and give[s] no deference to its legal conclusions.” [Snyder v. Murray City Corp.](#), 2003 UT 13, ¶ 17, 73 P.3d 325 (interpreting the establishment clause) (citing [Grand County v. Emery County](#), 2002 UT 57, ¶ 6, 52 P.3d 1148; [State v. Casey](#), 2002 UT 29, ¶ 19, 44 P.3d 756; [Cache County v.](#)

Prop. Div. of State Tax Comm'n, 922 P.2d 758, 766 (Utah 1996)).¹ This is the proper standard to apply to this issue.

B. Mixed Questions of Law and Fact Presented in this Appeal Require *De Novo* Review.

VRA frames its fourth issue on appeal as whether the trial court erred in concluding that USAC met its burden to prove that the Act substantially impaired the public's interest in the lands and waters that remain after the Act. (VRA Brief at pp. 2–3). This mixed question of law and fact contemplates an investigation into what the Act does and whether this proves sufficient to violate the public trust doctrine. Thus, as this Court explained, the appellate court provides “some level of deference to the district court's application of the law to the facts.” *Searle v. Milburn Irr. Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382 (citations omitted). This level of deference runs the gamut from very deferential to *de novo*. Questions of constitutional law, such as that in VRA's fourth issue on appeal, exist on the *de novo* end of the spectrum. *State v. Pena*, 869 P.2d 932, 938 (Utah 1994).

USAC contests VRA's articulation of the standard of review without explanation. USAC contends that there should be “some deference” to the district court's factual findings, followed by a “correctness” review of the district court's application of the law to the facts (Opposition at p. 4). USAC relies on *State v. Levin*, 2006 UT 50, 144 P.3d 1096. But as this Court recognized in *Levin*, where constitutional issues underlie the mixed questions of law and fact, appellate courts often employ a *de novo* review. *Levin*, 2006 UT 50, ¶ 43 (citing *State v. Brake*, 2004 UT 95, ¶¶ 14-15, 103 P.3d 699, reviewing for correctness mixed questions of fact and law in the context of Fourth Amendment

¹ See also *Summit Water Distribution Co. v. Utah State Tax Comm'n*, 2011 UT 43, ¶ 11, 259 P.3d 1055 (applying correctness standard of review to trial court's interpretation of art. XIII, s. 2); *Provo City v. Ivie*, 2004 UT 30, ¶ 7, 94 P.3d 206 (same for art. XI, s. 5); *Friedman v. Salt Lake Cty.*, 2013 UT App 137, ¶ 7, 305 P.3d 162 (same for art. I, s. 2).

search and seizure cases, based on “the substantial constitutional issues at stake ...” and “the need for a consistent body of case law that would set statewide standards ...”; *see also Sawyer v. Dep’t of Workforce Servs.*, 2015 UT 33, ¶ 14, 345 P.3d 1253 (“The mixed question of whether a defamatory statement was made with actual malice and the issue of whether speech may be punished as obscene are likewise reviewed *de novo*”); *Jensen v. Sawyers*, 2005 UT 81, ¶¶ 91–92, 130 P.3d 325; *City of St. George v. Turner*, 860 P.2d 929, 932–33 (Utah 1993). Other mixed questions with constitutional dimensions that this Court reviewed *de novo* for policy reasons include *Levin* itself, where the issue was whether a police interrogation was custodial, 2006 UT 50, ¶¶ 41–42, and *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993), where the issue was whether a confession was voluntary.

C. VRA and the State Met Their Obligation to Marshal Evidence.

Utah R. App. P. 24(a)(9) states, in part, that: “[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” Historically, marshaling was thought to require a rigorous rehashing of all relevant facts. But this Court has “repudiate[d] the requirements of playing ‘devil’s advocate’ and of presenting ‘every scrap of competent evidence’ in a ‘comprehensive and fastidious order.’” *State v. Nielsen*, 2014 UT 10, ¶ 43, 326 P.3d 645 (quoting *Chen v. Stewart*, 2004 UT 82, ¶¶ 77–78, 100 P.3d 1177). “That formulation is nowhere required in the rule. And its principal impact on briefing has been to incentivize appellees to conduct a fastidious review of the record in the hope of identifying a scrap of evidence the appellant may have overlooked. That is not the point of the marshaling rule, and will no longer be an element of our consideration of it.” *Nielsen*, 2014 UT 10, ¶ 43.²

² The advisory notes to Rule 24(a)(9), explain: “The rule reflects the marshaling requirement articulated in *State v. Nielsen*, 2014 UT 10, 326 P.3d 645, which holds that

USAC accuses VRA of failing to marshal the evidence adequately and, in so doing, betrays its misunderstanding of VRA’s argument. (Opposition at pp. 59–61). First, USAC contends that whether [Article XVII](#) confirmed the public’s right to use public waters in place is a mixed question of law and fact rather than a question of law and that VRA failed to marshal the relevant facts. VRA disputes this characterization. (*Id.* at p. 60). The question of what [Article XVII](#) did or did not do is a question of constitutional interpretation – a question of law. VRA challenges the trial court’s legal conclusion – its interpretation of the Constitution. VRA need not marshal any additional evidence.

Second, USAC asserts that VRA failed to marshal the evidence on the mixed question of law and fact of whether USAC met its burden to show that the Act substantially impaired the public’s interest in the lands and waters that remain. (*Id.* at p. 61). Here, with a few exceptions, VRA does not argue that the Court got the facts wrong, but instead argues that even based upon the factual findings relied upon, the trial court erred in concluding that USAC met its onerous burden to overturn a duly enacted statute on constitutional grounds. In other words, VRA argues that the improper conclusion was drawn from the facts presented. (VRA Brief at pp. 39–47). VRA has sufficiently marshaled the evidence as required by [Rule 24\(a\)\(9\)](#) to make its argument and demonstrate the facts against it.

ARGUMENT

I. USAC’S OPPOSITION MISSTATES THE ISSUES BEFORE THE COURT.

USAC contends that the right of public ownership of water and the corollary right of the public to touch the beds of all waters have existed for time eternal as a principle of

the failure to marshal is no longer a technical deficiency that will result in default, but is the manner in which an appellant carries its burden of persuasion when challenging a finding or verdict based upon evidence.”

natural law and, as such, cannot be impinged by the legislature. (Opposition at pp. 23–28). In so doing, USAC obscures the issues before the Court. The question of public ownership of the corpus of the water is not before the Court. The issue before the Court is whether the Legislature acted contrary to its authority and violated a constitutional right in enabling private landowners to restrict the public from touching the privately-owned beds of non-navigable streams.

USAC attempts to define the “easement” at issue in this appeal to incorporate the right to “dip one’s” cup or water one’s cattle with undiverted water. (*Id.* at p. 26). USAC attempts to incorporate into its definition of “easement” all uses of the corpus of the water recognized by *Deseret Livestock Co. v. Sharp*, 123 Utah 353, 259 P.2d 607 (1953) (“*Deseret*”), *Adams v. Portage Irrigation, Reservoir & Power*, 72 P.2d 648 (Utah 1937) (“*Adams*”), and *J.J.N.P. Co. v. Utah*, 655 P.2d 1133 (Utah 1982) (“*J.J.N.P.*”). (*Id.* at pp. 26–27). This appeal does not involve the question of whether the public owns the corpus of the water or whether the public has a right to use the corpus of the water. The Act, in fact, confirms the public’s ownership of the corpus of the water: “All waters in this state, whether above or under the ground, are hereby declared to be the property of the public....” [Utah Code Ann. § 73-1-1](#). Similarly, the claimed “right” of recreators “over” the water, as determined in *J.J.N.P.*, is not at issue. The Act explicitly permits floating on any river that is capable of being floated. *Id.* at [§ 73-29-202\(1\)](#). In fact, the Act assures the public’s ability to float safely through permission for incidental touching necessary to passage and also by regulating the use of fences, facilitating and not hindering passage over the water. *Id.* at [§ 73-29-207](#).

The only easement at issue is the one first recognized by the Court in *Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897 (“*Conatser*”). It was not until *Conatser* in 2008 that

Utah law addresses the question of whether the public is entitled to touch the privately-owned beds of non-navigable streams in conjunction with the use of the waters in the State. *Deseret* and *Adams* – relied upon by USAC – do not address this issue. They address the rights of the public to utilize the corpus of the water. *J.J.N.P.*, while articulating a public right *over* the water, explicitly stated that it was *not* intended to address the question of the use of the beds. None of these decisions need to be overruled to find in favor of VRA and the State. In fact, not even *Conatser* need be overruled.

The *Conatser* Court made clear that it was engaged in an analysis of a *statute* that *granted* the public a recreational easement.³ It cited to [Utah Code Ann. § 73-1-1](#). It did not cite to the Constitution. That statute has now been changed. Thus, the question before the Court is not whether *Conatser* was wrong or right in its interpretation of the then-current version of the law, but whether the *currently* operative legislation violates rights conferred upon the public by the Constitution. It does not.

³ The *Conatser* Court wrote:

By statute, “all waters in this state, whether above or underground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.” Under ***this*** doctrine of “public ownership,” the public owns state waters and has an “easement over the water regardless of who owns the water bed beneath.” ***In granting the public this easement***, “state policy recognizes the interest of the public in the use of state waters for recreational purposes.”

Conatser, 2008 UT at ¶ 8 (quoting [Utah Code Ann. § 73-1-1](#) (Supp. 2007) (emphasis added)); see also *Green River Canal v. Thayne*, 2003 UT 50, ¶ 28, 84 P.3d 1134 (“The right to use water in Utah has been governed by statute since 1888”).

II. THE COURT MAY ONLY STRIKE LEGISLATION THAT VIOLATES THE CONSTITUTION.

Under our form of government, it is the role of the court to assure that laws passed by the legislature comport with the rights conferred by the Constitution. And it is *only* when a law clearly and unequivocally violates the Constitution that a court may strike it down. *Jones v. Utah Board of Pardons & Parole*, 2004 UT 53, ¶ 10, 94 P.3d 283 (quoting *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994) (quoting *In re Estate of Baer*, 562 P.2d 614, 616 (Utah 1977))) (“[S]tatutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality.”). Natural law is not a basis on which to invalidate duly-passed laws.

The framers of the Utah Constitution were charged with articulating the rights of the people and establishing the bounds of the legislative authority. It is the Constitution and not natural law that determines how the legislature may act. No authority under Utah jurisprudence sanctions natural law as a basis on which to evaluate the actions of the legislature. The Court best expressed the reasoning and basis for this absence in *State v. Gardner*, 947 P.2d 630 (Utah 1997):

The difficulty with applying a theory of natural law or inherent rights to specific cases, however, is that while we may accept that natural rights exist “out there,” those rights are impossible to identify and defend without at least some articulation in the positive law. We may acknowledge the existence of natural rights, but as a judiciary we cannot enforce such rights, particularly when they challenge laws enacted by a democratically elected legislature, until those rights are positively set down in a constitutional document. We are not free to overturn legislation on the basis of previously known “natural rights” which we have independently identified, but we are free, and in fact our duty requires us to interpret existing constitutional language to the best of our ability in conformity with the meaning of that

language as we understand it and we conceive the framers meant it to be understood.

Id. at 637.

The court’s role is not to adjudicate or extrapolate “natural law”; it is to apply the Constitution according to its language. The Constitution does not cloak “natural law” in constitutionality either inherently or through [Article I, Section 25](#). It does not impose upon the legislature limits not specifically articulated. Here, the Act does not violate any constitutional right to touch the privately-owned beds of non-navigable streams. No such right exists.

III. ARTICLE XVII DID NOT RECOGNIZE OR CONFIRM A RIGHT IN THE PUBLIC TO TOUCH THE PRIVATELY-OWNED BEDS OF NON-NAVIGABLE WATERS.

USAC argues at length that the ownership of water and, thus, the claimed “right” to touch the privately-owned beds of non-navigable streams is rooted in natural law and has existed since the time of Justinian and, thus, such an “existing” right was confirmed by the plain language of [Article XVII](#). (Opposition at pp. 23–32). Irrespective of the question of ownership of water, USAC’s claimed right to touch the privately-owned beds of non-navigable streams is of recent statutory derivation and not one that traveled from the Roman Empire to England, across the Atlantic Ocean, and over the plains to Utah. And as a statutory “right”, the Legislature operated well within the bounds of its authority to change, modify, or limit the public’s ability to touch the privately-owned beds of streams.

In their opening briefs, VRA and *amicus* cite to and quote from the records of the Constitutional Convention demonstrating: (a) that the focus of [Article XVII](#) was to preserve established appropriated rights; (b) that the result of the convention was to defer questions regarding the ownership and administration of waters “in the state” to the

legislature; and (c) that there was no attention paid or reference made to any public “right” to touch the privately-owned beds of non-navigable streams. (VRA Brief at pp. 17–27; *Amicus* Brief at pp. 9–14). Notably, USAC does not dispute this characterization with any reference to the conventions proceedings themselves. (*See generally* Opposition)

A. A “Use” Does Not Equate to a “Right.”

[Article XVII](#), by its plain language, confirms then-existing “rights”; it does not confirm existing “uses.” VRA stipulated to certain historical “uses.” (Opposition at p. 22). It did not stipulate that those “uses” derived from any inherent or natural rights or that any corollary “right” was found in the contemporary law. In fact, the trial court specifically concluded that prior to [Conatser](#), it was understood that landowners were entitled to exclude the public from the privately-owned beds of non-navigable streams. (R. 2620, ¶ 40). The correctness of the trial court’s conclusion on this point is not challenged by any party on appeal.

Nor does the case law relied upon by USAC demonstrate any recognized or inherent public right to touch the privately-owned beds of non-navigable streams. That case law addresses only the rights to the use and public ownership of the *corpus* of the water, not the submerged lands beneath. This is evident from USAC’s own treatment of these cases.⁴

⁴ By way of example, USAC cites to [Munroe v. Ivies](#), 2 Utah 535, 538 (1880) with the quote: “This is a free country, and the lands are open to all, and the *appropriation* of water is open to all...” (emphasis added). (Opposition at p. 24). It cites [Salt Lake City v. Salt Lake City Water & Elec. Power Co.](#), 24 Utah 249, 67 P. 672, 677 (1902), for the premise that the public owns and has always owned Utah’s waters, irrespective of statute. Aside from the fact that this case did not address any use of the beds of the waters, it also expressly notes that the rights of the public are limited. USAC’s own parenthetical summarizes the holding as “Utah’s waters are public waters *until diverted*.” (Opposition at p. 24) (emphasis added). That is, the public ownership described in

Public ownership of the corpus of the water is not in dispute in this appeal. In fact, it is expressly preserved and confirmed by the Act. *See* [Utah Code Ann. § 73-3-1](#). Notably absent from USAC’s Opposition is any case from any jurisdiction or any time that recognizes a “natural right” or a constitutional public right to touch the privately-owned beds of non-navigable streams. The only case cited for this premise is *Conatser*. The *Conatser* decision, however, does not root the scope of the easement in “natural law” or the Constitution.⁵

B. Jurisprudence Demonstrates the Absence of a “Right” to Touch Privately-Owned Beds of Non-Navigable Streams.

USAC argues that “public ownership of natural waters can be traced to both Roman law and natural law.” (Opposition at p. 23). Even if broadly true, this point is immaterial. As discussed above, “natural law” is not a basis on which to “challenge laws enacted by a democratically elected legislature.” *Gardner*, 947 P.2d at 637. More fundamentally, however, even if public ownership of water is rooted in “natural law”, there is no suggestion that any “right” to touch the privately-owned beds is also so rooted or that such a “right” existed to be “confirmed” in [Article XVII](#) of the Constitution in 1895. The converse is true.

1. Landowners Have a Long-Recognized Right to Exclude the Public from Privately-Owned Submerged Lands.

The Utah Constitution was drafted in 1895. [Article XVII](#) confirmed only then-extant “rights to the use of any waters in this State for any useful or beneficial

addition to applying only to the corpus of the water was also inherently limited. None of the cases cited address the use of the beds. All address the use of the corpus of the water. *See Uintah Basin v. United States*, 2006 UT 19, ¶ 34, 133 P.3d 410; *Provo River Water Users Ass’n v. Morgan*, 857 P.2d 927, 933 n. 8 (Utah 1993); *Adams*, 72 P.2d at 652-53; *Oldroyd v. McCrea*, 65 Utah 142, 235 P. 580, 584 (1925).

⁵ *See* Section I, *supra*.

purpose....” The claimed public “right” to touch the privately-owned beds of non-navigable streams was not among those recognized rights.

In 1891 – a mere four years before Utah’s Constitutional Convention – the United States Supreme Court undertook the task of adjudicating the ownership of riparian lands in *Hardin v. Jordan*, 140 U.S. 371, 11 S. Ct. 808 (1891). The *Hardin* Court surveyed the historical treatment of ownership of those lands and the rights of the public therein. In so doing, the Court recognized the long history of private ownership: “And centuries *before Justinian*, Cicero spoke of the many lands, houses, lakes, ponds, places, and possessions confiscated by Scylla, and conferred upon his own favorites.” *Hardin*, 140 U.S. at 390 (emphasis added). The Court did not, however, recognize an unimpeachable right of the public to access and utilize such private property. Rather, it recognized the positive right of landowners to exclude the public.

In a summary statement, the *Hardin* Court wrote:

The cases are innumerable in which actions of trespass have been sustained for fishing in a several fishery, (which is the exclusive right to fish in one’s own waters, or is derived therefrom by grant;) or in which the action of trespass has been defended by the plea of common fishery, (which is the right to fish in the waters of another.) ***The right of public fishery is never mentioned except in connection with tidewaters where the title to the land is in the crown. It is never said that this right exists in lakes or ponds, or in any other fresh waters.***

Hardin, 140 U.S. at 389 (emphasis added). Express in this statement is that there was, in 1891, recognition of private ownership of lands and waters and recognition of the right to exclude the public. This contradicts not only any contention of a natural public right to touch the privately-owned beds of non-navigable bodies of waters, but even the more general principle of “public ownership” that USAC contends is recognized in [Article XVII](#).

The *Hardin* Court undertook a review of the historical common law and identified myriad cases in which claims of trespass were adjudicated not on the basis of a general right of the public to use the corpus of the water, but upon the question of whether the property was properly subject to public or private ownership.

By way of example, the *Hardin* court refers to the decision of the courts of England in *Bristow v. Cormican*, L.R. 3 App. Cas. 641, in which a riparian landowner pursued an action for trespass for fishing in a lake. *Hardin*, 140 U.S. at 391. Ultimately, the claim of trespass was rejected because the lake (15 miles in length, 10 miles in breadth) was subject to public ownership and *not* on the grounds that the public had an inherent right of access to private lands and waters.

The matter of *Cobb v. Davenport*, 32 N.J.L. 369, 33 N.J.L. 223, a case cited by the *Hardin* court arising out of New Jersey, involved a similar claim of trespass defended on the grounds that “the lake belonged to the state.” Plaintiff’s claim of trespass was sustained. The court wrote: “The title of the individual, being personal in him, is exclusive, *subject only to a servitude to the public for the purposes of navigation*, if the waters are navigable in fact.” *Hardin*, 140 U.S. at 395 (emphasis added).

In *Beckman v. Kreamer*, 443 Ill. 447, the Illinois Supreme Court adjudicated the rights of the public to fish on waters claimed to be the subject of private ownership. The Court there concluded: “By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water, where the tide does not ebb or flow, that if the riparian proprietor owns upon both sides of such stream no one but himself may come upon the limits of his land and take fish there....” *Hardin*, 140 U.S. at 396 (citing *Kreamer*, 443 Ill. 447). The public had no right of access or use of the stream in question.

The cases referenced above were among a number relied upon in *Hardin*. None of that precedent was disturbed. The *Hardin* Court explicitly recognized that waters and submerged lands *may* be subject to private ownership and, in such instance, the owner then had the right to exclude. In neither *Hardin* nor the myriad cases cited therein is there mentioned a “natural right” that allowed the public access to privately owned lands for fishing or any other use of water. The public had no right – natural or otherwise – to access or touch such lands that could have been confirmed by *Article XVII* of the Constitution in 1895.

2. Determination of Riparian Landowners’ Rights Is in the Domain of the Legislature.

The United States Supreme Court in 1894 was again asked to address the question of ownership of submerged lands in the matter of *Shively v. Bowlby*, 152 U.S. 1 (1894). As a general premise, it wrote: “The common law of England upon this subject, at the time of emigration of our ancestors, is the law of this country except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies, or by the Constitution and laws of the United States.” *Shively*, 152 U.S. at 14. The *Shively* Court recognized that it is the prerogative of the States – through their legislatures – to determine the bounds of riparian ownership and the associated rights.

In conjunction with its survey of the laws of various states on the question of the extent of riparian ownership, the *Shively* Court reverted to and relied upon its *Hardin* decision from 1891, quoting:

This right of the states to regulate and control the shores of tide-waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it *depends on the*

law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised.

Shively, 152 U.S. at 46 (quoting *Hardin*, 140 U.S. at 382) (emphasis added). More succinctly, the *Shively* Court quoted with approval Justice Brewer’s dissent in *Hardin*: “Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian extends is one of local law. For a determination of that question, *the statutes of the state and the decisions of its highest court furnish the best and final authority.*” *Shively*, 152 U.S. at 46 (quoting *Hardin*, 140 U.S. at 402, Brewer J., dissenting) (emphasis added).

Under the decisions of *Hardin* in 1891 and *Shively* in 1894, it is clear that the question of the scope of ownership of submerged lands, and the rights associated therewith, were questions to be left to the states and their legislatures. While certain governing principles flow from the common law of England, no natural right of access or use or even of public ownership of *all* waters are among the principles that might restrict the authority of a state legislature. In 1895, the framers of the Utah Constitution acted consistent with these principles and left the administration of water and the ownership of water to the judgment of the legislature.

C. The Legislature’s Regulation of the *Conatser* Easement Does Not Implicate Constitutional Constraints.

The trial court determined in this matter that the easement identified in *Conatser* was rooted in [Article XVII](#). (R. 0758). As shown, however, neither the public ownership of water nor the “corollary” right to touch the privately-owned beds of non-navigable streams are inherent in either the Constitution or the historical jurisprudence. The “right” arose for the first time as a product of statute with the *Conatser* decision in 2008 and, as such, is subject to modification or amendment by the legislature.

The *Conatser* Court made clear that it was engaged in statutory construction and interpretation; it was not engaged in constitutional analysis. *Conatser* reads:

By statute, “all waters in this state, whether above or underground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.” Under *this* doctrine of “public ownership,” the public owns state waters and has an “easement over the water regardless of who owns the water bed beneath.” *In granting the public this easement*, “state policy recognizes an interest of the public in the use of state waters for recreational purposes.”

Conatser, 2008 UT at ¶ 8 (quoting [Utah Code Ann. § 73-1-1](#) (Supp. 2007) (emphasis added)). The Court was engaged in an analysis of a *statute* that conferred public ownership. It recognized that this *statute*, not natural law or the Constitution, *granted* the public a recreational easement. It cited to [Utah Code Ann. § 73-1-1](#). It did not cite to or interpret the Constitution. It did not cite to “natural law.”

The statute – [Utah Code Ann. § 73-1-1](#) – declared public ownership and adjudicated the scope of private ownership of beds and the rights associated therewith. This is a legislative responsibility and a legislative prerogative. The legislature and *not* the Constitution, having given birth to these concepts is free to restrict or broaden them as it sees fit. As a result, there was no basis for the trial court to go any further and to do so was error.

IV. THE CONATSER EASEMENT IS NOT A RESOURCE SUBJECT TO PUBLIC TRUST EVALUATION.

The public trust doctrine nominally and in both state and federal jurisprudence applies only to public resources. Indeed, USAC enumerates the public resources to which the trust has applied in Utah, to wit – sovereign and other lands acquired by the State, school trust lands, public waters, and the ecological integrity of public lands and their public recreational uses. (Opposition at p. 34). Conspicuously absent from this list is the

type of property to which the trial court applied the public trust doctrine: the beds of non-navigable streams. Those beds are under private ownership and private property exists outside the application of the public trust doctrine. In fact, this is beyond the scope of all iterations of the doctrine, from its historic roots, to its appearance in federal jurisprudence, to its discussion in state jurisprudence and its codification in Utah statute.

A. The Public Trust Does Not Apply to the Beds of Non-Navigable Streams.

Deeply rooted in our nation's history, the public trust doctrine in fact predates the United States. *Juliana v. United States*, No. 6:15-CV-1517-TC, 2016 WL 1442435, at *11 (D. Or. Apr. 8, 2016). “The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country.” *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1234, 182 L. Ed. 2d 77 (2012); *see also Shively*, 152 U.S. at 16. In its nascent stages, the public trust doctrine applied to public resources – namely the lands under navigable waters.

At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Shively, 152 U.S. at 57.

Once the public trust doctrine showed up in federal jurisprudence, again it was limited in application to public resources. In the seminal case of *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 437, 13 S. Ct. 110, 112, 36 L. Ed. 1018 (1892) (“*Illinois Central*”), the court recognized:

[A]s the settled law of this country that the ownership of, and dominion and sovereignty over, *lands covered by tide waters, or navigable lakes*, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce.

Shively, 152 U.S. at 47 (citing *Illinois Central*, 146 U.S. at 435–437) (emphasis added).

The discussion of the public trust doctrine in federal case law focuses on public resources and primarily the land below navigable waterways.⁶

State jurisprudence does not buck this trend. The most frequently cited cases in this litigation demonstrate as much. See *Caminiti v. Boyle*, 107 Wash. 2d 662, 670, 732 P.2d 989, 994-95 (Wash. 1987) (State-owned tidelands); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094-1095 (Idaho 1983) (Lake Coeur D’Alene); *Weden v. San Juan County*, 135 Wash. 2d 678, 709, 958 P.2d 273, 288 (Wash. 1998) (navigable waters in San Juan County). More recently decided cases have likewise adhered to this principle. In *Rock-Koshkonong Lake Dist. v. State*

⁶ See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) (“navigability-and not tidal influence-has become the sine qua non of the public trust interest”); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 537 n.3 (4th Cir. 2013) (“The public trust doctrine is the principle, rooted in Roman civil law and English common law, that the public has the right to access and use navigable waters and the state will protect that right”); *United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty., Cal.*, 683 F.3d 1030, 1032 (9th Cir. 2012) (public trust analysis in context of tidal lands); *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 435, 658 P.2d 709, 719 (1983) (“It is, however, well settled in the United States generally and in California that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams”); *Christensen v. S. California Edison*, 553 F. App’x 748, 749 (9th Cir. 2014) (quoting *Lucas v. Santa Maria Pub. Airport Dist.*, 39 Cal. App. 4th 1017, 46 Cal. Rptr. 2d 177, 181 (1995) (“The public trust doctrine generally concerns the preservation of certain natural public resources[.]”).

Dep't of Natural Res., 2013 WI 74, ¶ 77, 833 N.W.2d 800, 818-19, the Wisconsin

Supreme Court explained that:

The DNR's position seeks to extend its public trust jurisdiction beyond navigable waters to non-navigable waters and land. Wetlands are often not “navigable in fact.” Non-navigable land is by definition not navigable and may not be marshy or “wet.” Eliminating the element of “navigability” from the public trust doctrine would remove one of the prerequisites for the DNR's *constitutional basis* for regulating and controlling water and land. Applying the public trust doctrine to non-navigable land above the OHWM would eliminate the rationale for the doctrine. The ramifications for private property owners could be very significant.

Rock-Koshkonong, 2013 WI 74, ¶ 77 (internal citations omitted) (emphasis in original); see also *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wash. App. 478, --- P.3d --- (Wash. Ct. App. June 14, 2016) (public trust analysis in context of navigable lake); *Estate of McFarlin v. State*, 881 N.W.2d 51, 63 (Iowa 2016) (public trust doctrine applies to navigable waters).⁷ USAC makes an effort to distinguish *Rock-Koshkonong*, arguing that this case was limited to non-navigable waters above the ordinary high-water mark of navigable waters (Opposition at pp. 36–37). But the Wisconsin Supreme Court made no such distinction:

The public trust doctrine is premised upon the existence of “navigable waters.”

...

Contemplating the question of ownership is important because the public trust doctrine implicates state ownership or virtual state ownership—by virtue of its trust responsibility—of *land* under navigable waters. If the public trust were extended to cover wetlands that are not navigable, it would create significant questions about ownership of and trespass on

⁷ USAC argues that Wisconsin “applies the public trust to public waters that are navigable for title as well as waters that are not.” (Opposition at p. 37). Although Wisconsin uses a different test of navigability, which it labels “navigable in fact for any purpose”, Wisconsin nevertheless limits public trust application to waters it deems navigable. See *Rock-Koshkonong*, 2013 WI 74, ¶ 77.

private land, and it would be difficult to cabin expansion of the state's new constitutionally based jurisdiction over private land.

Rock-Koshkonong, 2013 WI 74, ¶¶ 76, 84; see also *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, 820 (1914) (“Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks.”). USAC’s argument that Wisconsin applies the public trust doctrine to the streambeds below non-navigable waters is unsupported.⁸

⁸ USAC cites case law outside of Wisconsin for the premise that the public trust doctrine applies to non-navigable waters, but these are inapposite.

First, USAC cites *Montana Coal. for Stream Access, Inc. v. Curran*, 210 Mont. 38, 53, 682 P.2d 163, 171 (1984). This case dealt with a navigable waterway and a court that eschewed the navigability for title test in the context of a Montana Constitution that imbued the public with ownership of all waters of the state. This context alone renders this case inapplicable. Further, the court focused on the use of the surface of the water, concluding that “under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.” *Id.* Stated otherwise, this case made clear that a riparian landowner could not restrict use of the water. Just after this decision was issued, the Montana Legislature extended that right: “Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.” (*Montana Code Ann.* 23-2-302).

Second, *Parks v. Cooper*, 2004 S.D. 27, ¶ 53, 676 N.W.2d 823, 841 focused on the use of the water itself and not the streambed:

In conclusion, the public trust doctrine imposes an obligation on the State to preserve water for public use. It provides that the people of the State own the waters themselves, and that the State, not as a proprietor, but as a trustee, controls the water for the benefit of the public. In keeping with its responsibility, the Legislature has designated the Department of Environment and Natural Resources to manage our public water resources. However, it is ultimately up to the Legislature to decide how these waters are to be beneficially used in the public interest.

Third, *Lamprey v. State (Metcalf)* (1893) 52 Minn. 181, 53 N.W. 1139, 1143, was a case where the court was struggling with the English test of navigability – capable of having

Like its sister states, Utah has applied the public trust doctrine solely to navigable waters and not private property. This Court in *Colman v. Utah State Land Bd.*, 795 P.2d 622, 635 (Utah 1990) (“*Colman*”), describing *Illinois Central* as the “controlling” case with respect to the public trust doctrine, wrote: “The essence of [the public trust doctrine] is that **navigable waters** should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing.” *Id.* (emphasis added). This limitation of the public trust doctrine to public lands was echoed in *Nat'l Parks & Conservation Ass'n v. Bd. of State Lands*, in which the Court wrote: “The public trust doctrine, however, is limited to **sovereign lands** and perhaps **other state lands** that are not subject to specific trusts, such as school trust lands.” 869 P.2d 909, 919 (Utah 1993) (emphasis added).

Finally, the codification of the public trust doctrine in a number of Utah statutes and regulations reiterates that this doctrine applies only to public resources and not private lands. *Utah Code Ann. § 65A-1-1(4)* defines the public trust assets as: “those lands and resources, including sovereign lands, administered by the division.” “Sovereign lands” means “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.” *Id.* at § 65A-1-1(5); *see also* *Utah Admin. Code, R652-70-100*. And *Utah Code Ann. § 65A-10-1(2)* makes clear that there is no “state ownership of the beds of nonnavigable lakes, bays, rivers, or streams.”

an ebb and flow of a tide. With thousands of inland lakes unaffected by the lunar pull, the Minnesota court was trying to develop a new test for navigability, notwithstanding that the tidal test confirmed that the lake at issue was navigable. The Court nevertheless continued to muse and proposed a test that found lakes capable of boating as navigable.

Here, the property at issue is an easement to use privately-owned streambeds – the land below non-navigable streams. This land is not a public resource. Rather, it is private property. And based on the directive of common law, federal case law, state case law and Utah statutes, privately-owned streambeds below non-navigable streams are not subject to the public trust doctrine.

B. The Relevant Trust Resource, if any, Is All Waters of the State (USAC’s Cross-Appeal).

Although the public trust doctrine proves inapplicable to non-public resources, such as an easement to use privately-owned streambeds, to the extent the Court wishes to engage in the analysis, the relevant resource upon which the impact of the Act must be considered is all waters in the State of Utah. *See Utah Code Ann. § 73-29-102(8); Conatser, 2008 UT 48, ¶ 8.* Even if an easement for use of the water and, as a corollary, the privately-owned beds of non-navigable streams is within the scope of a public trust analysis, the trial court was correct in its legal conclusion that any such analysis must assess all waters of the State of Utah. (R. 2015–2018).⁹ Notwithstanding its cross-appeal, USAC conceded as much. (R. 0783) (“The trust resource at issue here is Utah’s public waters.”). Unfortunately, the trial court disregarded USAC’s earlier concession and failed to follow its own mandate.

The Act applies to public waters, defined as all waters “flowing or collecting on the surface: (A) within a natural or realigned channel; or (B) in a natural lake, pond, or reservoir on a natural or realigned channel.” *Utah Code Ann. § 73-29-102(8).* Utah case law supports this view: “[b]y statute, ‘[a]ll waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing

⁹ (See 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.”).

rights to the use thereof.”” *Conatser*, 2008 UT 48 at ¶ 8 (quoting Utah Code Ann. § 73-1-1 (Supp. 2007) (emphasis added)). Interpreting this statute, the Court stated, “the public owns state waters and has an ‘easement over the water regardless of who owns the water bed beneath.”” *Id.* (quoting *J.J.N.P.*, 655 P.2d at 1136). Because the easement applies to all waters of the State of Utah, the relevant trust resource in any public trust analysis must be all waters of the State of Utah.

For example, in *Caminiti v. Boyle*, 107 Wash. 2d at 665-66, the Washington Supreme Court considered a statute allowing “owners of residential property abutting state-owned tidelands and shorelands to install and maintain private recreational docks on such lands free of charge....” Citing *Illinois Central*, the court looked to the impact of the statute on all waters, not just the impact of the specific docks, and concluded that the legislature, in enacting the challenged statute, had ceded “relatively little right of control over the *jus publicum*, and has not conveyed title to any state-owned tidelands or shorelands.” *Caminiti v. Boyle*, 107 Wash. 2d at 672.

The Washington Court of Appeals again addressed this principle in *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wash. App. 478 (2016). In *Chelan*, a lake conservation organization brought action against the owner of a landfill, claiming that a statutory savings clause permitting a landfill on the eastern shores of Lake Chelan violated public trust doctrine. After the trial court ruled in favor of the conservationists, the appellate court reversed and remanded utilizing the test applied in *Caminiti*. *Chelan Basin Conservancy*, 194 Wash. App. 478, **6–7 (quoting *Caminiti*, 107 Wash.2d at 732). It explained that, among other things, determining whether the legislation permitting the landfill under *Caminiti* test required:

[L]ooking at the legislation as a whole, not a particular application. Indeed, *Caminiti* did not review the reasonableness of the legislation at issue by

examining its application to a specific dock. Instead, the court examined the statute's statewide impact. *Caminiti*, 107 Wash.2d at 672, 732 P.2d 989. Because vast areas of water were unaffected, the court concluded the legislature had not substantially given up control over the public's navigational rights. *Id.* (“By enacting RCW 79.90.105, the [l]egislature has given up relatively little right of control over the jus publicum”).

Chelan Basin Conservancy, 194 Wash. App. 478, *7.

Here, the legislation as a whole applies to all waters of the State of Utah. It is not limited to non-navigable streams. It is not limited to *fishable* streams. It is not limited to streams. The relevant measurement is the impact of the Act on all waters of the State. The relevant trust resource is all waters of the State – flat, flowing, fishable and not fishable. Notwithstanding the inapplicability of the public trust doctrine to privately-owned streambeds, should the Court endeavor to apply the doctrine, it is within this context, and with reference to the entire resource – waters in Utah – that the Court must conduct its analysis.

V. THE TRIAL COURT INCORRECTLY APPLIED THE PUBLIC TRUST DOCTRINE.

To the extent the Court is going to engage in a public trust analysis, it should adhere to its announced precedent – *Illinois Central*, explicitly adopted as the public trust authority in *Colman*. It should adhere to the multitudinous case law from other jurisdictions applying *Illinois Central*. And, it should adhere to *Article XX*, s. 1, in which the trial court rooted the public trust doctrine. Under any approach, a court must first find that the State abdicated control over the public trust resource before it can find any violation of the public trust doctrine.

A. The Public Trust Doctrine Requires an Alienation of Control.

1. An Abdication of Control is a Threshold Requirement to any Public Trust Violation.

Key to *Illinois Central* and its progeny, an abdication of control is a prerequisite to any invocation of the public trust doctrine. See *Illinois Central*, 146 U.S. at 453 (“The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”); see also *Colman*, 795 P.2d at 635. Indeed, “[a] common thread in judicially-pronounced public trust doctrine tests is deciding whether the state has retained adequate control over trust resources.” *Caminiti*, 107 Wash. 2d at 672.

As the Washington Supreme Court observed, “the ultimate state control is that the Legislature having by this statute given abutting landowners the license to use its tidelands and shorelands, can likewise revoke that license by repealing the statute in the event it sees fit to do so.” *Id.* at 673; see also *Weden*, 135 Wash. 2d 678. Thus, Washington employs the *Caminiti* Test, which, like the test VRA champions and the test prescribed by *Illinois Central*, requires as a threshold matter, an affirmative answer to the following before any public trust violation can occur: has the state, by the questioned legislation, given up its right of control over the *jus publicum*. And while “[s]everal statutes challenged under the public trust doctrine have met the same fate as that in *Caminiti*” this is the right result. *Chelan Basin Conservancy*, 194 Wash. App. 478, *6 (citations omitted). “While these outcomes may seem frustrating to public trust advocates, ... public trust issues are often best sorted out by the legislature through regulation.” *Id.* (citations omitted).

State courts outside of Washington have reached the same conclusion. See *State v. Vill. of Lake Delton*, 93 Wis. 2d 78, 93, 286 N.W.2d 622, 630 (Wis. Ct. App. 1979) (no abdication of control sufficient to invoke public trust doctrine where “the [private] benefit conferred is revocable. . . .”); *Menzler v. Elkhart Lake*, 51 Wis. 2d 70, 82-83 186 N.W.2d 290, 297 (Wis. 1971); *Kootenai Environmental Alliance, Inc.*, 671 P.2d 1094 (“The property has not been placed entirely beyond the control of the state and the legislature has not given away or sold the discretion of its successors.”).

Finally, [Article XX, section 1, of the Utah Constitution](#), in which USAC argues and the trial court agreed any state public trust doctrine is based, reads in pertinent part: “All lands of the State . . . *shall be held in trust for the people* . . .” and provides that such lands are “to be disposed of” only as provided by law, “for the respective purposes for that they have been or may be granted.” (emphasis added). That is, [Article XX](#) limits the State’s ability to dispose of public lands. Or, inversely stated, [Article XX, section 1 of the Utah Constitution](#) is not implicated unless there is an abdication of control.

2. The Alienation of Control Prerequisite Demands Something Greater Than a Revocable Regulation, Such as a Lease or Disposition in Fee Simple.

Although what constitutes an alienation or disposition sufficient to implicate the public trust doctrine has not been defined with 100% certainty by any court, the case law paints a spectrum of dispositions that are sufficient to raise public trust questions. This spectrum ranges from leases to fee simple dispositions. Notably absent from that spectrum is any case where a freely revocable and reversible regulation violates the public trust doctrine.

For example, in *Illinois Central*, the Supreme Court found the legislature’s fee simple disposition of the lands at issue was void under the public trust doctrine. *Illinois*

Central, 146 U.S. at 460; see also *ABKA Ltd. P'ship v. Wisconsin Dep't of Nat. Res.*, 2001 WI App 223, ¶ 49, 247 Wis. 2d 793, 823-25, 635 N.W.2d 168, 182, *aff'd on other grounds*, 2002 WI 106, ¶ 49, 255 Wis. 2d 486, 648 N.W.2d 854 (giving perpetual and vested private rights in public waters implicates the public trust doctrine); *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918, 920 (1896) (special legislation conveying title to lands underlying two lakes and authorizing the grantee to drain the lakes implicated the public trust doctrine).

Likewise, a lease for a set period of time, while not an eternal alienation, might be sufficient to necessitate the second and third factors of public trust analysis – whether the disposition is for a public benefit and whether the disposition substantially impaired the public's interest in what remains. See *Kootenai Environmental Alliance, Inc.*, 671 P.2d at 1095 (Idaho 1983); *Colman*, 795 P.2d at 636.

But a revocable statute or regulation that is reversible, in that it does not cede a vested interest in a public resource, does not violate the public trust.¹⁰ In fact, the only case cited where a regulation of any sort violated the public trust, *Owsichuk v. State*,

¹⁰ See, e.g., *Weden*, 958 P.2d at 283 (upholding ordinance prohibiting use of motorized personal watercraft on all marine waters of San Juan county in the face of a public trust challenge in part because the County had “not given up its right of control over its waters.”); *Caminiti*, 107 Wash. 2d at 672 (“the ultimate state control is that the Legislature having by this statute given abutting landowners the license to use its tidelands and shorelands, can likewise revoke that license by repealing the statute in the event it sees fit to do so.”); *Menzer*, 51 Wis. 2d 70, 186 N.W.2d 290 (an ordinance prohibiting the use of motor boats on a lake each summer Sunday did not violate the public trust doctrine); *Vill. of Lake Delton*, 93 Wis. 2d at 93 (when part of the Lake would be closed for a water ski show, the Court observed that “the benefit conferred is revocable, and has but a slight and temporary effect on other public interests and rights. It does not destroy any such rights, but merely defers their exercise to other times or spaces on the lake.”); *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838 P.2d 798 (Alaska 1992) (regulation prohibiting certain type of fishing in a specific location did not violate the public trust).

Guide Licensing & Control Bd., 763 P.2d 488, 491 (Alaska 1988), is unique and distinguishable because the statute at issue gave hunting guides exclusive use of a particular guiding area to pass down to their successors in perpetuity. Alaska's common use clause, like the public trust doctrine, imposes upon the state a trust duty to manage the state's resources for the benefit of all the people. *Id.* at 496. This regulation offended Alaska's common use clause, but only because of its perpetual nature: “[the grants] are not subject to competitive bidding, provide no remuneration to the state, ***are of unlimited duration, and are not subject to any other contractual terms or restrictions.***” *Id.* at 497 (emphasis added).

This conclusion is borne out by later Alaska case law, including *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838 P.2d 798, 800 (Alaska 1992), in which the Alaska Supreme Court considered whether a regulation prohibiting people from using an aircraft to locate salmon in Bristol Bay for the commercial taking of those fish violated Alaska's common use doctrine. In finding that this regulation did not offend Alaska's version of the public trust doctrine, the Court observed that the common use clause does not “obligate[] the state to guarantee access to a natural resource by a person's preferred means or method. ... Rather, it constituted a permissible limitation of the type traditionally imposed by the state on the means and methods which citizens may employ as they utilize fishery resources.” *Id.* at 801. The Court went on to distinguish *Owsichek* as uniquely offensive in that it granted “a special monopolistic privilege to a limited number of individuals.” *Id.* at 803.

Common law public trust iterations, [Article XX](#), s. 1, and even the trial court's test require a disposition to implicate the public trust. And no one in this litigation has cited a case where a revocable regulation that did not grant something akin to a vested interest

violated the public trust doctrine. Here, the challenged statute – the Act – is a freely revocable statute. The Act does not give away a vested interest – such as the title to a lake and the ability to drain it. Instead, the statute regulates use of a public resource. This is not the alienation of control, but the exercise of it. The Act does not offend the public trust doctrine; indeed, because the Act did not dispose of anything, it does not even make it past the initial inquiry of the public trust analysis.

B. Failure to Require an Alienation of Control Leads to Unintended Consequences.

During the nearly six years since USAC filed this lawsuit, no party has been able to cite to a case from any jurisdiction where the public trust doctrine was violated by a truly revocable regulation such as the Act. This is not surprising given that adopting a public trust doctrine where a freely revocable regulation, such as the Act, offends the public trust doctrine very likely leads to undesirable consequences. Sanctioning the trial court’s extraordinary test where a freely revocable regulation violates the public trust doctrine has the potential to open the courts to challenges to all regulations of public resources and divest the legislature of its authority.

Through the DWR and otherwise, the State promulgates a multitude of regulations, all of which impact and restrict the public’s right to recreate. Such promulgation is apparent through reference to the hunting and fishing guides published annually by the DWR.¹¹ The State determines when, how, and where any individual member of the public may recreate. This includes annual closures of some State waters to fishing, restrictions on species the fisherman may take, restrictions on where the fisherman may fish for certain species, and restrictions on what methods the fisherman

¹¹ See [Utah DWR Hunting and Fishing Guidebooks](http://wildlife.utah.gov/hunting-in-utah/guidebooks.html), at <http://wildlife.utah.gov/hunting-in-utah/guidebooks.html>.

may utilize to fish for particular species in particular locations.¹² Similarly, the State determines where, when and how individuals may hunt and for what types of animals. In fact, the State goes so far as to issue limited numbers of permits for access to particular hunting locales and for particular species. Not every hunter is allowed to shoot what she wants, when she wants, where she wants and with the weapon of her choosing.¹³ Each of these regulations is an exercise of the State's authority to manage the public's natural resources and involves a weighing of recreational and other interests.

In the event this Court agrees with the trial court and Utah becomes the only state where a revocable and reversible regulation violates the public trust doctrine, any aggrieved hunter or angler may then sue based upon claimed substantial impairment of the public's right. Complicating this question, because the analysis requires consideration of the substantial impairment of what remains, no regulation can be taken in isolation. Each is dependent upon all others; and, while any particular regulation may not affect a substantial impact, a combination of regulations may do so.¹⁴ Courts will be forced to

¹² "From territorial days ... and continuing to the present day, the Legislature has extensively regulated the use of public waters. Today an entire volume of the Utah Code is devoted to the legislative regulation and management of water and irrigation rights." (R. 0757) (citing [Utah Code Ann. § 73-1-1 et seq.](#); *Proclamation of the Wildlife Board for Taking Fish: 2012 Utah Fishing Guidebook*, p. 20 (<http://wildlife.utah.gov/dwr/fishing/673-2012-fishing-guidebook.html>) ("noting annual closure of some state waters to fishing")); (see also R. 0761).

¹³ See [Utah DWR Hunting and Fishing Guidebooks](#), at <http://wildlife.utah.gov/hunting-in-utah/guidebooks.html>.

¹⁴ By way of example, a regulation which limits the hunting season may not, alone, substantially impair the public's right to recreate. The result may be different, however, if combined with restrictions on location or species.

determine in any given case if a particular regulation is the straw that breaks the camel's back and crosses the line into "substantial" impairment.¹⁵

"As the branch of government responsible for policy-making, the Legislature is in the best position to weigh the competing interests in Utah's natural waters, and to regulate the scope of the public's use." (R. 0759). In allowing an action to proceed, and succeed, against this regulation under the public trust doctrine, the trial court's test paves the way for lawsuits against *any* regulation of natural resources under the public trust doctrine and shifts the authority of management and regulation from the legislature to the courts. Such a framework divests the State of its authority and responsibility to regulate and manage its natural resources and puts the onus and burden upon the courts to weigh the competing interests in Utah's natural resources. To avoid this result, and to adhere to precedent, the proper public trust analysis must involve as a threshold matter an analysis of whether the State has abdicated its control of the public trust resource. When the answer to that question sounds in the negative, the analysis ends. There can be no public trust violation when the State maintains control over the public trust resource.

VI. THE ACT DOES NOT VIOLATE THE PUBLIC TRUST DOCTRINE.

Whether under the common law standard evolved from Roman law, to England, to *Illinois Central* and *Colman*, whether under [Article XX](#), or whether under the trial court's trailblazing and ultimately unworkable test, the Act does not offend the public trust doctrine. Because the Legislature did not abdicate control over the public trust resource and because there was no substantial impairment in the public's interest in the lands and

¹⁵ And if one regulation is found to go too far, and another regulation in existence at the time of that finding is later revoked, there is the possibility for new litigation as to whether regulation that was previously found to have gone too far is now permissible.

waters that remain, the Act passes muster under any iteration of the public trust doctrine. There has been no violation of the public trust.

USAC bears the burden to demonstrate otherwise. And it is a profound burden: “[S]tatutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. *Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality.*” [Jones](#), 2004 UT 53, ¶ 10, (quoting [Ohms](#), 881 P.2d at 847 (quoting *In re Estate of Baer*, 562 P.2d at 616)) (emphasis added); (R. 0735). Although the trial court announced this burden, it failed to appreciate its weight. That is, contrary to the trial court’s ultimate conclusion, USAC did not meet its burden to prove substantial impairment of the public’s interest in the lands and waters remaining.

A. USAC Overstates the Impact of the Act

Before delving into the substantial impairment analysis, a quick aside regarding the Act places the discussion in the proper context. USAC sets forth a number of things that the Act purportedly does on its face. (Opposition at p.45). Important, also, is that which the Act does not do:

- The Act does not restrict the use of the corpus of any public waters in the State of Utah. See [Utah Code Ann. § 73-29-101 et seq.](#)
- The Act does not affect where the public may float. The Act effectively says if a river or stream is floatable, then the public may float upon it. That is, both before and after the passage of the Act, waters that are physically incapable of being floated remain incapable of being floated and rivers that have sufficient water to float remain floatable. See [Utah Code Ann. § 73-29-202.](#)
- The Act does not put the onus on the recreators to determine what is private versus public land; instead, the Act requires private property owners to (1)

cultivate their land; (2) post their land; (3) or request that people leave their property. [Utah Code Ann. § 73-29-102; 73-29-201](#).

- The Act does not require that private property owners prevent anglers from using their property. Fly anglers may fish on private property with permission. [Utah Code Ann. § 73-29-201](#).
- The Act did not alter access points to water. Private property before the Act remains private property after the Act and is subject to and protected by the same trespass laws regardless of where it falls on the timeline. And just as before the passage of the Act, anglers could not cut across private property to access a stream, absent landowner permission, this remains the case after the passage of the Act as well. *See id.*; *see also* [Utah Code Ann. § 76-6-206](#).
- Finally, the Act had no appreciable effect on flat-water recreation. (R. 2536).

All in all, the Act did not alter the vast majority of public uses. In fact, and as truly at issue here, the only substantive effect was to enable landowners to exclude the public from touching *a portion* of the beds of the streams and rivers of the State. Even this, however, is an insufficient basis on which to conclude that the Act substantially impaired the public's interest in the lands and waters remaining.

B. USAC Failed to Meet Its Burden to Prove Substantial Impairment of the Public's Interest in the Lands and Waters Remaining.

1. The Trial Court's Reliance on Mileage of "Fishable" Streams Was Error.

USAC attempts to obscure the trial court's error by contending that the trial court based its finding of substantial impairment on something more than just the mileage of fishable streams. (Opposition at p. 57). But in reaching its end result, the trial court showed its math, so to speak. The trial court's ruling was based solely on the numbers.

The trial court acknowledged that the sole question before it at trial was whether the Act substantially impaired the public's interest in the lands and waters that remain

after passage of the Act. The trial court considered, and rejected, USAC's argument on crowding as an embodiment of substantial impairment. (R. 2650) The trial court then considered USAC's argument, "in the alternative ... that the public's interest in the lands and waters remaining is substantially impaired by the Act's sweeping closure of more than 2,700 miles of Utah's rivers and streams to almost all public recreational use. In other words, the Act results in substantial impairment by virtue of its scope." (*Id.*). Plainly stated, the trial court based its finding of substantial impairment solely on the numbers. (R. 2659) ("Here, the Act closed more than 43% of Utah's fishable rivers and streams to almost all public recreational use. This expansive disposition impairs the public's interest in the waters remaining, because what remains is so drastically diminished.").

The trial court's conclusion that the Act substantially impairs the public's interest in the lands and waters that remain, based solely on the impact of miles on which to recreate, suffers from a number of errors.¹⁶ The trial court's finding that what remains is "drastically diminished" is a numerical finding. (*Id.*). The court's logic is that "what remains" is reduced in size by the Act's closure of 43% of Utah's fishable streams. But error pervades that logic. What was "diminished" is the whole, not the remainder. That is, what's left after the whole was diminished by 43% is, by definition, what remains.

¹⁶ Several of these errors are enumerated in VRA's opening brief and are not rehashed here, including: "(1) the trial court failed to examine the impairment of the lands and waters 'remaining'; (2) the proper scope of any quantitative inquiry must have considered more than 'fishable miles' of streams and rivers; (3) the trial court grounded its conclusion on unreliable numbers and resolved doubts against rather than in favor of constitutionality; and (4) the trial court's analysis misconstrued the question presented by limiting its inquiry to a quantitative assessment of fishing rather than a qualitative assessment of recreation." (VRA Brief at pp. 40-41).

Consequently, this part of the trial court’s decision does not at all address the impairment of what remains.

Moreover, the numbers do not demonstrate substantial impairment of the public’s interest in the lands and waters remaining after the Act as required by *Illinois Central* and its progeny. In its own words and in the first iteration of its holding, the trial court stated “the Act closed more than 43% of Utah’s rivers and streams to almost all public recreational use.” (R. 2659). Upon USAC’s Motion to Amend, the trial court corrected this statement to read: “the Act closed more than 43% of Utah’s *fishable* rivers and streams to almost all public recreational use.” (emphasis added) (R. 4854). But this error – initially concluding that the Act closed 43% of rivers and streams and then revising it to 43% of fishable rivers and streams, which is a greatly reduced total – highlights the cracks in the trial court’s analysis.

The trial court improperly focused solely on fishable rivers and streams. (R. 2659). That is, the trial court did not look at the impact, or lack thereof, of the Act on rivers and streams that do not contain fisheries. The trial court did not look at the impact of the Act on flat waters. The trial court did not look at the impact of the Act, or lack thereof, of the Act on hunters, bird watchers, waders, swimmers or any other recreators other than anglers and boaters. This nearsightedness renders the trial court’s ultimate conclusion of substantial impairment erroneous and unsustainable.

Whether under the trial court’s newly minted test or under the widely-adopted *Illinois Central* test, in the event of a disposition (or a statute tantamount to a disposition), the court must examine whether the state action was accomplished “without substantial impairment of the public’s interest in the lands and waters remaining.” (R. 1111); *see also Illinois Central*, 146 U.S. at 453. Stated otherwise, the trial court’s

analysis required it to look at the impact on what remains, not what was impacted. The court must examine not the property disposed of, but what is left of the public's interest *after* a disposition.

Here, as noted, the trial court did not look at what remained, but rather what it perceived to be lost. And it perceived the loss as “fishable miles.” (R. 2659; 4854). As a result, the court necessarily limited its analysis to anglers who prefer to fly fish and prefer to do so on rivers and streams.¹⁷ The trial court heard testimony from a very small segment of Utah's population – indeed, the minority opinion even in the angling population – and extrapolated the impact on this small segment to the rest of Utah's recreators in order to reach its ultimate conclusion. (R. 2622–2628).

Instead, the trial court should have focused on all of the available water-based recreational opportunities that exist, both on rivers and streams and also on flat waters, with and without fish. And the trial court should have concluded that because it received no evidence as to any impact on any recreator, besides anglers, on any body of water, besides fishable rivers and streams, that the Act did not substantially impair the public's interest on the lands and waters that remain.¹⁸

Perhaps understanding the task at hand but facing a dearth of evidence, the trial court extended its conclusion to recreators who were not represented and upon whom the impact of the Act is unknown. That is, the trial court made findings about the impact of

¹⁷ The trial court can hardly take the blame for this limited focus as USAC presented evidence on only this narrow use of a very narrow slice of Utah's waters during trial. (*See generally* R. 2876–4542).

¹⁸ And even the testimony as to fishing opportunities for this small subset of the angling population demonstrates that ample places for their desired angling experience – fly fishing on a river with only a few people – continues to exist (R. 1629; 1636–1640; 1948–1959; 3586–3589; 3605–3607; 3611–3612; 3262–3263) (*see also* Tr. Exh. 9, pp. 91–92; Tr. Exh. 10.1, pp. 93–135).

the Act on fishable rivers and streams and then concluded that this substantially impaired all recreators – such as hunters, birdwatchers, waders and swimmers – who can recreate on all waters, both flat and moving, regardless of whether they are fishable. In the trial court’s own words, the Act closed “43% of Utah’s fishable rivers and stream miles to nearly all fishing, and to all hunting, swimming, bird-watching, and any other recreational activity utilizing the water.” (R. 2654–55; 4854). And, setting aside VRA’s disagreement of the numbers, while this statement is otherwise technically sound, it is a meaningless metric. There is no evidence as the impact on a swimmer, who can swim on flat water, moving water, and water with and without fish, of the closure of streams with fisheries. There are an estimated 85,916 miles of rivers and streams in Utah, not to mention hundreds to thousands of square miles of flat water.¹⁹ Limiting the analysis to the approximately 6,219 miles that have been deemed “fishable” rivers and streams and looking at the impact of the Act just on these waters misconstrues the question presented and assumes that all other recreators can only recreate on moving water that contain fisheries.

2. USAC’s Claims of Overcrowding Are Insufficient to Find a Violation of the Public Trust.

To offend the public trust doctrine, the Act, itself, must substantially impair the public’s interest in the lands and waters that remain. (R. 2646); *Illinois Central*, 146 U.S. at 453. That is, there is a causation element. The substantial impairment must be due to the challenged statute. Here, the trial court rightfully concluded that the evidence of crowding was insufficient to find substantial impairment and, in any event, crowding could not be tied to the statute itself. (R. 2650 “On the question of crowding, the

¹⁹ See The Montana Watercourse, <http://mtwatercourse.org/waterfacts.htm>.

Coalition has failed to meet its burden of proof.”) Nevertheless, and without appealing the correctness of this conclusion, USAC argues now to the contrary.

USAC scolds VRA for failing to marshal (“i.e. ignor[ing]”) evidence related to crowding. (Opposition at p. 60). VRA submits that it suffered no obligation to marshal such evidence because VRA is not challenging the trial court’s holding with respect to crowding. The trial court found that substantial impairment in the form of crowding was not caused by the Act because of, among other things, intervening factors such as population growth. (R. 2650). That is, to the extent this Court now considers the evidence USAC sets forth of crowding, it must also take into account the evidence the trial court relied upon that negated USAC’s crowding argument.

In particular, at VRA’s request during trial, the trial court took judicial notice of the census information. Between 2000 and 2010, Utah’s population grew from 2,233,198 to 2,763,885. See <https://www.census.gov/prod/cen2010/cph-2-46.pdf>; see also (R. 2457–2459; 4342). This growth of over half a million people represents a 23.8% increase in Utah’s population. (R. 2640). This census information also shows incredible population growth in the areas where VRA pinpoints the most desirable angling – Central and Northern Utah. From 1990 to 2010, the population of Salt Lake County increased from 725,956 to 1,029,655, the population of Summit County increased from 15,518 to 36,324, the population of Utah County increased from 263,590 to 516,564 and the population of Wasatch County increased from 10,089 to 23,530. (R. 2457–2459) (citing <https://www.census.gov/prod/cen2010/cph-2-46.pdf>). As such, the trial court properly found that it could not attribute crowding to the Act when growth in population is just as likely a causative factor.

Likewise, in dismissing the crowding argument, the trial court found that comparisons between angling in Utah and angling in Idaho and Montana carried no water. As explained by USAC's witnesses, Idaho and Montana over 26,000 and 21,000 miles of fishable rivers and streams, respectively, whereas Utah has a purported 6,400 fishable miles. (R. 1472; 4299; Tr. Exh. 14). And Idaho and Montana have an estimated 447,000 and 267,000 licensed anglers, respectively, whereas Utah has an estimated 414,000 licensed anglers (*Id.*; *see also* R. 4105–4109). In other words, there is just more water per licensed angler in Idaho and Montana than there is in Utah. The differences in angling experiences between Utah and Idaho and Montana are a function of geography and population, and not the existence of the Act.

The trial court properly found that the Act did not substantially impair the public's interest in the lands and waters that remain vis-a-vis crowding. Instead, dismissing the crowding argument for lack of proof of causation, the trial court based its substantial impairment holding solely on the numbers. The evidence that the Act caused the purported crowding proves inadequate to find otherwise.

CONCLUSION

For the reasons set forth herein as well as in VRA's opening brief, the brief of *amicus*, and the briefs of the State, VRA respectfully requests that the Court reverse the trial court's judgment and direct entry of judgment in favor of VRA. VRA further requests an award of costs incurred on appeal.

DATED this 22nd day of September, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Utah R. App. P. 24(g)(5)(C) because this brief contains 13,724 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

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 Times New Roman in 13 points, according to the word processing program with which it was prepared.

DATED this 22nd day of September, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of September, 2016, I caused a true and correct copy of the foregoing to be served via hand delivery to the following:

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APPENDIX OF EXHIBITS

Appendix of Exhibits

- A. Excerpts from VR Acquisitions, LLC's Brief of the Appellee**
- B. Excerpts from USAC's Brief of the Appellee and Cross Appellant**
- C. Excerpts from the Record**

Exhibit A

IN 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. :

Appeal No. 20151048-SC

BRIEF OF APPELLANT VR ACQUISITIONS, LLC

Appeal from the Fourth Judicial District Court, Wasatch County,
Honorable Derek Pullan, Judge
Case No. 100500558

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Defendant/Appellant VR Acquisitions, LLC (“VRA”) submits the following Brief of the Appellant.

I. Jurisdictional Statement

VRA has appealed from a number of summary judgment rulings and orders and the trial court’s ruling, order and final judgment issued after trial. This Court has jurisdiction pursuant to [Utah Code Ann. § 78A-3-102\(3\)\(g\) & \(j\)](#).

II. Statement of the Issues

This appeal presents the following issues for review:

- (1) Whether the trial court erred in concluding that [Article XVII](#) of the Utah Constitution confirmed an easement permitting the public to touch privately-owned non-navigable streambeds. (R. 0393–407; 0758; 4330–4332).

Standard of Review: This issue is reviewed for correctness. [Univ. of Utah v. Shurtleff](#), 2006 UT 51, ¶ 15, 144 P.3d 1109, 1114 (citing [Provo City v. Ivie](#), 2004 UT 30, ¶ 7, 94 P.3d 206) (“[W]e review de novo a district court's interpretation of constitutional provisions, granting it no deference.”).

- (2) Whether the trial court erred in applying the public trust doctrine, through Article XX of the Utah Constitution or otherwise, to any public easement for use of the beds of privately-owned non-navigable streams. (R. 0410–4013; 0702–0703; 0760–0765; 0806–0811; 1100–1105; 1112; 4330–4332).

Standard of Review: This issue is reviewed for correctness. [Shurtleff](#), 2006 UT 51, ¶ 15 (citing [Provo City](#), 2004 UT 30, ¶ 7).

- (3) Whether the trial court erred in applying a public trust doctrine test that differs from that announced by *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892) and which allows for a revocable regulation or statute to constitute a violation of the public trust doctrine. (R. 0806–0811; 0815–0818; 1108–1112; 4330–4332).

Standard of Review: This issue is reviewed for correctness. *Shurtleff*, 2006 UT 51, ¶ 15 (citing *Provo City*, 2004 UT 30, ¶ 7).

- (4) Whether the trial court erred in concluding that USAC met its burden to prove that the Public Waters Access Act, codified at Utah Code Ann. §§ 73-29-101 to -208 (the “Act”), substantially impaired the public’s interest in the lands and waters that remain thereby violating the public trust doctrine. (R. 0735; 1107–1108; 2660; 3470–4713; 4869–4874).

Standard of Review: As a mixed question of fact and law, the Court “typically grant[s] some level of deference to the district court’s application of the law to the facts.” *Searle v. Milburn Irr. Co.*, 2006 UT 16, ¶ 16, 133 P.3d 382. “The measure of discretion afforded varies, however, according to the issue being reviewed.” *State v. Hansen*, 2002 UT 125, ¶ 26, 63 P.3d 650 (citing *State v. Pena*, 869 P.2d 932, 937–938 (Utah 1994)). “A spectrum of discretion exists and [] the closeness of appellate review of the application of law to fact actually runs the entire length of this spectrum.” *Pena*, 869 P.2d at 938, holding modified by *State v. Levin*, 2006 UT 50, 144 P.3d 1096. On the de novo end of the spectrum rest issues of constitutional law. *Pena*, 869 P.2d at 938. There is “the presumption of validity

that must be accorded legislative enactments when attacked on constitutional grounds.” *City of W. Jordan v. Utah State Ret. Bd.*, 767 P.2d 530, 532 (Utah 1988)).

III. Central Constitutional Provisions

The following statutes and constitutional provisions are central and may be determinative to this appeal: (1) [Utah Const., Art. XVII, § 1](#); (2) [Utah Const., Art. XX, § 1](#).

[Article XVII, section 1](#) reads, in pertinent part: “All existing rights to the use of any waters in this State for any useful or beneficial purpose are hereby recognized and confirmed.”

[Article XX, section 1](#), reads:

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 . . . 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.

IV. Statement of the Case

On July 18, 2008, the Utah Supreme Court issued the decision of [Conatser v. Johnson](#), 2008 UT 48, 194 P.3d 897 (“*Conatser*”), holding that the public has the right to touch the privately-owned beds of state waters incidental to recreation utilizing the water (the “*Conatser* Easement”). *Conatser* marked a fundamental change in the law. Before *Conatser*, the public understood the touching of privately-owned streambeds underlying public waters to be trespassing. (R. 2620, ¶ 40). In 2010, the Utah Legislature enacted

the Public Waters Access Act (the “Act”), codified at [Utah Code Ann. §§ 73-29-101 to -208](#). The Act permits, but does not mandate, landowners to prohibit the public from touching the beds of non-navigable streams for recreational purposes other than incidental to safe passage while floating. [Utah Code Ann. §§ 73-29-201 to-203](#).

VRA is the record owner of land in Wasatch and Summit Counties over which approximately 4 miles of the Upper Provo River flows. (R. 4362). The property is known as Victory Ranch and is part of a development and associated club which provides its members with access to fishing at Victory Ranch. (*Id.*; R. 4376–4377). On November 12, 2010, USAC initiated this action naming VRA’s predecessor in interest, ATC Realty Sixteen (“ATC”), as a defendant¹ and sought, among other things, an order: (1) declaring that the Act violates the state and federal public trust doctrine and the Utah State Constitution; (2) enjoining ATC from prohibiting access to the Upper Provo River where it traverses the property now owned by VRA; and (3) enjoining the State from enforcing the Act. (R. 1). Numerous rounds of summary judgment briefing ensued.

First, the parties filed cross motions for summary judgment based primarily upon stipulated facts. (R. 156; 340; 380). The trial court ruled on these motions on May 21, 2012, and concluded: (1) to the extent the Act purports to interpret the Utah Constitution, it violates [Article V, section 1 of the Utah Constitution](#); (2) [Article XVII of the Utah Constitution](#) recognized and confirmed public ownership of state waters; (3) the *Conatser* Easement is a corollary right of use derived from public ownership of State waters and

¹ VRA acquired Victory Ranch from ATC during the course of litigation and was substituted into the litigation as a defendant by stipulation of the parties. (R.1005).

this state . . . are hereby declared to be the property of the public, subject to all existing rights to the use thereof.” 655 P.2d at 1136. The *J.J.N.P.* Court went on to note “the public does not trespass when *upon* such waters.” *Id.* (citing *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961) (emphasis added)). The Court reasoned that this easement permits the public to perform lawful recreational activities when “utilizing [the] water.” *Id.* at 1136–37 (citing *Utah Code Ann. § 73-3-8*; *Day*, 362 P.2d 137). Thus, in *J.J.N.P.* where a landowner sought a fish installation in a lake fully enclosed on private land, the Court found that the public, via its easement under *Utah Code Ann. § 73-1-1*, had recreational interests in the water permitting the State to prohibit the fish installation. *J.J.N.P.*, 655 P.2d at 1135–37. The *J.J.N.P.* Court neither made any decision related to the lakebed nor constitutionalized a recreational easement. *See, e.g., id.*

Notwithstanding the Utah Supreme Court’s citation to statute to support its holdings in both *Conatser* and *J.J.N.P.*, the trial court pronounced the *Conatser* Easement a constitutional right relying upon the statement from *Adams* that: “. . . while water is still in the public, everyone may drink or dip therefrom or water his animals therein, This right of the public, as well as the rights of the appropriator were confirmed by the State Constitution in [A]rticle [XVII]” *Adams*, 72 P.2d at 653; (R. 0743). This flowery language fails to cloak the *Conatser* Easement with constitutional protection. A closer read of *Adams* shows that the Court was concerned with consumption not recreation, let alone the use of the privately-owned streambeds beneath the water. *Adams*, 72 P.2d at 652–53.

Other cases citing [Article XVII](#), similarly center on consumptive uses such as irrigation, mining and manufacturing rather than recreation. In *Whitmore v. Salt Lake City*, 57 P.2d 726, 731 (Utah 1936), the Court cited [Article XVII](#) in determining that water could be appropriated for power purposes from a stream that ran through private property. In *Chandler v. Utah Copper Co.*, the Court noted that [Article XVII](#) of the Constitution protected prior appropriators. 135 P. 106, 109 (Utah 1913); *see also Snake Creek Mining & Tunnel Co. v. Midway Irr. Co.*, 260 U.S. 596 (1923); *Hanson v. Salt Lake City*, 205 P.2d 255 (Utah 1949); *Little Cottonwood Water Co. v. Kimball*, 289 P. 116, 117 (Utah 1930); *Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 164 P. 856, 857 (Utah 1916); *Cole v. Richards Irr. Co.*, 75 P. 376 (Utah 1904).

The case law addressing [Article XVII](#) and pre-dating *Conatser* focuses almost exclusively on consumptive and appropriated uses of water and does not recognize [Article XVII](#) as protecting any public recreational easement over streambeds or confirming public ownership of the waters. Using waters for recreation did not arise in Utah jurisprudence until *J.J.N.P.* and *Conatser*. And both *J.J.N.P.* and *Conatser* ground recreational rights in [Utah Code Ann. § 73-1-1](#), not [Article XVII](#).

In “the absence of any constitutional restraint . . . the legislature may act upon any subject within the sphere of government.” *Kimball v. City of Grantsville City*, 57 P. 1, 5 (Utah 1899); *see also Shurtliff*, 2006 UT at ¶ 18. Because the *Conatser* Easement grows from statutory roots, when the Utah legislature enacted the Act, no constitutional violation occurred. The Act merely clarified and defined the public’s statutory right to use of Utah’s waters.

2. The Framers did not recognize public ownership or recreational rights.

This Court has set forth the standard and methodology for interpreting the Constitution, identifying its primary search as one “for intent and purpose.” *In re Young*, 1999 UT 6, ¶ 15, 976 P.2d 581, 586–87. Stated otherwise, the end goal of constitutional construction is to give effect to the intent of the framers of our Constitution. *Id.* “The process of interpretation, moreover, involves the judge in an exercise that implicates not the judge’s own view of what the law should be, but instead a determination of what the law is as handed down by the legislature or framers of the constitution.” *State v. Walker*, 2011 UT 53, ¶ 31, 267 P.3d 210 (Lee, J., concurring); *see also American Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 86, 140 P.3d 1235 (Durrant, J., concurring). Sources to consider when conducting this interpretation include “provisions dealing generally with the same topic,” the “framer’s intent,” and “historical evidence . . . supported by independent research” *In re Young*, 1999 UT at ¶ 15, n.5. Considering these sources, the trial court’s decision to expand Article XVII to include the *Conatser* Easement is contrary to the intent of the framers.

Any interpretation of the Constitution requires, first, an examination of the plain language. *Summit Water Distribution Co. v. Utah State Tax Comm’n*, 2011 UT 43, ¶ 12, 259 P.3d 1055 (citing *Grand Cnty. v. Emery Cnty.*, 2002 UT 57, ¶ 29, 52 P.3d 1148); *American Bush*, 2006 UT at ¶ 10. Article XVII of the Utah Constitution provides: “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.” The plain language confirms only the “rights” to use of the water extant at the time of the Constitution. There is no reference to

recreation or public ownership of the waters. These issues were deferred to the Legislature.

In following this Court’s sanctioned approach of interpreting constitutional provisions in terms of the “then-contemporary understanding of what they were to accomplish,” the conclusion dictated by [Article XVII](#)’s plain language finds support. Termed the “Irrigation Article,” [Article XVII](#) focused solely on protecting the public’s appropriated rights for use of water such as for irrigation, mining and manufacturing.

- i) Pre-statehood laws demonstrate the absence of a recreational easement extant at the time of the Constitution.

As an arid territory, Utah’s laws pertaining to water rights existed not only in the territorial laws, but also in Utah specific water laws adopted by the legislature of the territory of Utah. In all of these laws, water rights were couched squarely in the use of the body of water for irrigation, mining and manufacturing. These laws define the “existing” rights confirmed by [Article XVII](#).

The Federal Laws enacted in 1866 state, in the section for Desert Lands, that the “water supply upon the public lands . . . shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.” Compiled Laws of Utah, Vol. 1 Desert Lands, § 426 (1888). Similarly, the section on Water Rights provides that “whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued . . . the possessor and owners of such vested rights shall be maintained and protected in the same.” *Id.* at Water Rights, § 422. The then-contemporary meaning of water rights in the context of the Federal Territorial Acts

equates to the use of the body of water for survival purposes, namely irrigation, mining and manufacturing.

In 1880, the Legislature for the Territory of Utah enacted a Water Code recognizing the rights of prior water-appropriators for irrigation, mining, and manufacturing. *See* Compiled Laws of Utah, Vol. 2, Water Rights, § 2775–2789. Similar to the Territorial Acts, the Code stated that, “[a] right to the use of water for any useful purpose, such as domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized” *Id.* at § 2780, s. 6. Notably, the language of this statute foreshadows that of [Article XVII](#) and cites as examples of rights for any “useful” purpose appropriated rights, not recreational rights.

These pre-Constitution laws demonstrate that the meaning of the words “use of water” leading up to the enactment of [Article XVII](#) pertained exclusively to irrigation, mining, manufacturing “and other like purposes.”

ii) The Constitutional Convention Proceedings leave public ownership to the Legislature.

When attempting to discern the intent and purpose behind a constitutional provision, the constitutional convention proceedings prove a valuable resource. *See, e.g., American Fork City v. Crosgrove*, 701 P.2d 1069, 1072–73 (Utah 1985); *Summit Water Distribution Co.*, 2011 UT at ¶ 12. The Constitutional Convention proceedings on [Article XVII](#) reinforce the meaning of the “use of water” that saturates the Territorial Acts and the 1880 Water Code. [Article XVII](#) was familiarly referred to as the “irrigation

article,”³ and the “minority report on the subject of irrigation.” *Constitutional Convention Proceedings* (“Const. Conv. Proc.”), Apr. 5, 1895 at 711.⁴ The “emphasis on private ownership of water rights clearly dominated the thinking of delegates to the constitutional convention. . . . [And the debate] focused on assuring the sanctity of the private right to use water, and on confirmation of claims on this limited resource that were already in place.” Jean Bickmore White, *The Utah State Constitution: A Reference Guide*, Article XVII, 179 (1998). Equally apparent is the absence of any intent to create or recognize a recreational easement. *Id.* For example, Mr. Eldredge discussed the multiple uses of water relevant to [Article XVII](#):

There are different classes of rights we acquire to water; there are certain rights we acquire which only constitute a right to the use of the water, as for illustration, there may be a mill situated upon a stream and that is permitted to divert the water from its channel, carry it down and over its wheel and pass it back into the stream, and thus not infringe upon the rights of any person that may have acquired a right to the use of the water or even a right to the absorption of the water below them. Now that is one class of right. Another class of right would be a farmer. He takes a stream of water upon his land and he exhausts that stream. There is not one particle of it that passes off from his farm to go on to afford its use for somebody else, hence, there are two different modes in which the rights to water attach.

Const. Conv. Proc., Apr. 19, 1895 at 1216. The then-contemporary meaning of water rights ultimately confirmed by [Article XVII](#) as understood by Mr. Eldredge and his colleagues pertained to privately-acquired use of water such as for irrigation, mining and manufacturing. The framers made no mention of recreation or streambeds. They did,

³ See *The Irrigation Article*, Salt Lake Trib., Mar. 11, 1895; *Work of the Committee – Irrigation Questions*, Salt Lake Trib., Mar. 14, 1895; *That Irrigation Article*, Deseret News, Mar. 23, 1895; *Irrigation in the Constitution*, Deseret News, Apr. 6, 1895.

⁴ Available at <http://le.utah.gov/documents/conconv/utconstconv.htm> .

however, decline to constitutionalize public ownership – the very principle to which the trial court attached a right to recreate.

At first, the debates over [Article XVII](#) centered on the “majority” report that vested water rights in the State, and by extrapolation, the people of the State.⁵ *See id.* at 1203. The framers expressly rejected this majority report after a feeling of general uneasiness about including these provisions in the Constitution dominated the framers’ discussions. *Id.* at 1203, 1209, 1214. Most framers shared the sentiments of Mr. Chidester, who preferred to leave the issue of water rights in the hands of the Legislature, agitating “I think it is unsafe to couch [water rights issues] within the Constitution, but leave that to future legislation, and I think that they will govern this matter and enact laws that will be calculated to further the ends of justice in this regard.” *Id.* at 1203. Mr. Hammond echoed these thoughts: “I have been a user of irrigation water ever since this Territory was formed, . . . and I am satisfied and have been to leave this matter entirely in the hands of our Legislature” *Id.* at 1213. Mr. Barnes concurred: “the whole matter should be left to the Legislature. *Id.* at 1214.

Others worried the provision would effectively divest farmers of long-held rights to the use of particular water. As Mr. Jolley surmised,

⁵ The original proposal included Section 1 that provided for public ownership. It read:

The waters of all natural springs, streams, lakes and collections of still water, within the boundaries of the State are hereby declared to be the property of the State; but such ownership shall in no way impair any existing lawfully acquired right to the use of said waters.

Jean Bickmore White, *Charter for Statehood: The Story of Utah’s State Constitution* 78 (1996) (photograph of James P. Low’s workbook).

I would state that there appears to be a great uneasiness among the farmers of this Territory in relation to the word ceding the water to the State. They feel as though they ought to be protected very pointedly in their already acquired rights, and that the Legislature will be a safe body to regulate those things”

Id. at 1204; *see also id.* at 1216 (Mr. Eldredge).

In the end, the framers would not adopt the originally proposed language that would have constitutionalized public ownership of the waters. Rather, the framers adopted a portion of what was proposed as the “minority report.”⁶ The framers did so to put farmers and other irrigators at ease that their then-existing entitlements to water would not be abrogated by operation of the constitution. *See, e.g., Const. Conv. Proc.*, Apr. 20, 1895 at 1233. When given the opportunity to adopt a constitutional provision naming water rights as public property and to enumerate the scope of the rights of the public in the waters, the framers declined, leaving the issue to the Legislature.

During discussion of [Article XVII](#), the framers focused on the use of the corpus of the water itself and ensuring that those who used and appropriated the water pre-Constitution for irrigation purposes would not lose their rights with Utah’s entrance into the United States. They did not address recreation. Reading into [Article XVII](#) a

⁶ Section 1 of the minority report provided: “All existing rights to the use of any of the waters of this State for any useful purpose, shall be recognized and confirmed. *Const. Conv. Proceedings*, Apr. 5, 1895 at 711. Section 2 originally included in the minority report was never adopted as the framers were “in favor of leaving the whole thing to [the legislature and] not directing that they shall do certain things.” *Const. Conv. Proceedings*, Apr. 19 1895 at 1217.

constitutional right to walk down privately-owned streambeds requires reading the Constitution out of the context in which it was written.⁷

iii) Post-Constitution legislation confirms the limited scope of Article XVII.

When examined within the well-established framework of constitutional interpretation it is apparent that [Article XVII](#) was intended to do only what it said. The framers resolved that [Article XVII](#) would confirm existing irrigation and appropriated rights while leaving all other water issues to the Legislature.

The Legislature thereafter acted upon its delegated authority, enacting in 1903 the predecessor to [Utah Code Ann. § 73-1-1](#) *statutorily* recognizing public ownership of the waters. *See* 1903 Laws of Utah, Ch. 100, Sec. 47. Described as the “first general irrigation law” passed in the history of Utah, this original 1903 enactment concerned itself not with the protection of rights over streambeds, but with the establishment of an appropriation system and an office of the State Engineer for administration of those rights. *Big Irrigation Bill Passed*, Salt Lake Herald, Mar. 11, 1903, *available at*

⁷ It is also inconsistent with the public understand of the rights extant at the time of the Constitution. For example, in 1888, the Editor of Deseret News responded thusly to a query regarding the right to fish on privately-owned stretches of the Jordan River:

The Jordan is a stream capable of being navigated and, hence, under the common law rule . . . the public may use it as a highway. But the public have no right to enter upon, or make any use whatever of the land along the stream owned by private parties; and ***the overwhelming weight of authority is in favor of the proposition that the public have no right to catch fish in those portions of the stream which lie between tracts of land owned by private parties.***

Fishing in the Jordan, Deseret News, May 23, 1888, *available at* <http://digitalnewspapers.org> (emphasis added).

<http://digitalnewspapers.org>. This 1903 law eventually became the version of [Utah Code Ann. § 73-1-1](#) in operation at the time of *Conatser*. And this 1903 law provided the basis for the Supreme Court’s recognition of a right to recreate utilizing the beds of the non-navigable streams.

The trial court’s holding that Article XVII recognized and confirmed the *Conatser* Easement through public ownership of the waters proves unfounded and erroneous. The *Conatser* Easement and public ownership are statutory in nature and, thus, may be amended, revised and abrogated by the Legislature. This conclusion is determinative.

B. The Trial Court Erred in Applying the Public Trust Doctrine.

Importantly, the ability to restrict access to streambeds under the Act applies, by definition, exclusively to the beds of non-navigable streams. [Utah Code Ann. § 73-29-201\(1\)](#). Conversely, the public trust doctrine applies only to the beds of navigable waters in public ownership. Nevertheless, USAC asserted that the Act violated the public trust doctrine. Ultimately, the trial court agreed. But it never should have reached the merits of the argument.

The public trust doctrine grew from distinction between navigable waters – the beds of which are publicly owned – and non-navigable waters. The rule that the States, in their capacity as sovereigns, hold title to the beds under navigable waters derives from English common law. See *Shively v. Bowlby*, 152 U.S. 1, 13 (1894). “A key justification for sovereign ownership of navigable riverbeds is that a contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public’s right to use the waters as a highway for commerce.” [PPL Montana, LLC v.](#)

Montana, 132 S. Ct. 1215, 1230, 182 L. Ed. 2d 77 (2012). “By contrast, segments that are non-navigable at the time of statehood are those over which commerce would not then occur. Thus, there is no reason that these segments also should be deemed owned by the State under the equal-footing doctrine.” *Id.*⁸

Until now, Utah has applied the public trust doctrine solely to navigable waters. The Court in *Colman v. Utah State Land Bd.*, 795 P.2d 622, 635 (Utah 1990) (“*Colman*”) described *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (“*Illinois Central*”) as the “controlling” case with respect to the public trust doctrine. It further wrote: “The essence of [the public trust doctrine] is that **navigable waters** should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing.” *Id.* (emphasis added). The limitation of the application of the public trust doctrine to public lands was further clarified in *Nat'l Parks & Conservation Ass'n v. Bd. of State Lands*, in which the Court wrote: “The public trust doctrine, however, is limited to **sovereign lands** and perhaps **other state lands** that are not subject to specific trusts, such as school trust lands.” 869 P.2d 909, 919 (Utah 1993) (emphasis added). Consistent with this case law, Utah Code Ann. § 65A-1-1(4) defines public trust assets as: “those lands and resources, including sovereign lands, administered by the division.” “‘Sovereign lands’ means those lands lying below the ordinary high water mark of navigable bodies of water at the date of statehood and owned

⁸ Applying the public trust doctrine to all waters irrespective of navigability effectively vitiates the distinction set forth by the equal footing doctrine as well as the distinctions between public and private property adopted by Utah in numerous statutes including the Act, but also Utah Code Ann. §§ 65A-1-1 and 65A-10-1.

by the state by virtue of its sovereignty. *Id.* at 65A-1-1(5). And [Utah Code Ann. § 65A-10-1\(2\)](#) makes clear that there is no “state ownership of the beds of nonnavigable lakes, bays, rivers, or streams.”

Utah’s limitation of the public trust doctrine to navigable waters finds support in other states. Wisconsin has blatantly refused to apply it to non-navigable waters. In [Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res.](#), 2013 WI 74, ¶ 77, 833 N.W.2d 800, 818-19, the Wisconsin Supreme Court explained that “[e]liminating the element of ‘navigability’ from the public trust doctrine would remove one of the prerequisites for the DNR’s *constitutional basis* for regulating and controlling water and land. Applying the public trust doctrine to non-navigable land . . . would eliminate the rationale for the doctrine.” (emphasis in original). And, the oft-cited cases in this matter have involved navigable waters. *See, e.g., In Illinois Central (Lake Michigan), Caminiti v. Boyle*, 107 Wash. 2d 662, 670, 732 P.2d 989, 994-95 (Wash. 1987) (State-owned tidelands); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094-1095 (Idaho 1983) (Lake Coeur D’Alene); *Weden v. San Juan County*, 135 Wash. 2d 678, 709, 958 P.2d 273, 288 (Wash. 1998) (navigable waters in San Juan County).

Consistent with *Illinois Central*, with other public trust jurisprudence, and with Utah law, the trial court initially found the “federal” public trust doctrine announced in *Illinois Central* inapplicable as the Act applies only to non-navigable waters.

Any public trust doctrine encompasses public property and *only* public property. The limitation of the Act to non-navigable streams and, by extension, privately-owned

streambeds, convinced the trial court that Article XX, Section 1, and the public trust doctrine announced in *Illinois Central* – and sanctioned by this Court in *Colman* – do not apply. This was a correct decision. The trial court should have gone no further.

C. The Trial Court Erred In Applying the Public Trust to Revocable Regulations.

Early on in this litigation, the trial court held that because the Act “did not dispose of the public’s interest in land,” the public trust doctrine, whether under *Illinois Central* or [Article XX](#), section 1, did not apply. (R. 0764). The inquiry should have ended there. The trial court then explained, however, that the Act might nevertheless implicate a state public trust doctrine and ultimately articulated and applied a new and separate test which takes pieces from, but does not mirror, the test applied in *Illinois Central*. (R. 0765). Importantly, and erroneously, the trial court’s test differs from established precedent and the plain language of [Article XX](#) through its application to a revocable statute and disregard of the requirement for a “disposition.”

The trial court announced that a statute should be measured against the public trust doctrine through inquiry involving consideration of: “whether the statute regulates interests protected by the public trust; whether the public easement was disposed of for the purposes for which it was acquired; whether the state has given up its right of control over the public’s easement; and whether disposing of the public’s easement promoted the interests of the public therein, or was accomplished without any substantial impairment of the public interest in the lands and waters that remain.” (R. 1111).

Applying this newly-created test (which the trial court grafted on to Article XX of the Constitution, after the parties’ briefing demonstrated an absence of Utah case law on

the issue), the trial court ruled after trial that notwithstanding the revocable nature of the Stream Access Act, it was tantamount to a disposition and substantially impaired the public's interest in the lands and waters remaining. (R. 2643-2644; 2659). But the trial court's test is unfounded and unsustainable. Under *Illinois Central* and the trial court's initial interpretation of [Article XX](#), section 1, the Act did not dispose of any property, a required predicate for any public trust violation, and thus did not violate any public trust doctrine.

1. *Illinois Central* Controls.

Though sometimes termed the “federal public trust doctrine”, the test announced in *Illinois Central* sounds in state law:

The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country. Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of **state law**

[PPL Montana, LLC](#), 132 S. Ct. 1215, 1234-35 (emphasis added) (internal citations omitted); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285, 117 S. Ct. 2028 (1997) (finding that *Illinois Central* was “necessarily a statement of Illinois law”).

Although “Utah has not constitutionalized [a] public trust doctrine[.]” Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.W. 53, 183 (2010), it has had occasion to announce its public trust test:

The **controlling case** on this issue is *Illinois Central R.R. Co v. Illinois*, 146 U.S. 387 (1892), . . . The essence of this doctrine is that navigable waters should not be given without restriction to private parties and should be

preserved for the general public for uses such as commerce, navigation, and fishing.

Colman, 795 P.2d at 635 (emphasis added). That is, in *Colman*, Utah adopted as the controlling public trust doctrine test, the test of *Illinois Central*. It did so writing: “The Supreme Court made clear that a state can grant certain rights in navigable waters if those rights can be disposed of without affecting the public interest in what remains.” *Colman*, 795 P.2d at 635-36.

As announced in *Illinois Central* and repeated in *Colman*, 795 P.2d at 635, “[t]he trust with which [public lands and waters] are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or *when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.*” (emphasis in *Colman*). Thus, in consideration of the principles of *Colman* and *Illinois Central*, past application of similar law and in fulfillment of public trust principles, the factors to consider in determining whether there is a violation of the public trust are: (1) has the State disposed of or transferred the public property to a private party; if no, the analysis ends – no violation; if yes (2) was there a public benefit; if yes, the analysis ends – no violation; if no (3) has there been a substantial impairment in the interests of the lands and waters that remain; if no, the analysis ends – no violation. *Id.*; *Illinois Central*, 146 U.S. at 455-56.

Heeding this well-received precedent, the trial court did apply the *Illinois Central* test early in this litigation. In so doing, it concluded that the Act did not violate the public trust doctrine as, among other things, the Act did not dispose of public property. (R. 0764). But instead of stopping the analysis, the trial court announced a new and

separate test in which legislation regulating the use of public land may violate the public trust doctrine if it is the “functional equivalent of disposing of the land under Article XX, Section 1” (R. 1111-1112). To do so was error.

2. The public trust doctrine requires a disposition that precludes state regulation as a predicate to any violation.

Generally, a “public trust doctrine vests states with the duty to hold public resources in trust for the people of the state.” Julia K. Bramley, *Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust Doctrine*, 28 B.C. Env'tl. Aff. L. Rev. 445, 456 (2011). Key to this principle is the word “hold.” The doctrine does not mandate that any resource or property be used for any particular purpose or that any use be preserved. Rather, the key is that the property remains available to be used for the benefit of the public in a manner determined by the legislature to be of import at any particular time and in light of any particular circumstances.

[Article XX, section 1](#), of the Utah Constitution reads in pertinent part: “All lands of the State . . . ***shall be held in trust for the people***” and provides that such lands are “to be disposed of” only as provided by law, “for the respective purposes for that they have been or may be granted.” (emphasis added). That is, [Article XX](#) limits the State’s ability to dispose of public lands. Similarly, *Illinois Central* articulated the central premise of the public trust doctrine thusly: “The ***control of the state for the purposes of the trust can never be lost***, except as to such parcels as are used in promoting the interests of the public therein, or can be ***disposed of*** without any substantial impairment of the public interest in the lands and waters remaining.” *Illinois Central*, 146 U.S. at [453](#) (emphasis added).

Notably, the test described by *Illinois Central*—and applied in *Colman* – requires first a determination of whether the “control of the state” was lost before examination of whether such “disposition” was accomplished without “substantial impairment.” In other words, the key to invocation of the public trust doctrine is the state’s abdication of control: “The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties. . . .” *Id.* The purpose of this restriction is clear: the legislature must be permitted to regulate as it sees fit and in accordance with changing times and circumstances. And the *Illinois Central* Court explicitly recognized this: “the legislation which may be needed one day . . . may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.” *Id.* at 460. By extension, regulation – the goal of the public trust doctrine – cannot be restricted by the public trust doctrine.

The purpose of any public trust doctrine must be defined so as to retain or “preserve” the ability of the legislature to regulate the resource according to the will of the people. The public trust doctrine does not go so far as to define the particular uses to which any resource or land must be put. To do so would be to ignore the potential for a change in climate, in the dominant industry, or in cultural habits and to run the risk that the defined use becomes one that is more of a hindrance than a benefit.⁹ And it is the

⁹ At some points, use of water for mining may predominate for the public good, at other times it may be irrigation and at some point it may be fishing. In the event of a drought, some uses may need to be abrogated to assure adequate water for irrigation or human

legislature as the elected representative of the public – not the judiciary – that is charged with regulating upon a determination of the public interest subject to the bounds of the Constitution and the will of the people.¹⁰ As the trial court correctly recognized: “As the branch of government responsible for policy-making, the Legislature is in the best position to weigh the competing interests in Utah’s natural waters, and to regulate the scope of the public’s use.” (R. 0759).

3. *Illinois Central* and its progeny require an abdication of regulatory authority through disposition as a predicate to any public trust violation.

As articulated in *Illinois Central*, the purpose of the public trust doctrine is to prohibit the State’s abdication of control and to preserve the ability to regulate. To this end, the Supreme Court expressly held that “any attempted *cession of the ownership and control of the state* in and over the submerged lands in Lake Michigan . . . was inoperative to affect, modify or, in any respect, to control the sovereignty and dominion the state over the lands, or its ownership thereof . . .” *Illinois Central*, 146 U.S. at 460

consumption. Defining the doctrine according to use would restrict the ability of the legislature to allocate the publicly-held resource for the benefit of the public depending on the actual needs of the public at any particular point in time.

Consistent with this tenet, “[f]rom territorial days . . . and continuing to the present day, the Legislature has extensively regulated the use of public waters. Today an entire volume of the Utah Code is devoted to the legislative regulation and management of water and irrigation rights.” (R. 0757) (citing Utah Code Ann. § 73-1-1 *et seq.*; *Proclamation of the Wildlife Board for Taking Fish: 2012 Utah Fishing Guidebook*, p. 20 (<http://wildlife.utah.gov/dwr/fishing/673-2012-fishing-guidebook.html>) (“noting annual closure of some state waters to fishing”)). Similarly, the state regulates recreation upon the water, imposing limits on its use, and restricting the manner of its use. (R. 0761).

¹⁰ Presumably, if the legislature acts contrary to the will of the people or contrary to a general consensus of what constitutes the highest and best use of any resource, that legislature will not be re-elected.

(emphasis added). And each of the primary cases applying *Illinois Central* in other jurisdictions similarly requires an abdication of authority, such as through disposition in fee simple or determinative lease, as a predicate to a finding that the state acted in violation of the public trust. In deviating from this focus and finding that a revocable regulation may violate the public trust doctrine, the trial court rendered Utah an outlier in American jurisprudence.

Consistent with *Illinois Central*, this Court in *Colman*, determined that a lease granted by the State for a definite period of years during which the State abdicated control of the property at issue was subject to public trust examination. [Colman, 795 P.2d at 635-36](#). *Colman* does not stand for the proposition that any regulation of public property is subject to examination under the public trust as concluded by the trial court. Rather, it evidences only that examination of a transaction under the public trust doctrine is appropriate when the State has ceded control of the property to private interests for some definite period of time. *See id.* *Colman* does not excuse the requirement of a disposition or cession of control; it supports it.

The State of Washington explicitly requires a cession of control before finding a violation of the public trust doctrine. *See, e.g., Caminiti, 107 Wash. 2d at 674* (“the ultimate state control is that the Legislature having by this statute given abutting landowners the license to use its tidelands and shorelands, can likewise revoke that license by repealing the statute in the event it sees fit to do so”); *see also Weden, 135 Wash. 2d 678*.

Similarly, in *State v. Vill. of Lake Delton*, 93 Wis. 2d 78, 93, 286 N.W.2d 622, 630 (Wis. Ct. App. 1979) the Wisconsin Court of Appeals in concluding a lease did not violate the public trust doctrine observed that “the [private] benefit conferred is revocable. . . .” see also *Menzer v. Elkhart Lake*, 51 Wis. 2d 70, 82-83 186 N.W.2d 290, 297 (Wis. 1971). And, in *Kootenai Environmental Alliance, Inc.*— a case cited by this court in *Colman* — the Idaho Supreme Court held that grant of a renewable ten-year lease did not violate the public trust because, among other things, “[t]his case involves the granting of a permit for an encroachment, and not the grant of property in fee simple, to private parties. The property has not been placed entirely beyond the control of the state and the *legislature has not given away or sold the discretion of its successors.*” 671 P.2d 1094 (emphasis added).

The one case that the parties have referenced in this matter where a mere regulation proved a violation of a version of the public trust doctrine is *Owsichuk v. State, Guide Licensing & Control Bd.*, 763 P.2d 488 (Alaska 1988). In *Owsichuk*, the court examined whether a regulation that gave hunting guides exclusive use of a particular guiding area to pass down to his successor in perpetuity violated the “common use clause.” Alaska’s common use clause, like the public trust doctrine, imposes upon the state a trust duty to manage the state’s resources for the benefit of all the people. *Id.* at 496. This regulation offended Alaska’s common use clause, but only because of its perpetual nature: “[the grants] are not subject to competitive bidding, provide no remuneration to the state, *are of unlimited duration, and are not subject to any other contractual terms or restrictions.*” *Id.* at 497 (emphasis added).

Myriad courts have had opportunity to explore the public trust doctrine. And in each case, cited *supra*, a predicate disposition or abdication of control was required in the form of a lease, a sale, or perpetual obligation preventing regulation before any public trust violation can be found. The trial court disregarded this basic principle in determining that the Act violated the public trust doctrine.

4. The State exercised, rather than abdicated, its control in enacting the Act.

The Act may be amended or revoked in the future, evidencing the State’s retention of control over its waters. But, despite *Colman* and the application of the public trust doctrine by various courts only to transactions amounting to a cession of control, and despite its own observation that the Act did not dispose of anything and that a “different legislature may strike a different balance[,]” the trial court erroneously concluded that the Act was tantamount to a disposition. (R. 1109; 1111). This was error that has far reaching implications not only in the regulation of water, but in the Legislature’s ability to regulate all public lands.

To support its ultimate holding, the trial court relied on an Oxford English Dictionary definition of “dispose of” that equates it to ordering, controlling, regulating and managing. (R. 2642). Under this definition, “dispose of” essentially subsumes all regulatory conduct; it subjects all management of public trust resources – no matter how fleeting, itinerant, or easily revoked or revised – to scrutiny under the public trust doctrine. It would apply not only to the Act, but also potentially to regulations establishing hunting or fishing seasons, regulations prohibiting the use of bait, or tag limits applied to specific game. It would subject any regulation of public lands –

currently held by the state or later acquired by the state – to a determination by a court as to whether such a regulation was in the public’s interest. If the trial court’s definition of “disposition” is sustained, there is no restriction on what can be challenged. The determination of what is in the best interest of the public will ultimately not be made by the State’s elected body, but by its courts.

Conversely, Black’s Law Dictionary defines “disposition” as: “1. The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property. . . .” DISPOSITION, Black's Law Dictionary (10th ed. 2014). Application of this definition of “dispose” is consistent with *Illinois Central*, its progeny, and American jurisprudence, all of which require a cession or abdication of control. Application of this definition would avoid myriad potential suits by aggrieved recreators prohibited in any way from hunting or fishing when and where they want. Application of this definition would have, and should have, ended the inquiry as to the Act, which is nothing more than a revocable regulation subject to change by a future legislature.

The Legislature has retained the capacity to change the law with respect to stream access at any time should the public so demand. In the words of the trial court, a different legislature may strike a different balance. And for this reason, it was error to conclude that the Act violated the public trust doctrine.

D. The Act Did Not Substantially Impair Public Interest in the Waters that Remain.

Trial was held on the issue of whether the Act “substantially impaired the public’s interest in the lands and waters remaining.” The question of substantial impairment exists not only in the trial court’s erroneous test, but in *Illinois Central* after

determination of a disposition. *Illinois Central*, 146 U.S. at 454-55; (R. 1111-1112). Yet, even if the trial court was correct to apply the test that it did, the trial court nevertheless erred in its determination that USAC met its burden to prove that the Act substantially impaired the public's interest in the lands and waters remaining.

Utah jurisprudence places a heavy burden on parties endeavoring to prove legislation unconstitutional: “[S]tatutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. ***Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality.***” *Jones v. Utah Board of Pardons & Parole*, 2004 UT 53, ¶ 10, 94 P.3d 283 (quoting *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994) (quoting *In re Estate of Baer*, 562 P.2d 614, 616 (Utah 1977))) (emphasis added). This was the burden articulated by the trial court. (R. 0735). USAC did not meet this burden.

In reaching its conclusion that the Act substantially impaired the public's interest in the lands and waters that remain based solely on the purported “closure of more than 2,700 miles of Utah rivers and streams to almost all public recreational use” the trial court failed to resolve all reasonable presumptions and reasonable doubts in favor of constitutionality. (R. 2650). The trial court's conclusion that the Act substantially impairs the public's interest in the lands and waters that remain is incorrect for the following reasons: (1) the trial court failed to examine the impairment of the lands and waters “remaining”; (2) the proper scope of any quantitative inquiry must have considered more than “fishable miles” of streams and rivers; (3) the trial court grounded

its conclusion on unreliable numbers and resolved doubts against rather than in favor of constitutionality; and (4) the trial court’s analysis misconstrued the question presented by limiting its inquiry to a quantitative assessment of fishing rather than a qualitative assessment of recreation.

1. The trial court did not examine what “remained.”

Both the trial court’s new test and the *Illinois Central* test provide that in the event of a disposition (or a statute tantamount to a disposition), the court must examine whether the state action was accomplished “without substantial impairment of the public’s interest in the lands and waters remaining.” This aspect of the test asks the court to examine not the property disposed of, but what is left of the public’s interest *after* disposition. Here, the trial court erred in examining how much was purportedly lost by passage of the Act rather than what remained after passage of the Act.

Admittedly, this is a conceptually difficult inquiry when applied to the Act or any statute regulating public lands or waters at large. It raises difficult questions such as causation (i.e., whether the Act or some other variable impaired an ability to recreate), quality (i.e., some miles of river may be more valuable to anglers than others), or degree (i.e., what constitutes “substantial” impairment). Perhaps cognizant of this difficulty, all public trust doctrine tests of which VRA is aware, *other* than that which the trial court crafted, require a tangible disposition of specific property, the impact of which can be more easily determined.¹¹ A revocable regulation will not suffice.

¹¹ By way of example, a sale of dock on a large reservoir avoids the question of causation. It is it is a single transaction the impact of which can be independently assessed as opposed to multiple layers of regulation. By way of example, regulations

Nevertheless, the question – as framed by both the trial court and *Illinois Central* – requires examination of the remainder and not the property disposed. Here, USAC presented no evidence that any angler or, in fact, any recreator was prohibited from engaging in recreation on available waters *because* of the Act. Stated another way, USAC offered no testimony that a member was precluded from accessing public waters because of the Act. In this respect, the trial court erred in finding that USAC met its burden as to substantial impairment of what “remains.”

**2. Any quantitative impairment analysis required
assessment of flat water and non-fishable miles of streams.**

Because the Act did not negatively affect angling on flat water, such as lakes and reservoirs, USAC focused its arguments on – and limited its evidence to – rivers and streams and in particular “fishable rivers and streams.” The trial court appears to have been hooked by this limited focus and incorrectly restricted its analysis to fishable rivers and streams. While recognizing, initially, that ascertaining the scope of any impairment of the “lands and waters remaining” required an analysis of the entire proper public trust resource, namely the waters of the state of Utah generally, the trial court deviated from this analysis at trial, improperly focusing solely on “fishable streams.”

The trial court’s narrow focus proves problematic. The Act’s application is not limited to streams, let alone “fishable” streams. The Act applies to public waters, defined as all waters “flowing or collecting on the surface: (A) within a natural or realigned

prohibit bait fishing on certain streams and rivers of the state, meaning those streams and rivers were off limits to certain types of anglers with or without the Act. Similarly, a sale of a dock may actually impair the public’s interest in the remainder if no other public access point exists effectively making the lake off limits to everyone despite the fact that the lake itself – apart from the dock – remains in public ownership.

channel; or (B) in a natural lake, pond, or reservoir on a natural or realigned channel.” Utah Code Ann. § 73-29-102(8). Likewise, the *Conatser* Easement is not limited to fishing. *Conatser*, 2008 UT 48, ¶ 8 (quoting *J.J.N.P.*, 655 P.2d at 1137). It applies to all recreators – bird watchers, hunters, fur trappers and anglers, to name a few. Any focus solely on streams is artificial. Any focus on “fishable” waters is artificial. Non-angling recreators are not restricted to “fishable streams.” Bird-watchers do not require the presence of sport fish or a viable fishery to bird watch. Hunters and fur trappers do not need sport fish to partake in their desired recreation. (*See, e.g.*, R. 3714). And any water in the State with sufficient depth and flow is floatable and accessible to boaters under the plain language of the Stream Access Act – it need not be “fishable” to be floatable. Utah Code Ann. § 73-29-202(1).

Set forth in the stipulated facts, USAC “estimates” that Utah has 20,800 miles of river and streams, 850 miles of which are navigable, 12,700 miles of which traverse public or tribal grounds and 7,250 miles of which traverse private ground. (R. 2435). At trial, however, no evidence was presented regarding what recreational opportunities on any of these miles or any flat water, – public or private – were foreclosed by the Act other than stream angling. (*See, passim*, R. 2876-4542).

The trial court disregarded these shortcomings and instead evaluated impairment solely on the basis of “fishable” miles. (R. 2659; 4855). The 2,700 miles representing 43% of the purportedly 6,419 miles of fishable streams may have relevance for a subset of the angling public that prefers to fish on rivers and streams, but it is meaningless when it comes to the purported effect of the Act on anglers who prefer to use flat water, or non-

angling recreators that do not require a “fishable” stream. The amount of water available to all water recreators in Utah besides that subset of anglers who fish on rivers and streams remains wholly unknown. Accordingly, the trial court’s conclusion that the Act represents the “closure of 43% of Utah’s fishable rivers and stream miles to nearly all fishing, and to all hunting, wading, swimming, bird-watching, and any other recreational activity utilizing the water” is not supported based upon the evidence presented and USAC’s burden. (R. 2654-2655). The quantitative degree of impairment is thus, also, unknown and it was error to conclude otherwise.

3. The trial court failed to resolve all doubts in favor of constitutionality.

USAC, VRA and the State stipulated that the miles of fishable streams that flow over private property are not known with full accuracy. There are numerous factors to consider such as (1) whether there is Walk-In-Access (“WIA”); (2) whether a property owner permits fishing on her property; and, (3) whether a property owner has cultivated or marked her property with no trespassing signs. (R. 2435-2436). Moreover, the numbers offered by the State on the Stream Access Map, as clearly explained with their offering, are simply guidelines provided as general reference and the accuracy is not guaranteed: “the Information provided is not binding on courts, prosecuting attorneys or other law-enforcement agencies.” (R. 2433, Ex. 2).

The trial court recognized that the State’s numbers suffer from multiple errors. The Stream Access Map does not properly reflect streambeds owned by municipalities where there may be public access. (R. 2628-2634; 3337-3341; 3344; 3362; 3703-3707; 3710; 3743-3747; 3881-3883; 3890-3892; 4443; 4451-4452; 4462-4463; 4489-4490).

The DWR Regional Aquatics Managers testified to errors on the Stream Access Map as a result of oversight or human error or another unknown culprit. (*Id.*; Exs. 1; 4.1– 4.5; 22– 25). Further, the numbers are unreliable because “fishable streams” is a subjective term. (R. 2432; 2628-2634; 3291-3292; 3381; 4449; 4464-4465). DWR Regional Aquatics Managers defined this term differently, all concluding that a “fishable” stream has sport fish, but acknowledging the need to make a subjective determination of what anglers prefer. (*Id.*). Thus streams may have been excluded from the Map that one angler or even a different DWR Manager might consider fishable. (*Id.*). Similarly, streams today deemed non-navigable, may tomorrow be deemed navigable and, thus, open to the public even under the Act. (R. 2251). The trial court disregarded this very real fluidity in the applicable numbers.

Despite the inaccuracies and unknowns inherent in the State’s numbers, the trial court relied on these numbers, dismissing any inaccuracies as failures of the State rather than resolving these inaccuracies in favor of constitutionality. For example, rather than conclude that Walk-In-Access renders the number of purported fishable miles “closed” under the Act artificially high, the trial court brushed off WIA noting that the landowner can revoke such access without cause on 30-day’s notice. (R. 2655; Ex. 6). The trial court disregarded the fact that many property owners do not always mark their property or otherwise allow permissive fishing on their property. Given USAC’s burden and the trial court’s duty to resolve doubts in favor of constitutionality, the trial court’s finding of a substantial impairment rooted solely in unreliable, turbid, stream mile estimates cannot be sustained.

4. The trial court’s analysis misconstrues the question presented.

The trial court concluded that the Act substantially impaired the public’s interest in what remains because it purportedly placed a *quantity* of Utah’s water – 43% of Utah’s fishable rivers and streams – beyond the limits of Utah’s recreators. (R. 2659; 4855). This analysis exposes a misunderstanding of the question presented. The question was whether the Act substantially impaired the public’s interest in the lands and waters that remain. That is, the focus is on the water that remains and the public’s ability to exercise its interest – namely its recreational easement – on these waters. (R. 0763; 2015-2018); *see also Weden*, 135 Wash. 2d 678; *Kootenai Environmental Alliance, Inc. v.*, 671 P.2d 1085; *State v. Public Service Comm.*, 81 N.W.2d 71 (Wis. 1957); *Vill. of Lake Delton*, 286 N.W.2d at 632. It is not tied to a particular property. (*Id.*). This requires a qualitative, rather than a purely quantitative assessment. And the reported quality is high.

As the trial court found, the public continues to enjoy the ability to engage in every type of recreation in and on the waters that remain. (R. 1629; 1636-1640; 1948-1959; 2637-2640). That some rivers and streams in Utah may be off limits to certain types of recreation does not change the fact that Utah’s angling public remains on the whole satisfied with its angling experiences. (R. 3255-3256; 3262-3263; 4229-4231; Ex. 9, pp. 91–92; Ex. 10.1, pp. 93-135).¹² Utah anglers report that private property restrictions have not substantially impaired their angling experience. (R. 1629; 2637-

¹² Here, again, however the trial court ignored its duty to resolve all doubts in favor of constitutionality, blatantly dismissing a survey finding that “relatively few respondents felt that private property restrictions contribute to major limitations in access preferred fishing areas.” (R. 2640; Ex. 9, pp. 91-92).

2640). Utah anglers report high levels of satisfaction. And the Utah DWR Regional Aquatics Managers confirmed this conclusion, testifying that all types of angling experiences exist in their region even after the Act. (R. 3336-3337; 3366; 3703; 3709; 3720; 3748-3749; 3895-3896; 4468-4469).

Of import, no evidence was offered concerning whether the experience of any type of recreators *other* than anglers and boaters was impaired even an iota. The trial court could not determine whether birdwatchers, hunters, trappers, or any other group, are negatively impacted by the Act. (*See, passim*, R. 2876-4542).

The public's interest – the recreational easement – continues to flourish for anglers on the waters that remain. The trial court's finding of substantial impairment based on an artificial number –fishable miles – extrapolated to an improper conclusion about all water recreators in Utah, when that number was explicitly limited to fishable streams, provides no meaningful measurement of impairment. USAC limited its focus to a very narrow subset of the fishing population on a very narrow subset of Utah's waters. The experience of so few cannot be grafted onto the experience of all water recreators, especially in light of contradictory evidence indicating high levels of satisfaction in the angling community and the absolute absence of any evidence on the impact on birdwatchers, hunters, trappers, or any other subset of recreators. USAC did not meet its burden to show that the Act has substantially impaired the public's interest in the waters that remain.

VIII. CONCLUSION

For the reasons set forth herein, VRA respectfully requests that the decisions of the trial court be reversed and judgment entered in favor of VRA. VRA also respectfully requests an award of its costs on appeal.

DATED this 26th day of May, 2016.

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

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Exhibit B

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

BRIEF OF APPELLEE/CROSS-APPELLANT UTAH STREAM ACCESS COALITION

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

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Plaintiff/Appellee/Cross-Appellant
Utah Stream Access Coalition***

Here, VRA does not clearly articulate a standard of review and, instead, suggests that it ranges from ‘some level of deference to the district court’s application of the law to the facts” to “de novo [on issues of constitutional law].”

State

3. *Did the district court err in determining that the Public Waters Access Act also violated article XX, section 1 because it substantially impaired the lands and waters remaining?*

Standard of Review: The Court reviews for correctness constitutional challenges to statutes. (citations omitted)

This issue is fundamentally the same as VRA issue (4).

Because each of these issues present mixed questions of law and fact¹, USAC submits that the proper standard of appellate review on all three issues is not ‘correctness” or “de novo’, but something more deferential to the district court.

This Court articulated its approach to mixed questions of law and fact in *State v. Levin*, 2006 UT 50, 144 P.3d 1096. In *Levin*, the Court articulated the following three-part test to determine the level of deference an appellate court will give a trial court’s application of the law to a particular set of facts:

(1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on “facts” observed by the trial judge, “such as a witness's appearance and demeanor,

¹ See Points I.A. and IV, *infra*.

relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts;” and (3) other “policy reasons that weigh for or against granting discretion to trial courts

Id. at ¶26, 144 P.3d at 1103.

As the Court recognized, while factors (1) and (2) suggest that more deference should be given to the trial court, factor (3) was to be the appellate court’s focus given the policy implications of selecting the appropriate standard of appellate review in a given case. Further, while the Court dropped the ‘novelty’ factor is had applied in previous cases involving mixed issues of fact and law, it acknowledged that ‘novelty’ remains a part of factor (3) “in the rare instances where this ‘novelty of the situation’ factor may be important.” *Id.* at ¶30, 144 P.3d at 1105.

Against this backdrop, this matter presents the Court with its first opportunity to fully vet the public trust doctrine in Utah, and in a constitutional context. This may be one of those ‘rare’ instances. On the one hand, factors (1) and (2) warrant considerable deference to the district court which, in resolving these three issues, wrestled with and resolved a wide variety of complex facts, both stipulated and contested, the latter of which were presented through the testimony of fifteen fact and expert witnesses in a six-day bench trial. On the other hand, factor (3) plays an important role, given that the district court resolved these issues by applying its understanding, of constitutional and public trust issues of first impression to these facts.

So what standard of review does the Court apply? USAC submits that the Court should give some deference to the record evidence supporting the district court’s resolution of these issues – that is, the record evidence supporting (a) the Easement’s

place in Utah's territorial history and (b) the Act's substantial impairment of the public's interests in the trust resource that remains. Appellate courts addressing the public trust in other jurisdictions appear to accord due deference to the factual findings of the tribunal below. See e.g., *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085, 1095-96 (1983) (findings of state land board supporting commercial lease of small bay of Lake Coeur d'Alene); *State v. Village of Lake Delton*, 286 N.W.2d 622, 632 (Wisconsin 1979) (findings of fact of trial court regarding ordinance grating commercial lease and regulating use of small bay).

Here, given the factual and legal complexity and novelty of this matter, the Court should accord the district court's factual findings some deference and then review for correctness whether the district court properly applied the correct law to the facts in resolving these issues.

ISSUE ON CROSS-APPEAL

1. Whether the trial court erred in ruling that the relevant trust resource is all public waters as opposed to the public's easement to use public waters in place where they traverse private or non-federal public streambeds.

Issue Preservation: This issue was raised and preserved by USAC and addressed by the district court. ([R.1580-1583](#); [2013-2018](#))

Standard of Review: This issue presents a question of law and is reviewed for correctness. *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 15, 144 P.3d 1109.

ownership. *Conatser v. Johnson*, 2008 UT 48, ¶ 23, 25, 30, 194 P.3d 897, 902-03 (emphasis added). As an easement to use public waters in place, the Easement burdens the streambeds of those waters, the servient estate. *Id.*; see also, *J.J.N.P. Co. v. Utah*, 655 P.2d 1133, 1136 (Utah 1982) (“public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters”).

A. The Easement is Rooted in Utah History

As noted by the district court, the parties stipulated early on in this case that Utahns have a rich history of using their public waters in place dating back to territorial days and earlier (*e.g.*, fur-trapping; fishing for sustenance, subsistence and recreation; floating railroad ties and other wood products to markets or railheads, wading, swimming). Statement of Facts (“Facts”) at 1-15. Nowhere in this history does one find a single claim of trespass by those owning the streambed targeting those who used the waters.

Notably, neither VRA nor the State marshal let alone distinguish these facts as required.¹¹ And while VRA suggests that a newspaper editorial reflects the public’s understanding that the Easement did not exist in 1888, it misses its mark.¹² First, as noted, VRA and the State stipulated to this historical usage. Second, 19th century newspaper editors were well known to be the foil of vested interests. Third, newspaper

¹¹ See, Point V.A., *infra*.

¹² VRA at p.26, n.7.

editorials typically address current issues, not understandings. Fourth, public servants having greater expertise in Utah law would disagree.¹³

B. The Easement is Rooted in the Doctrine of Public Ownership of Water, not Statute

Again, VRA and *amicus* claim that the Easement is grounded solely in statute (*i.e.*, [Utah Code Ann. 73-1-1](#)). In fact, the Easement is grounded in the doctrine of public ownership of water, a principle which this Court has for more than century consistently held is grounded in natural law.

Public ownership of natural waters can be traced to both Roman law and natural law. “By natural law the air, flowing water, the sea, and therefore the shores of the sea are common to all.” [Justinian, Institutes \(Sanders ed. 1917\) Lib. II, ch. 1, § 1, at 90](#). From there the doctrine winds its way through English common law and into American jurisprudence. [Glass v. Goeckel, 473 Mich. 667, 677, 703 N.W.2d 58, 63 \(2005\)](#). In

¹³ The waters of the state belong to the state. The fish contained therein are also the property of the state. Fisherman may wade any of the streams of the state. If ordered off of the property of any owner thereof, they cannot be ordered out of the streams.

"Trout Fishing Tuesday" by State Game and Fish Commissioner R. H. Siddoway – Salt Lake Telegram; June 12, 1920; p.16.
<http://udn.lib.utah.edu/cdm/compoundobject/collection/tgm3/id/79214/show/79454/rec/1>

Water and fish in natural streams belong to the state and the citizens. Any person is entitled to fish on the stream if he does not trespass on the bordering property.” *** [A] fisherman may use the stream bed to the high water mark.” *** Going above the high water mark does constitute a trespass. One must stay in the stream bed if it is within private lands.

“Let George Do It” – Salt Lake Telegram, July 7, 1950, p.10, quoting Assistant Attorney General Mark Boyle)

https://newspapers.lib.utah.edu/details?id=17573714#t_17573714

Utah, that ‘natural law’ should govern the affairs of man permeated legal thought early on.¹⁴ “Public ownership of all natural resources, including water, was one of the foundation principles of the State of Deseret, and later of the Territory of Utah.” [Hunter, Milton R., *Brigham Young the Colonizer*; citing Mead, Elwood, *Irrigation Institutions*, p. 221](#). Thus, in territorial days, the right to use water from the public domain was acquired either by actual diversion, application of the water to beneficial use or legislative grant,¹⁵ then by grants of county courts (1852-80),¹⁶ followed by water commissioners (1880-1897) and the legislature (1897-1903).¹⁷ [Hutchins, Wells A., *The Utah Law of Water Rights*, p. 10 \(1965\)](#). While no surprise, Utah’s territorial Supreme Court believed the public owned public waters. [Munroe v. Ivie, 2 Utah 535 \(1877-1880 term\)](#) (“This is a free country, and the lands are open to all, and the appropriation of water is open to all ...”).

From the outset, this Court has consistently held that, under the doctrine of public ownership of water, the public owns and has always owned Utah’s waters, irrespective of statute. [See e.g., *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 67 P. 672, 677 \(1902\)](#) (Utah’s waters are public waters until diverted)¹⁸; [Oldroyd v.](#)

¹⁴ [See e.g., Thomas G. Alexander, *Utah’s Constitution: A Reflection on the Territorial Experience*, 39 Utah Hist. Q. 264, 269.](#)

¹⁵ [Hutchins, Wells A., *The Utah Law of Water Rights*, p. 10 \(1965\)](#) (“Hutchins”)

¹⁶ [Deseret Livestock Co. v. Hooppiana](#), 66 Utah 25, 239 P. 479, 482-483 (1925); citing Terr. Utah Laws 1852, p.38 sec. 39, “An Act in Relation to the Judiciary,” approved February 4, 1852.

¹⁷ [Hutchins at p. 14.](#)

¹⁸ One year later, the Utah legislature would also ‘declare’ that the public owned Utah’s

McCrea, 65 Utah 142, 235 P. 580, 584 (1925) (irrespective of statute, Utah’s waters are and have always been owned by the public); *Adams v. Portage Irr., Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648, 652-53 (1937) (waters flowing in or impounded on Utah’s rivers and streams are the “gift of Providence” and “belong to all as nature placed them or made them available”); *Provo River Water Users Ass’n. v. Morgan*, 857 P.2d 927, 933 fn.8 (1993) ([P]ublic ownership of all water in the state “must always have been so. *** [A]ll water ... from the time it reaches land within the confines of this state belongs to the public – the people of this state.” (quoting *McNaughton*, 242 P.2d at 575 (Wolfe, C.J., concurring))). *Uintah Basin v. United States*, 2006 UT 19, ¶34, 133 P.3d 410, 420 (Public waters are not subject to private acquisition ... even by the federal government or the state itself.).¹⁹

VRA and *amicus* ask the Court to overturn this precedent, arguing that Utah’s Constitutional Convention left ownership of water to the legislature. If VRA and *amicus* are correct, where did the Court get authority in *Salt Lake City*, 67 P. at 677, to declare public ownership of water? Who ‘owned’ Utah’s waters before the legislature declared that the public owned them in 1902? As this Court has consistently held and as the district court acknowledged, the public owns and has always owned Utah’s waters. *Utah Code Ann. § 73-1-1* and its predecessors merely confirmed what has always been.

waters.

¹⁹ See also, *Riordan v. Westwood*, 203 P.2d 922, 927 (Utah 1949), citing *Munroe, supra*; *McNaughton v. Eaton*, 121 Utah 394, 242 P.2d 570, 573 (1952); *Fairfield Irr. Co. v. Carson*, 122 Utah 225, 247 P.2d 1004, 1007 (1952); *Deseret Livestock Co. v. Sharp*, 123 Utah 353, 259 P.2d 607, 611 (1953); *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 31, 5 P.3d 1206, 1216.

For these same reasons, it is equally clear that the Easement isn't based solely in statute *or* of recent vintage.

Public waters ... are the gift of Providence: they belong to all as nature placed them or made them available. They are the waters flowing in natural channels or ponded in natural lakes and reservoirs. *** While it is flowing naturally in the channel of the stream or other source of supply, it must of necessity continue common to all by the law of nature ***

[N]o title to the corpus of the water itself has been or can be granted, while it is naturally flowing, any more than it can to the air or the winds or the sunshine. *** While it is flowing naturally in the channel of the stream or other source of supply, [water] must of necessity continue common by the law of nature ... or property common to everybody. And while so flowing, being common property, everyone has equal rights therein or thereto, and may alike exercise the same privileges and prerogatives in respect thereto, subject at all times of course to the same rights in others ... *** And so, while water is still in the public, everyone may drink or dip therefrom or water his animals therein, subject to the limitations above noted ...

Adams, 72 P.2d at 648, 652-53 (emphasis added) (dispute over use of stream by landowner where water was appropriated by others). VRA and *amicus* dismiss *Adams* as dicta, even though the public's right to use public waters in place was squarely at issue in *Adams*.

Adams was not the first time this Court recognized the public's right to use its public waters in place. *See e.g., Salt Lake City*, 67 P. at 677 (natural waters are, until diverted, "public juries [*sic*], and others have the same right to use it as the [appropriator]"). Nor was it the last.

In 1953, this Court held that because a public prescriptive easement afforded public access to a spring otherwise located entirely on private land, the public had the right to access and use those waters in place, stating:

It is settled law in Utah that one acquiring title to public lands does not also acquire title or interest in or to the water flowing upon that land. [citations omitted] *** [S]uch water is still unappropriated public water and we conclude that [the wool growers] have an equal right with all other members of the public, including the [landowner], to use the water as they desire until a superior right to such water is established.

Deseret Live Stock Co. v. Sharp, 259 P.2d 607, 611 (1953).

Thirty years later, this Court, quoting *Adams* extensively and citing *Deseret*, confirmed and further defined the Easement.

Although ‘navigability’ is a standard used to determine title to waterbeds ... it does not establish the extent of the State’s interest in the waters of the State. *See* Comment, *Basis for the Legal Establishment of a Public Right of Recreation in Utah’s Non-Navigable Waters*, 5 J. Contemp. L. 95 (1978). ***

The doctrine of public ownership is the basis upon which the State regulates the use of water for the protection of the people. *** A corollary of the proposition that the public owns the water is the rule that there is a *public easement* over the water regardless of who owns the water beds beneath the water. Therefore, public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters. ***

Irrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water. *** The right to use public waters for pleasure purposes is no less a right just because some landowners, for reasons sufficient to themselves, prohibit public access over their land to reach those public waters.ⁿ⁶

ⁿ⁶ As to whether the public has an easement in the beds of streams and lakes, we express no opinion.

J.J.N.P., 655 P.2d at 1136-38 (internal citations omitted) (emphasis added) (private landowner seeking to exclude public from natural lake).

In 2008, citing *Adams* and *J.J.N.P.*, this Court again confirmed that the public’s easement to use public waters in place was rooted in the doctrine of public ownership

and further defined the scope of the easement. *Conatser*, 2008 UT 48 at ¶8. At issue in *Conatser* was whether the public’s easement to lawfully access and use its public waters in place included a right to touch the privately-owned streambeds when public waters. This Court answered in the affirmative.

An easement gives rise to two distinct property interests: a ‘dominant estate,’ that has the right to use the land of another and a ‘servient estate,’ that permits the exercise of that use. ***

[A]n easement holder has the right to make incidental uses beyond the express easement and does not exceed the easement’s scope if those uses are made in a reasonable manner and they do not cause unnecessary injury to the servient owners. ***

2008 UT 48, ¶¶ 20-21 (internal quotes and citations omitted).

We hold that the scope of the easement provides the public the right to float, hunt, fish, and participate in all lawful activities that utilize the water. We further hold that the public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement, so long as they do so reasonably and cause no unnecessary injury to the landowner.

Id. at ¶30.

VRA and *amicus* ask the Court to overturn this precedent as well. Declining the same request below, the district court properly held that the Easement, as a corollary right to the public’s ownership of water, was rooted in natural law, not statute.

C. The Easement is Rooted in the Utah Constitution

1. The Easement is Rooted in [Article XVII, Section 1](#)

[Article XVII, Section 1 of the Utah Constitution](#) reads as follows:

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.

In *Adams*, this Court held that the public’s right to use its public waters in place – the Easement – was recognized and confirmed in [Article XVII](#):

[W]hile water is still in the public, everyone may drink or dip therefrom or water his animals therein, subject to the limitations above noted *This right of the public, as well as the rights of the appropriator, were confirmed in the State Constitution in art. XVII*

Adams, 72 P.2d at 653 (emphasis added). Citing *Adams* and other precedent of this Court and the parties’ stipulated facts regarding Utah’s historical use of their public waters in place, the district court agreed. (Facts at 1-15)

The Court’s decision in *Adams* is in keeping with this Court’s approach to interpreting Utah’s Constitution:

[I]n interpreting the constitution, we consider all relevant factors, including the language, other provisions in the constitution that might bear on the matter, historical materials, and policy. [citation omitted] Our primary search is for intent and purpose. Consistent with this view, this court has a very long history of interpreting constitutional provisions in light of their historical background and the then-contemporary understanding of what they were to accomplish.

In re Young, 1999 UT 6, ¶ 14, 976 P.2d 581, 586-587. In short, the first place Utah courts look is to the Constitution’s “plain language.” *In re Worthen*, 926 P.2d 853, 866 (Utah 1996) (quoting *CIG Exploration, Inc. v. Utah State Tax Comm’n*, 897 P.2d 1214, 1216 (Utah 1995) (internal brackets omitted)). If the Constitution’s plain language is unambiguous, the inquiry ends. *State v. Willis*, 2004 UT 93, ¶4, 100 P.3d 1218. In ascertaining the provision’s plain meaning, each word used is given “its ordinary and accepted meaning” at the time it was used. *State v. Holm*, 2006 UT 31, ¶16, 137 P.3d 726. And, “[w]hile many definitions are possible, Webster’s is representative of what is understood by the word in modern usage.”). *Id.* at ¶19.

Here, VRA and *amicus* claim that [Article XVII](#) doesn't mean what it says – that, *inter alia*, 'all existing rights' does not mean 'all existing rights,' that 'any useful or beneficial purpose' does not mean 'any useful or beneficial purpose.' In today's vernacular, those phrases and the rest of [Article XVII](#) are undeniably unambiguous and, as it turns out, they meant the same thing in 1896 as they do today.²⁰

Utah's historic public uses of public waters in place – fur trapping, railroad tie drives, fishing for food or fun, stock watering, floating, swimming and wading – were “useful or beneficial use(s)” of water in their day and in 1896. Are not those uses that continue today still “useful or beneficial?” Or is the issue – as the Act essentially states and this Court said in *J.J.N.P.* – “because some landowners, for reasons sufficient to themselves,” don't want the public accessing and using their public waters where those waters traverse private beds? *J.J.N.P.*, 655 P.2d at 1138.²¹

²⁰ *Webster's Complete Dictionary of the English Language* (1886):

“All” – “Every one; the whole number; the whole quantity”

<https://archive.org/stream/websterscomplete00webs#page/36/mode/2up>

“Any” – “One out of many, indefinitely; an indefinite number or quantity”

<https://archive.org/stream/websterscomplete00webs#page/60/mode/2up>

“Beneficial” – “Conferring benefits; useful, profitable; helpful; contributing to an valuable end” <https://archive.org/stream/websterscomplete00webs#page/124/mode/2up>

“Useful” – “Full of use, advantage or profit, power to produce good, helpful towards advancing any purpose”

<https://archive.org/stream/websterscomplete00webs#page/1456/mode/2up>

²¹ Make no mistake, VRA and other landowners desire to keep Utah's public waters and their wild trout to themselves, and profit while they do so. (*See e.g.*, TE 7.1-7.2)

Having all but ignored the plain language of both [Article XVII](#) and *Adams*, VRA and *amicus* claim that *Adams* dealt only with appropriative uses. In reality, they again ask the Court to overturn *Adams*, as *Adams* (and *Deseret*) recognized the public's right to lawfully access and its use of public waters in place so long as it did not prejudice the rights of a downstream appropriator. *Adams*, 72 P.2d at 652-53; *Deseret*, 259 P.2d at 611. The public uses in question (*e.g.*, camp water and stock watering) simply provided context and the Court did not suggest otherwise. Nonetheless, VRA and *amicus* argue that because the Court did not mention non-consumptive uses such as fishing – uses which on their face would be less offensive to an appropriator – it intended to exclude these and other non-consumptive uses. Why this is so, they do not and cannot say.

Similarly, they claim that because the Constitutional Convention did not discuss the public's right to use public waters in place when debating [Article XVII](#) – only certain appropriative uses – the framers intended to exclude that public right from [Article XVII](#). The district court rejected this argument as the framers conceptually discussed both consumptive and non-consumptive water rights. ([R.0744](#)) Again, VRA and *amicus* offer no explanation as to why the framers would have such an intent, let alone evidence that they did. Nor do VRA or *amicus* offer any legal authority for the proposition that the framers, in recognizing and confirming “[a]ll existing rights to the use of any of the waters in this State for any useful or beneficial purpose” intended to include only *some* existing rights and only *some* useful or beneficial purposes, and exclude others – that silence equals an intent to exclude something from “all” or “any.” But if they're correct, existing rights, whether public or private, to use water for ‘domestic’ purposes were

excluded from [Article XVII](#), as the framers did not mention ‘domestic’ uses during the Convention. And so were water rights to use water for “power generation”, which also were never mentioned during the Convention. *See e.g., Salt Lake City Water & Elec*, 67 P. 672.

In short, VRA and *amicus* ask this Court to overturn *Adams* and ignore [Article XVII](#)’s plain language (as they do) and history (as they have). And, hoping the Court does so, they ask the Court to conclude, despite a complete lack of supporting evidence or authority, that the framers, in wording [Article XVII](#) as they did, in fact affirmatively intended to only protect certain existing rights to use water, but not others, to protect only private rights, not public rights, and, specifically, to exclude the public’s right to lawfully access and use its public waters in place.

2. The Easement is Rooted in [Article I, Section 25](#)²²

[Article I, Section 25](#) of the Utah Constitution reads:

This enumeration of rights shall not be construed to impair or deny others retained by the people.

The Easement’s place in Utah’s history and its recognition by this Court are indisputable. Whether or not it was recognized and confirmed in [Article XVII](#)’s plain language it was and is a right retained by the people given [Article I, Section 25](#)’s all-encompassing

²² This argument was made to the district court in dispositive motion memoranda ([R.0185, 0663](#)) and this Court can affirm the district court’s final judgment on this basis as well. *See e.g., Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158, 1162-63 (appellate court can affirm judgment on any ground or theory apparent on the record).

language. Concluding otherwise would require the Court, yet again, to ignore history and the plain language of [Article 1, Section 25](#).

II. THE EASEMENT IS A PUBLIC TRUST RESOURCE

A. The Source and Scope of Utah’s Public Trust Doctrine

The public trust doctrine began as an ancient common law principle that required certain public resources be held and managed in trust for the benefit of the people. Like the doctrine of public ownership of natural waters, its roots can be traced from natural law, through Roman law and English common law and into early American jurisprudence.²³ The public trust doctrine originally developed to protect the public interest in commerce, *fishing* and navigability on or in waters affected by the tide and, in this manner, tidal lands as well. [Arnold v. Mundy](#), 6 N.L.J 1, 76-77, n. 1, 10 Am. Dec. 356, 368 (1821); [Martin v. Wadell](#), 41 U.S. (16 Pet.) 367, 418 (1842). In time, the doctrine made its way inland, where it was applied to non-tidal navigable waters and their beds. [Illinois Central Railroad v. Illinois](#), 146 U.S. 387 (1892). Today, as demonstrated *infra*, it has been further expanded in Utah and other states well beyond commerce, *fishing* and navigation on navigable waters.

[Illinois Central](#) is generally viewed as the seminal case on the public trust doctrine. However, [Illinois Central](#) is binding only in matters involving the equal footing doctrine and navigable-for-title waters. Otherwise, “[u]nder accepted principles of

²³ See, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-478 (1970); [Arnold v. Mundy](#), 6 N.L.J 1, 76-77, 10 Am. Dec. 356, 368 (1821).

federalism, the States retain residual power to determine the scope of the public trust over waters within their borders.” *PPL Montana LLC v. Montana*, 132 S.Ct. 1215, 1234-35, 182 L. Ed. 2d 77 (2012).

Consistent with this principle, this Court has recognized that the public trust doctrine applies in several arenas:

- Sovereign and other lands acquired by the State. *Article XX, Section 1* of the *Utah Constitution*; *Colman v. Utah State Land Board*, 795 P.2d 622, 634 (Utah 1990).
- School trust lands. *Article XX, Section 2* of the *Utah Constitution*. *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918 (Utah 1993)
- Public waters. *Uintah Basin*, 2006 UT 19 at ¶34 (“The State, acting as trustee rather than owner, has assumed allocating the use of the water for the benefit of all the people.”); *see also*, *J.J.N.P.*, 655 P.2d at 1136; *Tanner v. Bacon*, 136 P.2d 957, 966 (Utah 1943) (Larson, J., concurring).
- “[T]he ecological integrity of public lands *and their public recreational uses* ...” *National Parks*, 869 P.2d at 919 (internal citation omitted; emphasis added).

Clearly, in the Court’s mind, Utah’s public trust applies to the public’s interests in its public trust lands, public waters and their use.

B. Public Waters that Traverse Private or Non-Federal Public Streambeds Are the Relevant Trust Resource – not all Public Waters (Cross-Appeal)²⁴

The district court erred when it defined the relevant trust resource as all waters of the State. (*R.2014-2018*, 2608) By definition, the State’s public trust resources are those public resources that the State, as a matter of law, not only must *but can* hold and manage in trust for the public. So, while the State has authority to regulate the use of public

²⁴ While the district court defined the trust resource too broadly, it still found that the trust was violated and that ruling should be affirmed.

waters in trust for the people, that authority is not without limits. For example, it's sometimes subject to federal preemption (*e.g.*, Clean Water Act).

Similarly, just as the State has no authority to regulate access to federal lands (*e.g.*, lands the U.S. Forest Service, Bureau of Land Management, National Park Service, etc.), it also lacks authority to regulate access to public waters that traverse or are located on such lands (*e.g.*, non-navigable streams in Utah's five national forests or on BLM lands; Lake Powell and Flaming Gorge, Strawberry and Starvation Reservoirs). For these same reasons, the State may well have limited authority to enforce a public right of access on federally-owned beds of public waters.²⁵

Thus, while the Act and the district court (and even this Court's stream access caselaw) address stream access in terms of all public waters, as a matter of law any state legislation or court decision on stream access could only apply to public waters where the State has authority, as trustee or otherwise, to regulate public access. Those waters can't and don't include public waters traversing or located on federally-owned beds.

Stated otherwise, the relevant trust resource at issue here is, by definition, the resource as to which the State has authority to regulate and does regulate as to access²⁶ –

²⁵ The public would need no easement to access and use waters that traverse public beds as the public owns both the waters and the beds. However the public's right to use these public waters might be characterized, it is not an easement.

²⁶ This view is entirely consistent with that taken by the courts in other public trust cases – that the trust resource is the resource affected by the state action. *See e.g., Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435, 454-455 (1892)(trust resource is the portion of the bed of Lake Michigan sold, not all of Lake Michigan or all public waters of Illinois); *Kootenai*, 671 P.2d at 1087, 1092-93, 1095-96 (Idaho 1983)(trust resource is Lake Coeur d'Alene, not all public waters of Idaho); *Lake Delton*, 286 N.W.2d at 625-627 (Wisconsin 1979)(trust resource is Lake Delton, not all public waters of Wisconsin);

that is, public waters that are subject to the Easement, waters that traverse private or non-federal public streambeds.

C. The Easement, as an Interest in Land Otherwise Acquired, is Subject to the Public Trust under [Article XX of the Utah Constitution](#)

[Article XX, section 1 of the Utah Constitution](#) reads as follows:

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.

The district court ruled that the Easement, as an interest in land “otherwise acquired,” was subject to [Article XX, Sect. 1](#)’s public trust requirements.

VRA’s claim that Utah’s public trust doctrine applies only to the beds of navigable-for-title waters is simply wrong. VRA Brief at 27-30. On its face, [Article XX, Section 1](#) is much broader, encompassing “[a]ll lands ... granted by Congress, *and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired.*” *Id.* (emphasis added). VRA’s reliance for this proposition on [Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res.](#), 2013 WI 74, 833 N.W.2d 800, is misplaced. The court in [Rock-Koshkonong](#) held that Wisconsin’s public trust did not encompass non-navigable wetlands above the ordinary high-water mark (OHWM) of

[Weden](#), 958 P.2d at 283-84 (trust resource is County marine waters at issue, not adjacent marine waters of other counties); [Owsichuk v. State](#), 763 P.2d 488, 495–96 (Alaska 1988)(trust resource is wildlife management area at issue, not all of Alaska).

waters which are “*navigable in fact for any purpose.*”²⁷ *Id.* at ¶¶ 72-77 (citations and internal quotations omitted; emphasis in original). Stated otherwise, Wisconsin’s public trust is not limited to waters that are navigable-for-title. *Id.* at ¶ 76 (“any stream is ‘navigable in fact’ which is capable of floating any boat ... of the shallowest draft used for recreational purposes”). In short, Wisconsin, like Utah, applies the public trust to public waters that are navigable-for-title as well as waters that are not. They are not alone²⁸

Curiously, the Opposition does not challenge the district court’s ruling that the Easement, as an interest in land otherwise acquired, is subject to [Article XX](#). In fact, the State ignores it altogether. VRA only implicitly if erroneously challenges this conclusion by arguing that “[t]he public trust doctrine, however, is limited to sovereign lands and perhaps other state lands that are not subject to specific trusts, such as school trust lands”

²⁷ The OHWM is the extent of the public’s ownership of beds of navigable-for-title waters. It is also the extent of the public’s easement in other public waters in other jurisdictions. *See e.g., Rock-Koshkonong*, 2013 WI 74, ¶¶ 72-77; *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984); Idaho Code 58-1202(2). Here, the district court declined to define the Easement’s physical limits as extending to the OHWM. (R.2859-60; 2992-94, 3033, 3106-07, 3995-97, 4408, 4766-68, 4848-51) USAC asks the Court to do so here or to affirm and remand this issue to the district court for determination.

²⁸ *See e.g., Curran*, 682 P.2d at 171 (“[u]nder the public trust doctrine ... and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for non-recreational purposes.”); *Parks v. Cooper*, 676 N.W.2d 823, 833-836 (S.D. 2004) (non-navigable seasonal lakes); *Alaska Stat. Ann.* 38.05.965(13) (2004) (waters useful for landing and takeoff of aircraft); *Lamprey v. State (Metcalf)* (1893), 52 Minn. 181, 53 N.W. 1139, 1143 (“To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated...”).

but not, by implication, mere interests in land such as an easement. VRA Brief at 28, quoting *National Parks*, 869 P.2d at 919.

As it turns out, the State concedes in another matter before this Court that public easements and rights-of-way *are* encompassed by [Article XX](#). See, Reply Br. of State of Utah and Garfield County, *Garfield County v. U.S.*, No. 20150335-SC, pp. 13-16; USAC Addendum A000021-24. At issue in *Garfield* are public rights-of-way over federal lands, known as R.S. 2477 claims, which the State admits are “held in trust for the people and may be disposed of by the State (including via legislative enactment) only for the purposes for which they have been or may be granted—in this case public travel and access.” *Id.* As such, the State argues, a statute of limitations cutting off such claims would constitute an impermissible disposition under [Article XX](#). *Id.* (internal quotations omitted).

Since public rights-of-way granted by Congress over federal lands are encompassed by [Article XX](#), so too – as a gift of Providence and a principle of natural law – is the Easement. Similarly, as the State concedes in *Garfield*, because the State can only dispose of R.S. 2477 rights-of-way for the purpose for which the rights-of-way were acquired, so too is any State disposition of the Easement limited to the purposes for which it was acquired – public access to public waters. *Id.*

Further, in *Colman*, this Court recited a well-established rule that easements, even implied easements, are property interests protected from taking under [Article I, Section 22](#). 795 P.2d at 625-26. If privately held easements are protected from takings under Utah’s Constitution, a publicly held easement is an interest in land protected under

[Article XX, Section 1](#). In short, as the State acknowledges, the district court’s ruling that the Easement is encompassed by [Article XX, Section 1](#)’s broad language was correct.

D. The Easement, as a Right to Use Public Waters in Place, is Subject to Utah’s Common Law Public Trust²⁹

As demonstrated, in Pt. II.A., under the doctrine of public ownership of water, the State regulates the use of public waters as trustee for the benefit of the people. More specifically:

Due to the limited supply of water and its importance to the people of this State, it has wisely been provided that this resource shall be so used *as to best subserve the needs of the people* and the development of the state, *to the end that no one shall acquire a dominating right to such use of water as will* retard the maximum development of the state’s resources, or curtail the satisfaction of the people’s needs *in the things most important to their sustenance, development and happiness*. *** The state, as trustee for the people, must so administer its trust as to not permit its misuse, *or its use in any way adverse to the interests of the public*.

[Tanner v. Bacon](#), 136 P.2d 957, 966 (Utah 1943)(Larson, J., concurring)(emphasis added). Thus, as trustee charged with regulating the Easement and other uses of public waters, the State is bound to regulate that easement, it at all, for the benefit of the people, to best subserve their needs, and to not curtail the satisfaction of those needs in the things most important to their sustenance, development and happiness. *Id.*³⁰ As noted in is Point II.C., other states apply common law public trust principles to all waters accessible to the public under state law, not just navigable-for-title waters.

²⁹ This argument was presented to but not ruled on by district court. ([R.0198-99, 0783-84, 0878](#)). See fn. 10.

³⁰ See also, Pt. III., *infra*.

E.g., State v. Public Service Commission, 275 Wis. 112, 81 N.W.2d 71, 74 (1957); *see also* fn. 28, *supra*. This Court should not hesitate to do the same.

III. THE DISTRICT COURT CORRECTLY APPLIED THE PUBLIC TRUST

As demonstrated in Point II.C., *supra*, the Easement is a constitutionally-recognized public right to lawfully access and use public waters in place where they traverse or are located on private or non-federal beds, and to reasonably touch the beds of those waters in ways incident to that use. As such, the district court properly ruled that the Easement was an interest in land otherwise acquired is subject to the public trust under [Article XX](#). Further, as demonstrated in Point II.D., *supra*, the Easement, as public right to use public waters in place, is subject to Utah’s common law public trust doctrine.

Whether viewed in the context of [Article XX](#) or Utah common law, the primary public trust duty of the State is the same – the State must hold and manage the Easement and other public trust resources for the sole benefit of the people, and this Court has so held:

The duties of a trustee apply to the state in administering ... trust lands. *** All trustees owe fiduciary duties to the beneficiaries of the trust. The duty of loyalty requires a trustee *to act only for the benefit of the beneficiaries* and to exercise prudence and skill in administering the trust. These are legally binding duties, enforceable by those with a sufficient interest in school trust lands to have standing.

National Parks, 869 P.2d at 918 (internal citation omitted)(emphasis added).

Operating from this premise in its [Article XX](#) public trust analysis, the district court asked four questions, which it based in *Illinois Central*:

- Whether the Act regulates interest protected by the public trust?
- Whether the Easement was disposed of for the purposes it was acquired?

- Whether the state has given up its right of control over the Easement?
- Whether disposal of the Easement promoted the interests of the public or was accomplished without substantial impairment of the public interest in the lands and waters that remain?

(VRA Addendum at A0000071-72)

The Opposition claims, citing *Illinois Central* and *Colman*, that the district court should have stopped and dismissed USAC’s case when it originally ruled that the Act did not ‘dispose’ of the Easement. (State Brief at 14, VRA Brief at 32-33, *Amicus Brief at 20*) Similarly, they argue that the district court should have stopped and dismissed USAC’s case when it ruled that the Act did abdicate the State’s control of the Easement. (State Brief at 17-19, VRA Brief at 33, *Amicus Brief at 20*) Stated otherwise, they argue that so long as the State does not alienate the trust resource and retains authority to “undo” whatever action it takes, it can as trustee of the public trust do what it will with the trust resource, even if to the clear detriment of the public. *Id.*³¹

While USAC addresses the fallacy of these arguments in further detail in Pt. IV, *infra*, suffice it to say here that their view of the State’s duties as trustee of the public trust falls far short of this Court’s view as stated in *National Parks*, 869 P.2d at 918, and *Tanner*, 136 P.2d at 966 (Larson, J., concurring), even if *Illinois Central* and *Colman* say what they claim. Indeed, this Court expressly rejected the Opposition’s suggestion that

³¹ It is judicial review of legislative action affecting the public trust unburdened by trust principles that *amicus* characterizes as “an unworkable regime of judicial oversight of legislative function.” *Amicus at 14*. As the district court recognized, it is precisely this type legislative action that *demand*s judicial oversight if the public trust is to mean anything. (R.2642)

the State, as trustee, “can use the trust corpus for its own purposes during possession and that the trust obligations attach only on disposition of trust assets ...” *National Parks*, 869 P.2d at 918, n.7.

But in fact, neither *Illinois Central* nor *Colman* say what they claim. Specifically, *Illinois Central* says that the public trust is invoked when – but not *only* when – the State disposes in fee or abdicates control of the trust resource. *Illinois Central* 146 U.S. at 458. Similarly, this Court did not as the Opposition claims invoke the public trust in *Colman* because the State, in granting the lease at issue in *Colman*, had ‘disposed’ or ‘abdicated control’ of the trust resource. State Brief at 33-34; VRA Brief at 36-37. This Court simply did not characterize the lease in *Colman* as a disposition or alienation of the resource. Further, neither the word ‘abdicate’ nor any of its derivatives or synonyms can be found in *Colman*; and nowhere is ‘control’ used in the context that the Opposition suggests. Instead, this Court invoked the public trust in *Colman* because the State had leased a trust resource and remanded the case to determine whether the lease “rights” granted by the State impaired the public’s interests in that resource. *Colman*, 795 P.2d at 635-636.³²

Paradoxically, after claiming that a lease invoked the public trust in *Colman*, VRA argues in succeeding paragraphs that leases of public trust property in other jurisdictions did not invoke the public trust because they entailed neither a disposition nor abdication

³² In short, if *Illinois Central* is controlling as the Opposition claims, then it does not stand for what they claim, as this Court applied its public trust principles to a lease involving neither a disposition in fee nor abdication of control in *Colman*.

of control. *Id.* at 37. In fact, leases and similar actions affecting public trust resources in other jurisdictions can and do invoke the public trust.

For example, the Wisconsin Supreme Court applies a multi-faceted test in weighing whether state action involving a public trust resource violates the public trust:

- whether public bodies will control the use of the area
- whether the area impacted will be devoted to public purposes and open to the public
- whether the diminution of trust resource will be very small when compared with the whole of the resource
- whether any public uses of the lake as a lake will be destroyed or greatly impaired and
- whether the disappointment of those members of the public whose interests are impaired is negligible when compared with the greater convenience afforded members of the public benefitted by the proposed changes

State v. Public Service Commission, 81 N.W.2d at 74 (proposal to dredge small bay (1.25%) of public lake to create public park and facilities); *see also*, *State v. Village of Lake Delton*, 286 N.W.2d 622, 632 (Wisconsin 1979) (impact of ordinance granting commercial license to use and regulating use of portion of small bay of Lake Delton).

Similarly, the Idaho Supreme Court applied a five-factor test in weighing whether a state lease of a 4.5 surface acres (0.01%) of Lake Coeur d'Alene for construction and operation of a private yacht club's dockage facilities "impaired" the public trust:

- the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce
- the impact of the individual project on the public trust resource
- the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource, *i.e.* in this instance the proportion of the lake taken up by docks, moorings or other impediments

- the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, *i.e.* commerce, navigation, fishing or recreation and
- the degree to which broad public uses are set aside in favor of more limited or private ones

Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d at 1092-93.

In short, the district court did not err when it applied the public trust. *See also*, Point IV, *infra*. While that trust requires the State, at a minimum, to ‘hold’ public trust resources for the benefit of the public, it also requires that the State, should it take *any* action regarding a public trust resource, do so only for the benefit of the public.

IV. THE DISTRICT COURT CORRECTLY RULED THAT THE ACT VIOLATED THE PUBLIC TRUST

According to this Court, the State’s over-arching duty as trustee of the public trust is to act only for the benefit of the trust’s beneficiaries, the people. *National Parks*, 869 P.2d at 918. According to the Opposition, all the Act does is ‘regulate’ the public’s constitutional Easement, ‘balance’ the public’s interest therein with the interests of private landowners, and serve other public interests. State Brief at 23-30; VRA Brief at 30-29; *Amicus Brief* at 14-20. Framed in this manner, the district court closely scrutinized the Act applying public trust principles.³³

³³ *Kootenai*, 671 P.2d at 1092 (courts will take at “close look” at whether “impairment” of trust resource violates the public trust); *Owsichuk, supra*, 763 P.2d 488 (courts will “closely scrutinize” state action affecting the public trust).

What the Act Does

On Its Face

On its face, the Act:

- prohibits and criminalizes, absent landowner permission, access to and use of public waters traversing private streambeds, excepting only floating ([Utah Code Ann. 73-29-201](#))
- delegates to private landowners the authority to decide whether or not the public may use its public waters where they traverse private beds, excepting only floating (*Id.*)
- limits floating of public waters traversing private bed to waters that are ‘floatable’ and allows fishing while floating, but prohibits and criminalizes, absent landowner permission, stopping or touching of the streambed except as necessary for safe passage and continued movement (*Id.* at 73-20-202)

As Applied – According to Record Marshaled by the Opposition

According to the record evidence cited by the State and VRA, the Act prohibits and criminalizes, absent landowner permission and except for floating, access to and use of some 2,700 miles (42%) of Utah’s estimated 6,400 miles of fishable rivers and streams (“fishable rivers and streams”). ([R.2654, 2659](#)) In short, based on available miles, angling pressure on the remaining 3,700 miles of fishable rivers and streams traversing public beds increased 73% (*i.e.*, $6,400/3,700 = 1.73$). The 73% increase in angling pressure is likewise reflected in the number of licensed anglers per mile of fishable river and stream (*i.e.*, 60 to 105³⁴) and licensed anglers who prefer stream fishing per mile (*i.e.*, 25 to 44; $161,000/3,700 = 44$). (VRA Brief at 11)

³⁴ *Cf.* Facts at 38.

Against this backdrop, 232,000 *resident* anglers (66%) would fish the 2,700 miles if they could but, because they can't, they are forced to fish the remaining 3,700 miles of fishable rivers and streams, if they fish at all. (R.2655).³⁵ As VRA concedes, the increased angling pressure on these remaining waters has resulted in stream anglers having difficulty finding a place to park, finding water (*i.e.*, a 'run' or 'hole') to fish, anglers encroaching on waters other anglers are fishing, and deterioration of the resource. (VRA Brief at 10-11; R.2986, 3019-20, 3114, 3182, 4117)

As Applied – Balance of Record not Marshaled by the Opposition³⁶

As applied – according to record evidence ignored by the State and VRA – the Act had these *further* impacts:

- The Act prohibits and criminalizes, absent landowner permission and except for floating, access to and use of some 49 miles (56%) of the main stem Provo River's 88 miles of fishable water, including where it traverses VRA's property. (Facts at 25)
- The Act prohibits and criminalizes, absent landowner permission, all public access to and use of 2,231 of the 2,700 miles of fishable rivers and streams traversing private streambeds (*i.e.*, 35% of all fishable rivers and streams), as only 469 miles (at most) of the 2,700 miles are floatable (R.2615), and then only seasonally, and few if any of these 469 miles can be fished while floating without stopping or touching the streambed. (*Id.* at 26)

Again, because fishable rivers and streams that traverse or are located on private and non-federal beds are the only waters where the Easement can and does apply, those waters are the relevant trust resource. As such, the above-referenced facts pertain directly and

³⁵ VRA mistakenly characterizes the Southwick Survey as encompassing all Utah anglers. (*i.e.*, resident and nonresident). It only encompasses resident anglers. (R.2406, TE 8 at 2)

³⁶ Because the State and VRA failed to marshal and distinguish this evidence in their principle briefs, they are precluded from doing so in reply. *See*, Point V., *infra*.

solely to the Act's impact on the relevant trust resource and, as is clear, little remains of the public trust resource.

Assuming that the trust resource is all fishable rivers and streams (or even all public waters), the additional record evidence,³⁷ most of it uncontroverted, of the Act's substantial impairment of the public's interest in the fishable rivers and streams that traverse public streambeds (*i.e.*, that "remain") includes:³⁸

- Prior to the Act, anglers had more river and stream angling opportunities. After the Act, it's challenging to have a good fishing experience. (Facts at 24)
- Seventy-three percent (73%) of Utah *resident* anglers (242,000) fished Utah's rivers and streams between January-October 2009, 45% of whom (109,000) knowingly fished streams that traversed private streambeds. (*Id.* at 28)
- Several anglers noticed definite increases in angling pressure on rivers and streams traversing public beds following the Act. (*Id.* at 29)
- In 2011-12, angling pressure on some rivers streams averaged from 215 to 596 anglers/day, 365 days a year. (*Id.* at 28) Depending on the stream's mileage, this translated to an average of 13 to 31 anglers/mile/day, 365 days a year. (*Id.* at 30)
- While not all of these anglers were on the river all day every day, angling pressure was likely higher when fish were feeding and lower when they were not, and during warmer months. (*Id.* at 31)
- VRA closes the Provo River where it flows through Victory Ranch to fishing by its owners/guests July-August and limits owner and guest anglers to 18 anglers/day or five anglers/mile the other ten months. (*Id.* at 32)
- Most Utah anglers (*i.e.*, 61% or 259,000 anglers) prefer solitude when fishing and have "a substantial aversion ... to fishing in crowded settings." (*Id.* at 33)
- Half of Utah anglers (212,000 anglers) prefer to fish only where they can have the fishing experience they prefer. (*Id.* at 34)

³⁷ Evidence annotated to "VRA Brief" has been acknowledged to one extent or another by VRA or the State.

³⁸ While the district court declined to characterize this evidence as demonstrating "crowding," it still speaks to the Act's substantial impairment of the waters that remain.

- VRA markets Victory Ranch as a place where its owners/guests can find solitude while fishing for trophy trout. (*Id.* at 35)
- Among anglers who prefer river and stream fishing, Utah had 25 anglers/mile before the Act and 44 anglers/mile after the Act. (*Id.* at 36; VRA Brief at 11)
- Among anglers who fish both flatwater and rivers and streams, Utah had 34 anglers/mile before the Act and 59 anglers/mile after the Act. (Facts at 37)
- Utah had 60-66 anglers/mile of fishable river or stream prior to the Act and 105-115 anglers/mile after the Act. (VRA Brief at 11; TE 8 at 5; Facts at 38)
- Montana and Idaho, which have more, larger and longer fishable rivers and streams, had 13 and 17 licensed anglers/mile, respectively. (*Id.* at 39)
- Many of Montana's and Idaho's cold-water rivers and streams can be effectively fished from a drift boat or similar craft, while only one Utah river can. (*Id.* at 40)
- Utah's rivers and streams, being substantially smaller and shorter than those in Montana and Idaho, have substantially less carrying capacity – that is, a typical river or stream in Montana and Idaho, can handle substantially more anglers per mile than a typical river or stream in Utah. (*Id.* at 41)
- After the Act, many anglers fishing streams traversing public streambeds (*i.e.*, 21% to 65%, depending on the river or stream) reported that crowding negatively impacted their angling experience. (*Id.* at 42)
- Increased angling pressure on rivers and streams that remain publicly-accessible after the Act is causing significant 'wear and tear' on the resource. (*Id.* at 43)
- A substantial majority of Utah anglers (*i.e.*, 70%, ±297,000 anglers) reported that private property restrictions limited access to their preferred fishing locations. (*Id.* at 44)
- The 0.7 miles that VRA has enrolled in the state's Walk-in-Access Program, like the rest of the Provo River traversing VRA's property, is very difficult to access and wade fish. (*Id.* at 45)

The State and VRA criticize the record evidence *that they marshaled* as being inadequate to support the district court's finding of substantial impairment.

First, they claim that the evidence of the Act's impact was incomplete as it did not encompass all uses of all public waters. State Brief at 36; VRA Brief at 10, 44. This is a

red herring. The Act targeted the only waters to which the Easement could and did apply ... public waters that traverse private beds. *See*, Point II.B. As intended, as confirmed by every witness (with minor exceptions), the Act only impacts rivers and streams that traverse private beds. In doing so, as demonstrated above, it impacted hundreds of thousands of anglers who fish or prefer to fish Utah's fishable rivers and streams by placing almost half of those public waters off-limits and forcing anglers onto the remaining rivers and streams. Whether the Act may or may not have impacted other public uses of rivers and streams or lakes and reservoirs is irrelevant,³⁹ as the Act's impacts on hundreds of thousands of anglers and Utah's fishable rivers and streams (both those placed off-limits and those that remain) are sufficient in and of themselves to invoke and violate the public trust.

Second, contrary to VRA's assertion, the mileage figures used did not come from USAC alone. The State and USAC both calculated mileages based on mileage estimates generated by the State for public consumption and by USAC *using the State's data*.

(R.2613-14) Further, while the State and VRA claim that the estimated 2,700 miles of fishable rivers and streams traversing private beds supposedly included waters traversing

³⁹ Before or after that Act, hunters would likely not have used streams traversing private streambeds, as any game would either be located on (*e.g.*, deer) or fly-over (*e.g.*, waterfowl) private uplands when pursued or shot, raising trespass, safety and other concerns. After the Act, other uses of streams traversing private beds are, much like fishing, almost certainly out of the question, as it would be all but impossible to handle and discharge a firearm (hunting) or look at birds through binoculars (bird-watching) while simultaneously operating a canoe, kayak or other craft in a river, without stopping or touching the bed. *See also*, [Utah Code Ann. §73-29-102\(9\)](#).

beds owned by local governments, they could not say how many such miles there were, if any, or whether any such waters were accessible to the public. (R.4440-46) The State, in any event, treated any such waters as private. (*Id.*) Third, while the parties stipulated that 50 miles of fishable rivers and streams traversing private beds were enrolled in the state's Walk-in-Access program at the time of trial, the district court noted that these waters could be withdrawn at any time. (R.2615, 2655) ⁴⁰ Fourth, contrary to VRA's assertion, several miles of streams where the public has easements are counted as public by the State, not private, and it has not demonstrated otherwise. (R.4440-46) The district court reasonably determined that the mileages was the best source regarding the Act's impact. (R.2645)

VRA also complains that USAC failed to demonstrate which of the 2,700 miles were or weren't publicly accessible depending upon "whether a property owner has cultivated or marked her property with no trespassing signs." (VRA Brief at 44) Yet another red herring. Cultivating or posting one's property are but two of several ways a property owner can restrict access. The Act defines "private property as to which access is restricted" by cross-referencing seven other provisions in the Utah Code, including six (6) provisions in the Utah Criminal Code dealing with criminal trespass. VRA Addendum at A000001 (Utah Code Ann. 73-29-102(5)). Distilled to its essence, "private property as to which access is restricted" is property that is: (a) tilled for raising crops; (b) used for raising crops; (c) artificially irrigated pastureland; (d) posted with signs

⁴⁰ The 50 WIA miles make little difference, as the numbers are 2,650 miles (41%) traversing private beds and 3,750 miles (59%) public beds.

reasonably likely to be noticed; or (e) fenced or enclosed in a manner to exclude intruders (as opposed to enclose or contain something or someone).

As the district court heard, if property is fenced the public moves on rather than risk a confrontation or trespass citation. (*Id.*, [R.2963-2964](#), [3089](#), [4010](#), [4670](#)) Further, property that is not ‘posted’ today may be ‘posted’ tomorrow or a landowner may allow the public to fish her water today but not tomorrow, and may treat someone else differently. It was *because* of this ‘fluidity’ (as VRA terms it) that the district court declined to require USAC to ‘chase its tail’ – on what waters that are accessible today, yesterday or tomorrow – and viewed the mileage estimates for what they were, a reasonable estimate of the fishable rivers and streams impacted directly and indirectly by the Act.

The State and VRA further cite the district court’s finding that the increased angling pressure and any over-crowding on remaining waters is attributable not just to the Act, but to, *inter alia*, increases in population and the popularity of fly fishing. State Brief at 37; VRA Brief at 13. Whatever its causes, increasing angling pressure on Utah’s remaining fishable rivers and streams is real and underscores the import of the 2,700 miles placed off-limits by the Act and the inescapable fact that the Act has exacerbated the problem by substantially increasing that pressure on and substantially impairing on the 3,700 miles of fishable rivers and streams that remain.

A. The Act Violates the Public Trust as It Serves No Public Trust or Greater Public Purpose, only Private Interests

On its face and as applied, the Act achieved its stated purpose: to legislatively overturn *Conatser* and *J.J.N.P.*, to subordinate whatever right the public may have to access and use public waters traversing private streambeds to the interests of private landowners, and to delegate authority to private landowners to decide whether the public might use its public easement on those waters.

If, as the Opposition claims, the Act merely ‘balanced’ public versus private interests, it did so solely on the back of the public, for the Act works solely to the detriment of the public and to the benefit of private landowners.⁴¹ In short, it violates this Court’s prime directive regarding the State’s duties in administering the public trust – to act only for the benefit of the public.

Further, as this Court has noted:

A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water. Therefore, public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters

J.J.N.P., 655 P.2d at 1136-38.

An easement gives rise to two distinct property interests: a ‘dominant estate,’ that has the right to use the land of another and a ‘servient estate,’ that permits the exercise of that use. ***

⁴¹ Further, if as *amicus* claims, the misconduct of a few violates the rights of landowners, the remedy is to hold those few offenders accountable to the fullest extent of the law, not abrogate the constitutionally-recognized right of hundreds of thousands of anglers to lawfully access and use their public waters in place.

[A]n easement holder has the right to make incidental uses beyond the express easement and does not exceed the easement's scope if those uses are made in a reasonable manner and they do not cause unnecessary injury to the servient owners.

Conatser, 2008 UT 48, ¶¶ 20-21.

Here, by definition, the Easement is the dominant estate and private streambeds are the servient estate. By subordinating the dominant estate to the servient estate, the Act turns the law of easements on its head and the State, in passing the Act, in further violation of its duty as trustee to act only for the benefit of the public.

B. The Act Violates the Public Trust as It ‘Disposed’ of the Easement in Violation of [Article XX](#) and Utah’s Common Law Public Trust Doctrine

As demonstrated in Point I.C., *infra*, when interpreting Utah’s Constitution, courts are to look first to the plain language of the constitutional provision, ascribing to its terms their ordinary and accepted meaning when they were used. Here again, *Webster’s Complete Dictionary of the English Language* (1886) helps, this time as to the meaning of the word ‘disposed’ as used in [Article XX of the Utah Constitution](#):

All lands of the State ... that may otherwise be acquired, are hereby accepted ... 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.

(emphasis added). The first three senses ascribed to the word “dispose” in *Webster’s* are:⁴² “*To distribute and put in place; to arrange, to set in order;*” “*To regulate;* to fix; to adjust; *to order;* to determine; to settle” and “*To deal out; to assign to a service or use; to bestow for an object or purpose; to apply; to dispose of.*” *Id.* (emphasis added).

⁴² <https://archive.org/stream/websterscomplete00webs#page/390/mode/2up>

Here, the purpose of the Easement was and is to allow the public to lawfully access and use their public waters in place for any lawful purpose. Thus, in the context of [Article XX](#), which provides that the Easement is (paraphrasing) ‘to be held in trust and disposed of ... for the purpose for which it was acquired,’ the district court correctly interpreted ‘dispose’ to mean “to order, control, regulate, manage.” (R.2641-45) Stated otherwise, the State as trustee is to hold the Easement for the purpose of public access to public waters and, should it choose to regulate the Easement, do so consistent with that purpose. This interpretation is entirely consistent with public trust principles in general and the duty of the State as trustee of the public trust – that trust resources be held and managed for the benefit of the public.

In contrast, interpreting ‘dispose’ to mean ‘alienate’ as suggested by the Opposition is a *non sequitur*. How can one read [Article XX](#) as requiring the State to both ‘hold’ and ‘alienate’ the Easement? How can one read [Article XX](#) as requiring the State to ‘alienate’ the Easement in the interest of public access to public waters? When dealing with the Easement which by definition benefits the people, the district court’s definition of ‘disposed’ in [Article XX](#) is the only definition that makes sense. Read in this context, the Act – by prohibiting and criminalizing, absent landowner consent, the public’s Easement rights on fishable rivers and streams that traverse private streambeds – on its face and as applied regulates the Easement in a manner wholly inconsistent with the purpose of the Easement. In doing so, it violates the State’s public trust duties under [Article XX](#) and Utah’s common law public trust to act only for the benefit of the public.

C. The Act Violates the Public Trust as It Unlawfully Delegates and Abdicates the State’s Authority, as Trustee of the Public Trust, to Private Landowners

Again, the Act prohibits and criminalizes, *absent landowner permission*, otherwise lawful public access to and lawful use of public waters that traverse “private ... property as to which access is restricted.” (*i.e.*, property that is: tilled for raising crops, used for raising crops, artificially irrigated pastureland, posted with signs reasonably likely to be noticed, or fenced or enclosed in a manner to exclude intruders (as opposed to enclose or contain something or someone). In short, the Act grants landowners sole discretion to decide for their own purposes whether the public gets to access and use its public waters where they traverse private streambeds. And as VRA and *amicus* have made clear, most landowners reject the very notion of this Easement and are interested only in keeping the public off “their” property.

Again, the State, as trustee of the public trust, owes a fiduciary duty to act only for the benefit of the public, the beneficiaries of the public trust. *See e.g., National Parks, 869 P.2d at 918.* Applied here, this principles required the State, when it chose to ‘regulate’ the Easement, to do for the benefit of the public. Assuming it is within the State’s power to delegate its authority as trustee of the public trust, the person to whom that authority is delegated owes those same fiduciary duties to the public.

Need it be said, in granting private landowners sole authority to decide whether the public can enjoy its Easement, the State not only failed to act for the benefit of the public, it acted to the sole *detriment* of the public. To be sure, it delegated – abdicated –

its authority as trustee of the Easement to persons who not only owe no duty to the public, enforceable or otherwise, but who are predisposed to ignoring it if they do.

In short, the Act unlawfully delegates and abdicates, to private landowners for purely private purposes, the State's authority and discretion, as trustee for the benefit of the public, to regulate public's use of public waters in place. *See e.g., Lake Michigan Federation v. United States Army Corps of Engineers*, 742 F. Supp. 441 (N.D. Ill. 1990) (legislation granting university authority to control access to public trust property violates public trust); *Muench v. Public Service Comm.*, 261 Wis. 492, 515, 55 N.W.2d 40, 46 (1952) ("It is a well-recognized principle of the law of trusts that a trustee ... cannot delegate to agents powers vested in the trustee which involve an exercise of judgment and discretion ..."); *see also, Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 523 (1970) (The public trust is a matter of statewide concern and "cannot be delegated by the state legislature to any group which is less broadly based.").⁴³

⁴³ *See also, Curran*, 682 P.2d at 170 (1984) ("If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people."); *Responsible Wildlife Mgmt. v. State*, 124 Wash. App. 566, ¶ 29 (2004) (Quinn-Brintnall, J., concurring) (disposition of public trust resource that substantially impairs access violates public trust doctrine).

D. The Act Substantially Impairs the Public's Interest in the Trust Resource Remaining

1. The District Court Did not Base Its Finding of Substantial Impairment “Solely” on the Numbers

Other courts of have wrestled with the substantial impairment issue and their experience is instructive. In these cases, where state action impacted all or a significant portion of the relevant trust resource, substantial impairment (or an outright give-away of the relevant trust resource) was found. *See, e.g., Illinois Central*, 146 U.S. 387 (fee title to the bed of Chicago's harbor); *Owsichuk*, 763 P.2d at 495–96 (guiding privileges monopoly in wildlife management area). Where, however, the state action at issue impacted only a small portion of the relevant trust resource, substantial impairment was not found. *Kootenai* 671 P.2d 1085, 1087, 1092-93 (lease of 4.5 acres (0.01%) of Lake Coeur d'Alene); *Lake Delton*, 286 N.W.2d at 625-627 (commercial lease/license of small bay); *Weden v. San Juan County*, 958 P.2d 273, 283-84 (Wash. 1998) (ordinance barring one of many public uses of marine waters).

Here, the Act, in placing 42% (2,700 miles) of Utah's fishable rivers and streams off-limits absent landowner permission, the Act impacts all 6,400 miles of Utah's fishable rivers and streams and the interests of hundreds of thousands Utah anglers who fish those waters. While the district court was clearly and justifiably troubled by the numbers, VRA's suggestion that the court based its finding of substantial impairment

“solely” on the numbers (and erred) is simply wrong.⁴⁴ The clearest evidence of this is the following observation made by the district court:

Every parcel of public land, every reach of public water is unique. If Wasatch, Kodachrome Basin, and Snow Canyon State Parks were disposed of for reasons unrelated to their acquisition, the public's right to recreate in other places would be little consolation.

(R.2659-60) In short, while the public can still find a waters to fish, the district court acknowledged that those waters may not offer the same experience or have the same meaning to an angler as did the waters s/he can no longer access. And while the district court did not find that the Act resulted in “crowding,” it heard ample evidence of substantially increased fishing pressure on remaining waters and took notice of the fact that compelling 100% of hundreds of thousands of stream anglers onto 58% of the water will substantially impair the public’s interests in those remaining waters.

2. The Act Substantially Impairs the Public’s Interest in What Remains of the Trust Resource

Here, where rivers and streams traversing private streambeds are the relevant trust resource, the district court properly ruled that the Act effectively disposed of the Easement to use that resource. Specifically, the only remainder of the Easement is a limited right to float 469 (17%) of these 2,700 miles if and when floatable, without stopping or touching the bed, with all other uses being all but impossible to enjoy. The remaining 2,231 miles of the relevant trust resource are off-limits altogether. To say that

⁴⁴ Notably, the Opposition cites no authority for its argument that finding substantial impairment based solely on empirical evidence is incorrect as a matter of law.

what remains of the public’s interest in these waters has been ‘substantially impaired’ would be a gross understatement.

But even if the trust resource is all rivers and streams or even all public waters, the Act, by disposing of the Easement on 2,700 miles (42%) of fishable rivers and streams, has pushed hundreds of thousands of river and stream anglers onto the 3,700 miles (58%) of water that remain and, as demonstrated in Point IV., *supra*, substantially impaired their interests in the use and enjoyment of those waters.

V. THE STATE AND VRA HAVE NOT MET THEIR BURDEN ON APPEAL

A. The State and VRA Fail to Marshal and Distinguish the District Court’s Factual Findings

[Rule 24\(a\)\(9\), Utah R. App. P.](#), states in part “[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” (emphasis added) [Rule 24\(a\)\(9\)](#)’s marshaling requirement and the import of an appellant’s failure to meet that requirement was recently revisited by this Court.

We ... reaffirm the traditional principle of marshaling as a natural extension of an appellant's burden of persuasion. Accordingly, *from here on our analysis will be focused on the ultimate question of whether the appellant has established a basis for overcoming the healthy dose of deference owed to factual findings ...*

[State v. Nielsen, 2014 UT 10, ¶41, 326 P.3d 645, 651-52](#)(emphasis added) ([Rule 24\(a\)\(9\)](#)

‘failure to marshal’ challenge in appeal from criminal conviction).

Thus, an appellant who seeks to prevail in challenging the sufficiency of the evidence to support a factual finding or a verdict on appeal should follow the dictates of [Rule 24\(a\)\(9\)](#), as *a party who fails to identify and deal with supportive evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues.*

Id. at ¶ 40 (emphasis added). Of particular import here, where VRA claims that the district court failed to resolve all reasonable doubts in favor of constitutionality. Specifically, when a trial court resolves an issue of fact, this Court will not reverse that finding unless the supporting evidence, when viewed with deference to the finding, “is sufficiently inconclusive or inherently improbable” that reasonable minds would have found differently. *Id.* at ¶46 (emphasis added).

Here, the Opposition challenges two core findings of fact of the district court. First, VRA (and *amicus*) challenge the district court’s ruling that the public’s right to lawfully access and use public waters in place for any lawful purpose was recognized and confirmed in [Article XVII of the Utah Constitution](#). VRA Brief at 16; *Amicus* Brief at 9. In doing so, they characterize the issue as a question of law. In reality, the issue presented a mixed question of fact and law and the district court resolved it on that basis. First, it found, based on stipulated and other uncontested historical evidence, that Utahns had regularly accessed and used their public waters in place, irrespective of bed ownership, prior to 1896. (R.0733) Based on this finding and this Court’s jurisprudence, the district court concluded that the public had and has always had an easement to access and use its public waters in place and that the easement was recognized and confirmed in the plain language of [Article XVII of the Utah Constitution](#). (R.0741-0748)

VRA ignores the record evidence supporting this district court ruling (as does *amicus*). Having failed to marshal and distinguish (*i.e.*, “ignored”) the factual underpinnings of the district court’s ruling that Article XVII recognized and confirmed

the public easement at issue, VRA has failed to meet its burden on appeal regarding this issue.

Similarly, the State and VRA challenge the district court's finding that the Act substantially impaired the public's interest in the waters that remained – that is, in the 3,700 miles (58%) of fishable rivers and streams not directly impacted by the Act. Here, while the State and VRA marshal and attempt to neutralize some of the evidence that supports the district court's ruling, they do not do so in the manner required. Specifically, rather than marshaling those selected facts as presented to the district court, they merely reference and then 'spin' those selected facts to support their argument.

More importantly, the State and VRA fail to marshal and distinguish significant additional record evidence that supports the district court's finding of substantial impairment. *See*, Point IV.A. – The Act as Applied – Balance of Record. Having failed to marshal and distinguish “all record evidence that supports” the district court's finding that the Act substantially impaired the public's interests in the 3,700 miles of water not disposed of by the Act, the State and VRA have failed to meet their burden on this issue and their appeal fails.

B. The State and VRA Fail to Demonstrate that this Court Should Overrule Its Precedent.

Like most every court, this Court recognizes the doctrine of *stare decisis*. *See, e.g., State v. Menzies*, 889 P.2d 393, 398-99 (1994). Under that doctrine, this Court is bound by the rule of law established in its prior cases “unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more

Exhibit C

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
WASATCH COUNTY

2012 MAY 21 PM 12: 26

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a Utah non-profit corporation, Plaintff(s), vs. ATC REALTY SIXTEEN, INC., a California corporation, et. al. Defendant(s).	<u>RULING AND ORDER</u> ON CROSS MOTIONS FOR SUMMARY JUDGMENT Case No. 100500558 Judge Derek P. Pullan
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Plaintiff Utah Stream Access Coalition ("USAC") moved for summary judgment. Defendants State of Utah ("the State") and ATC Realty Sixteen, Inc. ("ATC Realty") opposed the motion and filed cross-motions for summary judgment. Amicus Curiae Utah Alliance to Protect Property Rights ("the Alliance") filed a brief in support of House Bill 141 ("H.B. 141"), the statute challenged in this case.

The Court heard oral argument on March 9, 2012. USAC was represented by attorneys Craig C. Coburn and Martin B. Bushman. The State was represented by assistant attorney general Thomas D. Roberts. ATC Realty was represented by attorneys Eric P. Lee and Collin R.

Simonson. The Alliance was represented by attorneys Michael D. Zimmerman, Troy L. Booher and Christopher L. Stout.¹

RULING

Standard Applicable to Summary Judgment

Burden of Proof on Summary Judgment

A party moving for summary judgment must show that “there is no genuine issue as to any material fact and that [he] is entitled to judgment as a matter of law.” URCP 56(c).

Moving for summary judgment on one’s own claims “carries with it the burden of establishing a factual basis for judgment.” *Orvis v. Johnson*, 2008 UT 2, ¶14, 177 P.3d 600. Where the party moving for summary judgment would bear the burden of proof at trial, “the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law. . . . The burden on summary judgment then shifts to the nonmoving party to identify contested material facts, or legal flaws in the [moving party’s case].” *Id.*, 2008 UT 2, ¶10.

In other words, “if the moving party would bear the burden of proof on the relevant issue . . . then the movant has an affirmative duty to provide the court with facts that demonstrate both

¹ The Court notes for the record the exceptional written and oral advocacy presented by counsel for USAC, the State, ATC Realty, and the Alliance.

that the party is entitled to judgment as a matter of law and that there are no material issues of fact that would require resolution at trial.” *Id.*, 2008 UT 2, ¶19.

The burden of proof shifts when a party moves for summary judgment as to claims on which that party will not bear the burden of proof at trial. Clarifying confusion in prior cases, the Utah Supreme Court held in Orvis:

A summary judgment movant, on an issue where the nonmoving party will bear the burden of proof at trial, may satisfy its burden on summary judgment by showing, by reference to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there is no genuine issue of material fact. Utah R. Civ. P. 56(c). Upon such a showing, whether or not supported by additional affirmative factual evidence, the burden then shifts to the *nonmoving* party, who "may not rest upon the mere allegations or denials of the pleadings," but "must set forth specific facts showing that there is a genuine issue for trial." *Id.* (e). This is the correct application of *Harline*, and any subsequent cases applying *Harline* differently are incorrect.

Id., 2008 UT 2, ¶ 18. Thus, in contrast to federal law under Celotex Corp. v. Catrett, 477 U.S. 37 (1986), "Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the nonmoving party's case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact." *Id.*, 2008 UT 2, ¶16.

Duty To Comply With The Requirements of Rule 7

When a motion for summary judgment is made and supported by citation to relevant materials, an adverse party “may not rest upon the mere allegations or denials of the pleadings.” URCP 56(e). Rather, the non-moving party must “set forth specific facts showing that there is a genuine issue for trial.” *Id.* Rule 7 requires that for each of the moving party’s facts that is controverted, the non-moving party shall “provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials.” URCP 7(c)(3)(B).

If the non-moving party does not substantially comply with this requirement, then the moving party’s statement of undisputed facts may be deemed admitted. *See Bluffdale City v. Smith*, 2005 UT App. 25, ¶¶ 8, 11, 156 P.3d 175 (district court did not abuse its discretion when it granted Plaintiff’s motion for summary judgment based on Defendants’ noncompliance with rule 7(c)(3)(B)).

Standards Applicable To The Court

Finally, in ruling on a motion for summary judgment, the Court views the facts in the light most favorable to the non-moving party. Additionally, “the trial court must not weigh evidence or assess credibility.” *Wasatch Oil & Gas, L.L.C. v. Reott*, 2007 UT App. 223, ¶ 35, 163 P.3d 713 (quoting *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984)). Where “there are other equally plausible inferences to be drawn

from the evidence” summary judgment should not be granted. Id. (citing Ellsworth Paulsen Constr. Co. v. 51-SPR, L.L.C., 2006 UT App 353, P18, 144 P.3d 261).

In sum, the trial court must construe “[d]oubts, uncertainties, or inferences concerning issues of fact . . . in a light most favorable to the party opposing summary judgment,” Id. (quoting Mountain States, 681 P.2d at 1261).

Undisputed Facts

The parties have filed with the Court a Stipulated Statement of Undisputed Facts. This Statement is incorporated by reference into this Ruling and Order.

USAC filed a Supplemental Statement of Undisputed Material Facts consisting of seven paragraphs. The State and ATC Realty do not dispute these seven additional statements of fact.

Finally, in its reply memorandum, USAC submitted (1) the declaration of Robert C. Rodman and supporting documents tracing ATC Realty’s title back to the original patents; and (2) authenticated newspaper articles published in the 1880’s and 1890’s relating to non-consumptive use of the Provo River to float railroad ties from the headwaters of the river, through Wasatch County, to Provo.² (USAC Reply Memo, Exhibits 1 and 2).

² The newspaper articles constitute ancient documents admissible under Rule 803(16) of the Utah Rules of Evidence.

Conclusions of Law

Issues Presented

USAC seeks summary judgment declaring that:

- waters flowing in or impounded on Utah's rivers, streams and other natural water courses, including such courses if and to the extent realigned or channelized, are and have always been owned by the public, and as such are public waters;
- the public has an easement to use these public waters that includes a right to engage in all recreational activities that utilize the water;
- this easement includes the right to touch the privately owned beds of public waters in ways incidental to such uses, including the right to touch privately owned beds of public waters in ways incidental to all such recreational activities;
- the aforementioned rights are protected by the Utah Constitution, specifically: Article I, Sec. 25³, Article XVII, Sec. 1; and Article XX, Sec. 1; and
- Sections 73-1-1(2), 73-1-1(3), 73-29-201(3) and 73-29-202 of the Utah Code—enacted in 2010 by the Utah Legislature as part of H.B. 141—abrogate the foregoing public rights

³ USAC's argument that H.B. 141 violates Article I, Section 25 of the Utah Constitution has not been briefed adequately. Therefore, the Court declines to address this argument.

of use in violation of the Utah Constitution and the public trust doctrine, and are therefore void and unenforceable.

The State and ATC Realty oppose USAC's motion, and seek summary judgment in their favor. They contend that HB 141 is constitutionally sound. They argue that the public trust doctrine does not apply to non-navigable waters and the beds underlying those waters. In the alternative, they argue that H.B. 141 is consistent with the public trust doctrine.

The Alliance agrees with the State and ATC Realty, arguing that "the Utah Legislature acted well within its constitutional authority when it enacted HB 141, a statute which reflects policy choices striking an appropriate, practical balance between private and public interests." (Alliance Brief, p. 1).

USAC's Burden

Statutes are presumed constitutional. A party challenging the constitutionality of a statute must show that the statute clearly, completely, and unmistakably violates a specific provision of the Constitution or some plain mandate thereof. *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958, 961-62 (Utah 1968). Every reasonable presumption and every reasonable doubt must be resolved in favor of constitutionality. *Id.*

Conaster v. Johnson and HB 141

In 2008, the Utah Supreme Court decided the scope of the public's easement in state waters. *Conaster v. Johnson*, 2008 UT 48, 194 P.3d 897. The Court held that (1) the public's easement included the right to engage in all recreational activities that utilize the water, and is not limited to activities that can be performed "upon" the water; and (2) the public's easement included uses incidental to recreational uses, including the "right to touch privately owned beds below [public] waters in ways incidental to all recreational rights." *Conaster*, 2008 UT 48, ¶¶ 15, 19-28.

By enacting H.B. 141, the legislature intended to change the result in *Conaster*. The declarations in section 73-29-103 read like a dissenting opinion. The legislature declared: "The real and substantial invasion of private property rights did not occur with recognition of the right to float on water that passes over the land, but with the right, first recognized in *Conaster v. Johnson*, to physically occupy the land for an indeterminate time and for a wide range of activities by the public against the owner's will and without just compensation." UCA 73-29-103(5).

HB 141 was intended to (1) "[restore] the accommodation existing between recreational users and private property owners before the decision in *Conaster v. Johnson*;" (2) "affirm a floating right recognized by the court in *J.J.N.P. Co. v. State*;" and (3) "recognize adverse use as

a constitutionally sound and manageable basis for establishing a limited right of public recreational access on private property in accordance with this chapter.” UCA 73-29-103(6).

Lamenting its own inaction, the legislature opined that *J.J.N.P.* and *Conaster* created uncertainty as to the scope of the public’s recreational easement, and failed to address “the constitutional prohibition on taking or damaging private property without just compensation.” UCA 73-29-103(3)(4). In short, the *Conaster* Court got it wrong.

In the legislature’s view, constitutional provisions protecting private property “protect against government’s broad recognition or grant of a public recreation easement to access or use public water on private property.” UCA 73-29-103(1). “General constitutional and statutory provisions declaring public ownership of water and recognizing existing rights of use are insufficient to overcome the specific constitutional protections for private property.” UCA 73-29-103(2). These provisions “do not justify inviting widespread unauthorized invasion of private property for recreation purposes where public access has never existed or has not existed for a sufficient period and under conditions required to support recognition under this chapter.” *Id.*

Section 73-29-103 Violates Article V, Section 1 of the Utah Constitution

In section 73-29-103, the legislature purports to interpret the Utah Constitution, and to decide the constitutionality of H.B. 141. This violates Article V of the Utah Constitution which prohibits the legislature from exercising powers appertaining to the judiciary. Utah Const., Art. V, Sec. 1.

The United States Supreme Court laid this question to rest more than two hundred years ago in *Marbury v. Madison*:

The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these two alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. . . .

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered . . . as one of the fundamental principles of our society.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Marbury v. Madison, 5 U.S. 137 (1803).

Like the people of the United States who established the federal Constitution, “the people of Utah established the Utah Constitution as a limitation on the power of government.” *Colman*

v. *Utah State Land Board*, 795 P.2d 622, 634 (Utah 1990). In 1976, the Utah Supreme Court reiterated the “long established and universally recognized” principles set forth in *Marbury*⁴:

The purpose of a constitution is to provide an orderly foundation for government and to keep even the sovereign . . . within its bounds. Therefore, the legislative power itself must be exercised within the framework of the constitution. Accordingly, it has been so long established and universally recognized, as to be hardly necessary to state, that if a statutory enactment contravenes any provision of the constitution, the latter governs.

Id., quoting, *Dean v. Rampton*, 556 P.2d 205 (Utah 1976). Stated differently:

The preeminent obligation of judges in constitutional adjudication is to give force to constitutional provisions intended to protect the rights of the people against intrusions by majorities and overreaching special interests who misuse legislative powers to advance their private self-interests at the expense of liberties of the people. The meaning of the constitutional provisions that judges are under oath to apply is found first and foremost in the plain meaning of the constitutional language.

Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co., 1999 UT 18, 974 P.2d 1194, 1210 (Stewart, J., concurring).

⁴ These fundamental principles—or the seeming disregard of them—remain at the forefront of contemporary political commentary. See, Will, George, *Gingrich’s Attack on Courts is Not Conservative*, Washington, Deseret News (December 22, 2011) (“What primarily stands between us and misrule, however, is the Constitution, buttressed by an independent judiciary. . . . Judicial deference to majorities can, however, be a dereliction of the judicial duty to oppose actions irreconcilable with constitutional limits on what majorities may do.”); Will, George, *‘Cosmic Theory’ Answers Constitutional Questions*, Washington, Deseret News (April 20, 2012) (“Wilkinson is right that judges, comprising an elite and ‘introverted’ profession, are prone to misreading the values of the broader society. But even if judges read those values correctly, judicial restraint can mean giving coercive sweep to the values of contemporary majorities. That a majority considers something desirable is not evidence that it is constitutional.”).

A written Constitution is the highest form of legislation—the paramount expression of the people’s will. It places limits upon legislative, executive, and judicial powers. The legislature may enact statutes, but the judiciary has the inherent authority to determine what the Constitution means, and to determine whether a statute violates the Constitution. If the legislature could rule on the constitutionality of its own enactments, the Constitution would be little more than “an absurd attempt[], on the part of the people, to limit a power in its own nature illimitable.” *Marbury*, 5 U.S. 137 (1803).

When the legislature enacts a statute which purports to interpret the Utah Constitution, or to decide the constitutionality of a statute, it undertakes a core judicial function outside the scope of its constitutional authority. Article V, Section 1 of the Utah Constitution divides the powers of government into three distinct departments—the legislative, the executive and the judicial. “No person charged with exercise of powers belonging to one of these departments, shall exercise functions appertaining to either of the others.” Utah Const. Art. V, Sec. 1.

To the extent that section 73-29-103 purports to interpret the Utah Constitution or to decide the constitutionality of H.B. 141, it violates Article V, Section 1 of the Utah Constitution. At best, the statute constitutes an expression of legislative intent and nothing more.

On this issue, the Court grants USAC’s motion for summary judgment.

Article XVII, Section 1 Of The Utah Constitution
Recognized and Confirmed Public Ownership of Natural Waters
and The Public Easement Derived from That Ownership.

USAC contends that the public easement recognized in *Conaster* is not a creature of statute, but one of the existing rights of use recognized and confirmed in Article XVII, Sec. 1 of the Utah Constitution. USAC argues that by abrogating the *Conaster* easement, the legislature eliminated this constitutionally confirmed right of use in public waters. Specifically USAC challenges the following statutes:

- UCA 73-1-(2). “The declaration of public ownership of water in Subsection (1) does not create or recognize an easement for public recreational use on private property.”
- UCA 73-1-1(3). “The Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property.”
- UCA 73-29-201(3). “A person may not access or use a public water on private property for recreational purposes if the private property is property to which access is restricted, unless public recreational access is established under Section 73-29-203.”

- UCA 73-29-202. Recognizing a “right to float on public water that has sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating” and defining the scope of that right.

The State, ATC Realty, and the Alliance argue that Article XVII, Section 1 does not recognize or confirm a public recreational easement over privately-owned stream beds. They argue that (1) the plain language of Article XVII did not create new or additional rights; (2) the framers intended that Article XVII recognize only appropriation rights existing at the time of statehood, and left administration of water rights to the legislature; and (3) there was no public recreational easement at the time the Utah Constitution was adopted.

The State, ATC Realty, and the Alliance contend that the public easement recognized in *J.J.N.P.* and *Conaster* is a creature of statute. Specifically, in section 73-1-1(1) of the Utah Code, the Legislature conferred upon the public ownership of state waters. This statute—first adopted in 1903—reads: “All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.” In the view of the State, ATC Realty, and the alliance, this legislative grant is the source from which the *Conaster* easement is derived.

Whether Article XVII, Section 1 recognizes and confirms public ownership of state waters is not an issue of first impression. More than seventy years ago in *Adams v. Portage Irrigation, Reservoir & Power Co.*, 72 P.2d 648 (1937), the Utah Supreme Court held:

Public waters are not the subject of larceny. The title thereto is in the public; all are equal owners; that is, have coequal rights therein, and one cannot obtain exclusive control thereof. These waters are the gift of Providence; they belong to all as nature placed them or made them available. They are the waters flowing in natural channels or ponded in natural lakes and reservoirs. The title thereto is not subject to private acquisition and barter, even by the federal government or the state itself. . . .

While [water] is flowing naturally in the channel of the stream or other source of supply, it must of necessity continue common by the law of nature, and therefore is nobody's property, or property common to everybody. And while so flowing, being common property, everyone has equal rights therein and thereto, and may alike exercise the same privileges and prerogatives in respect thereto, subject at all times to of course to the same rights in others, and to the special rights to divert and use which have theretofore attached, vested or been recognized by law. Said Mr. Justice Moffat in *Wrathall v. Johnson*, 86 Utah 50, 40 P.2d 755, 766: "Water from the source to the point where the appropriator or user captures or diverts it into his conveying channels or containers is publici juris; and others have the same right to use it as the appropriator, so long as they do not interfere with the appropriator's use, by diminishing his quantity or impairing the quality."

And so, while water is still in the public everyone may drink or dip therefrom or water his animals therein, subject to the limitations above noted . . . ***This right of the public, as well as the rights of the appropriator, were confirmed by the State Constitution in Article [XVII]:*** "All existing rights to the use of any of the waters of this State for any useful or beneficial purpose, are hereby recognized and confirmed."

Adams, 72 P.2d at 652-53 [emphasis added].

The State, ATC Realty, and the Alliance argue that Article XVII, Section 1 should be construed to confirm only a distinct class of water rights—specifically, any privately held water right appropriated for irrigation, mining, and manufacturing prior to statehood. In support of this

argument, ATC Realty and the Alliance cite extensively to statements made by the framers at the Constitutional Convention.

This argument is inconsistent with the Utah Supreme Court's decision in *Adams*. It is also inconsistent with the plain language of Article XVII which contains no such limitation. Rather, Article XVII recognizes and confirms "*all* existing rights to the use of *any* of the waters of this state for *any useful* or beneficial purpose."⁵

The Supreme Court's determination that Article XVII recognized and confirmed public ownership of state waters is consistent with Utah's unique history. In 1847, the Mormon pioneers entered the Salt Lake Valley determined to settle an arid wilderness. Use of the natural waters in the area was critical to survival of this community. Not surprisingly, "Public ownership of all natural resources, including water, was one of the foundation principles of the State of Deseret, and later of the Territory of Utah." Hunter, Milton R., *Brigham Young the Colonizer*, citing Mead, Elwood, *Irrigation Institutions*, p. 221. Mormon irrigation systems were

⁵ The record of the Constitutional Convention does reference non-consumptive water rights. See, ATC Realty Memo., Exhibit 2. Commenting on the term "useful purposes," Mr. Murdock said: "There may be any number of conflicting claims that would come up and they might be put upon that ground, substantially, useful purposes, but they might not have a legal right to the water although it has been used usefully." (p.11).

More to the point, Mr. Eldredge said: "Then there are different classes of rights we acquire to water; there are certain rights we acquire which only constitute a right to use the water, as for illustration, there may be a mill situated upon a stream and that is permitted to divert water from its channel, carry it down and over its wheel and pass it back into the stream, and thus not infringe upon rights of any person that may have acquired a right to use the water or even a right to the absorption of water below them. Another class of right would be a farmer. He takes a stream of water upon his land and he exhausts that stream. There is not one particle of it that passes off from his farm to go on to afford its use for somebody else, hence, there are two different modes in which the rights to water attach." (p. 19).

carried out through a community effort. Swenson, Robert W., *A Primer of Utah Water Law: Part I*, 5 J. Energy L & Policy 165, 166-67 (1983-84).

In so many ways, the early settlers of Utah were the real embodiment of Thomas Paine's hypothetical society in a "state of natural liberty." Paine, Thomas, *Common Sense*, ISBN 1-555709-458-6. Paine wrote:

In order to gain a clear and just idea of the design and end of government, let us suppose a small number of persons settled in some sequestered part of the earth, unconnected with the rest, they will then represent the first peopling of any country, or of the world. In this state of natural liberty, society will be their first thought. A thousand motives will excite them thereto, the strength of one man is so unequal to his wants, and his mind so unfitted for perpetual solitude, that he is soon obliged to seek assistance and relief from another who in his turn requires the same. . . .

Thus necessity, like a gravitating power, would soon form our newly arrived emigrants into society, the reciprocal blessing of which, would supersede, and render the obligations of law and government unnecessary while they remained perfectly just to each other; but as nothing but heaven is impregnable to vice, it will unavoidably happen, that in proportion as they surmount their first difficulties of emigration which bound them together in a common cause, they will begin to relax in their duty and attachment to each other; and this remissness, will point out the necessity, of establishing some form of government to supply the defect of moral virtue.

Some convenient tree will afford them a State-House, under the branches of which, the whole colony may assemble to deliberate on public matters.

So it was with Utah's early settlers—emigrants bound to each other in an arid, sequestered part of the earth. In such conditions, public ownership of natural waters was necessary to survival.

For nearly a century, Utah courts have affirmed that public ownership of natural waters has always been, independent of any statutory grant. See, *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 67 P. 672, 677 (1902) (prior to appropriation, natural waters are “public juries [sic]”); *Oldroyd v. McCrea*, 65 Utah 142, 235 P. 580, 584 (1925) (“under the statute, and before its enactment, it is and was settled doctrine in arid and semiarid sections of our country that the corpus of the water of a natural stream was not subject to private ownership but was the property of the public or the state”); *Adams*, 72 P.2d at 652-53 (1937) (public waters are the gift of Providence, common to all by the law of nature); *Riordan v. Westwood*, 203 P.2d 922, 927 (Utah 1949) (J., Wolfe, writing separately) (“The Legislature did not by a declaration, make public what were previously nonpublic waters.”).

In 1993, the Utah Supreme Court in *Provo River Water Users Assoc. v. Morgan*, 857 P.2d 927 (Utah 1993) expressed agreement with Justice Wolfe’s statement made in 1952:

“[Public ownership of all water in the State] must have always been so. The State through the Legislature progressively extended to various categories of water, procedures for acquiring use rights and general regulations to [be applied to] these categories But the fact that the State progressively applied regulation to the acquisition of use rights in water does not disturb the fundamental principle that all water . . . at least from the time it reaches land within the confines of this state belongs to the public—the people of this state.”).

Id., at 933, FN8, quoting, *McNaughton v. Eaton*, 121 Utah 394, 405, 242 P.2d 570, 575 (1952) (Wolfe, C.J., concurring).

ATC Realty argues that the Utah Supreme Court's opinions in *J.J.N.P.* and *Conaster* retreated from *Adams*, and grounded public ownership of water in statute not the Utah Constitution. See, *Conaster*, 2008 UT 48, ¶ 8 (“By statute, ‘[a]ll waters in this state, whether above or under the ground, are hereby declared to be the property of the public.’”); *J.J.N.P.*, 655 P.2d at 1136 (citing section 73-1-1). The Court disagrees.

Both *Conaster* and *J.J.N.P.* cite *Adams* favorably. See, *Conaster*, 2008 UT 48, ¶8, FN2; *J.J.N.P.*, 655 P.2d at 1136, FN3. If the Utah Supreme Court intended to reground public ownership of state waters in statute—in effect overruling *Adams* on an important question of constitutional law—it would have done so expressly. Until the Utah Supreme Court revisits the scope of Article XVII, Section 1, *Adams* remains good law.

Finally, “a corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water.” *J.J.N.P.*, 655 P.2d at 1136. If Article XVII recognized and confirmed public ownership of waters in the State, then it also recognized and confirmed the corollary rights derived from that ownership, including the public's easement and all incidental uses recognized in *J.J.N.P.* and *Conaster*.

For these reasons, the Court grants summary judgment in favor of USAC, and against the State and ATC Realty, on the following issues:

- Waters flowing in or impounded on Utah's rivers, streams, and other natural water courses, including such water courses if and to the extent realigned or channelized, are and have always been owned by the public, and as such are public waters.
- The public has an easement to use these public waters that includes a right to engage in all recreational activities that use the waters.
- The public easement recognized in *J.J.N.P.* and *Conaster* is a corollary right of use derived from public ownership of waters in the State, and was therefore recognized and confirmed by Article XVII, Section 1 of the Utah Constitution.

The Legislature Has Authority To Regulate

Use of Waters Owned By The Public And Use of The Easement

Derived From Public Ownership

The remaining issues presented in this case are (1) whether the Legislature has authority to regulate how the public uses its constitutionally confirmed ownership of public waters and the easement derived from that ownership? and (2) if so, whether that legislative authority is limited by Article XX, Section 1 of the Utah Constitution and/or the public trust doctrine? The Court turns now to the first of these questions.

Public ownership of waters in the State does not eliminate the Legislature's authority to regulate use of those waters. Indeed, the doctrine of public ownership is the basis for the legislature's regulatory authority. Thirty years ago, the Utah Supreme Court explained:

The State regulates the use of the water, in effect, as trustee for the benefit of the people. *Tanner v. Bacon*, 103 Utah 494, 516, 136 P.2d 957, 966-67 (1943) (Larson, J., concurring). *Accord, Day v. Armstrong*, Wyo., 362 P.2d 137 (1961); *see also Ne-Bo-Shone Association v. Hogarth*, 7 F. Supp. 885 (W.D. Michigan 1934) *aff'd*, 81 F.2d 70 (6th Cir. 1936). 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 uses 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.*** *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

J.J.N.P. Company, 655 P.2d 1133, 1136 (Utah 1982).

"The right to use water in Utah has been governed by statute since 1888." *Green River Canal v. Thayne*, 2003 UT 50, ¶ 28, 84 P.3d 1134. Consistent with the doctrine of public ownership, federal territorial laws acknowledged that "water supply upon the public lands . . . shall remain and be held *free for the appropriation and use of the public* for irrigation, mining and manufacturing purposes, subject to existing rights." The Compiled Laws of Utah, Vol. 1, Desert Lands § 426 (1888).

Describing regulation of water rights early in Utah history, Professor Jean Bickmore White writes:

Control of water is often a bone of contention in the West. Use of this limited resource, vital to survival in a semiarid land, was controlled by Mormon church officials when the Salt Lake Valley was settled in 1847. After establishment of territorial government under the Organic Act of 1850, the territorial legislature in 1852 placed control of water in the county courts, each of which consisted of a probate judge and two selectmen. As the territory developed, the "prior appropriation" doctrine, giving rights to a stream to the first person to use it, became entrenched. The right to specific stream flows, separate from the land, was recognized in territorial law. The development of reservoirs and canals to serve communities generally depended on cooperation, and water districts were formed to foster efficient conservation and orderly use of water. Legal rights to water were fiercely defended, and the tension between these rights and the need for some public control over such a vital resource sparked many debates in western constitutional conventions.

White, Jean Bickmore., *Charter for Statehood: The Story of Utah's State Constitution*, pp. 77-78, University of Utah Press (1996).

As USAC concedes, "in early territorial days, the right to use water from the public domain was acquired by either actual diversion and application of the water to beneficial use, or by legislative grant." USAC Memo, p. 4, citing, Hutchins, Wells A., *The Utah Law of Water Rights*, p. 10 (1965). The legislation permitting governance of water rights by the county courts remained in effect until 1880, when this responsibility was transferred to county water commissioners. Hutchins, pp. 12-13. "The 1880 law remained in effect until 1897, when Utah's state legislature established procedures for appropriating water and repealed all conflicting legislation." USAC Memo, p. 5, citing, Hutchins, p. 14. Clearly, the delegates to the Utah Constitutional Convention understood the extensive role the territorial legislature had played in regulating the use of water before statehood.

As to constitutional provisions relating to water, “[o]ne possible model for Utah was the 1889 Wyoming Constitution, which declared all water to be the property of the state; it established a board of control and state engineer to supervise the appropriation and diversion of state waters.” White, Jean Bickmore, at p.77.

This model was captured in the majority report of the Water Rights, Irrigation, and Agricultural Committee presented during Utah’s Constitutional Convention. The report proposed the following language:

Section 1. The waters of all natural springs, streams, lakes and collections of still water, within the boundaries of the State are hereby declared to be the property of the State; but such ownership shall in no way impair any existing lawfully acquired right to the use of said waters.

Section 2. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied, except when such denial is demanded by public interest. The right of eminent domain shall extend to land and water rights.

Section 3. The legislature shall divide the State into suitable water districts, and provide by law for the appointment of a State Engineer, the election of a Board of Control and such other officers as may be deemed necessary.

Section 4. The Board of Control shall be presided over by the State Engineer and said board shall have the supervision of the waters of the State, and their appropriation, distribution, and diversion, under such rules and regulations as may be prescribed by law. Its decisions to be subject to review by the courts of the State.

Id. at 78 (photograph of James P. Low’s workbook concerning water rights).

On April 5, 1895, the thirty-third day of the Convention, the minority report of “the committee on water rights” was submitted. (ATC Realty Memo, Exhibit 1). This alternative

report contained the language which in large measure became Article XVII as it exists today.

The minority report read:

Section 1. All existing rights to the use of any of the waters of this State for any useful purpose, shall be recognized and confirmed.

Section 2. The Legislature shall provide by law for the regulation, distribution and controlling of the waters of this State and may provide by law such rules and regulations under which rights may be acquired to any of the waters of this State, for any useful purpose.

(ATC Realty Memo., p. 7, quoting, *Const. Conv. Proceedings*, Apr. 5, 1895 at 711).

How and why the Utah framers rejected both the majority and minority reports in favor of the single sentence which now comprises Article XVII is instructive. The debate concerning the “article on water rights, irrigation and agriculture” occurred in the committee of the whole on Friday, April 19, 1895.

Almost immediately, Mr. Chidester moved to strike the entire majority report and to accept the minority report. Mr. Chidester stated the views echoed by other delegates.⁶ He said:

⁶ See, ATC Realty Memo, Exhibit 2: (1) MR L. LARSEN: “I am not in favor of creating new and expensive offices in this State, which I believe the people would not be in favor of I think it would be better to leave that part to the Legislature to provide for them if they deem proper to do so, and if they should make a mistake at any time, they can correct this, or it can be corrected by future legislation.” (p. 6); (2) MR. NEBEKER: “I do not think it would be wise for us to provide for a state engineer and board of control through this Constitution, because that will be a matter of experiment, and it may or may not be a good thing; and if it be a good thing, subsequent Legislatures can deal with that question.” (pp. 9-10); (3) MR. HEYBOURNE: “We have at the present time laws in relation to the water interests of the Territory, and I apprehend the matter is of vital importance and one that will receive due consideration at the hands of the Legislature.” (p. 13); (4) MR. HAMMOND: “I am satisfied to leave this matter entirely in the hands of our Legislature, and for that reason support the proposition to strike out [all of the majority report].” (p. 16); (5) MR. BARNES: “I think the entire article is wrong, and that the whole matter should be left to

[Adopting article 2 alone of the minority report] puts us in a position to leave this matter to future legislation. It provides that the Legislature may handle this And then again, the engineer and board of control, in my opinion, is an expensive luxury in which we do not, or should not wish to indulge. It would be impossible for us to repeal it unless it was done by constitutional amendment. If this was left to the Legislature and they tried the scheme and it was pronounced a failure, they could do away with it. Therefore, I think it is unsafe to couch that within the Constitution, but leave that to future legislation, and I think that they will govern this matter and enact laws that will be calculated to further the ends of justice in this regard.

(ATC Realty Memo, Exhibit 2, p. 5). On these grounds, the delegates declined to create within the Constitution a state engineer, a board of control, or a specific process for administering the use of state waters.

The delegates also rejected Section 1 of the majority report which declared all waters within the boundaries of the State to be property of the State. The intended purpose of this provision was to extinguish any federal claim to ownership or management of those waters. Mr. Murdock gave voice to this view,⁷ emphasizing that “the State” is the people:

the Legislature.” (p. 17); (6) MR. ELDREDGE: “One advantage that the Legislature would have in dealing with this question over this Convention would be this, that if the Legislature should make an error in providing for the mode in which the water should be controlled, they could correct that error far more easily and more readily than what this Convention could have it corrected, should they make an error in the Constitution. . . . I am fully in favor of leaving the question to the Legislature to handle.” *But see:* (1) MR. FARR, advocating for the majority report in its entirety; stating that a public declaration of State ownership is made “in order that the Legislature shall provide laws to govern this water and control it and there shall not be any question in regard to that, there shall not any man say it is mine.” (pp. 15-16); (2) MR. MURDOCK: Advocating for adoption of the majority report (pp. 17-18).

⁷ Other delegates gave the same explanation. See, ATC Realty Memo., Exhibit 2: (1) MR. NEBEKER: “By making this declaration here in this Constitution, it is possible for the State to obtain ownership and absolute control of the unappropriated waters of the State So if we can do that by declaration and thereby obtain the control of the water instead of having to deal with the parent government hereafter, we will simply have to deal with our State Legislature, so far as acquiring right to any of the unappropriated waters of this State is concerned.” (p. 9); (2) MR.

The object of the first section is this, nothing more or nothing less, simply to extinguish the right of the general government to the waters of the coming State of Utah, simply to extinguish the right that it may hold and let it revert to the domain or to the State. We might ask the question, who is the State, what is the State? The State is the people, consequently, it confirms any original right that they may have, it reverts to the people—to the State It brings the interest right home instead of forcing us to go to the general government to establish our claims.

(ATC Realty Memo, Exhibit 2, pp. 10-11; 17-18). In the view of Mr. Nebeker, adopting section 1 of the majority report would mean that citizens could “obtain [the right to use water] through the regulation of a subsequent Legislature.” *Id.* at p. 10. For different reasons, some delegates believed any provision designed to divest the federal government of waters within the State was unnecessary.⁸

CORAY: “The object of the committee was to transfer [unappropriated water rights] from the United States to the State.” (p. 13).

⁸ See, ATC Realty Memo., Exhibit 2: (1) MR. MALONEY: “Now the United States owns lands in this Territory as will the future State of Utah, but they have donated to us in the Enabling Act something like eleven and a half millions of acres. Of course, when that land was donated, we obtained the right to the water, because when the land was conveyed, it carries with it all the water rights that are appurtenant to the land.” (p. 12); (2) MR. SNOW: If the “only purpose of this section 1 is to declare that the State owns these waters, that is absolutely of no use, for if we own the waters, we own them by right of appropriation and use and from no other. And it does not matter if we make the declaration here if it does not rest upon that use and appropriation, it is of no value, and if it does rest upon appropriation and use it is of value without the declaration, and the idea that this will quiet our title seems to me to be absurd.” (p. 14).

The most common concern expressed by the delegates was the Section 1 of the majority report would result in forfeiture of water rights secured by use long before statehood.⁹ Mr. Maloney gave voice to this fear:

Now, when you come to look at this first section of the majority report, you find this first section is simply a confiscation of the water rights in this State So I say that this first section is meaningless and it is wholly unnecessary. I say that we cannot take away the vested rights of the people of this Territory who have since 1847 been using this water. I do not care what method you adopt to take it away from them, you cannot do it, and to put something in the Constitution declaring that their water is the water of the State is simply out of the question.

(ATC Realty Memo, Exhibit 2, pp. 12-13). Other delegates were confident that the fear of confiscation was unfounded.¹⁰

⁹ See ATC Realty Memo., Exhibit 2: (1) MR. HEYBOURNE: "I think we had better support the minority report It may have a tendency to appease the unsettled feeling and condition existing throughout the Territory in relation to the possibility of confiscating the water rights of the people." (p. 13); (2) MR. SNOW: The effect of Section 1 "is to confiscate the water rights of the Territory and place them under State control, of which companies, cities, and towns, who have admirable regulations for the use of water, would be jealous, and would not brook any such interference." (p. 14); (3) MR. BARNES: "I think it would be doing a very great injury to the people of my neighborhood to say that the [water] rights which they believe they are entitled to—many of them by virtue of paying out their money for it, shall become the property of the State. . . . Now, to come up and say that we no longer have that right and that the water belongs to the State, is something more than I can do." (p. 17).

¹⁰ See ATC Realty Memo, Exhibit 2: (1) MR. SNOW: Referring to section one of the minority report, "I will say frankly that I think is of no weight and does not increase the value of existing rights, but . . . it can do no harm." (p. 15); (2) MR. NEBEKER: Expressing the view that a declaration of public ownership could not result in forfeiture of vested water rights—"We would have to climb right over the Constitution of the United States, if it were a fact." (p. 17); (3) MR. MURDOCK: "Now there is not a feature in the bill that has been presented to the committee that takes away priority rights from them, but it is strictly guarded—strictly guarded." (p. 18).

Ultimately, Article XVII in its current form was approved, and more extensive proposals rejected. Article XVII constituted an assurance that water rights existing prior to statehood would not be forfeited when Utah entered the Union. Importantly, the framers left to future legislatures the details of water regulation and management. In the words, of Professor White:

The water rights article (Art. 17) written by the Water Rights, Irrigation, and Agriculture Committee, eventually was stripped down to a single sentence confirming previously acquired rights: "All existing rights to the use of any waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed." The keen sense of individual property rights won out over the concern for orderly future development of a limited resource. During the next decade, however, the state struggled with the problem of water use and rights. In 1903 it conformed to federal law by placing supervision of water rights in the office of the state water engineer. As large, federally funded water projects came to the West, the state needed more than a collection of individual owners and small water districts to assert its interests and to realize the potential for development of this precious resource.

White, Jean Bickmore, at 78.

The delegates decided not to include in Article XVII a statement that all waters within the boundaries of the State are property of the State. The proceedings demonstrate that this was not a rejection of the doctrine of public ownership of state waters. Rather, the delegates rejected a "state ownership" provision out of fear that it might confiscate existing water rights to the State. The concept that water is incapable of private ownership was expressly addressed during the proceedings. Mr. Murdock stated:

Men think that they own the water that they use. You might as well claim [the] air that goes through the air and that you use as to say that you own the water. There is not a man that owns the water. He only owns the use of it where it goes

from one to the other and passes by us as the air does . . . [T]here is not a man—I am strong on that point, that there is not a man that owns the water.

(ATC Realty Memo., Exhibit 2, p. 18).

After statehood and continuing to the present day, the legislature has regulated and administered the use Utah’s publicly owned waters. In 1903, the legislature enacted statutes which extensively regulated the use of water. Section 47 of the 1903 statute read: “The water of all streams and other sources in this State, whether flowing above or underground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof.” This statute in some form was reenacted in 1919, 1933, 1935, 1943, and exists today in Section 73-1-1(1) of the Utah Code. See, UCA 73-1-1, History. For the reasons stated above, this statute did not grant ownership of waters in the State to the public, but rather expressed what had always been the law—that the waters of Utah were the property of the public, subject to all existing rights to the use thereof.

From territorial days, to the 1903 statute, and continuing to the present day, the Legislature has extensively regulated the use of public waters. Today, an entire volume of the Utah Code is devoted to the legislative regulation and management of water and irrigation rights. UCA, 73-1-1, et. seq. See also, *Proclamation of the Wildlife Board for Taking Fish: 2012 Utah Fishing Guidebook*, p. 20 (<http://wildlife.utah.gov/dwr/fishing/guidebooks/673-2012-fishing-guidebook.html>) (noting annual closure of some state waters to fishing).

This page in history demonstrates two important principles. First, the delegates to the Constitutional Convention declined to include in Article XVII a provision declaring public ownership of Utah waters. In doing so, their intent was not to renounce the doctrine of public ownership, but rather to ease fears that Section 1 of the majority report would be interpreted to confiscate existing water rights. Second, the delegates desired that future legislatures take an active role in regulating and administering use of water in the State.

For the reasons stated above, Article XVII did recognize and confirm the public's ownership of waters in the State, together with the public easement derived from that ownership. However, this constitutional recognition of public ownership did not eliminate the legislature's authority to regulate use of the public's easement.

The question is whether H.B. 141 does more than regulate use. As stated, USAC contends that H.B. 141 abrogated the public's easement, transferring it to private parties who own the beds of non-navigable waters. A legislative decision to give away the public's constitutionally confirmed easement in state waters for no value would have constitutional implications. Utah Const., Article XVII, Sec 1; Article XX, Section 1. However, that is not what H.B. 141 did.

Fee title to property has long been described as a bundle of sticks. When a servient estate is burdened by an easement, the owner of that estate does not possess the full bundle. Some of the sticks are possessed by the holder of the easement—the dominant estate holder.

H.B. 141 did not transfer to private property owners any of the “sticks” representing the public’s easement as defined in *J.J.N.P.* and *Conaster*. Rather, H.B. 141 regulates the extent to which the public will use its easement in non-navigable waters. Lawful use consists of the right to float as defined in section 73-29-202. Both private citizens and the Division of Wildlife Resources are permitted to prove in court entitlement to broader recreational use based upon adverse possession principles. UCA 73-29-203; -204.

Certainly, by limiting the public’s use of public waters, the Legislature conferred upon ATC Realty—and all other similarly situated landowners in the State—a valuable benefit, but that benefit can be revoked at any time by future legislation. The public’s easement in its full scope as defined in *J.J.N.P.* and *Conaster* has not been transferred to private parties, abrogated, or abandoned and remains in public ownership today.

A future Legislature may strike a different balance between public recreational users and private land owners. A statute restoring lawful use of the public’s easement to its constitutionally confirmed limits will not constitute a taking of private property, because H.B. 141 did not transfer any property interest to private landowners. As the branch of government responsible for policy-making, the Legislature is in the best position to weigh the competing interests in Utah’s natural waters, and to regulate the scope of the public’s use.

For these reasons, the Court concludes that the challenged sections of H.B. 141 do not violate Article XVII, section 1 of the Utah Constitution. On this issue, the Court grants summary judgment in favor of the State and ATC Realty, and against USAC.

***The Legislature's Authority To Regulate The Public's Easement
In Natural Waters Is Limited by Article XX, Sec. 1***

Having determined that the legislature has authority to regulate the use of the public's easement in state waters, the Court must determine whether that regulatory authority is limited by Article XX, section 1 of the Utah Constitution, and the public trust doctrine.

USAC argues that the easement recognized in *Conaster* is an interest in land subject to the protections of Article XX, Section 1. USAC asserts that H.B. 141 abrogated that interest without any regard for "the respective purposes for which [it was] otherwise acquired." USAC concedes that the public did not acquire ownership of Utah's natural waters by a specific grant, patent, or deed of land in trust; but argues that this is not required for Article XX, Section 1 to apply. See, *State v. Rolio*, 71 Utah 91, 262 P. 987 (1927) (beds of navigable rivers and lakes were "otherwise acquired" under Utah's Enabling Act and the Equal Footing Doctrine, and therefore subject to Article XX, Section 1).

The State concedes that “public property is held by [the State] in trust for the benefit of its citizens.” (State Memo., p. 9). However, Article XX, Section 1 expressly permits disposition of trust property for a public purpose and “as provided by law.” The State argues that H.B. 141 meets this test. In support of this contention, the State points to cases permitting public entities to abandon easements for travel and use of public highways. *See, Tuttle v. Sowadzki*, 126 P. 959 (Utah 1912). In this context, the State’s authority to regulate is presumed and “a person cannot object . . . if he has no other interest [in the highway] save as one of the public.” *Id.*

ATC Realty contends that Article XX, Section 1 applies to public lands only. The stretch of the Provo River running through ATC Realty’s land is non-navigable and USAC has not claimed otherwise. Therefore, the bed is privately owned and Article XX, Section 1 has no application.

As to Article XX, Section 1, the Alliance argues that (1) the *Conaster* easement does not involve public lands; (2) H.B. 141 did not transfer any public rights; and (3) government abandonment of easements does not implicate this constitutional provision. The Alliance argues that the public trust doctrine has no application because: (1) the waters here are not navigable; (2) the Legislature has authority to regulate the use of public waters; and (3) HB 141 did not transfer the public’s easement to a private entity.

Article XX, section 1 of the Utah Constitution provides:

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, Sec. 1.

To decide whether Article XX, Section 1 limits the Legislature's authority to regulate the public's easement in State waters, the Court must answer three questions: (1) Whether the public's easement constitutes an interest in land? (2) If so, whether H.B. 141 disposed of all or part of the public's interest? and (3) If H.B. 141 disposed of the public's interest, was this done in violation of the State's trust responsibilities?

1. *The Public's Easement Constitutes An Interest in Land.*

"A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water." *J.J.N.P.*, 655 P.2d at 1136. This means that "public waters do not trespass in areas where they naturally appear, and the public does not trespass upon such waters." *Id.* The public's easement exists "irrespective of the ownership of the bed and navigability of the water." *Id.* at 1137.

To determine the scope of the public's easement, the Utah Supreme Court applied principles of real property law. This is not surprising because an easement is an interest in land.

Colman, 795 P.2d at 625 (“An easement is an interest in land”); quoting, 2 *Nichols on Eminent Domain* § 5.14, at 5-186 (3d ed. 1989). The *Conaster* Court wrote:

“An easement is a privilege which one person has a right to enjoy over the land of another.” [citation omitted]. Therefore, an easement “gives rise to two distinct *property* interests: a ‘*dominant estate*,’ that has [the] right to use land of another, and a ‘servient estate,’ that permits the exercise of that use.” [citation omitted]. Because there are two parties’ interests involved, “the right of the easement owner and the right of the land-owner are not absolute, irrelative, and uncontrolled, but are limited, each by the other, that there may be a due and reasonable enjoyment of both.” [citation omitted].

Conaster, 2008 UT 48, ¶ 20, 194 P.3d 897.

For these reasons, the Court holds that the public’s easement to utilize public waters in place is an interest land. This real property interest is included within Article XX, Section 1, which applies broadly to “all lands of the State . . . otherwise acquired.” Therefore, the public’s easement constitutes “public lands of the State; and shall be held in trust for the people.”

2. H.B. 141 Disposed Of All or Part of The Public’s Easement.

Article XX, Section 1 is implicated only if H.B. 141 “disposed of” the public’s easement in State waters. For the reasons stated above, the Court holds that H.B. 141 did not dispose of all or part of the public’s easement in waters of the State. Rather, it regulated the lawful use of those waters. Therefore, H.B. 141 does not implicate the trust responsibilities imposed upon the State in Article XX, section 1.

3. *Because H.B. 141 Did Not Transfer Title To a Private Party, The Federal Public Trust Doctrine Does Not Apply.*

Because H.B. 141 did not dispose of the public's interest in land, Article XX, Section 1 has no application to this case. For the same reason, the public trust doctrine as defined in *Illinois Central R.R. Co.* is inapplicable.

The Utah Supreme Court explained the public trust doctrine in *Colman*:

The controlling case on this issue is *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892), where the United States Supreme Court discussed the public trust doctrine and held that the Illinois legislature's earlier grant to the railroad of lands submerged under Lake Michigan could be revoked by a later legislature because the earlier grant was in violation of the public trust the state held over the waters.

The essence of this doctrine is that navigable waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing. Recent cases have examined this doctrine in deciding whether the state could grant uses of public waters to private parties. See, e.g., *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983).

Colman, 795 P.2d at 635.

Even if the relevant stretch of the Provo River is navigable, H.B. 141 did not give the public's easement in State waters without restriction to a private party. Therefore, the public trust doctrine as defined in *Illinois Central R.R. Co.* does not apply.

***Utah Case Law Recognizes A State Public Trust Doctrine
Which Applies To Legislation Regulating Use of Public Waters***

Article XX, Section 1 and *Illinois Central R.R. Co.* are not the only source of public trust responsibilities. The Utah Supreme Court has held that “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 (1943) (Larson, J. concurring). The regulatory authority of the State as trustee extends to both navigable and non-navigable waters. As the *J.J.N.P.* Court held: “Private ownership of the land underlying natural lakes and streams does not defeat the State’s power to regulate the use of the water or defeat whatever right the public has to be on the water.” *J.J.N.P.*, 655 P.2d at 1137.

The effect of this case law is to establish a state public trust doctrine which extends to both navigable and non-navigable waters.

The parties have not had sufficient opportunity to brief issues related to this state public trust. USAC refers in its papers to “trust principles” generally derived from Article XX, Section 1. The State suggests that in determining whether the public trust doctrine has been violated, the Court should consider whether the regulation curtailing public use “affects the public interest in what remains.” (State Reply Memo., p. 7, citing *Colman*, 795 P.2d at 635-36. However, with this exception, the briefing of the State, ATC Realty and the Alliance focuses on the inapplicability of the public trust doctrine as defined in *Illinois Central R.R. Co.*

To date, the nature and scope of Utah's public trust doctrine have not been well-defined in case law. This case presents a host of issues of first impression: (1) What are the trust purposes? (2) Who has standing to challenge a legislative regulation limiting public access to waters in place? (3) What degree of deference should be given to a legislative regulation limiting public use of waters in place? (4) What factors should be considered in determining whether a regulation violates the public trust? (5) What is the burden of proof and who shoulders it? With one exception, the Court requests further briefing on each of these important questions.

As to the second question, the Court concludes that any member of the public as a beneficiary of the trust could seek to overturn a regulation enacted in violation of trust purposes. The Utah Constitution recognized and confirmed the public's ownership of Utah waters, including the easement derived from that ownership. Given the constitutional significance of this property interest, alleged public trust violations in relation to that interest do not present a circumstance in which "faithfulness to the public trust reposed in the members of the legislative body will be presumed." *Sears v. Ogden City*, 572 P.2d at 1362 (compliance with public trust presumed when public entity vacates a street).

As to the third question, the Court observes that in regulating use of water the legislature acts as both the trustee of the public trust, and as the duly-elected representative of the public beneficiary. This dual role suggests that considerable deference should be given to legislative decisions relating to the lawful use of state waters. This deference ensures that judicial review is

not a vehicle for laying aside legislation in favor of policies preferred by the judiciary. That having been said, legislatively imposed regulations which are illegal, arbitrary, or capricious, or enacted in clear violation of trust purposes must be subject to judicial review, or the public trust is meaningless. The Court invites further briefing on this issue.

By way of general guidance, the Court observes that several sources of Utah law may be instructive. By analogy, cases involving the federal public trust doctrine and other public trust duties may inform the analysis. *See, National Parks Conservation Association v. Board of State Lands*, 869 P.2d 909, 919 (Utah 1993) (defining trust duties in relation to school trust lands; noting that federal public trust doctrine “protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large”).¹¹ Similarly, Title 65A, Chapter 1 of the Utah Code addresses trust principles related to “public trust assets,” including sovereign lands (meaning “those lands lying below the high water mark of navigable bodies of water at the date of statehood and owned by the state by virtue of its sovereignty.”) UCA 65A-1-1(4)(5).

The Court may also look to the law of other western states for guidance. Craig, Robin Kundis, *A Comparative Guide To The Western States' Public Trust Doctrines: Public Values, Private Rights, and The Evolution Toward Ecological Public Trust*, 37 Ecology L. Q. 53 (2010).

¹¹ See also, Mareck Teresa, *Comment: Searching for The Public Trust Doctrine in Utah Water Law*, 15 J. Energy Nat. Resources & Env'tl. L. 321 (1995).

Finally, whether HB 141 violates the state public trust doctrine may be an issue which turns on disputed issues of material fact.¹²

ORDER

For the foregoing reasons, the Court:

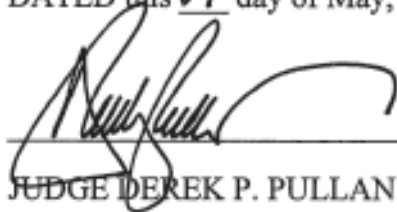
- Grants in part and denies in part USAC's motion for summary judgment;
- Grants in part and denies in part ATC Realty's and the State's motion for summary judgment.
- Requests further briefing on issues related to the state public trust doctrine.

Within 20 days of the date of this Ruling and Order, counsel shall file with the Court a stipulated briefing schedule. When briefing is completed, the parties shall file a Notice to Submit for Decision.

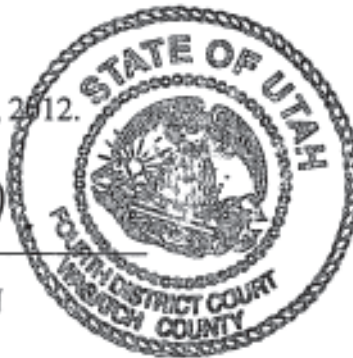
¹² For example, the State suggests that in determining whether the public trust has been violated, the Court should consider the impact of H.B. 141 upon the public use that remains. The extent of lawful use after enactment of H.B. 141 is contested in the briefing. H.B. 141 recognized a right to float, but only on "public water that has sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating." UCA 73-29-202(1). H.B. 141 appears to close all non-navigable rivers and streams that do not meet this standard. Some rivers and streams may never meet this standard at any time of the year. Others will be floatable only early in the year during periods of high water. This illustrates how determining the "extent of what remains" is fact-intensive.

If oral argument is requested, the Clerk will contact the parties for a mutually convenient date and time.

DATED this 21 day of May, 2012.


JUDGE DEREK P. PULLAN

Fourth District Court Judge

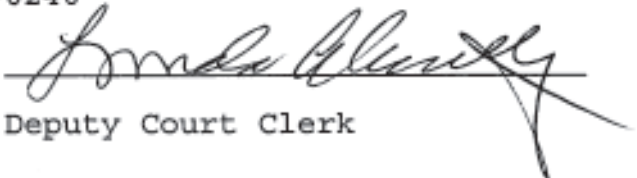


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100500558 by the method and on the date specified.

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Date: 5-21-12


Deputy Court Clerk

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Attorneys for Plaintiff Utah Stream Access Coalition

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a
Utah non-profit corporation,

Plaintiff,

vs.

ATC REALTY SIXTEEN, INC., a California
corporation; *et al.*,

Defendants.

**UTAH STREAM ACCESS COALITION'S
SUPPLEMENTAL MEMORANDUM:**

**IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

and

**IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Civil No. 100500558

Hon. Derek Pullan

The Utah Stream Access Coalition ("the Coalition"), by and through its counsel of record and pursuant to the Court's *Ruling and Order on Cross Motions for Summary Judgment* dated May 21, 2012, submits this Supplemental Memorandum in Support of the Coalition's Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment.

INTRODUCTION – OVERVIEW

In its *Ruling and Order on Cross Motions for Summary Judgment* dated May 21, 2012 (“the *Ruling*”), the Court held that, under Art. XVII of the Utah Constitution, the public owns and has always owned the waters flowing in or impounded on Utah’s rivers and streams. The Court further held that the public has a constitutional right to lawfully access and use these public waters in place where they traverse private property and to reasonably touch the private beds of these waters in a manner necessary and incident to such use, defining said right as a ‘right to use’ under Art. XVII and as an ‘easement’ and ‘interest in land’ under Art. XX.¹ The Court also held that H.B.141 did not violate these constitutional protections because it did not dispose of or abrogate this public constitutional right in its entirety but, instead, regulated it. Finally, the Court held that because the State regulates the use of Utah’s waters as trustee for the benefit of the people, its regulation of the public’s constitutional right to use in place public waters that traverse private property must comport with Utah’s public trust doctrine. The Court reserved judgment on whether H.B. 141 violated public trust principles and requested further briefing on the issue.²

The Court’s *Ruling* coupled with the undisputed fact that H.B.141 severely restricts the public’s constitutional right to use in place public waters that traverse private property means that the State and ATC Realty now have the burden of proving that H.B.141 does not violate the

¹ For ease of reference, this right is hereinafter frequently referred to as “the public’s constitutional right to use in place public waters that traverse private property.”

² The Court further noted that whether H.B.141 violates the public trust doctrine may well turn upon disputed issues of material fact. By stipulation of the parties and, it is believed, concurrence of the Court, this issue is deferred pending a determination by the Court as to whether H.B.141 violates the public trust doctrine as a matter of law.

State's fiduciary duty to regulate this public right consistent with public trust principles. The State and ATC Realty have not and cannot meet this burden, for H.B. 141 on its face and in fact violates the State's public trust obligations in that it serves no public trust or greater public purpose and serves, instead, only private or special interests and, further, greatly impairs or encumbers the public's constitutional right to use in place the trust resource and thereby violates the public trust purpose.

THE LAW AND STATUS OF THE CASE

The salient elements of the Court's *Ruling* include:

Waters flowing in or impounded on Utah's rivers, streams, and other natural water courses, including such water courses if and to the extent realigned or channelized, are and have always been owned by the public, and as such are public waters. [Ruling at p.20]

* * * * *

The public has an easement to use these public waters that includes a right to engage in all recreational activities that use the waters. [Ruling at p.20]

* * * * *

The public easement recognized in *J.J.N.P.* and *Conaster* is a corollary right of use derived from public ownership of waters in the State, and was therefore recognized and confirmed by Article XVII, Section 1 of the Utah Constitution. [Ruling at p.20]

* * * * *

Article XVII ... recognize[d] and confirm[ed] the public's ownership of waters in the State, together with the public easement derived from that ownership. [Ruling at p.30]

* * * * *

[Because H.B. 141 did not transfer, abrogate or abandon the public easement to use public waters in place in its entirety], the challenged sections of H.B. 141 do not violate Article XVII, section 1 of the Utah Constitution. [Ruling at p.32]

* * * * *

[T]he public's easement to utilize public waters in place is an interest land ... is included within Article XX, Section 1 ... [and] constitutes "public lands of the State; and shall be held in trust for the people." [Ruling at p.35]

* * * * *

H.B. 141 did not dispose of all or part of the public's easement in waters of the State. Rather, it regulated the lawful use of those waters. Therefore, H.B. 141 did not implicate the trust responsibilities imposed upon the State in Article XX, section 1. [Ruling at p.35]

* * * * *

[For this same reason], the public trust doctrine as defined in *Illinois Central R.R. Co.* is inapplicable. [Ruling at p.36]

The effect of ... [Utah] case law is to establish a state public trust doctrine which extends to both navigable and non-navigable waters [and governs the State's regulation of the use of such waters]. [Ruling at p.37]

* * * * *

In sum, the Court held that the public's right to use in place public waters that traverse private property is a constitutionally-protected right. It further held that because the State regulates the use of Utah's public waters as trustee for the benefit of the people, H.B.141's attempt to regulate this public constitutional right must comport with the trust purpose and public trust principles. Having so held, the Court requested further briefing on the issue remaining before the Court – that is, whether H.B.141's regulation of the public's constitutional right to use in place public waters that traverse private property comports with the public trust doctrine.

ARGUMENT

I. RESPONSES TO THE COURT'S QUESTIONS.

A. "What Are the Trust Purposes?"

In general, the public trust "protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large." *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 920 (Utah 1993) (emphasis added). More specifically:

The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles. This is an accepted process of in our law: Anglo-American jurisprudence is rife with judicially developed doctrines that reflect the deeply held convictions of our society. In natural resources law generally, the unique qualities of some resources have impelled courts to apply the public trust doctrine ... [to] allow maximum public utilization. * * * The focus of the doctrine is on the resources themselves. * * * The heart of the public trust doctrine ... is that it imposes limits and obligations on governments [when dealing with public trust resources].

Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis Law Rev. 269, 315-316, 284 (1980-81).

The trust resource at issue here is Utah's public waters. As this court recognized, the State regulates the use of this public resource "as trustee for the benefit of the people." *Ruling* at p.21, quoting *J.J.N.P. Co. v. Utah*, 655 P.2d 1133, 1136 (Utah 1982) (emphasis added). But what exactly is required of the State in this regard? Stated otherwise, what is the trust purpose to which the State is bound when regulating the use of Utah's waters? Former Chief Justice Larson of the Utah Supreme Court offered some insight.

Due to the limited supply of water and its importance to the people of this State, it has wisely been provided that this resource shall be so used as to best subserve the needs of the people ... to the end that no one shall acquire a dominating right to such use of water as will retard the maximum development of the state's resources, or curtail the

satisfaction of the people's needs in the things most important to their sustenance, development and happiness. * * * Where a matter is of such moment and serious public concern as water is in this state, and is property of the public, it properly is declared not subject to private rights or claims except to the limited extent provided by law, in the uses which shall be deemed most beneficial to the public welfare, as contradistinguished from the benefit of the individual. Since all waters flowing in natural streams in the state are the property of the public, no one has an inherent or vested right to appropriate it to a private use. * * * The state, as trustee for the people, must so administer its trust as not to permit its misuse, or its use in any way adverse to the interests of the public.

Tanner v. Bacon, 136 P.2d 957, 966-67 (Utah 1943) (Larson, J., concurring) (appeal from decision of state engineer rejecting application to appropriate waters for power generation).³

In short, from Justice Larsen's perspective, the purpose of the public trust with regard to Utah's public waters is to manage and regulate the use of those waters "so ... as to best subserve the needs of the people", to prevent private or special interests from acquiring "a dominating right to use public waters and [thereby] curtail the satisfaction of the people's needs in the things most important to their sustenance, development and happiness", and prevent use of water "in any way adverse to the interests of the public." *Id.* As trustee of Utah's public waters, the State owes a fiduciary duty to the trust beneficiaries, the public, to fulfill these trust purposes.

Focusing on the public's constitutional right to use in place public waters that traverse private property, multiple Utah Supreme Court decisions shed further light on both the resource; the constitutional *res*, and the trust purpose as applied to this right which the State, as trustee for the benefit of the public, has a fiduciary duty to protect.

³ *Cf., In re Water Use Permit Applications*, 9 P.3d 409, 445 (2000) (constitutional public trust requires the state to regulate use of waters for the benefit of the people).

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a Utah non-profit corporation, Plaintff(s), vs. VR ACQUISITIONS, L.L.C., et. al. Defendant(s).	<u>RULING AND ORDER</u> ON CROSS MOTIONS FOR SUMMARY JUDGMENT RE: PLAINTIFF'S STANDING AND THE PUBLIC TRUST DOCTRINE Case No. 100500558 Judge Derek P. Pullan
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On May 21, 2012, the Court issued its Ruling and Order on Cross Motions for Summary Judgment ("the Prior Ruling"). In the Prior Ruling, the Court held that Utah case law "establish[ed] a state public trust doctrine which extends to both navigable and non-navigable waters." (Prior Ruling, p. 37).

The Court observed that the "nature and scope of Utah's public trust doctrine have not been well-defined" and that the parties "have not had sufficient opportunity to brief issues related to this state public trust." (Prior Ruling, pp. 37-38). The Court requested further briefing on a "host of issues of first impression" including:

- What are the trust purposes?
- Who has standing to challenge a legislative regulation limiting public access to waters in place?
- What degree of deference should be given to a legislative regulation limiting public use of waters in place?

- What factors should be considered in determining whether a regulation violates the public trust?
- What is the burden of proof and who shoulders it?

The supplemental briefing has been completed. The Court heard oral argument on January 22, 2013. Utah Stream Access Coalition (“USAC”) was represented by its counsel, Mr. Craig C. Coburn and Ms. Kristina H. Ruedas. Defendant VR Acquisitions, L.L.C. (“VRA”) was represented by its counsel, Mr. Nathan D. Thomas and Ms. Elizabeth M. Butler. The State of Utah was represented by Assistant Attorney General Thom D. Roberts. Amicus Curiae, the Utah Alliance to Protect Private Property Rights (“the Alliance”) was represented by Mr. Michael D. Zimmerman.¹

Having considered the briefing and arguments presented, the Court now enters the following:

RULING

Standing to Challenge A Regulation Limiting Use of Public Waters

USAC Meets The Relaxed Requirements for Traditional Standing

In the Prior Ruling, the Court concluded that “any member of the public as a beneficiary of the trust could seek to overturn a regulation enacted in violation of trust purposes.” (Ruling, p.38). The parties appear to have reached an agreement not to challenge USAC’s standing “at least for purposes of the current dispositive motions.” (USAC Reply to Alliance Supp. Brief, p. 1-2). However, the Alliance requests that the Court revisit its standing decision.

¹ The Court again acknowledges the exceptional legal work provided by counsel in this case. The case is a difficult one. It presents issues of first impression which affect the rights of all Utah citizens. In the briefing and at oral argument, counsel made well-crafted and persuasive presentations that have been of great help to the Court.

The standing arguments made by the Alliance are narrowly focused. The Alliance concedes that USAC has a special interest in the use of public waters, and that this interest provides USAC standing to advance all arguments made except those related to the public trust. The Alliance contends that that public trust arguments “concern members of [USAC] as members of the public, not as water users.” (Alliance Supp. Memo., p.2).

The Alliance correctly cites the general rule—“a party having only such interest as the public generally cannot maintain an action;” rather, “to pass upon the validity of a statute, the proceeding must be initiated by one whose special interest is affected.” *Baird v. State*, 574 P.2d 713, 716 (Utah 1978). A party who seeks to invoke the protections of the public trust doctrine does so as a member of the general public, and would not generally have the “special interest” required for traditional standing.

However, the Utah Supreme Court has recognized that “there may be cases where it is appropriate to grant standing to persons who share the same or similar grievances as other individuals or groups.” *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶25, 148 P.3d 960. To that end, the Court has relaxed traditional standing requirements in cases which do not offend the fundamental concerns on which those requirements rest. *Id.* (citing *Society of Professional Journalists v. Bullock*, 743 P.2d 1166, 1174 (Utah 1987)). Standing requirements are rest on two concerns: (1) “courts deciding matters that are not properly reduced to a concrete dispute;” and (2) courts “considering matters better dealt with by another branch of government.” *Id.*

These concerns are not implicated here. This case arises out of a concrete dispute. Six of USAC’s members previously accessed and used the Provo River where it flows

through VRA's property. Under authority of H.B. 141—also known as the Public Waters Access Act ("the Act")—VRA's predecessor in interest prohibited USAC's members from doing so. One USAC member was cited by the State for criminal trespass. The same USAC members would have continued to use this stretch of the Provo River but for the Act. A decision by this Court as to the constitutionality of the Act and the applicability of the state public trust doctrine will address the injuries claimed.

Deciding the constitutionality of a state statute or regulation is a core function of the judicial branch. As explained below, the public trust doctrine is grounded in Article XX, Section 1 of the Utah Constitution. This provision limits the authority of government to dispose of and—in limited instances—to regulate trust property. Moreover, as a practical matter parties litigating alleged violations of the public trust will do so as members of the public. Strict application of traditional standing requirements to these cases would mean that public trust violations of Article XX, Section 1 would evade judicial review.

For these reasons, the Court concludes that (1) this is the type of case in which relaxed traditional standing requirements do not offend the concerns underlying the doctrine of standing; and (2) USAC has traditional standing to advance its public trust arguments. On these issues, the Court grants summary judgment in favor of USAC.

USAC Meets The Requirements Of Alternative Standing

Even if traditional standing requirements barred USAC from advancing its public trust argument, the Court concludes that USAC has alternative standing to raise this claim. "A party may qualify for alternative standing if the party is (1) an appropriate party to bring suit; and (2) the issue being presented is one of sufficient public

importance to balance the absence of the traditional standing criteria.” *BV Lending, LLC v. Jordanelle Special Service District*, 2013 UT App. 9, ¶12 (quoting *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶16, 233 P.3d 461).

To be an appropriate party, USAC must show that it has “the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions and that the issues are ‘unlikely to be raised’ if USAC is denied standing.” *Sierra Club*, 2006 UT 74, ¶36 (quoting *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)). An issue is of sufficient public importance where “the outcome of the particular dispute at issue will itself affect the community” as opposed to having “a potential impact on certain individual members of the public in the future.” *BV Lending*, 2013 UT App 9, ¶14.

As an organization interested in the recreational use of public waters, USAC has “the interest and expertise necessary to investigate and review all relevant legal and factual questions” relating to use of the Provo River and application of the public trust doctrine to waters of the State. USAC has demonstrated its competence in addressing difficult legal issues in this case. Also, as explained above, strict application of traditional standing requirements will result in public trust violations evading judicial review.

Finally, this case raises issues of sufficient public importance. The outcome of this case will affect members of the public state-wide, both as users of public waters in place and as owners of private property through which public waters flow. The outcome is not limited to a few select members of the public.

For these reasons, the Court concludes that USAC has alternative standing to advance its public trust arguments. On this issue, the Court grants summary judgment in favor of USAC.

The Utah Public Trust Doctrine

Article XX, Section 1 and the Issue Presented

As the United States expanded westward, new states were created on lands owned by the federal government. “When Utah became a state, it received land grants from the federal government for various purposes.” *National Parks and Conservation Assoc. v. Bd. Of State Lands*, 869 P.2d 909, 917 (Utah 1993). Utah “accepted these lands and agreed to hold them in trust for the purposes for which they were received.” *Id.*; Utah Const., Art. XX, Sec. 1 and 2.

In some instances, specific trusts were created and trust duties assumed. Utah Const., Art. XX, Sec. 2; *National Parks*, 869 P.2d at 917 (“In administering school trust lands, the State . . . acts as a trustee” and the fiduciary duties of a trustee apply). Where no specific trust was created, “public lands [are] held broadly in trust for the people.” *National Parks*, 869 P.2d at 919 (quoting *United States v. Ervien*, 246 F. 277, 280 (8th Cir. 1917) *aff’d*, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919)).

The general public trust is established in Article XX, Section 1 of the Utah Constitution:

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.

This language applies broadly to all public lands, whether acquired at statehood or sometime later. It does not matter how the lands came in to public ownership—by grant from Congress, gift, grant or devise, from any person or corporation, or otherwise—they are all held in trust for the people.

In the Prior Ruling, this Court held that the waters of the State of Utah are and always have been publicly owned. Public ownership of Utah's waters was recognized and confirmed in Article XVII, Section 1 of the Utah Constitution. "A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water." *J.J.N.P. Company v. State*, 655 P.2d 1133, 1136 (Utah 1982). This easement constitutes an interest in land and "is included within Article XX, Section 1, which applies to 'all lands of the State . . . otherwise acquired.'" (Prior Ruling, p. 35).

The Legislature has authority to regulate the use of publicly owned waters and the easement derived from that ownership. (Prior Ruling, pp. 20-32). Indeed, "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 public." *J.J.N.P.*, 655 P.2d at 1136.

On its face, Article XX, Section 1 is implicated when the State "disposes" of public lands. Similarly, the preeminent case involving the federal public trust doctrine—*Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892)—involved the State of Illinois transferring title to lands submerged beneath Lake Michigan to a private railroad company. In adopting the Act, the Legislature did not "dispose" of or transfer title to all or part the public's easement in waters of the State of

Utah. In fact, the easement exists in public ownership today. Rather, in adopting the Act the Legislature regulated use of the public's easement.

Thus, the issue presented is whether the public trust under Article XX, Section 1 of the Utah Constitution limits the Legislature's authority to regulate use of the public's easement in waters of the State of Utah? This is an issue of first impression.

Scope of The Utah Public Trust Doctrine

Under Article XX, Section 1 "all lands of the State . . . otherwise acquired are declared to be public lands; and shall be held in trust for the people." This public trust does not prohibit the State from disposing of State lands, but does impose two prerequisites. First, the State must dispose of public lands in a manner consistent with applicable law. Second, the State must dispose of public lands only "for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired." Utah Const., Art. XX, Sec. 1. The question is what duties and obligations are imposed on the State because public lands are "held *in trust* for the people" under Article XX, Section 1.

The State concedes that it "has duties and responsibilities with regard to public or state assets." (State Supp. Memo., p 7). These duties include a general requirement that the State act in the public interest and not to confer private benefits. *Id.* (citing, *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, 412 (Utah 1986); *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975)). However, in the State's view all remaining public trust duties arise not from the trust language in Article XX, Section 1, but from other constitutional requirements—i.e. the due process clause, equal protection, uniform operation of laws.

The Court disagrees. Article XX, Section 1 expressly provides that public lands “shall be held in trust for the people.” Reading this trust language to require no more than that the State comply with its other constitutional obligations renders the trust language in Article XX, Section 1 inoperative and superfluous. Like statutes, constitutional provisions should be “construed . . . so that no part [or provision] will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another.” *Archuleta v. St. Mark’s Hospital*, 2009 UT 36, ¶13, 238 P.3d 1044 (Utah 2010) (quoting *State v. Jeffries*, 2009 UT 57, ¶9, 217 P.2d 265).

The preeminent case addressing the public trust doctrine is *Illinois Central*. In 1869, the Illinois Legislature granted title to more than 1,000 acres of submerged lands beneath Lake Michigan to the Illinois Central Railroad Company. The grant placed “under the control of the railroad nearly the whole of the submerged lands of the [Chicago] harbor.” *Illinois Central*, 146 U.S. at 451. Four years later, the Legislature repealed the grant. The issue presented was “whether the legislature was competent to thus deprive the state of its ownership of the submerged lands . . . and of the consequent control of its waters.” *Id.* at 452.

The U.S. Supreme Court ruled that the Illinois legislature was without authority to deprive the state of its ownership interest in the submerged lands. While the state held title to the submerged lands, that title was “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.” *Id.* at 452.

The public trust did not prohibit transfer of the publicly owned lands. The legislature could transfer title to the submerged lands for the purpose of improving “navigation and use of the waters.” *Id.* at 453. The legislature could transfer title to the lands if this could be done “without any substantial impairment of the public interest in the lands and waters remaining.” *Id.*

But the Legislature could not “abdicate its trust over property in which the whole people are interested” or its “general control” over that property.

Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by the transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Id. at 453.

Defendants contend that the public trust recognized in *Illinois Central* applies only when the State transfers title to the beds of navigable waters in public ownership, and that the public trust protects only limited interests—navigation, commerce, and fishing. The Court disagrees with this narrow reading of *Illinois Central*.

The public trust doctrine articulated in *Illinois Central* named three interests of the public in navigable waters—navigation, commerce, and fishing. *Id.* at 452. These have been called the “the traditional triad” of public trust rights. Stoner, Ivan M., Comment: *Leading a Judge to Water: In Search of a More Fully Formed Washington Public Trust Doctrine*, 85 Wash. L. Rev. 391 (May 2010). But the Court also referred to “use of the waters” generally. *Illinois Central*, 146 U.S. at 453.

Moreover, Utah case law suggests that the public trust doctrine (1) applies even though the State has retained fee title to the public lands at issue; and (2) protects public interests (called the *jus publicum*²) broader than navigation, commerce, and fishing.

The Utah Supreme Court first addressed the public trust doctrine in *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990). The State of Utah had granted Colman a lease and easement to maintain an underwater brine canal on the bed of the Great Salt Lake. In 1984, water levels in the Lake were rapidly rising. To avert flooding, the Legislature authorized the breach of the Great Salt Lake causeway. Colman alleged that breaching the causeway would cut the banks of the brine canal and create turbidity and sedimentation that would make use of the canal impossible. The trial court denied Colman's motion for preliminary injunction. The causeway was breached. Colman sued claiming that his property interest had been taken or damaged for public use without just compensation. See, Utah Const., Art. I, Sec. 22.

The State argued that the waters of the Great Salt Lake were held in trust for the public, and that by granting an easement to Colman on the lakebed the State had violated the public trust doctrine. In other words, like the State of Illinois in *Illinois Central*, the State argued that Colman's property interest had been granted without authority in the first place. Therefore, it could be taken without compensation.

The Supreme Court explained that "the essence of [the public trust] doctrine [articulated in *Illinois Central*] is that navigable waters should not be given without restriction to private parties and should be preserved for the general public for uses such

² The *jus publicum* refers to "the right, title, or dominion of public ownership; esp., the government's right to own real property in trust for the public benefit." Black's Law Dictionary, 7th Ed., p. 867, West Group, St. Paul, Minn. (1999). Cf., "*jus privatum*," referring to the "right, title, or dominion of private ownership." *Id.*

as commerce, navigation, and fishing.” *Colman*, 795 P.2d at 635. The Court noted recent cases in which the doctrine had been extended to situations in which the State granted use of public waters to private parties. *Id.* (citing *Kootenai Envtl. Alliance Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983)). Finally, the Court held that property held in public trust “cannot be alienated except [when] parcels [are] used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.” *Colman*, 795 P.2d at 635 (citing *Illinois Central*, 146 U.S. at 455-56).

The Supreme Court could have ruled that the public trust doctrine did not apply because the State had merely granted Colman an easement on the lakebed, not title to it. But the Court did not do so. Rather, it remanded the case to the trial court to determine whether Colman’s easement in the lakebed impaired the public interest in any way. *Colman*, 795 P.2d at 635.

Three years after *Colman*, the Utah Supreme Court decided *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909 (Utah 1993), *rehg. denied* (March 26, 1994). In that case, the Court held:

The “public trust” doctrine, discussed in *Colman v. Utah State Land Board* protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large. The public trust doctrine, however is limited to sovereign lands and perhaps other lands that are not subject to specific trusts, such as school trust lands.

National Parks, 869 P.2d at 919 (citing Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269 (1980); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970)). Thus, in Utah the public trust doctrine has been expanded to protect not only the

“traditional triad” of public trust rights—navigation, commerce, and fishing—but also the ecological integrity of public lands and public recreational uses.

Duties of The Trustee

Having defined the scope of the Utah public trust, the Court turns to the duties of the trustee under Article XX, Section 1 of the Utah Constitution. As trustee of the public trust, state actors—including the Legislature—have a duty to manage public lands for the benefit of the people of the State of Utah.

“Control of water is often a bone of contention in the West” and “use of this limited resource [is] vital to survival in a semiarid land.” White, Jean Bickmore, *Charter for Statehood: The Story of Utah's Constitution*, pp. 77-78, Univ. of Utah Press (1996).

The public’s easement in waters of the State of Utah is only one of many competing interests of the public. As trustee, the State Legislature has authority to assess the relative importance of competing water uses, and then to enact policies which favor one or more uses over others.

In the words of the Wisconsin Court of Appeals: “No single interest . . . though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all.” *State v. Village of Lake Delton*, 286 N.W.2d 622, 632 (Wis. Ct. App. 1979). On this point, Justice Durham’s reasoning is precise:

A state has powers and duties far beyond those of an ordinary citizen. It has both the power to make almost any law or regulation, limited only by the state and federal constitutions, and the responsibility to legislate in the interest of its citizens. A state can never have “undivided loyalty” to a single interest group; it must consider the health, safety, and welfare of all its people. It also has the duty to manage and preserve public lands for the benefit of present and future generations.

National Parks, 869 P.2d at 923, (Durham, J., concurring in the result; joined by Zimmerman, J.). Thus, as the Supreme Court observed in the context of school trust lands: “[T]he state [cannot] enact legislation that violates the terms of the trust. Clearly, however, general laws enacted pursuant to the police power are not likely to violate the terms of the trust.” *National Parks*, 869 P.2d at 921, FN9.

Still, “however broad the scope of the police power, it is always subject to the rule that the Legislature may not exercise any power expressly or impliedly forbidden by constitutional provisions.” *Colman*, 795 P.2d at 627 (“police powers are not, however, beyond the limitations established by the constitution”) (quoting *Bountiful City v. De Luca*, 77 Utah 107, 119-21, 292 P. 194, 199-200 (1930)). Article XX, Section 1 requires that legislation disposing of land held in trust promote “the . . . purpose[] for which [the land was] . . . granted, donated, devised, or otherwise acquired.”

Judicial Scrutiny and Burden of Proof

The level of judicial scrutiny applied to statutes disposing of public trust lands “has fascinated academics, giving rise to both ringing praise, and withering criticism.” Stoner, Ivan M., 85 Wash. L. Rev. 391, 397, FN. 40-41. As indicated in the briefing, courts have applied standards of review ranging from rational basis review to “close” or heightened scrutiny. *See, State v. Haskell*, 955 A.2d 737, 740 (Me. 2008) (applying rational basis review); *Weden v. San Juan County*, 135 Wash. 2d 678, 958 P.2d 273 (1998) (applying heightened scrutiny); *In Re Water Use Permit Applications*, 9 P.3d 409, 454 (Hawaii 2000) (applying a higher level of scrutiny); *Kootenai*, 671 P.2d at 1092 (Idaho 1983) (court will take a “close look”); *Arizona Ctr. For Law in Public Interest v.*

Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) (close look); *Owsich v. State*, 763 P.2d 488 (close scrutiny).

As the people's representative body, the Legislature cannot have undivided loyalty to one stakeholder in public lands. Rather, it must "consider the health, safety, and welfare of all [Utah citizens]" and has a duty to "manage and preserve public lands for present and future generations." *National Parks*, 869 P.2d at 923, (Durham, J., concurring). There is a presumption that in balancing these often competing interests, the Legislature acts for the benefit of the people, and not to serve private interests.

Instilled almost at every turn with an arid and rugged beauty, Utah's public wilderness is truly the timeless gift of Providence. Certainly, these lands may be sacrificed in the short-term to "over-reaching special interests who misuse the legislative process." *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, 974 P.2d 1194, 1210 (Stewart, J., concurring). Future generations cannot access legislative halls to defend their birthright. They silently trust the present generation to be a wise and responsible steward of the land and water.

However, the remedy for short-term special interests misusing legislative processes is for majorities to organize and participate fully in representative government. That political remedy exercised by the generation of today is the best hope for responsible stewardship of public wilderness and waters.

For these reasons, the Court concludes that:

- Legislation regulating use of public land enacted in the exercise of general police powers "will not be disturbed as long it does not violate constitutional limits."

Colman, 795 P.2d at 627, (citing *Salt Lake City v. Young*, 45 Utah 349, 355, 146 P. 1047, 148-49 (1915)).

- If legislation regulating use of public land is the functional equivalent of disposing of the land under Article XX, Section 1, the legislation must be rationally related to the purpose for which the land was granted, donated, devised, or otherwise acquired. Utah Const., Art. XX, Sec. 1.
- In either case, the party challenging the statute use shoulders the burden of proof.

A Regulation of Public Use Can Violate Article XX, Section 1

The only issue remaining is a narrow one: Whether a statute can so narrowly limit public use of waters in place as to be the functional equivalent of the state “disposing” of the public’s easement in violation of the public trust recognized in Article XX, Section 1 of the Utah Constitution? The answer is yes.

For guidance on this issue of first impression, the Court looks to the law of regulatory takings. Regulatory takings “occur when a governmental entity intrudes to limit the use of private property while not physically seizing it.” *B.A.M. Development, L.L.C. v. Salt Lake County*, 2006 UT 2, ¶33, 128 P.3d 1161 (citing *Yee v. City of Escondido*, 503 U.S. 519, 532, 539, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)). Regulatory takings do not always require compensation, and there is “no set formula to determine whether a regulatory taking is unconstitutional.” *B.A.M. Development*, 2006 UT 2, ¶3 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)). Rather, Courts have engaged in essentially an “ad hoc factual inquiry” identifying several relevant factors. *B.A.M. Development*, 2006 UT 2, ¶3. These factors include the “economic impact of the regulation, its interference with reasonable

investment-backed expectations, and the character of the government action.” *B.A.M. Development*, 2006 UT 2, ¶3 (citing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)).

In the end, each regulatory taking stands or falls on its own, and must be “examined individually to determine whether the regulation is ‘so onerous that its effect is tantamount to a direct appropriation or ouster.’” *B.A.M. Development*, 2006 UT 2, ¶3 (citing *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

By analogy, the state may so narrowly define lawful use of the public’s easement on state waters as to be the functional equivalent of “disposing” of that easement for purposes of Article XX, Section 1. In this context, the first two factors for determining whether a regulatory taking has occurred are not helpful. Use of the public’s easement on state waters is not tied to “economically viable use” or “reasonable investment-backed expectations.” Therefore, the Court considers the character of the government action and whether it is so onerous as to be tantamount to a disposal of the public’s easement.

The Act defines “public water” broadly. Utah Code § 73-29-102(8)(a). The term means “all waters in this state, whether above or under the ground,” including water “flowing or collecting on the surface . . . within a natural or realigned channel; or in a natural lake, pond, or reservoir on a natural or realigned channel.” Utah Code § 73-29-102(8)(a)(ii)(A)(B) (incorporating the definition of water in Section 73-1-1).

The Act recognizes a public right to use navigable public waters in the manner permitted by law. Utah Code § 73-29-201. As to non-navigable public waters, the public has a “right to float,” but only if the water “has sufficient width, depth, and flow to allow

free passage of the chosen vessel at the time of floating.” Utah Code §73-29-202(1). This right to float includes three incidental rights: (1) the right to fish while floating; (2) the right to “incidentally touch private property as required for safe passage and continued movement;” and (3) the right to “portage around a dangerous obstruction in the water” in a manner that is “most direct, least invasive, closest to the water.” Utah Code § 73-29-202(2). All other uses of the public easement are prohibited.

The Act permits any person or the Division of Wildlife Resources to establish the right to broader public recreational access, but only by successfully prosecuting a quiet title action in court. Utah Code § 73-29-204. As applied, the Act requires the person filing the suit to bear all costs of restoring use rights to the general public.³ To prevail, the claimant must prove that “private property has been used by the public for recreational access requiring the use of public water for a period of at least 10 years after September 22, 1982.” Utah Code § 73-29-203(1)(a). Public use must have been “continuous during the season conducive to the recreational access, open and notorious, adverse, and without interruption.” Utah Code § 73-29-203(1)(b).

Public recreational use which occurred before September 22, 1982 is insufficient, no matter how continuous, open, notorious, adverse, or without interruption. A property owner’s overt act intended to interrupt uninvited recreational access “is a sufficient interruption” to restart the period if the act “came to the attention of the public.” Utah Code § 73-29-203(3)(a). However, public notice of the overt act is not required. It is

³ In 2009, the Utah Legislature prohibited the award of attorney’s fees under the private attorney general doctrine in any action filed after May 12, 2009. Utah Code § 78B-5-825.5. At oral argument in this case, the Court asked the assistant attorney general if the Utah Attorney General intended to prosecute quiet title actions on behalf of members of the public who came forward with meritorious claims for broader recreational access of public waters on private land. The answer was no.

also sufficient if the overt act merely “resulted in actual interruption” of recreational use, apparently by even one person. *Id.*

Thus—absent permission or a judgment—the Act prohibits the public from accessing for any purpose public waters on private land if the water is non-floatable, or if the water becomes non-floatable at any season of the year. Even where the water is floatable, only one lawful use remains—the right to float, and the limited rights incidental thereto. All other recreational rights within the scope of the public’s easement on state waters are forbidden. This includes hunting, wading, swimming and any other use utilizing the water.

The Court concludes that the Public Waters Access Act is the functional equivalent of the state disposing of the public’s easement on state waters. Therefore, that disposition is subject to the trust duties imposed under Article XX, Section 1.

The Constitutionality of the Public Waters Access Act

The Court now turns to whether the Act violates the public trust established in Article XX, Section 1. In deciding this question, the Court considers the following factors derived from the language of Article XX, Section 1 and case law defining the scope of the public trust in Utah:

- Whether the statute regulates interests protected by the public trust?
- Whether the public easement was disposed of for the purposes for which it was acquired?
- Whether the state has given up its right of control over the public’s easement?

- Whether disposing of the public’s easement promoted the interests of the public therein, or was accomplished without any substantial impairment of the public interest in the lands and waters that remain?

The Act Regulates Interests Protected By The Public Trust

The Act regulates recreational use of public water. *See* Utah Code §§ 73-29-201 (defining lawful recreational uses of public water by members of the public); 73-29-202 (recognizing the public’s right to float on certain public waters; to incidentally touch private property for safe passage and continued movement; to portage around dangerous obstructions; and to fish while floating); 73-1-1(2) (statutory declaration of public ownership does not “create or recognize an easement for public recreational use on private property.”).⁴

As discussed above, the public trust in Utah protects recreational uses. *National Parks*, 869 P.2d at 919 (public trust doctrine protects ecological integrity of public lands and recreational uses). These uses are within the scope of the public’s easement on state waters. *J.J.N.P.*, 655 P.2d 1333, 1137 (public easement includes “the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water”); *Conaster v. Johnson*, 2008 UT 48, ¶¶25-26, 194 P.3d 897 (public easement includes swimming and wading, and incidental right to touch the water’s bed when reasonably necessary for effective enjoyment of rights provided for in the easement).

The Act Does Not Promote Interests Of The Public In The Easement

This case does not involve the Legislature making a policy decision about the relative importance of competing uses of state waters. Establishing the order in which

⁴ Article XVII, Section 1 of the Utah Constitution recognized and confirmed public ownership of state waters and the public easement derived from that ownership. (Prior Ruling, pp. 13-20).

this limited resource will be used is a legislative function. *See* Prior Ruling, p. 31 (“As the branch of government responsible for policy-making, the Legislature is in the best position to weigh the competing interests in Utah’s natural waters.”).

Likewise, the Legislature is in the best position to regulate non-consumptive uses of public waters, including recreational use. Generally, Article XX, Section 1 places no limits upon this regulatory authority. However, the public trust recognized in Article XX, Section 1 limits the authority of the Legislature to enact laws which are tantamount to disposition of the public’s interest in land—in this case, the easement derived from public ownership of state waters.

When this occurs, the statute must be rationally related to the purpose for which the public’s interest was acquired. In other words, does disposing of the public land “promote the interests of the public therein?” *Illinois Central*, 146 U.S. at 453.

As discussed in the Prior Ruling, the public acquired ownership of water in the State of Utah so that this limited resource could be placed to beneficial use. The easement on state waters derived from public ownership was acquired to promote public access to and use of state waters.

By intention, the Act does not in any way promote these interests. *See* Utah Code § 73-29-103. Rather, for the reasons stated above, the Act so narrowly defines lawful access to public waters as to be tantamount to disposition of the public’s interest. The Act’s extensive limitations on public access to and use of state waters did not promote any other public interests in water use, or favor a higher or more beneficial use of public waters.

The State Retained Control Of The Public's Easement

By enacting the Public Waters Access Act, the state did not give up its right to control the public easement. Rather, the Act constitutes an assertion of that right. Utah Code §§ 73-1-1(2) (“The Legislature shall govern the use of public water for beneficial purposes.”); 73-29-201, et. seq. (defining lawful recreational use of state waters and recognizing a cause of action to establish public recreational access).

As stated in the Prior Ruling, the Act did not transfer any property interest to private landowners. “The public’s easement in its full scope as defined in *J.J.N.P.* and Conaster has not been transferred to private parties, abrogated, or abandoned and remains in public ownership today.” (Prior Ruling, p. 31).

The Public’s Interest In Lands and Waters Remaining

The Act extensively prohibits public access to and use of non-navigable public waters. However, whether the Act substantially impairs the public’s interest in the lands and waters remaining—in the Provo River itself or in public waters statewide—is a disputed issue of material fact. Indeed, the parties have so stipulated. *See* Stipulated Supplemental Briefing Schedule, filed June 20, 2012.

ORDER

USAC has standing to raise its public trust claims. On this issue, the Court grants summary judgment in favor of USAC.

As to whether the Act violates the public trust recognized in Article XX, Section 1 of the Utah Constitution, the Court denies the cross motions for summary judgment. The degree to which the Act impairs the public’s interest in the lands and waters

remaining is a disputed issue of material fact which precludes summary judgment on this question.

DATED this 8 day of March, 2013


JUDGE DEREK P. PULLAN
Fourth District Court



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100500558 by the method and on the date specified.

MAIL: CRAIG C COBURN 299 S MAIN ST STE 1500 POB 2465 SALT LAKE CITY, UT 84111

MAIL: ERIC P LEE 1441 W UTE BLVD STE 330 PARK CITY UT 84098

MAIL: THOMAS D ROBERTS 160 E 300 S FIFTH FLR POB 140857 SALT LAKE CITY UT 84111-0857

MAIL: NATHAN D THOMAS 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101

MAIL: MICHAEL D ZIMMERMAN KEARNS BLDG STE 721 136 S MAIN ST SALT LAKE CITY UT 84101-1020

Date: 03/08/2013

/s/ DIANN BURGNER

Deputy Court Clerk

- My review of the depositions taken in this matter of the Utah Division of Wildlife Resources' five (5) Aquatics Resource Managers.
- My familiarity with waters accessible to the public via Utah's Walk-In Access Program and the Central Utah Project Mitigation Commission.
- Personal observations and experiences regarding stream access or lack of stream access as I have traveled and fished around the State.
- My review of fishable rivers and streams and fishing licenses issued in Utah¹ versus Montana² and Idaho³, and the relative number of licensed anglers theoretically plying each mile of Utah's available fishable rivers and streams before and after H.B. 141, versus licensed anglers plying each mile of Montana's and Idaho's fishable rivers and streams.

c. Understanding of Utah's Stream Access Laws: History

Conner v. Johnson. It is my understanding that this decision confirmed the public's right to access from any public access point and use for any lawful purpose any Utah river or stream and to reasonably touch the streambed in any manner necessary and incident to doing so, regardless of bed ownership.

H.B. 141. It is my understanding that H.B. 141 made it unlawful, without landowner permission, to access or use any non-navigable Utah river or stream that traverses "posted" land, with the exception of floating that river or stream without touching the streambed except as required to continue floating.

d. Discussion

Anglers fishing Utah's waters have for several years expressed a growing concern regarding increasingly more crowded fishing conditions on Utah's fishable cold-water rivers and streams and the negative impact on the fishing experience as a result of this condition. These concerns became significantly greater and more frequently expressed following the passage of H.B. 141. In all such conversations the message has been the same: overcrowding on Utah's rivers and streams from the increasing lack of access to Utah's public waters.

After H.B. 141 became law, I received a number of e-mails from out of state customers who said they would no longer choose Utah as a fly-fishing destination. Also, a number of Utah customers said they would not be purchasing a Utah fishing license as a result of said impacts. Instead they would spend their time fishing in Idaho and Montana where the stream access laws are more favorable.

¹ Skiles Report; <http://www.senate.gov/press/2012/pubs/thw11-mt.pdf> (Table 56).

² <http://legis.mt.gov/content/getItem.cfm?id=30788> (pg. 9); <http://www.senate.gov/press/2012/pubs/thw11-mt.pdf> (Table 56).

³ <http://fishandgame.idaho.gov/public/fishguides/anglerGuideSection1.pdf> (pg. 11).

<http://www.senate.gov/press/2012/pubs/thw11-mt.pdf> (Table 56).

Exhibit 2

When asked how frequently they fish on larger rivers in Utah such as the Weber, Green, Lower Provo, Bear, and Colorado rivers, survey participants were most likely to say that they do so “never or rarely.” As indicated in Figure 3-19, across the combined set of all respondents well over one-half (56.5%) of survey participants indicated that they typically do not fish such areas, while only 18% said they do so “often” or “always.” Those purchasing a resident age 65 and older license were least likely to report frequent fishing on large rivers, with two-thirds (66.7%) of respondents in that group saying they do so “never” or “rarely.”

Respondents were also most likely to say that they “never” or “rarely” spend time fishing on Utah’s moderate-sized streams, such as the Logan River, the Middle Provo River, Currant Creek, or Huntington Creek (Figure 3-20). For the combined set of responses across all license categories, 46% of survey participants said they fish such areas never or rarely, 29.4% said they do so only occasionally, and 24.6% reported doing so often or always. The percentage of respondents saying they “often” or “always” fish on the state’s moderate-sized rivers and streams was lowest among those purchasing a resident age 65 and older fishing license (22.5%), and highest among those who had purchased a nonresident 365 day or temporary license (28.2%).

The final question in this series asked about time spent fishing on small streams in Utah. Once again, the most common responses to this question were “never” or “rarely,” with over half (51.6%) of all respondents selecting those response options (Figure 3-21). Virtually identical percentages of respondents indicated that they fish small streams either occasionally (24%) or often/always (24.3%). Interestingly, those who had purchased a resident age 65 and older fishing license were more likely than individuals in any other license category to say they never/rarely fish on small streams (63%), but also were more likely than respondents in other categories to say they fish those settings often or always (34.3%).

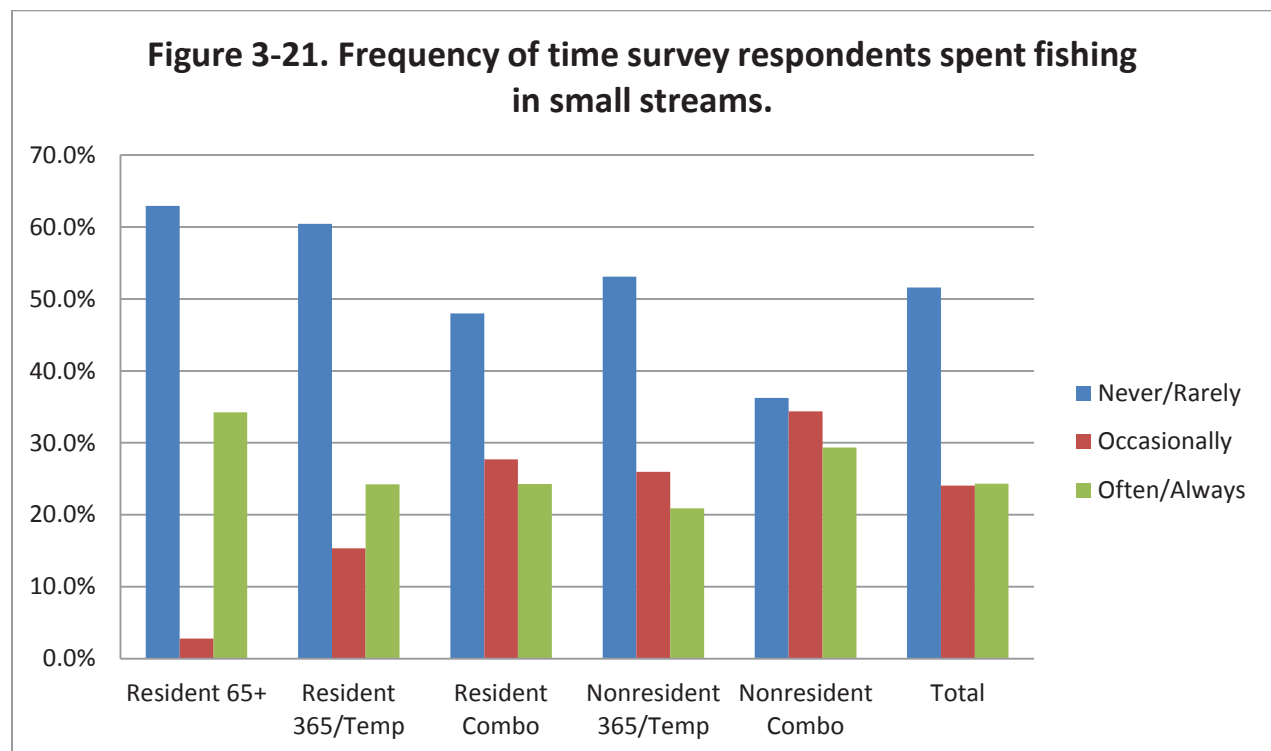
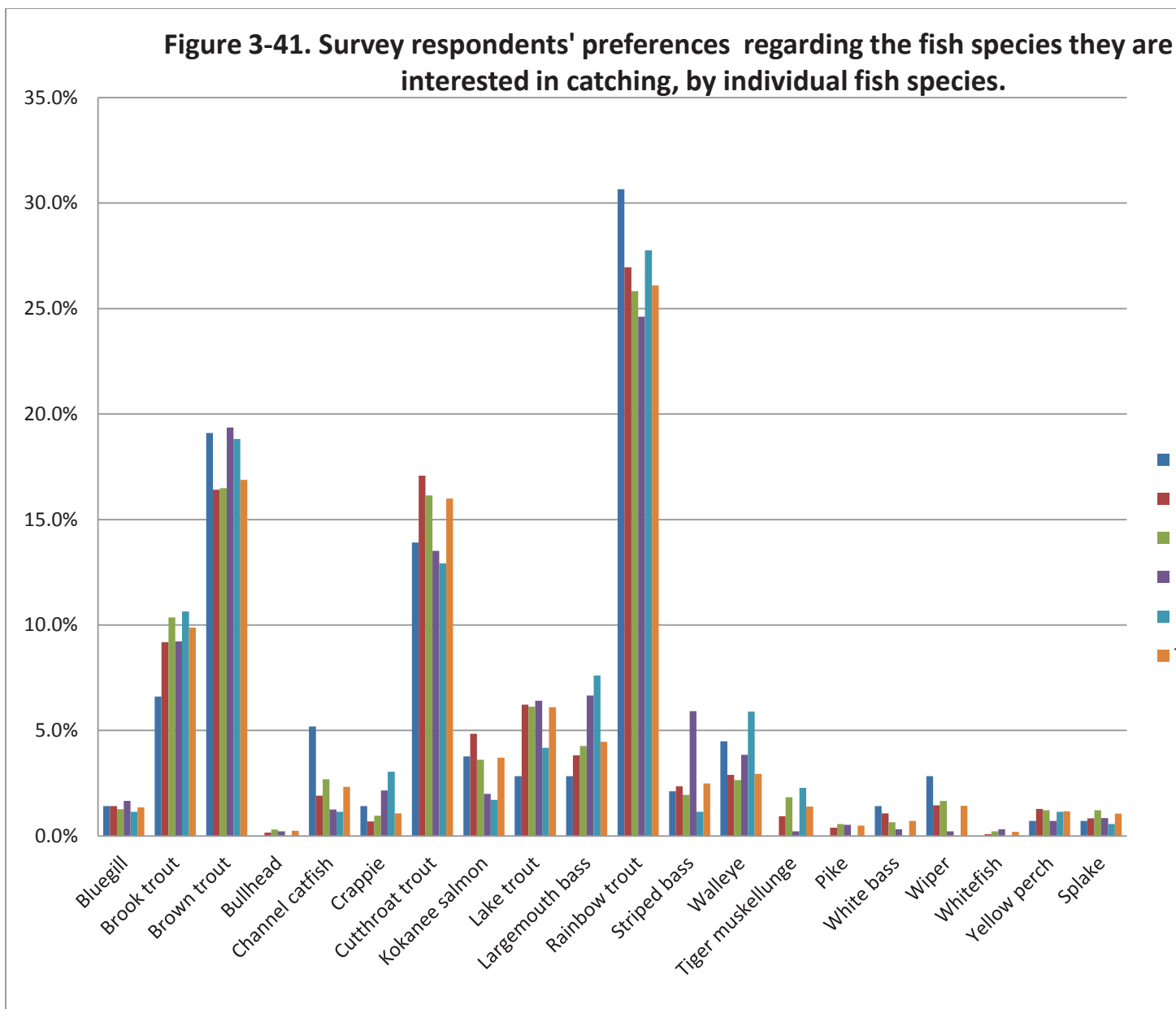


Figure 3-41. Survey respondents' preferences regarding the fish species they are interested in catching, by individual fish species.



Since survey participants expressed little overall concern about fishing access in Utah, it is not surprising that relatively few respondents felt private property restrictions contribute to major limitations in accessing preferred fishing areas. As indicated in Figure 3-92, only 10% of respondents across the combined set of all license types indicated that fishing access is “highly limited” by private property restrictions. At the same time, nearly 30% of respondents did suggest that access to their preferred fishing areas is “moderately limited” by private property. In addition, there was a noteworthy difference across some of the individual license type categories in the patterns of response to this question, with those who had purchased a nonresident 365-day or temporary fishing license far more likely to say that their fishing access is “not at all limited” by private property restrictions (about 46% of responses) than was the case for any other license type category.

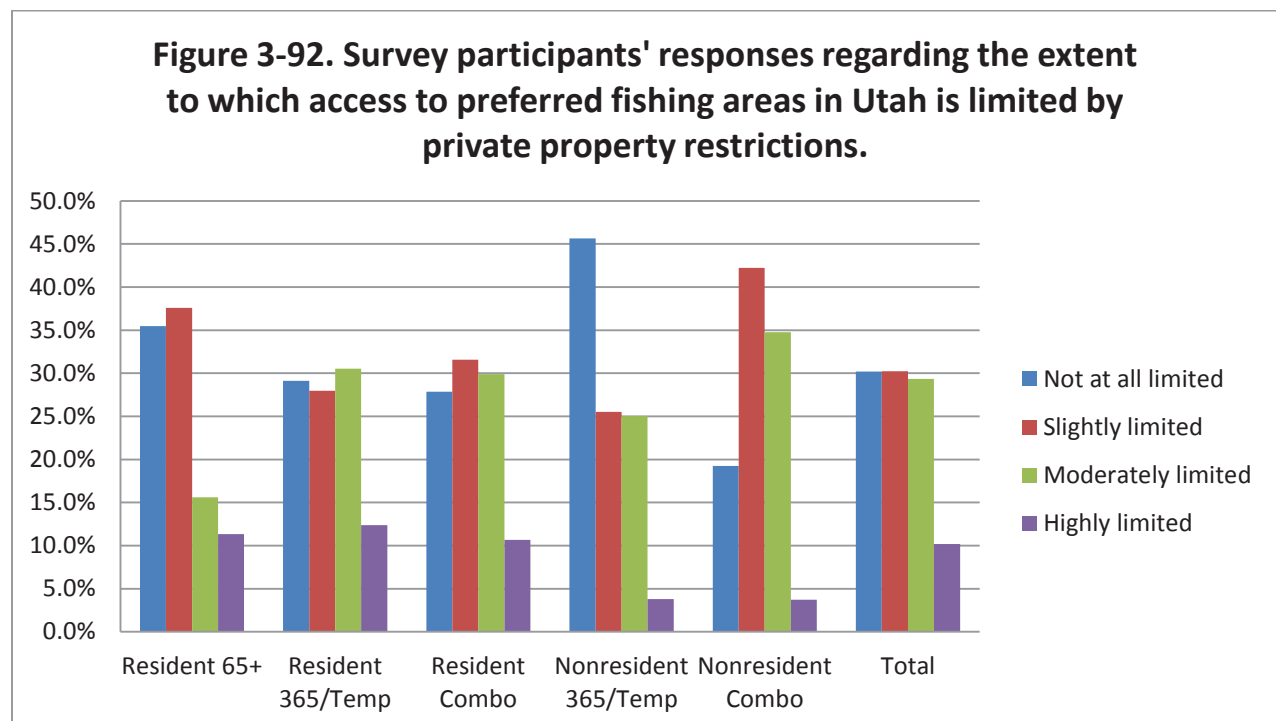
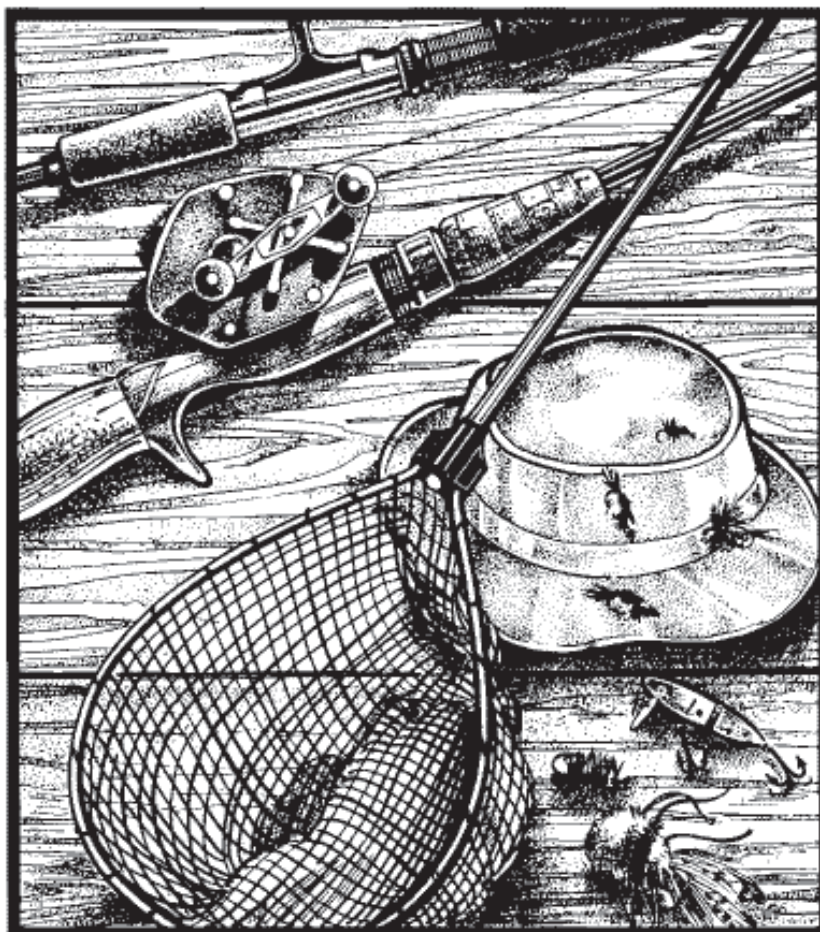


Exhibit 3

2011-2012 Utah Angler Survey

Project Summary Report



Prepared by

R.S. Krannich, R.J. Lilieholm, and J. Unger

Utah Division of Wildlife Resources
November 2012

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noteworthy. For example, the number of trips in the Southeast Region containing Lake Powell increases from less than 25,000 trips in April (Figure 4-4a), to nearly 100,000 trips in July (Figure 4-4d). Note also that contributing to the large July increase are a significant number of trips reported by nonresident license holders.

Figure 4-3. DWR fishing management regions in the State of Utah.



Table 4-1. Angler fishing trips by month and region.

	Northern	Northeast	Central	Southern	Southeast	Don't Know	Total
April	30,249	21,198	57,905	14,677	24,383	2,692	151,104
May	36,604	37,526	74,380	13,421	25,126	3,038	190,095
June	55,236	38,148	87,211	21,481	39,943	7,606	249,625
July	55,862	68,589	67,435	55,413	96,044	13,860	357,203
August	82,163	74,392	126,869	24,923	42,592	3,592	354,531
September	79,142	58,721	103,900	24,430	34,201	3,202	303,596
October	72,742	46,291	84,831	23,845	35,473	1,736	264,918
Nov-Dec	51,444	26,546	62,244	9,010	23,965	1,024	174,233
Jan-Feb	78,252	35,879	67,347	13,974	31,034	2,500	228,986
March	61,150	25,452	60,558	7,016	18,961	871	174,008
Total	532,844	432,725	732,680	208,190	349,722	40,121	2,448,299

Table 4-4. Angler days on selected waters for each region.

Region	Names of Specific Waterbodies								
	(Number of angler days)								
Northern Region	Echo Reservoir (17,816)	Bear Lake (26,720)	Blacksmith Fork River (27,884)	Logan River (57,597)	Mantua Reservoir (76,379)	East Canyon Reservoir (112,135)	Rockport Reservoir (124,979)	Willard Bay Reservoir (125,178)	Weber River (158,980)
Northeast Region	Steinaker Reservoir (11,306)	Pelican Lake (42,016)	Strawberry River (107,983)	High Uintas (South Slope) (115,739)	Starvation Reservoir (175,393)	Green River (206,061)	Flaming Gorge Reservoir (321,719)	All other locations (343,500)	Total (1,327,717)
Central Region	Jordanelle Reservoir (29,316)	Lower Provo River (78,634)	Deer Creek (109,192)	Utah Lake (125,413)	Middle Provo River (131,963)	Strawberry Reservoir (493,830)	All other locations (320,158)	Total (1,288,506)	
Southern Region	Quail Creek Reservoir (48,895)	Fish Lake (88,630)	Otter Creek (92,576)	Panguitch Lake (108,129)	Boulder Mountain Lakes (162,812)	All other locations (386,820)	Total (887,862)		
Southeast Region	Huntington Reservoir (Mammoth) (7,931)	Electric Lake (11,511)	Huntington Creek (14,760)	Scofield Reservoir (88,843)	Lake Powell (160,100)	All other locations (227,760)	Total (510,905)		

Table 5-2. Angler perceptions of crowding on Northern Region waters.

	Crowding substantially reduced the quality of the experience	Crowding moderately reduced the quality of the experience	Crowding slightly reduced the quality of the experience	Crowding did not reduce quality of the experience at all
Bear Lake	4%	4%	15%	77%
Blacksmith Fork	0%	13%	8%	79%
East Canyon Reservoir	5%	10%	31%	54%
Echo Reservoir	6%	0%	24%	71%
Logan River	3%	8%	30%	60%
Mantua Reservoir	4%	8%	32%	56%
Rockport Reservoir	6%	10%	21%	62%
Weber River	7%	13%	23%	57%
Willard Bay Reservoir	8%	13%	24%	55%
All other locations	4%	10%	24%	62%
Average	5%	10%	24%	60%

Table 5-5. Angler trip satisfaction on Northeast Region waters.

	Completely dissatisfied	Mostly dissatisfied	Neutral	Mostly satisfied	Completely satisfied
Big Sandwash Reservoir	0%	0%	20%	80%	0%
Flaming Gorge Reservoir	3%	7%	13%	47%	30%
Green River	1%	8%	8%	43%	40%
High Uintas (South Slope)	0%	10%	17%	28%	45%
Pelican Lake	5%	5%	15%	40%	34%
Red Fleet Reservoir	0%	17%	33%	17%	33%
Starvation Reservoir	0%	8%	14%	46%	32%
Steinaker Reservoir	0%	10%	20%	51%	20%
Strawberry River	2%	6%	18%	50%	25%
All other locations	2%	7%	15%	32%	43%
Average	2%	7%	14%	40%	37%

Table 5-6. Angler perceptions of crowding on Northeast Region waters.

	Crowding substantially reduced the quality of the experience	Crowding moderately reduced the quality of the experience	Crowding slightly reduced the quality of the experience	Crowding did not reduce quality of the experience at all
Big Sandwash Reservoir	0%	0%	0%	100%
Flaming Gorge Reservoir	3%	7%	22%	68%
Green River	5%	9%	33%	54%
High Uintas (South Slope)	0%	13%	22%	65%
Pelican Lake	0%	0%	0%	100%
Red Fleet Reservoir	0%	0%	0%	100%
Starvation Reservoir	1%	7%	21%	71%
Steinaker Reservoir	0%	10%	20%	70%
Strawberry River	2%	10%	24%	65%
All other locations	1%	6%	30%	64%
Average	2%	7%	25%	66%

Table 5-9. Angler trip satisfaction on Central Region waters.

	Completely dissatisfied	Mostly dissatisfied	Neutral	Mostly satisfied	Completely satisfied
Deer Creek Reservoir	4%	13%	24%	41%	18%
Jordanelle Reservoir	10%	7%	34%	44%	5%
Lower Provo River	0%	6%	25%	50%	19%
Middle Provo River	2%	3%	19%	48%	28%
Strawberry Reservoir	2%	12%	19%	41%	25%
Thistle Creek	0%	0%	29%	29%	41%
Utah Lake	3%	10%	31%	33%	23%
All other locations	4%	11%	20%	41%	24%
Average	3%	10%	22%	42%	23%

Table 5-10. Angler perceptions of crowding on Central Region waters.

	Crowding substantially reduced the quality of the experience	Crowding moderately reduced the quality of the experience	Crowding slightly reduced the quality of the experience	Crowding did not reduce quality of the experience at all
Deer Creek Reservoir	7%	10%	23%	60%
Jordanelle Reservoir	10%	12%	30%	48%
Lower Provo River	7%	20%	29%	44%
Middle Provo River	12%	16%	37%	35%
Strawberry Reservoir	2%	6%	25%	67%
Thistle Creek	0%	0%	29%	71%
Utah Lake	6%	5%	18%	72%
All other locations	5%	13%	29%	53%
Average	5%	13%	29%	53%

Exhibit 4

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a Utah
non-profit corporation,

Plaintiff,

vs.

ATC REALTY SIXTEEN, INC., a California
corporation; *et al.*,

Defendants,

DECLARATION OF:

KRISTOFOR A. OLSON

Civil No. 100500558

Hon. Derek Pullan

I, KRISTOFOR A. OLSON, declare, under criminal penalty of the State of Utah, that the following information is true and correct:

1. I am over the age of twenty-one years of age and reside in Salt Lake County, State of Utah.
2. I am a member of the Utah Stream Access Coalition. I am also its President.

3. I have accessed on multiple occasions prior to and including May 10, 2010, the Provo River where it flows through Victory Ranch from a public right-of-way and, walking up the bed of the River below the high-water mark, fly fished the River.
4. I returned to fish the Provo River where it flows through Victory Ranch after May 10, 2010, but was turned away by 'No Trespassing' signs and similar postings posted by ATC or its predecessor.
5. Even though I have desired to do so, I have not returned to fish the currently-posted section of the Provo River where it flows through Victory Ranch since May 10, 2010.
6. I accessed and fished on multiple occasions prior to May 10, 2010, the Weber River near Peoa with the consent of landowner Lloyd Marchant.
7. Following passage of H.B.141, Mr. Marchant informed me that he no longer owned the land on the Weber River and that he could no longer allow me to fish there.
8. I am familiar with the Stream Access Map made available by the State of Utah (i.e., the Utah Division of Wildlife Resources ("DWR")) made available to the public online at http://wildlife.utah.gov/maps/stream_access/ ("the DWR Map).
9. According to DWR Map site, the DWR Map was last updated on September 17, 2013.
10. To my understanding, the DWR Map shows all Utah rivers and streams which the DWR believes support a viable sport fishery and further delineates where those streams traverse publicly-owned beds (in yellow) and privately-owned beds (in red).
11. It is my understanding that the defendants in this case contend that roughly 2,700 miles of the waters the DWR Map shows as traversing private beds (in red) includes waters where the State of Utah or the federal government has purchased public access rights or easements to the streams to allow public access and use.

12. This contention is not true if and to the extent these waters include waters where the Utah Reclamation Mitigation and Conservation Commission, which I understand to have been formed and funded to mitigate the impacts of the Central Utah Project, obtained access or easements ("CUP Waters").

13. I have fished many of the CUP Waters over the years, including the Middle Provo River (between Jordanelle and Deer Creek Reservoirs), the Strawberry River (below Soldier Creek Dam), Currant Creek, 6th Water and Diamond Fork. While I have not fished the Duchesne River (incl. the West and North Forks near Hanna) or Rock Creek, both of which have CUP Waters, I know where those streams are and am generally where the CUP Waters are on those streams.

14. To my understanding, all of the CUP Waters that I have fished or am generally familiar with are shown as traversing public beds (in yellow) on the DWR Map.

15. It is my further understanding that the defendants in this matter contend that the DWR Map shows waters traversing beds allegedly owned by local government entities and therefore publicly accessible as traversing private beds.

16. This contention may or may not be true, as the DWR Map shows some waters within city boundaries as traversing private beds and others traversing public beds (*e.g.*, the Provo River in the Orem/Provo area and the Weber River in the Ogden area).

Dated this 29 day of September, 2014.


KRISTOFOR A. OLSON

Exhibit 5

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IN THE FOURTH JUDICIAL DISTRICT COURT, WASATCH COUNTY

STATE OF UTAH

UTAH STREAM ACCESS COALITION, a
Utah non-profit corporation,

Plaintiff,

vs.

VR ACQUISITIONS LLC, a Delaware limited
liability company; et al.

Defendants.

**VR ACQUISITIONS, LLC'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

Civil No. 100500558

Hon. Derek Pullan

Defendant VR Acquisitions, LLC ("VR Acquisitions"), by and through counsel, hereby submits the following reply memorandum in support of its motion for summary judgment, pursuant to Utah Rule of Civil Procedure 56.

I. INTRODUCTION

This Court concluded in its most recent Ruling and Order that H.B. 141 is a regulation tantamount to a disposition of the public’s easement in the beds underlying streams and rivers which flow over private property and that it does not promote the public interest. The Court also concluded, however, that that “[b]y enacting [H.B. 141], the state did not give up its right to control the public easement. . . . [H.B. 141] did not transfer any property interest to private landowners.” (March 8, 2013 Ruling and Order at 22). But the Court did not resolve the final and dispositive factor of its test – “whether the [H.B. 141] substantially impairs the public’s interest in the lands and waters remaining” (*Id.* at 22–23). Accordingly, VR Acquisitions seeks summary judgment on the grounds that the Utah Stream Access Coalition (“USAC”) cannot demonstrate substantial impairment of the public’s interest in the lands and waters that remain.

Importantly, the question is not what effect H.B. 141 had on the Conatser Easement or even the scope of the Conatser Easement. The Court has already determined that H.B. 141 operated to effectively dispose of the Conatser Easement over private property. Rather, the question is whether the public’s interest in all other lands and water remaining *after* such disposition has been substantially impaired. And as is apparent from the undisputed facts, there has been no impairment of the public’s interest in what remains. The public retains a right to float and to fish while floating on all floatable waters regardless of streambed ownership. The public retains a right to fish while standing on the streambeds of nearly 60% of Utah’s waters flowing over public property unimpeded by H.B. 141. There is no type of fishing available in Utah to which the public does not have access because it exists only on private property.

Finally, even the most pessimistic impairment perspective recognizes that impairment is not necessarily permanent. The “state did not give up its right to control the public easement ...” because H.B. 141 did not effectuate a permanent disposition of any lands or waters. (*Id.* at 22).

It operated to quell tensions between anglers and landowners. It was a balance struck by the legislature based upon its perception of the public will. Importantly, to the extent the public will changes and the public adopts the view of USAC, the right of the public to seek an alternate treatment remains, again, unimpaired by H.B. 141.

The enactment of H.B. 141 affected less than half of the streams and rivers of the State. The remainder has not been impacted at all. USAC has not proven otherwise and cannot prove otherwise. The public remains able to enjoy rugged beauty of Utah's lands and waters. The public retains the ability to find solitude and an opportunity for contemplation through recreation utilizing the lands and waters that remain after passage of H.B. 141. As a result and given the undisputed material facts, summary judgment in favor of VR Acquisitions is appropriate.

II. FACTS

Rather than set forth all statements of fact raised by the parties in conjunction with the pending motion, VR Acquisitions, for the convenience of the Court, consolidates such factual statements in the appendices attached hereto. Appendix A is a chart which sets forth VR Acquisitions' original statement of undisputed facts, a verbatim recitation of USAC's response, and VR Acquisitions' reply. Appendix B is a chart that sets forth USAC's supplemental statement of facts and VR Acquisitions' response. It is apparent from review of the parties' factual statements that there is no dispute of material fact which prevents the Court from entering summary judgment in favor of VR Acquisitions.

III. ARGUMENT

The last question to be answered by this Court is whether H.B. 141 substantially impairs the public's interest in the lands and waters remaining. The examination does not focus on the subject of the disposition (i.e., what was "disposed" of), but on what lands, waters, activities and rights remain *after* the disposition. The question is whether what remains has been impaired to a substantial degree, and the answer is no for three reasons. First, the public's access to remaining waters and lands is not impaired. Second, the public's ability to engage in its chosen uses of the remaining waters and lands is not impaired. And finally, the public retains the fundamental right to amend or even repeal H.B. 141. The fact of the matter is that the public is still free to recreate as it chooses and to avail itself of its constitutional right to seek an alternate treatment of the beds of streams and rivers which flow across private property. The public trust has not been violated.

A. USAC bears the burden to prove that H.B. 141 substantially impairs the trust resource that remains.

USAC argues that it no longer bears the burden of proving a violation of the public trust doctrine. This argument is misguided. "Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality." *Jones v. Utah Board of Pardons & Parole*, 2004 UT 53, ¶ 10, 94 P.3d 283 (quotations omitted)). It is only when the party challenging a statute's constitutionality has demonstrated there is no "reasonable basis upon which the statute can be found to come within the constitutional framework" has the party met its burden. *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994).

The Court has not yet decided whether H.B. 141 passes constitutional muster under an Article XX, Section 1 challenge because the Court has not yet decided whether H.B. 141 substantially impairs the public's interest in the lands and waters that remain. In its March 8, 2013 Ruling and Order, the Court declined USAC's invitation to conclude that H.B. 141

manifestly infringed upon the public's interest in the lands and waters that remain. (March 8, 2013 Ruling and Order at 22). Simply put, the Court has not decided whether H.B. 141 violates the public trust doctrine. Thus, contrary to USAC's assertion, the burden has not shifted.

B. USAC has not demonstrated that H.B. 141 substantially impairs the public's interest in the waters that remain.

USAC contends the trust resource at issue is not the public waters but instead the Conatser Easement, which USAC defines as an easement attaching to only those public waters that traverse private property. (USAC's Memorandum in Opposition to Motions for Summary Judgment Filed by the State of Utah and VR Acquisitions, LLC (the "Opposition") at 3). USAC builds on this faulty premise, concluding that because H.B. 141 restricts the public's use of private property under public water, it "disposes" of the Conatser Easement and thus nothing remains. (*Id.* at 7). USAC is mistaken. Although, VR Acquisitions concedes that this Court has held the Conatser Easement is protected by the public trust doctrine, this does not mean the Conatser Easement is by extension the trust resource itself. The trust resource is the public's water. In fact, USAC has argued as much. (USAC's Supplemental Memorandum: In support of Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment" at p. 5). ("The trust resource[,], at issue here is Utah's public waters.").

But even if this Court defines the Conatser Easement as the public trust resource, it is a distinction without a difference. The Court has found that H.B. 141 regulated the Conatser Easement in a manner that is tantamount to a disposition of that easement with respect to streams and rivers which flow over private property. The Conatser Easement, however, is not limited to any particular river, stream, or lake, or even limited to private property. In *Conatser v. Johnson*, 2008 UT 48, ¶ 8, 194 P.3d 897, the Utah Supreme Court granted the public an easement to use the public trust resource – Utah's public waters: "Under this 'doctrine of public ownership,' the

public owns state waters and has an ‘easement over the water *regardless of who owns the water bed beneath.*’” (quoting *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1136 (Utah 1982)) (emphasis added). The only portion of the “easement” effectively disposed of by H.B. 141, however, was that portion associated with privately-owned property; it remains in all other respects. And because of this, the Court must look to the entirety of the resource -- whether that is the waters of the state as a whole or the easement underlying those waters -- to determine what remains.

1. The question posed by the Court requires examination of what remains *after* disposition of the Conatser Easement, not the extent of the disposition itself.

USAC argues that the public’s interest in the Conatser Easement has been disposed of and that this ends the inquiry. (Opposition at 6–7). In so arguing, USAC evidences a misunderstanding of the question posed by the Court. The Court already concluded that “H.B. 141 is the functional equivalent of the state disposing of the public’s easement on state waters.” (March 8, 2013 Ruling and Order at 19). Irrespective of whether the parties agree with this conclusion, the question is not now whether there has been a disposition of the Conatser Easement on private property. The focus now is on what remains. “H.B. 141 extensively prohibits public access to and use of non-navigable public waters. However, whether the Act substantially impairs the public’s interest in the lands and waters remaining – in the Provo River itself or in public waters statewide – is a disputed issue of material fact.” (*Id.* at 22). The question is not whether H.B. 141 operated to dispose of the Conatser Easement, but whether the public’s interest in what remains *after* that disposition has been substantially impaired. (*Id.* at 20).

The query no longer focuses on the trust resource which was the subject of the legislation, but upon the public’s interest in that which was *not* the subject of the disposition. And the Court has already identified the relevant “public interest” the impairment of which is at

issue: recreational uses of Utah’s public waters. (*Id.*). Thus, stated completely, the inquiry is whether H.B. 141 substantially impairs the public’s ability to recreate on Utah’s public waters by examining the retained interests in the waters remaining. This analysis – looking to the remaining waters not impacted by the relevant legislation or governmental act – is consistent with VR Acquisitions’ cited public trust cases.

For example, in *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), the Idaho Supreme Court considered the lease to a private club for the construction, maintenance and use of private docking facilities on a bay in a navigable lake. In assessing whether this grant of a lease implicated the public trust, the Idaho Supreme Court examined, among other things, “the proportion of the lake taken up by docks, moorings or other impediments” and “the impact of the project on the public trust resource” *Id.* at 1092–93. The Court considered the remaining water in the navigable lake that was not impacted by the private docking facilities – the “remaining interest.” The Court concluded that although the dock would impair fishing for a small number of fishermen, the dock did not impair aesthetics, water quality or fish habitat. *Id.* at 1095. The grant was permissible under the public trust doctrine.

Likewise, in *State v. Public Service Comm.*, 81 N.W.2d 71, 73–74 (Wis. 1957), the Wisconsin Supreme Court considered the delegation of authority to the City of Madison to dredge and fill approximately four acres of Lake Wingra for use as a public park or “any other municipal purpose.” *Id.* at 72. In assessing whether this delegation implicated the state public trust doctrine, the Court considered the ability to use the non-filled portion of the lake. *Id.* In other words, the Court looked to the public’s interest in what would remain of the lake – the non-disposed portion. The Court upheld the delegation despite findings that the proposal would reduce the fish producing potential of the lake by 1,600 to 2,000 pounds per year, because “no one of the public uses of the lake as a lake will be destroyed or greatly impaired” *Id.*

Finally, in *Weden v. San Juan County*, 958 P.2d 273 (Wash. 1998), the Washington Supreme Court considered an ordinance prohibiting use of motorized personal watercraft on all marine waters of San Juan county in the face of a public trust challenge. In assessing whether the ordinance implicated the state public trust doctrine, the Court explained that “[a]lthough the ordinance prohibit[ed] a particular form of recreation, the waters are open to access by the *entire* public, including owners of [personal watercrafts] who utilize some other method of recreation.” *Id.* at 283–84; *see also Menzer v. Elkhart Lake*, 51 Wis.2d 70, 186 N.W.2d 290 (1971) (an ordinance prohibiting the use of motor boats on a lake each summer Sunday did not violate the public trust doctrine). That is, the Court examined the public’s interest in the remaining uses of the water – not just the prohibited use.

USAC attempts to distinguish this authority and argues that H.B. 141 constitutes a substantial impairment by making comparisons between the size or amount of property disposed in *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387 (1892), *Kootenai*, *Weden* and the “Wisconsin cases” and in the matter at hand. In particular, USAC points out that in *Illinois Central*, the disposition was .007% of Lake Superior¹; in *Kootenai*, the disposition was .01% Lake Coeur D’Alene, in *Weden*, the disposition was one use,² and in the Wisconsin cases the dispositions were 1.25% and a single bay. (Opposition at 7–8). But these comparisons simply evidence USAC’s misunderstanding of the question before the Court.

The issue is not what was disposed, but what remains irrespective of the amount of the disposition. As made clear by *Illinois Central*, a disposition of a public resource will be tolerated so long as what is retained is not substantially impaired. The scope of the actual disposition is

¹ Although, USAC does not explain that the issue in *Illinois Central* was not the percentage of the lake lost, but rather than the entirety of Chicago’s outer harbor would have been lost. *Id.* at 454–56.

² Notably, the disposal in *Weden* is greater than that here. Here, no singular use has been lost.

immaterial to whether H.B. 141 substantially impairs the public's ability to recreate on waters that remain. As set forth in VR Acquisitions' Opening Memorandum and revisited below, H.B. 141 does not substantially impair the public's interest in the waters that remain.

2. The public's ability to recreate on its public waters has not been substantially impaired.

USAC argues that impairment is difficult to prove because the pre-Conatser public acted in much the way they do post-H.B. 141 and that it is hard to measure what the public has lost because the public purportedly never knew it had this right. USAC laments the difficulty in proving what was lost. (Opposition at 8–9).³ Again, however, the question is not what was lost, but what remains after the effective disposition found by the Court. And in looking at what remains, it is undisputed that the public's ability to recreate utilizing the waters of the State of Utah has not been impaired. Each and every recreational opportunity available in the state is available on public lands.

As VR Acquisitions explained, based upon USAC's own offered numbers,

- Approximately 61% of the total miles of streams and rivers are fully-accessible to the public;
- Approximately 57% of miles of streams and rivers deemed "fishable" by USAC are fully accessible to the public for that purpose;

³ USAC argues that the proper measure of H.B. 141's impact on the so-called, but undefined, "Broader Public Right" to use all public waters is "to compare the situation now with the situation as it would have been had Utahns understood the truth from the outset – that Conatser had always been Utah stream access law – with the situation after H.B. 141." (Opposition at 9). In other words, USAC asks this Court to engage in a hypothetical analysis of what the public's use of public waters might have been like and to compare that hypothetical scenario with present-day reality. Such speculation, however, is not necessary. There is no form of recreation or use of the water which has been impaired by operation of H.B. 141. (Slater Depo., VR Acquisitions, LLC's Memorandum in Support of Motion for Summary Judgment ("Opening Memorandum") at Ex. J at 117:21–120:17; Olson Depo., Ex. D to Opening Memorandum, at 88:9–88:14; Thompson Depo., Ex. K to Opening Memorandum, at 139:5–139:14; Nichols Depo., Ex. O to Opening Memorandum, at 18:21–29:11).

- Approximately 73% of rivers and streams deemed “floatable” by USAC are fully available to the public for that purpose.⁴

Even under USAC’s calculations this is the water that remains wholly-available for public use. And there is no indication that use of *any* of these miles of streams and rivers is impaired by operation of H.B. 141; there is no contention that H.B. 141 somehow prevents a recreator from utilizing any of this resource. There is no impairment of what remains in this most basic sense.

The same is true of the broader question regarding the ability of the public to recreate as it so chooses. Again, there has been no impairment. The public may float on all public waters, regardless of the ownership of the streambeds. Under USAC’s calculation, Utah boasts 1,760 miles of “floatable” streams irrespective of whether they cross public or private property. (Eichorn Report, attached to VR Acquisitions Memorandum in Support of Motion for Summary Judgment (“Opening Memorandum”) at Ex. H, at p. 11). The public remains permitted to float each and every one of these 1,760 miles. In this respect, H.B. 141 is of no moment. Every impairment on the ability to float identified by USAC fits easily within the statutory exception that allows recreators to touch the bed of streams to assure safe passage. *See* Utah Code Ann. § 73-29-202.

There is, similarly, no impairment of the right to utilize the waters of the state to fish. The public has, under USAC’s numbers, the unrestricted ability to fish over 57% of the state’s rivers and streams. The public also remains able to fish the public waters flowing over privately owned property while floating, or with permission, or with walk-in access. There is no type of

⁴ These numbers underestimate the total number of streams accessible to the public, as they exclude streams on private property where the property owner has granted “walk-in” access, streams not in the “walk-in” program but where the property owner nonetheless allows access or has failed to preclude access as required by H.B. 141, streams traversing the property of cities and counties, and streams on private property for which the public has acquired prescriptive easements. (State of Utah’s Resp. To Pl.’s First Set of Interrogs., Second Set of Req. for Prod., Ex. I to Opening Memorandum, at p. 6).

fishing available in Utah which is unavailable because it exists solely on private land; that is, the public may engage in every type of fishing on every type of water in Utah – a desert state.

Nevertheless, USAC offers two pages of bullet points of contended impairments on the public's ability to fish and float. (Opposition at 10–12). These impairments – if they are impairments at all – are not impairments attributable to H.B. 141.

- H.B. 141 does not discriminate between warm water and cold water fisheries.
- The Utah Legislature did not apply H.B. 141 to certain regions of the State and exclude others; H.B. 141 is universally applicable to the entire State.
- H.B. 141 did not reduce the number of Blue Ribbon Fisheries.
- Any overcrowding on Utah's limited waters is a result of myriad factors. USAC's expert witness identified the cause of overcrowding as the increased population of anglers in the state and the limited amount of water "regardless if [the public] has access to all the state's waters or not." (Schmidt Depo. 55:21–56:4). Repeal of H.B. 141 would not change these factors and is, thus, not the cause of any overcrowding.
- Seasonal access problems – whether for fishing or floating – are not the result of H.B. 141. H.B. 141 has no impact on Utah's climate patterns or the location and amount of snowfall.
- With respect to floating, it is undisputed the public can float on *any* river or stream in the state and is expressly permitted to touch *any* streambed for the purpose of safe passage. H.B. 141 did not change this. And USAC identifies no individual who has been cited for trespassing for touching a streambed incidental to safe passage while floating. (Nichols Depo. at 29:20–32:15; *see also* Olson Depo. 41:15–42:19; Schmidt Depo. 30:19–31:2).

USAC has not identified any impairment of which H.B. 141 is the cause that impairs the public's ability to recreate on the public waters that remain. USAC has not offered any evidence to demonstrate that repealing H.B. 141 would alleviate any of these so-called impairments. The public retains the right and the ability to engage in the recreational activities of its choice on the

beds of rivers and streams not within the scope of H.B. 141. Slater Depo., Ex. J to Opening Memorandum at 117:21–120:17; Olson Depo., Ex. D to Opening Memorandum, at 88:9–88:14; Thompson Depo., Ex. K to Opening Memorandum, at 139:5–139:14; Nichols Depo., Ex. O to Opening Memorandum, at 18:21–29:11).

Admittedly, the public may have to travel to get to the best fishing or the best floating, but the argument that every member of the public should be able to access world-class fishing or floating minutes from their doorstep is nothing more than a straw man; even if H.B. 141 had not been enacted, large percentages of the public would still have to travel to fish and to float. Enactment of H.B. 141 did not change the location of the waters of the state and it did not change the population centers of the state. The rivers are where they are and the people are where they are. And, any angler in the state can engage in the type of fishing he or she chooses and may do so without impediment by H.B. 141.

Even after H.B. 141, all types and methods of fishing available in the State of Utah remain available to the public that has retained full access, without exception, to more than half of Utah’s public waters. The floating recreating public has full access to all of Utah’s floatable public waters. The public interest in what remains, namely the ability to recreate on Utah’s public waters has not been substantially impaired by H.B. 141.

C. The public’s ability to seek alternative legislation remains and is not impaired.

USAC’s characterization of its legislative efforts as protected by Rule 408 of the Utah Rules of Evidence mystifies VR Acquisitions. USAC made no secret of its legislative efforts. USAC issued press releases, made telephone calls, advertised its legislative efforts on social media and held rallies on the steps of the Capitol. These efforts are emblematic of USAC’s efforts to participate in legislation.

More importantly, USAC offers no substantive rebuttal to the argument that it retains the right to seek alternative legislation. The fact that it has not been successful is of little import and, in fact, suggests that the public-at-large (as opposed to a small public interest group) supports H.B. 141 and the interests it was intended to protect. The legislature is tasked with balancing the interests of all of its constituents. “As the branch of government responsible for policy-making, the Legislature is in the best position to weigh the competing interests in Utah’s natural waters, and to regulate the scope of the public’s use.” (May 21, 2012 Ruling and Order at 31); *see, e.g., Hirpa v. IHC Hospitals, Inc.*, 948 P.2d 785, 792 (Utah 1997). Political climates change. And a different legislature may strike a different balance. It does not matter that the position for which USAC advocates is not the currently popular position. What matters is that Utah retains control over its public waters and thus USAC maintains the ability to change the law.

Pushing for alternative legislation and garnering support for that legislation remains the proper route for relief. The lack of success thus far does not mean USAC’s efforts are in vain nor does it mean that USAC’s proper avenue for relief is through the judiciary. If USAC’s will becomes the will of the masses, change will happen. But until change occurs, the public’s waters remain protected under the control of the State of Utah.

IV. CONCLUSION

Notwithstanding the passage of H.B. 141, the right to recreate and enjoy the waters of the State of Utah remains. The public’s interest in the lands and waters remaining is unimpaired. And the public retains the right to seek a different balance from the Legislature in the future. USAC cannot show otherwise based upon the undisputed facts. And that inability is dispositive. As noted, “[i]t is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality.” *Jones v. Utah Board of Pardons &*

Parole, 2004 UT 53, ¶ 10, 94 P.3d 283 (quotations omitted). It was USAC's burden to demonstrate that H.B. 141 manifestly infringes some constitutional provision and USAC failed to carry that burden.

Accordingly, for the reasons set forth herein, VR Acquisitions respectfully requests that the Court enter summary judgment in its favor.

DATED this 5th day of November, 2014.

JONES WALDO HOLBROOK & McDONOUGH PC

By: /s/ Elizabeth M. Butler

Eric P. Lee

Nathan D. Thomas

Elizabeth M. Butler

Attorneys for Defendant VR Acquisitions, LLC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of November, 2014, I caused a true and correct copy of the foregoing to be served via electronic filing to the following:

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APPENDIX A

Appendix A

No.	Defendant's Statement of Fact	Plaintiff's Response	Defendant's Reply
<u>Legislative and Judicial History</u>			
1.	On July 18, 2008, the Utah Supreme Court issued the decision of <i>Conatser v. Johnson</i> , 2008 UT 48, 194 P.3d 897 (" <i>Conatser</i> "), holding that the public has the right to touch the privately-owned beds of state waters in ways incidental to all recreational activities that utilize the water.		Undisputed.
2.	<i>Conatser</i> marked a fundamental change in the law. Before <i>Conatser</i> , the public understood the touching of privately-owned streambeds underlying public waters to be trespassing. (Deposition of Steven J. Schmidt ("Schmidt Depo.") attached hereto at Exhibit A at 31:3–33:2, 36:8–36:16; Deposition of Jonathan "Harley" Jackson ("Jackson Depo.") attached hereto at Exhibit B at 75:5–75:19; Deposition of Jeffrey Harwin attached hereto at Exhibit C ("Harwin Depo.") at 22:16–23:23).	DISPUTED: This is an erroneous legal conclusion, not a fact. While <i>Conatser</i> speaks for itself, it did not "mark a fundamental change in the law." It confirmed and clarified existing Utah law. It did however clarify Utahns' understanding of Utah stream access law and that was what witnesses Schmidt and Harwin confirmed. Ex. 7: Schmidt Depo. at 31:3-33:2; Ex. 14: Harwin Depo. at 75:5-75:19, IMMATERIAL: <i>Conatser</i> speaks for itself.	Notwithstanding USAC's response, it is undisputed that prior to <i>Conatser</i> the public understood the touching of privately-owned streambeds underlying public waters to be trespassing. (Schmidt Depo., Ex. A to VR Acquisitions' Memorandum in Support of Motion for Summary Judgment ("Opening Memorandum"), at 31:3-33:2; Harwin Depo., Ex. C to Opening Memorandum, at 22:16–23:23).
3.	<i>Conatser</i> , however, did not mark a fundamental change with respect to the relationship between anglers and landowners. There was animosity between anglers and landowners over the anglers' use of landowners' property both before and after the <i>Conatser</i> ruling. (Deposition of	DISPUTED: Though this fact is immaterial, witness Olson testified only to angler/landowner conflicts during the <i>Conatser</i> Window, not prior to <i>Conatser</i> . Ex. 5: Olson Depo. at 62:21-63:12 Further, USAC disputes VRA's contention that this	Notwithstanding USAC's response, it is apparent that USAC does not dispute that there was animosity between anglers and landowners both before and after the <i>Conatser</i> ruling. (Schmidt Depo. 75:16–76:25).

	Kristofor A. Olson (“Olson Depo.”) attached hereto at Exhibit D at 62:21–63:12; Schmidt Depo. 75:16–76:22).	animosity, to the extent it exists, was or is a product of “anglers’ use of landowners’ property both before and after the Conatser ruling.” Instead, it was and is a product of anglers exercising their right to lawfully access and use their public waters that traverse private beds.	
4.	The Utah Legislature, in response to <i>Conatser</i> and to its constituents’ concerns, passed H.B. 141 in 2010, codified at Utah Code Ann. §§ 73-29-101 <i>et seq.</i> and amending Utah Code Ann. §§ 57-14-4 and 73-1-1. It became effective on May 10, 2010. (See April 18, 2011 First Amended Complaint (“First Amended Compl.”), on file with the Court, at ¶ 14).	DISPUTED IN PART: The 2010 Utah Legislature, or at least a majority of legislators, in fact listened only to the concerns of their constituents — that is, persons owning property traversed by public waters. They did not listen to those who were not their constituents; that is, members of the public who did not own such properties and supported public access to all public waters. IMMATERIAL: H.B.141 did what it did.	USAC does not cite any evidence to support any claimed dispute. It admits that the Utah Legislature listened to the concerns of their constituents. Thus, the fact is undisputed.
5.	The Legislature explained the necessity of H.B. 141 at Utah Code Ann. § 73-29-103, implicitly invoking the Utah Constitution’s protection of private property right (Article I, Section 22): (1) the Utah Constitution’s specific private property protections, including recognition of the inalienable right to acquire, possess, and protect property and the prohibition on taking or damaging private property for public use without just		Undisputed.

	<p>compensation, protect against government's broad recognition or grant of a public recreation easement to access or use public water on private property;</p> <p>....</p> <p>(6) its intent to foster restoration of the accommodation existing between recreational users and private property owners before the decision in <i>Conatser v. Johnson</i>, affirm a floating right recognized by the court in <i>J.J.N.P. Co. v. State</i>, and recognize adverse use as a constitutionally sound and manageable basis for establishing a limited right of public recreational access on private property in accordance with this chapter.</p>		
<u>Procedural History</u>			
6.	<p>On November 12, 2010, the Utah Stream Access Coalition ("USAC") filed a civil suit against ATC Realty Sixteen and the State of Utah in the Fourth Judicial District Court for Wasatch County challenging the constitutionality of H.B. 141. (November 12, 2010 Complaint, on file with the Court, <i>passim</i>). VR Acquisitions, LLC, subsequently acquired the property owned by ATC Realty Sixteen at issue and was substituted as Defendant by stipulation. (December 10, 2012 Order granting <i>Stipulated Motion for Substitution of Party Defendant</i>, on file with the</p>	<p>DISPUTED: USAC disputes VRA's characterizations of the Procedural History in their entirety; in particular its characterizations of the Court's prior substantive rulings, which characterizations are incomplete and inaccurate. The Court's prior rulings speak for themselves.</p>	<p>Notwithstanding USAC's response, USAC offers no evidence to contradict the fact stated which references docket entries of the Court which speak for themselves and do not create a dispute of fact. Thus, the fact is undisputed.</p>

	Court).		
7.	In its Amended Complaint, filed on April 18, 2011, USAC sought, among other things, an order declaring that H.B. 141 violates the state and federal public trust doctrine and the Utah State Constitution. (First Amended Compl., <i>passim</i>).	<i>Id.</i>	Notwithstanding USAC's response, it offers no evidence to contradict the fact stated which references docket entries of the Court which speak for themselves and do not create a dispute of fact. Thus, the fact is undisputed.
8.	The parties filed cross motions for summary judgment based primarily upon stipulated facts. On May 21, 2012, the Court held that because H.B. 141 did not dispose of or transfer any of the public's easement but rather only regulated the easement for use of the streambeds, it was, for the most part, constitutional. (May 21, 2012 Ruling and Order on Cross Motions for Summary Judgment ("May 21, 2012 Ruling and Order") on file with the Court, at 12; <i>see also id.</i> at pp. 31–36). The Court further held that H.B. 141 did not violate the Federal Public Trust Doctrine because the Federal Public Trust Doctrine was inapplicable. (<i>Id.</i> at p. 36).	<i>Id.</i>	<p>Notwithstanding USAC's response, the fact stated is undisputed. USAC offers no contrary evidence.</p> <p>It is undisputed that the Court stated "H.B. 141 did not transfer to private property owners any of the 'sticks' representing the public's easement Rather H.B. 141 regulates the extent to which the public will use its easement in non-navigable waters." (May 21, 2012 Ruling and Order at 31).</p> <p>It is undisputed that the Court stated "The public's easement in its full scope as defined in <i>J.J.N.P.</i> and <i>Conatser</i> has not been transferred to private parties, abrogated, or abandoned and remains in public ownership today." (<i>Id.</i>).</p> <p>It is undisputed that that the Court stated: "Because H.B. 141 did not dispose of the public's interest in land, Article XX, Section 1 has no</p>

			application to this case.” (<i>Id.</i> at 36).
9.	Finally, the Court held that even though the Federal Public Trust doctrine was not implicated, a Utah state public trust doctrine might be implicated. Since the parties did not brief the scope and application of the state public trust doctrine, the Court requested supplemental briefing on the issue. (<i>Id.</i> at pp. 37–39).	<i>Id.</i>	Notwithstanding USAC’s response, the fact stated is undisputed. USAC offers no contrary evidence. It is undisputed that the Court requested supplemental briefing on the state public trust doctrine. (<i>Id.</i> at 37–39).
10.	Following the parties’ supplemental briefing, the Court issued its ruling on the state public trust doctrine issue on March 8, 2013, and outlined a test to determine whether H.B. 141 violates the Utah public trust doctrine. (<i>See</i> March 8, 2013 Ruling and Order on Cross Motions for Summary Judgment re: Plaintiffs’ Standing and the Public Trust Doctrine (“March 8, 2013 Ruling and Order”), on file with the Court, at pp. 19–20). In applying this test, the Court concluded that: (1) H.B. 141 regulates recreational use of public water, bringing it within the scope of the public trust doctrine rooted in Article XX of the Utah Constitution; (2) H.B. 141 does not promote any public interests in water use; (3) H.B. 141 neither ceded the State’s control over public waters nor transferred any property to private landowners. (<i>Id.</i> at pp. 20–22). The Court further concluded that the final question of whether H.B. 141 impairs the public’s interest in the lands and waters remaining was	<i>Id.</i>	Notwithstanding USAC’s response, the fact stated is undisputed. USAC offers no contrary evidence. It is undisputed that the Court stated: “The Act regulates recreational use of public water These uses are within the scope of the public’s easement on state waters.” (March 8, 2013 Ruling and Order at 20). It is undisputed that the Court stated: “The Act Does Not Promote Interests of the Public in the Easement.” (<i>Id.</i>). It is undisputed that the Court stated “By enacting the Public Waters Access Act, the state did not give up its right to control the public easement.” (<i>Id.</i> at 22). It is undisputed that the Court stated “[w]hether the Act substantially impairs the public’s interest in the lands and waters remaining – in the

	the subject of disputed issues of material fact. (<i>Id.</i> at p. 22). The Court denied the cross motions for summary judgment. (<i>Id.</i>).		Provo River itself or in public waters statewide – is a disputed issue of material fact.” (<i>Id.</i>). Finally, USAC cannot dispute that the Court denied the parties cross-motions for summary judgment on the issue of whether the Act violates the public trust recognized in Article XX, Section 1 of the Utah Constitution. (<i>Id.</i>).
11.	Since the Court’s March 8, 2013 Ruling and Order, the parties have engaged in discovery on the question of impairment. By this motion, VR Acquisitions seeks summary judgment in its favor on the basis that the undisputed facts demonstrate, as a matter of law, that the public’s interest in the lands and waters remaining has not been substantially impaired by operation of H.B. 141.	<i>Id.</i>	Notwithstanding USAC’s response, the fact stated is undisputed. USAC offers no contrary evidence. It is undisputed that that the parties have been engaged in discovery. (<i>See, e.g.</i> , Notices of Depositions on file with the Court). It is also undisputed that VR Acquisitions now seeks summary judgment.
<u>The Streams</u>			
12.	Using the State of Utah’s geospatial imaging database, USAC asserts that Utah has 20,800 miles of streams. Of those streams, according to USAC, 12,700 traverse public property and 7,250 traverse private property. (<i>See, e.g.</i> , Expert Report of McKenzie Skiles and Supplemental Report (“Skiles Report”) attached hereto at Exhibit E, at p. 2; Pl.’s Resp. to Def.’s First Set of Reqs. for Admis., Interrog. and Reqs. for Produc. of		Undisputed.

	Docs., attached hereto at Exhibit F, at p. 7).		
13.	<p>USAC asserts that Utah has 6,291 “fishable” miles of streams. “Fishable” is defined as “State Water which, according to the Division of Wildlife Resources, has regular water flows or levels to provide fishing opportunities.” (USAC’s First Set of Interrogs. and Second Set of Reqs. for Prod., attached hereto at Exhibit G, at p. 3). Of those “fishable” streams, USAC identifies 3,584 miles that flow over public property and 2,707 miles that flow over private property. (<i>See, e.g.</i>, Skiles Expert Report at pp. 2, 4).</p>	DISPUTED: See NOTE in USAC response to State Fact No. 1, <i>supra</i> .	<p>Notwithstanding USAC’s response, it is apparent that this fact is not in dispute. USAC offers no contrary evidence.</p> <p>USAC does not dispute that USAC used the State of Utah’s GIS data to determine that Utah has 6,291 “fishable miles of streams.”</p> <p>The definition of “fishable” is not disputed. (USAC’s First Set of Interrogs. and Second Set of Reqs. for Prod., Ex. G to Opening Memorandum, at 3).</p> <p>The parties do not dispute that USAC used the State of Utah’s GIS data to determine that 3,584 miles of “fishable” stream flow over public property and 2,707 miles flow over private property. (<i>See, e.g.</i>, Skiles Expert Report, Ex. E to Opening Memorandum, at 2, 4).</p>
14.	<p>USAC also asserts that Utah has 1,760 miles of “floatable” streams. (Expert Report of Michael Eichorn and Supplemental Report (“Eichorn Report”), attached hereto at Exhibit H, at p. 11). “Floatable” is defined as “State Water that may be floated as contemplated by Utah Code Ann. 73-29-202.” (USAC’s First Set of Interrogs. and Second Set of Reqs. for Prod., Ex. G, at p. 3). Of the</p>		Undisputed.

	total “floatable” miles, USAC identified 1,291 miles that flow over public property and 469 miles that flow over private property. (Eichorn Report at p. 11).		
15.	<p>USAC’s numbers underestimate the mileage of streambeds available to the public in a number of ways:</p> <ul style="list-style-type: none"> First, USAC’s calculation of “public streams” does not include those streams traversing private property where the private property owner has made the streambeds freely available through walk-in access granted to the State and which type of access the State, through the Utah Department of Wildlife Resources (“DWR”), appears more “aggressive” than ever in securing and promoting. At present, there exists approximately 51.86 miles of streams flowing over private property enrolled in the walk-in access program, and the State of Utah is making continuing efforts to acquire additional walk-in access. (State of Utah’s Resps. to Pl.’s First Set of Interrogs., Second Set of Req. for Prod., attached hereto at Exhibit I, at p. 6; Schmidt Depo. 66:23–67:6). Second, USAC’s calculation of “public streams” does not include 	<p>DISPUTED: See NOTE in USAC response to State Fact No. 1, supra. Further, USAC did not attempt to calculate “the mileage of streambeds available to the public.” Ex. 10: Skiles Report.</p> <p>IMMATERIAL/IRRELEVANT: Correcting the State’s data to reclassify 51.86 miles of ‘Walk-In Access’ waters as traversing public beds has no material impact on the numbers or analysis. Specifically, with this adjustment the mileages (percentages) become 2,670 miles (42%) traversing private beds and 3,636 miles (51.5%) traversing private beds. See USAC “Note” in response to State Fact No. 1. Further, all Walk-In Access agreements are terminable at the will of the landowner. Thus, whether or not a landowner has enrolled public waters traversing his property in the State’s Walk-In Access program is also irrelevant. Ex. 17: Thompson (DWR) Depo. 85:8-20; Ex. 18: Slater (DWR) Depo. 50:4-51:16; Ex. 19: Hedrick Depo. 43:2-45:7; Ex. 21: Hepworth (DWR) Depo. 42:8-17.</p> <p>IMMATERIAL/IRRELEVANT. VRA has not identified</p>	<p>First, USAC does not dispute that its calculation of “public streams” does not include those streams traversing private property where the private property owners has made the streambeds freely available through walk-in access granted to the State.</p> <p>USAC does not dispute that at present there exists approximately 51.86 miles of streams flowing over private property enrolled in the walk-in access program.</p> <p>Second, USAC does not dispute that USAC’s calculation of “public streams” does not include streams and rivers flowing over private property where landowners allow access or do not post or cultivate their land.</p> <p>Third, USAC does not dispute that its calculation of “public streams” did not include rivers and streams traversing the property of cities and counties and public service districts because these are categorized as “private property” in the Utah GIS database.</p> <p>Fourth, USAC does not dispute that its calculation of “public streams” does not</p>

	<p>streams and rivers flowing over private property where landowners allow access or do not post or cultivate their property to preclude access as required H.B. 141. (State of Utah’s Resps. to Pl.’s First Set of Interrogs., Second Set of Req. for Prod., Ex. I, at p. 6).</p> <ul style="list-style-type: none"> • Third, USAC’s calculation does not include rivers and streams traversing the property of cities, counties and sundry public service districts, which are currently categorized as “private property” in Utah’s database. (State of Utah’s Resps. to Pl.’s First Set of Interrogs. at p. 6) • Fourth, USAC’s calculation of “public streams” does not account for prescriptive easements the public has acquired on private property. The Legislature, in enacting H.B. 141, specifically provided for prescriptive rights for certain qualifying streams. Utah Code Ann. § 73-29-203. While the statute <i>allows</i> the public to seek to quiet title to these streams through litigation, streambeds qualify for public use irrespective of legal action. (<i>Id.</i>). (See Utah Code Ann. § 73-29-203 (establishing a “(1) Public recreational access . 	<p>these waters, where these waters are or, most importantly, quantified the mileages of these waters. Absent such evidence, whether or not these waters traverse public beds but are included in the 2,707 miles identified by USAC as traversing private beds is immaterial. Second, a landowner can rescind his or her consent to access public waters traversing his or land at will, including access to waters enrolled in the State’s Walk-In Access program, and landowners have done so. <i>Id</i> Third, because a landowner may rescind public access to such waters at will, such waters may be publicly-accessible one day, off-limits the next, and the numbers cannot be reliably determined.</p> <p>DISPUTED: See NOTE in USAC response to State Fact No. 1, <i>supra</i>.</p> <p>IMMATERIAL.VRA has not identified these waters, where these waters are or, most importantly, quantified the mileages of these waters. Absent such evidence, whether or not these waters traverse public beds but are included in the 2,707 miles identified by USAC as traversing private beds is immaterial.</p> <p>IMMATERIAL: Apparently advocating civil disobedience, VRA effectively argues that Utahns should, at the risk of being prosecuted for criminal trespass, can and should be</p>	<p>include prescriptive easements the public has acquired on private property.</p>
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	<p>... if: (a) the private property has been used by the public for recreational access requiring the use of the public water for a period of at least 10 consecutive years that begins after September 22, 1982; and (b) the public use has been: (i) continuous during the season conducive to the recreational access; (ii) open and notorious; (iii) adverse; and (iv) without interruption.”).</p>	<p>accessing public waters that traverse private beds where a non-adjudicated public prescriptive easement may exist. Similarly, it suggests that USAC (a non-profit entity staffed and represented by uncompensated individuals), rather than the State of Utah (with its public trust obligations and comparatively vast resources), should be all H.B.141 requires to establish these prescriptive easements statewide. (For example: (a) canvassing the entire state for citizens both competent and willing to testify (on a stream segment-by-segment basis) that, other than paying property taxes, the public has adversely possessed (i.e., permissive use excluded) a certain reach of a certain stream for a continuous 10-year period between 1982 (not earlier) and the present; and (b) bringing quiet title actions on each stream segment and prove that the public has established a prescriptive easement to use those waters where it already has a constitutional easement to use those waters. Utah Code Ann. 73-29-203.)</p>	
<p><u>Public Fishing Opportunities</u></p>			
16.	<p>Utah’s reservoirs, lakes and streams sustain a wide variety of anglers including fishermen who use flies, lures and bait. (<i>See, e.g., Deposition of Michael T. Slater</i></p>	<p>IRRELEVANT/IMMATERIA L: Public access to Federal Public Waters — that is, the vast majority of the public waters that defendants claim</p>	<p>USAC does not dispute this fact. Rather it simply characterizes it as irrelevant. The question of what recreational opportunities</p>

	<p>(“Slater Depo.”), attached hereto at Exhibit J, at 117:21–120:13).</p>	<p>are part of the “trust resource that remains” — is not regulated by H.B. 141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the “trust resource that remains.” See also, n. 3.</p>	<p>remain after enactment of H.B. 141 is plainly pertinent to the question of whether the public’s interest in what remains has been substantially impaired by operation of H.B. 141 as set forth in VR Acquisitions moving papers and the accompanying Reply Memorandum in Support of Motion for Summary Judgment.</p>
17.	<p>Utah offers a variety of fishing opportunities to these anglers, including cold and warm water species on flat/still water and streams. (<i>Id.</i>).</p>	<p>IRRELEVANT/IMMATERIA L: Public access to Federal Public Waters — that is, the vast majority of the public waters that defendants claim are part of the “trust resource that remains” — is not regulated by H.B.141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the “trust resource that remains.” See also, n. 3</p>	<p>USAC does not dispute this fact. Rather it simply characterizes it as irrelevant. The question of what recreational opportunities remain after enactment of H.B. 141 is plainly pertinent to the question of whether the public’s interest in what remains has been substantially impaired by operation of H.B. 141 as set forth in VR Acquisitions moving papers and the accompanying Reply Memorandum in Support of Motion for Summary Judgment.</p>
18.	<p>As the DWR Regional Aquatics Manager for the Central Region of Utah, in which Victory Ranch is located, explained, Utah has “all kinds of opportunities within the region for anglers.” (Slater Depo. 120:9–120:10; <i>see also</i> Slater Depo. 117:21–120:13; Deposition of Paul Thompson (“Thompson Depo.”), attached hereto at Exhibit K, at 139:5–139:14; Expert Report of Jonathan “Harley” Jackson</p>	<p>IRRELEVANT/IMMAIERIA L: Public access to Federal Public Waters — the vast majority of the public waters that defendants claim are part of the “trust resource that remains” — is not regulated by H.B.141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not</p>	<p>USAC does not dispute this fact. Rather it simply characterizes it as irrelevant. The question of what recreational opportunities remain after enactment of H.B. 141 is plainly pertinent to the question of whether the public’s interest in what remains has been substantially impaired by operation of H.B. 141 as set</p>

	("Jackson Report") attached hereto at Exhibit L, at p. 7).	encompass these waters and these waters are not part of or subject to the "trust resource that remains." See also, n.3.	forth in VR Acquisitions moving papers and the accompanying Reply Memorandum in Support of Motion for Summary Judgment.
19.	These varied fishing opportunities in Utah remain after H.B. 141. (<i>Id.</i>).	IRRELEVANT/IMMATERIA L: Public access to Federal Public Waters — that is, the vast majority of the public waters that defendants claim are part of the "trust resource that remains" — is not regulated by H.B.141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the "trust resource that remains." See also, n. 3	USAC does not dispute this fact. Rather it simply characterizes it as irrelevant. The question of what recreational opportunities remain after enactment of H.B. 141 is plainly pertinent to the question of whether the public's interest in what remains has been substantially impaired by operation of H.B. 141 as set forth in VR Acquisitions' moving papers and the accompanying Reply Memorandum in Support of Motion for Summary Judgment.
20.	In fact, during the period after the <i>Conatser</i> decision in 2008 but before the enactment of H.B. 141 in 2010, fly-fishing guides did not guide on privately-owned streambeds because ample opportunities existed on public streambeds. (Jackson Depo. 94:3–97:15; 101:1–102:6; Jackson Report at pp. 4–5).	DISPUTED: VRA takes liberties with the facts. In fact, the one fly-fishing guide referenced by VRA testified that the guide service he worked for didn't guide on public waters that traversed private beds. Another guide deposed by VRA testified that he guided on public waters that traversed private beds during the Conatser Window, but stopped when H.B141 ended that practice. Ex. 7: Schmidt (USAC Expert) Depo.at 48:5 -22, 59:14-24; Ex. 14: Harwin Depo. at 22:16-24:4; See also, n.3. IRRELEVANT/IMMATERIA	This fact is not in dispute. USAC's expert, Steve Schmidt was asked: "After Conatser, before H.B. 141, did Western Rivers guide on any streams that flowed across private property." He responded: "Not to my knowledge." (Schmidt Depo. at 38:7-38:9). Additionally, USAC cites to testimony of Jeff Harwin that he guided after <i>Conatser</i> , but before H.B. 141, on one identified stretch of that flowed across private land – the Aquarium. (Harwin

		<p>L: To the extent these opportunities were available on Federal Public Waters — the vast majority of the public waters that defendants claim are part of the “trust resource that remains” — public access to such waters is not regulated by H.B.141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the “trust resource that remains.” See also, n.3.</p>	<p>Depo. at 22:16-24:4). He later testified, however, that “With the Aquarium, it was my belief that it was not private.” And he continued that he did not think his employer at the time “would want you going on private land without permission.” He continued to clarify that he had fished another location with permission from the landowner during the period after <i>Conatser</i> and before H.B. 141. (See Additional Pages of Harwin Depo., attached hereto at Exhibit A (“Harwin II”) at 56:23-57:22).</p>
21.	<p>Further, fly-fishing guides also chose not to fish on private property because private streambeds did not contain viable fishing, thus rendering them unsuitable for private trips. (Schmidt Depo. 38:7–38:25).</p>	<p>DISPUTED: VRA again takes liberties with the facts. In fact, one witness testified that his guide service did not guide on certain unidentified public waters traversing private beds during the Conatser Window as they were not “viable due to low flows in the key summer months. But he also testified that several other specific public waters traversing private beds and therefore off limits to the public were and are viable fisheries. Ex. 7: Schmidt Depo. at 102:22-103:30.</p>	<p>Notwithstanding USAC’s response, it is apparent that USAC does not dispute that Steve Schmidt stated the following:</p> <p>Mr. Thomas: “After Conatser, before H.B. 141, did Western Rivers guide on any streams that flowed across private property?”</p> <p>Mr. Schmidt: “Not to my knowledge.”</p> <p>Mr. Thomas: “So why did Western Rivers not guide on those streams then [?]”</p> <p>Mr. Schmidt: “For the same reasons that we didn’t – streams weren’t viable; otherwise we would have.”</p> <p>Mr. Thomas: “What do you</p>

			<p>mean that the streams weren't viable?"</p> <p>Mr. Schmidt: "From the standpoint of offering the type of fly-fishing experience that we wanted to offer – well, at the time of Conatser we didn't have any private property we guided on other than possibly the Duchesne, and I don't really recall the dates of that. But mostly the fisheries weren't viable. Lack of water, fishing experience wasn't – mostly I would say lack of water was the main reason on those fisheries in the key months of the summer."</p> <p>(Schmidt Depo. 38:7–25).</p>
22.	<p>Consistent with these quality fishing opportunities, the Utah fishing economy remains robust. (Schmidt Depo. 16:12–16:23; 18:5–21:2; 21:25–22:12; Harwin Depo. 25:7–26:7; 49:19–50:13; 70:11–71:13; 78:24–79:11; Jackson Report at pp. 5–6)</p>		<p>Undisputed.</p>
23.	<p>Although USAC understands that the fly fishing industry has been impaired by H.B. 141, this has not been borne out by the evidence. (Olson Depo. at 28:19–28:25; Schmidt Depo. 16:12–16:23; 18:5–21:2; 21:25–22:12; Harwin Depo. 25:7–26:7; 49:19–50:13; 70:11–71:13; 78:24–79:11; Jackson Report at pp. 5–6).</p>	<p>DISPUTED: Impairment of the fly-fishing industry isn't simply a matter of revenue or revenue trends. H.B.141 pushed 100% of stream anglers onto the public waters that traverse public beds, most of them Federal Public Waters. Using the USAC average mileages, the result is a 75% increase in angling pressure on public waters that traverse public beds (i.e., (6,297 miles /</p>	<p>Notwithstanding USAC's response, it is apparent that USAC does not dispute that the fly-fishing industry as measured in terms of revenue has not been impaired by H.B. 141. (Olson Depo. at 28:10–28:25; Schmidt Depo. 16:12–16:23; 18:5–22:12). This is true irrespective of the claims of overcrowding.</p> <p>Moreover, even USAC's own</p>

		<p>3,584 miles) = 1.75). Using the average ‘fishable’ stream mileages calculated by the State and USAC, the result is a 94% increase (i.e., (6,360 miles / 3,274 miles) = 1.94). As a result, H.B.141 has impaired the fly-fishing industry in ways not directly measured by revenue or revenue trends, such as making it more difficult to find a good angling experience, generating conflict among guides and the public on public waters traversing public beds, and motivating out-of-state customers of Utah fly shops to go elsewhere to fish. Ex. 6: Schmidt Report at pp. 4-6; Ex. 14: Harwin Depo. at 22:16-24:4 and 96:13-97:1; Supplemental Facts at ¶s 9, 10-16.</p>	<p>witness testified that even after HB. 141, he is able to find water for an appropriate guided trip any day of the year. (Harwin Depo. at 79:7-17).</p>
24.	<p>The waters of Utah still provide world class recreation activities. (Olson Depo. 88:21–89:2; Harwin Depo. 75:14–76:24).</p>	<p>DISPUTED: VRA again takes liberties with the facts, suggesting that H.B.141 had no impact on the world class activities offered by Utah’s waters. In fact, USAC President Kris Olson testified that members of the public are still able to engage in world class recreation activities “[on] some waters ... somewhere within the boundaries of [Utah].” Ex. 5: Olson Depo. at 88:21-89:2. Similarly, Jeff Harwin testified that while he can still provide a world-class experience for his customers, his ability to do so has gotten worse over the years because “Utah has a limited amount of</p>	<p>Notwithstanding USAC’s response, it is apparent that USAC does not dispute this fact.</p> <p>In response to the question of whether “The members of USAC currently are able to engage in world class recreation activities in the waters in the State of Utah; correct”, Mr. Olson, president of USAC, testified “Some waters in the state, yes. Somewhere within the boundaries of the state, yes.” (Olson Depo. 88:21-89:2).</p> <p>USAC does not dispute that Mr. Harwin testified that he</p>

		<p>water, and a lot of it closed off by private water” and “the rivers are getting overcrowded.” Ex. 14: Harwin Depo. at 96:13-97:1.</p> <p>IRRELEVANT/IMMATERIA L: To the extent that such activities are still available on Federal Public Waters — that is, the vast majority of the public waters that defendants claim are part of the “trust resource that remains” — public access to such waters is not regulated by H.B.141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the “trust resource that remains.” See also, n.3.</p>	<p>believes the fishing in Utah is “world class.” (Harwin Depo. 75:14–24).</p>
25.	<p>And a fly-fishing guide can put a customer on a fish on any given day of the year:</p> <p>Q. So, you believe that if somebody called you up and said, I want to catch a fish today, if I call you up and said, I want to catch a fish today, you could put me on a fish today?</p> <p>A. I could.</p> <p>Q. And that would be true for any day of the year?</p> <p>A. 99.9 percent of the time, yeah.</p>	<p>DISPUTED: See USAC Response to 24.</p> <p>IRRELEVANT/IMMATERIA L: To the extent this can still happen on Federal Public Waters — that is, the vast majority of the public waters that defendants claim are part of the “trust resource that remains” — public access to such waters is not regulated by H.B.141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the “trust resource</p>	<p>Notwithstanding USAC’s response, it is apparent that USAC does not dispute that a fly fishing guide in Utah can put a customer on a fish on any given day of the year. (Harwin Depo. 78:24–79:11).</p>

	<p>Q. That point one percent --</p> <p>A. Yes.</p> <p>Q. -- why not?</p> <p>A. Because of the weather.</p> <p>(Harwin Depo. 78:24–79:11).</p>	that remains.” See also, n.3.	
26.	<p>All recreation that could be done before H.B. 141 on the waters of Utah can still be done now. (Olson Depo. 88:9–88:14).</p>	<p>UNDISPUTED: In fact, the public can no longer use more than 2,700 miles of public waters for recreation, save for 469 miles (17%) of these waters that can be seasonally floated and, if feasible, fished while floating. Supplemental Facts at ¶s 12-18.</p> <p>IRRELEVANT/IMMATERIAL: To the extent that such activities are still available on Federal Public Waters — that is, the vast majority of the public waters that defendants claim are part of the “trust resource that remains” — public access to such waters is not regulated by H.B.141 because the State cannot regulate that access. As such, the trust resource at issue — the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the “trust resource that remains.” See also, n.3.</p>	<p>Notwithstanding USAC’s response, it is apparent that USAC does not dispute that there is no type of recreation that could be done before H.B. 141 on water somewhere in Utah that can no longer be done anywhere in Utah. (Olson Depo. 88:9–88:14).</p> <p>USAC’s response does not offer any contrary evidence, but relies upon mileage of water available to the public rather than the recreational possibilities.</p>
27.	<p>Similarly, USAC was unable to identify any waters that flow over property that are unavailable to the public because access requires touching a privately-owned streambed. (Schmidt Depo. 102:1–</p>	<p>DISPUTED: VRA again takes liberties with facts and ignores other facts. One witness identified portions of the Provo River, the Weber River and Thistle Creek that the</p>	<p>Notwithstanding USAC’s response, it is apparent that USAC does not dispute that it did not identify any waters flowing over public property that are unavailable to the</p>

	102:18).	public can no longer fish due to H.B.141. Ex. 7: Schmidt Depo. at 51:12-52:7.5 This same witness testified that several other quality fisheries are inaccessible to the public because they traverse private beds. Id at 102:1 — 103:21. Still others have identified other fisheries that are off-limits to the public because of H.B.141. Ex. 4: Olson Decl. at ¶s 4-11.	public because access requires touching a privately-owned streambed. (Schmidt Depo. 102:1–102:18). The pertinent fact is not whether any streambed was rendered unavailable to the public by H.B. 141. The fact is that no witness has identified any public-streambed that cannot be used because of H.B. 141.
28.	<p>And USAC was unable to identify any clients who had declined guiding services because of inability to fish on private property:</p> <p>Q. Okay. Now, with that in mind, have you ever had a client decline to take a trip with you because you did not have access to a particular stretch of water that the angler requested?</p> <p>A. No.</p> <p>Q. On how many occasions have you declined to guide a client because the only available fishing on the Provo River was located on private land?</p> <p>A. None.</p> <p>. (Harwin Depo. at 88:7–88:15).</p>	DISPUTED: “After H.B. 141 became law, I received a number of e-mails from out of state customers who said they would no longer choose Utah as a fly-fishing destination. Also, a number of Utah customers said they would not be purchasing a Utah fishing license as a result of said impacts. Instead they would spend their time fishing in Idaho and Montana where the stream access laws are more favorable.” Ex. 6: Schmidt Report at p. 4 (emphasis added).	Notwithstanding USAC’s response, it is apparent that USAC does not dispute the fact that no client declined to take a guided fishing trip because a particular stretch of river or stream was inaccessible. In fact, Mr. Harwin further testified that he was always able to find suitable water for a client. (Harwin II 53:7-54:5; Harwin Depo. 78:24–79:11).
29.	Utah’s fishing license sales have steadily increased since 2004.		Undisputed.

	<p>According to USAC's expert, Steve Schmidt, Utah sold roughly 413,000 fishing licenses "prior to H.B. 141." (Expert Report of Steve Schmidt ("Schmidt Report"), attached hereto at Exhibit M, at p. 5). According to the U.S. Fish and Wildlife Service's National Fishing License Report, <i>available at</i> http://wsfrprograms.fws.gov/Subpages/LicenseInfo/FishingLicCertHistory20042013.pdf, attached hereto at Exhibit N, fishing license sales in Utah have increased consistently over time with approximately 463,000 sold in 2013. The high point for license sales occurred in 2012 – <i>after</i> H.B. 141 – with a total of 468,045, up from 386,127 license sales in 2007. (<i>Id.</i>).</p>		
30.	<p>Consistent with the increase in the number of licenses sold, the Utah fly-fishing guiding industry has grown steadily in the past decade with an increase in consumers and purveyors. (Schmidt Depo. 16:12–16:23; 18:5–21:2; 21:25–22:12; 55:21–59:5; Jackson Depo. 60:9–60:12; Jackson Report at pp. 2, 5–6). For example, Western Rivers Flyfisher – owned and operated by Steve Schmidt, USAC's expert – enjoyed a 20-25% increase in revenue from 2004 to 2014. Likewise, Western Rivers Flyfisher has roughly 20% more customers at present than it had in 2004. (Schmidt Depo. 58:5–59:7).</p>		Undisputed.
31.	<p>USAC expert Steve Schmidt claimed less water is available to anglers after H.B. 141 than was</p>	<p>DISPUTED: VRA, by comparing stream access before Conatser and after</p>	<p>Notwithstanding USAC's response, it is apparent that USAC does not dispute that it</p>

	<p>available prior to <i>Conatser</i>, but he identified only about two miles of streambed where previously available waters are now private. (Schmidt Depo. 55:21–56:20). Conversely, Schmidt avers that there are significantly more fishermen since H.B. 141, estimating an increase of 75%. (Schmidt Depo. 55:21–56:4). In other words, irrespective of H.B. 141, the increased interest in fishing is likely the culprit for any difficulty in finding a satisfactory fishing experience. (<i>Id.</i>; see also Jackson Depo. 54:6–54:13).</p>	<p>H.B.141, seeks to divert the Court’s attention from reality — that is, the reality that the public has always had a constitutionally-recognized right to use all public waters in place and to touch and use the beds of those waters when doing so, irrespective of bed ownership — and how that reality began to manifest itself during the Conatser Window. Schmidt addressed that reality when he identified dozens of miles of fishable public waters traversing private beds that are off limits to the public following H.B.141 including, inter alia, the Weber River (85 miles) and the Upper Provo River (44 miles, including the Victory Ranch segment). Schmidt also addressed the reality of H.B.141’s impairment of that public right when it effectively eliminated public access to what the State has identified as 2,700+ miles (43%) of fishable public waters that traverse private beds, increased fishing pressure on the remaining public waters by 75% and, in turn, substantially diminished the public’s angling experience on the public waters that remain. Ex. 6: Schmidt (USAC Expert) Report at pp. 4-6; Ex. 7: Schmidt (USAC Expert) Depo. at 102:22 —103:22.</p>	<p>estimates a 75% increase in fishermen since H.B. 141. (Schmidt Depo. 55:21-56:4).</p> <p>USAC does not dispute that it identified only about two miles of streambed where the public actually went before Conatser that was not available after H.B. 141 because of landowner decision to post no trespassing signs. (Schmidt Depo. 55:21–56:20).</p> <p>And USAC does not dispute that Steve Schmidt testified that the problem of overcrowding is attributable to “a limited number of water, period, regardless if [the public] has access to all the state’s water or not.” (Schmidt Depo. 53:18–55:2).</p>
32.	<p>Part of this difficulty is likely due to fly fishermen themselves, who do not always pleasantly coexist</p>		<p>Undisputed.</p>

	with bait fisherman. For example, fly fishermen have loudly opposed opening the middle Provo River to bait fishermen even when it was only a temporary move to improve the fish population. (Slater Depo. 126:7–131:7). Stated another way, part of the reason less water is available is because fly-fishing anglers seek to exclude bait anglers and anglers seeking an increased harvest from access to certain otherwise public fishing locales. (<i>Id.</i>).		
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The Public’s Ability to Float

33.	USAC identified a number of ways in which it contends the ability to float safely or enjoyably on Utah’s rivers or streams is purportedly impaired by H.B. 141. In particular, USAC’s expert witness, Gary Nichols, identifies the following safety concerns and/or impairments implicated by H.B. 141: (1) resting to prevent fatigue/relieve cramping; (2) adding or removing clothes to prevent hypo- or hyperthermia; (3) eating or drinking; (4) minimizing the risk of lightning during a thunderstorm; (5) avoiding a flash flood; (6) treating injuries; (7) posting someone on the bank with a rescue rope; (8) scouting the river; (9) re-entering a boat; (10) practicing or coaching boating techniques; (11) urinating; and, (12) photographing. (Expert Report of Gary C. Nichols (“Nichols Report”), attached hereto at Exhibit O, at pp. 4–5).		Undisputed.
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34.	At his deposition Mr. Nichols testified that resting, adding/removing layers, eating/drinking, treating injuries, avoiding lightning, avoiding flash floods, putting someone on the bank with a rope, scouting, and allowing a boater to reenter the boat are all necessary to safely float and do not necessarily require use of the streambed, but rather the property adjacent to it. (Deposition of Gary C. Nichols (“Nichols Depo.”), attached hereto at Exhibit P, at 18:21–29:11). The remaining impairments are photographing, urinating, and coaching/practicing boating, which Mr. Nichols testified are all possible without the use of the streambed. (Nichols Depo. 29:20–32:15).	DISPUTED. It is nigh on impossible to get in or out of many watercraft suitable to floating — such as a kayak, canoe, float tube, inner tube, pack raft, etc. — without touching the streambed, even if the ultimate destination of the individual(s) involved is the stream bank or adjacent uplands. Ex. 8: Nichols (USAC Expert) Report at pp. 4-5; Ex. 9: Nichols (USAC Expert) Depo. at 18:7— 36:3	Notwithstanding USAC’s response, it is apparent that USAC does not dispute that resting, adding/removing layers, eating/drinking, treating injuries, avoiding lightning, avoiding flash floods, putting someone on the bank with a rope, scouting and allowing a boater to reenter the boat are all necessary to safely float. (Nichols Depo. 18:21–29:11). USAC does not dispute that perhaps while difficult, photography, urination, coaching/practicing boating are all possible without the use of the streambed.
35.	Neither Mr. Nichols nor USAC is aware of anyone who has been cited for trespass since the enactment of H.B. 141 for engaging in the activities identified by Mr. Nichols or for otherwise touching the streambed while engaged in floating. (Nichols Depo. at 29:20–32:15; <i>see also</i> Olson Depo. 41:15–42:19; Schmidt Depo. 30:19–31:2).		Undisputed.
<u>Legislative Activities by USAC</u>			
36.	USAC identifies its mission as promoting and assisting in all aspects of restoring and protecting stream access in the State of Utah, and it seeks to accomplish these goals through legal means,		Undisputed.

	legislative means, or negotiated means. (Olson Depo. 14:18–14:24; 24:14–24:19).		
37.	USAC’s members are primarily anglers who engage in fly fishing as opposed to other types of anglers (e.g., bait). (Olson Depo. 36:7–38:7).		Undisputed.
38.	In addition to litigation, USAC has long pursued legislative remedies. USAC was formed in opposition to H.B. 141. (Olson Depo. 15:19–15:22).		Undisputed.
39.	USAC promoted legislation to supplant H.B. 141, termed the “Compromise Bill,” in both the 2013 and 2014 Legislative Sessions. (See Olson Depo. at Exhibit 34 thereto entitled “USAC Stream Access Compromise – Bill Version (Clean)” and Exhibit 35 thereto entitled “Public Waters Access Act – 2014 General Session State of Utah”; <i>see also</i> Olson Depo. at 54:25–55:11). The Compromise Bill proposed to allow public access to streambeds that, during high water, are of sufficient flow to allow passage of a log six-feet long and six inches in diameter. (Olson Depo. 50:25–51:13). This “Compromise Bill” would not transfer property to the public and would not give the public access to all streambeds of the State of Utah. Rather, the public would still be excluded from touching the beds of small streams even though those streams may contain viable fisheries. (Olson Depo. 68:25–70:20).		Undisputed.

40.	In 2013, USAC encouraged its members to contact their legislators in opposition to H.B. 68 and in support of USAC's "Compromise Bill." (Olson Depo. 46:8–46:22).		Undisputed.
41.	USAC's legislative efforts proved unsuccessful. (<i>See, e.g.</i> , Olson Depo. at 55:10–56:17; <i>see also</i> Utah State Legislature, 2014 General Session, H.B. 37 Public Waters Access Act, http://le.utah.gov/~2014/bills/statutes/hb0037.html at "Status").		Undisputed.
42.	Nevertheless, USAC avers that if the Compromise Bill were passed, it would dismiss its lawsuits. In other words, the Compromise Bill satisfies USAC's goals of restoring the rights granted by the <i>Conatser</i> decision. (Olson Depo. 91:15–92:8).	DISPUTED IN PART: This "fact" mischaracterizes the cited testimony and constitutes argument. While USAC President Kris Olson did testify that USAC would have dismissed its two lawsuits if the legislature had passed the Compromise Bill, he did not testify that the Compromise Bill would "restore the rights granted by the Conatser decision." To the contrary, he testified that Conatser "clarified" the public's easement to use public waters. Ex. 5: Olson Depo. at 78:7 — 78:18] He also testified that, as is the nature of compromise, USAC's Compromise Bill would restore the Conatser Easement on larger streams impacted by H.B.141, but not on smaller streams. Id at 67:20 - 70:17, 79:19 - 82:6	It is undisputed that USAC averred it would dismiss its lawsuit if the Compromise Bill were passed. (Olson Depo. 91:15–92:8). It is undisputed that the Compromise Bill would restore, at least in part, the Conatser Easement. (<i>Id.</i>).

APPENDIX B

Appendix B

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
1.	<p>A 2011 Utah Angler Attitudinal Survey (Exhibit 2) commissioned by the Utah Division of Wildlife Resources (DWR) reported as follows: (Many or most of the streams identified in this Survey are Federal Public Waters. Public access to such waters is not regulated by H.B.141 because the State has no authority to regulate that access. As such, the trust resource at issue —the Conatser Easement — did not and does not encompass these waters and these waters are not part of or subject to the "trust resource that remains." USAC cites this Survey only to underscore the fact that Utah's public waters that traverse public beds are becoming increasingly crowded and the H.B.141 has increased that crowding by roughly 85%.)</p> <p>a. 80% of anglers prefer to fish for trout (all cold-water species); <i>Id</i> at 46.</p> <p>b. 18% of anglers fished Utah's "larger rivers ... such as the Weber, Green, Lower Provo, Bear and Colorado rivers;" <i>Id</i> at p. 27.</p> <p>c. 54% of anglers fished Utah's "moderate-sized streams; such as the Logan River, the Middle Provo River, Currant Creek and Huntington Creek; <i>Id</i>,</p> <p>d. 48% of anglers fished Utah "small streams;" <i>Id</i> at 29.</p> <p>e. 70% of Utah anglers under age 65 said that restrictions on access to public waters traversing private beds "limited" their angling experience (i.e., "highly" = 10%, "moderately" =30%, "slightly" = 30%) <i>Id</i> at 92, Fig. 3-92 (2" and 3rd columns).</p>	<p>Undisputed for the purposes of this motion. The referenced survey speaks for itself. That being said, VR Acquisitions avers, that USAC's assertions do not paint the entire picture.</p> <p>As a preliminary matter, USAC obscures the fact that only 10% of anglers under the age of 65 said that restrictions on access to public waters traversing private beds "highly" limited their experience. Moreover, the question before the court is not one of access over private lands to streambeds, but the ability to stand on the beds of streams and rivers which flow over private property. Even if H.B. 141 is repealed, it would not create a right to traverse private property to access streambeds.</p> <p>Additionally, the same survey on which USAC relies for this supplemental fact explained that:</p> <p>Over 30% of anglers often or always fish from a non-motorized, float tube or pontoon craft and over 20% do so on occasion. (2011 Utah Angler Attitudinal Survey attached hereto at Exhibit B at pp. 21–22),</p> <p>Over 30% of anglers often or always fish from a motorized boat and over 20% do so on occasion. (<i>Id.</i>).</p> <p>Over 60% of anglers often or always fish from the shore or the bank. (<i>Id.</i> pp. at 21, 23).</p> <p>Over 40% of anglers often or always fish on large lakes or reservoirs and 28% do so on occasion. (<i>Id.</i> at pp. 25–26).</p> <p>Over 30% of anglers often or always fish on smaller lakes or reservoirs and over 30% do so on occasion. (<i>Id.</i> at pp. 26–27).</p> <p>By comparison, over 50% of anglers never fish on large rivers. (<i>Id.</i> at pp. 27–28).</p> <p>Over 45% of anglers never fish on moderately-sized streams. (<i>Id.</i>).</p> <p>And over 50% of anglers never fish on small streams.</p>

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
		<p>(<i>Id.</i> at pp. 27, 29).</p> <p>Less than 10% of anglers said travel time to the fishing error was of no effect on their fishing participation. (<i>Id.</i> at p. 67).</p>
2.	<p>The fishable segments of Colorado and White Rivers, the Bear River from Cache County down, and most of the fishable segments of the Green and San Juan Rivers — totaling over 500 miles — are warm water fisheries. Ex. 17: Thompson (DWR) Depo. at 59:23 — 60:24; Ex. 19: Hedrick (DWR) Depo. at 34:1 — 3, 37:23 — 38:13; Ex. 20: Hart (DWR) Depo. at 15:25 — 16:5</p>	<p>Undisputed for the purposes of this motion.</p>
3.	<p>A 2011-2012 Utah Angler Survey (Exhibit 3) commissioned by the Utah Division of Wildlife Resources (DWR) reported as follows: (<i>Id.</i> at n.6.)</p> <p>a. DWR management of Utah's fisheries is divided into five (5) regions — Northern, Northeastern, Central, Southeastern, and Southern; <i>Id.</i> at p. 33</p> <p>b. almost 73% of angler trips occurred in the Northern, Northeastern and Central Regions; <i>Id.</i> at p. 34</p> <p>c. in the Northern Region:</p> <p>1) of the total angler days reported for the nine (9) listed public waters, 34% (±245,500) occurred on the three streams listed — the Weber River (±160,000), the Logan River 457,600) and the Blacksmith Fork River (127,900); <i>Id.</i> at p. 48 and</p> <p>2) of the anglers who fished these three streams, 43% of those who fished the Weber reported that crowding negatively impacted their angling experience, while 41% of anglers said the same of the Logan and 21% of the Blacksmith Fork. (The survey further reported that the following percentages of anglers were satisfied with their trips on</p>	<p>Undisputed for the purposes of this motion. The referenced survey speaks for itself. That being said, VR Acquisitions avers that USAC's assertions do not paint the entire picture. The same survey on which USAC relies for this supplemental fact explained that:</p> <p>a. Throughout Utah:</p> <p>Over 75% of anglers stated that crowding did not reduce or only slightly reduced the quality of their fishing experience at all on rivers. (2011-2012 Utah Angler Survey attached hereto at Exhibit C at p. 94).</p> <p>Over 85% of anglers stated that crowding did not reduce or only slightly reduced the quality of their fishing experience at all on lakes. (<i>Id.</i>).</p> <p>Over 65% of anglers are completely or mostly satisfied with their fishing trips on Utah rivers. (<i>Id.</i> at p. 93).</p> <p>Over 65% of anglers are completely or mostly satisfied with their trips on Utah lakes. (<i>Id.</i>).</p> <p>b. in the Northern Region:</p> <p>60% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Northern Region rivers and over another 20% said it only slightly reduced the quality of the experience. (<i>Id.</i> at pp. 97–98). This represents</p>

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
	<p>these streams: Weber — 65%; Logan — 68%; and Blacksmith Fork — 2%. <i>Id</i> at p. 101.) <i>Id</i> at p. 102</p> <p>d. in the Northeastern Region:</p> <p>1) of the total angler days reported for the seven (7) listed public waters, 35% ($\pm 369,000$) occurred on the two streams on listed — the Green River ($\pm 261,000$) and the Strawberry River ($\pm 108,000$); <i>Id</i> at p. 48 and</p> <p>2) of the anglers who fished these two streams, 47% of those who fished the Green reported that crowding negatively impacted their angling experience, while 36% of anglers said the same of the Strawberry. (The Survey further reported that the following percentages of anglers were satisfied with their trips on these streams: Green — 83%; and Strawberry — 75%. <i>Id</i> at p. 110.) <i>Id</i> at p. 111</p> <p>e. in the Central Region:</p> <p>1) of the total angler days reported for the six (6) listed public waters, 22% ($\pm 210,600$) occurred on the two streams on the list — the Middle Provo River ($\pm 132,000$) and the Lower Provo River ($\pm 78,600$); <i>Id</i> at p. 48 and</p> <p>2) of the anglers who fished these two streams, 65% of those who fished the Middle Provo reported that crowding negatively impacted their angling experience, while 56% of anglers said the same of the Lower Provo. (The Survey further reported that the following percentages of anglers were satisfied with their trips on these streams: Middle Provo — 76%; and Lower Provo — 69%. <i>Id</i> at p. 118.) <i>Id</i> at p. 119</p>	<p>approximately 80% of respondents.</p> <p>Almost 60% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Northern Region lakes and over another 20% said it only slightly reduced the quality of the experience. (<i>Id.</i> at pp. 97–98). This represents approximately 80% of respondents.</p> <p>Over 15% of anglers are completely satisfied with their fishing trips on Utah's Northern Region rivers and over another 45% are mostly satisfied. (<i>Id.</i> at p. 97). This represents approximately 60% of respondents</p> <p>Over 15% of anglers are completely satisfied with their fishing trips on Utah's Northern Region lakes and over another 35% are mostly satisfied. (<i>Id.</i>). This represents approximately 40% of respondents.</p> <p>c. in the Northeastern Region:</p> <p>60% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Northeastern Region rivers and over another 25% said it only slightly reduced the quality of the experience. (<i>Id.</i> at pp. 107). This represents 85% of respondents.</p> <p>Over 60% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Northeastern Region lakes and over another 20% said it only slightly reduced the quality of the experience. (<i>Id.</i>). This represents approximately 80% of respondents</p> <p>Over 35% of anglers are completely satisfied with their fishing trips on Utah's Northeastern Region rivers and another 40% are mostly satisfied. (<i>Id.</i> at p. 106). This represents approximately 75% of respondents.</p> <p>30% of anglers are completely satisfied with their fishing trips on Utah's Northeastern Region lakes and over another 45% are mostly satisfied. (<i>Id.</i>). This represents approximately 75% of respondents.</p>

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
		<p>d. in the Central Region:</p> <p>Over 35% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Central Region rivers and over another 30% said it only slightly reduced the quality of the experience. (<i>Id.</i> at pp. 116). This represents approximately 65% of respondents.</p> <p>40% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Central Region lakes and over another 30% said it only slightly reduced the quality of the experience. (<i>Id.</i>). This represents approximately 70% of respondents.</p> <p>Approximately 25% of anglers are completely satisfied with their fishing trips on Utah's Central Region rivers and over another 45% are mostly satisfied. (<i>Id.</i> at p. 115). This represents approximately 70% of respondents.</p> <p>Over 20% of anglers are completely satisfied with their fishing trips on Utah's Central Region lakes and almost another 40% are mostly satisfied. (<i>Id.</i>). This represents approximately 60% of respondents.</p> <p>e. in the Southern Region:</p> <p>Over 75% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Southern Region rivers and over another 20% said it only slightly reduced the quality of the experience. (<i>Id.</i> at pp. 123). This represents approximately 95% of respondents.</p> <p>Over 70% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah's Southern Region lakes and almost another 20% said it only slightly reduced the quality of the experience. (<i>Id.</i>). This represents approximately 90% of respondents.</p> <p>Over 30% of anglers are completely satisfied with their fishing trips on Utah's Southern Region rivers and over another 45% are mostly satisfied. (<i>Id.</i> at p.</p>

No.	PLAINTIFF’S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT’S REPLY
		<p>122). This represents approximately 75% of respondents.</p> <p>Over 30% of anglers are completely satisfied with their fishing trips on Utah’s Southern Region lakes and almost another 35% are mostly satisfied. (<i>Id.</i>). This represents approximately 65% of respondents.</p> <p>f. in the Southeastern Region:</p> <p>Over 80% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah’s Southeastern Region rivers and almost another 10% said it only slightly reduced the quality of the experience. (<i>Id.</i> at pp. 130). This represents approximately 90% of respondents.</p> <p>Over 75% of anglers stated that crowding did not reduce the quality of their fishing experience at all on Utah’s Southeastern Region lakes and over another 10% said it only slightly reduced the quality of the experience. (<i>Id.</i>). This represents approximately 85% of respondents.</p> <p>Over 40% of anglers are completely satisfied with their fishing trips on Utah’s Southeastern Region rivers and over another 40% are mostly satisfied. (<i>Id.</i> at p. 129). This represents approximately 80% of respondents.</p> <p>Over 25% of anglers are completely satisfied with their fishing trips on Utah’s Southeastern Region lakes and over another 35% are mostly satisfied. (<i>Id.</i>). This represents approximately 60% of respondents.</p>
4.	The State of Utah defines 'fishable' streams and rivers as those "sufficient to sustain significant public fishing . " Ex. 1: State of Utah's Responses to USAC' s First Set of Interrogatories at	Undisputed for the purposes of this motion.

No.	PLAINTIFF’S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT’S REPLY
	Interrogatory No. 4.	
5.	<p>The State of Utah estimates that of 6,419 miles of 'fishable' rivers and streams in the State:</p> <ul style="list-style-type: none"> a. 2,738 miles (some 43%) traverse privately-owned beds; and b. 3,274 miles (51%) traverse publicly-owned beds. <p><i>Id.</i></p>	Undisputed for the purposes of this motion.
6.	<p>Using the State's data, USAC's GIS expert calculated that there are 6,291 miles of fishable streams in Utah, 2,707 (43%) of which traverse private beds and 3,584 (57%) traverse public beds, the vast majority of them on federal lands. Ex. 10: Skiles Report.</p>	Undisputed for the purposes of this motion that there are 6,291 miles of fishable streams in Utah, 2,707 of which traverse private beds and 3,584 of which traverse public beds. Disputed, but immaterial, that McKenzie Skiles Expert Report identified the majority of these public beds as “federal land.”
7.	<p>This same GIS expert calculated that of the Provo River's 88 miles of 'fishable' water:</p> <ul style="list-style-type: none"> a. 49 miles (56%), including the Victory Ranch segment, traverse privately-owned beds; <p>and</p> <ul style="list-style-type: none"> b. 39 miles (44%) traverse publicly-owned beds. <p>Ex. 11: Skiles Supplemental Report.</p>	Undisputed for the purposes of this motion.
8.	<p>Averaging the State and USAC state-wide numbers, the mileages of fishable public waters are: 6,360 total 'fishable' miles; 2,722 (42.8%) traversing private beds; and 3,440 (54%) traversing public beds.(Note: The State's mileages for fishable waters traversing 'private beds' and 'public beds' add up to 6,012 miles, 407 miles short of its total of 6,419 'fishable' miles. While the State does not account for the 407 missing miles, USAC suspects but has not confirmed that the 'missing' miles represent fishable waters that traverse tribal lands, which are freely-accessible only to tribal members. Averaging the State and</p>	Undisputed for the purposes of this motion.

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
	USAC mileages reduces the 'unaccounted for' mileage to 198.) USAC uses these mileages for the balance of this memorandum.	
9.	Utah has far fewer miles of fishable public waters (6,360) than Idaho (26,000) or Montana (21,600). Ex. 6: Schmidt (USAC Expert) Report at p. 4, n. 2 and n.3.	Undisputed for the purposes of this motion. VR Acquisitions avers, however, that Idaho has over 115,000 miles of rivers and streams, Montana has over 170,000 miles of rivers and streams, and Utah has over 85,000. (<i>See</i> Montana Watercourse: State Total River and Stream Miles, http://mtwatercourse.org/facts/#stream-miles attached hereto at Exhibit D).
10.	As a result, Utah has proportionately far more licensed anglers per mile of public water than Idaho or Montana, to wit: a. Idaho — 17 angler/mile; b. Montana —13 anglers/mile; and c. Utah — 66 anglers/mile before H.B.141 and 115 anglers/mile after H.B.141. Id at p. 4.	Undisputed for the purposes of this motion. VR Acquisitions avers, however, that the population of Utah exceeds that of Idaho and Montana combined. (<i>See</i> United States Census: Quick Facts – Utah http://quickfacts.census.gov/qfd/states/49000.html , attached hereto at Exhibit E, listing Utah's 2010 population as 2.76 million; United States Census: Quick Facts – Idaho, http://quickfacts.census.gov/qfd/states/16000.html , attached hereto at Exhibit F, listing Idaho's 2010 population as 1.57 million; United States Census: Quick Facts – Montana, http://quickfacts.census.gov/qfd/states/30000.html , attached hereto at Exhibit G, listing Montana's 2010 population as .99 million). Further the number of people per square mile in Montana and Idaho is 6.8 and 19.0, respectively. In Utah, it is 33.6. (<i>Id.</i>).
11.	H.B. 141 has impacted the 2,722 miles of 'fishable' waters that traverse privately owned beds, including the Upper Provo River where it traverses Victory Ranch, as follows: a. all 2,722 miles are off limits to any public use other than seasonal floating; b. assuming all 469 miles of floatable waters identified by USAC are encompassed by this 2,722 miles, H.B.141 eliminated all public	Immaterial. The question pending before this Court is whether the public has experienced a substantial impairment in the interest in the lands and waters remaining. The focus is not on the disposition. (March 8 Ruling and Order at 22). It is undisputed that the public may fly fish, lure fish and bait fish on warm waters and cold waters, flat waters and moving waters even after the passage of H.B. 141. Further, it is undisputed the public maintains the ability to float on all floatable waters, irrespective of streambed ownership, in Utah. (<i>See, e.g.,</i>

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
	<p>access to at least 2,253 miles (83%) of all public waters; c, all 2,722 miles are off-limits to anglers having watercraft capable of floating such waters except during periods, typically seasonal, when a river or stream has sufficient water to be 'floatable';</p> <p>d. even when 'floatable', all 2,722 miles are effectively off limits to anglers owning and using watercraft to float a river or stream, except where an angler can simultaneously navigate his/her vessel and fish or turn their attention from navigating her/his vessel to angling without touching the bed;</p> <p>e. all 2,722 miles are off-limits to anglers who cannot financially afford or who physically unable to operate watercraft capable of floating such waters;</p> <p>f. all 2,722 miles are off-limits to anglers who prefer or wish to wade fish (i.e., fishing while wading a stream);</p> <p>g. these waters are off-limits to individuals who merely wish to wade the stream to birdwatch, study entomology, fur trap or pursue other otherwise lawful activities other than angling; and</p> <p>h. these waters are off-limits to individuals who wish swim the stream.</p> <p>Ex. 6: Schmidt Report at pp. 3-6; Ex. 7: Schmidt Depo. at 50:21-51:23, 55:21-56:4, 89:1-90:4.</p>	<p>Slater Depo. Ex, J to Opening Memorandum at 117:21–120:13; USAC's Opposition to Motion for Summary Judgment at 12).</p>
12.	<p>By effectively eliminating public access to 2,722 of Utah's 6,440 miles of 'fishable' waters, H.B.141:</p> <p>a. increased fishing pressure on the 3,440 miles remaining by at least 75%; Ex. 6: Schmidt (USAC Expert) Report at p. 5</p> <p>b. has contributed to many remaining waters becoming 'heavily utilized' by anglers arid</p>	<p>Immaterial. The question pending before this Court is whether the public has experienced a substantial impairment in the interest in the lands and waters remaining. The focus is not on the disposition. (March 8 Ruling and Order at 22). It is undisputed that the public may fly fish, lure fish and bait fish on warm waters and cold waters, flat waters and moving waters even after the passage of H.B. 141. Further, it is undisputed the public maintains the ability to float on all floatable waters,</p>

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
	<p>angling pressure being "extremely heavy", especially in the northern half of the State; Ex. 17: Thompson (DWR) Depo. at 141:1-18; Ex. 18: Slater (DWR) Depo. at 79:14-21.</p> <p>c. has contributed to an existing and growing concern among anglers, guides and fly shops regarding over-crowding and a substantially and continually diminishing fishing experience on Utah's rivers and streams; Ex. 6: Schmidt (USAC Expert) Report at pp. 4-6.</p> <p>d. this increasing pressure and over-crowding has led to conflicts between anglers, guides and anglers and guides, contributing the decline in anglers' fishing experience of the remaining public waters, especially on waters closer to the Wasatch Front; Id</p> <p>e. this increasing pressure and over-crowding has also made more difficult for anglers to find solitude; Id</p>	<p>irrespective of streambed ownership, in Utah. (<i>See, e.g.</i>, Slater Depo. at Ex. J to Opening Memorandum at 117:21-120:13; USAC's Opposition to Motion for Summary Judgment at 12).</p>
13.	<p>Most of the 2,722 miles directly impaired by H.B.141 are situated in Utah's valleys, while most of the 3,440 miles remaining are the upper reaches of Utah's public waters and originate in Utah's more mountainous regions on public lands. As a result:</p> <p>a. the 2,722 miles directly impaired by H.B.141 are generally situated closer to improved public highways and bridges than the 3,440 miles remaining;</p> <p>b. the 2,722 miles directly impaired by H.B.141 generally found in gentler terrain than the 3,440 miles remaining;</p> <p>c. the 2,722 miles directly impaired by H.B.141 are generally easier to access physically than the 3,440 miles remaining;</p> <p>d. the 2,722 miles directly impaired by H.B.141 are generally easier to access</p>	<p>Immaterial. The question pending before this Court is whether the public has experienced a substantial impairment in the interest in the lands and waters remaining. The focus is not on the disposition. (March 8 Ruling and Order at 22). It is undisputed that the public may fly fish, lure fish and bait fish on warm waters and cold waters, flat waters and moving waters even after the passage of H.B. 141. Further, it is undisputed the public maintains the ability to float on all floatable waters, irrespective of streambed ownership, in Utah. (<i>See, e.g.</i>, Slater Depo. at Ex. J to Opening Memorandum at 117:21-120:13; USAC's Opposition to Motion for Summary Judgment at 12).</p>

No.	PLAINTIFF’S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT’S REPLY
	<p>physically than the 3,440 miles remaining;</p> <p>e. the 2,722 miles directly impaired by H.B.141 are generally more easily accessed and fished by anglers during the winter months than the 3,440 miles remaining, which are frequently inaccessible except by snowmobile, skis, snowshoes, etc. and iced over and covered in snow.</p> <p>Ex. 17: Thompson (DWR) Depo. 53:10-55:17, 6:15-58:6, 75:9-76:6; Ex. 18: Slater (DWR) Depo. 35:25-37:10; Ex. 19: Hedrick (DWR) Depo. 28:13-30:3, 35:7-36:9, 72:10-18; Ex. 21: Hepworth (DWR) Depo. 55:10-56:10.</p>	
14.	<p>According to VRA Expert Jonathon 'Harley' Jackson, a law that eliminates public access to some 2,700 (43%) of 6,300 miles of public waters has had a substantial negative impact on both the fly fishing industry and the fly-fishing public. Ex. 15: Jackson (VRA Expert) Depo. at 97:1 — 101:6.</p>	<p>Immaterial. The question pending before this Court is whether the public has experienced a substantial impairment in the interest in the lands and waters remaining. The focus is not on the disposition. (March 8 Ruling and Order at 22). It is undisputed that the public may fly fish, lure fish and bait fish on warm waters and cold waters, flat waters and moving waters even after the passage of H.B. 141. Further, it is undisputed the public maintains the ability to float on all floatable waters, irrespective of streambed ownership, in Utah. (<i>See, e.g.</i>, Slater Depo. at Ex. J to Opening Memorandum at 117:21–120:13; USAC’s Opposition to Motion for Summary Judgment at 12).</p> <p>Moreover, the USAC’s purported fact does not accurately reflect Mr. Jackson’s testimony. Mr. Jackson was asked the hypothetical question: “assuming Conatser was always a law, it is your opinion that when HB 141 removed roughly 2,700 miles of waters from 43 percent of Utah’s fishable waters, that had no negative impact on the fly fishing guide industry?” (Jackson Depo. at 97:2-6). The question is hypothetical and further disregards the law and public perception prior to <i>Conatser</i> that the beds of streams flowing over private property were off limits. Additionally, Mr. Jackson responded: “In my opinion it had no negative impact on the fly fishing industry that I am aware of.”</p>

No.	PLAINTIFF’S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT’S REPLY
		<p>The cited testimony is replete with “assumptions.” (Jackson Depo. at 97:2; 98:4; 94:6; 94:11; 98:19-99:8). Counsel for VR Acquisition objected to this form of questioning. (<i>Id.</i>).</p> <p>Additionally, Mr. Jackson was later asked: “You talked in response to [counsel’s] hypothetical about the withdrawal of 2,700 miles of stream by HB 141, about the impact. Would that impact consist of having to go to different waters in those 2,700 miles?” Mr. Jackson responded: “I think there’s plenty of water in Utah to absorb all the fishermen.” (<i>See</i> Additional Pages of Jackson Depo. (“Jackson II”) attached hereto at Exhibit H, at 117:4-9). Similarly, when asked “The publicly available waters, are those sufficient to support the guiding industry?” Mr. Jackson responded: “Absolutely.” (Jackson II at 117:14-16).</p>
15.	<p>During the Conatser Window, anglers fished streams that they had not fished prior to Conatser, they stopped fishing those streams after H.B.141 and were angry and disappointed when they had do so, as many understood that they had always has the right to fish those waters.</p> <p>Ex. 17: Thompson (DWR) Depo. at 122:19 — 124:16, 139:18 — 142:18; Ex. 18: Slater (DWR) Depo. at 93:20— 97:12, 142:1 — 142:14.</p>	<p>Undisputed for the purposes of this motion that anglers fished streams post-Conatser that they had not fished prior to Conatser and that anglers stopped fishing those streams after H.B. 141.</p>
16.	<p>H.B.141 eliminated several public waters traversing private beds that, with public access, would likely qualify as Blue Ribbon Fisheries (i.e., fisheries offering a high quality angling experience), including but limited to all or reaches of:</p> <p>a. the Weber River, Blacksmith Fork, S. Fork of the Ogden, Lost Creek, E. Fork of Chalk Creek and tributaries; Ex. 17: Thompson (DWR) Depo. at 91:5 — 11, 96:3 — 10, 96:11 — 97:19. 98:18 —99:18, 103:14 — 19 and</p>	<p>Immaterial. The question pending before this Court is whether the public has experienced a substantial impairment in the interest in the lands and waters remaining. The focus is not on the disposition. (March 8 Ruling and Order at 22). It is undisputed that the public may fly fish, lure fish and bait fish on warm waters and cold waters, flat waters and moving waters even after the passage of H.B. 141. Further, it is undisputed the public maintains the ability to float on all floatable waters, irrespective of streambed ownership, in Utah. (<i>See, e.g.,</i> Slater Depo. at Ex. J. to Opening Memorandum at</p>

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
	<p>105:19 —25</p> <p>b. the Upper Provo River, including where it flows through Victory Ranch, and Diamond Fork; Ex. 18: Slater (DWR) Depo. 69:4 — 71:7</p> <p>c. the Duchesne and Strawberry Rivers; Ex. 19: Hedrick (DWR) Depo. at 55:6 — 56:20</p> <p>d. Lower Fish Creek; Ex, 20: Hart (DWR) Depo. at 38: 1 0 — 39:24 and</p> <p>e. Mammoth Creek, E. Fork of the Sevier River and the Fremont River; Ex. 21: Hepworth</p> <p>(DWR) Depo. at 120:17 — 121:6 See also, Ex. 6: Schmidt (USAC Expert) Report at p. 5; Ex. 7: Schmidt (USAC Expert) Depo. At 102:22 — 03:22.</p>	<p>117:21–120:13; USAC's Opposition to Motion for Summary Judgment at 12).</p>
17.	<p>USAC GIS Expert Michel Eichorn — utilizing property ownership data provided by the State, data provided by others, and data he developed himself— estimates that:</p> <p>a. Utah has 1,706 miles of `floatable rivers and streams; Ex. 12: Eichorn Report; Ex. 13: Eichorn Supplemental Report.</p> <p>b. 1.291 miles (73%) of these waters traverse publicly-owned beds, including rivers deemed navigable by the State of Utah; (Most of these waters are Federal Public Waters and, therefore, not part of the trust resource, that remains or otherwise,) <i>Id</i></p> <p>c. 469 miles (27%) of these waters traverse privately-owned beds; <i>Id</i></p> <p>d. an estimated 254 miles, much or most of which are included in the 469 miles of floatable waters traversing private beds, are situated close enough to the Wasatch Front to allow for day use by the vast majority of Utahns, including but not limited to the Weber</p>	<p>Immaterial. The question pending before this Court is whether the public has experienced a substantial impairment in the interest in the lands and waters remaining. The focus is not on the disposition. (March 8 Ruling and Order at 22). It is undisputed that the public may fly fish, lure fish and bait fish on warm waters and cold waters, flat waters and moving waters even after the passage of H.B. 141. Further, it is undisputed the public maintains the ability to float on all floatable waters, irrespective of streambed ownership, in Utah. (<i>See, e.g.</i>, Slater Depo. at Ex. J to Opening Memorandum at 117:21–120:13; USAC's Opposition to Motion for Summary Judgment at 12).</p>

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
	<p>River (85 miles), Provo River (40 miles), Price River (46 miles), Strawberry River (32 miles), Currant Creek (24 miles), East Canyon Creek (14.5 miles), and Chalk Creek (13 miles); Ex. 12: Eichorn (USAC GIS) Report (attachment entitled Private Floatable Miles; Ex. 8: Nichols (USAC Expert) Report at p. 4.</p> <p>e. an estimated 859 miles, all or most of which are included in the 1,291 miles of floatable waters traversing public beds, are encompassed by just seven (7) streams — the Colorado River (171 miles), Green River (327 miles), San Rafael River (98 miles), Dirty Devil (175 miles, incl. Muddy Creek), San Juan Rivers (30 miles), the White River (32 miles) and Virgin (26 miles) — all of which are situated far enough from the Wasatch Front to preclude day use by the vast majority of Utahns. Ex. 12: Eichorn (USAC GIS) Report (attachment entitled Public Floatable Miles); Ex. 8: Nichols (USAC Expert) Report at p. 4.</p>	
18.	<p>H.B.141's 'floating' provisions¹³(Utah Code Ann. 73-29-202(1)) contain multiple ambiguities that create a high risk of confusion and conflict between the floating public, landowners and law enforcement on the 469 miles of ostensibly 'floatable' public waters that traverse private beds, to wit (emphasis added):</p> <ul style="list-style-type: none"> a. whether or not a public water has "sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating;" b. whether or not the individual's touching of the streambed was "required for safe passage and continued movement;" and c. whether or not the individual's "portage around a dangerous obstruction ... was made in a manner that [was] most direct, least invasive and closest to the water." 	H.B. 141 speaks for itself.

No.	PLAINTIFF'S STATEMENT OF SUPPLEMENTAL MATERIAL FACTS	DEFENDANT'S REPLY
	<p>Interpretation of these ambiguities depends on, inter alia, the vessel, the operator(s), the operator's(s') age/experience, ever-changing or varying stream/debris conditions within the reach being floated, the landowner(s), law enforcement, the prosecutor and, ultimately, the courts, Resolution of these ambiguities against the individual floater(s) subjects them to criminal penalties for exercising their constitutionally-recognized right to use their public waters in place. These ambiguities in the law discourage boaters from floating public waters where they traverse private beds. Ex. 8: Nichols (USAC Expert) Report at pp. 4-5; Ex. 9: Nichols (USAC Expert) Depo. at 18:7 — 36:3, 56:2 — 57:8.</p>	

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IN THE FOURTH JUDICIAL DISTRICT COURT, WASATCH COUNTY

STATE OF UTAH

UTAH STREAM ACCESS COALITION, a:
Utah non-profit corporation,

Plaintiff,

vs.

VR ACQUISITIONS LLC, a Delaware limited:
liability company; et al.

Defendants.

**INDEX OF EXHIBITS TO VR
ACQUISITIONS, LLC'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

Civil No. 100500558

Hon. Derek Pullan

EXHIBIT**TITLE**

- A. Additional Pages of Deposition of Jeffrey Harwin
- B. 2011 Attitudinal Survey of Utah Anglers
- C. 2011-2012 Utah Angler Survey
- D. Montana Watercourse: State Total River and Stream Miles
- E. United States Census: Quick Facts - Utah
- F. United States Census: Quick Facts - Idaho
- G. United States Census: Quick Facts - Montana
- H. Additional Pages of Deposition of Jonathan “Harley” Jackson

EXHIBIT A

UTAH STREAM ACCESS COALITION v. VR ACQUISITIONS, LLC

December 18, 2013

JEFFREY HARWIN

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION,)
a Utah non-profit corporation,)
) Civil No. 100500558
Plaintiff,)
) Judge Derek Pullan
vs.)
) Deposition of:
VR ACQUISITIONS, LLC, a)
Delaware limited liability)
company, et al.,)
)
Defendants.)

December 18, 2013
9:19 a.m.

Location: Jones Waldo Holbrook & McDonough
170 South Main Street, Suite 1500
Salt Lake City, Utah

Reporter: Rashell Garcia

Page 1

E X H I B I T S

Number	Description	Page
25	Operating Agreement for Four Seasons Fly Guides	13
26	Blog entitled Green River Fishing in Wyoming dated 10-24-13	74
27	Blog entitled Utah Fly Fishing: The Year of the Dry dated 7-21-13	74
28	Internet advertisement - Provo River Guide Service - World Class Fishing, World Class Guides dated 6-2-13	74
29	Internet advertisement - Provo River Guide Service - World Class Fishing, World Class Guides - A Busy Week on Utah Rivers dated 2-19-13	74
30	Internet advertisement - Provo River Guide Service - World Class Fishing, World Class Guides - Utah Fishing Report Lower Provo River dated 2-6-13	74
31	Internet advertisement - Provo River Guide Service - World Class Fishing, World Class Guides - Fall Fly Fishing In Utah dated 9-28-13	74

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A P P E A R A N C E S

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I N D E X

Witness	Page
JEFFREY HARWIN	
Examination by Mr. Thomas	4
Examination by Mr. Roberts	94
Further Examination by Mr. Thomas	102

Page 2

1 December 18, 2013 9:19 a.m.
2 PROCEEDINGS
3 JEFFREY HARWIN,
4 called as a witness, by and on behalf of the defendant, VR
5 Acquisitions, having been first duly sworn, was examined and
6 testified as follows:
7 EXAMINATION
8 BY MR. THOMAS:
9 Q. Good morning. My name is Nathan Thomas. I'm
10 counsel for Victory Ranch in the matter of the Utah Stream
11 Access Coalition versus VR Acquisitions. VR Acquisitions is
12 the official name of Victory Ranch now.
13 A. Okay.
14 Q. I appreciate you being here today. Have you ever
15 had your deposition taken before?
16 A. I have.
17 Q. So you know the drill, but let me just run
18 through a few things, just some reminders. Since this is
19 being transcribed today, I'll ask you to speak clearly and
20 give audible answers. The court reporter can't take down
21 nods of the head or shakes of the head. So, do you
22 understand?
23 A. Yes.
24 Q. I'll ask that you listen to the questions and
25 answer my questions. And if there's a question that's

Page 4

1 (Pages 1 to 4)

RASHELL GARCIA
801.538.2333

1930

1 clear.

2 MR. COBURN: Thank you.

3 Q Were there any locations that you recall were
4 specifically requested for guide trips through Four Seasons
5 that you had to decline because you did not have access?

6 A I didn't have to decline the trip, but I had to
7 steer them to something different.

8 Q Did any client -- do you have any specific
9 recollection of a client who requested to fish on land where
10 you did not have access?

11 A Yes.

12 Q What land?

13 A On the Lower Provo.

14 Q Okay.

15 A And -- mainly on the Lower Provo at that time.

16 Q And when would that have been, approximately?

17 A In -- the approximate date?

18 Q Yes.

19 A I'm not -- I don't have an approximate date. I
20 just have -- recall instances where they wanted to fish
21 certain areas on the Lower Provo, and I just steered them
22 away from there.

23 Q When you say steered them away, what did you do?

24 A I said, I can't fish there because it's private.
25 I didn't want to take the risk of getting a trespass ticket.

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1 was -- once again thought was public. I got out, and I don't
2 know the person's name, but this big old heavyset guy with no
3 shirt was reaming us out to the point where we couldn't even
4 enjoy our fishing.

5 Q These locations that you thought were public,
6 were they posted no trespassing?

7 A Not that I saw.

8 Q Were they cultivated? Was there farm land that
9 approached the --

10 A It didn't look like it, no.

11 Q Were they fenced?

12 A No, they were open areas.

13 Q Those locations on the Lower Provo that were
14 specifically requested by guides or by anglers for a guided
15 trip, I believe you referred earlier to Aquarium?

16 A Yeah.

17 Q And there was one more. What was that?

18 A Below Rockport Reservoir.

19 Q Rockport Reservoir, below Rockport Reservoir.
20 Have you ever guided those areas?

21 A In Aquarium? Yeah.

22 Q When did you do that?

23 A I guided them in that slot that I thought was
24 open.

25 Q So when was that?

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1 Q I think you said you'd steer them to other areas.
2 What other areas would you steer them to?

3 A I would either steer them back to the Middle
4 Provo or steer them to some other areas on the Lower Provo
5 that I believed was not private.

6 Q Okay.

7 MR. ROBERTS: For clarification, we're still
8 talking Four Seasons, right?

9 Q Yes.

10 A Yeah.

11 Q While you were with Four Seasons, did you ever
12 have any conflict with private landowners regarding guided
13 trips on land they claimed?

14 A I've got to think about that. For 2010 and 2011,
15 yeah, I did.

16 Q With whom?

17 A I was -- you can float the Lower Provo, so I
18 floated the Lower Provo, and I anchored up in a spot that I
19 thought was public. And someone -- I think the guy's name is
20 Putnam -- came out of the campground and started yelling at
21 us.

22 Q Okay. Any others?

23 A Yeah, I was -- there was another time I was
24 floating a client named Jim Shore, and we got out in this
25 place called Gomez, a spot called Gomez, and what I thought

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1 A I don't know. 2009, 2010.

2 Q How many guide trips did you take there?

3 A I don't know. Probably 20.

4 Q Were you with Jan's at the time?

5 A I was not -- no, I don't believe I was with Jan's
6 at the time.

7 Q Who were you with between Jan's and --

8 A Oh, I'm sorry.

9 Q -- Four Seasons?

10 A 2009 --

11 MR. COBURN: You've got to make sure you don't
12 talk over him.

13 Q My question is, who were you with between Jan's
14 and Four Seasons?

15 MR. COBURN: Well, he's answered.

16 A I was right from Jan's to Four Seasons.

17 Q Right. So were you with Jan's when you guided
18 Aquarium and below Rockport?

19 A I must have been, yeah.

20 Q So did Jan's have a policy regarding guiding on
21 private land during 2009 and 2010?

22 A Not that I'm aware of.

23 Q So, earlier when I asked if you had fished on
24 private lands while at Jan's, you had identified Thousand
25 Creek and Rendezvous Ranch. You didn't identify Aquarium and

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1 Rockport. So are you saying those are places you fished that
2 were private lands while at Jan's?

3 A. Let me go back. There is a lot of rivers I have
4 to go back to. With The Aquarium, it was my belief it was
5 not private. And I'm sure they wouldn't want you going on
6 private land without permission.

7 While I was at Jan's, I did have -- I'm sorry, I
8 failed to mention, I did have access to some water below
9 Rockport.

10 Q. When you say you had access to some water below
11 Rockport, is that because Jan's had a relationship with the
12 landowner?

13 A. It wasn't really Jan's, it was one of the guides.

14 Q. One of the guides had permission to guide on that
15 portion of the stream?

16 A. And he got me there, yes.

17 Q. Now Aquarium, you said that you believed it was
18 not private. Why was that?

19 A. Because of the -- I thought at a certain time,
20 **because the law had changed, that you could use it through**
21 **an easement of the bridge and walk in there without**
22 **trespassing.**

23 Q. And you did guide Aquarium while you were at
24 Jan's?

25 A. Correct, probably a few times.

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1 Q. A few times. What does that mean?

2 A. I don't know. Five to ten. I can't recall
3 specifically.

4 Q. So, between 2005 and when you started with Four
5 Seasons, you probably guided Aquarium five to --

6 A. **No, when I said I was at Four Seasons, it would**
7 **probably be another ten times at Four Seasons. So probably**
8 **ten with Jan's, ten with Four Seasons, or five with Four**
9 **Seasons and 15 with Jan's. Around 20 times. I can't recall**
10 **exactly.**

11 Q. Let's slow down just because I want to make sure
12 that I understand this. So, while you were with Jan's, how
13 many times would you estimate you fished Aquarium?

14 A. Five to ten times.

15 Q. Five to ten times, okay. Then you said you've
16 also fished it while you were with --

17 A. **Four Seasons.**

18 Q. -- Four Seasons. Okay. And how many times with
19 Four Seasons?

20 A. Five to ten times.

21 Q. Five to ten times. And then you started guiding
22 with Four Seasons in February of 2010?

23 A. That's correct.

24 Q. Okay. When did you start doing trips with Four
25 Seasons? Was it immediately in February of 2010?

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1 A. It was immediately, yes.

2 Q. Okay. Those trips to Aquarium, were they spaced
3 out throughout your time with Four Seasons or clumped
4 together?

5 A. I don't know. I would say more than likely
6 **spaced out. I didn't go there that often.**

7 Q. But maybe over the whole two years, how
8 frequently would you go?

9 A. Once every -- once or twice every -- once a
10 **month, something like that.**

11 Q. Okay.

12 A. I mean maybe more clumped up during the summer
13 **when I am more busy.**

14 Q. Were you ever asked to leave Aquarium because it
15 was private property?

16 A. At any time?

17 Q. Yes.

18 A. Yes.

19 Q. While guiding?

20 A. Yes.

21 Q. And who asked you to leave Aquarium?

22 A. I don't know the gentleman's name.

23 Q. Did you return after having been asked to leave?

24 A. I did not.

25 Q. Were you ever cited for trespassing there?

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1 A. **I have not been, no.**

2 Q. Have you fished there since being asked to leave?

3 A. **I have not fished there since I've been asked to**
4 **leave.**

5 Q. So, if I recall, it was in approximately February
6 of 2012 that you severed your relationship with Four Seasons;
7 is that correct?

8 A. Yes.

9 Q. And if I recall from our earlier conversation,
10 you then started guiding as a subcontractor for a variety of
11 other outfitters; is that correct?

12 A. Yes.

13 Q. Okay. And that lasted until you started the
14 Provo River Guide Service?

15 A. Correct.

16 Q. And when did you start the Provo River Guide
17 Service?

18 A. **It was last January, around last January.**

19 Q. January of 2013?

20 A. **2013, yes.**

21 Q. Did Provo River Guide Service exist as an entity
22 before you joined it?

23 A. No.

24 Q. Now, earlier when we talked about the period
25 after Four Seasons, you said that you guided with Wasatch

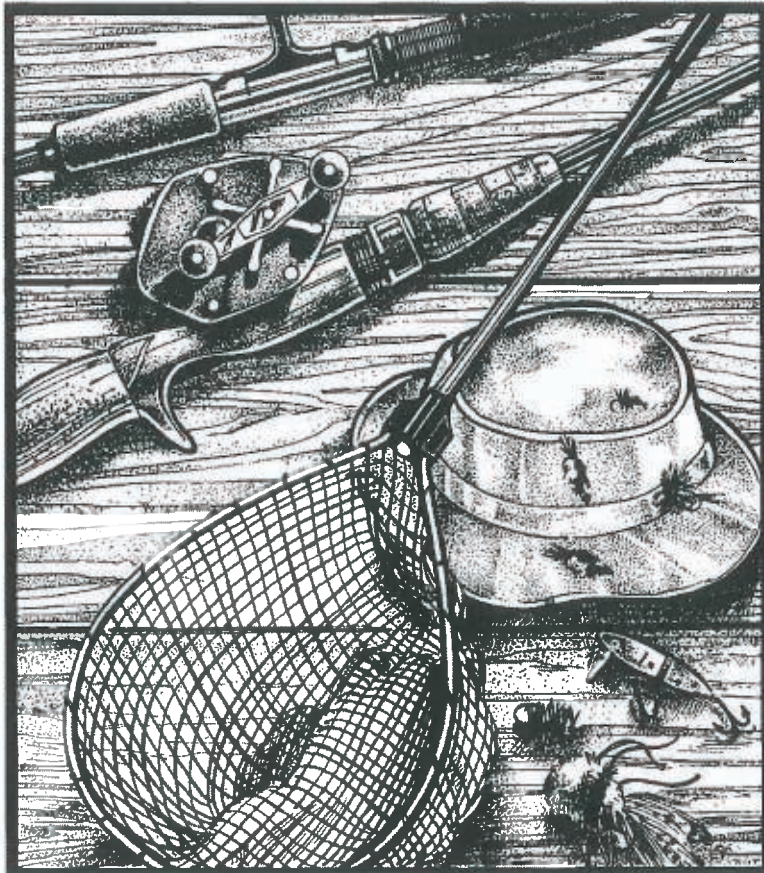
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15 (Pages 57 to 60)

EXHIBIT B

2011 Attitudinal Survey of Utah Anglers

Project Summary Report



Prepared by
R.S. Krannich, J. Unger and R. Lilieholm
Utah State University

for
Utah Division of Wildlife Resources

January, 2013

The next series of questions asked respondents to indicate the extent to which their fishing activity involves fishing from a non-motorized boat or float tube/pontoon craft, fishing from a motorized boat, fishing while wading, fishing from the shore or bank of a waterbody, and ice fishing. Responses to that series of questions are summarized in Figures 3-12 through 3-16.

Overall, just under one-half (45%) of survey respondents indicated that they never or rarely fish from a non-motorized watercraft (Figure 3-12). At the same time, nearly one-third (32%) of respondents indicated that they often or always fish from a non-motorized watercraft. Similar response patterns were observed for the question pertaining to fishing from a motorized boat (Figure 3-13), with 46% of survey participants indicating that they never do so, and 31% saying they do so often or always.

Figure 3-14 summarizes responses to the question in this series that asked about the frequency with which anglers fish while wading. Overall, anglers were most likely (44.5%) to say that they do so never or rarely. At the same time, over one-third of respondents (34.6%) said they often or always wade while fishing. In contrast, a substantial majority of anglers (61%) said they often or always fish from the bank or shoreline, while only 15% said they do so never or rarely (Figure 3-15).

Finally, the response distributions summarized in Figure 3-16 reveal that participation in ice fishing was reported far less frequently than any of the other types of angling addressed in this series of questions. Overall, more than two-thirds of survey respondents (68%) said they “never or rarely” participate in ice fishing, while only a small minority (13%) said they ice fish “often or always.”

Figure 3-12. Frequency of fishing from a non-motorized boat, float tube or pontoon craft.

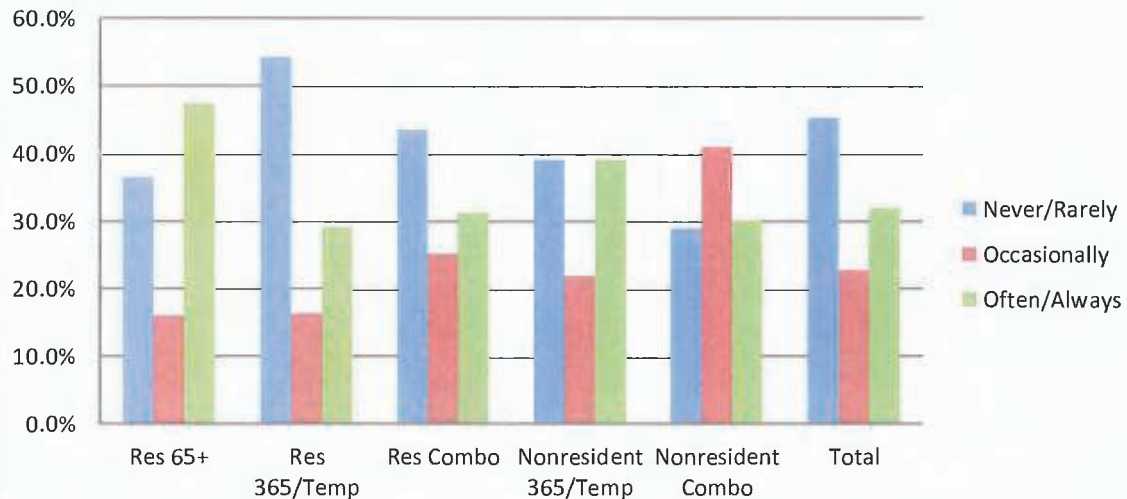


Figure 3-13. Frequency of fishing from a motorized boat.

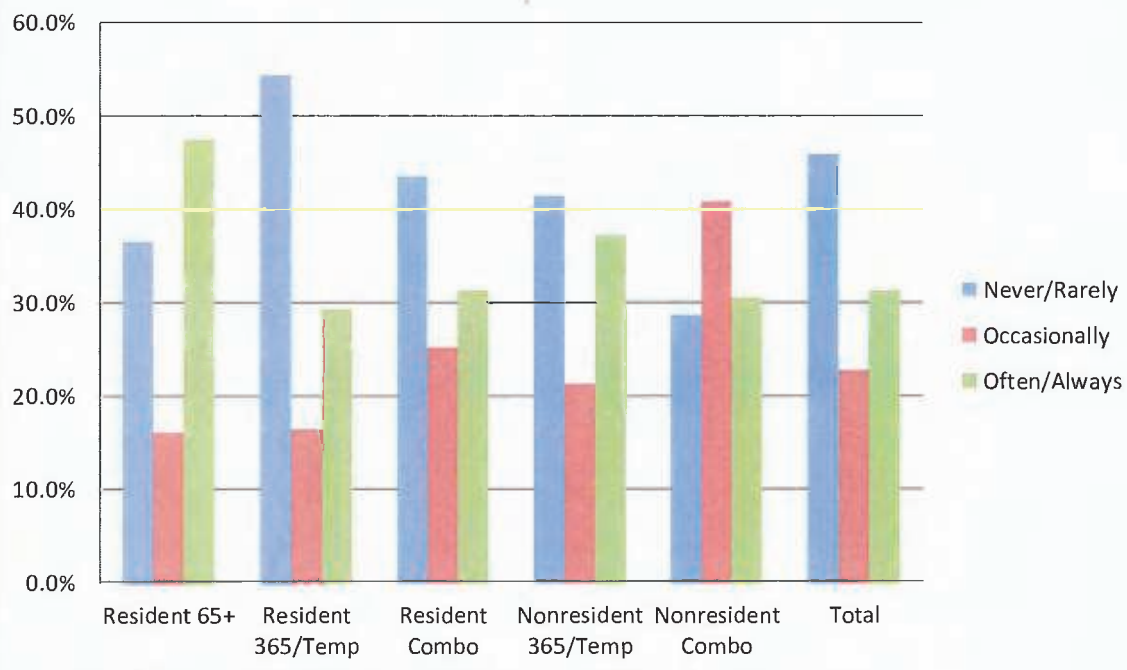


Figure 3-14. Frequency of fishing while wading.

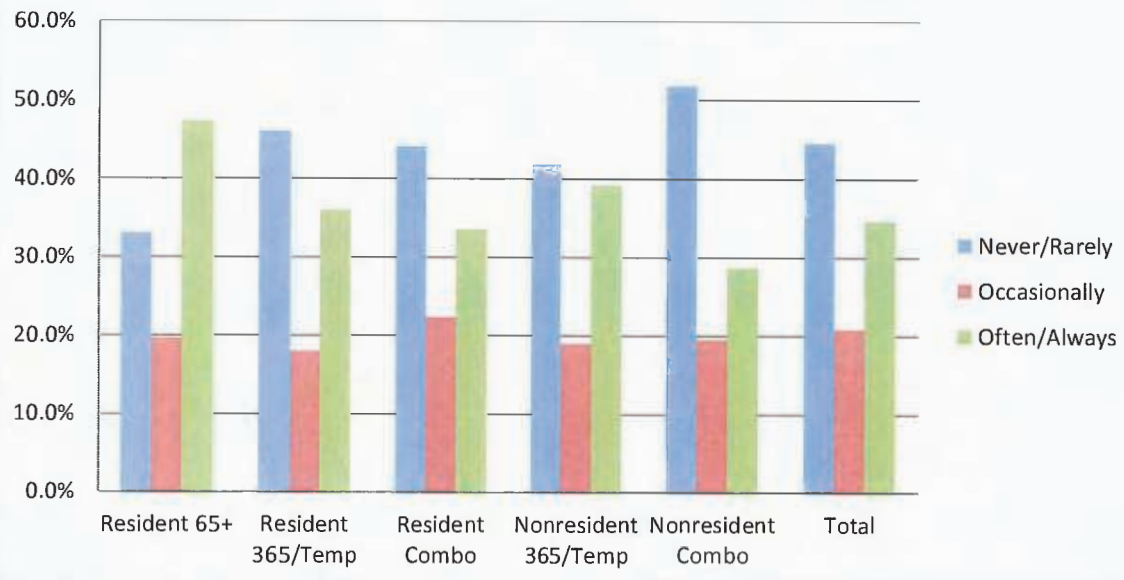


Figure 3-15. Frequency of fishing from shore or bank.

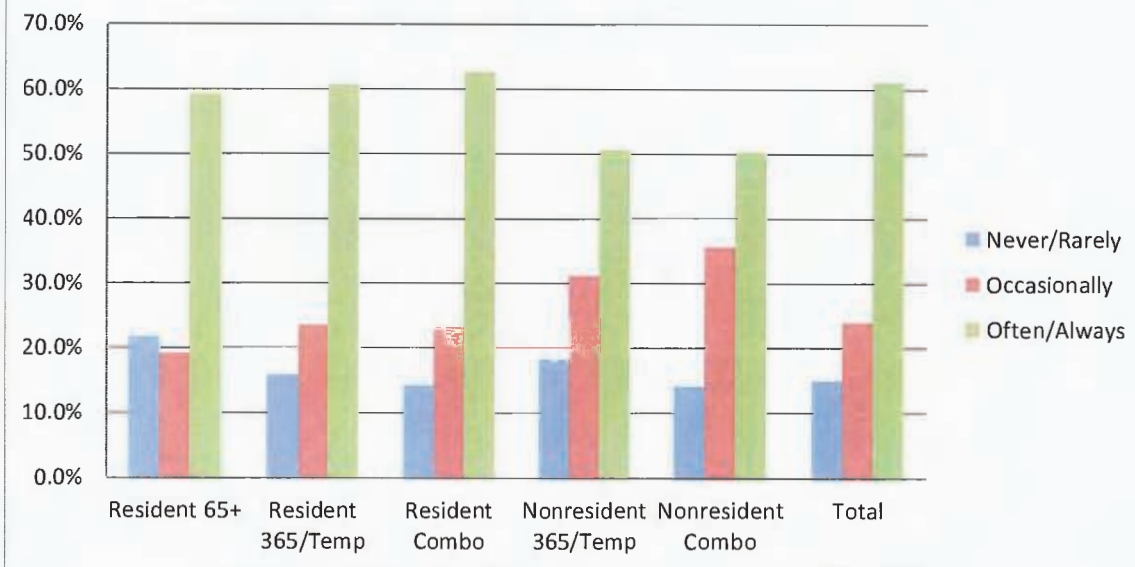
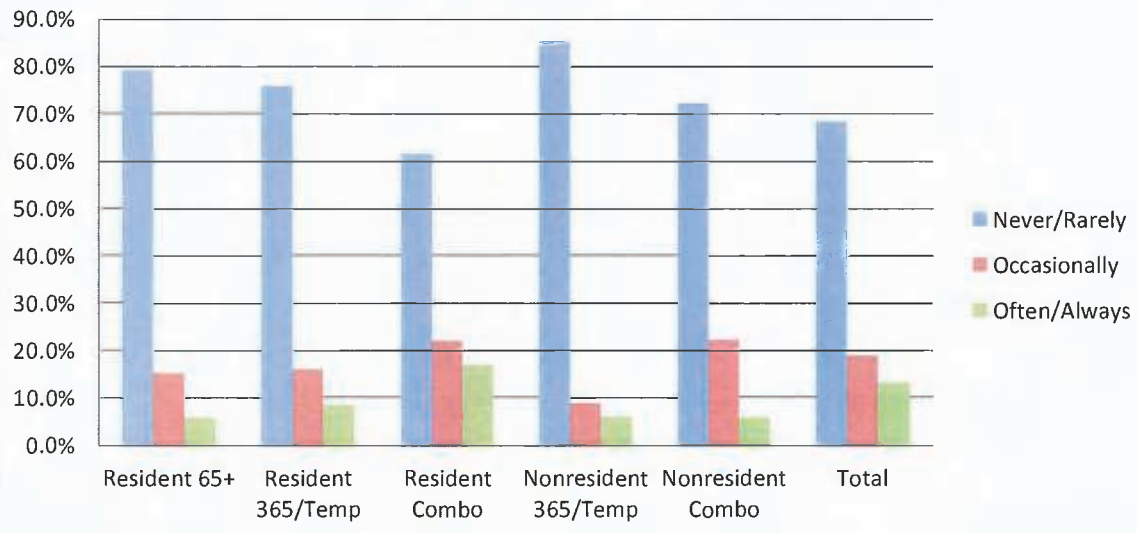


Figure 3-16. Frequency of participating in ice fishing.



Frequency of Fishing at Specific Types of Water Bodies

Another group of questions focused on angler experiences and activity patterns asked respondents to indicate how often they typically fish at various types of water bodies. Response distributions to that series of questions are summarized in Figures 3-17 through 3-21.

When asked how often they fish on Utah's large lakes or reservoirs (such as Strawberry, Jordanelle, Steinaker, and Flaming Gorge reservoirs), about four out of ten respondents (40.3%) said they fish at such locations "often or always" (Figure 3-17). Approximately three out of ten respondents said they fish large lakes and reservoirs "occasionally" (28.6%), with a similar percentage (31%) indicating they never or rarely fish such areas. Frequent fishing at large lakes/reservoirs was reported most often by anglers who had purchased a resident age 65 and older license, with over half (53.3%) of individuals within that license category indicating they fish such areas "often or always."

Figure 3-18 outlines responses to a similar question that asked respondents how often they fish at smaller lakes or reservoirs in Utah. Overall, very similar percentages of respondents indicated that they fish such water bodies never/rarely (32.3%), occasionally (33.2%), or often/always (34.6%). Fishing activity involving use of these smaller lake/reservoir settings was reported as occurring least often by those in the nonresident 365 day/temporary license category, with 43.6% of individuals in that group saying they never or rarely fish at Utah's smaller lakes and reservoirs.

Figure 3-17: Frequency of time survey respondents reported fishing at large lakes or reservoirs.

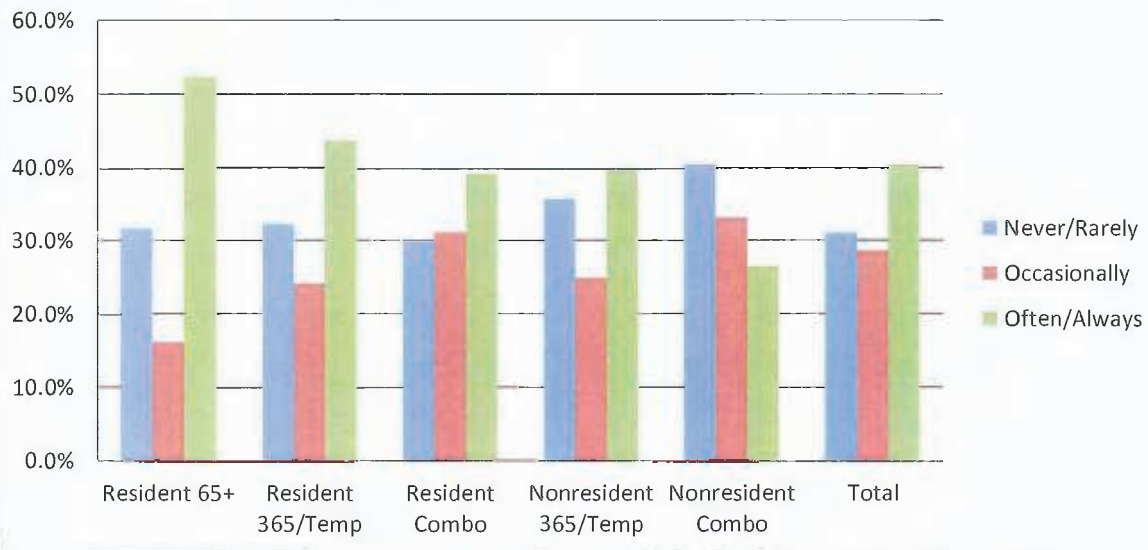
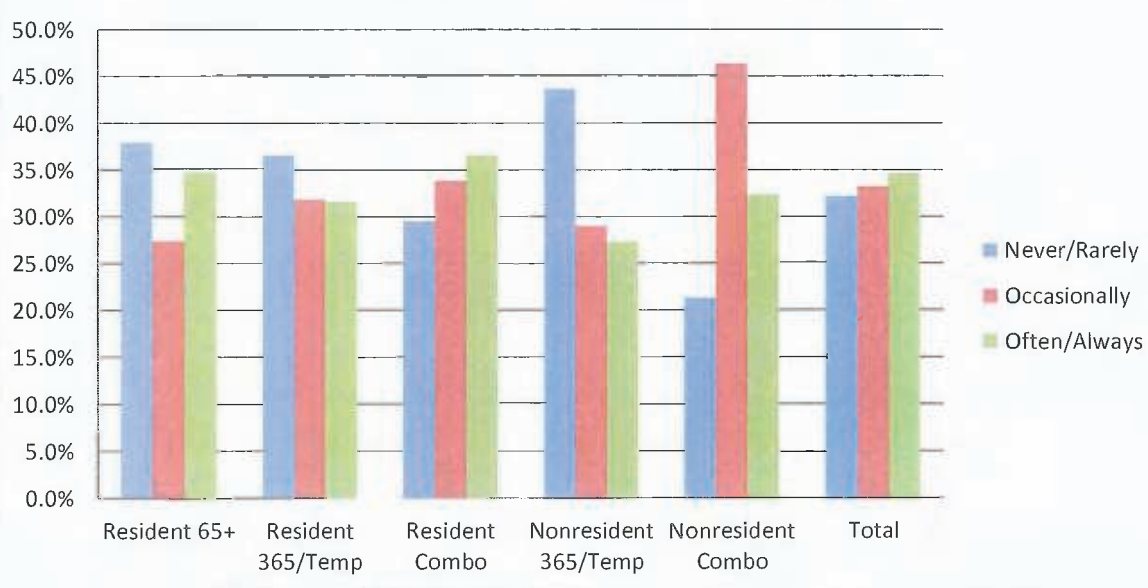


Figure 3-18. Frequency of time survey respondents spent fishing at smaller lakes or reservoirs.



When asked how frequently they fish on larger rivers in Utah such as the Weber, Green, Lower Provo, Bear, and Colorado rivers, survey participants were most likely to say that they do so “never or rarely.” As indicated in Figure 3-19, across the combined set of all respondents well over one-half (56.5%) of survey participants indicated that they typically do not fish such areas, while only 18% said they do so “often” or “always.” Those purchasing a resident age 65 and older license were least likely to report frequent fishing on large rivers, with two-thirds (66.7%) of respondents in that group saying they do so “never” or “rarely.”

Respondents were also most likely to say that they “never” or “rarely” spend time fishing on Utah’s moderate-sized streams, such as the Logan River, the Middle Provo River, Currant Creek, or Huntington Creek (Figure 3-20). For the combined set of responses across all license categories, 46% of survey participants said they fish such areas never or rarely, 29.4% said they do so only occasionally, and 24.6% reported doing so often or always. The percentage of respondents saying they “often” or “always” fish on the state’s moderate-sized rivers and streams was lowest among those purchasing a resident age 65 and older fishing license (22.5%), and highest among those who had purchased a nonresident 365 day or temporary license (28.2%).

Figure 3-19. Frequency of time survey respondents spent fishing on large rivers.

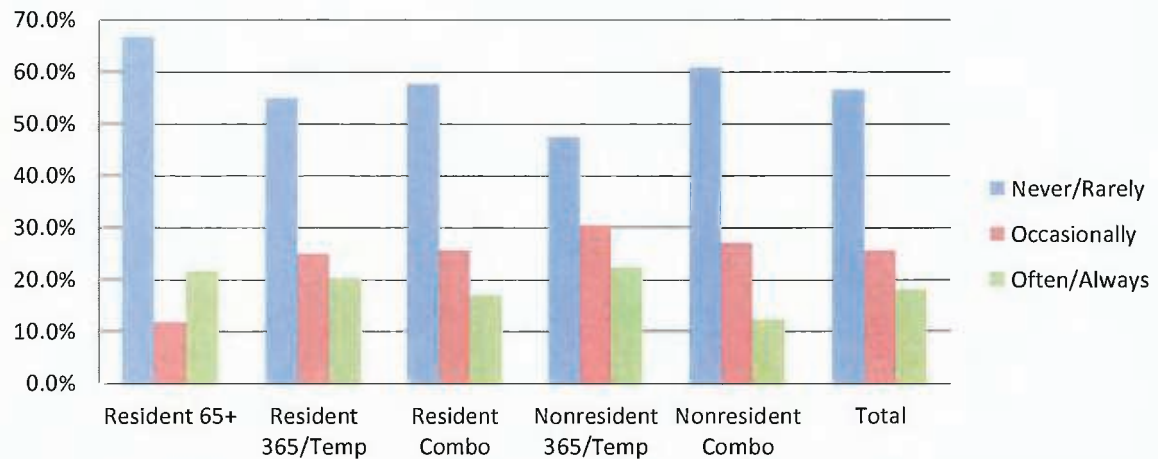
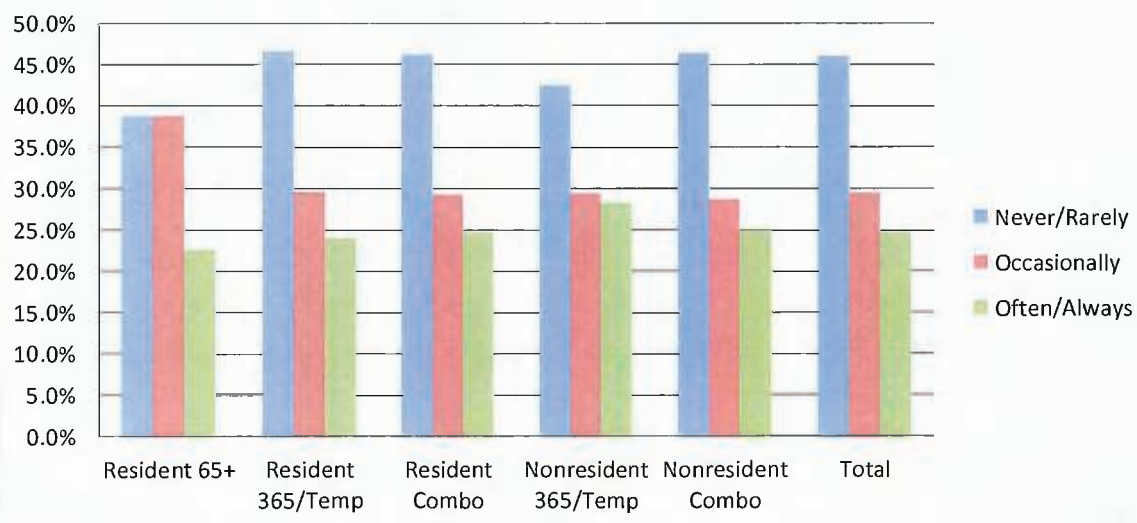
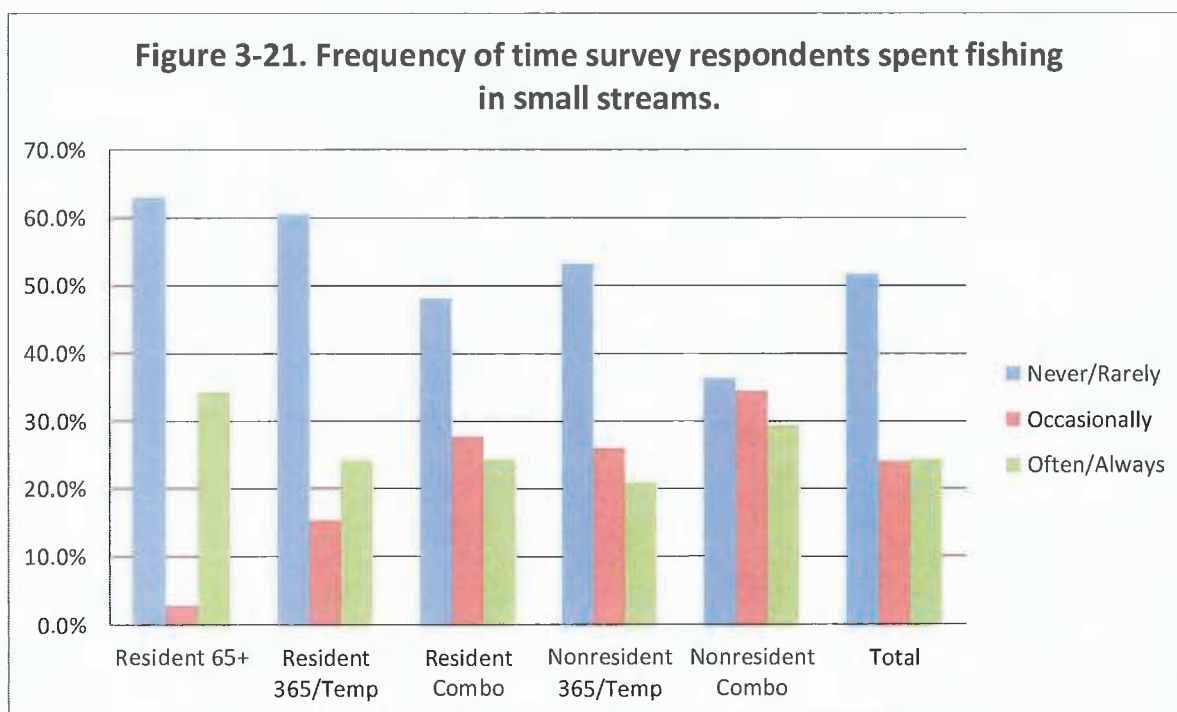


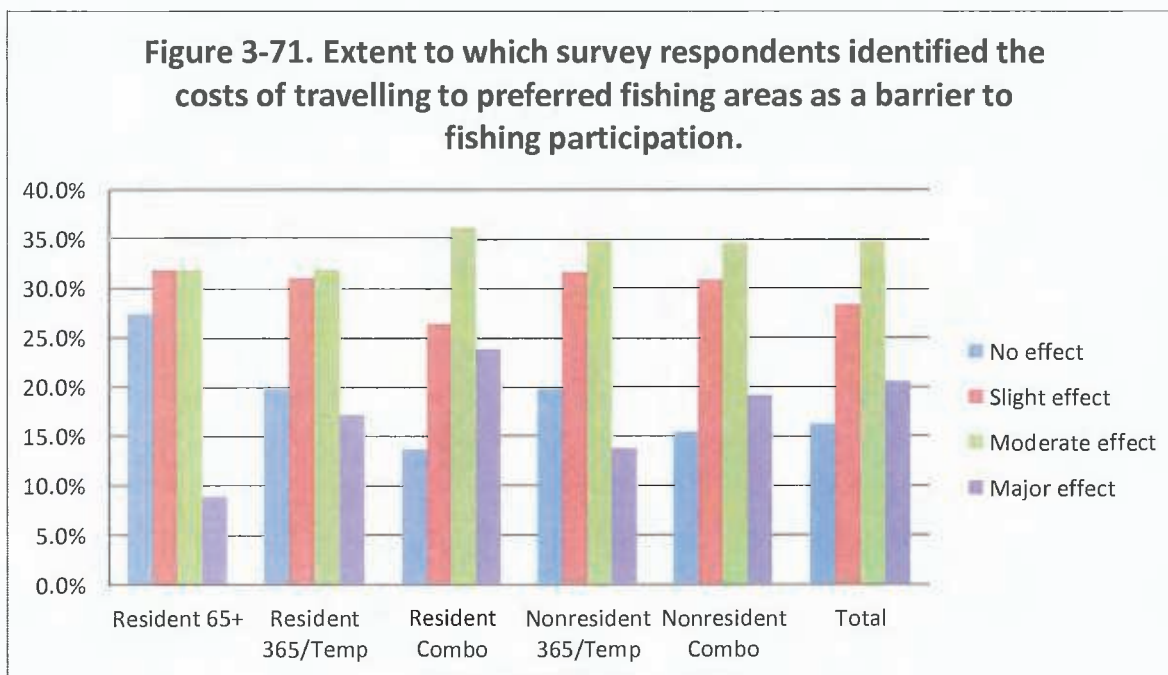
Figure 3-20: Frequency of time survey respondents spent fishing on moderately-sized streams.



The final question in this series asked about time spent fishing on small streams in Utah. Once again, the most common responses to this question were “never” or “rarely,” with over half (51.6%) of all respondents selecting those response options (Figure 3-21). Virtually identical percentages of respondents indicated that they fish small streams either occasionally (24%) or often/always (24.3%). Interestingly, those who had purchased a resident age 65 and older fishing license were more likely than individuals in any other license category to say they never/rarely fish on small streams (63%), but also were more likely than respondents in other categories to say they fish those settings often or always (34.3%).



Similarly, the costs of traveling to preferred fishing areas also represent a significant barrier to fishing participation among many survey participants. As indicated in Figure 3-71, across the combined set of all license categories such costs were identified as having “no effect” on fishing participation by just 16.2% of respondents. Slightly over one-fourth of respondents said travel cost factors have only a slight effect on their fishing participation. At the same time, over one-third of survey participants (34.8%) identified the costs of travel as a moderate barrier to fishing at their preferred locations, while 20.6% said those costs have major effects on their fishing participation.



Respondents also indicated that the distant location of some areas where they prefer to fish and the time required for travel to those locations can be a barrier to fishing participation (Figure 3-70). While about one-half of respondents indicated that distance and travel time issues had no effect or only a slight effect on their fishing participation, over one-third (37.9%) said those factors have a moderate effect, while an additional 11.3% identified distance/time issues as having major effects on their ability to fish as often as they wish.

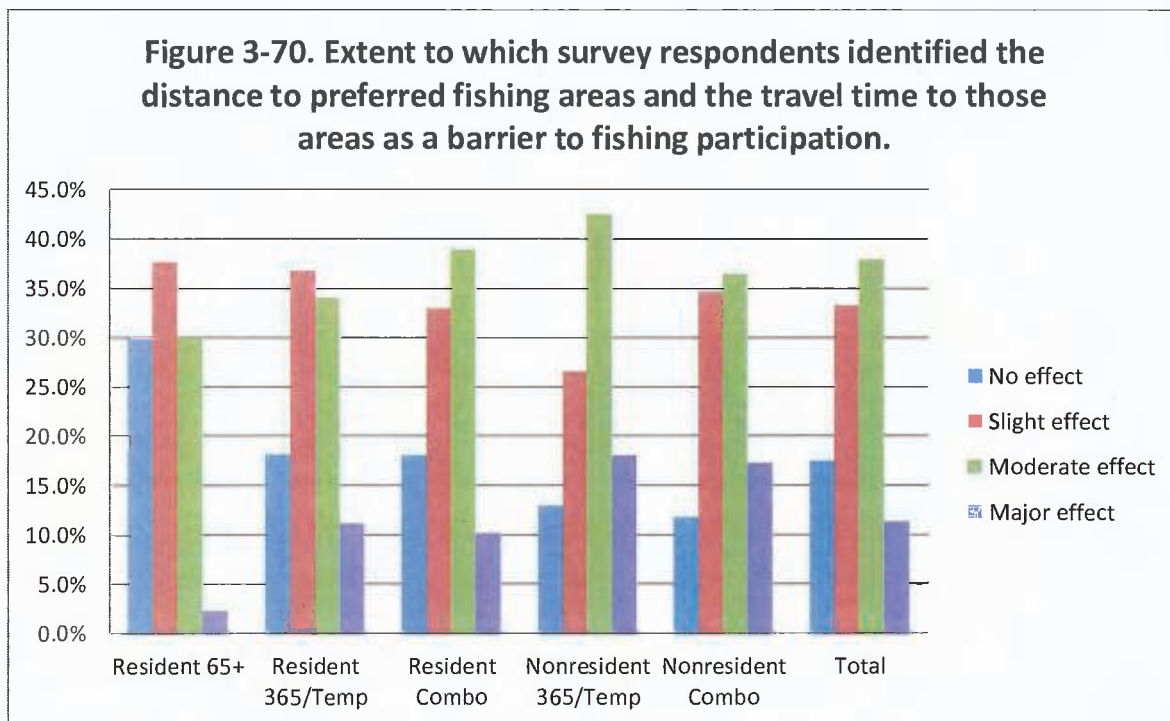
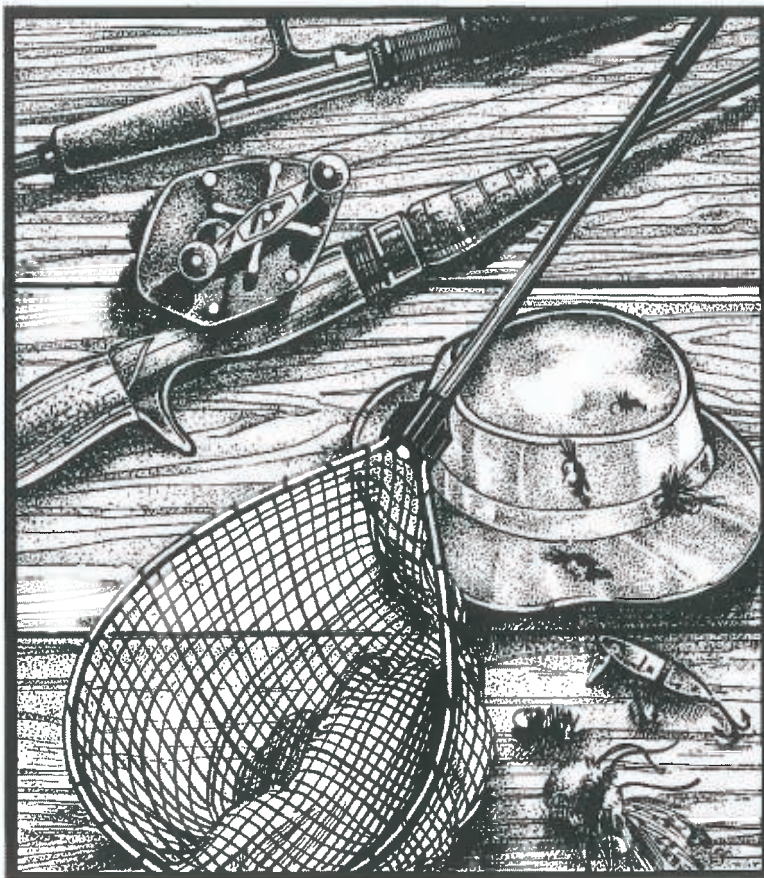


EXHIBIT C

2011-2012 Utah Angler Survey

Project Summary Report



Prepared by

R.S. Krannich, R.J. Lilieholm, and J. Unger

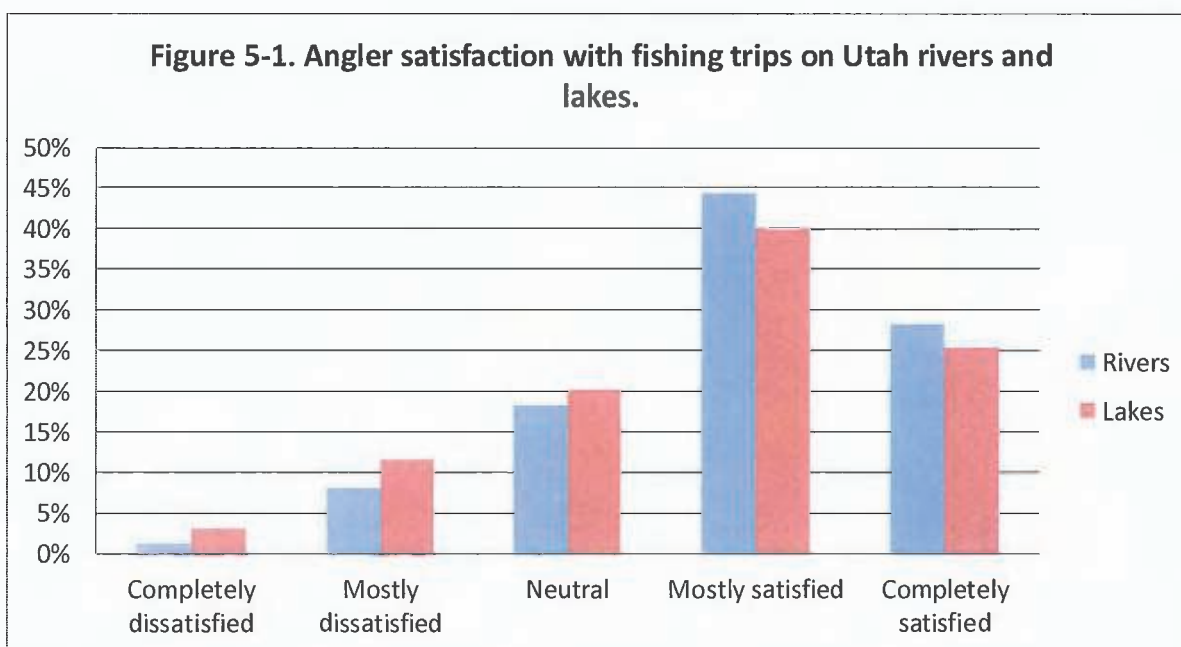
Utah Division of Wildlife Resources
November 2012

Section 5:

Angler Trip Satisfaction, Perceptions of Crowding, and Boat Use

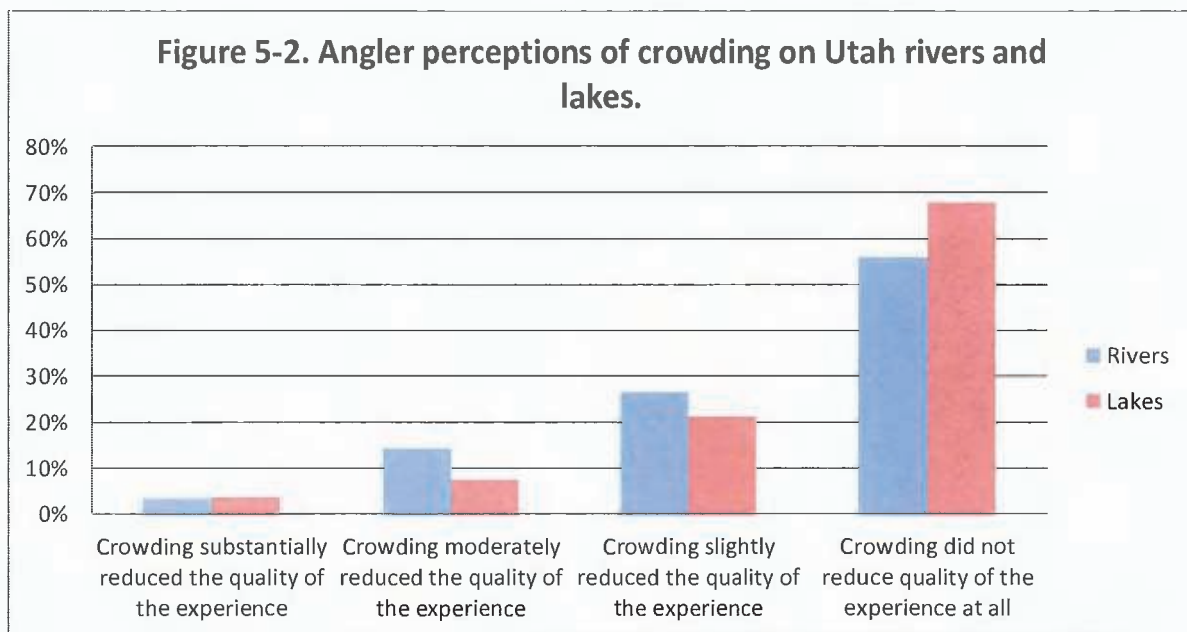
State-wide Angler Satisfaction, Perceptions of Crowding, and Boat Use¹⁰

Summed across all reporting periods and license categories, anglers experienced high levels of satisfaction with their fishing trips on Utah waters during the April 2011 through March 2012 study period (Figure 5-1). Satisfaction was slightly higher for anglers on the State's rivers and streams than on lakes and reservoirs. State-wide and across both water types, a very low percentage of anglers reported any level of dissatisfaction with their fishing trips.



¹⁰ Subsequent portions of this Section give Region-specific information on angler satisfaction, crowding, and boat use for both the Region and individual high-use waters.

Angler perceptions of crowding can reduce overall trip satisfaction and are a potential concern for UDWR, particularly if crowding persists on specific waters or during specific time periods. Across all reporting periods and license categories, a majority of anglers on both rivers and lakes reported that crowding did not reduce the quality of their fishing experience (Figure 5-2). This low perception of crowding was most evident among survey respondents who reported fishing trips to lakes and reservoirs.



Anglers access and use Utah waters in different ways, and recent concerns have been raised over the ability of anglers to launch boats on some of the State’s waterways. Across all reporting periods and license categories, 50% of angler trips on lakes and reservoirs utilized a boat, while just 15% reported using a boat on rivers (Figure 5-3). Anglers reporting the use of boats indicated that they were “mostly” or “highly” satisfied with boat launch facilities (Figure 5-4). A very limited percentage of respondents indicated any level of dissatisfaction.

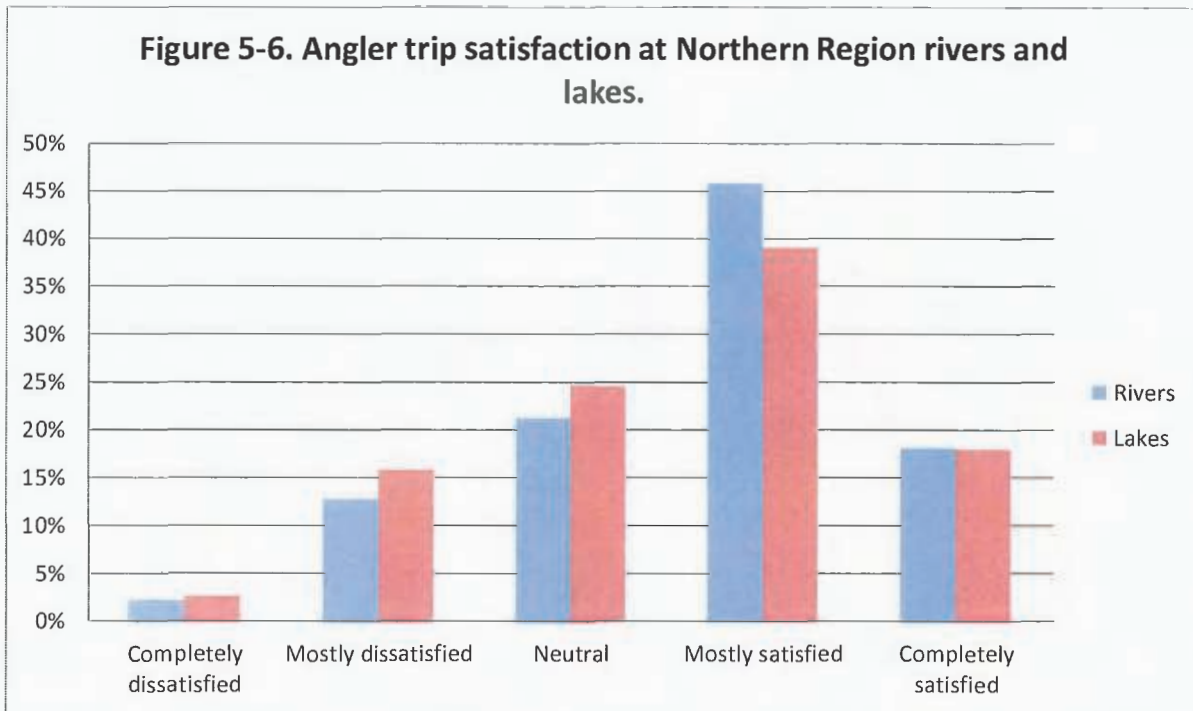
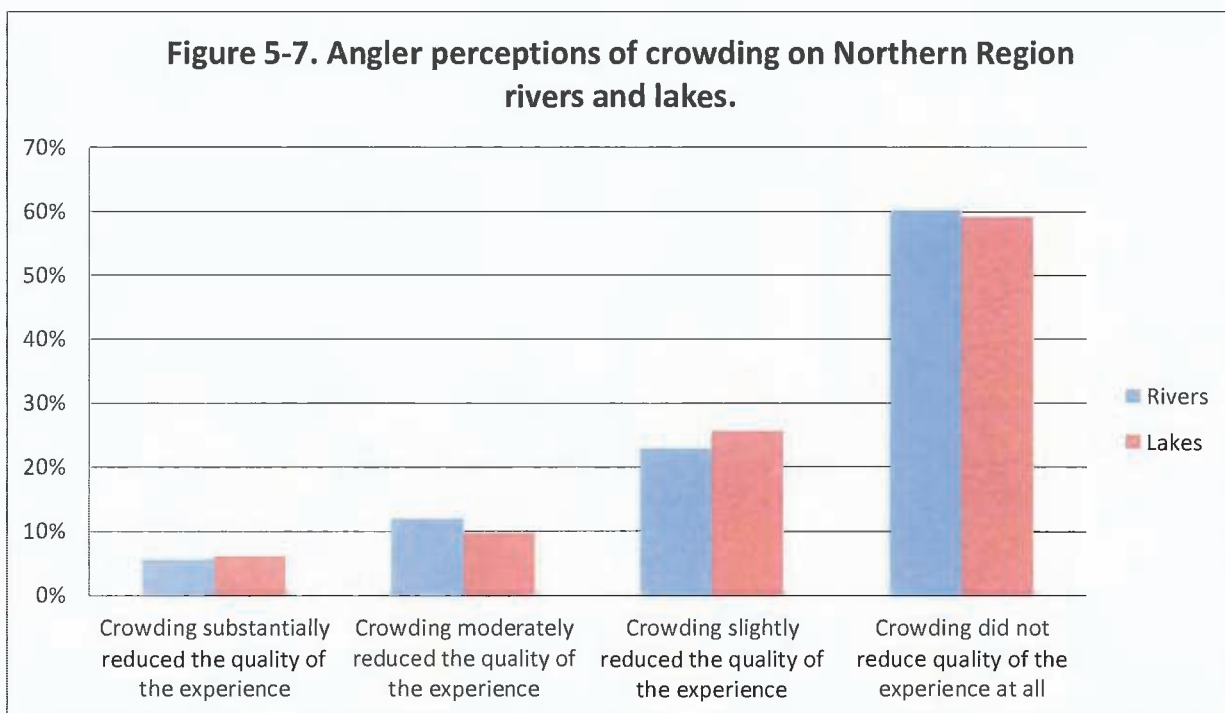


Figure 5-7 shows angler perceptions of crowding on Northern Region rivers and lakes. Overall, crowding did not diminish the quality of fishing experiences for most Northern Region anglers, and perceptions of crowding were very similar on the two types of water bodies. Based on a seasonal analysis of the data, expressions of concern about crowding were most evident in July and September.



Very few anglers reported using a boat on rivers in the Northern Region (Figure 5-8). In contrast, on lakes and reservoirs roughly 40% of anglers reported using a boat for fishing. Figure 5-9 shows anglers' overall satisfaction with boat launch facilities on all waters throughout the Northern Region. Among anglers reporting boat use, most reported being either mostly or completely satisfied with boat launch facilities. Figure 5-10 breaks-out angler response data by river and lakes. Here, although boat use on rivers was limited (Figure 5-8), roughly one-third of respondents indicated that they were "mostly dissatisfied" with river-related boat launch facilities (Figure 5-10).

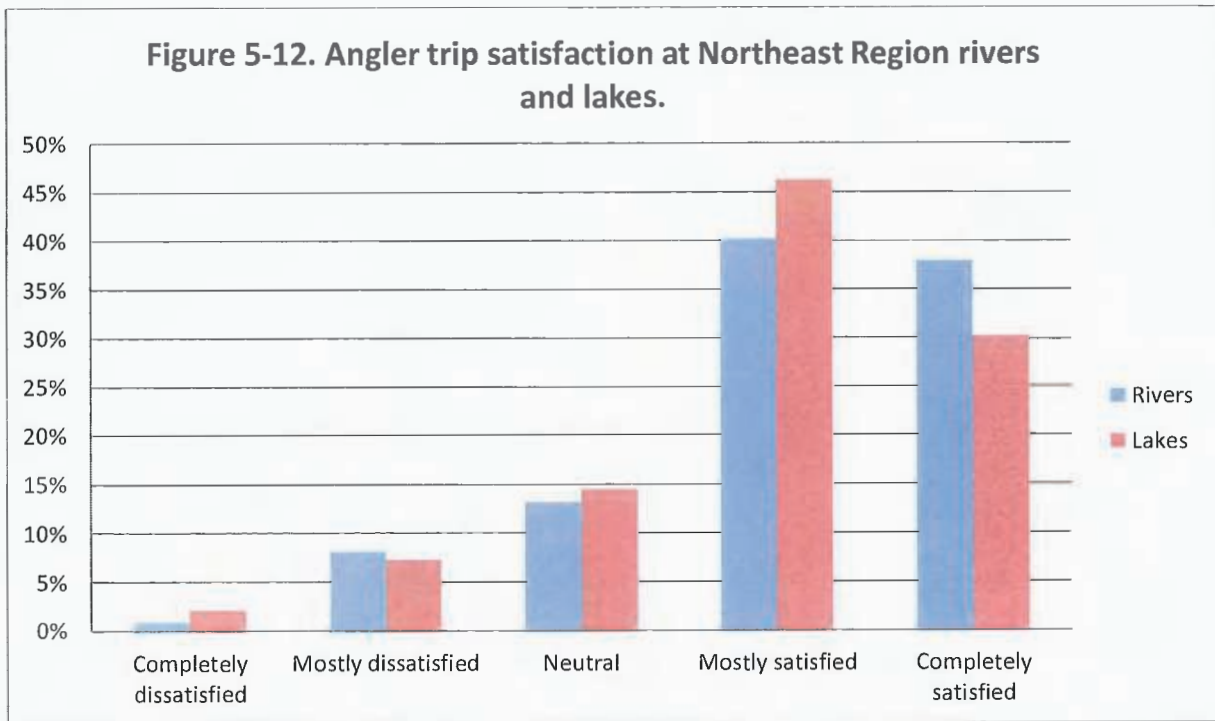
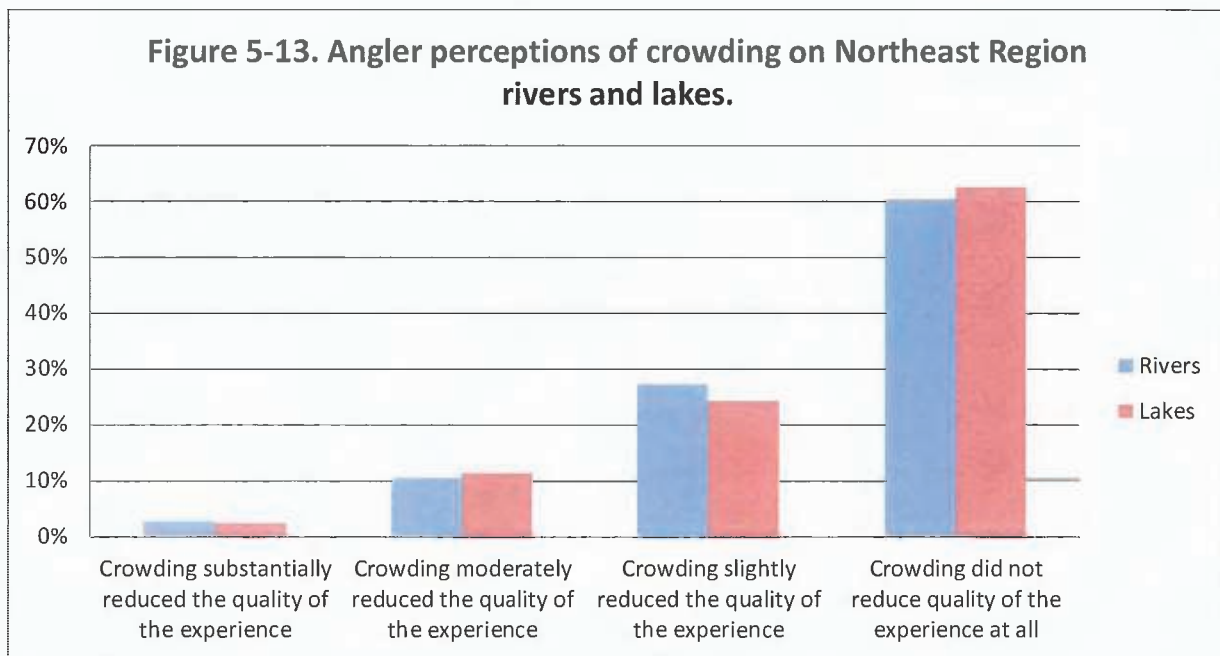


Figure 5-13 shows angler perceptions of crowding across all license categories and reporting periods for rivers and lakes in Utah’s Northeast Region. Strong majorities indicated that crowding did not diminish their angling experience, and perceptions of crowding were very similar on the two types of water bodies. A review of data by reporting period did find, however, that anglers experienced some moderate reductions in angling quality due to crowding during the months of August and September.



Boat use on rivers and lakes in the Northeast Region exceeded levels reported for the Northern Region – this was especially true for rivers (Figure 5-14). Overall, anglers expressed significant dissatisfaction with boat launch facilities in the Northeast Region (Figure 5-15). In Figure 5-16, a closer examination of the data reveals that anglers using boats on the Northeast Region’s rivers generally expressed high levels of satisfaction with boat launch facilities, while boaters on the Region’s lakes and reservoirs expressed higher levels of dissatisfaction – an interesting reversal from Northern Region trends described above.

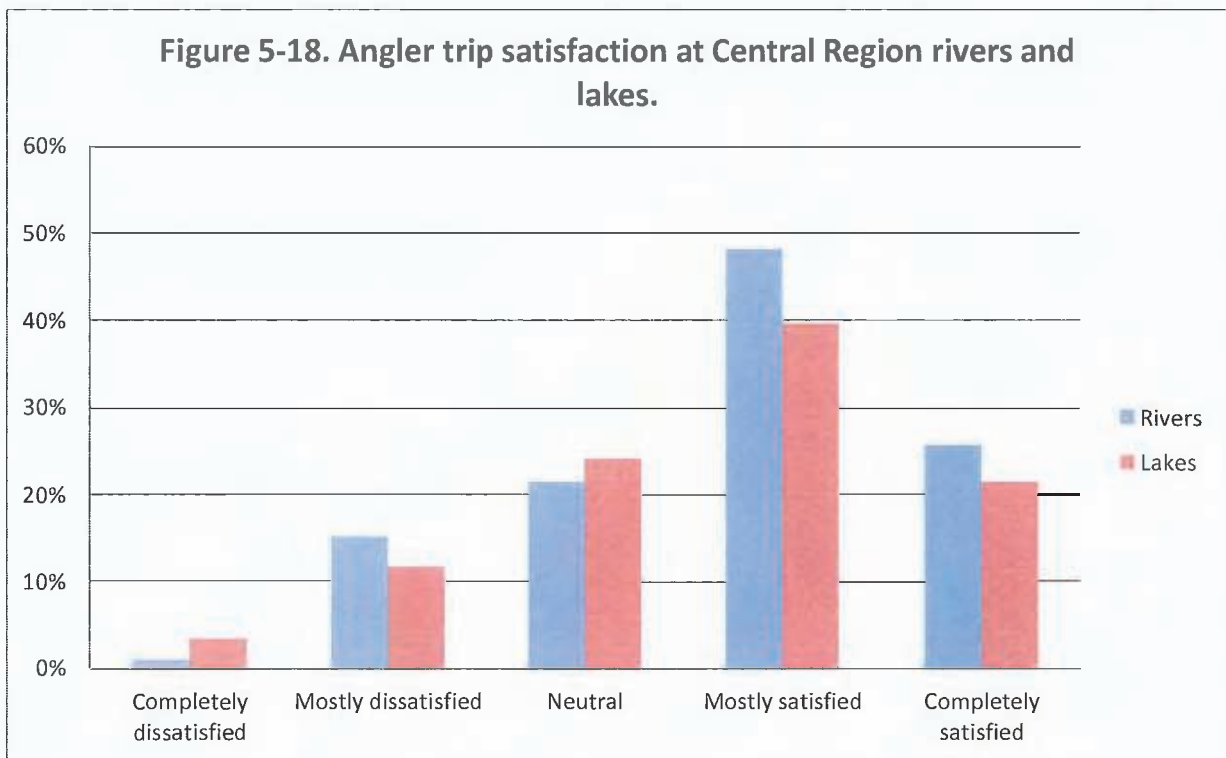


Figure 5-19 shows angler perceptions of crowding on Central Region rivers and lakes. Overall, crowding had little adverse effect on angler experiences. Anglers on rivers were more likely to report some level of reduced angling quality due to crowding. In comparison, half of lake anglers reported no crowding effect. No survey respondents reported using a boat on Utah rivers in the Central Region (Figure 5-20). In contrast, on lakes and reservoirs, roughly 45% of anglers reported using a boat for fishing. Based on an analysis of responses by reporting period, boat use was highest in the summer months. Of anglers reporting boat use on lakes, most reported being satisfied with boat launch facilities (Figure 5-21).

Figure 5-19. Angler perceptions of crowding on Central Region rivers and lakes.

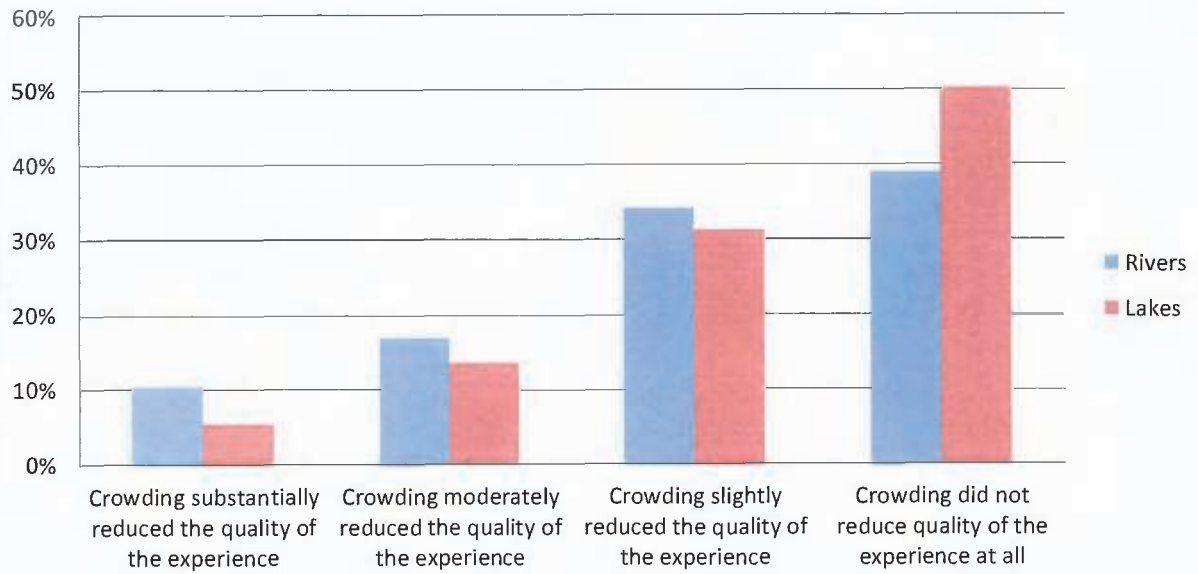


Figure 5-20. Angler use of boats on Central Region rivers and lakes.

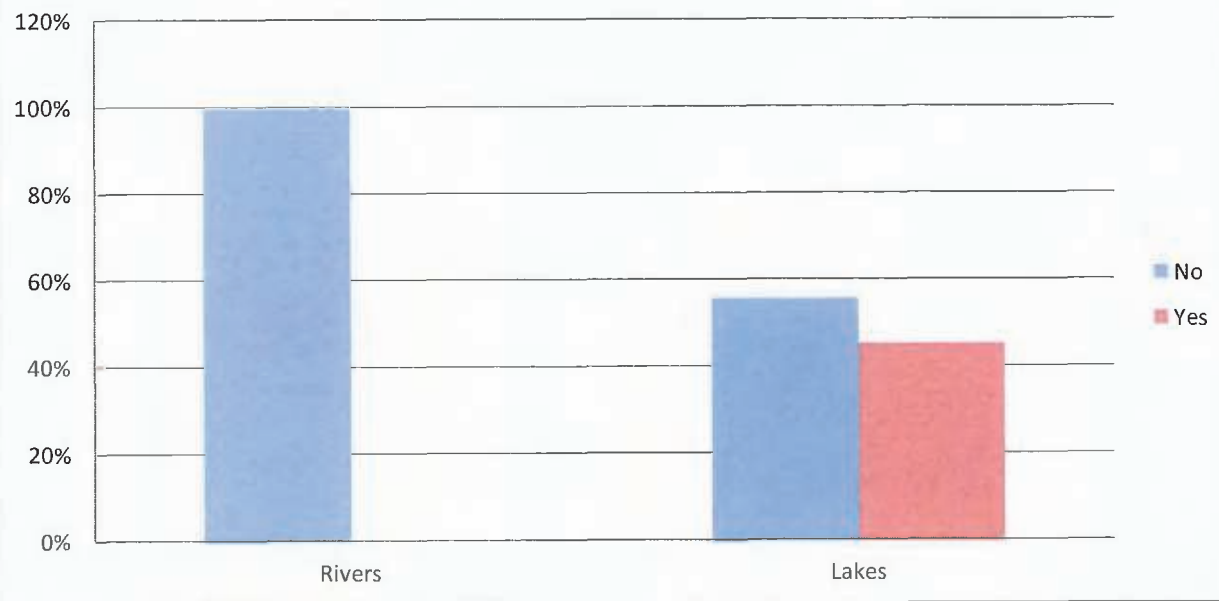


Figure 5-22. Angler trip satisfaction in the Southern Region.

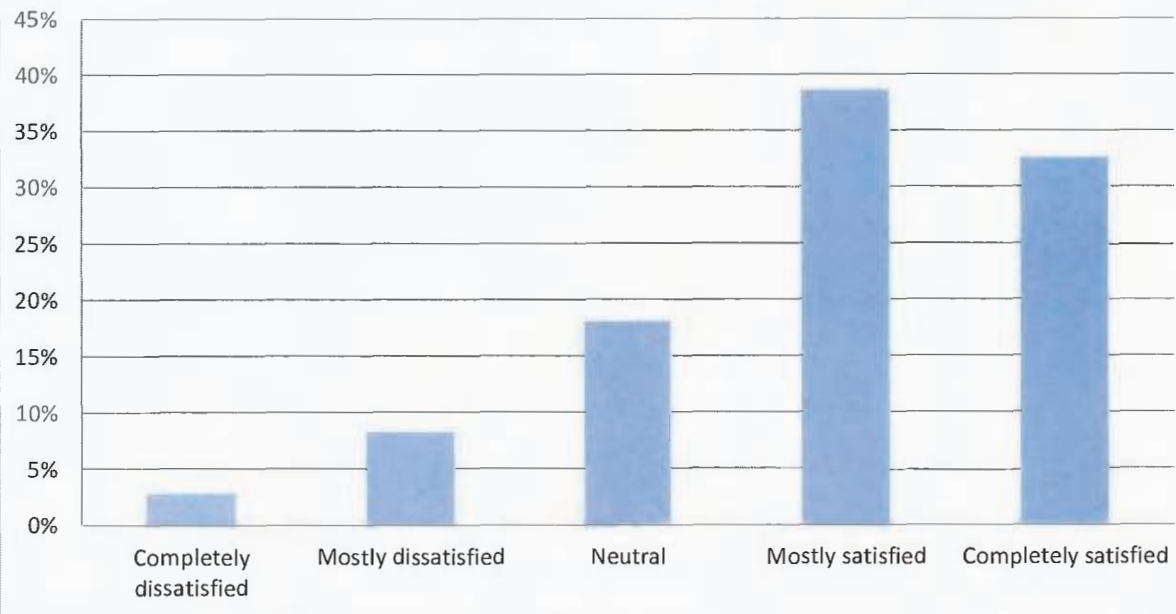


Figure 5-23. Angler trip satisfaction at Southern Region rivers and lakes.

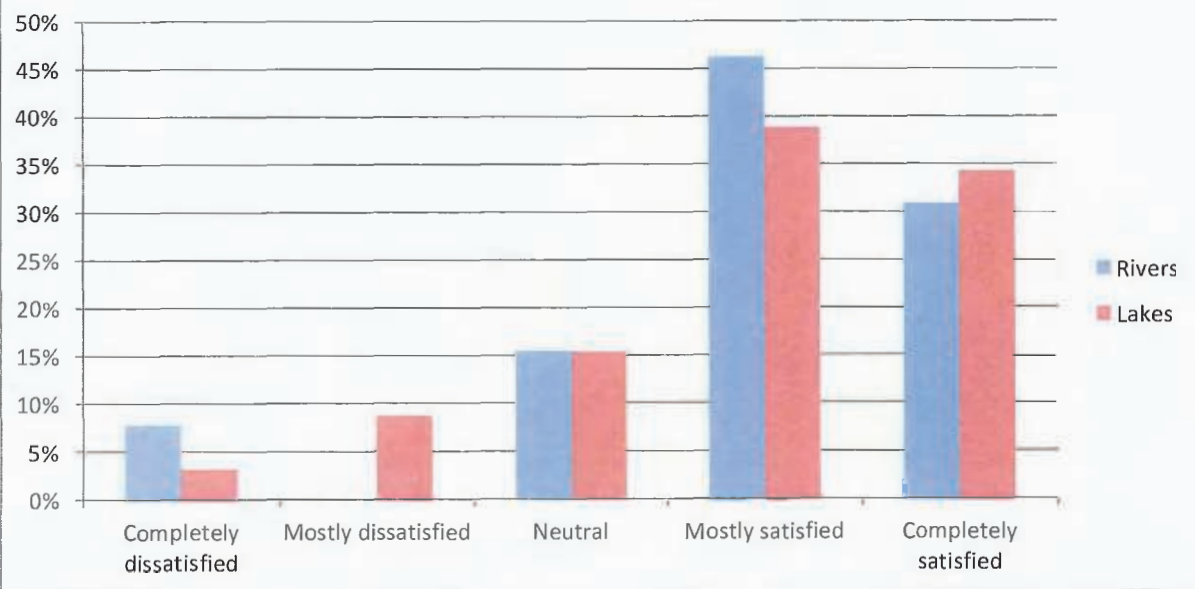


Figure 5-24. Angler perception of crowding in the Southern Region.

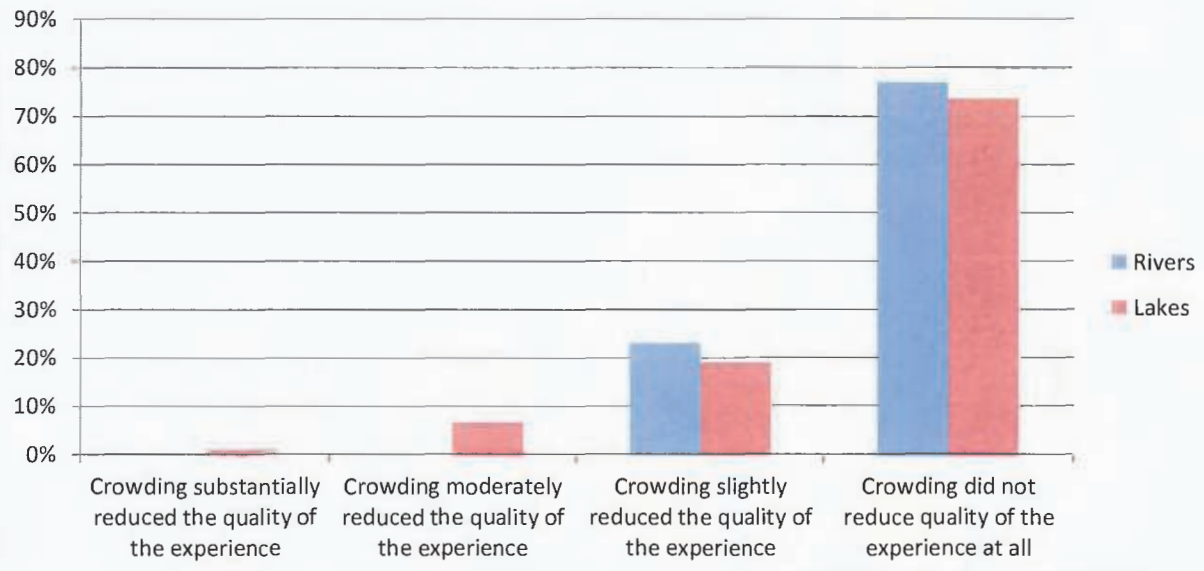
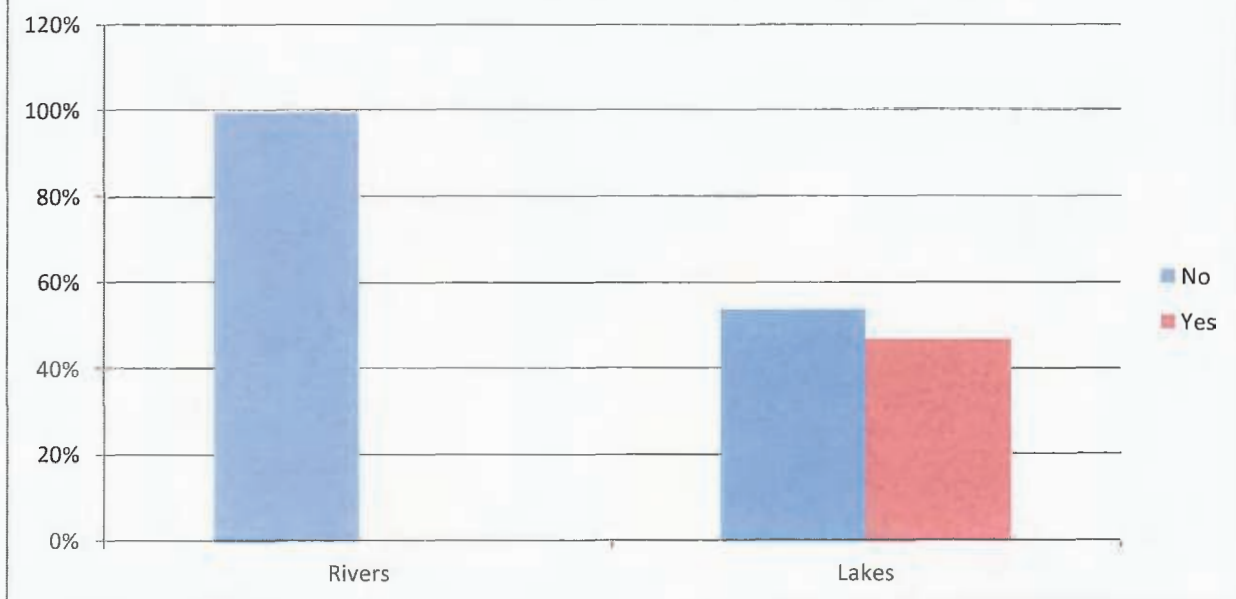


Figure 5-25. Angler use of boats on Southern Region lakes.



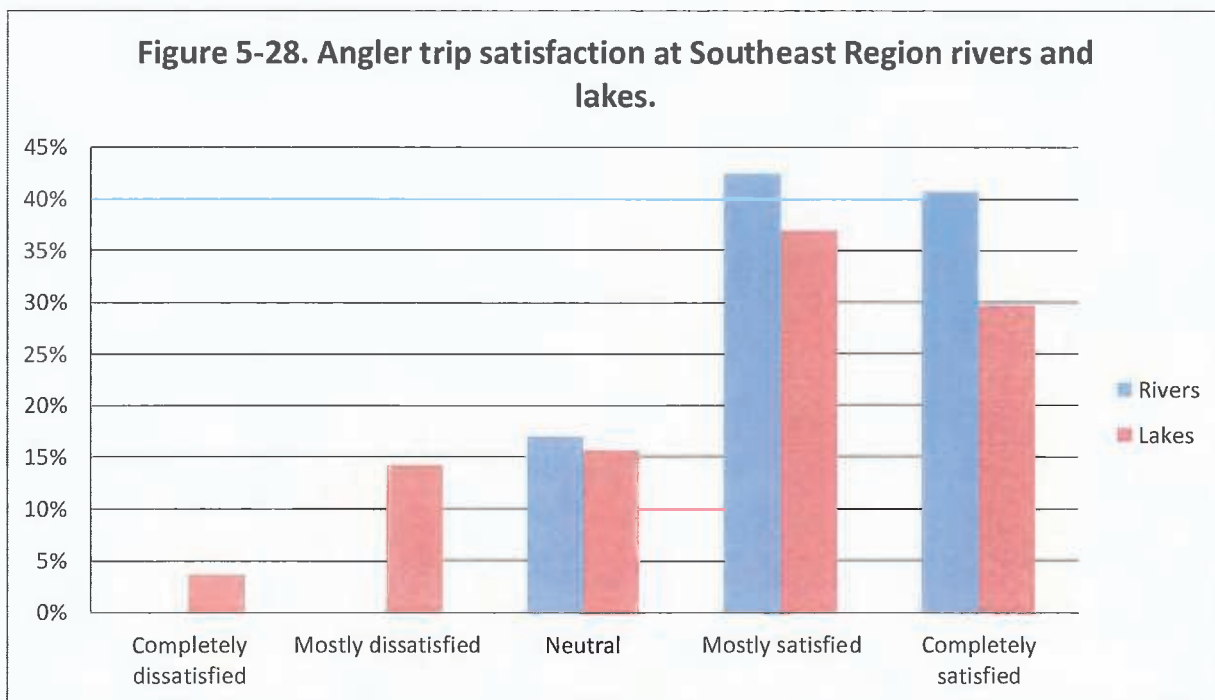


Figure 5-29 shows angler perceptions of crowding on Southeast Region rivers and lakes. Angler responses strongly indicate that perceptions of crowding did not diminish the quality of fishing experiences for the vast majority of survey respondents on either type of water body.

No anglers reported using a boat on rivers in the Southeast Region (Figure 5-30). In contrast, on lakes and reservoirs, roughly 55% of anglers reported using a boat for fishing. Boat use was highest in the months of May, June and August. Figure 5-31 shows angler satisfaction with boat launch facilities throughout the Southeast Region. Overall, anglers expressed satisfaction with these facilities.

Figure 5-29. Angler perceptions of crowding on Southeast Region rivers and lakes.

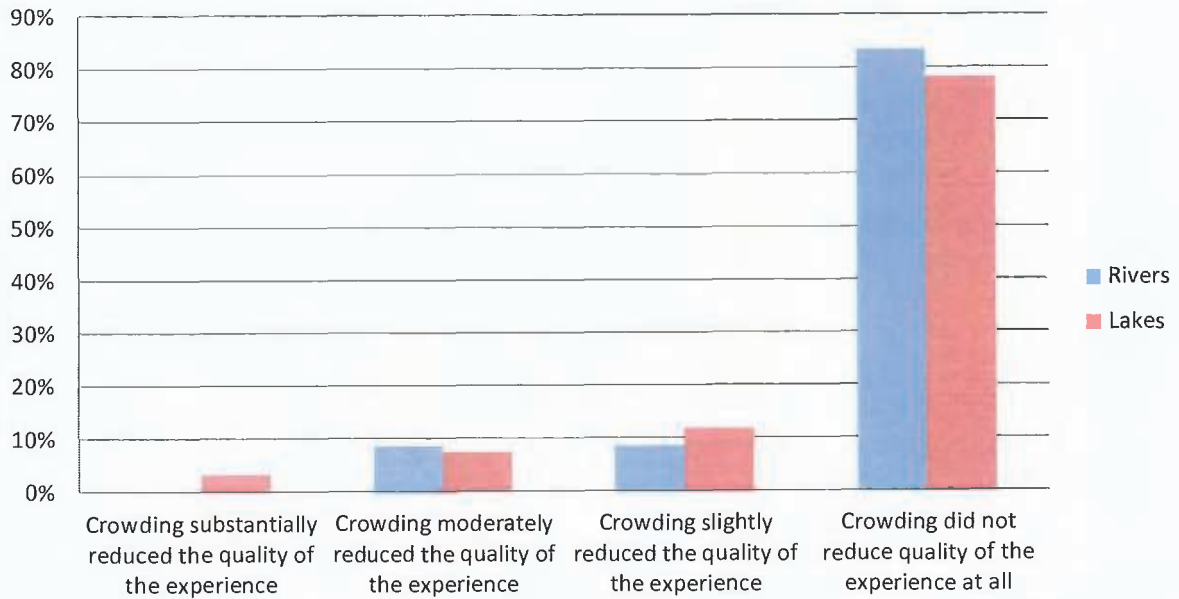


Figure 5-30. Angler use of boats on Southeast Region rivers and lakes.

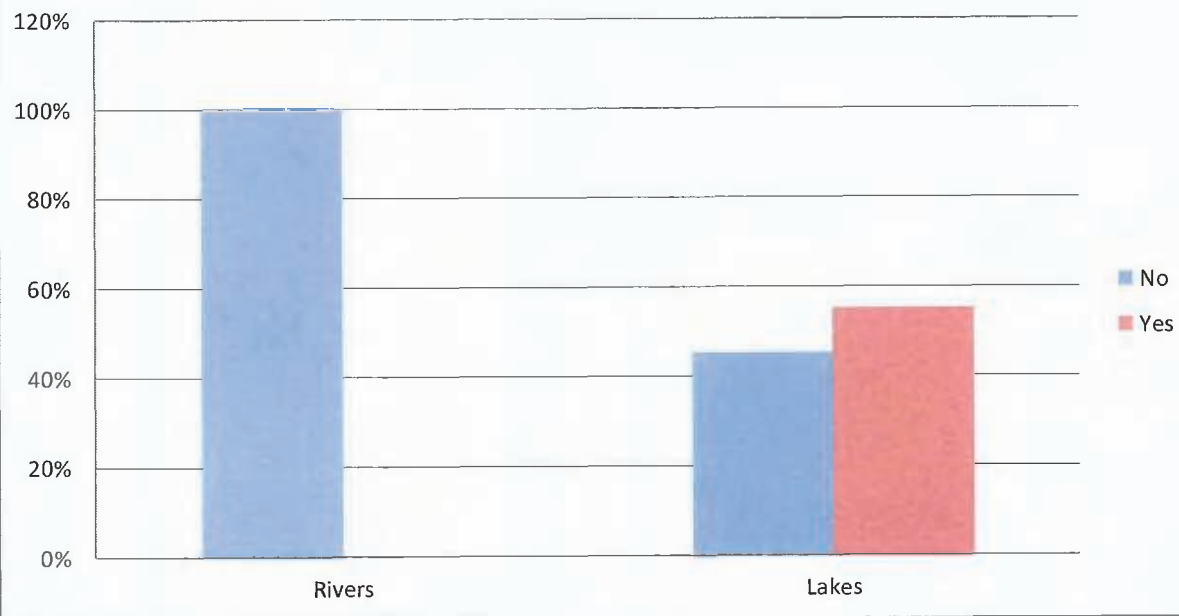


EXHIBIT D


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[Water Resources](#)
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[Education](#)
[Recreation](#)
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Montana Water Facts

Montana's Water Resources are diverse. Read further for some interesting Montana Water Facts.



Major Montana Rivers and Streams

- More than 170,000 miles of streams and rivers meander through Montana. The state ranks third in total stream miles in the contiguous U.S (not including Alaska and Hawaii). - Source: [Headwaters to a Continent See US stream miles table below](#).
- Montana contains the headwaters for three continental watersheds: the St. Mary's River, the Columbia River, and the Missouri River. Sources: [Headwaters to a Continent](#) and [DEQ non-point management plan](#)
- Wetlands and riparian areas (streamside green zones) cover 1-4% of Montana. These places support half of Montana's plant species and 38% of amphibians, reptiles, birds, and mammals of special concern. Sources: [Montana Audubon](#) and [1997 USGS summary on wetlands](#)
- Water withdrawn for irrigation accounts for more than 97.6% of water withdrawn in Montana each year and waters 2.82 million acres. Source: [DEQ non-point source management plan](#)
- 43.8% of Montana's domestic water supply is from groundwater and 56% is from surface water. - Source: [USGS 2000 estimated water use survey](#)
- Another way to look at Montana's water supply is to say that 38% of public supply and 93% of self-supplied domestic water is from groundwater. ("Public supply" is a water company which may supply domestic, industrial and commercial uses. "Self-supplied domestic" is water for in-home use only but not from a public system.) [See NRIS site](#).

Supply in Montana (2000 data)	Ground-water (mgd)	Surface-water (mgd)	Total (mgd)
Public water supply	56.1	92.4	149
Self supplied domestic	17.3	1.29	18.6
Totals	73.4	93.69	167.6

*mgd is million gallons per day

- The average total home water use for each person in Montana is 100 gallons per day. Source: [American Water Works Association](#)
- Producing a typical lunch--hamburger, French fries, and a soft drink--uses 1500 gallons of water. This includes the water needed to raise the potatoes, the grain for the bun, the grain needed to feed the cattle, and the production of the soda. [World Wildlife Fund](#) (This is a widely quoted fact, but finding the true source proves to be very difficult. At best it is a rough estimate given the amount of water it takes to make the components of lunch. Consider this fact simply "food for thought.") Source:
- One gallon of used motor oil can contaminate up to one million gallons of water. -Source: [EPA factsheet](#)

State Total River and Stream Miles from [US EPA state reports](#)

State	Miles	State	Miles
Alabama	77,274	Montana	176,750
Alaska	365,000	Nebraska	81,573
Arizona	90,373	Nevada	143,578
Arkansas	87,617	New Hampshire	10,881
California	211,513	New Jersey	6,450
Colorado	107,403	New Mexico	110,741
Connecticut	5,830	New York	52,337
Delaware	2,509	North Carolina	37,853
Florida	51,858	North Dakota	54,373
Georgia	70,150	Ohio	29,113
Hawaii	3,905	Oklahoma	78,778
Idaho	115,595	Oregon	114,823
Illinois	87,110	Pennsylvania	83,260
Indiana	35,673	Rhode Island	1,392
Iowa	71,665	South Carolina	29,898
Kansas	134,338	South Dakota	9,937
Kentucky	49,105	Tennessee	61,075
Louisiana	66,294	Texas	191,228
Maine	31,752	Utah	85,916
Massachusetts	8,229	Vermont	7,099

1961

Maryland	17,000	Virginia	49,358
Michigan	51,438	Washington	70,439
Minnesota	91,444	West Virginia	32,278
Mississippi	84,003	Wisconsin	57,698
Missouri	51,978	Wyoming	108,767

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EXHIBIT E

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Data, Data, DataAbout the Bureau
About the BureauHelp/Privacy
Help, Privacy, Data

State & County QuickFacts

Utah

People QuickFacts	Utah	USA
Population, 2013 estimate	2,900,872	316,128,839
Population, 2010 (April 1) estimates base	2,763,885	308,747,716
Population, percent change, April 1, 2010 to July 1, 2013	5.0%	2.4%
Population, 2010	2,763,885	308,745,538
Persons under 5 years, percent, 2013	8.8%	6.3%
Persons under 18 years, percent, 2013	30.9%	23.3%
Persons 65 years and over, percent, 2013	9.8%	14.1%
Female persons, percent, 2013	49.7%	50.8%
White alone, percent, 2013 (a)	91.6%	77.7%
Black or African American alone, percent, 2013 (a)	1.3%	13.2%
American Indian and Alaska Native alone, percent, 2013 (a)	1.5%	1.2%
Asian alone, percent, 2013 (a)	2.3%	5.3%
Native Hawaiian and Other Pacific Islander alone, percent, 2013 (a)	1.0%	0.2%
Two or More Races, percent, 2013	2.3%	2.4%
Hispanic or Latino, percent, 2013 (b)	13.4%	17.1%
White alone, not Hispanic or Latino, percent, 2013	79.7%	62.6%
Living in same house 1 year & over, percent, 2008-2012	82.6%	84.8%
Foreign born persons, percent, 2008-2012	8.3%	12.9%
Language other than English spoken at home, pct age 5+, 2008-2012	14.4%	20.5%
High school graduate or higher, percent of persons age 25+, 2008-2012	90.6%	85.7%
Bachelor's degree or higher, percent of persons age 25+, 2008-2012	29.9%	28.5%
Veterans, 2008-2012	146,524	21,853,912
Mean travel time to work (minutes), workers age 16+, 2008-2012	21.5	25.4
Housing units, 2013	1,006,106	132,802,859
Homeownership rate, 2008-2012	70.4%	65.5%
Housing units in multi-unit structures, percent, 2008-2012	21.3%	25.9%
Median value of owner-occupied housing units, 2008-2012	\$217,800	\$181,400
Households, 2008-2012	880,873	115,226,802
Persons per household, 2008-2012	3.09	2.61
Per capita money income in past 12 months (2012 dollars), 2008-2012	\$23,794	\$28,051
Median household income, 2008-2012	\$58,164	\$53,046
Persons below poverty level, percent, 2008-2012	12.1%	14.9%
Business QuickFacts	Utah	USA
Private nonfarm establishments, 2012	70,454 ¹	7,431,808
Private nonfarm employment, 2012	1,070,986 ¹	115,938,468
Private nonfarm employment, percent change, 2011-2012	4.1% ¹	2.2%
Nonemployer establishments, 2012	199,393	22,735,915
Total number of firms, 2007	246,393	27,092,908
Black-owned firms, percent, 2007	0.5%	7.1%
American Indian- and Alaska Native-owned firms, percent, 2007	0.6%	0.9%
Asian-owned firms, percent, 2007	1.9%	5.7%
Native Hawaiian and Other Pacific Islander-owned firms, percent, 2007	0.3%	0.1%
Hispanic-owned firms, percent, 2007	3.7%	8.3%

Women-owned firms, percent, 2007	24.9%	28.8%
Manufacturers shipments, 2007 (\$1000)	42,431,657	5,319,456,312
Merchant wholesaler sales, 2007 (\$1000)	25,417,368	4,174,286,516
Retail sales, 2007 (\$1000)	36,574,240	3,917,663,456
Retail sales per capita, 2007	\$13,730	\$12,990
Accommodation and food services sales, 2007 (\$1000)	3,980,570	613,795,732
Building permits, 2012	13,007	829,658
Geography QuickFacts	Utah	USA
Land area in square miles, 2010	82,169.62	3,531,905.43
Persons per square mile, 2010	33.6	87.4
FIPS Code	49	

1: Includes data not distributed by county.

(a) Includes persons reporting only one race.

(b) Hispanics may be of any race, so also are included in applicable race categories.

D: Suppressed to avoid disclosure of confidential information

F: Fewer than 25 firms

FN: Footnote on this item for this area in place of data

NA: Not available

S: Suppressed; does not meet publication standards

X: Not applicable

Z: Value greater than zero but less than half unit of measure shown

Source U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, American Community Survey, Census of Population and Housing, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits
Last Revised: Tuesday, 08-Jul-2014 06:37:34 EDT

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STATE AND COUNTY QUICKFACTS

POPULATION & HOUSING

ECONOMIC TOPICS

GENERAL INFO

EXHIBIT F

Search

State & County QuickFacts

Idaho

People QuickFacts	Idaho	USA
Population, 2013 estimate	1,612,136	316,128,839
Population, 2010 (April 1) estimates base	1,567,652	308,747,716
Population, percent change, April 1, 2010 to July 1, 2013	2.8%	2.4%
Population, 2010	1,567,582	308,745,538
Persons under 5 years, percent, 2013	7.0%	6.3%
Persons under 18 years, percent, 2013	26.5%	23.3%
Persons 65 years and over, percent, 2013	13.8%	14.1%
Female persons, percent, 2013	49.9%	50.8%
White alone, percent, 2013 (a)	93.7%	77.7%
Black or African American alone, percent, 2013 (a)	0.8%	13.2%
American Indian and Alaska Native alone, percent, 2013 (a)	1.7%	1.2%
Asian alone, percent, 2013 (a)	1.4%	5.3%
Native Hawaiian and Other Pacific Islander alone, percent, 2013 (a)	0.2%	0.2%
Two or More Races, percent, 2013	2.2%	2.4%
Hispanic or Latino, percent, 2013 (b)	11.8%	17.1%
White alone, not Hispanic or Latino, percent, 2013	83.1%	62.6%
Living in same house 1 year & over, percent, 2008-2012	82.3%	84.8%
Foreign born persons, percent, 2008-2012	6.0%	12.9%
Language other than English spoken at home, pct age 5+, 2008-2012	10.4%	20.5%
High school graduate or higher, percent of persons age 25+, 2008-2012	88.6%	85.7%
Bachelor's degree or higher, percent of persons age 25+, 2008-2012	24.7%	28.5%
Veterans, 2008-2012	125,905	21,853,912
Mean travel time to work (minutes), workers age 16+, 2008-2012	20.1	25.4
Housing units, 2013	676,192	132,802,859
Homeownership rate, 2008-2012	70.1%	65.5%
Housing units in multi-unit structures, percent, 2008-2012	15.1%	25.9%
Median value of owner-occupied housing units, 2008-2012	\$167,100	\$181,400
Households, 2008-2012	577,648	115,226,802
Persons per household, 2008-2012	2.66	2.61
Per capita money income in past 12 months (2012 dollars), 2008-2012	\$22,581	\$28,051
Median household income, 2008-2012	\$47,015	\$53,046
Persons below poverty level, percent, 2008-2012	15.1%	14.9%
Business QuickFacts	Idaho	USA
Private nonfarm establishments, 2012	42,899 ¹	7,431,808
Private nonfarm employment, 2012	493,786 ¹	115,938,468
Private nonfarm employment, percent change, 2011-2012	2.3% ¹	2.2%
Nonemployer establishments, 2012	114,707	22,735,915
Total number of firms, 2007	151,671	27,092,908
Black-owned firms, percent, 2007	0.2%	7.1%
American Indian- and Alaska Native-owned firms, percent, 2007	0.9%	0.9%
Asian-owned firms, percent, 2007	0.8%	5.7%
Native Hawaiian and Other Pacific Islander-owned firms, percent, 2007	S	0.1%
Hispanic-owned firms, percent, 2007	2.6%	8.3%

Women-owned firms, percent, 2007	23.5%	28.8%
<hr/>		
Manufacturers shipments, 2007 (\$1000)	18,010,976	5,319,456,312
Merchant wholesaler sales, 2007 (\$1000)	14,286,715	4,174,286,516
Retail sales, 2007 (\$1000)	20,526,631	3,917,663,456
Retail sales per capita, 2007	\$13,691	\$12,990
Accommodation and food services sales, 2007 (\$1000)	2,415,951	613,795,732
Building permits, 2012	6,265	829,658
<hr/>		
Geography QuickFacts	Idaho	USA
Land area in square miles, 2010	82,643.12	3,531,905.43
Persons per square mile, 2010	19.0	87.4
FIPS Code	16	

1: Includes data not distributed by county.

(a) Includes persons reporting only one race.

(b) Hispanics may be of any race, so also are included in applicable race categories.

D: Suppressed to avoid disclosure of confidential information

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S: Suppressed; does not meet publication standards

X: Not applicable

Z: Value greater than zero but less than half unit of measure shown

Source U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, American Community Survey, Census of Population and Housing, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits
Last Revised: Tuesday, 08-Jul-2014 06:37:34 EDT

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EXHIBIT G

Search

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State & County QuickFacts

Montana

People QuickFacts	Montana	USA
Population, 2013 estimate	1,015,165	316,128,839
Population, 2010 (April 1) estimates base	989,417	308,747,716
Population, percent change, April 1, 2010 to July 1, 2013	2.6%	2.4%
Population, 2010	989,415	308,745,538
Persons under 5 years, percent, 2013	6.0%	6.3%
Persons under 18 years, percent, 2013	22.1%	23.3%
Persons 65 years and over, percent, 2013	16.2%	14.1%
Female persons, percent, 2013	49.8%	50.8%
White alone, percent, 2013 (a)	89.5%	77.7%
Black or African American alone, percent, 2013 (a)	0.6%	13.2%
American Indian and Alaska Native alone, percent, 2013 (a)	6.5%	1.2%
Asian alone, percent, 2013 (a)	0.8%	5.3%
Native Hawaiian and Other Pacific Islander alone, percent, 2013 (a)	0.1%	0.2%
Two or More Races, percent, 2013	2.5%	2.4%
Hispanic or Latino, percent, 2013 (b)	3.3%	17.1%
White alone, not Hispanic or Latino, percent, 2013	87.0%	62.6%
Living in same house 1 year & over, percent, 2008-2012	83.6%	84.8%
Foreign born persons, percent, 2008-2012	2.0%	12.9%
Language other than English spoken at home, pct age 5+, 2008-2012	4.6%	20.5%
High school graduate or higher, percent of persons age 25+, 2008-2012	91.9%	85.7%
Bachelor's degree or higher, percent of persons age 25+, 2008-2012	28.5%	28.5%
Veterans, 2008-2012	97,991	21,853,912
Mean travel time to work (minutes), workers age 16+, 2008-2012	18.0	25.4
Housing units, 2013	485,771	132,802,859
Homeownership rate, 2008-2012	68.5%	65.5%
Housing units in multi-unit structures, percent, 2008-2012	16.6%	25.9%
Median value of owner-occupied housing units, 2008-2012	\$183,000	\$181,400
Households, 2008-2012	405,508	115,226,802
Persons per household, 2008-2012	2.37	2.61
Per capita money income in past 12 months (2012 dollars), 2008-2012	\$25,002	\$28,051
Median household income, 2008-2012	\$45,456	\$53,046
Persons below poverty level, percent, 2008-2012	14.8%	14.9%

Business QuickFacts	Montana	USA
Private nonfarm establishments, 2012	36,241 ¹	7,431,808
Private nonfarm employment, 2012	343,842 ¹	115,938,468
Private nonfarm employment, percent change, 2011-2012	2.3% ¹	2.2%
Nonemployer establishments, 2012	84,767	22,735,915
Total number of firms, 2007	114,398	27,092,908
Black-owned firms, percent, 2007	0.2%	7.1%
American Indian- and Alaska Native-owned firms, percent, 2007	2.0%	0.9%
Asian-owned firms, percent, 2007	0.6%	5.7%
Native Hawaiian and Other Pacific Islander-owned firms, percent, 2007	S	0.1%
Hispanic-owned firms, percent, 2007	1.0%	8.3%

Women-owned firms, percent, 2007	24.6%	28.8%
Manufacturers shipments, 2007 (\$1000)	10,638,145	5,319,456,312
Merchant wholesaler sales, 2007 (\$1000)	8,202,782	4,174,286,516
Retail sales, 2007 (\$1000)	14,686,854	3,917,663,456
Retail sales per capita, 2007	\$15,343	\$12,990
Accommodation and food services sales, 2007 (\$1000)	2,079,426	613,795,732
Building permits, 2012	2,736	829,658

Geography QuickFacts	Montana	USA
Land area in square miles, 2010	145,545.80	3,531,905.43
Persons per square mile, 2010	6.8	87.4
FIPS Code	30	

1: Includes data not distributed by county.

(a) Includes persons reporting only one race.

(b) Hispanics may be of any race, so also are included in applicable race categories.

D: Suppressed to avoid disclosure of confidential information

F: Fewer than 25 firms

FN: Footnote on this item for this area in place of data

NA: Not available

S: Suppressed: does not meet publication standards

X: Not applicable

Z: Value greater than zero but less than half unit of measure shown

Source U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, American Community Survey, Census of Population and Housing, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits
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SPECIAL TOPICS

NEWSROOM

EXHIBIT H

May 27, 2014

JONATHAN 'HARLEY' JACKSON

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION,)
a Utah non-profit corporation,)
) Civil No. 100500558
Plaintiff,)
) Judge Derek Pullan
vs.)
) Deposition of:
VR ACQUISITIONS, LLC, a) JONATHAN "HARLEY" JACKSON
Delaware limited liability)
company, et al.,)
)
Defendants.)

May 27, 2014
9:06 a.m.Location: Richards Brandt Miller & Nelson
299 South Main Street, Suite 1500
Salt Lake City, Utah

Reporter: Rashell Garcia

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EXHIBITS

Number	Description	Page
37	Expert Report of Jonathan "Harley" Jackson with attached Curriculum Vitae	122

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APPEARANCES

For the plaintiff:	CRAIG C. COBURN Attorney at Law RICHARDS, BRANDT, MILLER & NELSON 299 South Main Street P.O. Box 2465 Salt Lake City, UT 84110-2465 (801) 531-2000
For the defendant, VR Acquisitions:	NATHAN THOMAS Attorney at Law JONES WALDO HOLBROOK & McDONOUGH 170 South Main Street Suite 1500 Salt Lake City, UT 84101 (801) 521-3200
For the defendant, State of Utah:	THOMAS D. ROBERTS Assistant Attorney General UTAH STATE ATTORNEY GENERAL'S OFFICE 160 East 300 South, 5th Floor P.O. Box 140857 Salt Lake City, UT 84114-0857 (801) 366-0353
Also Present:	STEVE SCHMIDT

INDEX

Witness	Page
JONATHAN "HARLEY" JACKSON	
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1 May 27, 2014 9:06 a.m.
2 PROCEEDINGS
3 JONATHAN "HARLEY" JACKSON,
4 called as a witness, by and on behalf of the plaintiffs,
5 having been first duly sworn, was examined and testified as
6 follows:

EXAMINATION

BY MR. COBURN:

7 Q. Would you state your name for the record, please?
8 A. Jonathan Jackson.
9 Q. You go by Harley?
10 A. Yes, sir.
11 Q. And, Harley, you and I know each other from years
12 ago and haven't seen each other a lot over the ensuing years,
13 but do you mind if I call you Harley?
14 A. No.
15 Q. And you can call me Craig?
16 A. Okay.
17 Q. Harley, where is your place of residence?
18 A. Francis, Utah.
19 Q. What's the address?
20 A. 1735 Hallam Road, 84036.
21 Q. Have you ever had your deposition taken before?
22 A. No, sir.
23 Q. I'm sure that Nathan Thomas, Mr. Thomas, has
24
25

Page 4

May 27, 2014

1 so I'll go first.
 2 EXAMINATION
 3 BY MR. ROBERTS:
 4 Q. You talked in response to Mr. Coburn's
 5 hypothetical about the withdrawal of 2,700 miles of stream by
 6 HB141, about the impact. Would that impact consist of having
 7 to go to different waters in those 2,700 miles?
 8 A. I think there's plenty of water in Utah to absorb
 9 all the fishermen.
 10 Q. Well, but I mean the negative impact was if you
 11 withdraw those 2,700 miles, and they couldn't go onto those
 12 2,700 miles: correct?
 13 A. Correct.
 14 Q. The publicly available waters, are those
 15 sufficient to support the guide fishing industry?
 16 A. Absolutely.
 17 MR. COBURN: Objection, foundation.
 18 A. Absolutely.
 19 Q. Same question with regard to fishermen. The
 20 impact of withdrawing those would mean those fishermen
 21 couldn't go on those 2,700 miles; right?
 22 A. Correct.
 23 Q. It would be negative because they couldn't go
 24 onto those particular 2,700 miles?
 25 A. Correct.

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1 Q. Are there sufficient waters for them to go onto
 2 through public waters?
 3 MR. COBURN: Objection, leading.
 4 A. Absolutely. There's plenty of water right now.
 5 Q. Are there any fishing -- to your knowledge, are
 6 there any fishing and recreational abilities that are only
 7 available on private waters and not on public waters?
 8 A. No.
 9 MR. COBURN: Can I have a leading objection?
 10 MR. ROBERTS: A leading objection?
 11 MR. COBURN: Yes. You're leading the witness.
 12 And I can interrupt every question, or you can just keep
 13 doing it and I'll just have a standing objection.
 14 MR. ROBERTS: You can have a standing objection
 15 to my leading questions.
 16 MR. COBURN: Thank you.
 17 Q. (By Mr. Roberts) You testified as to the growing
 18 nature of the business with regard to guide services.
 19 A. (Witness nods head.)
 20 Q. What if any limitations do you see with regard to
 21 that growth? What factors that would limit the growth of the
 22 industry.
 23 A. Economy.
 24 Q. Excuse me?
 25 A. The economy.

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1 Q. What about recreational -- well, what about
 2 places to fish, would that be a limiting factor?
 3 A. No.
 4 Q. I'm struggling to cough and talk, so that's
 5 enough for me.
 6 EXAMINATION
 7 BY MR. THOMAS:
 8 Q. I've got a couple of questions.
 9 A. Excellent.
 10 Q. When you're fishing, how do you know where you
 11 can and cannot go?
 12 A. Legally?
 13 Q. Yes.
 14 A. By no trespassing signs.
 15 Q. Prior to 2008, was your assessment of where you
 16 can and can't go any different than that?
 17 A. No.
 18 Q. So you determined it by posting?
 19 A. Posting of no trespassing signs.
 20 Q. When you were at Trout Bum 2 between 2008 and
 21 2010, did the areas which you guided change at all?
 22 A. No.
 23 Q. In 2010, did you have to stop offering guide
 24 trips to any location because it was no longer accessible to
 25 the public?

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1 A. Absolutely not.
 2 Q. Is the fishing -- is it possible -- strike that.
 3 What is the quality of the fishing right now at
 4 Victory Ranch?
 5 A. On this day?
 6 Q. On this day.
 7 A. Unfishable.
 8 Q. Why?
 9 A. The water is way too high.
 10 Q. When do you anticipate that it will be fishable
 11 again?
 12 A. 23 days.
 13 Q. Okay. Very particular estimate. Is it fishable
 14 year round?
 15 A. No.
 16 Q. When is it not fishable other than today?
 17 A. From approximately mid November, end of November
 18 to about mid March, it's not fishable.
 19 Q. Why not?
 20 A. Because of the ice on the river.
 21 Q. So that would be that it's not open during the
 22 winter due to winter conditions like those other ones we were
 23 talking about earlier?
 24 A. Yes. It's variable on severity of the winter.
 25 And it's also unfishable essentially depending on severity of

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FILED
JAN 21 2015

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a
Utah non-profit corporation,

Plaintiff,

v.

VR ACQUISITIONS LLC, a Delaware limited
liability company, et. al.

Defendants.

RULING AND ORDER:

**DENYING VRA'S MOTION
FOR SUMMARY JUDGMENT**

**DENYING THE STATE'S MOTION
FOR SUMMARY JUDGMENT**

Case No. 100500558

Judge Derek P. Pullan

Defendants VR Acquisitions ("VRA") and State of Utah ("the State") move for summary judgment. Amicus Curiae Utah Alliance to Protect Property Rights ("the Alliance") joins in these motions. Plaintiff Utah Stream Access Coalition ("the Coalition") opposes the motions.

The Court heard oral argument on December 22, 2014. VRA was represented by its counsel, Nathan D. Thomas and Elizabeth M. Butler. The State of Utah was represented by assistant attorney general Thomas D. Roberts. The Alliance was represented by its counsel, Michael D. Zimmerman. The Coalition was represented by its counsel Craig C. Coburn.

Having considered the memoranda and oral arguments, the Court now enters the following:

RULING

Summary Judgment Standard

The Coalition bears the burden of proving that the Public Waters Access Act (“the Act”) violates the public trust under Article XX, Section 1 of the Utah Constitution. VRA and the State move for summary judgment on this question.

As summary judgment movants “on an issue where the non-moving party will bear the burden of proof,” VRA and the State must (1) “affirmatively provide factual evidence establishing that there is no genuine issue of material fact;” and (2) on the undisputed facts, demonstrate that they are entitled to judgment as a matter of law. *Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600.

In ruling on VRA’s and the State’s motions for summary judgment, the Court views the facts in the light most favorable to the non-moving party. Doubts, uncertainties, or inferences related to issues of fact are resolved in favor of the Coalition. *Wasatch Oil & Gas, L.L.C. v. Reott*, 2007 UT App. 223, ¶ 35; *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984).

Disputed Issues of Material Fact

The Coalition’s opposition memorandum sets forth numerous disputed issues of fact which it claims are material. In many instances, VRA and the State challenge the materiality of the Coalition’s facts. In the alternative, VRA and the State assert that they are entitled to judgment as a matter of law on the facts as stated by the Coalition.

Almost two years ago in its March 8, 2013 Ruling and Order, the Court found that “whether the Act substantially impairs the public’s interest in the lands and waters remaining . . . is a disputed issue of material fact.” The lengthy memoranda filed in connection with the pending motions for summary judgment demonstrate that this remains true today.

Viewing the facts in the light most favorable to the Coalition, the Court concludes that the Coalition can demonstrate that the Act substantially impairs the public’s interest in the lands and waters remaining. Because material facts on this question remain disputed, the Court denies VRA’s and the State’s motions for summary judgment.

Conclusions of Law

In the moving papers, the parties disagree about the scope of the public trust resource at issue. The scope of the trust resource is important in deciding whether the Act “substantially impairs the public’s interest in the lands and waters remaining.” The parties have briefed this legal question. Deciding it now will assist the parties in their trial preparation.

VRA and the State contend that the public trust resource is the waters of the State of Utah, whether traversing private or public land, including federal land. (VRA Memo, pp. 3-10; State Memo, pp. 3-7). The Act limits the public’s interest in only those streams that traverse private property. Some 12,700 miles of streams traversing public land (representing 61% of streams in Utah) remain open and available for all lawful recreational use by the public. Of the 6,291 miles of fishable streams in Utah, 3,584 miles (57%) traverse public land and remain open for fishing by the public. In VRA’s and the State’s view, the availability of these remaining

waters for public use means that the public's interest has not been substantially impaired by the Act.

The Coalition contends that the trust resource is the *Conatser* easement—the public's “constitutionally-recognized easement to access and use public waters in place for any lawful purpose where they traverse private beds and to reasonably touch those beds when doing so in any manner incident and necessary to that use.” (Coalition Memo, p. 3). The Act reduces this broad recreational right to (1) the right to float, but only if the water “has sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating;” (2) the right to fish while floating; (3) the right to incidentally touch private beds as required for safe passage and movement; and (4) the right to portage around dangerous obstructions. Utah Code § 73-29-202(1)(2). Given the narrow public rights that remain, the Court—in the Coalition's view—must conclude that the Act has substantially impaired the public's interest in the *Conatser* easement.¹

¹ In the alternative, the Coalition argues that even if the trust resource is the waters of the State of Utah generally, the Court should still deny VRA's and the State's motions for summary judgment. The Coalition sets forth a number of disputed facts which—if viewed in the light most favorable to the Coalition—demonstrate that the Act substantially impairs the public's interest in the waters of the State of Utah remaining. These facts include: (1) the Act substantially restricts public access to and use of 8,100 miles of streams (almost 40% of Utah's total 20,800 miles of streams); (2) the Act substantially restricts access to 2,707 miles of fishable streams, or 43% of Utah's 6,291 miles of fishable streams; (3) of the 8,100 miles of streams in Utah that traverse private land, only 469 miles (less than 6%) are “floatable” as that term is defined under the Act; and (4) by substantially limiting access to almost 40% of Utah's 20,800 miles of streams, the Act increases the number of fishermen per stream mile, decreasing the availability and quality of the recreation experience, especially on streams on public lands located near large population centers.

In defining the trust resource, the Court looks first to the legislation being challenged. The Act regulates public recreational activities on waters of the State of Utah generally, whether on private or public land. Section 73-29-201 provides:

- (1) The public may use a public water for recreational activity if
 - (a) the public water:
 - (i) is a navigable water;
 - (ii) is on *public property*; and
 - (b) the recreational activity is not otherwise prohibited by law.
- (2) A person may access and use public water on *private property* for any lawful purpose with the private property owner's permission.
- (3) A person may not access or use a public water on *private property* for recreational purposes if the private property is property to which access is restricted, unless public recreational access is established under Section 73-29-203.

Utah Code § 73-29-201(1)-(3) (emphasis added). Public trust analysis must focus on what remains of the affected trust resource after the challenged disposition. The issue then is whether the Act substantially impairs the public's interest in the lands and waters remaining in the State of Utah generally, whether those waters traverse private or public property.

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. No trust resource could be disposed of because every disposition would result in nothing remaining. This would conflict with the public trust doctrine as articulated in *Illinois Central*, *Colman*, and many other cases.

Looking to the legislation or regulation itself to define the affected trust resource is consistent with case law applying the public trust doctrine.² In *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387 (1892), the U.S. Supreme Court held that the State of Illinois violated the public trust doctrine when the State Legislature and City of Chicago granted fee title to 1,000 acres of submerged lands in the Chicago harbor to private a railroad company. The focus of the Court's analysis was the substantial impact on waters remaining in the harbor, the trust resource affected by the legislative action. *Id.* at 454-455.

Similarly, in *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), the Idaho Supreme Court held that a state permit leasing submerged lands in Lake Coeur d'Alene to a private party for construction of a dock did not violate the public trust doctrine. Noting that the proposed dock "impeded navigation on about .01% (.0001) of the lake area," the Court concluded that the permit did not "violate the public trust in the resource at this time." *Id.* at 1087, 1094. The resource appears to be Lake Coeur d'Alene, the body of water affected by the permit.

In *State v. Public Service Commission*, 81 N.W.2d 71 (Wis. 1957), the city of Madison sought to fill a portion of Lake Wingra. The Attorney General challenged the action because

² *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990) is not particularly helpful on this point. Colman operated and maintained an underwater brine canal on the bed of the Great Salt Lake. He leased the lakebed from the State of Utah. The State challenged its own lease on the ground that it violated the public trust doctrine. Citing *Illinois Central*, the Court held that the state could grant certain rights in the beds of navigable waters if those rights could be disposed of without affecting the public interest in what remains. However, there was nothing in the record to "show that Colman's canal impaired the public interest in any way at the time the State granted him the right to conduct his operation." *Colman*, 795 P.2d at 635-36 (emphasis added). As in the instant case, this was "a question of fact to be decided by the trial court." *Id.*

filling the lagoon would interfere with navigation and therefore violate the public trust. In rejecting this claim, the Court considered “the [very small] diminution of lake area . . . when compared with the whole of Lake Wingra,” the body of water affected by the project. *Id.* at 73.

The Coalition contends that as a matter of the law waters on federal land cannot be assets of Utah’s public trust. In the Coalition’s view, these waters are not subject to state regulation and therefore should not be included when determining the public’s interest in the lands and waters remaining. Resolving this legal question is important because the vast majority of streams in Utah are found on federal lands. (Coalition’s Demonstrative Exhibits 1 and 2).

The Court disagrees with the Coalition. In *J.J.N.P. Co. v. State*, the Utah Supreme Court held: “A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water *regardless of who owns the water beds beneath the water.*” *J.J.N.P. Co.*, 655 P.2d 1133, 1136 (Utah 1982) (emphasis added). The Coalition correctly argues that the State cannot regulate or manage federal lands or the waters that traverse them. The federal government has authority to restrict access to and use of these waters, and may bar public access entirely. Existing impediments to the full use of and access to the public trust resource³ are relevant in determining whether the Act substantially impairs the public’s interest in the lands

³ The public trust doctrine would mean little if laws and regulations affecting the public trust resource were viewed in isolation, without considering other impediments to full access or use by the public. If the challenged legislation or regulation is considered in isolation, the State could dispose of the public trust in small pieces, never substantially impairing the public’s interest in what remains, but nevertheless disposing of nearly all of it over time. As Mr. Zimmerman described it, no individual step a person takes toward a wall substantially decreases the distance to the wall remaining, but with each step the distance closes nevertheless.

and waters remaining. *Kootenai*, 671 P.2d at 1092. However, these impediments do not remove waters on federal land from the public trust resource.

For these reasons, the Court concludes that the public trust resource at issue in this case is the waters of the State of Utah generally, whether they traverse private or public land, including federal land.

ORDER

Because there are material issues of fact that remain disputed, the Court denies VRA's and the State's Motion for Summary Judgment.

The Clerk shall contact counsel and schedule a pre-trial conference on a date convenient to them. The purpose of the conference will be to schedule a trial date.

No further order of the Court is required.

DATED this 21 day of January, 2015.


JUDGE DEREK P. PULLAN
Fourth District Court



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100500558 by the method and on the date specified.

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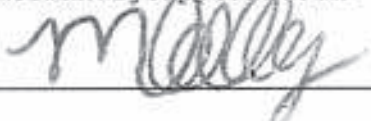
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**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH**

UTAH STREAM ACCESS COALITION, a Utah
non-profit corporation,

Plaintiff,

v.

VR ACQUISITIONS, LLC, a Delaware limited
liability company, et al.,

Defendant.

REQUEST FOR JUDICIAL NOTICE

Civil No. 100500558

Hon. Derek Pullan

Pursuant to Utah Rule of Evidence 201, VR Acquisitions asks the Court to take judicial
notice of the following facts:

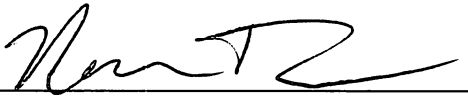
- The population of Utah increased from 1,722,850 in 1990 to 2,763,885 in 2010. U.S. Department of Commerce, U.S. Census Bureau, Utah: 2010 Census of Population and Housing, Utah, *available at* <https://www.census.gov/prod/cen2010/cph-2-46.pdf>, at p. 1, attached hereto at Exhibit A.
- The population of Salt Lake County increased from 725,956 in 1990 to 1,029,655 in 2010. (*Id.* at p. 6)
- The population of Summit County increased from 15,518 in 1990 to 36,324 in 2010. (*Id.*).
- The population of Utah County increased from 263,590 in 1990 to 516,564 in 2010. (*Id.*).
- The population of Wasatch County increased from 10,089 in 1990 to 23,530 in 2010. (*Id.*).
- And, in 2014, the population of Utah was an estimated 2,942,902. Utah Quick Facts from the U.S. Census Bureau, *available at* <http://quickfacts.census.gov/qfd/states/49000.html>, attached hereto at Exhibit B.

Rule 201 of the Utah Rules of Evidence requires the Court to take judicial notice upon request by a party of information that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Utah R. Evid. 201. Population statistics from the United States Census Bureau are of this type of evidence and have been judicially noticed in other jurisdictions. *See United States v. Bailey*, 97 F.3d 982, 985 (7th Cir.1996) (taking judicial

notice that in 1992 a 65-year-old white male in the United States had a life expectancy of approximately 80.4 years) (citing Bureau of the Census, United States Dept. of Commerce, *Statistical Abstract of the United States: 1995* 86 (115th ed.1995)); 2 Wharton's Criminal Evidence § 5:15 (15th ed.) (“Judicial notice will be taken of compilations of statistics accepted as accurate and of official census data”); 31A C.J.S. Evidence § 181 (same). Accordingly, VR Acquisitions respectfully asks the Court to judicially notice the United States Census Bureau statistics pertaining to the population of Utah and various counties set forth herein.

DATED this 9th day of September, 2015

JONES WALDO HOLBROOK & McDONOUGH

By: /s/ 
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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

UTAH STREAM ACCESS COALITION, a
Utah non-profit corporation,

Plaintiff,

vs.

VR ACQUISITIONS LLC, a Delaware
limited liability company; *et al.*,

Defendants.

**PLAINTIFF UTAH STREAM ACCESS
COALITION'S *PROPOSED*
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 100500558

Hon. Derek Pullan

This matter was tried to the Court on August 26-28 and September 2-3, 2015.

Closing arguments were presented on September 4, 2015. Plaintiff Utah Stream Access Coalition ("the Coalition") was represented by Craig C. Coburn and John L. Young.

Defendant VR Acquisitions LLC (Victory Ranch) was represented by Eric P. Lee, Nathan D. Thomas and Elizabeth M. Butler. Defendant State of Utah (State) was represented by Thom D. Roberts.

Having received, heard and considered the pleadings, stipulated facts, evidence, testimony and arguments of counsel, the Court makes the following findings of fact and reaches the following conclusions of law.

FINDINGS OF FACT

Rivers and Streams

1. In 2010, the State prepared a ‘Utah Stream Access Map’ (“Stream Access Map”) in direct response to passage of the Public Waters Access Act (“the Act”), Utah Code Ann. 73-1-101, et seq. http://wildlife.utah.gov/maps/stream_access/. (August 26, 2015 Stipulated Facts at ¶4; Ex. 1; Ogborn testimony)

2. The State did so to advise the angling public where they can and can’t fish Utah’s ‘fishable’ rivers and streams without landowner permission – that is, where rivers and streams traversed publicly-owned beds and privately-owned streambeds, respectively. (Ogborn testimony)

3. There is no evidence before the Court that the State made any effort to similarly advise the angling public where they could and couldn’t fish Utah’s ‘fishable’ lakes, reservoirs and ponds, based on streambed ownership.

4. The Act as applied had little or no impact and in any event no material impact on the angling public’s ability to access and use Utah’s ‘fishable’ public waters impounded in lakes, reservoirs or ponds – e.g., Lake Powell, Flaming Gorge, Bear Lake, Utah Lake, Willard Bay, High Uinta Lakes, Boulder Mountain Lakes, and Strawberry, Starvation, Jordanelle, Deer Creek and Pineview Reservoirs. (Slater, Hedrick, Hepworth, Thompson, Hart and Ogborn testimony; Exhibit 1)

5. Instead, as discussed *infra*, the Act as applied impacts, almost exclusively, the angling public’s access to and use of Utah’s ‘fishable’ rivers and streams and, more specifically, Utah’s ‘fishable’ rivers and streams where they traverse privately-owned

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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

<p>UTAH STREAM ACCESS COALITION, a Utah non-profit corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>VR ACQUISITIONS, LLC, a Delaware limited liability company; and the STATE OF UTAH,</p> <p style="text-align: center;">Defendants.</p>	<p><u>RULING, ORDER</u> <u>and</u> <u>FINAL JUDGMENT</u></p> <p>IN FAVOR OF PLAINTIFF UTAH STREAM ACCESS COALITION</p> <p>Case No. 100500558</p> <p>Judge Derek P. Pullan</p>
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This matter came before the Court for trial on August 26-28, and September 2-4, 2015. Plaintiff Utah Stream Access Coalition (“The Coalition”) was represented by its counsel, Mr. Craig C. Coburn and Mr. John L. Young. Defendant VR Acquisitions, LLC (“VRA”) was represented by its counsel, Mr. Nathan D. Thomas, Ms. Elizabeth M. Butler, and Mr. Eric P. Lee. Defendant State of Utah (“the State”) was represented by Assistant Attorney General Thomas D. Roberts.¹

In the 2010 General Session, the Utah Legislature enacted the Public Waters Access Act (“the Act”). Utah Code 73-29-101, et. seq. (effective May 11, 2010). The question presented in this case is whether the Act violates article XX, section 1 of the Utah Constitution. Article XX,

¹ The legal representation in this case has been exceptional. At trial, counsel cooperated with each other to present a substantial amount of evidence in an understandable and efficient manner. The arguments on all sides were well-considered and persuasive. The attorneys have been models of professionalism and civility.

section 1 requires that public lands of the State “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.

Having considered the evidence and arguments presented, the Court now enters the following:

RULING

Rulings Made Prior To Trial

The Coalition commenced this action in November 2010. In the years leading up to trial, the parties filed cross-motions for summary judgment and a motion to reconsider. In deciding these motions, the Court made the following legal rulings:

Memorandum Decision 1—May 21, 2012

- To the extent that section 73-29-103 of the Act (a legislative intent provision) purports to interpret the Utah Constitution or to decide the constitutionality of the Act, it violates article V, section 1 of the Utah Constitution which prohibits the legislature from exercising powers appertaining to the judiciary. *MDI*, at 9.
- Public ownership of state waters was recognized and confirmed in article XVII, section 1 of the Utah Constitution. *Id.*, at 13-20.
- Waters flowing in rivers, streams, and natural water courses (including courses realigned or channelized) are and always have been owned by the public, and as such are public waters. *Id.*, at 20.

- The public has an easement to use public waters that includes a right to engage in all recreational activities that use the waters. *Id.*
- The public easement recognized in *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982) and *Conatser v. Johnson*, 194 P.3d 897, 2008 UT 48 (Utah 2008) is a corollary right of use derived from public ownership of State waters, and was therefore recognized and confirmed in article XVII, section 1 of the Utah Constitution. *Id.*
- Public ownership of state waters is the basis on which the State regulates use of those waters for the benefit and well-being of the people. Constitutional recognition and confirmation of the public's ownership of state waters did not eliminate the legislature's authority to regulate use of those waters, and the public easement derived from public ownership. *MD1*, at 20-31.
- The Act does not violate article XVII, section 1 of the Utah Constitution. The Act regulates use of the public's easement. It does not transfer title to or abandon the easement to private parties. The public's easement over state waters remains in public ownership today. The Act's limitations are revocable by the Legislature. Any person, including the Division of Wildlife Resources ("DWR"), can prove broader recreational use rights based on adverse possession principles. *Id.*, at 29-31.
- As the branch of government responsible for policy-making, the legislature is in the best position to weigh competing interests in Utah's natural waters, and to regulate the scope of public use. *Id.*, at 31.
- The Legislature's authority to regulate use of the public's easement in Utah waters is limited by article XX, section 1 of the Utah Constitution. *Id.*, at 34-36.

- The public's easement on state waters constitutes an interest in land under article XX, section 1. *Id.*, at 34-35.

In *Memorandum Decision 1*, the Court made four additional rulings: (1) public trust duties under article XX, section 1 of the Utah Constitution were not implicated because the Act did not dispose of all or part of the easement, but rather regulated use; (2) the federal public trust doctrine as articulated in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892) does not apply because the Act did not transfer title to the public's easement to a private party; (3) Utah case law is the source of a state public trust doctrine which may limit legislative authority to regulate use of public waters; and (4) as a beneficiary of the trust, any member of the public may challenge a regulation enacted in violation of the public trust. *MD1*, at 35-40.

After considering additional briefing and argument on the public trust doctrine, the Court revisited and modified each of these four rulings in *Memorandum Decision 2*.

Memorandum Decision 2—March 8, 2013

In *Memorandum Decision 1*, the Court requested further briefing on the scope of Utah's public trust doctrine. Specifically, the Court asked the parties to address five issues of first impression: (1) what are the trust purposes?; (2) who has standing to challenge a legislative regulation limiting public access to waters in place?; (3) What degree of deference should be given to a legislative regulation?; (4) what factors should be considered in determining whether a regulation violates the public trust?; and (5) what is the burden of proof and who shoulders it?

The Court decided these issues in *Memorandum Decision 2*. The Court made the following rulings:

- The Coalition meets the relaxed requirements for traditional standing, and the requirements for alternative standing. *MD2*, at 2-6.
- The public trust is established in article XX, section 1 of the Utah Constitution. *Id.*, at 8.
- The public trust under article XX, section 1 protects not only the traditional triad of public trust rights—navigation, commerce, and fishing—but also the ecological integrity of public lands and public recreational uses. *See Colman v. Utah State Land Board*, 795 P.2d 622, 635 (Utah 1990); *National Parks and Conserv. Assoc. v. Board of State Lands*, 869 P.2d 909, 919 (Utah 1983); *MD2*, at 12-13.
- Article XX, section 1 does not prohibit the disposition of public lands, but does impose two prerequisites: (1) the State must dispose of public lands consistent with State law; and (2) the State can dispose of public lands only “for the respective purposes for which they have been or may be . . . otherwise acquired.” *Id.*, at 8.
- State action limiting use of public lands may constitute a disposition under article XX, section 1, even though the State retains title to the regulated lands. *See Colman*, 795 P.2d 622 (Utah 1990) (remanding a case to the trial court to determine whether leasing a portion of the bed of the Great Salt Lake to a private party violated the public trust). *Id.*, at 8-13.
- Any disposition of public land under article XX, section 1 must be rationally related to the purpose for which the land was granted, donated, devised or otherwise acquired. *Id.*, at 16.
- The party challenging a statute under article XX, section 1 has the burden of proof. *MD2*, at 16.
- Applying these principles to the Act, the Court ruled that:

- The Act regulates recreational use of the public's easement on state waters, an interest protected under article XX, section 1. *Id.*, at 20.
- The State retains control over the public's easement on state waters. *Id.*, at 22.
- The Act constitutes a disposition of the public's easement on state waters under article XX, section 1. *Id.*, at 16-19.
- The public's easement on state waters was acquired for the purpose of promoting public access to and use of those waters. The Act is not rationally related to these purposes. The Act did not represent a policy favoring a higher beneficial use of public waters over another use, or promote one recreational use of the water at the expense of another.² *Id.*, at 20-21.
- Only one remaining question must be answered to determine the constitutionality of the Act under article XX, section 1: Does the Act substantially impair the public's interest in the lands and waters remaining, whether in the Provo River itself or in public waters statewide? This is a disputed issue of material fact.

Memorandum Decision 3—January 21, 2015

Late in 2014, VRA and the State moved again for summary judgment. The Court decided these motions in *Memorandum Decision 3*. In doing so, the Court made the following rulings:

² In *Memorandum Decision 2*, the Court recognized the Legislature's broad authority to assess the relative importance of competing water uses and to enact policies that favor one or more uses over others. *MD2*, at 13. In adopting the Act, the Legislature was not engaged in this kind of policy-making.

- Whether the Act substantially impairs the public's interest in the lands and waters remaining is a disputed issue of material fact to be resolved at trial. *MD3*, at 2-3.
- The public trust resource at issue is the waters of the state of Utah generally, whether on public or private land, not the regulated easement. *Id.*, at 3-8.
- Public trust analysis must focus on what remains of that trust resource after the challenged disposition. *Id.*
- Existing impediments to full use of and access to the public trust resource (i.e. federal and state regulations) are relevant in determining whether a particular regulation impairs the public's interest in the lands and waters remaining. *See Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho). *MD3*, at 7-8.

Memorandum Decision 4—August 5, 2015

In July 2015, VRA moved the Court to reconsider its order denying VRA's motion for summary judgment. The Court decided this motion in *Memorandum Decision 4*. The Court made the following rulings:

- Whether The Coalition can meet its burden to show that the Act—on its face or as applied—substantially impaired the public's interest in the lands and waters remaining is an issue of fact which must be resolved at trial. *MD4*, at 3.
- The ruling of another Court determining that a one-mile stretch of the Weber River was navigable was relevant to this action, but not necessarily outcome determinative. *Id.*, at 3 (citing *Utah Stream Access Coalition v. Park*, Utah 3rd Dist., Case No. 110500360).
- In *Edridge v. Johndrow*, 345 P.3d 553, 2015 UT 21, the Utah Supreme Court did not repudiate legal tests which require intensive fact-finding. *MD4*, at 3-4.

Question Presented at Trial

As explained, the only legal question left unanswered in this case is whether the Act violates Article XX, Section 1 of the Utah Constitution. To answer this question, the Court must determine whether the Act substantially impaired the public's interest in the lands and waters remaining. This is the factual dispute which required a trial.

Stipulated Facts

The parties stipulated to the following facts for purposes of trial:

General

1. The Coalition preliminarily estimated that the State of Utah has 20,800 total miles of rivers and streams. Of those 20,800 miles of rivers and streams, The Coalition preliminarily estimated that 850 miles are navigable, 12,700 miles traversed public and/or tribal ground and 7,250 miles traverse private ground.
2. The State of Utah defines "navigable waters" as waters which Utah "recognizes" as being navigable for title purposes under the equal footing doctrine. Utah has "recognized" such waters in instances where courts have declared certain portions of rivers or streams or the portions of rivers recognized by Rule to be navigable. There may be other waters not yet declared navigable which would qualify as being navigable rivers or streams. In addition, various lakes and/or rivers have been determined to be navigable waters and the dividing line between the rivers and streams which flow into the bodies of water versus the waters is uncertain.
3. The State "recognizes" that 574.39 miles of rivers or streams in Utah are navigable-for-

title purposes and that the streambeds of these waters are sovereign lands.

Stream Access Map

4. The State maintains a “Utah Stream Access Map” at http://wildlife.utah.gov/maps/stream_access/.
5. The “Utah Stream Access Map” indicates on its key, it “is a work in progress and should be used for general reference only. The Division of Wildlife Resources (“DWR”) will continue to add and update information over the coming weeks and months. Please note that some streambeds that appear to be privately owned are actually owned by municipalities that grant public access.”
6. The “Utah Stream Access Map” also bears a disclaimer which reads as follows:

Streambeds highlighted on this map represent those areas with regular water flow and fishing opportunity. Streambeds located on Native American Trust Lands are not included.

Although every effort is made to ensure accuracy, this map is provided for general reference only. The [DWR] does not guarantee the accuracy of this map or access to any private or public land. The information provided is not binding on courts, prosecuting attorneys or other law-enforcement agencies. It is provided solely for general information and does not represent legal advice or counsel. To learn more about how the stream access law (H.B. 141) affects anglers, visit our question and answer page.

7. Privately-owned land in Utah’s Geographic Information Systems (“GIS”) land ownership dataset is defined as all non-public land. Thus, private land in the dataset includes town, city, and county held properties. See Utah Automated Geographic Reference Center – Land Ownership, <http://gis.utah.gov/data/sgid-cadastre/land-ownership/> (last visited Nov. 3, 2015). And privately-owned land in Utah’s GIS landownership dataset includes walk-in access, easements or permissive use.

8. A State web-link to DWR's "question and answer page" advises visitors as follows:

Recreational access to Utah waters on private land

How the stream access law affects Utah anglers.

What does the law prohibit?

The law does not allow recreational water users (including anglers, kayakers, tubers, hunters and others) to walk on the private bed of a public waterbody. This means that if you are fishing or recreating in public water that flows over private property closed to trespass, you may not walk on the land beneath the water without obtaining landowner permission.

What does the law allow?

The current law allows you to float on the surface of the water, even if you're floating over private property that is closed to trespass. It also allows you to fish while floating. Your right to float only applies under the following conditions:

- **Water volume.** The water must have sufficient width, depth and flow to float your vessel.
- **Stopping prohibited.** You and your vessel must move with the current and not anchor or stop.
- **Public water.** The water must flow in a natural channel, or it must collect in a natural lake, pond or reservoir on a natural channel.

Where can I fish without obtaining permission?

There are still thousands of places you can fish without obtaining landowner permission.

You do not need permission to:

- Fish while floating over private property.
- Fish on public property where the activity is authorized by the managing agency. This applies to fishing on property owned by the U.S. Forest Service, the Bureau of Land Management, the DNR and other public agencies.

- Fish on private property that is not closed to trespass.

If possible, try to communicate with landowners before you float over property closed to trespass. It is courteous and always appreciated.

The DWR has also worked with other agencies and private landowners to obtain public access to stretches of the following rivers and streams: Duchesne River, Little Bear River, Ogden River, Provo River (middle section), Salt Creek, Sanpitch River, Spanish Fork River, Strawberry River, Thistle Creek, Weber River and many others. To find a waterbody where you do not need permission to walk the bed, contact the DWR office in the region where you want to fish.

You can also visit the DWR's Fishing Hotspots, Community Fisheries, Blue Ribbon Fisheries and Walk-in-Access sites to learn about more great places to fish.

Does the DNR have a map showing the streams where I can fish?

We've put together an interactive stream access map that shows both public and private streambeds across the state. The map is a work in progress, so please use it for general reference only as we work to fine tune and improve it.

See <http://wildlife.utah.gov/component/content/article/40-fishing/238-hb-141.html>.

"Fishable" Waters

9. The State estimates that there are 6,419 miles of "fishable" rivers and streams in Utah.

According to the State, of these 6,419 miles:

- a. Approximately 2,738 miles (around 43%) ostensibly traverse privately-owned streambeds; and
- b. Approximately 3,681 miles (around 57%) traverse publicly-owned streambeds, including 407 miles that traverse adjudicated sovereign lands (i.e., streambeds of rivers adjudicated to be navigable-for-title).

10. The State qualifies its approximations as follows:

- a. These approximations under represent the length of the rivers and streams in Utah as the approximation is limited to "fishable streams," which term

DWR used based upon whether portions of the streams had “fisheries,” meaning that they were sufficient to sustain significant public fishing on that portion of the stream in a beneficial manner. Thus, even though all streams have fish in them and could be fished, many stretches of streams are excluded from this 6,419 mile number based upon, among other reasons, the number of fish present and the species of fish not being popular for fishing.

- b. Furthermore, the approximations underestimate the amount of beds publicly owned and overestimate the amount privately owned. This is because, in part, the lengths did not include estimates of all places where the public has obtained easements, walk-in access, or other agreement to allow “public” access. In addition, the beds that are publicly owned generally only reflect those owned by the state and federal government; “public” ownership should also include those rivers and streams owned by other public entities, such as cities, counties, and special service districts, which are currently generally included in the “privately owned” category.³

11. The Coalition estimates that the State’s Stream Access Map has identified 6,291 miles of “fishable” rivers and streams in Utah. Of these 6,291 miles, the Coalition estimates that:

- a. 2,707 miles (around 43%) ostensibly traverse privately-owned streambeds;
and
- b. 3,584 miles (around 57%) traverse publicly-owned streambeds, including

³ The fact that public waters flow through city or county boundaries does not mean that the city or county owns the land over which the water passes. The fact that public waters flow over lands owned by a city or county does not mean that the city or county permits public access.

segments of some rivers adjudicated or claimed by the State to be navigable-for-title.

- c. These numbers were derived by (1) securing the digital river/stream map data for “fishable” waters available at <http://wildlife.utah.gov/maps/stream>, (2) augmenting that data with supplemental/updated data made available by the State during discovery, and (3) overlaying the data described in (1) and (2) with land ownership data available at <http://gis.utah.gov> and data for river/stream segments recognized by the State of Utah as navigable for title purposes found at <http://www.ffsl.utah.gov/gis/coverages.php>.

Walk-In Access Waters

12. The State operates a Walk-In-Access (“WIA”) program whereby it leases wildlife habitat and public access to that habitat for hunting and/or fishing. Leases with private property owners for the WIA program may be
 - a. terminated for any reason by either party upon 30 days written notice; or
 - b. amended at any time upon written agreement by the landowner and the DWR.
13. If a WIA recreational lease agreement is terminated prior to the ending date specified in the recreational lease agreement, the compensation fee shall be prorated based upon the recreational lease activity provided and the number of days that access was provided. And, if a habitat project is provided by the DWR and the landowner terminates the WIA contract prior to the agreed term, the landowner will be required to reimburse the DWR for the value of the project, which shall be prorated based on termination date.

14. An estimated 50 miles of “fishable” streams and rivers traversing ostensibly private beds are enrolled in the State’s WIA program.
15. The mileages of “fishable” rivers and streams that traverse publicly-owned streambeds as estimated by the State and the Coalition do not include an estimated 50 miles that ostensibly traverse privately-owned streambeds but are accessible to the public through the State’s Walk-In Access program. Accounting further for these 50 miles:
 - a. Of the State’s approximation of 6,419 miles of “fishable” rivers and streams, 3,796 miles (59.1%) traverse publicly-owned streambeds or are publicly accessible and 2,623 miles (40.9%) ostensibly traverse privately-owned streambeds; and
 - b. Of the Coalitions’ approximation, using the State’s GIS data, of 6,291 miles of “fishable” rivers and streams, 3,699 miles (58.8%) traverse publicly-owned streambeds or are publicly accessible and 2,722 miles (41.2%) ostensibly traverse privately-owned streambeds.

Floatable Waters

16. The Coalition estimates that 1,760 miles of rivers and streams in Utah are “floatable” as defined by H.B.141. Of these 1,760 miles, the Coalition estimates that:
 - a. 469 miles (around 27%) ostensibly traverse privately-owned streambeds; and
 - b. 1,291 miles (around 73%) traverse publicly-owned streambeds, including rivers and streams that are adjudicated or claimed by the State to be navigable-for-title.

- c. These numbers were derived by (1) digitizing and determining the mileage of floatable Utah river/stream segments identified in Gary Nichols' *River Runners' Guide to Utah and Adjacent Areas* (GARY NICHOLS, RIVER RUNNERS' GUIDE TO UTAH AND ADJACENT AREAS (2002)), (2) overlaying the data described in (1) with land ownership data available at <http://gis.utah.gov> and data for river/stream segments recognized by the State of Utah as navigable for title purposes found at <http://www.ffsl.utah.gov/gis/coverages.php>.

17. These "floatable" rivers and streams include:

- a. waters that are "floatable" only on a seasonal basis (*e.g.*, during spring runoff); and
- b. waters that may or may not be "floatable" during irrigation season; and
- c. waters that are "floatable" year-round.

The Provo River

- 18. The Provo River has its headwaters in the Uinta Mountains in Summit County and flows, in turn, through Summit, Wasatch and Utah Counties, ultimately discharging into Utah Lake.
- 19. The Provo River's drainage basin is 673 square miles.
- 20. Provo River waters flow through parcels of land that are owned by the federal government, state government, other state agencies and entities (including State Institutional Trust Lands), local government entities (including cities, counties, special service districts, and conservation districts), and private parties.

21. Some portions of the Provo River remain in a natural channel, while other portions do not due to re-channelization, diversion, or other manmade structures, or other manmade changes to the river course.
22. Seasonal flows on the main stem of the Provo River range from 200 to 2,000 cubic-feet-per-second.
23. Flows in the Provo River are from time-to-time – typically on a seasonal basis – augmented by waters artificially diverted from the Weber River. Similarly, the flows of other Utah rivers and streams may, from time-to-time, be augmented by flows from other waters.
24. Flows in the Provo River are from time-to-time – typically on a seasonal basis – diminished by waters artificially diverted for irrigation, municipal, industrial and other uses. On some Utah streams, flows are diminished to where the water is not practicably usable.
25. The Provo River has long been one of Utah’s leading sport fishing streams. The State of Utah has designated the Middle Provo River and a portion of the Lower Provo River as “Blue Ribbon” fisheries, meaning that they are recreational fisheries of extremely high quality.
26. Fishing on the Provo River is a source of business for local and regional sporting goods stores, guides and outfitters. It is a nationally recognized fly-fishing stream, and has been a popular destination for out-of-state anglers.
27. Portions of the Provo River are frequently floated by recreationists in canoes, rafts, whitewater kayaks and inner tubes. It is considered a recreational resource by river

runners in Utah.

28. The stretch of the Provo River running from the Trial Lake Basin in the Uinta Mountains down to Jordanelle Reservoir is known as the “Upper Provo.”
29. The State estimates that 204 miles of the Provo River and its tributaries are ‘fishable.’ Of these 204 miles, the State estimates that:
 - a. 108 miles (around 53%) ostensibly traverse privately-owned streambeds; and
 - b. 96 miles (around 47%) traverse publicly-owned streambeds.
30. The State’s estimates are subject to the same qualifications identified.
31. The Coalition estimates that the State has identified some 88 “fishable” miles on the Provo River’s main stem. Of these 88 miles, the Coalition estimates that:
 - a. 49 miles (around 56%) ostensibly traverse privately-owned streambeds; and
 - b. 39 miles (around 44%) traverse publicly-owned streambeds.
 - c. These numbers were derived by (1) securing the digital river/stream map data for “fishable” waters available at <http://wildlife.utah.gov/maps/stream>, (2) augmenting that data with supplemental/updated data made available by the State during discovery, and (3) overlaying the data described in (1) and (2) with land ownership data available at <http://gis.utah.gov> and data for river/stream segments recognized by the State of Utah as navigable for title purposes found at <http://www.ffsl.utah.gov/gis/coverages.php>.
32. The State does not “recognize” or claim that any portion of the Provo River is navigable-

for-title purposes or that any of its streambed is sovereign land.

Victory Ranch

33. An approximately four-mile stretch of the Provo River flows through Victory Ranch.
34. According to the State, the streambed of the Provo River where it flows through Victory Ranch is privately-owned.
35. VR Acquisitions, LLC claims that it owns the streambed of the Provo River where it flows through Victory Ranch.
36. Of the approximate 4 miles of the Provo River that traverses Victory Ranch's property, Victory Ranch has opened 0.7 miles to the public through the Walk-In Access program.

Blue-Ribbon Fisheries

37. The State has adopted a Blue Ribbon Fisheries designation program that:
 - a. identifies publicly-accessible waters "that provide highly-satisfying fishing and outdoor experiences for diverse groups of anglers and enthusiasts;"
 - b. the State weighs several factors and sub-factors when considering a water for Blue Ribbon status, including:
 - i. public access;
 - ii. fishing quality;
 - iii. quality outdoor experience;
 - iv. quality fish habitat; and
 - v. economic benefits.
38. The purpose of the Blue Ribbon Fishery program is to:

- a. Identify and designate Blue Ribbon fisheries throughout Utah;
- b. Enhance the aquatic habitat and recreational setting of Blue Ribbon fisheries;
- c. Protect Blue Ribbon fisheries through collaborative efforts between government agencies and private entities; and,
- d. Promote Blue Ribbon fisheries to anglers from all over.

Additional Findings of Fact

Custom, Conatser and The Act

- 39. Prior to the Utah Supreme Court's decision in *Conatser* the source and scope of the public's easement on state waters had not been conclusively determined.
- 40. By custom, members of the recreating public (1) floated on and fished while floating on public waters flowing over private land without obtaining permission from the landowner; and (2) did not touch the beds of public waters flowing over private land unless the landowner gave permission, or the land was historically open to public use.
- 41. Boaters used privately owned beds and land below the ordinary high water mark to walk, rest, scout, advance their craft, and portage around obstructions. They used privately owned land above the ordinary high water mark to scout safe passage and for other reasons related to safe floating. *Testimony of Gary Nichols.*
- 42. In *J.J.N.P.*, 655 P.2d 1133, 1137 (Utah 1982), the Utah Supreme Court held that Utah waters are "property of the public" and that "the public has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water." The Court expressed no opinion as to whether "the public has an easement in the beds of streams

and lakes.” *Id.*, 655 P.2d at 1138, n. 6.

43. Twenty-five years later, the Court decided *Conatser*, defining for the first time the full scope of the public’s easement on state waters. *Conatser* held that members of the recreating public had the right to “touch privately owned beds of state waters in ways incidental to all recreational rights provided for in [the public’s] easement.” *Conatser*, 2008 UT 48, ¶ 19.
44. In response to *Conatser*, the Utah Legislature adopted the Act in 2010. The objective of the Act was to “foster restoration of the accommodation existing between recreational users [of public waters] and private property owners before the decision in *Conatser*.” Utah Code § 73-29-103(6).
45. The evidence presented at trial established that before *Conatser* customary use of public water on private land was generally consistent with the framework established in the Act.
46. Thus, before *Conatser* the scope of the public’s right to use state waters flowing over or impounded on private land was an undecided legal question. The *Conatser* Court answered this question, recognizing public rights broader than those developed by custom.⁴
47. Between the day *Conatser* was decided on July 18, 2008 and the effective date of the Act on May 11, 2010, many members of the recreating public departed from custom and exercised the broader recreational use rights to which they were entitled, including the right to touch the beds of state waters flowing over or impounded on private land.
48. This period of public recreational use has been referred to by the parties as the *Conatser*

⁴ This Court has ruled that these broader public rights always existed, whether customarily exercised by the public or not, and were recognized and confirmed in article XVII, section 1 of the Utah Constitution.

window.

Anecdotal Evidence of Fishing Pressure Before and After The Act

49. Kris Olson is the President of the Coalition and an experienced fly fisherman.
50. He testified that people fish to find solitude in nature—that "catching fish is the goal, but that's not the point."
51. Olson testified that he has fished the Lower Provo, the Middle Provo, and Upper Provo on the Victory Ranch stretch numerous times both before and after May 11, 2010, the effective date of the Act.
52. In his experience crowding on each of these stretches increased after 2010 diminishing the quality of the fishing experience. Olson experienced the same increase in fishing pressure on the Blacksmith's Fork, the Logan, the Lower and Middle Strawberry, and the Middle Weber.
53. Ryan Houk has been a member of the Coalition since 2012. Like Olson, he is an accomplished fly fisherman with long experience fishing Utah rivers and streams. Houk testified that his preferred angling experience is to experience beautiful scenery, to get away from "man-made stuff," and to fish where there is a reasonable amount of water to move up and down the stream.
54. Houk testified that he has fished the Lower Provo, Middle Provo, and Upper Provo on the Victory Ranch stretch numerous times both before and after the effective date of the Act. He too experienced increased crowding on each of these stretches after 2010. Houk

observed the same increase in fishing pressure on the Middle Weber, the Weber immediately above Rockport, the Lower Strawberry and the Middle Strawberry.

55. Houk testified that rivers and streams currently available for public use are well known and well used. Parking access lots are full and access trails are worn down.
56. Houk has used the DWR stream access map to determine where he can and cannot fish.
57. Houk conceded that guided fishing tours have definitely increased in the last 10 years.
58. Jeffrey Harwin has been a fly fishing guide in Utah since 2002. He started guiding for Jans in Park City, was a co-owner of a fly shop and guide service in Heber City, and most recently the owner of Provo River Guide Service.
59. Harwin has guided hundreds of trips on the Lower and Middle Provo, the Middle Weber, and the Lower and Middle Strawberry. He has noticed the greatest fishing pressure on the Lower and Middle Provo.
60. Harwin has personally fished the walk in access at Victory Ranch. He testified that this area has "tremendous sized fish"⁵ and that fishing there was one of the "best experiences" of his life.
61. Harwin testified that in 2011 he noticed a significant and accelerated crowding on all rivers he guides. Because of this crowding, guides must leave very early in the morning and "race to the river" to secure a place to fish.

⁵ *Exhibit 7.6* illustrates a "tremendous sized fish" caught on the Upper Provo River reach passing through VRA property.

62. Harwin conceded that the number of professional guide services has increased over the years. In 2005 there were 15-20 guide services in Utah. Today there are 40-50.
63. Harwin confirmed the truth of his own advertising—that Utah continues to offer world-class fishing and that on any given day he can put a client on a fish 99.9 percent of the time.
64. Steve Schmidt has been the owner of Western Rivers Fly Fishers since 1986. Western Rivers is a retail and guide service. He is a member of the Coalition and was one of its earliest members.
65. Schmidt was an original member of the Governor's Blue Ribbon Fisheries Advisory Council responsible for designating exceptional fisheries in Utah.
66. Schmidt testified that the following waters would have been recommended for Blue Ribbon Fishery status but for the fact that they flow over private ground: (1) Chalk Creek; (2) Lost Creek; (3) 4-5 miles of the Upper Weber above Rockport, including Thousand Peaks; (4) the Upper Provo, including the stretch through Victory Ranch, and then continuing above Woodland to the confluence; (5) Mammoth Creek in the Sevier River Drainage; and (6) Panguitch Ranch in the Sevier River Drainage.
67. In Schmidt's opinion the Act has substantially and negatively impacted the public's enjoyment of rivers and streams in Utah, especially those waters located near population centers on the Wasatch Front.
68. He gave the following reasons for this opinion:

- a. In Utah, the length and width of rivers is smaller than in Idaho and Montana. This means that from the outset Utah rivers have a smaller carrying capacity—meaning they can support fewer anglers.
- b. The Act closed approximately 2,700 miles of Utah’s 6,400 miles of fishable rivers and streams, or 41 percent.
- c. Before the Act, there were approximately 60 licensed anglers per stream mile. After the Act there are 105 licensed anglers per mile. By contrast, Idaho has 17 licensed anglers per stream mile, and Montana 13.
- d. After the Act took effect in 2010, Schmidt observed a definite increase in crowding on the Lower Provo, Middle Provo, and Middle Weber. He did not observe “that great a difference” in crowding on the Middle Strawberry.
- e. In his fly shop, a contingent of loyal customers known as “the coffee crew” gathers frequently to talk about fly-fishing among themselves, with guides, and with customers. This anecdotal “shop talk” suggests an increase in fishing pressure on the Blacksmith’s Fork, the South Fork of the Ogden, the Lower Strawberry, and the main stem and West Fork of the Duchesne. Schmidt attributed this increase in fishing pressure to the Act and testified that this customer feedback is causing him to change his business model.

f. Other than on the Green River, there is “no place in Utah” that a person can effectively float and fish at the same time.

69. On cross-examination, Schmidt conceded that (1) Utah’s population growth has impacted the crowding of rivers and streams; (2) guide services contribute to fishing pressure; and (3) desirable fishing conditions contribute to fishing pressure.
70. Schmidt confirmed that his own customer database has grown by 20% in the last 10 years, but testified that growth has been relatively flat in the fishing guide industry as a whole.
71. Schmidt conceded that only 157,000 (38%) of all licensed anglers prefer fishing rivers and streams. Using this figure, there were 25 anglers per stream mile in Utah before the Act. After the Act, that number rose to 44 anglers per mile.
72. Finally, Schmidt conceded that as a measure of fishing pressure, the number of anglers per stream mile tends to significant overstatement. Not every licensed angler goes fishing on the same day.
73. Jonathan Levi Jackson has been the retail and head fishing guide for Victory Ranch since 2013. He too is an accomplished guide and fisherman. He has been employed as a fishing guide in Utah since 1994 and has guided more than 1,000 people on Utah’s rivers and streams.
74. Jackson testified that he has never declined a guide trip due to lack of public access. In his experience, the Act did not impact the public’s ability to recreate on State waters, or his ability to guide fishing trips.

75. Jackson testified that the Act did not change the rivers that he guides. In his view, there remains an “ample amount of water” available for public recreation and there is “no fishing opportunity in Utah that exists only on private land.”
76. Jackson confirmed that the guiding industry has grown due to more demand.
77. Matthew Brent Eastman has been the outfitters director at Victory Ranch for 15 years. He is responsible for conservation efforts on the property and on the stretch of the Provo River that flows through Victory Ranch.
78. Eastman too is an avid fisherman. He fishes the Middle Provo 20-25 times per year. He has hosted a television show on ESPN called “Wanna Go Fishing?” He has a BS degree in Environmental Science. His studies focused on wetland biology.
79. Eastman testified that Victory Ranch has worked hard to improve and manage the fishery on its property. Members and owners at Victory Ranch can fish there but must first participate in a half-day orientation. Members are taught to handle fish properly, to debarb hooks, to use a net, and to avoid nesting areas. Only two rods are permitted on any beat at a time. Only 12 anglers may fish per day. Catch and release is required.
80. Eastman testified that this stretch of the Provo River has good fishing from March to April, in June, and from September to November each year. Victory Ranch closes the fishery from July 4 to September 1.
81. Eastman testified that members of the public float through Victory Ranch property on the Upper Provo from May through June. VRA does not view these boaters as trespassers and has not reported their activity to police.

82. Eastman testified that in 2009 Victory Ranch opened .7 miles of the Upper Provo River on its property to Walk-In Access. *See Exhibit 19*. It is open for fly-fishing only. Members of the public must obtain a WIA authorization permit number and sign in. Only 10 anglers per day are allowed. The WIA closes at the same time Victory Ranch closes the fishery.
83. During the 620 days the WIA has been open, anglers signed in on 317 days. The WIA has been used by 603 anglers. The highest number of anglers on any given day was seven. *Exhibits 7.3, 7.3A*.
84. Finally, Eastman agreed that the popularity of fly-fishing has exploded in recent years and that there are more people on the Provo River than there used to be.

The Utah Department of Natural Resources Witnesses⁶

85. The Utah Department of Natural Resources divides the State into five regions—the Northern, the Northeastern, the Central, the Southern, and the Southeastern.
86. At trial, aquatics managers from each region were called to testify.

Central Region

87. Michael T. Slater is the aquatics manager in the Central Region. Slater testified that all Central Region rivers and streams on the Stream Access Map are fishable waters—

⁶ Some of these witnesses testified that they were employed by the Division of Wildlife Resources (DWR), others by the Department of Natural Resources (“DNR”). The Division of Wildlife Resources is a division of the Department of Natural Resources. For clarity, the Court will refer to the witnesses as employees of DNR.

meaning rivers and streams containing a sufficient number of fish to sustain significant public fishing in a beneficial manner.

88. Slater testified that the Stream Access Map is not accurate. In 2013, he recommended adding several streams to the Map. *See Exhibit 24*. The Map was not amended and he does not know why.
89. Slater testified that crowding on the Middle Provo is a problem.
90. Slater testified that the Upper Provo—including the reach flowing through Victory Ranch—would qualify as a Blue Ribbon Fishery but for the lack of public access.
91. Slater testified that after *Conatser* anglers were excited about new fishing opportunities, and that he observed a decrease in pressure on the Middle Provo.
92. Slater qualified this testimony stating that it was hard to attribute this decrease in fishing pressure to *Conatser* alone. He confirmed that Utah is growing in population, and that fly fishing is growing in popularity. He agreed that the designation of rivers and streams as Blue Ribbon Fisheries invited increased use of these waters.
93. Finally, Slater testified that after the Act every type of fishing can still be enjoyed in the Central Region, although one must be “more selective to get a good experience.”

Northern Region

94. Paul Thompson is the aquatics manager for the Northern Region.
95. Thompson testified that the Stream Access Map depicts a majority, but not all fishable rivers and streams in the Northern Region.

96. In 2013, Thompson recommended adding many streams and creeks to the Map. *See Exhibit 25.*
- a. He recommended including the Wasatch Front streams in Davis, Weber, and Box Elder Counties. As these streams exit U.S. Forest Service land, they are diverted and “for the most part cannot support trout populations at that point.” *Id.*
 - b. He recommended including in Rich County Otter Creek and the north, middle and south branches of Otter Creek. *Id.*
 - c. He recommended including in Box Elder County (1) four streams on the south slope of the Raft River Mountains; (2) fourteen streams on the north slope of the Raft River Mountains; (3) two streams on the Goose Creek Drainage; and (4) Bettridge Creek in the Pilot Mountain Range. *Id.*
97. Many of these streams in Rich and Box Elder Counties are dewatered before they reach the valley floor and would no longer support trout. *Id.*
98. Thompson conceded that all of his recommended additions were “small streams, but some people do angle them.” *Id.*
99. Thompson’s recommendations were not added to the Stream Access Map. Thompson’s definition of what constituted a map-worthy viable fishery was clearly broader than that of his fellow DNR aquatics managers.

100. Thompson testified that some portions of the Weber River marked private on the Map flow through the cities of Ogden, Morgan, Logan, and Coalville and may be publicly accessible there, but conceded that he does not know who owns the land within these city reaches. He estimated the reaches within Morgan and Coalville to be only one half mile.
101. Thompson testified that in the Weber River Drainage there are 25-30 miles of Blue Ribbon Fisheries, with only 12-15 miles being publicly accessible.
102. Thompson would recommend that other waters in the Weber River Drainage be designated as Blue Ribbon Fisheries, but for the fact that they traverse private ground, including (1) the Upper Weber above Rockport to the confluence of Beaver Creek, (2) Lost Creek above the reservoir, and (3) the east fork of Chalk Creek.
103. Thomson testified that in the Bear River Drainage the Logan River from the third dam north to the Idaho Border, and Blacksmith's Fork from milepost 10 to Hardware Ranch are Blue Ribbon Fisheries open to the public.
104. Thompson would recommend that the upper portions of Woodruff Creek above the confluence with the Bear River be designated a Blue Ribbon Fishery but for the fact that the creek flows over private ground.
105. Thompson testified that most streams in the Northern Region have some public access.
106. However, he conceded that the Weber River is the "third-most popular" fishery in the State and most of it traverses private property.

107. The maps admitted at trial demonstrate that the vast majority of the Weber and Bear Rivers flow over private ground. *See Exhibits 3.2, 3.3.*
108. Thompson testified that after *Conatser*, he observed anglers fishing areas that crossed private property all along the Weber, in East Canyon, and in Lost Creek. He received complaints from the angling public after the Act closed these areas.
109. Thompson testified that he had seen two anglers float the Upper Weber above Rockport, and that he has personally floated portions of the Weber River in a 14-foot raft for research purposes.

Northeast Region

110. Trina Hendrick is the aquatics manager in the Northeast Region.
111. Hendrick testified that the Stream Access Map is not accurate. Specifically, the State owns mitigation commission easements that allow for public access to 1.5 miles of the Lower Strawberry and 11 miles of the Middle Strawberry.
112. Hendrick testified that one stretch of the Lower Strawberry just outside Duchesne has exceptional fishing and would qualify as a Blue Ribbon Fishery but for the fact that it flows over private land.
113. Hendrick testified that after the Act cold and warm water fisheries and flatwater fisheries all remain available for public use in the Northeast Region.

Southern Region

114. Richard Dale Hepworth is the aquatics manager for the Southern Region.

115. Hepworth testified that the Southern Region rivers and streams on the Stream Access Map are all “viable fisheries”—meaning waters with enough fish in them to interest anglers.
116. He confirmed that the Stream Access Map is not accurate. In 2013, Hepworth recommended removal of the Escalante River upstream from the town of Escalante, and removal of Sand Creek as viable fisheries. He recommended adding reaches of (1) Corn Creek and Chalk Creek in Millard County; (2) Fish Creek and Shingle Creek in Sevier County; and (3) Parawon Creek, Summit Creek, Little Creek, and Kanarraville Creek in Iron County. *See Exhibit 22.*
117. Hepworth testified that the East Fork of the Sevier River above and below Kingston and Black Canyons, a 5-10 mile stretch of the Fremont River, and a 6-8 mile stretch of Mammoth Creek would qualify as Blue Ribbon Fisheries but for the fact that they flow over private ground.
118. Hepworth testified that he did not observe a change in angling behavior after *Conatser*. After the Act, there was some frustration from anglers who could no longer access “a couple of isolated areas.” However, in Hepworth’s experience the Act did not make it hard to find areas to fish and recreate on public waters.

Southeast Region

119. Justin Hart is the Aquatics Manager for the Southeast Region.
120. Hart testified that he provided information for the Stream Access Map in 2010. He provided updated information in 2013.

121. Hart testified that Lower Fish Creek is a Blue Ribbon Fishery. It flows over some public land and some private land without posted “no trespassing” signs.
122. Hart testified that the Act had no impact on angling behavior in the Southeast Region.
123. On cross, Hart conceded that the Southeast Region is the least populated, that it has the fewest number of cold water stream miles in Utah, and that most of the high quality fishing in the Southeast Region is on public ground.

Creation of the Stream Access Map

124. Gary Ogborn has worked for DNR for 23 years. He is the only DNR employee with GIS training. He is responsible for managing DNR data, and for presenting geographic information in a digital format.
125. Ogborn was responsible for collecting that data on viable Utah fisheries and creating the Stream Access Map.
126. Ogborn testified that when the Legislature was considering the Act, DNR directed him to prepare a stream access map that would show in a general way where people could go to fish.
127. Ogborn testified that the map used the following data sets:
 - a. A national hydrology data set showing the location of Utah rivers and streams. Ogborn filtered out channelized streams and intermittent streams from this data set. He contacted regional managers to determine which rivers and streams in the data set contained a sport fishery of sufficient

size and quality for fisherman to seek it out. Rivers and streams which were not viable fisheries were eliminated.

- b. The Utah Automated Geographic Reference Center data set reflecting the ownership of public and private land. In this data set “private ownership” includes land owned by individuals, cities, counties, and the mitigation commission. Therefore, there are some reaches of river reflected on the Map which flow through cities and counties which may have public access, although the number of these stream miles with public access is unknown.

- 128. Ogborn testified that the Stream Access Map was released in 2010. DNR had hoped to refine it further, but has made no changes to it.
- 129. DNR sought additional information from regional aquatics managers in 2013 in connection with discovery conducted in this case. While this effort identified numerous errors on the Stream Access Map, DNR did not update the Map to correct these errors.
- 130. The only correction that has been made to the map since 2010 related to the Jordan River. At first, the Map erroneously depicted the Jordan River as flowing entirely over private ground.

The 2009 Angler Access Survey

- 131. In 2009, during the *Conatser* window, the DWR contracted with Southwick Associates, Inc. to conduct an Angler Access Survey. *Exhibit 8.*

132. The purpose of the survey was to measure: (1) “Familiarity of anglers with the [*Conatser* decision];” (2) “[the] types of waters generally fished by anglers in Utah;” and (3) “the likelihood that anglers would now fish rivers and streams that were opened as a result of the [*Conatser*] decision and that were previously closed to the public.” *Id.*, at 2.
133. Survey participants were “selected randomly” from a pool of 330,264 people who “purchased resident fishing licenses (all fishing and combination) in the period spanning 01/01/09 to 10/15/09.” *Id.*
134. The survey was conducted by email. Participants had to be over 18 and have an email address. DWR had email addresses “for roughly 30 percent of its fishing license holders.” *Id.*
135. The survey skewed heavily toward combination license holders, but Southwick Associates accounted for this problem by weighting “survey respondents by type of license purchased to mirror the general angler population.” *Exhibit 8*, at 3.
136. The net email sample was 32,788. The final valid sample was 4,300. The response rate was 13.1%. *Id.*
137. The Survey determined that 66.2% of anglers fished both flat water and rivers/streams. Another 7.3% fished rivers and streams exclusively. *Id.*
138. Of those anglers who fished rivers and streams, 45.1% fished rivers and streams that they knew flowed over private property. 42.2% fished rivers and streams that did not flow over private property. 12.7% were uncertain if the waters they fished flowed over private property or not. *Id.*, at 4.

139. Of those who knowingly fished rivers and streams flowing over private property, 45.1% knew that the section of water fished had been closed prior to *Conatser*. This translates to an estimated 48,571 anglers fishing waters open to the public after *Conatser* and subsequently closed by the Act. *Id.*
140. The survey found that 69.7%—an estimated 232,210 anglers—were likely to fish rivers and streams flowing over private property which were subsequently closed by the Act. *Exhibit 8*, at 5.
141. The Act prohibited these anglers from doing so. Thus, more than 230,000 anglers who would have spent some time fishing rivers and streams flowing over private land were required under the Act to fish only those rivers and streams flowing over public land, or otherwise open to the public.

The 2011-2102 Attitudinal Survey of Utah Anglers

142. In 2011 after the *Conatser* window had closed, DNR contracted with R.S. Krannich to conduct an on-line random sample survey of licensed anglers in Utah. *Exhibit 10*.
143. The objectives of this survey included (1) assessing angler use levels for specific lakes, streams, and reservoirs; and (2) evaluating anglers' levels of satisfaction with their fishing experiences. *Id.*, at 3.
144. The survey was conducted over a one year period from April 1, 2011 through March 31, 2012. It measured fishing activity over the entire year using 10 independently drawn random samples. *Id.*, at 4.

145. During the 2011 calendar year, DWR issued 483,806 Utah resident and non-resident fishing or combination licenses, a 17% increase over the number of licenses sold six years earlier in 2005. *Id.*, at iii.
146. The net sample size for the survey was 48,344 anglers. The overall response rate was approximately 20%. *Id.*, at 5-7.
147. The survey was over-representative of male, Utah residents, and older license purchasers. *Exhibit 10*, at 11. The vast majority of all respondents identified as White, Caucasian, Anglo. *Id.*, at 16.
148. The survey showed almost 2.5 million fishing trips over the 2011-2012 study period—an estimated 5.3 million angler days of fishing activity. *Id.*, at iii, 34.
149. The number of angler days is highest in the North, Northeast, and Central Regions of the State with roughly 1.3 million angler days occurring in each of these regions during the study period. *Id.* at iii.
150. The average license holder fishes nine days per year. *Id.*, at 34.
151. Survey respondents were asked about their perceptions of crowding in each DWR Region and on specific waters.
152. In the Northern Region, 84% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. *Exhibit 10*, at 102.
 - a. This level of satisfaction dropped when anglers were asked specifically about the Weber River.

- b. As to the Weber River, 80% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. But 75% of anglers remained mostly or completely satisfied with their fishing experience there. *Id.*, at 101-102.
- 153. In the Northeast Region, 91% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. *Id.*, at 111.
 - a. This level of satisfaction dropped when anglers were asked specifically about the Strawberry and Green Rivers.
 - b. As to the Green River, 87% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. But 83% of anglers remained mostly or completely satisfied with their fishing experience there. *Id.*, at 110-111.
 - c. As to the Strawberry River, 89% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. But 75% of anglers remained mostly or completely satisfied with their fishing experience there. *Id.*, at 110-111.
- 154. In the Southern Region, 89% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. *Exhibit 10*, at 126.
- 155. In the Southeast Region, 88% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. *Id.*, at 133.
- 156. In the Central Region, 82% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience.
 - a. This level of satisfaction dropped when anglers were asked about

crowding on the Lower and Middle Provo River. *Id.*, at 119.

- b. The Lower Provo River stretches from below Deer Creek Dam to the mouth of Provo Canyon. As to the Lower Provo, 73% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. But 69% remained mostly or completely satisfied with their fishing experience there. *Id.*, at 118-19.
- c. The Middle Provo flows through the Heber Valley between Jordanelle and Deer Creek Reservoirs. As to the Middle Provo, 65% of respondents reported that crowding did not reduce or slightly reduced the quality of their fishing experience. But 76% remained mostly or completely satisfied with their fishing experience there. *Id.*, at 118-19.

157. The survey further concluded that “relatively few respondents felt that private property restrictions contribute to major limitations in accessing preferred fishing areas.” *Exhibit 9*, at 92 (*See also Figure 3-92*).

158. This conclusion appears unsupported given the fact that 40% of respondents reported private property restrictions moderately or highly limiting access to preferred fishing areas in Utah. *Id.*, at 92, 220 (*See also Figure B-141*).

Population Growth in Utah

159. Between the 2000 Census and the 2010 Census the population of Utah grew from 2,233,198 to 2,763,885. *Defendant's Exhibit 33*, at Table 1.

160. This is a 23.8% increase representing more than half a million people. *Id.*

Conclusions of Law

Plain Language Public Trust Analysis Under Article XX, Section 1

Public trust analysis must begin with the plain language of article XX, section 1 which reads:

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 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.

The wording of article XX, section 1 requires a three-part public trust analysis. The Court must first determine whether “lands of the State of Utah” have been “disposed of” by the challenged legislation. If the answer to this question is no, then article XX, section 1 has no application. If the answer is yes, the Court must address two additional questions: (1) Were the lands “disposed of as may be provided by law?” and (2) Were the lands “disposed of . . . for the respective purposes for which they have been or may be granted, donated, devised, or otherwise acquired?” If the answer to either of these questions is no, then the challenged legislation violates the public trust under article XX, section 1.

In summary, article XX, section 1 forbids both the unlawful disposition of public lands held in trust for the people, and dispositions which do not promote the purposes for which the lands were acquired.

Applying Plain Language of Article XX, Section 1 To the Instant Case

Article XX, section 1 applies broadly to “all lands . . . otherwise acquired” by the State. The public’s easement on state waters is an interest in land—a dominant estate which burdens

the privately owned servient estates over which public waters flow or on which those waters are impounded.

The Court has ruled that the Act constituted a disposition of the public's easement. This ruling is consistent with the plain meaning of the verb "to dispose of." The first definition in the Oxford English Dictionary for "to dispose of" is "to make a disposition, ordering, or arrangement of; to do what one will with; to order, control, regulate, manage." *Dispose Definition*, Oxford English Dictionary Online, <http://www.oed.com/view/Entry/55113?rskey=bpgHzf&result=2> (last visited November 2, 2015). The second and third definitions include the act of "get[ting] rid of" or "part[ing] with . . . by way of sale or bargain." *Id.*

Thus, while state action transferring title to public lands—"getting rid of" them—would clearly implicate the public trust duties set forth in article XX, section 1, a legislative act ordering, controlling, regulating, or managing public lands may do so as well.

This interpretation is consistent with the context in which the verb phrase "to be disposed of" appears in article XX, section 1 which requires that public lands be "*held* in trust for the people of the state of Utah" (emphasis added). Public trust duties do not suddenly leap into being upon the State's decision to sell public lands, but rather are binding during periods when public lands are "held" by the State. During such periods, the State is constitutionally required to "dispose of"—meaning use, control, regulate, and manage—public lands for the purposes for which they were acquired. To rule that public trust duties arise only upon the sale of public lands to another would render the public trust under article XX, section 1 practically meaningless.

This conclusion—that a disposition under article XX, section 1 encompasses more than transfers of title to public lands—is consistent with the Utah Supreme Court's ruling in *Colman*,

795 P.2d 622 (Utah 1990). The State of Utah had granted Colman a lease and easement to maintain an underwater brine canal on the bed of the Great Salt Lake. In 1984, water levels in the Lake were rapidly rising. To avert flooding, the Legislature authorized breach of the Great Salt Lake causeway. Colman alleged that breaching the causeway would cut into the banks of the brine canal. This would create turbidity and sedimentation that would make continued use of the canal impossible. The trial court denied Colman's motion for preliminary injunction. The causeway was breached.

Colman sued claiming that his property interest had been taken or damaged for public use without just compensation. The State argued that the waters and bed of the Great Salt Lake were held in trust for the public, and that by granting an easement to Colman the State had violated the public trust doctrine articulated in *Illinois Central*, 146 U.S. 387, 13 S. Ct. 110 (1892).

The Utah Supreme Court could have ruled that the public trust doctrine did not apply because the State had merely granted Colman an easement on the lakebed, not title to it. But, the Court did not do so. Rather, it remanded the case to the trial court to determine whether Colman's lease of the lakebed impaired the public's interest in any way.

Admittedly, in *Colman* the State did not argue that the lease violated the public trust under article XX, section 1. Still, the case is instructive as to what it means for the sovereign to hold public lands in trust for the people and to dispose of those lands. *Colman* demonstrates that the public trust may be violated by a mere lease of public land to a private party. A transfer of title or permanent loss of control was not required. This principle informs the Court's analysis of what constitutes a "disposition" under article XX, section 1.

Turning to the instant case, the Act constitutes a disposition of the public's easement to use public waters on private property. Before the Act, the public's easement on state waters

included (1) the right to engage in all recreational activities that utilize the water, and was not limited to activities that can be performed on the water; and (2) “the right to touch privately owned beds below [public] waters in ways incidental to all recreational rights.” *Conatser*, 2008 UT 48, ¶¶ 15, 19-28.

The Act eliminates all non-permissive recreational use of public water flowing over private property except floating. Utah Code § 73-29-202(1). The right to float itself is a seasonal one. It can only be exercised when the water has “sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating.” *Id.* The right to float can also be obstructed to achieve any lawful purpose. Utah Code § 73-29-207(1)(2) (permitting owner to place a fence or obstruction across public water on private property). The Act permits three narrow uses incidental to floating—(1) the right to “incidentally touch private property as required for safe passage and continued movement;” (2) the right to “portage around a dangerous obstruction in a manner that is most direct, least invasive, and closest to the water;” and (3) the right to “fish while floating.” Utah Code § 73-29-202(2)(a)-(c).

In an effort to educate members of the public about where they can and cannot recreate under the Act, DWR produced the Stream Access Map in 2010. While the Stream Access Map includes a written disclaimer stating that DWR does not guarantee the accuracy of the Map, it also includes the statement that “every effort has been made to assure accuracy” (emphasis added). The Map notes that some streambeds designated as private may flow over land owned by municipalities that grant public access. However, the Map does not depict these streambeds as public, identify their location, or assess the degree to which municipalities restrict public access. Instead, all such streams wherever they may be located are shown in red as privately

held and without access. Finally, the Stream Access Map does not identify any “non-fishable” rivers and streams which may exist, or designate such streams as public or private.

With the exception of the Southeast Region aquatics manager, all DNR witnesses agreed that the Stream Access Map is not accurate. In 2013, the aquatics managers in each DNR region of the State submitted proposed additions or deletions of specific rivers and streams. However, for reasons that are unclear the Stream Access Map has never been amended to reflect these recommendations.

Notwithstanding its deficiencies, the Stream Access Map is the best source of information about the effect of the Act on public access to rivers and streams flowing over private land. The State agency responsible for management of natural resources produced the Map and has assured the public that “every effort [has been] made to assure accuracy.” DWR made the Map publicly available. Citizens seeking to conform their recreational activities to the Act rely upon the Stream Access Map in its current form. In the end, the Map’s yellow and red depiction of open and closed rivers and streams represents the Act as applied by the State of Utah.

Using the Map as a guide, Utah has at least 6,419 miles of fishable rivers and streams. Some 2,738 miles traverse privately-owned streambeds. The Act—unfittingly titled the “Public Waters Access Act”—closed more than 2,700 miles of rivers and streams to any public recreational use other than floating, and three narrow uses incident thereto. This represents closure of 43% of Utah rivers and streams to almost all public recreational use. Many of these areas would qualify for designation as Blue Ribbon Fisheries, but for the present lack of public access. This sweeping regulation of the public’s easement constitutes a disposition for purposes of article XX, section 1.

Finally, the public's easement on state waters traversing or impounded upon private property was acquired for the purpose of promoting public access to and use of the waters. The Legislature adopted the Act not to promote this purpose but rather to protect against the "real and substantial invasion of private property rights." Utah Code § 73-29-103(5).

Under article XX, section 1, the Legislature's authority to dispose of—meaning to order, control, regulate, manage, or get rid of—public lands is a limited one. Dispositions must be "for the respective purposes for which [the public lands] have been . . . acquired." Utah Const., art. XX, § 1. While the Legislature has broad authority to protect private property interests, it cannot do so at the expense of its public trust duties under article XX, section 1.

Because the Act disposes of the public's easement for reasons unrelated to the purpose for which that easement was acquired, the Act violates the clear mandate of article XX, section 1. If the analysis ends here with the plain language of article XX, section 1, the Act is unconstitutional and the Coalition prevails.

Substantial Impairment of The Lands and Waters Remaining

Trial in this case focused on a single question—whether disposition of the public's easement under the Act substantially impaired the public's interest in the lands and waters remaining. Answering this question requires a clear understanding the public trust doctrine, Utah's expansion of that doctrine, and the U.S. Supreme Court's decision in *Illinois Central*.

The public trust doctrine is described clearly and succinctly in this excerpt from *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983):

Under the public trust doctrine, the state, acting on behalf of the people, has the right to regulate, control and utilize navigable waters for the protection of certain public uses, particularly navigation, commerce, and fisheries. The state, it is often said, retains a dominant 'easement' or 'servitude' in navigable waters for this purpose. More recent cases have

held that the trust includes a broader range of public uses than were recognized in earlier cases; it is now held that the trust protects varied public recreational uses in navigable waters, such as the rights to fish, hunt, and swim. The trust is dynamic, rather than static, and seems destined to expand with the development and recognition of new public uses.

Id. (quoting Roderick Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 U. Santa Clara L. Rev. 62 (1982)).

The Utah public trust doctrine is more expansive in two ways. First, the public trust applies to both navigable and non-navigable waters. *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1136 (Utah 1982) (holding that “there is a public easement over the waters regardless of who owns the beds beneath the waters”). Second, the trust purposes have expanded beyond the traditional triad—navigation, commerce, and fishing—to protect “the ecological integrity of public lands and their public recreational uses.” *Nat. Parks & Consvr. Assoc. v. Bd. Of State Lands*, 869 P.2d 909, 919 (Utah 1993) (citing *Colman*, 795 P.2d at 635; Charles Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. C. Davis L. Rev. 269 (1980); Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970)).

The concept of “substantial impairment to the lands and waters remaining” has long informed public trust analysis. The United States Supreme Court articulated this standard more than 120 years ago in *Illinois Central Rail Road Company v. Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892). In that case, the Illinois legislature had granted to the railroad company fee simple title to 1,000 acres of submerged lands in the Chicago harbor. Four years later, Illinois sought to revoke the grant arguing that it violated the public trust doctrine.

The Court ruled in favor of Illinois, holding that:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, *except in instances of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains*, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more comfortable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.

Id., 146 U.S. at 453-54 (emphasis added).

The public trust under the Utah Constitution is more expansive than the trust found in *Illinois Central*. The public trust under article XX, section 1 is implicated upon the lands being “disposed of.” As explained, public lands are “disposed of” not only when the State grants fee simple title to another—an act which leaves the lands entirely under the use and control of private parties—but also when the State authorizes use of, regulates, controls, or manages the lands held in trust.

Commenting on the principle of substantial impairment, the Utah Supreme Court explained in *Colman*: “The [United States] Supreme Court made clear that a state can grant certain rights in navigable waters if those rights can be disposed of without affecting the public interest in what remains.” *Colman*, 795 P.2d at 635-36. The Court remanded the *Colman* case to determine whether “Colman’s canal impaired the public interest in any way at the time the State granted him the right to conduct his operation.” *Id.*, at 636. This was a “question of fact to be decided by the trial court.” *Id.*

Thus, the common law public trust doctrine allows the sovereign a degree of flexibility in authorizing use of, controlling, regulating, and managing public lands held in trust for the people. The doctrine is not violated if the disposition (1) improves the public interests for which the land is held in trust; or (2) can be accomplished without substantial impairment to the public's interest in the trust property that remains. *Colman*, 795 P.2d at 635-36.

Again, the Court notes that the plain language of article XX, section 1 does not grant a "pass" to dispositions of public lands which are unrelated to the purposes for which the lands were acquired, but which do not substantially impair the public's interest in the lands and waters remaining. Under the plain language of article XX, section 1, the degree to which a disposition of public lands impacts the public's interest in remaining trust property is immaterial.

Still, under article XX, section 1 public lands are "held in trust for the people." The nature and scope of the State's trust duties under the Utah Constitution can be informed by public trust principles developed under the common law. With this in mind, the Court turns to the issue presented: Did disposition of the public's easement under the Act substantially impair the public's interest in the lands and waters remaining? The Coalition has the burden of proof on this question.

The Coalition has argued that closing 2,700 miles of river and stream in Utah caused crowding on the remaining publicly accessible waters, substantially impairing the public's interest in them. VRA contends that (1) The Coalition's evidence of crowding is anecdotal; (2) crowding does not impact the quality of the fishing experience for most anglers; and (3) crowding, to the extent it exists, is caused by Utah's growing population and the growing popularity of fly-fishing, not the Act alone.

On the question of crowding, The Coalition has failed to meet its burden of proof. Both The Coalition and VRA offered anecdotal evidence on this issue. The Coalition's witnesses testified that after 2010, they observed significant and accelerated crowding on Utah rivers and streams, and that this crowding negatively impacted the quality of their angling experience. VRA's witnesses testified that the Act had no or little impact the public's ability to have a quality fishing experience, and that any increased crowding was the result of conditions unrelated to the Act. In this Court's view, the anecdotal testimony about crowding was evenly balanced, and grounded in the subjective assessment of each witness.

The best evidence about crowding is the 2011-2012 Attitudinal Survey. Across all five regions of the State, between 82% and 91% of anglers surveyed reported that crowding did not reduce or slightly reduced the quality of their fishing experience. These figures dropped when anglers were asked about particular rivers—especially the Lower Provo and the Middle Provo. But even on these rivers, the majority of anglers were mostly or completely satisfied with their fishing experience.

Finally, all witnesses agreed that crowding—to the extent it does exist—had causes independent of the Act, including (1) Utah's growing population; (2) the State's public promotion of Blue Ribbon Fisheries; (3) the growing popularity of fly-fishing; and (4) the growing number of guide services in Utah.

In the alternative, the Coalition contends that the public's interest in the lands and waters remaining is substantially impaired by the Act's sweeping closure of more than 2,700 miles of Utah rivers and streams to almost all public recreational use. In other words, the Act results in substantial impairment by virtue of its scope.

Before considering this question, it is important to identify three things that the Legislature did *not* do when adopting the Act. First, the Legislature did not prefer one kind of water use over another (i.e. use as drinking water over agricultural use). In the arid west, water is a necessary, scarce—and therefore, precious—public resource. *See generally* Robin Craig, *A Comparative Guide to the Western State' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward An Ecological Public Trust*, 37 Ecology L.Q. 53. The public's right to use state waters for recreation is only one of many competing uses. As trustee, the Legislature has broad authority to assess the relative importance of competing water uses and to enact policies that favor one use over another.

Second, the Legislature did not favor one type of recreational use of state waters over another type. Clearly, the State has broad authority to regulate and manage competing recreational uses of public waters, and to favor one public trust purpose over another.

Third, the Legislature did not limit public use of state rivers and streams to conserve them as public trust resources (i.e. closing a river or stream to preserve habitat). Dispositions of public lands which advance “the purposes for which [public lands] have been . . . granted, donated, devised, or otherwise acquired” are expressly permitted under article XX, section 1.

With this in mind, the Court turns to the question of whether legislation can by virtue of its scope impair the public's interest in the lands and waters remaining. Like many issues presented in this case, this is a question of first impression. The Court looks to *Colman* and to cases in sister states for guidance.

As explained, in *Colman* the State of Utah had leased a portion of the bed of the Great Salt Lake to Colman. On the submerged land, Colman operated a five-mile long underwater

brine canal. To avert flooding, the State of Utah breached a causeway on the Lake destroying Colman's canal. Colman sought just compensation for his loss. The State contended that the lease violated the public trust in the first instance and was therefore unenforceable. *Colman*, 795 P.2d at 623-24. The Utah Supreme Court remanded the case to the trial court to decide whether leasing only five miles of submerged public lands impaired in any way the public's interest in the lands and waters remaining. *Id.*, at 635-36.⁷

In *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), the Alliance challenged a permit granted to the Yacht Club by the Idaho State Land Board. The permit granted the Club a ten-year lease. The lease allowed the Club to encroach upon a five-acre area of surface water on Lake Coeur d'Alene. The Club could occupy one half of that area with 112 boat slips, pilings, waterways, and related facilities. The Lake was seventy square miles, and the encroachment impeded navigation on about .01% of the lake area. The Club had the right to apply for successive ten-year terms. *Id.*, 671 P.2d at 1087.

The Alliance argued that the permit violated the public trust. The Idaho Supreme Court disagreed. In reaching this decision, the Court considered five factors: (1) "the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce;" (2) "the impact of the individual project on the public trust resource;" (3) "the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource;" (4) "the impact of the project on the public trust resource when that resource is examined in light

⁷ As stated, this ruling suggests the recognition of a broader public trust than that recognized in *Illinois Central*. The State's lease did not convey land in fee simple to Colman. The submerged lands were not placed "entirely beyond the direction and control of the State." *Illinois Central*, 146 U.S. at 454. When Colman's lease term ended, control of the submerged five-mile stretch would return to the State of Utah. Nevertheless, further proceedings were required to determine if the easement violated the public trust.

of the primary purpose for which the resource is suited;” and (5) “the degree to which broad public uses are set aside in favor of more limited or private ones.” *Id.*, at 1092-93, 1095-96.

In *Priewe v. Wisconsin State Land and Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896), the Court held that a statute permitting a private person to drain one lake violated the public trust.

In *In re Trempealeau Drainage Dist. v. Houghton*, 131 N.W. 838 (Wis. 1911), the District sought to drain wetlands for agricultural reclamation. The wetland was approximately six miles long and varied in width up to three miles. The Court found that the proposed plan would improve navigation—a determination that might have been outcome determinative. Clearly, the State has discretion to favor one public trust purpose over another trust purpose. Nevertheless, the Court went on to assess the effect of the project on hunting and fishing. The Court found that limitations on hunting and fishing were not by “nature and magnitude such a deprivation to the public as to be a violation of the trust to the public.” *Id.*, 131 N.W. at 842.

In *State v. Public Service Commission*, 81 N.W.2d 71 (Wis. 1957), the Commission authorized the City of Madison to fill a portion of the lakebed of Lake Wingra and use the filled area for parking cars and expanding the beach. Lake Wingra covered 320 acres, and would be reduced in area by approximated 1.25%. Its fish producing potential would be reduced by 800 to 1,000 pounds of game fish. The number of fish caught in the lake would be cut by about 50 pounds for each acre filled. Navigation would be destroyed as to the filled area, but would be improved due to planned dredging near the outlet of the Lake. *Id.*, 81 N.W.2d at 74.

The Court ruled that filling a portion of the lakebed did not violate the public trust. In reaching that conclusion, the Court “attach[ed] importance” to the following facts:

(1) Public bodies will control the use of the area; (2) The area will be devoted to public purposes and open to the public; (3) The diminution of lake area will be very small when compared with the whole of Lake Wingra; (4) No one of the public uses of the lake as a lake will be destroyed or greatly impaired; (5) The disappointment of those members of the public who may desire to boat, fish or swim in the area filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.

Id., 81 N.W.2d at 73-74. The Court affirmed the State's broad discretion to balance trust purposes against other public interests.

In *Weden v. San Juan County*, 958 P.2d 273 (Wash. 1998), the County had enacted an ordinance banning—with a few narrow exceptions—the use of motorized personal watercraft “on all marine waters and one lake in the county.” *Id.*, 958 P.2d at 276. Personal watercraft users argued the ordinance violated the public trust. The Court held that the ordinance did not violate the public trust “because the County has not given up its right of control over its waters. Although the Ordinance prohibits a particular form of recreation, the waters are open to access by the entire public, including owners of [personal watercraft] who utilize some other method of recreation.” *Id.*, at 283-84.

In each of these cases, the challenged statute, regulation, or permit affected a relatively small part of the public trust property—five miles in the Great Salt Lake, five acres of Lake Coeur d'Alene, one lake, six miles of wetland, 1.25% of Lake Wingra. *Weden* involved all marine water and one lake in the county, but the ordinance eliminated only one recreational use on those waters—motorized personal watercraft.

In contrast, with the exception of a seasonal floating right and the three uses incidental thereto, the Act eliminates all public recreational use on more than 2,700 miles of river and stream in Utah. This represents the closure of 43% of Utah's river and stream miles to nearly all

fishing,⁸ and to all hunting, wading, swimming, bird-watching, and any other recreational activity utilizing the water. In short, the Act is legislation of an entirely different order and magnitude, both in the degree of effect on public recreational uses protected by the trust and in the diminution of the public trust resource.

Almost 70% of licensed anglers surveyed—an estimated 232,210 anglers—reported that they were likely to fish waters that flow over private ground. The Act closed these waters. Thus, more than 230,000 people who would have spent time fishing rivers and streams that flow over private land must now fish only those state waters that remain publicly accessible under the Act.

With the exception of the seasonal right to float, the Act sets aside broad public uses in favor of more limited private ones. As evidenced by VRA's own activities on the Upper Provo, public bodies no longer control or manage rivers and streams closed under the Act. The Court notes that VRA's own stream management efforts on the Upper Provo have been of the highest order, but not every landowner will have the same resources or incentive to manage public waters so responsibly. WIA agreements like that granted by VRA may result in some areas closed under the Act becoming publicly accessible. However, the impediments to public use under the WIA program are substantial. The State cannot compel the landowner to grant WIA and the landowner can revoke WIA without cause on 30-day's notice.

The Act's impairment of the public's interest in the lands and waters remaining is compounded by other factors. Utah rivers and streams are generally shorter and narrower, and therefore have reduced carrying capacity for recreational use. The infusion of more than 230,000

⁸ Only parts of the Green and Weber rivers can be effectively floated and fished at the same time. *See supra Findings of Fact*, ¶¶ 66f, 109.

people onto 43% fewer miles of river and stream constitutes substantial impairment to the public's interest in the lands and waters remaining.

The number of licensed anglers per river/stream mile is one way to measure the impact of the Act on the waters remaining. Approximately 66% of all licensed anglers—more than 218,000—fish both flatwater and rivers and streams. Thirty-eight percent—157,000 anglers—prefer fishing rivers and streams. Using the number of licensed anglers who prefer river and stream fishing, the Act increased the number of licensed anglers per publicly accessible river/stream mile from 25 to 44. Using the number of licensed anglers who fish both flatwater and rivers and streams, the Act increased the number of licensed anglers per publicly accessible river/stream mile from 34 to 59. Admittedly, not every licensed angler goes fishing on the same day, at the same time. However, these increases are significant given the limited carrying capacity of Utah rivers and streams.

The Act was adopted at a time when demand for river and stream access is on the rise. Utah's population has been growing dramatically. Between 2000 and 2010, Utah's population grew by more than half a million people. *Defendant's Exhibit 33*, at Table 1. Fly-fishing itself is growing in popularity. In 2005, there were only 15-20 guide services in Utah. Today there are between 40 and 50. *See Testimony of Jeffrey Harwin*. Between 2005 and 2011, the number of fishing licenses issued by the State increased 17%. *See Exhibit 10*, at iii.

Additionally, as a matter of policy the State has publicly promoted Utah's Blue Ribbon Fisheries, increasing the number of people who use these waters. Blue Ribbon Fisheries are public waters of the highest value. The Act closed to public use many areas in the State that would otherwise qualify for Blue Ribbon Fishery designation but for the lack of public access.

VRA has argued that because the State Legislature can repeal or amend the Act at any time, the public trust has not been violated. *See Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203 (Wash. Ct. App. 2004) (state prohibition of certain hunting practices constituted an increase in state control; state maintained control of the public trust resource because it retained the power to amend or repeal the statute at any time); *Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987) (statute allowing owners of residential property abutting public tidelands to construct recreational docks for free did not violate the public trust; the State's ability to repeal the statute is the ultimate state control).

The Court notes that even in these cases the power to repeal was only one of many factors considered in determining whether the public trust was violated. More important, if the power to repeal were outcome determinative, the public trust duties under article XX, section 1 could be violated by any statute governing use of but not alienating public lands. At a minimum, such statutes would remain in effect from the date of enactment until the next legislative session. Such statutes would be immune from constitutional challenge even though they disposed of public lands for reasons unrelated to the purposes for which the lands were acquired. Making the revocability of legislation the touchstone of public trust analysis would make article XX, section 1 a hollow guarantee indeed.

VRA has argued that recognition of a quiet title action to establish broader public recreational use than that recognized under the Act cures any constitutional deficiency. The Court disagrees.

Sections 73-39-203 and -204 of the Act allow a person to file a quiet title action to establish public recreational access to waters flowing over private property, but closed to public use under the Act. To establish public recreational access, a person must prove that (1) "the

private property has been used by the public for recreational access requiring use of the public water for a period of at least 10 consecutive years that begins after September 22, 1982;” and (2) the public use has been “continuous during the season conducive to the recreational access, open and notorious, adverse, and without interruption.” Utah Code §§ 73-29-203(1)(a)(b); 73-29-204(5) (burden of proof is on the claimant).

Under article XX, section 1, the people of the State of Utah are constitutionally entitled to have public lands—including the public’s easement on state waters flowing over private land—to be “held in trust” for them. The Legislature cannot dispose of—meaning order, control, regulate, manage, or get rid of—public lands unless the disposition advances the “purposes for which [the public lands were] granted, donated, devised or otherwise acquired.” Utah Const., art. XX, § 1.

For the reasons stated above, the Act violates the plain language of this constitutional guarantee. Recognizing a quiet title action that requires members of the public to incur the expense of vindicating a right to which they are already entitled does not cure the constitutional violation. To hold otherwise would upend the purpose of article XX, section 1, which limits legislative authority in the first instance. That individual citizens must bear the initial expense of the litigation adds insult to constitutional injury.

As applied, the Act appears to have had this effect. At the beginning of this litigation, the Court inquired of the State’s attorney whether the Attorney General’s Office intended to prosecute quiet title actions on behalf of citizens seeking to establish public recreational access under the Act. At first the answer was an unqualified “no.” Later, the State’s attorney indicated any such actions presented to the Attorney General would be reviewed on a case by case basis.

According to the State's attorney, in the five years since the Act was adopted the Attorney General's Office has not filed or joined in a single action to establish public recreational use under the Act. Moreover, as a matter of law the Division of Wildlife Resources "may not be compelled to file a quiet title action; or join a quiet title action filed by another person." Utah Code § 73-29-204(1)(c).

The cause of action for quiet title is itself so narrow in scope that it fails to protect the public's interest in state waters closed under the Act. Public recreational use of waters flowing over private land which occurred *before* September 22, 1982—no matter how frequent or extensive—is never sufficient to establish public recreational access. Utah Code § 73-29-203(1)(a). Any overt act of the landowner subjectively intended to interrupt prescriptive use restarts the ten-year clock if the act resulted in any "actual interruption," even by one member of the public. Utah Code § 73-29-204(3)(a). That the overt act actually came to the attention of the public generally may be considered, but is not required.

Finally, VRA has argued that closure of rivers and streams flowing over private property does not substantially impair the public's interest in the trust resource remaining because the public can recreate on other rivers and other publicly accessible flatwaters. While it is true that the public can recreate somewhere else, this argument is not without its rational limits. Here, the Act closed more than 43% of Utah rivers and streams to almost all public recreational use. This expansive disposition substantially impairs the public's interest in the waters remaining, because what remains is so drastically diminished. Every parcel of public land, every reach of public water is unique. If Wasatch, Kodachrome Basin, and Snow Canyon State Parks were disposed of

for reasons unrelated to their acquisition, the public's right to recreate in other places would be little consolation.

For these reasons, the Court concludes that the Coalition has met its burden of proof. The Act substantially impaired the public's interest in the lands and waters remaining.

ORDER AND JUDGMENT

The Public Waters Access Act violates article XX, section 1 of the Utah Constitution.

Specifically, the following provisions are unconstitutional:

- Utah Code § 73-1-1(2) and (3);
- Utah Code § 73-29-103(1) through (6);
- Utah Code § 73-29-201(2) and (3);
- Utah Code § 73-29-202(1) to the extent that the right to float recognized therein is limited to rivers and streams that have "sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating" such that touching the privately owned bed is prohibited;
- Utah Code § 73-29-202(3)(b);

Judgment is granted in favor of the Coalition, and against VRA and the State of Utah.

VRA is enjoined from taking any action which prohibits, prevents, impedes, limits, or impairs in any way the public's right to access the stretch of the Upper Provo River flowing through VRA's property.

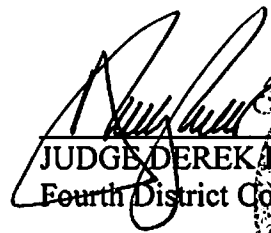
The State of Utah, its agencies, and divisions are enjoined from enforcing the Act.

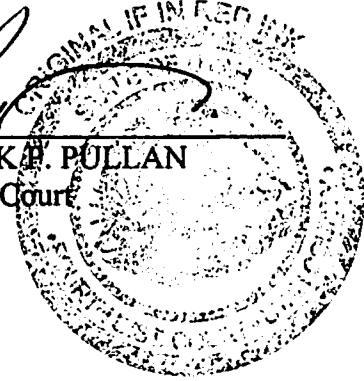
The Department of Natural Resources and Division of Wildlife Resources shall either remove the Stream Access Map from the public website, or amend the Stream Access Map to be

consistent with this Ruling. Any and all other initiatives undertaken by the Department of Natural Resources or the Division of Wildlife Resources to notify the public of where the public can and cannot recreate on state waters shall be consistent with this Ruling, Order and Judgment.

This is the final order and judgment of the Court. No further action or order is necessary.

DATED this 4 day of November, 2015.


JUDGE DEREK P. PULLAN
Fourth District Court



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100500558 by the method and on the date specified.

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Date: 11/4/15

Heuchan

Deputy Court Clerk

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1 A Uh-huh (affirmative). Yes. Yes, sir.

2 Q Is that you?

3 A It is me.

4 Q What are you doing there?

5 A Casting.

6 Q Anything special about that cast?

7 A Looks like a double haul cast to me, it looks like a
8 fairly decent one.

9 Q Okay. I've only learned this in the last 24 hours,
10 so I'm doing to ask you now. What is a double haul cast?

11 A So when you cast forward, it's a single haul and
12 when you combine the cast backwards to speed it up and then
13 you go forward, that's a double haul; basically speeding up
14 the line so you can cast farther.

15 Q How many years did it take you to get that down?

16 A I'm not sure I completely have it down yet, but I'm-
17 -I'm still trying to perfect it. It took me about a--a year
18 to get it down.

19 Q All right. That's all we're doing with the photo,
20 so you can put that down.

21 A Okay.

22 Q Do you recall executing an expert report in this
23 matter?

24 A I do.

25 Q Can you turn in one of those binders to Tab No.

1 13?

2 A Whoops.

3 Q If you flip through that document, is that the
4 expert report you recall executing in this matter?

5 A Yes. It is.

6 MR. THOMAS: At this point, your Honor, for
7 efficiency sake, I would like to move for the admission of
8 this report. The parties have stipulated to all of the--the
9 admission of all of the exhibits except for the expert's
10 report, the exception with respect to the expert reports was
11 that the expert needed to testify in order to be--to render
12 the exhibit admissible.

13 THE COURT: I typically have not admitted the report
14 into evidence because it's cumulative of testimony.

15 MR. THOMAS: Okay.

16 THE COURT: Is there a reason in this case I should
17 depart from that?

18 MR. THOMAS: Not necessarily, your Honor. The
19 parties have stipulated, I do think it would be helpful and
20 perhaps more efficient to be able to have that as a reference
21 rather than go through all aspects of the basis of the
22 opinions.

23 THE COURT: Okay. Do you agree with that?

24 MR. COBURN: Well, the only--I did stipulate, we did
25 stipulate, your Honor. The only thing is that the experts

1 have been sitting in on trial, I'm not sure their opinions
2 have been modified somewhat but based upon what they've--
3 they've heard the evidence that has come in, so...

4 THE COURT: Okay. Based on the stipulation, I'll
5 receive Mr. Jackson's report.

6 MR. THOMAS: Thank you, your Honor.

7 Q (By Mr. Thomas) Harley, what's your birthday?

8 A 6-9-73.

9 Q So how old are you?

10 A 42.

11 Q Where did you grow up?

12 A Ephraim, Utah.

13 Q And how long did you live in Ephraim?

14 A I lived there until I was about 19.

15 Q Going to go back there. What's your current
16 occupation?

17 A I am a fishing and hunting guide.

18 Q And who's your employer?

19 A Victory Ranch.

20 Q How long have you been a fishing guide?

21 A Been a fishing guide since approximately 1994.

22 Q Is that about the same time you left Ephraim?

23 A I left--yeah. Yeah, around that. I left in the end
24 of '93, so it might have been the first of '95, when I first
25 started really guiding.

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1 Q Have you done anything else for income since 1993 or
2 1994?

3 A Yeah. Yeah. I've been a bird hunting guide for
4 myself and also I hosted a television show about bird dogs.

5 Q Can you tell me a little bit about that show?

6 A Yeah. It was called American Gun Dog, it was on
7 ESPN for one year and then it kinda trickled down to sports--
8 sportsmen's channel, the outdoor channel. It basically
9 featured showing different breeds of dogs and chasing
10 different wild game and--and we traveled all over and--and
11 featured those--those things.

12 Q Interesting. Prior to Victory Ranch, have you
13 guided with other outfitters in Utah?

14 A Yes, sir. I guided with Western Rivers for a few
15 years and then I guided for Trout Bum 2 in Park City.

16 Q And where is Western Rivers located?

17 A In Salt Lake City.

18 Q Now, I want to take you back now to when you were in
19 Ephraim. When did you learn how to fish?

20 A Learned how to fish, approximately when I was four
21 years old, started bait fishing.

22 Q So about 1977?

23 A Yeah.

24 Q How did your--who taught you to fish?

25 A My father taught me, I had--I grew up with nine

1 brothers and sisters as well, so there were quite a few
2 helpers around. And I learned from my--my father and my
3 brothers.

4 Q So you weren't the oldest, though?

5 A No, sir.

6 Q So where did you learn to fish?

7 A I learned to fish on a lot of flat water to begin
8 with; Nine-Mile Reservoir, Duck Fork Reservoir, Miller's Flat
9 Reservoir, Electric Lake.

10 And then I started to, when I got a little older, I
11 started to fish Thistle Creek and a creek called Gooseberry
12 Creek, Huntington Creek, San Pitch at that point, a little
13 bit, but mostly those little rivers.

14 Q When you started out fishing, were you fishing a fly
15 rig?

16 A No, sir. I--I started out fishing bait on the flat
17 water and fishing little spinners on all those little creeks.

18 Q Do you still fish spinners and bait?

19 A I don't fish bait much anymore, I do have a couple
20 spinning rods in my truck right now, as a matter of fact.

21 Q When you were growing up around Ephraim, did--did
22 you ever fish on property that you understood was private?

23 A No.

24 Q Why not?

25 A There was no need, really. And--and I wasn't aware

1 of any private property that I needed to fish to do what I
2 needed to do. My father agreed, you know, we had plenty of
3 public access to excellent fisheries and that's what we did.

4 Q How did you figure out where to go?

5 A I figured out where to go from my father and he
6 figured out to go from maps and just driving and exploring
7 and--and word of mouth as well.

8 Q So you say you started out spin fishing and bait
9 fishing, when did you take up fly fishing?

10 A I learned how to first cast a fly rod when I was
11 about 17 and I kinda took a break and then I really started
12 when I was about, oh, out--just out of high school, so 18.

13 Q All right. So 23-24 years ago?

14 A Yeah.

15 Q Is that when you were still living in and around
16 Ephraim?

17 A Yes, sir. Yeah.

18 Q So where did you fly fish down there?

19 A Started fly fishing predominantly on Huntington
20 Creek, Thistle Creek, Gooseberry Creek, I also fished a lot of
21 still water, the same still waters that we spoke of; Ferron
22 Reservoir, I did quite a bit there and a little bit on the
23 Sevier, which is in southern Utah. And mostly those, I
24 attended Snow College and--and--and mostly fished instead of
25 attending Snow College.

1 Q Did you finish at Snow College?

2 A I did.

3 Q What did you study?

4 A I got my associate's degree.

5 Q In what?

6 A In art.

7 THE COURT: In what? I'm sorry.

8 THE WITNESS: It was an associate--it was an
9 associate degree.

10 Q (By Mr. Thomas) Did you have a particular area of
11 study?

12 A I don't remember--I mean, I don't recall. It was--I
13 was going into English, though, arts.

14 THE COURT: Oh, in arts. That's what I didn't hear.

15 THE WITNESS: Yeah.

16 THE COURT: Thank you.

17 THE WITNESS: Yeah. Sorry.

18 Q (By Mr. Thomas) Can you tell me, so you've been fly
19 fishing now for over 20 years and you've been fishing for 37.
20 What--what do you enjoy about fishing?

21 A I love the places it takes you, for sure. I love
22 the water, the water really does a lot for me, whether it's
23 moving or not moving. I like what lives in the water, around
24 the water.

25 Usually with rivers or lakes, you're surrounded by a

1 lot of things that depend on those waters and I really enjoy
2 those; birds, plants, all the--all the areas around them.
3 That makes me happy.

4 Q Do you have kids?

5 A I do. I have one 13--or 12-year-old daughter and
6 two stepsons, eight and 15.

7 Q Do they fish?

8 A They certainly do.

9 Q How often do you go fishing with them?

10 A Depending on the time of year, I mean, through the
11 summer, we fish probably three days a week.

12 Q And where do you live, now?

13 A I live in Francis, Utah.

14 Q When's the last time you went fishing with your
15 kids?

16 A About--about four nights--three nights ago.

17 Q After work?

18 A After work, yeah. We went to the West Fork of the
19 Duchesne which is about half an hour away and fished for about
20 an hour-and-a-half, two hours.

21 Q Do you fish with fly rod, spin rod, what did you--

22 A Oh, we had one spin rod going and--and three fly
23 rods.

24 Q On a stream?

25 A Yeah. On the West Fork of the Duchesne, up on the--

1 the national forest end of it.

2 Q How have you taught your kids how to fish?

3 A How have I taught my kids how to fish?

4 Q Yeah.

5 A Very carefully. I--I mean, it's--it's a process,
6 I've been guiding for over 20 years, so I mean, you just start
7 them out casting and then you get in the river. There's no
8 other way to do it than getting in the river or the lake.

9 Q And you do that with them, did you say three or four
10 times a week in the summer?

11 A Yes, sir.

12 Q All right. Over the last 30-something years, can
13 you tell me and just give me a list of the different counties
14 in Utah that you have fished in?

15 A Oh, my goodness. Yeah. Wayne County, Sanpete
16 County, Emery County--

17 Q Why don't you slow down, make sure--

18 A Okay.

19 Q --you answer a little slower, too.

20 A Duchesne County, Daggett County, Wasatch County,
21 Summit County, Davis County, Morgan County, Box Elder County,
22 Tooele County, I forget where Panguitch is, I think that's
23 Washington County, I'm not sure, maybe Iron County.

24 Q But you've fished around Panguitch?

25 A Yes.

1 Q In all of those places, have you fished streams?

2 A I've fished a lot of streams in those places, yes.

3 Q And flat water?

4 A Some flat water in those places as well, yes.

5 Q What makes a good fishing experience for you
6 personally?

7 A For me, personally? Oh, that's a good question. I--
8 -I like having the opportunity to catch fish, there has--there
9 needs to be some sort of fish there for--for sure. I like the
10 beauty of the places and that can be all relative. I like the
11 travel to a lot of places, honestly, I--I consider that part
12 of the adventure, whether it be walking or driving, I think
13 that's all part of it. And again, a lot of the animals and
14 fauna around those rivers, all that goes into making a good
15 experience for me, for sure.

16 Q I don't know if you caught this earlier, but I'm
17 going to ask you this question based on Mr. Krannich's
18 testimony earlier. Sometimes do you fish with your kids even
19 though you don't want to?

20 A Absolutely.

21 Q Now, as both an individual and as a guide, can you
22 tell me approximately how many days per year you've spent on
23 rivers or streams since 2010, for a year average?

24 A Guiding and personal fishing?

25 Q Yeah.

1 A Since 2010? I would say around 75 to 100 days.

2 Q Seventy-five to 100 days?

3 A Yeah, uh-huh (affirmative).

4 Q On streams?

5 A Yes, sir.

6 Q Is that more or less or the same as before 2010?

7 The year--maybe the five years before 2010?

8 A Some of that was variable because I--I was doing the
9 television show, it's about the same, honestly. And I--and
10 some years, it was more because I guided a lot more, so, I
11 mean, one year, I did 125 guide trips and I also fished, so
12 it--it ebbs and flows, depending... But essentially, yeah, I
13 mean, you could average it out to around a hundred, probably.

14 Q Okay. When you were coming up in Ephraim, did you
15 have an understanding of what you were--whether you were
16 permitted to fish on the streambeds of rivers that flowed
17 across private property?

18 A I didn't have any understanding of that growing up
19 in Ephraim. I mean, I--I didn't ever encounter it.

20 Q All right. How about when you started guiding?

21 A Absolutely when I guided, I--there were places that
22 were marked no trespassing and I respected that.

23 Q Do you remember a decision called Conatser?

24 A I'm familiar with that, yes.

25 Q What was--do you recall when that decision came

1 down from the Supreme Court?

2 A Approximately 2008.

3 Q Do you have an understanding of what the current
4 stream access law is?

5 A Current stream access law is, if it's posted or
6 marked no trespassing, you're not permitted to fish the water
7 that flows over that posted land.

8 Q So let--let me just sum up. So you've been guiding
9 for over 20 years, so you guided before Conatser, after
10 Conatser, and do you know when the current law became the law?

11 A H.B. 141, I think was decided--that came into
12 effect May 11th, 2010.

13 Q We were going to--

14 MR. THOMAS: Your Honor, yesterday, you had
15 requested we can stipulate to a date and I believe May 11th,
16 2010, is the date.

17 MR. COBURN: That is correct, your Honor.

18 THE COURT: Very good. Thank you.

19 Q (By Mr. Thomas) Now, how did--how did you learn how
20 to become a fishing guide?

21 A I learned from a mentor. One of my--a cousin of
22 mine in--in Sun Valley, I learned a lot--a lot from him. He's
23 a--he was a professional guide at that point and that was rare
24 at that point.

25 I also learned from a lot of my fellow associates at

1 my first job at Western Rivers, that was some invaluable
2 stuff.

3 I also did it the old-fashioned way and actually
4 books, we didn't have the inter-"tube" at that point. And a
5 lot of fishing on my fish.

6 Q What sort of stuff would you learn from your college
7 at Western Rivers?

8 A Part of the professional part of it, you know, how
9 to understand people and expectations and understanding how
10 to--to match their skills to the situations involved.

11 Patience, for sure. How to have a good time with
12 those people, regardless of the fishing situation.

13 And a lot--a lot was the bugs and--meaning the
14 insects and the entomology and the--the habits of the river
15 and streams.

16 Q Did you ever talk about where to go?

17 A Absolutely.

18 Q Can you tell me, when you started at Western Rivers,
19 what--what was your job description?

20 A It was predominantly retail when I started, with a
21 little bit of guiding. And then that kind of changed a little
22 bit at the end, '97-'98, I guided quite a bit more, so it was
23 retail predominantly at first and then it had a blend of
24 retail and also guiding.

25 Q Can you describe for the Court, please, what it's

1 like to work in a fly shop?

2 A I--it requires a fair amount of patience and it
3 requires a lot of knowledge, knowledge of multiple things;
4 entomology, knowledge of fishing spots for one, knowledge of
5 product. And also a good sense of humor, fly shops are
6 gathering spots for fishermen and--and people in general and
7 they want to share stories and facts and pictures, usually.

8 Q A lot of shootin' bull?

9 A That is correct.

10 Q Talking about who caught the biggest fish?

11 A Or the smallest, whatever the case may be.

12 Q So you described certain knowledge that you had to
13 have to work in a fly shop, that included entomology, did you
14 say geography or loc--

15 A Geography, topography, I mean understanding fishing
16 spots, understanding the rivers and the access spots and--and
17 where to go.

18 Q Why is that necessary when you're working in a--in
19 retail in a fly shop?

20 A Well, people come to fly shops for knowledge and
21 whether they buy anything or not, you have to give them
22 knowledge, otherwise, they will not come back. So if you send
23 them to a bad spot, they're not going to come back. If you
24 send them to a good spot, they'll come back and trust you and
25 then you have them for life.

1 Q So how does the entomology play into that?

2 A The entomology plays into spots, it's crucial
3 because the bugs or the entomology really determine how the
4 fish eat, right? So different rivers have different
5 entomology. If you understand that--excuse me--understand
6 that entomology, then you can understand the fish much better
7 and a lot of the entomology is determined by life cycles and
8 also by flows of the rivers, which are determined by snow
9 pack.

10 Q I believe you said you left Western Rivers in 1999--
11 strike that.

12 When you started at Western Rivers, how many people
13 were guiding out of Western Rivers? Do you have a--an
14 estimate?

15 A Out of Western Rivers, probably--I mean, there were
16 some Green River guides as well, but probably three or four
17 local river guides.

18 Q And I believe you said you left in 1999?

19 A '99, April of '99.

20 Q So why did you leave?

21 A I left to start another business in Park City.

22 Q What was that business?

23 A It was a fly shop called Trout Bum 2.

24 Q Okay. And what was your role at Trout Bum 2?

25 A My role at Trout Bum 2, at that point, was pretty

1 much everything; I was the buyer, I received product, I
2 guided, I worked at--I worked the retail end of it and really,
3 it was me and--and one or two other gentlemen that did it at
4 that point in '99.

5 Q In 1999. And when did you leave Trout Bum?

6 A 2013. May.

7 Q Was it still just the three of you?

8 A No, sir.

9 Q How many people did Trout Bum employ by the time you
10 left?

11 A Retail, probably five or six people. We had about,
12 oh, upwards to 15 local river guides and probably three or
13 four Green River guides at that point.

14 Q Okay. So what was the change in the number of
15 guides you had from 1999 to 2013?

16 A Well, we had when--when we started, we had about two
17 or three guides and when we ended, it was probably--I mean,
18 full-time guides, probably ten and then some part-time guides
19 to make about 13 or 15 guides, total.

20 Q And you--you said you were also doing retail at
21 Trout Bum 2?

22 A That is correct.

23 Q Is--is that a different atmosphere than working at
24 Western Rivers or is it all kind of the same?

25 A I mean, it's--it's the same. You get a blended mix

1 of people, you know, you get young kids that want to learn,
2 you get middle-aged people that want to learn and you get
3 older people that want to learn. They all come in to learn
4 and to hopefully, buy something.

5 Q In 2008, were you working at--in retail at Trout Bum
6 sometimes?

7 A 2008? Yes, sir.

8 Q Did anybody ever--did people discuss the Conatser
9 ruling with you at the time?

10 A There was some discussion of that, I remember. I
11 mean, we--we had an eclectic blend of people there, we had
12 some private landowners that would come in and--and some
13 individuals that would discuss it on both ends.

14 To my knowledge, it wasn't hugely discussed, you
15 know, it--I remember hearing about it but I don't remember it
16 being a huge impact on me.

17 Q Do you remember if there was a consensus? Did
18 people generally feel one way or another about the ruling?

19 A I mean, the--the private landowners, the two that I
20 really heard from, had concerns, again, it wasn't--it wasn't
21 an overwhelming topic there.

22 Q So in 2013, you left Trout Bum 2?

23 A Yes, sir.

24 Q And why did you leave?

25 A To take a job at Victory Ranch.

1 So can you describe me what your job is at Victory
2 Ranch?

3 A I am the buyer of retail merchandise, head fishing
4 guide and also head upland bird hunting guide.

5 Q So over the last 20 years, can you estimate how many
6 people you have guided on rivers in Utah?

7 A Thousands.

8 Q More than a thousand?

9 A More than a thousand.

10 Q More than fifteen hundred?

11 A Yes.

12 Q So you've been doing it for 20 years, I'm--I'm
13 assuming you must like it. Why?

14 A I like helping people catch fish, I like helping
15 them understand the correlation between the art of it and the
16 nature of it. It's fun to see people smile and I get to do
17 that in an environment that's really splendid that I like
18 hanging out in as well, so if you get to combine those two
19 things as part of a job, I think that's really valuable.

20 Q Can you describe for the Court what people--who
21 likes--who likes to hire a fly fishing guide?

22 A Over the years, I've--I've guided many, many
23 different types of individuals, people that want to learn, you
24 know, I've--I've guided young kids, you know, predominantly, a
25 lot of middle-aged men for sure, some women, some older men,

1 but really, people of all ability level and--and yeah.

2 Q So people who--some people who are just starting out
3 and some people who are quite good?

4 A Absolutely. People hire guides for different
5 reasons.

6 Q Have you ever guided anybody in this--any of the
7 lawyers in this room?

8 A Possibly. I don't remember.

9 MR. COBURN: It was a good trip.

10 THE WITNESS: Must have been good guiding.

11 MR. THOMAS: So my real question and this is really
12 the crux of it is, is Coburn actually any good?

13 THE WITNESS: At--at fishing?

14 MR. THOMAS: Yeah, yeah. Okay. I figured it was, we
15 just wanted that on the record and now you have that; correct?

16 THE WITNESS: He learned from Schmidt, so he's good.

17 Q (By Mr. Thomas) So what's your first interaction
18 like with someone who wants to hire a guide?

19 A Well, you have to understand their expectations,
20 right? And the--the ideal is to have fun, first of all, you
21 want to make an enjoyable time, they're paying a lot of money.
22 More importantly, they're spending their valuable time and
23 they're trusting that with you, so you need to be a
24 professional, you need to understand their expectations, need
25 to understand their ability levels and you need to mesh those

1 two into making a decision as to where you're going to go or
2 what you're going to do.

3 Q All right. Can you talk to me about some of the
4 different expectations people--are that people have?

5 A Some people--some people want to catch a lot of
6 fish, some people want to catch a big fish, some people just
7 want to learn spots, meaning access spots and learn how to
8 read the river and how to--to fish the river. Some people
9 just want to get away and be in a beautiful spot. Some people
10 want to learn about the bugs and equipment and honestly, some
11 people just want to talk.

12 Q Now, when you started guiding in 1994, where did
13 you take people? Where--where did you--what do you recall the
14 spots being in 1994, that you would take people to guide--

15 A My first--

16 Q --regularly?

17 A --my first trip was on the Lower Provo at Vivian
18 Park, I remember--actually--actually, it was above. It was up
19 above Sundance on the Lower Provo.

20 Q Okay. And what other sorts of places would you take
21 people that--

22 A At that point, I really loved the Lower Provo. I
23 used to guide on the Middle Provo a little bit and then I
24 started branching out onto some of the smaller, more--more
25 moderately size streams in Utah.

1 Q How did you learn about those small and moderately
2 sized streams?

3 A At that point, there wasn't any internet, so I--it--
4 a lot of it was word of mouth, I read a lot, but really, you
5 have to just log the miles and go and--and drive to them and
6 walk.

7 Q So--so when you were guiding at Western Rivers in
8 Salt Lake, were the places that you guided significantly
9 different than the places you guided when you were at Trout
10 Bum 2 and--

11 A I guide a lot of the same places, still, and so
12 the answer is no, you know, it's--it's--I mean, the Lower
13 Provo has changed a little bit, not much, the Middle Provo has
14 changed since then because of some Federal work that has been
15 done there.

16 Q Can you--can I--can you describe what that is?

17 A The Federal work?

18 Q Yeah.

19 A That was a Federally-funded project that altered the
20 streambed. And I forget when exactly that was.

21 Q How many times do you think you've fished the Middle
22 Provo since 1994?

23 A At least a couple hundred.

24 Q When's the last time--

25 A Fished or guided?

1 Q Fished.

2 A Fished, myself, probably--since '94? Probably over
3 75 times.

4 Q Okay. And how many times have you guided it?

5 A Hum, around 200, probably.

6 Q When's the last time you guided it?

7 A The Middle Provo? About two weeks ago.

8 Q How was it?

9 A Real good.

10 Q Did you see a lot of people?

11 A I mean, that depends on what you mean by a lot. I
12 saw three people fishing in the river.

13 Q Who were you guiding? I don't need a name, but can
14 you describe the person you were guiding?

15 A I was guiding a gentleman and his eight-year-old
16 son.

17 Q Did they have a good time?

18 A They told me they had a really good time.

19 Q Did they give you a tip?

20 A They sure did.

21 Q Sounds like a good time.

22 A Uh-huh (affirmative).

23 Q I think you started to tell me about the places that
24 you guided when you were at Western Rivers, but when you were
25 at Trout Bum, where did you guide? Can you give me a list of

1 places you would regularly go?

2 A Absolutely. Lower Provo, Middle Provo, the Duchesne
3 River, the West Fork of the Duchesne River, the North Fork of
4 the Duchesne River, Current Creek Strawberry Pinnacles, Six-
5 Water Creek, Thistle Creek, Lower Fish Creek. Where else?
6 I'm missing one. A little bit on the Weber, a couple times on
7 the Weber. I know I'm missing one. Oh. Lost Creek.

8 Q Were those all places that you guided before 2008?

9 A Before 2008? Yeah. Yes.

10 Q Are they--did you guide anywhere new between 2008
11 and 2010?

12 A 2008 and 2010?

13 I mean, I've been guiding the same places, really,
14 throughout my guiding career. No, I don't recall.

15 Q Have you guided any new places since then, other
16 than Victory Ranch?

17 A A couple times, I've guided on the Upper Provo up
18 above Victory Ranch. Yes.

19 Q Up in the headwaters?

20 A No. On some private property above Victory Ranch, I
21 had access.

22 Q Okay. How did you get access?

23 A Verbal permission.

24 Q Over the course of your 24 years, have you ever had
25 people decline to give you verbal permission to fish their

1 property?

2 A One time on the Duchesne River.

3 Q Did you have an understanding as to why permission
4 was declined?

5 A He told me that his cattle had been mis-treated--

6 MR. COBURN: Objection. Hearsay.

7 MR. THOMAS: The question was his understanding and
8 I'm not offering it for the truth of the matter as to why,
9 just what was told to Mr. Jackson.

10 THE COURT: Why is it--why is it relevant if it's
11 not offered for its truth?

12 MR. THOMAS: Because is the understanding ad to why
13 he wouldn't be able to per--be permitted to fish on private
14 property.

15 THE COURT: Yeah. I don't know that it--it's just--
16 I don't know how it's relevant, so--

17 MR. THOMAS: I'll move on.

18 THE COURT: --sustained.

19 Q (By Mr. Thomas) You currently work for Victory
20 Ranch?

21 A That's correct.

22 Q And you guide for members of the Victory Ranch; is
23 that correct?

24 A Members and heir guests.

25 Q Can you describe for the Court what the fishing on

1 Victory Ranch is like?

2 A The fishing on Victory Ranch, I consider volatile,
3 like a lot of freestone rivers and when I say freestone
4 rivers, those are rivers without dams. And when I say
5 volatile, I mean, the--the water level can be volatile, the
6 water clarity can be volatile, the water temperatures can be
7 volatile. And what that makes is a--is a really good fishery
8 sometimes and a--and a pretty tough fishery sometimes.

9 Q How is the fishing on it today?

10 A Extremely mediocre.

11 Q Mediocre. Is it open?

12 A It's not open. We have it closed right now.

13 Q Why is it closed?

14 A Low water levels, which in turn, really makes for
15 high water temperatures, which make it undesirable for trout
16 and makes it hard to fish and honestly, when--if you do catch
17 a fish, you can kill fish in those sort of water temperatures.

18 Q So if a Victory Ranch club member wanted to go
19 fishing on a guided trip today and to have the Victory Ranch
20 experience, where would you take him?

21 A Any of those number of rivers that I've talked
22 about. The Strawberry Pinnacles is fishing great right now,
23 upper Current Creek would be great. If they wanted to stay
24 closer, West Fork of the Duchesne. If they want to go for a
25 couple hours and travel ten minutes, we'd go to the Middle

1 Provo.

2 Q Okay. Now, you talked earlier about how people who
3 hire guides have a variety of expectations. I'd just like to
4 go through them. So let's say someone wants to do a half-day
5 trip and catch lots--catch lots of fish, where would you take
6 them?

7 A Probably the Middle Provo. I mean, it depends on
8 what kind of fishing they want to do and that's part of the
9 expectations you have to understand, nymph fishing underneath
10 the water, streamer fishing or dry fly fishing. If you just
11 want to catch a fish, nymph fishing's really the best way to
12 do it.

13 Q Okay. What if they want to catch big fish?

14 A Big fish? I would take them--are you asking me
15 where I would take them?

16 Q Yeah.

17 A I would take them to the Strawberry Pinnacles, Six-
18 Water Creek or the lower part of the West Fork of the
19 Duchesne.

20 Q What if they wanted to learn a new spot to fish, for
21 say, a small creek. Can you think of a place you'd take them?

22 A Any--any of those places. Current Creek would be
23 great. If they're not concerned about the size of the fish,
24 the Upper Provo, along Highway 150 is a phenomenal spot.
25 Also, the East Fork of the Bear on Highway 150. The North

1 Fork of the Duchesne, up higher, up past all the campgrounds.

2 Q So on--when someone wants a guided trip, how do you
3 decide where you're going to take them that day?

4 A Again, it's based on their expectations and
5 sometimes, it has to do with their schedule, but if--really,
6 again, if they want to catch a lot of fish, big fish, fish dry
7 flies, fish nymphs, it's really--and--and you know, you ask
8 them that and then if they don't know any of those, you just
9 take them to where you think the best opportunity's going to
10 be for them to catch fish.

11 Some people don't know any of those things, if
12 they're just beginning, so you show them a good time and--and
13 like Mr. Slater said, some people just want to catch a fish
14 and feel something on the end of the line.

15 Q In your 21 years of guiding, have you ever had
16 trouble finding a location to fish on a particular day?

17 A Not a location to fish. I've certainly come to
18 spots and had them be adverse conditions; meaning high water,
19 dirty water. Now, you can check on the graphs, on USGS and
20 Central Utah Water District websites, but sometimes that
21 changes throughout a few hours and you get there and the
22 water's high and dirty.

23 Q Have you ever declined to take a trip with someone
24 on the basis that the only appropriate location was
25 unavailable because it was on private property?

1 A No, sir.

2 Q In your 21 years of guiding, have you ever had
3 someone decline a trip because you couldn't take them where
4 they wanted to go because it was on private property?

5 A No, sir.

6 Q I think you've been here for at least part of
7 yesterday, so I'm going to--I just want to show you a couple
8 of maps.

9 MR. THOMAS: May I approach, your Honor?

10 THE COURT: You may.

11 Q (By Mr. Thomas) Are you familiar with the region
12 that is shown on this map?

13 A I am.

14 Q And do you see all of this, let's say off the
15 Middle Weber and the (inaudible) have you fished any of that?

16 A That is--so this is the Middle Weber and this is
17 what we call Chalk Creek and this is the--the South Fork of
18 Chalk Creek. I have never--I have fished Chalk Creek--or the
19 South Fork of Chalk Creek once. This is all very high
20 elevation, which is extremely tough to get to and very small
21 and brushy, so no, I've never actually fished Chalk Creek, no.

22 Q But how do you know that this is all high elevation
23 and brushy?

24 A I mean, I--I've driven up there grouse hunting, for
25 one, and you can tell by the nature of--of rivers, the

1 headwaters, starts small and then collect and go into the big
2 water.

3 Q So is that somewhere that you would want to take
4 someone on a guided trip?

5 A No.

6 Q How about up here to the north a little bit? I'm
7 not sure what this river is, this one is, do you know?

8 A That is--that is Lost Creek right here. I'm not
9 exactly sure what this is right here, that must be upper Lost
10 Creek, I'm not familiar.

11 Q Are you familiar with the area?

12 A Familiar with Lost Creek. Actually, this might be
13 Lost Creek. Let me see here. No. No. No. That's right,
14 this is 80, this is some strange creek I've never even heard
15 of, honestly. This is Lost Creek and some of--yeah, I've
16 fished it a couple times, pretty tough.

17 Q So some of these places on here, after guiding for
18 21 years, you still don't know what they are?

19 A Absolutely. Like some of these stuff over here,
20 right here--

21 Q Uh-huh (affirmative).

22 A --along these mountains, really steep, up from 84.

23 Q So you'd have trouble accessing it?

24 A Accessing it physically and yeah--yeah, yes.

25 Q In your experience guiding, what's the farthest you

1 might have someone who's in, you know, good physical shape
2 walk up a streambed on a given day?

3 A I mean, I--I think probably four miles in a
4 streambed is a tremendous amount of walking.

5 Q Have you ever done that with anybody?

6 A I've done that, yeah, on the Fremont River.

7 Q How did that turn out?

8 A It was great. The guy could barely pick up his fork
9 to eat at the end of the day, but we caught a lot of fish.

10 Q I'd like to have you take a look at this, if I
11 could.

12 MR. THOMAS: May I approach?

13 Q (By Mr. Thomas) Do you recognize this map, this
14 area?

15 A Yes, sir.

16 Q And you put the VR sticker on there to show where
17 Victory Ranch is?

18 A I did. I did.

19 MR. THOMAS: The Court may note that before we
20 convened this morning, we did label some of the maps with the
21 areas that people have been talking about.

22 THE COURT: Yeah.

23 MR. THOMAS: And those would be stipulated by the
24 parties that that's a general description.

25 THE COURT: Is that correct?

1 MR. COBURN: That's correct. General location,
2 that's correct.

3 THE COURT: Very good. Thank you.

4 MR. THOMAS: Not to take (inaudible) or anything;
5 right?

6 Q (By Mr. Thomas) And this mark here, do you know
7 what that denotes, that little black tick right there?

8 A Oh, that--I mean, in general, that's the end of
9 Victory Ranch's property on the river.

10 Q Okay. So--have you fished all the Victory Ranch
11 property? Like the whole length of the river that goes--

12 A Yes. Yes.

13 Q And how far is that?

14 A Just under four miles.

15 Q Okay. Does that include the walk-in access portion?

16 A I'm fairly certain that includes the walk-in access.

17 Q Now, we've heard a little bit about the S.R. 32
18 bridge. Is that the only public access point to access the
19 Upper Provo where it flows through Victory Ranch?

20 A Yes, sir.

21 Q Do you know how far it is to the next public access
22 point?

23 A Approximately eight miles, I would say, seven to
24 eight miles.

25 Q Seven to eight miles?

1 A Yeah. It would be the Bench Creek bridge.

2 Q Okay. So that's--you couldn't walk that whole
3 length in one day when you're guiding?

4 A Especially not on that river, no.

5 MR. THOMAS: Can I have one moment, your Honor?

6 Q (By Mr. Thomas) So as we talked about earlier, you
7 were designated as an expert in this case. Do you recall
8 that?

9 A I do recall that.

10 Q Are you being compensated beyond your ordinary
11 salary from Victory Ranch for that, for your testimony?

12 A No, sir.

13 Q Have you developed an opinion as to whether the
14 current stream access law materially alters or impacts the
15 ability of the public to engage in fishing? Is that--have you
16 developed that opinion?

17 A I have developed an opinion.

18 Q What is your opinion?

19 A My opinion is that--is that it has not impacted the
20 access or ability for the public to recreate.

21 Q Okay. And so what's the basis for your opinion?

22 A Being on the rivers, my experience, my history with
23 all these rivers and--and all the waters that we're talking
24 about, I haven't seen any impact from any of those rulings,
25 honestly. In my opinion, there's ample amount of water for me

1 to recreate or for me to perform my job.

2 Q And has it--do you have an opinion on whether it's
3 had a negative impact on the ability to guide fishermen in
4 Utah?

5 A I have an opinion on that.

6 Q What is that opinion?

7 A I mean, I--it hasn't impacted that in--in one bit,
8 in my opinion.

9 Q How has the guiding industry changed since 1994?

10 A Many, many, many more guides.

11 Q Why are there more guides?

12 A There must be the demand.

13 Q Are you aware of any fishing opportunity--withdraw
14 that.

15 You testified earlier that you spin fish and you
16 fly fish; is that correct?

17 A Yeah. I predominantly fly fish. I--I've picked up
18 a spinning rod just because my--my youngest stepson has been
19 doing it and actually, it's kind of fun.

20 Q How old is he?

21 A He's eight.

22 Q How--how good of a fisherman is he?

23 A He's really good with that thing, I can tell you.

24 Q So when did he--when did he start learning how to
25 fish?

1 A He started about a year ago, a year ago, maybe a
2 little bit longer than that, ago. And you know, a lot of
3 times, that's more effective, we fish a lot of the Uinta lakes
4 as well and a little fly behind the bubble.

5 Q Uh-huh (affirmative).

6 A I mean especially for young, eight-year-old, can
7 definitely get the job done. That's how I grew up fishing,
8 too.

9 Q So you're teaching your kids to fish in the same way
10 you learned?

11 A Yeah. On many of the same lakes, honestly.

12 Q Are you aware of any fishing opportunity that's
13 available in northern Utah that exists only on private
14 property?

15 A No.

16 Q When H.B. 141 was passed, did that take away from
17 you any streams and rivers, taking out Victory Ranch, streams
18 and rivers that you'd fished previously that you now no longer
19 can fish?

20 A No.

21 MR. THOMAS: I'll pass the witness, your Honor.

22 THE COURT: Thank you.

23 You may cross.

24 MR. COBURN: Does Mr. Roberts have any for--

25 THE COURT: Oh, I--I assumed you would be crossing,

1 so...

2 CROSS-EXAMINATION

3 BY MR. COBURN:

4 Q Harley, just so you know, there's no water there, if
5 you need it.

6 A Thank you. I appreciate it.

7 Q May I call you Harley?

8 A You may, sir.

9 Q You can call me Craig, if you wish.

10 A Okay.

11 Q Okay.

12 MR. COBURN: With the Court's permission.

13 Q (By Mr. Coburn) Do you know who Steve Schmidt is?

14 A I certainly do.

15 Q And who is Steve Schmidt?

16 A Steve Schmidt is the owner of Western Rivers Fly
17 Fishing in Salt Lake. He's sitting in this courtroom.

18 Q Did you learn anything from him?

19 A I certainly did.

20 Q What did you learn from Steve?

21 A The thing that comes foremost to mind is how to cast
22 a fly rod.

23 Q Did he teach you to double haul?

24 A I think actually Art Ditman taught me the double
25 haul, but Steve Schmidt probably refined it.

1 Q Okay. Did Art teach you to cast side arm?

2 A He did. He did, actually. He told me my cast was
3 less than poor, when I first met him.

4 Q I heard similar comments.

5 A I don't know how it gets any worse than less than
6 poor, but--

7 Q Did Steve Schmidt also teach you how to fish the
8 dry fly?

9 A To fish the dry fly? I think he certainly aided in
10 that, yes.

11 Q Okay. A typical clientele at Victory Ranch any
12 different than the clientele that you might en--have
13 encountered at Trout Bum 2?

14 A We had a lot of the same clientele; in fact, we had
15 a lot of Victory Ranch people that would come in to Trout Bum
16 2. It was highly--it was in Park City, it was a very affluent
17 clientele.

18 Q Different clientele than your typical clientele at
19 Western?

20 A Fairly affluent clientele at Western Rivers as well,
21 maybe a little bit different.

22 Q Right. And certainly different clientele than the
23 every day fly caster?

24 A Yeah, I mean, we would get a lot of--it was an
25 eclectic blend. I would say predominantly a lot of affluent

1 middle-aged men, but we would also get younger snow boarding
2 crew in--in Trout Bum 2, we would get a fair amount of women
3 in there as well, at the end--especially at the end of the--my
4 career there.

5 Q Did you get any land surveyors coming into Trout Bum
6 2 or Western?

7 A Land surveyors?

8 Q Land--yeah, people of that ilk, if you will, just
9 good, common working people.

10 A Absolutely.

11 Q Do you have any of those at Victory Ranch, besides
12 the people who might work there?

13 A I mean, they're good, honest working people.

14 Q The people who work there?

15 A The people that own and work there.

16 Q Okay. But they're--I think you described them in
17 your deposition as affluent outdoor people?

18 A That's correct.

19 Q Okay. When they come to Victory Ranch, if you know,
20 do they--is a typical Victory Ranch member book a guide trip
21 to the river, to the Provo River where it runs through Victory
22 Ranch? Are they assigned a beat? How does that work?

23 A When--when they come to Victory Ranch?

24 Q Right.

25 A Meaning when they purchase at Victory Ranch?

1 Q Well, maybe that's a good place to start. If
2 somebody just buys property at Victory Ranch, are they
3 entitled to fish the river?

4 A They're entitled to a certain amount of days per
5 week, yes, to fish the river, as long as it's open.

6 Q What does that mean? As long as it's open?

7 A At a certain point, if the water temperatures are
8 too high and the water level is too low, we'll close the river
9 to anybody fishing.

10 Q Can a person buy a membership--strike that--buy a
11 lot in Victory Ranch without buying a membership in the club?

12 A I'm--I'm 99 percent sure that when you buy a--a lot,
13 you get a membership.

14 Q Okay. And if you want to fish with a guide on
15 Victory Ranch such as yourself, is that an extra charge?

16 A That is an extra charge.

17 Q How much?

18 A Depending on the amount of time.

19 Q Well, half day?

20 A Half day, meaning four hours?

21 Q You have half-day trips?

22 A We have two-hour, four-hour and six-hour trips.

23 Q Well, why don't you tell me two hours.

24 A One or two people?

25 Q Two.

1 A Two people, a four-hour, I think is \$350.

2 Q Per person?

3 A No. Total.

4 Q Is that a two-hour or four-hour?

5 A Four.

6 Q Okay. Six?

7 A Six, I think is another hundred, so I think it's
8 450. I'm not positive on these numbers. That's the
9 approximate.

10 Q Well, you're head guide there; correct?

11 A I am head guide. That doesn't mean I ring them up.

12 Q So if I understand your testimony, two people for
13 six hours would be 450?

14 A Fairly certain.

15 Q Okay. I believe you--it's also been your testimony,
16 at least in your deposition, that people who hire guides
17 typically have discretionary income?

18 A I would say that's fair to say.

19 Q And I think you were here for Dr. Krannich's
20 testimony when he said well over 90 percent of the anglers in
21 Utah do not hire guides.

22 A I was here for that, yes, sir.

23 Q Right. Does that suggest to you that most people
24 can't hire guides and maybe afford to get on private land if
25 that's--there's a raw charge or something?

1 MR. THOMAS: Objection. Foundation.

2 THE WITNESS: I--I--

3 THE COURT: I'm sorry. How is there a foundation
4 problem?

5 MR. THOMAS: He's asking him about what the meaning
6 of Dr. Krannich's research is, it is not something that he's
7 an expert in, it's not something he was designated or called
8 to offer testimony about.

9 THE COURT: Okay.

10 MR. COBURN: I'm just asking for his understanding.

11 MR. THOMAS: That was the first question but not the
12 second.

13 THE COURT: Okay. Thank you.

14 I think he's been offered as an expert witness. He
15 can respond to Krannich's research, to the extent that he's
16 aware of it.

17 MR. COBURN: Thank you.

18 Q (By Mr. Coburn) You are aware, are you not, that
19 Dr. Krannich's report, one of the surveys, and you testified
20 about this, said well over 90 percent of Utah anglers do not
21 hire guides; is that correct?

22 A That's my understanding, yeah.

23 Q Does that suggest to you that over 90 percent of
24 Utah anglers can't afford a guide?

25 A Assuming on his facts, maybe they choose not to hire

1 a guide, maybe they can't afford a guide, I--I don't--I can't
2 discern between those two.

3 Q Okay. You testified a few minutes ago about upper
4 Chalk Creek, which is one of the drainages that feeds the
5 Weber; correct?

6 A Yes, sir.

7 Q And you testified that those high mountain streams
8 are small, difficult access and difficult to fish because of
9 brush, et cetera?

10 A Correct.

11 Q Is that fair?

12 A That's fair, yeah.

13 Q Is that a general--as a general proposition, is that
14 a--fair characteristics of most, if not all, of the high
15 mountain streams in Utah?

16 A Some, yeah. I've never actually fished those actual
17 streams, I've just looked at them and walked next to them.

18 Q You've been up in the High Uintas?

19 A Yes, sir. Lots.

20 Q Yeah. And most streams up in the High Uintas are
21 pretty small?

22 A Some of them, yes.

23 Q In the High Uintas, not--I'm not talking where
24 they're coming off the Uintas, like the Yellowstone or Lake
25 Fork, I'm talking about up in the high mountain streams, if

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IN THE FOURTH JUDICIAL DISTRICT COURT, HEBER
WASATCH COUNTY, STATE OF UTAH

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UTAH STREAM ACCESS)	
COALITION,)	
)	
Plaintiff,)	Case No. 100500558
vs.)	
)	TRIAL
VICTORY RANCH, LC,)	
SILVER CREEK-ROBERT LARSEN,)	
UTAH DIVISION OF WILDLIFE)	(Volume Four)
RESOURCES, SHERIFF TODD)	
BONNER, VR ACQUISITIONS,)	
ATC REALTY SIXTEEN, INC.,)	
)	
Defendants.)	

STATE OF UTAH ATTORNEY)
GENERAL, STATE OF UTAH,)
and UTAH ALLIANCE TO)
PROTECT PROPERTY,)
)
Intervenors.)

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BE IT REMEMBERED that on the 2nd day of September, 2015, commencing at the hour of 8:34 a.m., the above-entitled matter came on for hearing before the HONORABLE DEREK P. PULLAN, sitting as Judge in the above-named Court for the purpose of this cause and that the following proceedings were had.

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1 P R O C E E D I N G S

2

3 (Transcriber's Note: Speaker identification
4 may not be accurate with audio recordings.)

5

6 THE COURT: --Acquisitions, Counsel are all here,
7 parties are present as well.

8 Who's next?

9 MR. COBURN: Your Honor just a couple of
10 housekeeping matters before we get started.

11 THE COURT: Okay.

12 MR. COBURN: First, Mr. Thomas and I, and I believe
13 Mr. Roberts were discussing, in anticipation of Friday as
14 closing arguments, were you looking to have draft or proposed
15 findings and conclusions submitted by the parties by then?

16 THE COURT: I wanted to talk to you about that. I
17 was able to clear time on Friday afternoon and so I just--I
18 just blocked that out. I do have some other days that we can
19 talk about, was it the 17th, the one that Wood doesn't need?

20 THE CLERK: (Inaudible)

21 THE COURT: I had a six-day trial, I had the pre-
22 trial conference and they said they would need five, so I have
23 September 17th as well. But I wanted to just hold the--the 4th
24 for you so what--what would you prefer to do?

25 MR. COBURN: Your Honor, I think my preference would

1 be to, while it's all fresh in our minds, proceed on the 4th.

2 THE COURT: Okay.

3 MR. THOMAS: I would concur with that, your Honor,
4 and then if you wanted us, you could direct us with regard to
5 findings--proposed findings thereafter, rather than doing it
6 before.

7 MR. ROBERTS: I would prefer the 17th but I'll go on
8 the 4th, your Honor.

9 THE COURT: Okay. Well, let's--why don't we go on
10 the 4th then and then if you'll submit your proposed findings
11 and conclusions. How--how long do you think that would--what
12 a reasonable time for you to put that together?

13 MR. ROBERTS: Maybe we can do that by the 18th?

14 THE COURT: Is that okay?

15 MR. COBURN: That should work, your Honor.

16 THE COURT: Okay. Is the 17th a Thursday? Or is
17 that--yeah, by Friday, the 18th. Okay. That--is everyone
18 okay with that schedule then, closing argument on the 4th,
19 proposed findings of fact, conclusions of law by the 18th.
20 Okay. Sounds good. Thank you.

21 MR. COBURN: Your Honor, do you anticipate giving us
22 any direction or do you just want us to set forth our findings
23 in accordance with our feelings and theories of the case?

24 THE COURT: Maybe not your feelings, but consistent-
25 -consistent with the evidence that's been presented. I know

1 that there are disputed issues of fact, I've tried to take
2 careful notes and you know, that's what I would say,
3 consistent with the evidence that's been received. And I--
4 certainly we can't--what I don't want to see are proposed
5 findings that disregard conflicting evidence, so maybe you can
6 work together on some of that, but I mean, I can't--you can't
7 state it all your way, if there's--there's been conflicting
8 evidence that's come in, that doesn't help me, you know. So
9 that's why I often do it by myself, frankly, because I get
10 proposed findings that come in that disregard evidence that's
11 come in the other way, so--what do you think? Advise me.

12 MR. COBURN: Well, my experienced is, your Honor,
13 that I think both sides kind of make their case in the
14 proposed findings and conclusions and the Court weighs those
15 findings against its own weighing of the evidence on the
16 factual findings and the points of law and makes its decision.

17 THE COURT: You've done this before. I trust you,
18 so put them together as best you can and--and I realize I'm
19 going to have to resolve conflicting evidence, that's what
20 trial courts do, so...

21 MR. COBURN: Your Honor, on another housekeeping
22 matter, I've been in conversation with Mr. Roberts and Mr.
23 Thomas over the last few days about adding some exhibits to
24 Exhibit 5, the blue ribbon fisheries exhibit. And we have a
25 stipulation that we can add five additional exhibits, 5.4

1 through 5.8, they're not in your binder at--currently, your
2 Honor, but what we can do is during the break, we can deliver
3 copies to (inaudible) and counsel--

4 THE COURT: Okay. What are--what are they?

5 MR. COBURN: They are blue ribbon narratives on five
6 rivers, the Lower Provo, the Middle Provo, the Middle Weber,
7 the Lower Strawberry and Middle Strawberry.

8 THE COURT: Okay. Do you have some--a sticky--it's
9 5.4 through--

10 MR. COBURN: Right. And I have them here if we want
11 to take some time and--and--

12 THE COURT: I just--no, I mean, sorry, sticky notes,
13 I'll just (inaudible)

14 MR. ROBERTS: Your Honor, just to add to that, when
15 he says narratives, these are the descriptions of the blue
16 ribbon fisheries from the State website.

17 THE COURT: Okay. And there will be 5.4 through
18 what?

19 MR. COBURN: 5.8.

20 THE COURT: Okay. Now, if you'd just mark them when
21 it's convenient and we'll get them in.

22 MR. COBURN: Thank you, your Honor.

23 THE COURT: Anything else this morning?

24 MR. COBURN: I thin that's it, your Honor.

25 MR. THOMAS: No, your Honor.

1 THE COURT: All right. All right. We last heard
2 from Trena Hendrick. Were we done with her? I tink we were.

3 MR. COBURN: Yes, your Honor.

4 MR. YOUNG: Yes, your Honor.

5 THE COURT: Okay. The Coalition may call its next
6 witness.

7 MR. YOUNG: Thank you, your Honor. The Coalition
8 calls Mr. Paul Thompson.

9 PAUL THOMPSON,
10 called as a witness by and on behalf of the plaintiff in this
11 matter, after having been first duly sworn, assumed the
12 witness stand and was examined and testified as follows:

13 THE COURT: Can I just be clear on what I was saying
14 about the findings of fact and conclusions of law? My point
15 is that sometimes I get proposed findings that suggest that
16 absolutely nothing else happened in the case except what we
17 put on. And that's the kind of findings I don't want to see,
18 they--they really aren't helpful and I really end up starting--
19 -I end up just disregarding them, frankly.

20 And so when I say I trust you, I--you know, we've
21 been doing this a long time, you have been doing it a long
22 time, you know how that ought to look and--and so I don't
23 expect I would receive those types of findings from either
24 side, that's what I'm getting at. Understood?

25 MR. COBURN: Understood, your Honor.

1 MR. THOMAS: Understood, your Honor.

2 THE COURT: So I don't want to create confusion on
3 that, that's my point.

4 So all right. How do you spell your last name?

5 THE WITNESS: Thompson, T-h-o-m-p-s-o-n.

6 THE COURT: Thank you. And it's Paul; correct?

7 THE WITNESS: Correct.

8 MR. YOUNG: Proceed?

9 THE COURT: Go ahead, yeah.

10 DIRECT EXAMINATION

11 BY MR. YOUNG:

12 Q Good morning, Mr. Thompson. My name is John Young.
13 Could you give us a little background with respect
14 to your education, please?

15 A Sure. I did my undergraduate work at Eastern
16 Illinois University, I got a Bachelor's of Science in
17 environmental biology with a minor in chemistry and botany.
18 And I did my master's work, Master's of Science at the
19 University of Wyoming. And that would--the degree is in
20 zoology and physiology, but there's no fisheries title in the
21 program there, but it is a fisheries degree.

22 Q How long have you been working for the Division of
23 Wildlife Resources in Utah?

24 A Close to twenty-and-a-hand years.

25 Q And what is your present position?

1 A The northern region aquatics manager out of the
2 Ogden office.

3 Q How long have you held that position?

4 A Be three years this December.

5 Q Could you just give us a quick summary of the
6 positions you've held at the Division since you started?

7 A I hired in as a biologist in the Salt Lake office,
8 worked there for about two three years and three months,
9 mainly on the Colorado River fishes, the endangered fish
10 program there.

11 I hired into the Ogden office as the native aquatics
12 biologist in June of 1997 and I held that position until
13 around 2008, when I became the aquatics, the assistant
14 aquatics manager. Basically, I was still doing the same
15 duties, native aquatics, and I did a lot of native cutthroat
16 work, too, and that time, even some high lakes work.

17 But in 2008, becoming the assistant aquatics
18 manager, kept the same duties and just kept over the aquatic
19 invasive species program within the northern part of the
20 State.

21 In 2010, the manager did a career mobility down in
22 our Salt Lake office, so for about eleven months, I did native
23 aquatics biologist position, the assistant manager position
24 and the manager position. Then when he returned, I went back
25 to my old duties as assistant manager until December of 2012,

1 when the manager did move on and I took that job full time.

2 Q Thank you. So if my math is correct, you've been
3 involved in the northern region, northern division for 18
4 years?

5 A A little over 18 years.

6 Q Could you describe for the Court, please, the
7 general area of the northern region? Looking at this, looking
8 at Exhibit 1.

9 A Most of our regions are by county, there are some
10 discrepancies but for the most part, northern region is Davis
11 County, Weber County, Box Elder County, Cache County, Rich
12 County, Morgan County and the majority of Summit County. We--

13 Q So generally speaking, you're looking at this region
14 through here?

15 A Salt Lake City north, for the most part, and then we
16 have some of the north slope of the Uintas over to the--over
17 to the Beaver Creek drainage, Hoop Lake. The dividing line
18 between northern and central region does follow Interstate 80
19 up to Route 40 and then I believe it goes over and up Mirror
20 Lake Highway.

21 Q Okay. Could you describe for the Court please, what
22 your duties are as aquatics manager for the northern region?

23 A I supervise seven biologists within our office. We
24 have a biologist at Bear Lake that just works on that lake
25 primarily, but he has helped in other--in duties we have in

1 Cache County and Rich County.

2 We have a cutthroat biologist in our Ogden office.
3 We have a flat water biologist in our Ogden office. We have a
4 native aquatics biologist that I supervise and aquatic-basin
5 species biologist. And another kind of hybrid biologist
6 that's half cutthroat and half native species.

7 We also have a stream restoration biologist and that
8 position is currently vacant, has been since the first part of
9 July, on a career mobility, and that is also our blue ribbon
10 biologist. So that--that position was our assistant manager,
11 that's vacant right now. So that person would be supervising
12 our aquatic invasive species program, but I am currently doing
13 that since it's vacant.

14 Q Okay. Are you familiar with Exhibit 1?

15 A State of Utah?

16 Q Right.

17 A Yes.

18 Q Is that--does that represent the Stream Access map
19 for the State?

20 A It's hard to tell from this point if it has
21 everything on it.

22 Q Would it help if I brought it up closer to you?

23 A It might.

24 So this is--

25 Q I'm handing you Exhibit 1, which is the Utah Stream

1 access map.

2 A This is the map that was developed, starting in 2010
3 through 2013.

4 Q Okay. And it repre--or it designates all the viable
5 fisheries in the State of Utah?

6 A Yeah. That looks--looks like the map.

7 Q Thank you.

8 I'm going to show you--

9 MR. YOUNG: May I approach, your Honor?

10 THE COURT: You may.

11 Q (By Mr. Young) I'm going to show you what has been
12 marked as Exhibit 3.3, which is a blow-up of a portion of the
13 stream access map that you've just identified, dealing with
14 this Weber River and its tributaries, does that look accurate
15 to you?

16 A It does look fairly accurate, there might be a few
17 places where the secured access is not up to date. I--it's
18 hard to tell between the red and the pink, but--

19 Q Well, maybe there is 'cause there is pink there, but
20 the East Canyon Creek in the lower reaches, there should be
21 little secured access to, probably even part of the Weber
22 River here.

23 So what I'd like to do to begin with and I want to
24 do this as easy as possible.

25 A Okay.

1 MR. YOUNG: Your Honor, I don't know whether it's
2 easier for him to do it sitting down or whether it would be
3 better on the easel.

4 THE COURT: Whatever you'd like to do is fine.

5 MR. YOUNG: All right. Would you step over here,
6 please?

7 Q (By Mr. Young) If you would, Mr. Thompson, I would
8 like you to label for us some of the drainages, part of the
9 drainages that go into the overall Weber River drainage. And
10 I'll put on the list that you--

11 Could you, first of all, as I understand it, the
12 main stem of the Weber River is going from essentially above
13 Wanship down through Morehead and down the canyon all the way
14 to Ogden; is that right?

15 A Yes.

16 Q Could you just label that that's the Weber River,
17 please.

18 Now, could you label, it might be so that the Court
19 can see what you're doing, if you can move just over like
20 this, so if you'd label the main stem right there. Could you
21 show us where the Lost Creek tributary is?

22 (Inaudible)

23 A Okay. Lost Creek.

24 Q Okay. Ad if you'd stand there for just a second.
25 Lost Creek is--begins up here and runs down to--is this the

1 Lost Creek Reservoir right here?

2 A That would be, yes.

3 Q And it runs on down and comes into--joins the Weber
4 upstream from Morgan; is that right?

5 A That is correct.

6 Q Okay. Where is East Canyon Creek?

7 A East Canyon Creek is this stream here that comes
8 down and joins the Weber right below Morgan.

9 Q So it begins with--

10 A Up in Park City.

11 Q So it goes from Park City all the way down to just
12 below Morgan? Would you label that?

13 Okay. And where is Echo Creek?

14 A This would be Echo Creek, it goes along Interstate
15 80 up towards Evanston.

16 Q Okay. And would you label that, please?

17 And where is the Chalk Creek area?

18 A This is the drainage, Chalk Creek, that comes into
19 Coalville.

20 Q So all these various stems of it come together and
21 meets at Chalk Creek here?

22 A Yes.

23 Q Would you label that Chalk Creek right there?

24 Okay. What is this stream coming in here?

25 A This is just one of the small tributaries in the--

1 what we call the Lower Weber, it's called Cottonwood Creek.

2 Q Okay. Would you label that one?

3 Okay. Now, when--this--that one comes through all
4 the main stem of the Weber River above the mouth of the
5 canyon; is that right?

6 A Including major tributaries?

7 Q Yes. These are the streams coming off of the east
8 side of the Wasatch; is that right?

9 A That's correct.

10 Q Okay. They all feed into East Canyon Creek?

11 A No. Just the hard scrabble (inaudible) these
12 actually--this stream may come into the lower parts of East
13 Canyon, but the rest of these are like Cottonwood, they come
14 right into the Weber.

15 Q Okay. So from about this juncture on, right here?

16 A Yeah. Somewhere in there.

17 Q Can you make a mark there? And that would be the
18 dividing line between where these are joining the Weber and at
19 least one more (inaudible) and then we get down to (inaudible)
20 just--(inaudible) is this a known area right here?

21 A This is the Mountain Green area.

22 Q Okay. So Mountain Green is--why don't you just
23 write in Mountain Green right there.

24 Okay. Then above that is another contribu--or
25 tributary to the Weber River drainage is the Ogden River; is

1 that right?

2 A That is correct.

3 Q And that is this drainage through here?

4 A It is, it's this entire drainage.

5 Q Okay. So what is this part of the drainage called?

6 A South Fork of the Ogden.

7 Would you label that, please?

8 And is this the North Fork?

9 A It is.

10 Q Okay. So just label that.

11 And then did you label the main stem of the Ogden
12 River?

13 And so just for purposes of where they join, the
14 Weber joins the Ogden River at approximately--is it in Uinta
15 or is it below that?

16 A It's below that. It would be in the town of Ogden.

17 Q Okay. All right. I want to turn now to the Bear
18 River drainage and its tributaries. There's a couple of these
19 that I believe are already labeled, but on all--first of all,
20 is this--could you tell us where the Bear River actually
21 originates?

22 A Bear River begins in Utah up in the Uinta Mountains
23 ad flows north into Wyoming.

24 Q Does this--does this have the designation of the
25 Upper Bear?

1 A It's known as the Upper Bear.

2 Q Okay. Would you label that?

3 It flows into Wyoming, comes back into Utah for a
4 little ways on the eastern border (inaudible) is that right?

5 A That's correct.

6 Q You mentioned in your deposition an area that's
7 called I think the Potter Creek area?

8 A Yes.

9 Q And could you label--is that in this general area,
10 is it back in Utah as it comes back in?

11 A It is. It's a--mostly likely this stream, but this
12 is not quite complete.

13 Q Okay. What are these other two major streams,
14 please?

15 A This would be Big Creek and this would be Woodruff
16 Creek.

17 Q Okay. Would you label those two, please?

18 Okay. Then it flows, the Bear River flows out of
19 Utah again and it flows to Bear Lake and goes into Wyoming and
20 then on up into Idaho; right?

21 A That's correct.

22 Q And where does it come back in to Utah?

23 A Comes back in right in Cache Valley, north of Logan.

24 Q Okay. Is this the Bear River right here, coming in?

25 A It is.

1 Q Would you label that?

2 And then is this other tributary, is that the
3 (inaudible)

4 A It is.

5 Q Would you label that, please?

6 Okay. Once we get down, there's another--several
7 more tributaries. This--what is this one right here?

8 A That would be--there's a few streams there, it
9 might be High Creek.

10 Q But you're not sure?

11 A I'm not entirely sure on that.

12 Q Okay. And so what is this area of--into--to Logan?

13 A That's the Logan River.

14 Q Okay.

15 A That's been labeled.

16 Q Okay. Are there--and that originates up near the
17 border with Idaho?

18 A Yeah. Just into Idaho.

19 Q Okay. So the Bear River comes down in the Cache
20 Valley area and it joins the Logan River over by Tremonton?

21 A Well, the Bear River flows into the Cottonwood
22 Reservoir, of which the Logan River and the South Fork of the
23 Little Bear also do.

24 Q Okay. That was the next one. The south fork's
25 called the Little Bear?

1 A The south--this is the South Fork--this is the
2 Little Bear--

3 Q Okay.

4 A --and this is the South Fork or the East Fork of the
5 Little Bear.

6 Q Okay. Would you label the Little Bear, please?

7 And then there's another river that comes in. Is
8 this the Malad River over here?

9 A It is.

10 Q Coming in out of Idaho? Would you label that?

11 Okay. Thank you.

12 MR. YOUNG: Your Honor, would it be helpful to take--
13 --to give the Court a little--a closer look at this for a
14 moment?

15 THE COURT: I think I've watched. I'm good.

16 MR. YOUNG: Okay.

17 Q (By Mr. Young) Okay. Mr. Thompson, I'd like to ask
18 you a few questions about, first of all, about the Weber River
19 drainage and its tributaries.

20 Are you familiar with the walk-in access program
21 that the Division has?

22 A I am.

23 Q And that--well, tell me what it is, for sure then.

24 A It's where we--we have a biologist in our region
25 that approaches landowners for either access to the stream or

1 upland habitats for hunting and pay them a small fee for
2 public access. And the contracts are one to five years.

3 Q And you mention those were for hunting. Do you also
4 have some for fishing?

5 A I thought I did mention fishing, but yeah, for
6 angling and for upland and hunting, yeah.

7 Q Okay. With respect to the Weber River, what is--
8 what is the mileage, what are the total stream of mileage of
9 walk-in access that the Division does secure?

10 A In the entire Weber River drainage, it's between
11 nine and ten miles, including some of the major tributaries.

12 Q Okay. So when you say nine and ten miles for the
13 Weber River drainage, you're talking about all the drainages
14 that are reflected on Exhibit 3.3?

15 A Yes.

16 Q So that includes the Ogden River and its
17 tributaries?

18 A Yes.

19 Q You don't happen to have an estimate or know the
20 actual stream miles of the Weber River drainage with its
21 tributaries, do you?

22 A I don't, with tributaries. I--the main stem would
23 be an educated guess, even.

24 Q Does the Division also have any access easements
25 that it has acquired in--on any of the Weber drainage?

1 A We do.

2 Where are those located?

3 A We have easements between Echo and Rockport. I
4 think there's one in--near the town of Henefer and there are a
5 few other types of accesses that we have to it.

6 Q On the main stem of the Weber that you just
7 mentioned, how many miles of easement access has the Division
8 acquired?

9 A I'm not sure on the total mileage on that, but I do,
10 talking with our walk-in access biologist and our habitat
11 biologist, who is over easements and leases, between Echo
12 Reservoir and Rockport Reservoir, they feel that we have about
13 half of that reach open to angling. So that's--that's where
14 the bulk of our easements are.

15 Q And how long is that reach?

16 A I believe it's ten or 12 miles.

17 Q So half of that, five or six miles?

18 A Yes.

19 Q And is that--is there also separate from that, any
20 walk-in access--

21 A There is one--

22 Q --in that stretch?

23 A There is, yeah, I think one little walk-in access
24 piece in that reach as well, but a lot of that is easements.

25 Q What's the length of the walk-in access on that

1 stretch?

2 A I'm not--I'm not entirely sure.

3 Q When you say "little," is it less than a mile?

4 A I believe it is, yeah.

5 Q Okay. So in that stretch, there's public access on
6 about half of it, most of which is through the easement
7 program?

8 A Easements and some leases, I believe.

9 Q How long did the--well, when you were talking
10 leases, are you including that in your easement mileage?

11 A Well, that reach that I was referring to between
12 Echo and Rockport, the 50 percent we've obtained access for
13 includes easements, leases and walk-in access, yes.

14 Q Okay. So the total is half of it?

15 A Yes.

16 Q Okay. With respect to the easements, are those
17 long-term agreements?

18 A They are longer term, we've got 20 years is what we
19 try for or even longer.

20 Q When were those easements entered into?

21 A That's--it was done out of our habitat program. I
22 know some of them originated in the '90s, but I don't know
23 when they're--when they had come up for--

24 Q So if they originated--if they originated in the
25 '90s, we're getting pretty close to 20 years now, aren't we?

1 A Yeah, it's not--

2 MR. THOMAS: Objection. Foundation.

3 THE WITNESS: I think some of them--

4 MR. THOMAS: Argumentative.

5 THE COURT: Overruled.

6 Is that true, we're getting close to expiring on
7 some of these?

8 THE WITNESS: On some of these, yes.

9 THE COURT: Okay.

10 Q (By Mr. Young) Do you have any idea--any knowledge
11 as to the mileage of streams that are getting close to
12 termination in the easement agreements?

13 A I don't. That's our--a different section that
14 handles the--those easements.

15 Q Are you familiar with the--the blue ribbon fisheries
16 program?

17 A I am.

18 Q Can you describe that for us? What is it?

19 A It's a council that designates different waters
20 within the State as blue ribbon fisheries on a--on a series
21 of criteria.

22 Q Okay. And we've had testimony with respect to what
23 the criteria is, so I won't go into that, but with respect to
24 the stretches of the Weber River drainage, do you know how
25 many miles of blue ribbon fisheries have been designated--or

1 excuse me, how many miles of the streams in the Weber River
2 drainage have been designated blue ribbon fisheries?

3 A Well, we have the South Fork of the Ogden and two
4 reaches on the Weber.

5 Q Okay. Let's--let's go one at a time.

6 A Okay.

7 Q On the South Fork of the Ogden.

8 A That's above Pineview. Yes.

9 Q The--the stream flowing into Pineview Reservoir?

10 A Yes. That's one of the streams.

11 Q Do you know how many miles of blue ribbon fishery is
12 in there?

13 A Is there a key on the map as far as how much is a
14 mile?

15 Q I don't believe--

16 A I don't know these--I don't know the numbers off the
17 top of my head, but it's--it's that reach above Pineview
18 Reservoir, I believe up to Memorial Park.

19 Q Okay. Is it within--is the stretch that's blue
20 ribbon fishery contained within the yellow reaches, public
21 access reaches of that stream?

22 THE WITNESS: May I get up?

23 THE COURT: Yeah.

24 THE WITNESS: I believe it is.

25 MR. YOUNG: Okay.

1 THE WITNESS: I believe it is the reservoir right
2 above--right above here in this reach right in here.

3 Q (By Mr. Young) Okay. So is the blue ribbon
4 fisheries all the way on the public access part or are you
5 saying that it also includes the private?

6 A The council designated the entire reach as blue
7 ribbon.

8 Q Okay. So is it your understanding that one of the
9 act--one of the qualifications to be designated as a blue
10 ribbon fishery is to have public access?

11 A Yes. That is one of the things that they look at.

12 Q So looking at these maps, maybe I should go back,
13 you understand that the reaches that are in red are the
14 stretches of rivers and streams that traverse private land?

15 A Yes.

16 Q And conversely, the yellow is traversing public
17 land?

18 A Yes.

19 Q So would it be accurate to say that if it's been
20 designated as blue ribbon fishery, it would be located in a
21 yellow section?

22 A It's--the council designated it for the entire
23 reach, so whether its on private or public, that reach is a
24 reach that is designated blue ribbon.

25 Q Okay. Are you familiar with that stretch of stream?

1 A Yeah, I don't--I'm not as familiar as other parts
2 of the Weber, but--

3 Q Are there any walk-in access designations in that--
4 in that stretch of the South Fork?

5 A Not that I am aware of.

6 Q Are there any easements?

7 A I'm not sure.

8 Q Okay.

9 A I'm not entirely sure.

10 Q Any--any leases?

11 A Not entirely sure on that, either.

12 Q Okay. Thank you.

13 A Uh-huh (affirmative).

14 So you indicated--you started your testimony by
15 dealing with--with the blue ribbon fishery designation in the
16 Weber between Echo and Rockport and now you've talked about
17 the south fork of the Ogden. Are there any other blue ribbon
18 fisheries in the stretches or streams that are depicted in
19 Exhibit 3.3?

20 A There is a reach of the Weber from what we'd call
21 Gateway up to the Stoddard diversion, so that's near the town
22 of Mountain Green, upstream, to just below Morgan.

23 Q Okay. And that's on the main stem?

24 A It is.

25 Q So how many miles are in this section between Morgan

1 and Mountain Green is blue ribbon fisheries?

2 A That's approximately ten to 12 miles as well.

3 Q And would that be limited to the public access area
4 that's designated in yellow?

5 A No. I believe the council designated that entire
6 reach as blue ribbon.

7 Q When did they do that?

8 A I don't know exact time frame. It was probably
9 before my time as manager and our--we have a biologist that
10 works with the council on those designations.

11 Q Okay. Are there any other areas of blue ribbon
12 fishery designations that we you can recall on Exhibit 3.3?

13 A Pineview Reservoir, I believe, is also a--

14 Q I'm limit--I'm--sorry. My question is just limited
15 to rivers and streams.

16 A Okay. Oh, yes, we have a short reach in the town of
17 Ogden, it's about, I think, one-and-a-half miles of where it--
18 a river's been restored in the town of Ogden.

19 Q Is that on the main stem of the Weber?

20 A Of the Ogden River.

21 Q Of the Ogden River?

22 A Yeah.

23 Q Okay.

24 A Yes.

25 Q Okay. Any others?

1 A I don't believe so.

2 Q Okay. Are there, to your knowledge, are there any
3 stretches of--of streams in the Weber River drainage that you
4 believe would qualify under the conditions set forth as blue
5 ribbon fisheries, but they have not been designated as such
6 because they traverse private land?

7 A I don't know what the discussions has been with the
8 council and with the biologist out of our office as far as
9 that type of a question, but it would be up to the council on
10 if they wanted to designate it. As far as the stream in the--
11 the fishery aspect of it, there are some other areas that are
12 good fisheries within the Weber, but I don't know if they--the
13 council would designate them as blue ribbon because of the
14 other criteria.

15 Q I--I understand that. My question is whether you,
16 in your position, knowing the qualifications to be designated
17 as blue ribbon fishery, on rivers and streams, are there any
18 of the portions of these drainages that you believe would meet
19 those qualifications but for the fact that they're traversing
20 private lands?

21 MR. THOMAS: Objection. Foundation.

22 THE COURT: Overruled. He--I think there has been
23 testimony that these aquatics managers makes make
24 recommendations on blue ribbon fisheries. He may testify as
25 to whether he could--he would recommend areas of the Weber

1 drainage to the council for that designation.

2 MR. THOMAS: Thank you.

3 THE WITNESS: On a fisheries standpoint, the reach
4 of the Weber River above Rockport Reservoir up to the
5 confluence with Beaver Creek--

6 MR. YOUNG: Okay.

7 THE WITNESS: --could be a reach that has a fishery
8 on the fishery side of the question.

9 Q (By Mr. Young) Okay. So when you're talking about
10 above Rockport, Rockport Reservoir is just immediately south
11 of Wanship?

12 A That's correct.

13 Q And where the--there's a very small section of
14 yellow at that Rockport State Park on the upper end of the
15 reservoir?

16 A that is correct.

17 Q So you're saying from that point up to the point
18 where the Weber joins Beaver Creek?

19 A Yes.

20 Q Okay. I think--

21 A That's the stream coming down through Kamas.

22 Q Okay. And I think--would you come label that for
23 me, please? We didn't--

24 THE COURT: We neglected to label that one.

25 Q (By Mr. Young) Show us where Beaver Creek is.

1 Okay. And so do you know approximately how many
2 miles that would be?

3 A It would be approximately eight miles, maybe.

4 Q Okay. So eight miles from the Rockport State Park
5 up to the confluence with--

6 A Beaver--

7 Q --Beaver Creek.

8 Okay. What about above that, on Beaver Creek,
9 itself?

10 A We don't have a lot of information on Beaver Creek,
11 but I don't think the fish tends to be that way, you wouldn't
12 probably move that one forward just on the fish side of
13 things.

14 Q Okay. What about Lost Creek?

15 A Lost Creek above the reservoir would be another
16 reach, that could be considered blue ribbon (inaudible) based
17 on fish density.

18 Q What about below the reservoir?

19 A Below the reservoir contain--contains good numbers
20 of fish at times, but it does--it's pretty cyclic and right
21 now, it's not very--the numbers are quite low in that region,
22 where we monitor.

23 Q Okay. So because of cycles, things change over
24 time; is that correct?

25 A They do.

1 Q At the time that you gave your deposition a couple
2 years ago, I believe it was in September of 2013,--

3 A Okay.

4 Q --when you were asked that question, didn't you
5 designate the entire stretch of Lost Creek down to the
6 confluence of the Weber--

7 A I may have.

8 Q --that would qualify for that?

9 A I may have, but I--I thought I was (inaudible) to
10 the part above.

11 Q Okay. Any other areas?

12 A The east fork of Chalk Creek is another great
13 network of streams with a good fishery and the south fork of
14 Chalk Creek isn't quite on the same level but I think it's a
15 good fishery as well.

16 Q Well, this entire Chalk Creek area, as I understand,
17 is all private land?

18 A Yeah. It's--it has--I don't know that it has a
19 public line in it, maybe some--some several pieces, I don't
20 know.

21 Q Okay. And is it true that a lot of that area is
22 managed by private fishing clubs?

23 A There might be some private fishing clubs, but I'm
24 more familiar with the hunting in the Chalk Creek drainage and
25 that's what, I think, most of the people go into that area

1 for.

2 Q But as I understand it then, all of the east fork
3 portion of Chalk Creek drainage and possibly even south--south
4 fork drainage of the Chalk Creek would qualify at--for blue
5 ribbon fishery access--or for blue ribbon fishery designation?

6 A It could, based on the fisheries--

7 Q Well--

8 A --just the fisheries alone, but--

9 Q --excluding the concept of having public access as a
10 requirement, it meets the other basic requirements of--of
11 designation?

12 A I don't--I haven't been through a full designation
13 with the council, I don't know how they look at. Economics is
14 the one factor but it--it would aesthetically meet it and it
15 would, as far as the fishery and the habitat, correct.

16 Q Okay. One moment.

17 Mr. Thompson, could you return to the stand, please?

18 A Sure.

19 Q You have two books in front of you. Why don't you
20 take a look at Exhibit 5.2. They're numbered on the tabs.

21 A Okay.

22 Q The first page of 5.2, brings the first paragraph,
23 and this is--do you recognize this document? Have you seen
24 this before?

25 A Yes.

1 Q Okay. It lists four elements that indicates that
2 the status of the water would be blue ribbon status--
3 designation; right?

4 A Yes.

5 Q And the first one is fishing quality?

6 A Correct.

7 Q And Chalk Creek would meet that, as I understand
8 your testimony?

9 A Yes.

10 Q The next one is a quality outdoor experience.
11 You're familiar with it from at least a hunting aspect at
12 least, it meets that quali--that issue.

13 A Yes.

14 Q What about quality fish habitat?

15 A Yes.

16 Q And what about economic benefit?

17 A That was the part, I'm not sure how the council
18 views that (inaudible)

19 Q Okay. But other--otherwise, it meets those, as far
20 as you're concerned, it meets those qualities?

21 A Yes. I would say so.

22 Q And do you have any estimate as to the mileage of
23 the--of the streams that all comprise the Chalk Creek
24 drainage?

25 A They're both fairly large drainages with a lot of

1 different tributaries that have a good fishery in these, too.

2 I don't know the exact mileage in those two.

3 Q Okay. Just for relevance purposes, I think you said
4 that the stretch from the upper end of Rockport, from Rockport
5 State Park up to the confluence with Beaver--Beaver Creek was
6 approximately eight miles?

7 A It's an estimate.

8 Q Okay. Okay. Are there any others that would
9 qualify as blue ribbon fisheries but for the fact that they're
10 traversing private land?

11 A I don't think I, on a fisheries side of things,
12 would try to move anything else.

13 Q Okay. Looking at the Weber River drainage, I want
14 to ask you some questions about stretches of these streams
15 that you--the DWR has classified as warm water fisheries. Do
16 you know what I mean by that?

17 A I wasn't aware that we'd classified the Weber as a
18 warm water fishery.

19 Q Well, for example, once--once the river leaves the
20 city of Ogden and goes--

21 A Okay.

22 Q --and drains into the Great Salt Lake, would that
23 stretch from Ogden into the Salt--the Great Salt Lake be a
24 warm water fishery?

25 A It does have, seasonally have trout. It would be

1 probably borderline.

2 Q Okay. Are there any other stretches in this Weber
3 River drainage that would call in the classification of warm
4 water fishery?

5 A No.

6 Q Okay. Okay. Looking at the Bear River drainage and
7 the tributaries, you've already gone through and helped us out
8 by listing those out by name so we can generally know what
9 we're talking about. Can you identify for us the walk-in
10 access areas on the Bear River tributary--Bear River and its
11 tributaries?

12 A You don't have as much walk-in access in the Bear
13 River. Weber River's been a real focus of ours because of the
14 popular area of that fishery, but we do have a segment of the
15 population that does like to angle for cat fish and we've been
16 able to secure a couple access points on the Malad River.

17 Q Okay.

18 A Over near Tremonton.

19 Q Kind of para--paralleling I-15?

20 A That is correct.

21 And then there is a--I believe it's a walk-in access
22 piece right above Hyrum Reservoir on the Little Bear.

23 And there is a little piece that--

24 Q Where--is this--this is Cutler, isn't it?

25 A I believe so.

1 Q Where is Hyrum Reservoir?

2 A It's up between Hyrum and Paradise. That blank in
3 the stream down--

4 Q Oh, okay.

5 A Yeah. Right there.

6 Q Right here where you're written in Little Bear?

7 A Yeah.

8 Q So you say it's warm--warm water--excuse me. Walk-
9 in access below that?

10 A No. Just above the reservoir.

11 Q Just above it.

12 Would it be in this little park that's designated in
13 the yellow as public?

14 A It may be. I'm not sure, I can't recall on how that
15 got to be yellow initially, but it may be because of the walk-
16 in access. I'm not sure.

17 Q How many miles? How big is that walk-in access?

18 A I'm not entirely sure on that either. I--I would
19 say it's a mile or less, if I recall.

20 On the Malad, I believe the two pieces of property
21 there are close to three miles.

22 Q That's on the warm water fishery area?

23 A It is.

24 Q Okay. Any others?

25 A Not that I'm aware of.

1 Q Okay. Let's talk about identifying blue ribbon
2 fisheries in this drainage. Can you tell us where--number
3 one, are any of these fisheries designated as blue ribbon
4 fisheries?

5 A There are. Excluding lakes?

6 Q Let's--let's start and I'm talking about streams and
7 rivers again.

8 A Streams. Okay.

9 Logan River.

10 Q Okay. Logan River, you designated is this drainage
11 up here.

12 A That's correct.

13 Q Going up towards Bear Lake from Logan?

14 A Yes.

15 Q How many miles?

16 A It would be--it would be a guess, I don't know.
17 It's--that's a big drainage, though.

18 Q So you don't know how many miles of it is actually
19 blue ribbon?

20 A Oh. From Third Dam, so above the town of Ogden,
21 there's a series of three dams--or of Logan, excuse me,
22 there's a series of three dams and from that uppermost dam,
23 which is referred to as Third Dam, up to the Idaho border.
24 But I don't know how many miles that is.

25 Q Can you come and show us where Third Dam is?

1 A I can, approximately.

2 I believe this is the right-hand fork, so it's
3 downstream from there. This is, without any more detail on
4 the map, it would be a--I'd guess that it's probably somewhere
5 in here.

6 Q Okay. Do you want to just write in Third Dam?

7 Okay. So from that point, you're saying all the way
8 upstream for the entire--

9 A Yeah.

10 Q --lake?

11 A To the border of Idaho, yeah. That's my
12 understanding.

13 Q Okay. I need to back track for a second. I was
14 asking you about walk-in access a moment ago. I failed to ask
15 you about any easements. Are there any easements that DWR has
16 in the Bear River drainage for public access?

17 A I'm not aware of any easements. We have a piece of
18 state property, what we call a wildlife management area on the
19 east fork of the Little Bear right here, or yeah, east fork of
20 Little Bear below Porcupine.

21 Q Wildlife management?

22 A Yeah. It's a wildlife management area and that
23 would the yellow there.

24 Q Why don't--can you write in WL--

25 A WMA?

1 Q Yeah. Okay. And that's just this little stretch of
2 public land right there?

3 A Yeah.

4 Q Okay.

5 A We have--

6 Q And that was--where was that? Up above which
7 reservoir?

8 A It's below Porcupine Reservoir.

9 And then we have Hardware Ranch up the Blacksmith
10 Fork, which is another wildlife management area.

11 Q Okay. Where is--Blacksmith Fork is--

12 A This stream here.

13 Q Okay. Can you stand--there you go. All right.
14 Just so where the--where is the area on the Blacksmith Fork?

15 A It's up here towards the top, it's--it includes some
16 of Curtis Creek, Rock Creek and some of the main stem, I
17 believe, right in this area.

18 Q So basically, that's the southern fork coming in to
19 Blacksmith Fork; is that right? That you're talking about.

20 A Well, this would be the southern fork, right, so
21 it's these two forks, Rock Creek and Curtis Creek and some of
22 the Blacksmith Fork.

23 Q Okay. Why don't you write in Rock Creek and Curtis
24 Creek so we know where it is?

25 Do you know how many miles that is?

1 A I don't.

2 Q Okay. Any other blue ribbon fishery designations in
3 that tribu--in that drainage?

4 A We have covered the Logan River.

5 So the Blacksmith Fork River as well.

6 Q Okay. What stretch?

7 A It's in the can--from the canyon reach, I believe
8 it's Mile Post 10, which is near the mouth of the canyon up to
9 Hardware Ranch, so this reach here.

10 Q Okay. And what about--are you including in that the
11 portion of the Blacksmith Fork after the confluence with the
12 private sections?

13 A I believe the Council designated from Mile Post 10
14 up through Hardware Ranch as blue ribbon.

15 THE COURT: I'm sorry. I thought we were talking
16 about easements still.

17 MR. YOUNG: Sorry, Judge?

18 THE COURT: I thought we were talking about
19 easements still. Have we moved on to blue ribbon fisheries?

20 MR. YOUNG: I'm sorry. I just wanted that one--I
21 think that was the only easement you have; right, that we
22 talked about a moment ago?

23 THE WITNESS: I believe we did wrap up on easements.

24 MR. YOUNG: I did revert back to blue ribbon
25 fisheries, your Honor, I'm sorry.

1 THE COURT: All right. Then I--I need you to repeat
2 that then.

3 Where is--I've got blue ribbon fisheries, I have the
4 Logan River, above Logan, Third Dam up to the Idaho border.
5 Where was the one you just spoke of?

6 MR. YOUNG: They were--we're now on the Blacksmith's
7 Fork.

8 Q (By Mr. Young) And where did you designate blue
9 ribbon fisheries in that area?

10 A With basically, once you get into the canyon
11 reaches, I think it's around Mile Post 10, upstream to
12 Hardware Ranch.

13 Q Why don't you label Hardware Ranch for us?

14 Okay. Any--anything else on Blacksmith Fork?

15 A No. Not on Blacksmith.

16 Q Okay. Any other streams, stretches of stream in the
17 Bear River drainage that have been designated as blue ribbon
18 fisheries?

19 A It's my understanding that the council recently
20 designated high Uinta streams and lakes above, I think it--the
21 designation was 8,500 feet. They were going back and forth
22 between 8,500 and 9,000 feet in elevation.

23 Q And there you've talking about the upper Bear River?

24 A Yeah. So some of these streams may be within the--
25 would probably fall out in that designation.

1 Q Okay. But you're not sure whether that's been done
2 or not?

3 A They were discussing it and it hasn't been posted on
4 our website so I don't know if it is official.

5 Q Okay.

6 A I think they're moving forward with that.

7 Q Okay. Is that everything?

8 A That would be it, yeah.

9 Q Okay. Could you designate for us which stretches,
10 which streams would be classified as warm water fisheries?
11 Why don't we start on the left side and we'll work our way
12 over?

13 A The Malad River, most likely, I mean, I don't know
14 of any trout in this stream. In the Bear River, below Cutler
15 Reservoir, there are--while there are a few trout right below
16 the reservoir, it's primarily warm water, channel cat fish,
17 walleye, maybe bass.

18 The Bear River up in Cache Valley, we don't know
19 much about this stream, I think there are still some trout in
20 it but it has some of those same warm water species, but we
21 primarily would say Cutler Reservoir downstream.

22 Q What about the Cub?

23 A The lower--well, higher up in the Cub, we have--in
24 Idaho, there's really great populations of Bonneville
25 cutthroat and we're still not entirely sure on whether they

1 come down and over winter in this reach.

2 Q Okay. So do you have warm water species in the Cub?

3 A There would be some in the lower reaches.

4 Q As well as in the Bear above Cutler?

5 A Yes.

6 Q Any other warm water designations?

7 A No.

8 Q Okay. Thank you.

9 Okay. So I believe we've now designated the walk-in
10 access areas and the blue ribbon fishery areas in the Logan
11 and in the Weber as well; is that right?

12 A Yes.

13 Q Are there any stretches of streams that are in red,
14 or private--traversing private property, in the Bear River and
15 its tributaries that would be designated as blue ribbon trout-
16 -blue ribbon fisheries but for the fact that there's no public
17 access?

18 A In Woodruff Creek above Woodruff Reservoir, that
19 reach has a unique species, Bonneville cutthroat trout and
20 good population densities.

21 Q Okay. And Woodruff Creek joins the--also joins the-
22 -goes down and joins, what, you said the Bear?

23 A Yes.

24 Q Okay. And are you talking about the upper high
25 country stretches or are you talking about the lower areas

1 A The upper stretch.

2 Q I'm sorry?

3 A The upper reaches.

4 Q The upper reaches up here?

5 A Yes.

6 Q So those areas marked as private in that area on
7 Woodruff--on the upper portions of Woodruff Creek would--you
8 would classify or believe they'd qualify for blue river--blue
9 ribbon fisheries designation?

10 A On a fisheries standpoint, yes.

11 Q Okay. Any others?

12 A Not that I'm aware of, no.

13 Well, the upper--no, 'cause the Upper Bear does have
14 the public land, so...

15 Q What about the portions of the Upper Bear that are
16 designated as private, in red?

17 A The best fishing in the Upper Bear is for the most
18 part, at least the fish density wise is what's in the yellow.
19 There are some decent fisheries down lower in Millcreek, which
20 is the tributary on the far right and in the west fork of the
21 Bear. But the Bear River itself, the densities are quite--
22 quite low.

23 Q So are you saying that those tributaries would fall
24 in a blue ribbon quali--qualification?

25 A I don't know--I don't know that much about them,

1 about those streams.

2 Q Okay. This area up around Woodruff Creek and then
3 Beaver Creek, I think you said, is this generally what you
4 call the Otter Creek or is Otter Creek the one to the south?

5 A Actually, Otter Creek is further to the north. I
6 believe I labeled it.

7 Q Oh, okay. What is this stream, this section coming
8 in from the south?

9 A That is Salareas Creek, it's an intermittent stream
10 that runs through Deseret Land and Livestock. Intermittent, I
11 mean, it has probably some seasonal--well, I don't know if
12 intermittent's the right word, it has really low fish
13 densities.

14 Q Really low fish densities?

15 A Really very low, yeah.

16 MR. YOUNG: Your Honor, could we have a few moments?

17 THE COURT: Sure. Do you need a recess or not?

18 MR. YOUNG: Five minutes or so.

19 THE COURT: Okay. Court's in recess.

20 (Recess)

21 THE COURT: We'll go back on the record in the
22 matter of Utah Stream Access Coalition vs. VR Acquisitions.
23 The witness is on the stand, the parties are present, counsel
24 are present.

25 Go ahead.

1 MR. YOUNG: Thank you, your Honor.

2 Q (By Mr. Young) Mr. Thompson, we were--I just want
3 to clarify a couple of things on the Blacksmith Fork. I think
4 you were telling me that in the area around Mountain Green,
5 there was a section of--of blue ribbon fishery designation; is
6 that right?

7 A You said Blacksmith Fork. You're talking Weber
8 River?

9 The Blacksmith Fork's up in Logan.

10 Q I'm sorry. I was talking about the Weber. You
11 indicated that there was a section by Morgan that was
12 designated as blue ribbon fisheries?

13 A From Mountain Green up to Stoddard, so it--it stops
14 short of the town of Morgan.

15 Q Okay. Has that section been closed to the public?

16 A There are reaches that have public access in that
17 reach.

18 Q Okay. But has a section of the river been--blue
19 ribbon fishery designation been closed to the public?

20 A Recently, there was a closure in Mountain Green.
21 One landowner decided to close a piece of the--the river
22 there.

23 Q Okay. And that--how long--how long of a stretch was
24 that?

25 A Probably about a mile.

1 Q Okay. Do you know why it was closed?

2 A The son, I think, took ownership of the property and
3 wanted to have a good fishery for his family.

4 Q Okay. Are there other blue ribbon fishery
5 designations in the Weber that have been closed to the public?

6 A That's the only one that I'm aware of.

7 Q Okay. Now, we were talking about blue ribbon
8 fishery designations on private property and looking at the
9 Weber River drainage, do you know where the Thousand Peak area
10 is?

11 A I believe Thousand Peaks is in the Upper Weber.

12 Q Okay. And would that be on the section above Kamas
13 or on the section below--

14 A That section you're on right there.

15 Q East. Is that section in the Thousand Peaks area
16 designated as a blue ribbon fishery?

17 A It is not.

18 Q Is that because there's no public access to it?

19 A I don't know much about that reach 'cause I've
20 naturally in my 18 years have never sampled it. We sample
21 downstream of Thousand Peaks and the fishery isn't of
22 sufficient quality to where I'd want to move it forward from
23 below there.

24 Q So the Thousand Peaks area is a--is a private
25 fishing area.

1 A It is, uh-huh (affirmative).

2 Q But the DWR doesn't have any information about
3 whether it would qualify as a blue ribbon fishery?

4 A We don't have any fisheries information from that
5 piece of river.

6 Q On the Little Bear, is there any section of the
7 Little Bear that is qualified as warm water fishery?

8 A I don't believe so.

9 Q Okay. Then goes back to the Blacksmith's Fork. On
10 the lower Blacksmith's Fork, is there any section that you
11 described as being a blue ribbon fishery, where it would
12 qualify as a blue ribbon fishery that's on the private
13 section?

14 A So we're back on the Blacksmith's Fork in Logan?

15 Q Right.

16 A So we said that blue ribbon fishery was from the
17 mouth of the canyon up through Hardware Ranch and there is
18 private property in that reach.

19 Q Okay. But it's designated blue ribbon fishery, the
20 entire reach?

21 A For the most part, yes.

22 Q Okay. And if we could have that identified. So
23 you're talking about the area from the mouth all the way to
24 the top?

25 A Yeah. The one stream you just went on was the left

1 hand fork, but yeah, the main stem pretty much to the top, the
2 Hardware Ranch.

3 Q Okay. That area, the southern part?

4 A Yeah.

5 Q Okay.

6 A On the main stem, not--I don't believe that includes
7 tributaries.

8 Q Okay. What about the south fork of the Ogden River?
9 Are there sections of that that are designated as blue ribbon
10 fishery?

11 A Yes. From above Pineview Reservoir up. I'm not
12 entirely sure on the--the designation where it starts and
13 stops, but my understanding is it's above Pineview Reservoir
14 up to Memorial Park.

15 Q Okay. And that's this section right through here?

16 A Yes.

17 Q Now, you're talking about the section, this is the
18 south fork of the Ogden River that you've labeled going--that
19 feeds into the--to the southern arm of Causey Reservoir;
20 correct?

21 A Yes.

22 Q Okay. And you say the designation for blue ribbon
23 fishery is that entire drainage of the--of that south fork?

24 A It would go up to Memorial Park, which is below
25 Causey Reservoir, so just the main stem there, not those

1 tributaries above it.

2 Q Okay. Would--why don't you come show us where
3 Causey Reservoir is?

4 Okay. So it's blue ribbon fishery downstream of
5 Causey Reservoir?

6 A Yes.

7 Q What about upstream?

8 A No.

9 Q And is it downstream from Causey Reservoir all the
10 way to where it joins--comes into Pineview Reservoir?

11 A I don't know if it goes all the way to Pineview
12 Reservoir.

13 Q Would all of that stretch of stream qualify as blue
14 ribbon fishery, in your estimation?

15 A Yeah. Like I said, I don't know what was designated
16 but as you get closer to Pineview, water temperatures get a
17 little warmer and your fish densities do go down as you get
18 closer to Pineview.

19 Q Pineview's one of those middle lakes with some warm
20 water species and some cold water species?

21 A It's primarily warm water now. Water quality has
22 gotten such that we don't manage for trout in Pineview
23 Reservoir.

24 Q Okay. Thank you.

25 THE COURT: And did you say that that stretch is--is

1 designated as a blue ribbon fishery or you would recommend it
2 as one?

3 THE WITNESS: It is designated.

4 Q (By Mr. Young) Okay. With respect to the Weber
5 River drainage there, as I understand your testimony, you have
6 a total of--of approximately ten miles of walk-in access and
7 easements in that--in the entire drainage; is that right?

8 A That would be just walk-in access.

9 Q Okay. And how many in easements?

10 A I don't have that number, but we have a fair number
11 of wildlife management areas, easements and leases as well.

12 Q Okay. Would that--when you say a fair amount--

13 A I would think it is at least as much as the walk-in
14 access, but I'm not entirely sure on the stream miles.

15 Q So if it's as much as the walk-in access, you've got
16 20 miles of walk-in access and easements in the entire
17 drainage.

18 A Approximately, yes.

19 Q When I say you, I mean the DWR.

20 A Right.

21 Q Do you have any estimate of the total miles of blue
22 ribbon fishery designations on the--in the entire Weber River
23 drainage?

24 A Estimate would be 25-30 miles.

25 Q Okay. In describing the northern region, when you

1 started your testimony, you were talking about the area of Box
2 Elder County being included all the way out to the border with
3 Nevada and Idaho; is that right?

4 A That is correct.

5 Q And up in the very far northwestern part of the
6 State, there's a few little streams that are designated. Is
7 that what's--what you'd call the Raft River range area?

8 A The majority of that is the Raft River, but there
9 are a few streams over in Goose Creek drainage as well.

10 Q Okay. As I understand your testimony, at least at
11 the time of your deposition, there really hasn't been any DWR
12 involvement in that area for 16 years.

13 A We hadn't looked at that area until the early 2000s,
14 but we have been active in sampling out there since the early
15 2000s.

16 Q How many miles of priv--of public access streams are
17 out in that area?

18 A I don't know the total number. The majority of the
19 public access would be on the north side of the Raft Rivers
20 and the Sawtooth National Forest, but there is some--little
21 pieces out there as well.

22 Q So would that mean that access to those areas is
23 through Idaho?

24 A You'd need to go through Idaho to come back into
25 Utah.

1 Q Okay.

2 A But the Raft--the Raft Rivers are a part of the
3 Sawtooth National Forest.

4 Q Right. Is--are most of the areas or streams in that
5 little area on private property?

6 A As far as the number of streams, probably--

7 Q I'd say mileage.

8 A Mileage?

9 Q Yes.

10 A I wouldn't--well, on the north--on the whole Raft
11 River drainage?

12 Q No. I'm talking about--

13 A Just the north side?

14 Q --what you have listed in the--on the map.

15 A Well, there's--there's a difference between the
16 north side where we have forest property and the south side,
17 which is pretty much privately owned.

18 Q Okay.

19 A Do you want me to include the whole--

20 Sure.

21 A --mountain range?

22 Q Let me--let me back up. Everything south of the
23 Raft River Range is private?

24 A Everything that flows off the Raft River Range
25 south is private with a few pieces of the yellow on there and

1 in--on those stream.

2 Q Okay. Is the--does the public have access to that
3 property to the stream or is it landlocked?

4 A It is landlocked.

5 Q By private property?

6 A Yes.

7 Q Okay. Are there any walk-in access agreements with
8 the Division in that area?

9 A Not that I'm aware of.

10 Q Are there any blue ribbon fishery designations in
11 that area?

12 A No.

13 Q Okay. With respect to the Weber River drainage, you
14 said there's approximately 20 miles of--of--25 to 30 miles of
15 blue ribbon fishery. How much of that is actually publicly-
16 accessible?

17 A I don't know. The--I mean, that would be an
18 educated guess, but if--

19 Q If it's educated, I'd like to hear it.

20 A Okay. Twelve to maybe half.

21 Q So half of--half of the blue ribbon fishery
22 designations in the Weber River drainage is accessible to--
23 accessible to the public?

24 A Yes.

25 Q You also have flat waters, lengths of the reservoirs

1 that are designated as blue ribbon fisheries in your region?

2 A Yes.

3 Q Could you give us the names of the principal ones?

4 A Bear Lake and Pineview Reservoir.

5 Q Is that the only two?

6 A Only two that have been designated.

7 Q Okay. Are there any flat waters, lakes or
8 reservoirs in your region that would be designated as blue
9 ribbon fisheries but are not because of lack of access to the
10 private property restrictions?

11 A I don't believe so.

12 Q Now, with respect to access generally in your
13 region, I want to ask you some questions about actual physical
14 access. Is it easier to--for direct physical access,
15 irrespective of whether it's private or public property, just
16 physical access, being able to get to the river or the stream,
17 in areas where you have infrastructure and roads and bridges
18 and things of that nature as opposed to the upper mountain
19 reaches?

20 A Yeah. I would say that would be a fair statement.

21 Q Okay. These lower are--basically is less strenuous
22 and less--less difficult to actually get in the river?

23 A Generally.

24 Q Okay. Is it generally true that the upper reaches
25 are--are also quite limited because of seasonal access as

1 opposed to the lower reaches? For example, by reason of snow
2 and ice in the winter time?

3 A I guess it depends on what you'd consider the upper
4 reaches, like the Uinta Mountains? Yes.

5 Q Okay. What about the areas up in the--for example,
6 the east side of the Wasatch?

7 A Yeah. Those--

8 Q That area.

9 A --those little tributaries would--would definitely
10 freeze and snow in.

11 Q Okay. And what about, for example, up in the Logan
12 River area.

13 A Yes. That would also freeze and snow in.

14 Q So generally, the higher mountain areas, seasonal
15 access becomes quite limited.

16 A For angling.

17 Q And it's also true, isn't it, that in the lower
18 reaches down in the valleys that most of the access, most of
19 those streams, are flowing over private property with
20 restricted access?

21 A We have a secured, fair number of areas with access
22 but the remainder of that is private, yeah. Yes.

23 Q Well, fair amount of areas, I think you've defined a
24 moment ago as being approximately 20 miles.

25 A And we've worked hard to get to those.

1 Q I'm sure you have. And everybody appreciates it.

2 Are there also areas where you have public access up
3 in the upper reaches but as they flow down, they go into
4 private property that therefore blocks access to get up into
5 the upper reaches?

6 A I'm thinking.

7 Q In other words, for access purposes, they're almost
8 landlocked to get into the public area?

9 A Most of our forest streams, there is some level of
10 access into them. I can't think of any outside of those
11 pieces of land, of BLM land down the Rafts, on the south side
12 of the Rafts.

13 Q Okay. You're familiar with H.B. 141?

14 A Yes.

15 Q Let me ask you a couple--just a few questions about
16 that. Is it your understanding that the public has access to
17 some of the streams and rivers that flow across private land
18 if they can float on it and that water, that stream or that
19 river has sufficient width, depth and flow to allow free
20 passage of a vessel?

21 A It is my understanding that you can float across
22 some--in some rivers.

23 Q And as I understand it, on the website, DWR tells
24 floaters that they may not stop in the course of floating.

25 A You can't stop to fish, to angle, but I believe you

1 can get out and navigate an obstacle.

2 Q Portage around a dangerous area?

3 A Yes.

4 Q Okay. Any other reason?

5 A I would assume if you're dragging your craft, you
6 need to get through that obstacle.

7 Q Well, if you're trying to get over a shallow ripple
8 as opposed to a dangerous obstacle, that section would really
9 be classified as not having sufficient flows, wouldn't it?

10 MR. THOMAS: Objection, your Honor. Calls for legal
11 conclusion and foundation. He's not in enforcement, your
12 Honor.

13 MR. YOUNG: I'd be happy to get some more
14 foundation, your Honor.

15 THE COURT: Okay. Sustained as to foundation.
16 Go ahead.

17 Q (By Mr. Young) Have you floated sections of some of
18 the streams in your region?

19 A For work, yes.

20 Q What are you--and describe for us what you do by way
21 of work?

22 A When we sample the main stem, Weber River, we float
23 a raft, a 14-foot raft down the river, we have a platform in
24 the front and we put electricity into the water which stuns
25 the fish, allows us to capture those and view a--get an idea

1 of the densities of fish and the species in certain reaches.

2 Q Okay. And a 14-foot raft is a fairly large vessel
3 as compared to the size of the river, isn't it?

4 A It is. It's--it is.

5 Q Now, and it would require, in many instances, that
6 you're actually having to walk that raft to certain sections
7 of the stream to get down to do your work.

8 A There are times when we do need to get out and walk
9 the raft. We try to float at certain flows that are high
10 enough to allow us better--

11 Q Okay.

12 A --floating capabilities.

13 Q Is there a typical type of--time of year that you
14 perform these surveys?

15 A Not necessarily. We try to perform them when we
16 have two to 300 cfs in the river.

17 Q Okay. So you're--you're trying to make sure that
18 you can float it at the time where you can have enough volume
19 and flow going down the stream, you can float a 14-foot raft?

20 A With--with as much--yeah, as easily as possible with
21 not much dragging.

22 Q Okay. But even during that period of time, there
23 are areas where you'd have to get out and drag over a shallow
24 ripple?

25 A Not necessarily the ripples, but at least some

1 irrigation diversions and obstacles.

2 Q Okay. You've actually done that types of work on
3 the Weber River, haven't you?

4 A Yes.

5 Q What time of year did you perform that work?

6 A We've done it from January to November

7 Q Okay.

8 A Or, I'm sorry. February to November. But if we get
9 the flows we want, we obviously go in the summer when it's
10 nicer conditions.

11 Q When you're floating at those times, are you
12 primarily floating below the reservoirs? For example, from
13 Rockport down.

14 A I've floated from above Rockport where Beaver Creek
15 comes in pretty all the way downstream to the confluence with
16 the Ogden River excluding reservoirs.

17 Q Okay.

18 A So, I mean, above and below.

19 Q So have you ever fished while you were floating
20 these sections?

21 A No. We were working.

22 Q Have you ever floated those stretches when you were
23 not working? For fishing purposes?

24 A Not for angling, no.

25 Q Have you actually floated it for any other purpose,

1 besides work?

2 A Yeah. I've been a tube for different reaches,
3 especially up by Taggart, a few years ago.

4 Q Up by where?

5 A Taggart. It's a pretty popular area for kayakers,
6 tubers and rafters.

7 Q Okay. That's in the canyon--

8 A Uh-huh (affirmative).

9 Q --below Echo?

10 A Yes.

11 Q So it's about, what, a third of the way down the
12 canyon?

13 A Actually start below--just below Henefer, above the
14 canyon and go down to Taggart, so it's maybe five miles.

15 Q That's kind of the--the kayaking area that everybody
16 tries, isn't it?

17 A Well, it's more rafting companies and tubers, at
18 really high flows, the kayakers like that reach.

19 Q Okay. And when you have low flows, can you--can you
20 float it?

21 A No.

22 Q So when you were doing your work, starting from the
23 confluence of Beaver Creek down to Rockport, that's private
24 land, isn't it?

25 A It is, above Rockport.

1 Q Have you seen any--while you were there, did you
2 observe any fishermen floating that section of the river?

3 A We did that day, there were two floating, in kick
4 boats and fishing.

5 Q And I think you indicated in your deposition that
6 those two people had permission from the landowner?

7 A That is correct.

8 Q Okay. And have you ever seen anyone else floating?

9 A I've seen a few anglers in that area, by (inaudible)
10 and Taggart that were in a tube and angling and then down near
11 the town of Uintah, but very few that have been floating to
12 angle.

13 Q Okay. What about the section from Rockport to Echo?

14 A I've only been on it twice and we saw two anglers
15 that day.

16 Q Okay. Were they floating?

17 A Yes.

18 Q And fishing?

19 A Yeah. I don't know how much they were fishing out
20 of their craft, it was more than getting to a location and
21 stopping and--and walking--

22 Q Okay.

23 A --and then coming back and floating some more.

24 Q So they floated to a section that allowed public
25 access to get on the bed of the stream?

1 A well, if they had permission, I--I would assume they
2 could have--

3 Q Or they had permission?

4 A They accessed it through the landowner.

5 Q And you've seen two people do that?

6 A The one time I floated that reach, there were two
7 people in--

8 Q What time of the--

9 A --kick boats.

10 Q --year was that?

11 A Probably June.

12 Q So irrigation season?

13 A Yeah.

14 Q Have you ever observed anyone floating and fishing
15 any of the Chalk Creek sections that we talked about?

16 A No.

17 Q What about Lost Creek?

18 A No.

19 Q East Canyon Creek?

20 A No.

21 Q Beaver Creek?

22 A No.

23 Q Echo Creek?

24 A No.

25 Q What about south fork of the Ogden?

1 A I have not.

2 Q What about Cottonwood Creek?

3 A No.

4 Q What about the Upper Weber?

5 A That is the reach that I was describing, the two
6 with the kick boat, that's what I call the Upper Weber, above
7 Rockport.

8 Q Okay. Well, I--I'm sorry. I was looking at the
9 designation of being above the confluence with Beaver Creek.

10 A Okay. I have not.

11 Q Okay. What about floating any of the stretches of
12 stream on the Bear River, have you done the same type of work
13 on the Bear River?

14 A I have. In Rich County and in--below Cutler
15 Reservoir.

16 Q Okay. When you say in Rich County, you're talking
17 about the area over in the Big Creek, Wood Creek--oh, Woodruff
18 Creek area, where it joins to Bear River, that section?

19 A Just in the Bear River, but yes, we floated--

20 Q Okay.

21 A --a part, half of that reach probably.

22 Q From what point to what point?

23 A Around the town of Woodruff to near the town of
24 Randolph and then a little bit down towards whatever highway
25 that is that crosses into Wyoming.

1 Q Highway 30?

2 A Yeah.

3 Q Okay. So when you say from Woodruff, it's probably-
4 -it's approximately where Highway 39 comes in?

5 A Yeah. It's where that--Woodruff Creek would come in
6 right there, where the Bear River makes that big bend to the
7 north.

8 Q Okay. And you've floated from there down to
9 Randolph?

10 A Randolph Creek, yeah.

11 Q And--

12 A Which is near where Big Creek comes in.

13 Q Right here?

14 A No. I think it's further up by the other stream.
15 Big Creek.

16 Q So you went past Highway 30 that's coming in?

17 A No. We accessed a little bit by Highway 30, but
18 where we stopped on that other float was at Big Creek,
19 Randolph, which is a little further upstream than what you'd
20 indicated.

21 Q Okay. Were you able to freely float that section of
22 that river or was it difficult?

23 A It was quite low that day. It was difficult.

24 Q So were you having to drag the raft down over
25 ripples?

1 A Yeah.

2 Q And that's all just-again, just private land;
3 correct?

4 A It is.

5 Q Could you see--have you ever seen anyone float
6 fishing that stretch of river?

7 A I have not.

8 Q Okay. What about the Logan River? Say from Third
9 Dan all the way up to the Idaho border. Have you ever seen
10 anyone float fishing that section of river?

11 A I have not.

12 Q And what about the south fork of the Ogden, have you
13 seen anyone float fishing that section?

14 A Are you referring to the south fork of the Ogden
15 or--

16 Q I'm sorry, I've got the wrong map.
17 The south fork of the Ogden.

18 A No. I--

19 Q Have you ever seen anyone float fishing that
20 section?

21 A I have not.

22 Q Have you seen anyone floating the Ogden River above
23 the mouth of the canyon, and fishing?

24 A No.

25 Q What about down in the valley?

1 A I've seen tubers and kayakers but I haven't
2 witnessed anybody fishing. I'd say float.

3 Q Is there--that section of the river down there have
4 a lot of obstacles that would prevent float fishing?

5 A You would definitely need to be prepared for
6 obstacles.

7 Q Such as overhanging--

8 A Just overhanging sweeps, yeah.

9 Q What is a sweep?

10 A Sweep is just big branches that come out and can
11 knock you out of your craft.

12 Q Even a fallen tree that's laying across the river?

13 A Yeah. Those are even more obstacles than a sweep
14 are.

15 Q Same question with respect to Blacksmith's Fork.
16 Have you ever seen anyone float fishing the Blacksmith's Fork?

17 A I have not.

18 Q Is there a particular window of time during the year
19 on most of these rivers and streams that is the window that
20 would allow, in your estimation, someone to float and fish
21 without having to drag on the bottom of the stream? I'm not
22 talking about getting around obstacles, but just being able
23 to--to float fish it without dragging on the bottom of the
24 stream. Is there a particular window of time generally, of
25 the year that you could do that?

1 A On an average run-off year, it would be pre-peak
2 run-off and post-peak run-off, when flows aren't too high to
3 be dangerous.

4 Q Okay. So pre-run-off is--

5 A March/April.

6 Q --is in spring before everything starts to melt?

7 A Well, you get some melting, which increases water
8 levels to the point where you--

9 Q Right.

10 A --float. And then post run-off, one that peak run-
11 off is over.

12 Q Okay.

13 A And it's come down again to levels that aren't
14 dangerous but there's enough water to float.

15 Q But after the peak run-off has occurred and it
16 starts to come down, that's when you also start the irrigation
17 season, isn't it?

18 A It is.

19 Q And a lot of these rivers and streams have
20 irrigation diversions, don't they?

21 A The Weber has many.

22 Q Many taking water out of the stream?

23 A Yes.

24 Q How would you describe the fishing pressure on the
25 Weber?

1 A My understanding is it's the third most utilized
2 stream fishery in the State of Utah.

3 Q I think you described that in your deposition as
4 being heavy pressure, didn't you?

5 A Yes.

6 Q And in looking at the Exhibit 3.3 on the Weber River
7 drainage, I'm not going to estimate, but it is by and large
8 marked in red as traversing private property, isn't it?

9 A By and large.

10 Q Do you fish?

11 A I do.

12 Q What type of fishing do you do?

13 A Primarily fly fishing, but I do all kinds.

14 Q Where do you principally try to go and fly fish?

15 A I like to go all over but the Weber is my home
16 river.

17 Q Okay. Do you like to float fish?

18 A I do some float fishing. I do still like to be on
19 my feet.

20 Q Where do you do--where do you go to float fish?

21 A I've floated south fork of the Snake and the Green
22 below Flaming Gorge and Fontanelle.

23 Q Okay. Any other places?

24 A Not yet.

25 Q Do you go to the Green and the Snake River in Idaho

1 to float, because you have streams that are large enough to
2 allow you to float fish?

3 A Those are larger than what we have in northern Utah
4 and it makes it easier to float.

5 Q I take it that in performing your duties, you deal
6 with the public quite a bit?

7 A Yes.

8 Q In your experience, are you aware of any complaints
9 or concerns that have been voiced by anglers regarding access
10 to flat water fisheries that have been restricted by reason of
11 private property access?

12 A I don't know that I've received complaints.

13 Q Okay. Besides the warm water fisheries that you
14 designated in your region a moment ago, I think you said it
15 was--remind me if you did, I think you said two of them.

16 A Pineview Reservoir--are you talking flat waters?

17 Q Right.

18 A Pineview Reservoir, Willard Bay and Cutler
19 Reservoir, Newton Reservoir. Those would be the four that
20 would be a hund--pretty much managed just as warm water.

21 Q Okay. What are the other major warm water
22 fisheries in the State of Utah?

23 A So there's more as you get further south. So Lake
24 Powell and--and reservoirs down south would be all warm water.

25 Q Okay.

1 A There's some cold water reservoirs there as well,
2 though.

3 Q What about rivers?

4 A Colorado, Green, those rivers.

5 Q The Green, when it comes back into Utah from
6 Colorado?

7 A Right. After the--after the Yampa confluence.

8 Q Okay. And then the Colorado River itself, down
9 south?

10 A Yeah.

11 Q And the White River?

12 A White River would be warm water.

13 Q Okay. And Utah Lake, is that a warm river fishery--
14 or a warm water fishery?

15 A It is at present. It wasn't historically.

16 Q Yuba Reservoir?

17 A Yuba. These are outside of my region, but--

18 Q I know. I'm just asking--

19 A --yeah, Yuba is--I think they have stocked trout in
20 there, but--in the recent past, but I don't know how--I don't--
21 -I don't think they do that anymore.

22 Q Okay. Going back to H.B. 141, prior to that and
23 after the Conatser decision, you know what I mean--referring
24 to when I say that?

25 A Yes.

1 Q After the Conatser decision, did you observe people
2 fish--anglers going out and fishing these areas that--crossing
3 private properties?

4 A Yes.

5 Q On the Weber River?

6 A Yes.

7 Q On the Logan?

8 A Not sure on the Logan.

9 Q Okay. What about the south fork of the Ogden?

10 A Yes.

11 Q What about Chalk Creek?

12 A Not aware.

13 Q You just weren't up there?

14 A Wasn't up there.

15 Q What about Beaver Creek?

16 A Again, I wasn't aware, wasn't there.

17 Q With respect to the areas that you are aware, you
18 said the Weber River. Are you talking about, say, from the
19 confluence of the Weber Creek down to the confluence of Lost
20 Creek, for example?

21 A Really all the way down--

22 Q All the way?

23 A --the Weber. Yeah.

24 Q What about areas like Lost Creek?

25 A I didn't see people doing it but I--I've heard, you

1 know, that people fished--

2 Q Well, you've--

3 A --East Canyon, Lost Creek and those major
4 tributaries.

5 Q Yeah. All of them were big fishing.

6 A Uh-huh (affirmative).

7 Q Okay. Now, after the passage of H.B. 4--141, did
8 you have any complaints registered with you or the people
9 working under you from the public being excluded from these
10 places they had been fishing?

11 A Yes, they were disappointed.

12 Q And what--generally, what would they say?

13 A We want to have access back into those areas.

14 MR. YOUNG: Can I have just a moment, your Honor?

15 Q (By Mr. Young) You were talking about times of the
16 year when it was eas--when it's easier to float certain
17 sections of some of these rivers. And is it easier to fish
18 while floating during those periods of time?

19 A Well, it would be easier because--just 'cause you're
20 not having to haul your craft over the stream bottom
21 continuously.

22 Q Well, with respect to these rivers and streams in
23 the northern region, is it feasible generally to effectively
24 float and fish on all these various streams that we've talked
25 about?

1 A The tributaries that you've mentioned are too small
2 in my mind. The main stem Weber, you could, but it still is
3 pretty tight if you were going to try to fish out of a craft.

4 Q And so all of the tributary streams we've discussed
5 would fall into that category?

6 A It would be difficult. I'm not saying you couldn't
7 do it but it would be difficult.

8 Q Okay. And if you could do it, it's going to be in a
9 very narrow window of the year, isn't it? Time-wise.

10 A Yeah. It won't be the entire year, it will be when
11 you have adequate water, which is around, before and after
12 run-off.

13 Q Okay.

14 A There are times where irrigation season actually
15 puts more water into the Weber and allows people to float, you
16 know.

17 Q Further down?

18 A Further down, yeah, like below Echo.

19 Q But upstream is where all the water is being taken
20 out?

21 A It is.

22 Q During this period of time between the Conatser
23 decision and passage of 141, did you observe people going in
24 and--anglers going in and be--and starting to fish the private
25 areas of the Blacksmith's Fork?

1 A I had heard that they were. I didn't witness it.

2 Q Okay. When you heard that they were, you were
3 getting this information from the biologists that work under
4 you?

5 A Other anglers that are just--

6 Q Other anglers?

7 A Other anglers primarily, yeah.

8 Q So were they calling you to talk about where to go
9 or were they just--

10 A Yeah. Or--

11 Q --telling you that's where they'd been?

12 A They were calling and--and calling that they had
13 been fishing in Blacksmith Fork and getting some tips and
14 they'd seen other people, you know, a lot of people were
15 calling in, still confused about the ruling and where they can
16 go and fish.

17 MR. THOMAS: Objection. Your Honor, I'd like to
18 object on hearsay.

19 MR. YOUNG: Your Honor, it appears to me from his
20 testimony that part of his duties is to have direct contact
21 with the public and take comments and gather information
22 generally in his--in performing his duties so that he can then
23 take action and make reports with respect to the, you know,
24 performing his job.

25 THE COURT: Well, why are you offering it? If it's

1 offered for its truth, I think it is hearsay.

2 MR. YOUNG: I'm simply offering it for the fact that
3 the statement was made.

4 THE COURT: And that's relevant because?

5 MR. YOUNG: I think it's relevant, your Honor,
6 because it demonstrates that once these streams were open, the
7 anglers immediately during that period of time, started going
8 out and fishing these areas, which is going to go to the
9 surveys that we have entered into evidence with respect to
10 some of the findings and conclusions reached in those surveys.
11 So I think it's directly relevant to that.

12 THE COURT: If it's--but if it's offered to show
13 that the anglers were actually there, that's for its truth;
14 right?

15 MR. YOUNG: Yes.

16 THE COURT: Sustained.

17 Q (By Mr. Young) Okay. I think one last question,
18 then I'll be done. You said that it's generally difficult to
19 try and float and fish most of these tributaries and streams;
20 correct?

21 A Yes.

22 Q And where you are not allowed to stop while you're
23 floating and fishing, does that make it ever more difficult?

24 A Yeah. It--it would, 'cause there's some areas that
25 you'd want to spend some more time in that you would pass

1 through pretty quick.

2 Q And you can't stop without touching the bed of a
3 stream; correct?

4 A Not to angle is my understanding.

5 MR. YOUNG: Thank you, your Honor. I'll pass the
6 witness.

7 THE COURT: You may cross.

8 MR. THOMAS: Good morning, Mr. Thompson.

9 THE WITNESS: Good morning.

10 CROSS-EXAMINATION

11 BY MR. THOMAS:

12 Q Do you only fly fish for trout?

13 A No. I fly fish for most species.

14 Q Most species. Including warm water species?

15 A Yes.

16 Q And you do that in your region?

17 A I do it in my region, in the State, anywhere I can.

18 Q And the same with, when you fish for cold water
19 species, you do that in your region and all over the State?

20 A Yes. And wherever I can.

21 Q In your book, one of those books, could you turn to
22 Tab 25. And maybe there are two volumes, do you have it
23 there?

24 A I do.

25 Q Can you tell the Court what this is?

1 A This is correspondence on putting this--the map
2 together.

3 Q So this e-mail was written by you; correct?

4 A Yes.

5 Q Okay. Can you just generally tell us what the
6 content of that e-mail is? I don't want you to go through
7 every stream and river.

8 A So in 2013, we were asked to look at the map again
9 and see if there were any streams that were missed in previous
10 revisions on the map and--and I was indicating that there were
11 some.

12 Q Okay. Do you know why those streams were missed?

13 A I think it was oversight.

14 Q Do you think you've now identified every fishable
15 stream in the--in your region?

16 A I wouldn't say I've identified every. I don't,
17 there's probably some I don't even know that have a fishery
18 that are still out there, but yes, I mean, we're--definitely
19 have most of them identified.

20 Q And you were asked to identify all the fishable
21 streams in--which--all the streams which had--which were
22 fishable, in your opinion; is that correct?

23 A Which contained a sport fishery.

24 Q Okay. Does that mean that you included every
25 stream and river with fish in it?

1 A I believe so.

2 Q And all of these streams that you've listed here
3 were not included in the 2010 version of the map; is that
4 correct?

5 A As far as I recall, that's why they were listed
6 here.

7 Q Okay. Now, I'd like to look at a couple of points
8 on this e-mail of yours. If you look at below your first list
9 where it says none of the Wasatch streams in Davis, Weber and
10 Box Elder Counties are included.

11 A Yes.

12 Q And then in the paragraph under there, you've
13 written Millcreek and Steve Creek are scheduled to have
14 Bonneville cutthroat trout reintroduced in the fall of 2013.
15 Those were--so were they fisheries before the introduction of
16 Bonneville cutthroat?

17 A They were not. They were streams that likely
18 contained a fishery until the floods of the '80s where the
19 fishery was lost.

20 Q Okay. So it was lost from the '80s until the fall
21 of 2013, when the state was reintroducing the cut--

22 A That's my understanding, yeah.

23 Q And so you listed these on this edition because they
24 would be--they would become fisheries; is that right?

25 A Yeah. Fish were going into them at that time.

1 Q Okay. The other streams already contained a trout
2 population. Period.

3 I want to ask you about this next sentence. Also,
4 as these streams exit U.S.F.S. lands, they are diverted and
5 for the most part, cannot support trout--trout populations at
6 that point.

7 U.S.F.S. is United States Forest Service; is that
8 right?

9 A That is correct.

10 Q And when the streams are in U.S. Forest Service
11 land, does the public have access to them?

12 A They do.

13 Q And you say when they leave, they were diverted.
14 What do you mean by diverted?

15 A As they come down and exit Forest Service land,
16 cities and municipalities take that water for--for their use.

17 Q Okay. And it says and for the most part cannot
18 support populations at that point. So what you're saying with
19 respect to those streams is that when they're on the public
20 land, they have enough water to support a fishery, but once
21 they leave it and have been diverted, they no longer do?

22 A Yeah. For the--in general, they take enough water
23 to where they're either de-watered or then contain
24 insufficient water to maintain a trout fishery.

25 Q I'd like to see an example of one of these streams.

1 Which map would be the easiest for you to show us on?

2 A I--the--the streams that are listed here on the
3 Wasatch Front would be on this map that's showing but they're
4 not highlighted.

5 Q Okay. On 3.2? This Exhibit 3.2--

6 A Yes.

7 Q --the Bear River and its tributaries.

8 Can you show me just where they would be generally
9 speaking?

10 A There's a few up in Box Elder County, down through
11 Weber County and then Davis County.

12 Q Okay.

13 A So along the Wasatch Front here.

14 Q And they're not shown here?

15 A They're not.

16 Q And when they're in U.S. Forest Service land,
17 though, they would be on public land?

18 A Yes.

19 Q Now, I'd like you to look at your No. 3, your list
20 of No. 3, starting with Box Elder County, South Slope, Raft
21 River Mountains.

22 A Okay.

23 Q Excuse me. If you'd turn to the next page, you say
24 these streams are de-watered at the valley floor and would no
25 longer support trout. What does that mean?

1 A Again, we don't have a big city out in Box Elder
2 County on the south slope of the Rafts, but they--used for
3 agricultural purposes.

4 Q Okay. So when you say de-watered, what exactly, is
5 that--does that mean?

6 A The water's taken from the stream and put on the
7 crops.

8 Q Yeah. Is de-watering something that happens
9 seasonally?

10 A It happens seasonally when there is irrigation, but
11 these streams also are--once they hit the valley bottom,
12 they'll--historically would have flowed a certain distance and
13 then subbed out, they would never have had really connection
14 with the Great Salt Lake, in recent times at least.

15 Q Okay. If I was going to look at an example of some
16 of these that de-water in the valleys, which would be the best
17 map to look at?

18 A I don't believe there--

19 Q Is this what we're stuck with?

20 A This is what--yeah. And so it's further west from
21 there.

22 Q Further west from here. But perhaps maybe you could
23 just generally--

24 A Okay.

25 Q --point to--I can bring it to you.

1 A It would be the south side of this mountain range
2 right here.

3 Q Okay. Thank you. And so is it fair to say that
4 before those streams enter the valleys, they would be
5 fisheries and then once they get to the point where they're
6 de-watered, they cease becoming fisheries?

7 A Yeah. Some fish would seasonally go down into those
8 reaches, but they become dry as the summer progresses and
9 yeah, so we would lose that fishery once they're out of the
10 mountain.

11 Q So part of the year, those would be a fishery--it
12 would be a fishery and part of the year, it would not?

13 A Well, what--it wouldn't be a great fishery 'cause
14 there'd just be some--a few fish coming down.

15 Q Okay.

16 A Seasonally.

17 Q And that would be in the lower reaches of those
18 streams?

19 A Yes.

20 Q So when Mr. Young asked you earlier about whether
21 the fishing is generally better in the lower reaches, that's
22 not always true; right?

23 A Well, it wasn't--it's not true on those four
24 streams.

25 Q Now looking over this e-mail you just looked at,

1 are--can you tell me if all of those additions have been made
2 to this map? Bring it up close.

3 A It doesn't appear that all of them have been.

4 Q When you were compiling this list, I see in your
5 e-mail a couple of times you reference--so if we look at that
6 same age, the very last under 5, under Box Elder County, it
7 says many of these streams are small, but some people do angle
8 them.

9 Was that the criteria you were using in 2013,
10 whether people angled those streams, to include them?

11 A We were given direction to highlight what streams
12 are--have sport fish in them--

13 Q Uh-huh (affirmative).

14 A --and what streams would have some angling pressure.

15 Q And so if someone was--if people do angle those
16 streams, that would be a reason to include it?

17 A Well, I guess that we don't have to have proof that
18 it could be angled, but if they have a sport fishery, it makes
19 sense that people would angle them.

20 Q Right.

21 A But these streams, I am aware that people do go and
22 angle them.

23 Q Can a fishery change, over time?

24 A Yes.

25 Q How so? Can you give me some examples of how a

1 fishery might change over ten or 20 or 30 years?

2 A One can just be cyclic with wet and dry cycles.
3 During dry cycles, the population numbers can shrink and be
4 smaller and then during wet cycles, they can expand and--
5 'cause there's more food and resources.

6 Another way fisheries can change are just the land--
7 the habitat can change through time and water inputs.
8 Pineview Reservoir used to be a trout fishery and then with
9 all the development in Ogden Valley, it's become a warm water
10 fishery through time, we can't support trout there anymore, so
11 that's a--a permanent change.

12 Q So Millcreek, for example, 20 years ago would not
13 have been a fishery but it is today because of the
14 introduction of trout, too; correct?

15 A My understanding is the--most of the streams along
16 the Wasatch Front contained trout at one time. And then the
17 floods of the '80s pushed those populations out and changed
18 habitat and now those streams have--habitat has improved in
19 those and we're putting fish back into some of those streams
20 that became fishless during that time, during the high flow
21 events.

22 Q But if there was another flood season, you might
23 expect the same sort of reduction in population from the '80s?

24 A Or elimination, if it's that large, on small
25 streams like that, yes.

1 Q So what is a fishery today might not be in ten or 15
2 years?

3 A True.

4 Q Are you aware of any rivers and streams in your
5 region that flow over city or county property?

6 A Yes. I mean, there's--most of the streams come
7 through the city in the valleys.

8 Q Do you know if the public has access to the portions
9 of those rivers that are--that flow through the cities?

10 A A large portion of the Lower Weber, once you get out
11 of Weber Canyon is open to the public, down through Uintah,
12 Riverdale and--and Ogden City and then through the City of
13 Ogden, the Ogden River is--is available.

14 And Morgan County and Morgan City have some property
15 in the Weber up through their city and then Logan City as well
16 has some property on the Logan.

17 Q Thank you. Sorry to make you look at another map.

18 A That's okay.

19 Do you have an opinion on the general accuracy of
20 the maps?

21 A Maps are--there's always something not quite up to
22 date on a map, it seems, but--

23 Q I usually like to blame Mr. Coburn for that.

24 Can you show me, when you were talking about some of
25 the property that flows through cities, can you just trace

1 with your finger where some of that would be?

2 A It would be some of this pink here through Ogden
3 and the--the Weber, there is some area up here through the
4 town of Morgan and then I had mentioned the property up in
5 Logan City, too.

6 Q Okay. What about through Coalville?

7 A Coalville, there's a little piece through the
8 fairgrounds here that, through time, I haven't been there
9 recently, it hasn't been posted and yeah, people do go in
10 there and angle.

11 Q Okay. Do you know why this stretch of stream around
12 Ogden here is labeled in pink representing secured access on
13 private land?

14 A There's a trail network down through Ogden that the
15 cities have gotten together and tried to secure a--a trail
16 network through there which allows the access to those
17 streams.

18 Q Okay. How about this pink section around Morgan?

19 A Again, that's my understanding that that's either
20 county or area--or reaches that go through the city.

21 Q Okay. So we just talked about that there are
22 stretches of these rivers that flow over cities and counties
23 and that the public can access those. You mentioned that
24 certain portions of the streams are not posted. What do you
25 mean by that?

1 A Our law enforcement section, if you access a river
2 on a public right-of-way and you angle through either a piece
3 of property that we've obtained access for to where you're
4 exiting that property, if it is not posted properly, those
5 reaches can be angled as well.

6 Q Okay. So can you say that all landowners in your
7 region post their property?

8 A I wouldn't say all do.

9 Q Can you give me some examples of stretches of river
10 that are not posted? And I don't need you to name the owners
11 if you could just--

12 A No, I--

13 Q --really describe where they are.

14 A And it's been a few years since I've been to these
15 reaches, but through time, I've been able to angle some
16 reaches between Echo and Rockport and like that and also in
17 the Peterson, Mountain Green area.

18 Q Now, if you could turn to--unfortunately, it's
19 going to be in your other book.

20 A Okay.

21 Q There's a No. 5.6 in the book. A new addition to
22 the book. Now--

23 A Okay.

24 Q --do you recognize what this is?

25 A Yeah. It's a reach of the Weber River between Echo

1 and Rockport Reservoirs.

2 Q Okay. That you were discussing earlier with Mr.
3 Young?

4 A Yes.

5 Q And part of this blue ribbon fishery flows through
6 private property, does it not?

7 A It does.

8 Q And can all anglers use this, all types of anglers
9 use this blue ribbon fishery?

10 A As far as--

11 Q If I'm a bait fishermen, can I use this?

12 A No. This is artificial fly and lure and two fish
13 limit, so special regulations.

14 Q Special regulations. Are there--what--what other--
15 how much of the Weber River is subject to special regulations,
16 do you know?

17 A Very little. This reach is kind of reserved for
18 those special regulations that some fly anglers prefer and we
19 have a regulation for catch and release. Cutthroat from Echo
20 Reservoir downstream and that's to protect that population,
21 but the data we have on the Weber shows that harvest isn't
22 detrimental to the population; in fact, it could be
23 beneficial, so we want to allow all anglers the opportunity to
24 fish the Weber and if they want to take some fish, it's not
25 going to hurt the population.

1 Q Okay. But this blue ribbon section is limited to
2 artificial fly and lure?

3 A It is.

4 Q You talked briefly with Mr. Young about physical
5 access to property, to--to fishing opportunities and--and I
6 believe you said that there would be some places in the higher
7 mountains that would be more difficult to reach.

8 A There could be.

9 Q And some streams that would be iced over?

10 A Yeah.

11 Q Correct?

12 A Correct

13 Q Those--those same difficulties with access would
14 apply to either private or public property, wouldn't they?

15 A In those areas, yes.

16 Q And sometimes, you just need to hike or work harder
17 to get to a particular place to fish, don't you?

18 A Sometimes that's the--what people prefer.

19 Q Just to clarify something. I believe Mr. Young
20 asked you a question about whether this map had all of the
21 streams and rivers in your region marked on it. Does it?

22 A Not all, but it has the majority.

23 Q I think you referenced earlier that Otter Creek was
24 not quite complete on a particular map. Do you recall that?

25 A I do.

1 Q Is that this map here?

2 A Can I get up?

3 Q You can get up or I can bring it to you. Either
4 way.

5 A It would be this one and this one as well.

6 Q Okay. Let's look at this map. If you'll just stand
7 to the side a little bit so that we can show the Court. Where
8 was Otter Creek?

9 A Otter Creek is this stream here.

10 Q Okay. And you said it wasn't complete, for some
11 reason?

12 A Yeah. It should be--lead all the way up and then
13 there's three little forks that have water in and trout.

14 Q Okay. And people angle those?

15 A They do.

16 Q You can probably sit back down.

17 MR. THOMAS: I'm sorry, your Honor, just--I want to--
18 -I apologize for taking so much time.

19 Q (By Mr. Thomas) Now, you talked about Taggart in
20 the canyon below Echo, where there was tubing and kayaking.
21 And I'm sorry, can you tell me which map would be the easiest
22 to point that out on?

23 A The Weber map.

24 Q The Weber map. Can you show me where that is?

25 A It would be somewhere in this area, below Henefer,

1 probably right here on this yellow piece and then down to--
2 past the confluence of Lost Creek to Taggart.

3 Q So passing over both yellow and red portions there?

4 A Yes.

5 Q On this map.

6 And that's a popular spot for tubing, I think you
7 said?

8 A Tubing, yes. And rafts.

9 Q Rafts and kayaks?

10 A Yeah. There's a few white water--well, smaller
11 white water features there.

12 Q Now, I think you've testified that there are flat
13 water fisheries in your region?

14 A Yes.

15 Q And the public can access those?

16 A Yes.

17 Q And does the public have fishing opportunities to
18 fly fish for cold water species in your region?

19 A On flat waters?

20 Q On--on streams and rivers. I'm sorry.

21 A Yes.

22 Q How about warm water species on streams and rivers
23 in your region?

24 A There's a few opportunities for warm water on
25 streams but more, probably, in reservoirs.

1 Q Okay. And can the public access small streams in
2 your region?

3 A There are many, yes.

4 Q And medium-size streams?

5 A Yes.

6 Q And large streams?

7 A Yes.

8 Q Is it fair to say that in your experience discussing
9 this with fishermen that some fishermen prefer streams over
10 flat water?

11 A Some do.

12 Q And some prefer flat water over streams?

13 A That's correct.

14 And some prefer warm water species over cold water
15 species?

16 A Yes.

17 Q Fair to say that some people have cross-over between
18 these interests?

19 A Yes.

20 Q And it's fair to say they can all engage in the type
21 of recreation they want to in your region?

22 A They can find all of those.

23 MR. THOMAS: One moment, your Honor.

24 I'll pass the witness, your Honor.

25 THE COURT: Thank you.

1 From the State?

2 MR. ROBERTS: Thank you, your Honor.

3 CROSS-EXAMINATION

4 BY MR. ROBERTS:

5 Q Mr. Thompson, to your knowledge, is any of the Bear
6 River navigable or claimed to be navigable by the Division of
7 Forestry and Fire?

8 A I believe the reach below Cutler Reservoir down to
9 the Great Salt Lake is and that's why it's indicated on yellow
10 on these maps.

11 Q Okay. Are you aware of any other rivers or streams
12 claimed by Forestry and Fire as navigable within your region?

13 A The one mile above Rockport, the recent ruling, I
14 don't know where that necessarily stands yet but it's my
15 understanding that that mile may become navigable or it has.

16 Q And that was an adjudication by the Court?

17 A Yes.

18 Q Are you aware of any other adjudications by courts
19 with regard to navigability of any streams or rivers in your
20 region?

21 A I'm not.

22 Q You indicated there are a number of blue ribbon
23 fisheries--blue ribbon fishery designations on rivers that the
24 stretches have both, flow over public and private land.

25 A The council has designated reaches that have both

1 public and private land, yes.

2 Q So access is an issue but it's not necessarily an--
3 or public access is an issue with regard to designation?

4 A The--

5 MR. YOUNG: Objection. Leading.

6 THE COURT: This is cross. But he's identified with
7 you and I think the rule says that ordinarily leading
8 questions will be permitted on cross. Given the
9 circumstances, sustained.

10 MR. ROBERTS: I forgot my question.

11 THE WITNESS: I was going to ask you to repeat it,
12 please.

13 THE COURT: In a different way,

14 Q (By Mr. Roberts) Do you know what generally the
15 four--or what the requirements or factors are for blue ribbon
16 fisheries?

17 A Yes.

18 Q What are they?

19 A One is the fishery, which access is part of that.
20 Economics, what it contributes economically. Habitat and
21 outdoor experience are the four that I'm aware of.

22 Q Okay. So and those are--those are factors to be
23 considered by the council?

24 A Those are four large categories that the council
25 considers.

1 Q You provided information to Mr. Gary Ogborn in
2 connection with the preparation of the stream access map?

3 A Yes.

4 Q What did he ask you to provide?

5 A What did he specifically ask? Or what I've been
6 asked for through time from the Division of Wildlife?

7 Q Well, when they were first putting the map together
8 in 2010--

9 A Okay.

10 Q --what information was requested from your region?

11 A If I recall, in 2010, the first attempt at putting
12 a map together was just to identify what streams would contain
13 a fishery, a sport fishery and then in 2011, maybe the end of
14 2010, beginning of 2011, we were provided that map with land
15 ownership, private versus public, and asked to identify other
16 reaches that may have--may be read, or may be private, but
17 still public is allowed access into those. And then in 2013,
18 we were asked to review that map again and that's when I
19 provided some additional streams that were looked--an
20 oversight was made in the initial maps.

21 Q Okay. And when they asked for streams that had
22 fisheries on them, what was the meaning of fisheries?

23 A Fisheries means they contained a sport fishery, so
24 they had a sport fish in those streams, we had data showing
25 that there were sport fish in those streams.

1 Q Okay. You just--one sport fish would be enough to
2 call it a fishery?

3 A Many of our smaller, you know, headwater tributaries
4 just have one trout, yes, one species of trout.

5 Q No. I was talking about one fish. Not one species.

6 A Oh. That was kind of a little bit gray, but if--if
7 we had sampled a stream and found one fish in a quarter mile
8 reach, I wouldn't--didn't include those, so I--it had to have
9 some density.

10 Q So for example, up in the northeast, sort of that
11 corner of the State, the Raft River reaches--

12 A Yes.

13 Q --you indicated there were a number of streams that
14 came off to the south.

15 A Yes.

16 Q None of those were shown on the map?

17 A They aren't on this map, no.

18 Q Okay. And because those--although there were
19 streams that might have some fish in them, they were not a
20 fishery?

21 A I did indicate in 2013, they should be on the map.

22 Q Okay. You talked about streams in your region being
23 de-watered. Did you mean that they completely go dry, some of
24 them?

25 A De-watered can be anywhere from yeah, de-watered

1 entirely to where they're dry a hundred percent or enough
2 water is removed that it really impacts the fishery and maybe
3 even keeps a fishery from being established there.

4 Q Okay. What uses are made of the--of the water in
5 your region?

6 A So for municipal uses, cities, town, municipalities,
7 agricultures takes a lot of water. Drinking. Yeah,
8 everything.

9 Q Okay. And do those uses--do those uses, municipal
10 or irrigation uses, affect the ability to engage in recreation
11 on those waters?

12 A Recreation as in what type of recreation?

13 Q Fishing, floating, any--swimming? Any type of
14 recreation.

15 A There are times where there's irrigation season, it
16 either has more water in the river and it's difficult to angle
17 where I wouldn't float it, or too little water in the stream
18 to angle or to float, yeah.

19 Q Okay. So what about the--does the municipal
20 culinary water use also affect any streams with regard to
21 recreational uses?

22 A The--having water withdrawn from any stream and the
23 more that is withdrawn does impact, yeah.

24 Q Okay. Are there streams in your region where, when
25 the water's going to be used for culinary or irrigation

1 purposes, it gets diverted or put into a canal or covered?

2 A There are many canals in my region, yes.

3 Q Okay. What about recreation in those canals? Is
4 that possible?

5 A The--they're all privately owned.

6 Q Are there any streams that, when they use them for
7 irrigation or culinary purposes, where they actually cover it,
8 put it into a pipe or put a cover over the canal?

9 A There are some, yes.

10 Q Okay. Recreation can't happen at those times
11 either?

12 A No.

13 Q Do people swim in the rivers in your region?

14 A Yes.

15 Q And in the lakes and reservoirs?

16 A Yes.

17 Q The pressure or the difference between the streams
18 and flat water, is there pressure on both flat water and
19 streams in some places?

20 A Oh. There are pressure on both, yes, sir.

21 Q Is the pressure on flat--flat water sometimes
22 heavier than that on streams?

23 A Pressure with--in terms of just straight
24 recreation?

25 Q Yes.

1 A Yes.

2 Q How about pressure with regard to fishing?

3 A Without having any recent creels, it would be
4 difficult to say, but I would say our flat waters get higher
5 use than our--our streams, as far as the total number of
6 anglers.

7 Q And do people contact you and the Division with
8 regard to finding places to fish?

9 A Yes.

10 Q Regularly?

11 A Yes.

12 Q Do you provide that--how do you provide that
13 information to them?

14 A Verbally, over the phone, over e-mail, type in, you
15 know, or verbally kind of describe on how to get to an area or
16 I'll, depending on what type of recreation they want, if they
17 want to fish the Weber in certain areas, then I'll refer them
18 to our walk-in access map on the Division's website.

19 Q Okay. So you refer them to the Division website on
20 occasion?

21 A On occasion.

22 Q What type of information is available with regard to
23 fishing specifically, on your website?

24 A We have all of our stockings for a given year and--
25 and probably for ten to 15 years previously, so what species

1 were stocked, where. We have our walk-in access map which is,
2 I believe is, according to our walk-in access biologist, is
3 up-to-date on those properties and it has some of our wildlife
4 management areas, but it still needs to have some of those
5 included as well as some of the easements and leases we have,
6 so it's not complete but I think they're still working on that
7 map.

8 There--and then there's just general, there's videos
9 on how to catch fish and you know, and just general
10 information on fish and fisheries in the State.

11 Q Are there fishing reports--

12 A Yes.

13 Q --talking about what--what's the hot place to fish
14 or--

15 A There are.

16 Q --the bad place to fish?

17 A Yeah. There are.

18 Q And those conditions with regard to fishing on
19 rivers will change on a daily basis, hourly basis in terms of
20 being good fishing, hot fishing?

21 A Yeah. Fish can turn on and off. And as far as
22 conditions of the rivers, it usually isn't quite that quick,
23 but as far as success at angling, it can be.

24 Q Okay. To your knowledge, is there any type of
25 recreational activity on--you normally do on waters that you

1 can't do in your region?

2 A I'm not aware.

3 Q Okay. So any--and any type of fishing you might
4 want to do, you can find a spot in your region to do that?

5 A Yeah. Again, like I say, we come back to the size
6 of the rivers we have, people aren't launching drift boats on
7 our--our streams and trying to float them that way.

8 Q Okay. Well, let's talk about fly fishing. Somebody
9 wants to fly fish in your region for trout, they can--can they
10 do that?

11 A Oh, yes.

12 Q On public land--on public--on water that flows over
13 public lands?

14 A Or that we've secured access to, yes.

15 Q Okay. You talked about how some places have
16 pressure. Is that constant, daily pressure?

17 A Yeah. Our most popular fisheries, there's anglers
18 there pretty much every day and--and quite a few of them at
19 times.

20 Q Okay. Are any of those brought there by a guide
21 service, to your knowledge?

22 A There is some guiding in--in our region in the Upper
23 Weber, Jan's Sports out of Park City, I believe, are--guides
24 up there. And I'm not--to be honest with you, I'm not
25 entirely sure on what else on the Weber has guiding on it.

1 Q Okay. But you've seen guides taking people onto the
2 rivers?

3 A Not many. Some.

4 I think between Echo and Rockport, there's more of
5 that as well, but I haven't fished that reach for some time.

6 Q Okay. And is it possible in your region to find
7 places to fly fish that are where you're not in a crowd?

8 A Yes.

9 Q Can you do that on a daily basis, find some place
10 that's not crowded?

11 A I would say yes.

12 Q You were asked some questions with regard to access
13 to rivers that--up in the high--higher countries or higher
14 reaches. Are there a lot of roads that follow up the rivers
15 and streams up those canyons and draws?

16 A Depending on where you're at, there are quite a few
17 roads, but in the high Uintas, there is, you know, a fair
18 amount of roadless area as well and wilderness.

19 Q Okay. But other than the high Uintas--

20 A Oh--

21 Q --a number of those reaches will have roads, dirt
22 roads, other types of access like that?

23 A Many do.

24 MR. ROBERTS: That's all for now, your Honor.

25 THE COURT: Redirect?

1 REDIRECT EXAMINATION

2 BY MR. YOUNG:

3 Q Mr. Thompson, as I understand it, the objective for
4 the preparation of the stream access map by the DWR was to
5 provide direct on-line information to anglers with respect to
6 areas of fishable rivers and streams in Utah; is that right?

7 A I believe so.

8 Q Is there any other reason?

9 A You know, I was brand new at that point in time and
10 I was told to put--help put this map together. I wasn't
11 really entirely sure on the direction behind it.

12 Q I understand. But now that it's been there for a
13 few years, isn't its primary purpose to give information to
14 the public, particularly the anglers?

15 A I don't believe this map is being used that way. I
16 tried to find this map on our website recently and--and had to
17 do a search for it and it and it said it hadn't been updated
18 since 2013. So I--I don't use this map when I'm giving public
19 information, I go to our walk-in access map or give it to them
20 verbally.

21 Q Okay. So one of the objectives and one of the
22 duties that you have is to give information to anglers who are
23 seeking information about where to go to fish?

24 A Exactly.

25 Q Okay. And if, for example, the Goose Creek Raft

1 River section up in northwest Utah was left off of the map or
2 parts of it were left off of the map and anglers did reference
3 it, that information is not available to them, is it?

4 A They can call our office and we would give it to
5 them.

6 Q They could call if they knew about it, but if they--
7 if it's not on the map and they don't know it's there, do you
8 think they're going to call and ask about it?

9 A Yeah. They may not know.

10 Q Okay. So isn't the purpose of--of identifying
11 fishable rivers and streams in the State of Utah primarily for
12 the benefit of anglers seeking information?

13 MR. THOMAS: Objection. Foundation.

14 THE COURT: Overruled.

15 THE WITNESS: Yeah. I think the purpose of this
16 type of map would be to show where we have fisheries.

17 Q (By Mr. Young) And so if it's not--if the
18 information's not available to them D--through DWR, for
19 example, in that Raft River/Goose Creek region in the
20 northwest part of the State, then DWR is not really making
21 recommendations to anglers that that's a good place to go
22 fish, are--is it?

23 A Well, we're not promoting it.

24 Q Okay. You were talking a bit about preferences and
25 types of fishing and I think your--you said your preference

1 was fly fishing.

2 A It would be primarily fly fishing.

3 Q And do you prefer to fish rivers and streams?

4 A I fish mostly rivers and streams, but I like flat
5 water as well.

6 Q Okay. And do you fish mostly cold water?

7 A Mostly. But I like warm water, too.

8 Q Okay. And I believe that the warm water thing that
9 you identified in your deposition was you like to fly fish on
10 Pineview Reservoir for tiger muskie in the early part of the
11 season.

12 A Pineview and Newton, when we had tiger muskies in
13 Newton, yes.

14 Q They have them in Newton as well?

15 A We used to. We hopefully will again.

16 Q Is that the flat water warm water fishing that you
17 do? Fly fishing?

18 A No. I also do crappie fishing with the fly rod and
19 with bait.

20 Q Where do you go--where do you go crappie fishing
21 with a fly rod?

22 A Pineview. And then I go out of state as well. I go
23 to Mantua, fish blue gill with my fly rod and with bait. Ice
24 fishing, I like to ice fish and that isn't with a fly rod.

25 Q You were asked questions about the Wasatch Front

1 streams that have been flooded out in 1983 and now the--the--
2 that previously had some trout in it and the DWR has been
3 trying to re-establish those populations. Those are basically
4 the really small streams along the Wasatch Front that drain
5 in--to the west, down into the west drainages, areas.

6 A Most of those are quite small. A few are a little
7 bit larger, but--

8 Q And they have small fish?

9 A Yeah. Fish up to maybe ten inches.

10 Q You were asked a couple of questions about municipal
11 stretches of streams that are listed on the map and the ones
12 that I noted that you mentioned were Morgan City? The City of
13 Morgan?

14 A Morgan.

15 Q All right. And is that the one where the city owns
16 a half mile of river through the fairgrounds?

17 A They do own some through the fairground there, yes.

18 Q It's about a half mile?

19 A Yeah. I think there's maybe a--maybe it's our
20 easement even above that, but there's a longer stretch than a
21 half mile in Morgan that you can fish.

22 Q But a half mile is owned by the city?

23 A That may be true.

24 Q Okay.

25 A I don't know for sure.

1 Q And then I think you said Coalville and you
2 mentioned the fairgrounds there. That's another half mile
3 stream on Chalk Creek.

4 A Be a small reach.

5 Q And then you talked about some of the trail
6 development in the--within the city of Ogden, once you're down
7 in the city and I think we talked about obstacles and things
8 floating in that area, didn't we?

9 A Yes.

10 Q And finally, you--I think the other one was Logan
11 city. Are those stretches going through Logan city owned by
12 the city?

13 A I don't know for sure, but they're open to the
14 public.

15 Q Okay.

16 A I would assume some of them would be.

17 Q But so some of it may be owned by the city and some
18 of it may be owned by adjoining landowners?

19 A Yeah. I don't know for sure.

20 Q Okay. Do you fish any of those waters?

21 A I don't fish the lower Logan.

22 Q I'm talking about the ones going through the
23 municipalities, do you--

24 A I do some down through Ogden.

25 Q Okay. Coalville?

1 A No.

2 Q Morgan?

3 A I have Morgan, yes.

4 Q In the--in the stretch owned by the city?

5 A Well, in the stretch through the city, whether it's
6 actually what the city owns or not, I--I wasn't aware.

7 Q You don't know? Okay.

8 Now, you've mentioned areas of--about anglers
9 being able to fish through private property because it was not
10 posted and I understand what this--what you meant by that, I
11 think, with respect to the statute. Have you still had
12 instances or complaints from anglers about having
13 confrontations with landowners when they've fished through
14 private property that was not posted?

15 A We get a few a year that I hear through one of our
16 conservation officers.

17 Q I think you also mentioned that the Otter Creek
18 drainage on the map was not complete. Again, it's not
19 complete because the information that DWR was using didn't
20 make it complete; is that right?

21 A I'd have to--

22 MR. THOMAS: Objection. Foundation, your Honor.

23 MR. YOUNG: Well, your Honor, if I can speak to
24 that. This map, as I understand it, was--was prepared by
25 getting input from each one of the regional offices, including

1 input from Mr. Thompson. And he's now testified that there
2 were areas that were not included on the map. My point is, it
3 wasn't included because DWR didn't put it on there; correct?

4 THE COURT: Okay. The objection is overruled.

5 You may answer.

6 Is that correct?

7 THE WITNESS: We had the opportunity to put those
8 streams on the map.

9 Q (By Mr. Young) Well, it was your--part of your
10 duty, wasn't it?

11 A I'd have to go back and look to see if it was missed
12 in my office or if that information was sent to our central
13 office and not put on that that time, but--

14 Q I understand that, but part of your duties and your
15 work was to provide assistance with respect to preparation of
16 this map?

17 A Yes.

18 MR. YOUNG: I think that's all, your Honor. Thank
19 you.

20 THE COURT: Thank you.

21 You may step down.

22 Next?

23 MR. COBURN: Your Honor, may this witness be excused

24 THE COURT: Any objection?

25 MR. THOMAS: No objection, your Honor.

1 THE COURT: Mr. Thompson, thank you. You're free to
2 go or stay, if you'd like.

3 MR. COBURN: Ready to proceed, your Honor?

4 THE COURT: Yeah.

5 MR. COBURN: Okay.

6 THE COURT: Yeah.

7 MR. COBURN: The Utah Stream Access Coalition would
8 like to call, okay. we'll go with McKenzie Skiles.

9 THE COURT: Ms. Skiles, if you'll come up to the
10 clerk's desk, please face the clerk, raise your right hand,
11 take an oath to tell the truth.

12 MCKENZIE SKILES,
13 called as a witness by and on behalf of the plaintiff in this
14 matter, after having been first duly sworn, assumed the
15 witness stand and was examined and testified as follows:

16 THE COURT: Thank you. Would you be seated here to
17 my right and respond to counsel's questions?

18 DIRECT EXAMINATION

19 BY MR. COBURN:

20 Q Good morning. Do you mind if I call you McKenzie?

21 A Yes. That's fine.

22 Q That's my daughter's name, too, so it will be easy
23 to remember.

24 Will you--

25 THE COURT: Let me have you spell your last name?

1 THE WITNESS: Skiles, S-k-i-l-e-s.

2 Q (By Mr. Coburn) Could you spell your first name
3 also, McKenzie?

4 A M-c-K-e-n-z-i-e.

5 Q Is the K capitalized?

6 A The K is capitalized.

7 Q Okay. Thank you.

8 And where do you reside?

9 A In Pasadena, California.

10 Q And what do you do in Pasadena? What's your
11 occupation?

12 A I am a research scientist for NASA's jet propulsion
13 laboratory.

14 Q Okay. And how long have you had that position?

15 A For seven months.

16 Q Okay. Why don't you des--tell the Court, give the
17 Court a brief description of your formal education following
18 high school?

19 A I have a Bachelor of Science in geography and
20 environmental studies from the University of Utah. I
21 graduated in 2008. I also have a geographic information
22 science certificate from the University of Utah. I have a
23 Master of Science in geography from the University of Utah in
24 2010. And I have a PhD in geography from the University of
25 California, Los Angeles, in 2014.

1 Q You mentioned a GIS certificate, that's global
2 information systems?

3 A Geographic information systems.

4 Q Oh, I'm sorry. Thank you.

5 A Yup.

6 Q And that's basically digitizing geographic
7 information?

8 A It's the--it could include digitizing geographic
9 information, analysis of information, compiling and
10 distribution of geographic information.

11 Q Okay. You were asked to provide some expert
12 analysis and work for the Coalition in this case; correct?

13 A Yes.

14 Q And what--what was it that you were asked to do?

15 A I was asked to analyze rivers and streams in the
16 State of Utah crossing certain land designations, private and
17 public, and summarize the mileages of fishable streams as
18 provided by the State of Utah. And I was also asked to map
19 and visualize that information.

20 Q And when you say map and visualize that information,
21 are you looking, for example, at Exhibit 3.3?

22 A Yes.

23 Q Okay. What--where did you go to find your source of
24 data for your work on this case?

25 A For the total mileage of rivers and streams, I got

1 it from the automated geographic reference center, the
2 A.G.R.C., to--

3 Q What does A.G.R.C. stand for?

4 A The automated geographic reference center. And it's
5 a--a site, a website that provides data, GIS data for the
6 State of Utah.

7 And for the fishable rivers and streams, that was
8 provided by the State of Utah and downloaded from the DWR
9 website.

10 Q Okay. And what about the information regarding
11 private versus public property?

12 A That was downloaded from A.G.R.C., there's a land
13 designation layer that is provided or shape file data layer
14 that is provided by A.G.R.C. that designates lands as public,
15 private or tribal.

16 Q Okay. Would you take a look in the book in front of
17 you, it will be Volume 1, Exhibit 16, please--I mean, excuse
18 me. Exhibit 15.

19 A I think this--

20 MR. COBURN: May I approach, your Honor?

21 THE COURT: You may.

22 Q (By Mr. Coburn) Do you have Exhibit 15 in front of
23 you, McKenzie?

24 A I do.

25 Q Would you take a minute or two just to review that?

1 Okay. Have you reviewed it?

2 A I did.

3 Q What is Exhibit 15?

4 A It's a description--

5 Q Let me ask it this way: Are these your reports that
6 you issued in this case that you provided from the
7 investigation analysis you did that you just described?

8 A Yes.

9 Q Okay. And there are two reports in there, aren't
10 there?

11 A I'm not--sorry. Two reports for--

12 Q There's an original report and a supplemental
13 report?

14 A Yes.

15 Q Okay. Thank you. And these two reports contain the
16 numbers that you generated, if you will, the mileages that you
17 generated with regards to both fishable streams in the State
18 of Utah; correct?

19 A Yes.

20 Q And those crossing private--the mileages crossing
21 private property as shown by the State of Utah?

22 A Yes.

23 Q And those fishable streams crossing--crossing public
24 property as shown by the State of Utah?

25 A Yes.

1 Q Okay. And then you also did the same calculus, if
2 you will--or calculations on the Provo River, main stem;
3 correct?

4 A Yes.

5 Q Okay. Do you recall what the numbers were for the
6 Provo main stem, total fishable miles as shown by the State?

7 A I have it in a report. I think it was 88 miles, if
8 I recall.

9 Q Okay. And do you recall how many of those miles the
10 State shows as crossing private land?

11 A Is it in here? Can I look or--I--

12 Q If you need it to refresh your recollection, yes.

13 A It was 39 miles across publicly-owned and 49 miles
14 across privately owned.

15 Q So a total of 88 miles fishable on the main stem of
16 the Provo?

17 A Yes.

18 Q And what were the percentages of--for the mileages
19 across public and private lands?

20 A 44 percent across public and 56 percent across
21 private.

22 Q Okay. Thank you.

23 MR. COBURN: Your Honor, I would move to admit
24 Exhibit 15 into evidence per stipulation.

25 THE COURT: 15 is received.

1 MS. BUTLER: No objection.

2 MR. COBURN: Okay.

3 Q (By Mr. Coburn) Just out of curiosity, McKenzie,
4 did you generate any data, yourself, to produce these numbers?

5 A I did not.

6 Q You took it strictly from the State?

7 A Yes.

8 Q Okay.

9 MR. COBURN: That's all I have, your Honor.

10 THE COURT: Thank you.

11 You may cross.

12 CROSS-EXAMINATION

13 BY MS. BUTLER:

14 Q Hello, Ms. Skiles. How are you?

15 A Good. How are you?

16 Q Doing well. Thank you.

17 So looking at what is Exhibit 15 in your book, when
18 you were calculating the mileages that I believe are found on
19 the second and fourth page of your report, you relied on data
20 provided to you by the State; is that correct?

21 A Yes.

22 Q And when you were making those calculations, is it
23 fair to say that you didn't make any changes to the data you
24 used from the State showing public or private property?

25 A I did not.

1 Q And when you were doing those calculations, is it
2 fair to say that you didn't make any changes to what the State
3 showed as navigable or non-navigable waters?

4 A No. I did not.

5 Q And did you make any independent determination of
6 what was a fishable stream?

7 A No.

8 Q And you didn't make any changes to the data you got
9 from the DWR regarding what was fishable?

10 A No.

11 Q So when you created these--when you created the maps
12 and did the calculations, you were relying on the data
13 provided to you by the State?

14 A Yes.

15 Q And if there are any errors or inaccuracies in that
16 data, they would show up in your maps and calculations, too;
17 correct?

18 A Yes. If there were error in the original data, yes.

19 Q Do you have any idea why the numbers you came up
20 with are different than the numbers that the State came up
21 with?

22 A I don't.

23 Q And then when you were speaking with Mr. Coburn, you
24 talked about a total mileage number you got from the A.G.R.C.,
25 I believe. That--is that number in your report?

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1 A It's not in Exhibit 15.

2 Q Okay.

3 MS. BUTLER: Just give me one second, please.

4 I'll pass the witness, your Honor.

5 THE COURT: Thank you.

6 From the State?

7 MR. ROBERTS: Thank you, your Honor.

8 CROSS-EXAMINATION

9 BY MR. ROBERTS:

10 Q Did you look to see what the data was defined as, as
11 the State stored it and used it?

12 A Can you be more specific about data?

13 Q Well, for example, the land ownership layer--

14 A Uh-huh (affirmative).

15 Q --you referenced that there were four categories of
16 ownership. Did you determine what those four categories of
17 ownership were based upon?

18 A No. I just took the--I took the information
19 provided.

20 Q Okay. So you--so you didn't go in to the A.G.R.C.
21 database to identify when it said private, what was included
22 within private?

23 A I trusted their designations. I followed whatever
24 it was designated as private, I considered private.

25 Q So was the same true with regard to the other

1 aspects of data that you took? So like fishable streams, you
2 didn't delve down to find out or get into what they meant by
3 fishable streams?

4 A No.

5 Q So you took just the--the data as the State had it
6 and presented it to your analysis?

7 A Yes.

8 Q And--and you got to calculate the geometry of the
9 streams in order to figure out the length of the streams?

10 A Yes.

11 Q Exhibit 15, your report, did you prepare that?

12 A Yes.

13 Q When you said--when you say in the report, in your
14 findings, where it says some 3,584 miles, 57 percent of which
15 traverse ostensibly publicly-owned streambeds. You wrote that?

16 A I think I had some assistance of language, but these
17 were my findings.

18 Q Okay. What--

19 A Yes.

20 Q --what did you mean by "ostensibly?"

21 A Ostensibly means apparently or purportedly, so which
22 traverse apparently publicly-owned streambeds.

23 Q Okay. So the point of that finding to use that
24 term was what? Why did you use that term?

25 A The--the data provided to me was designa--was

1 specified as public or private and I based my findings off of
2 the data provided to me. I didn't do any original analysis.

3 Q I was just wondering if there was some reason why
4 you used "ostensibly" with regard to the ownership but not
5 "ostensibly" with regard to navigable or the amount of miles.
6 You only used that in that particu--just on ownership. I was
7 just wondering why.

8 Or do you--do you recall?

9 A I don't recall.

10 Q In addition to the A.G.R.C. and DWR databases and--
11 which I assume you access--were able to access through the
12 websites.

13 A Uh-huh (affirmative).

14 Q Okay. What other information were you provided?

15 A I--what do you mean, provided?

16 I was in the--in--I was given information as to how
17 they created the map on the DWR website, so I was provided
18 with those layers, the data layers with which they created
19 those maps.

20 Q No. I was wondering about what information you were
21 given besides what you were able to find on the websites of
22 DWR and A.G.R.C. Did Mr. Coburn provide you with any
23 information?

24 A No.

25 Q Did you review plaintiff USAC's answers and

1 responses to discovery in connection with your doing this
2 report?

3 A I don't recall.

4 Q Would you look on the first page of Exhibit 15,
5 there's a footnote down there saying more detailed
6 descriptions on methodology is set forth in USAC's answers to
7 VR Acquisitions, LLC's first set of interrogatories,
8 Interrogatory No. 10.

9 A Yes.

10 Q So you--you wrote that?

11 A The more detailed methodology?

12 Q You wrote that footnote?

13 A I can't recall if I wrote it, but yes, I--there is a
14 more detailed description of my methodology contained in the
15 Interrogatory No. 10.

16 Q Okay. Did you assist Mr. Coburn in the preparation
17 of the answers to discovery requests on behalf of his client,
18 USAC? Interrogatory No. 10 or all of them? Just generally
19 for, you know, (inaudible) did them all--

20 A For--relating to my methodology, I would have
21 assisted in describing that methodology.

22 Q Okay. But--but--so your assistance would only have
23 been describing your methodology? You didn't assist them in
24 how they answered the interrogatories?

25 MR. COBURN: Objection. Objection. Form, your

1 Honor.

2 THE COURT: What's wrong with it?

3 MR. COBURN: I'm sorry?

4 THE COURT: What's wrong with the question?

5 MR. COBURN: He said--he said--the question asks,
6 you didn't--you assisted only in providing information as to
7 your methodologies, but you didn't assist in answering
8 interrogatories and the methodology is part of the
9 interrogatory.

10 THE COURT: Sustained. It's compound.

11 Go ahead.

12 Q (By Mr. Roberts) Did you provide any assistance to
13 USAC in connection with answering their interrogatories other
14 than providing your methodology to them?

15 A Not that I recall.

16 MR. ROBERTS: That's all I have, your Honor.

17 MR. COBURN: No questions, your Honor.

18 THE COURT: Thank you. May this witness be excused?

19 MR. COBURN: Actually, we're going to have her
20 listen to one of the State's witnesses tomorrow.

21 THE COURT: Okay. So you'll remain under your trial
22 subpoena. Thank you. You may step down.

23 Next?

24 MR. COBURN: The Coalition would like to call
25 Michael Eichorn to the stand, please.

1 THE COURT: Mr. Eichorn, if you would come forward
2 to the clerk's desk, face the clerk, raise your right hand,
3 take an oath to tell the truth.

4 MICHAEL EICHORN,
5 called as a witness by and on behalf of the plaintiff in this
6 matter, after having been first duly sworn, assumed the
7 witness stand and was examined and testified as follows:

8 THE COURT: Thank you.

9 DIRECT EXAMINATION

10 BY MR. COBURN:

11 Q Would you state your full name for the record,
12 please?

13 A Michael Eichorn.

14 Q How do you spell your last name?

15 A E-i-c-h-o-r-n.

16 Q And where do you reside?

17 A Salt Lake City.

18 Q And what is your occupation?

19 A I'm an archeologist and a GIS analyst.

20 Q GIS meaning again--

21 A Geospacial information systems.

22 Q Okay. And briefly describe for the Court, if you
23 would, your post--formal post-high school education.

24 A I got my Bachelor's Degree in anthropology and
25 recreational management from the University of Vermont and a

1 certificate in GIS from Salt Lake Community College and
2 currently a Master's student at the U in the MSGIS program.

3 Q And would you explain what MSGIS means, please?

4 A The Master's of Science of GIS.

5 Q And GIS again is?

6 A Geospecial information systems.

7 Q And you were here when Ms.--when Dr. Skiles was
8 discussing what all this means, GIS means. Was her
9 description accurate?

10 A Yes. It was.

11 Q Okay. And you've been asked to do some work and
12 provide some expert testimony, if you will, on behalf of the
13 Coalition in this case; correct?

14 A Correct.

15 Q And what were you asked to do?

16 A I was asked to map the floatable stream and river
17 miles of the State, based off Gary Nichols' book and determine
18 how many of those miles cross public versus private land.

19 Q Okay.

20 MR. COBURN: Your Honor, we have a placeholder, if
21 you will in the exhibit binder for Gary Nichols' book. It's
22 Exhibit 12. There's no book there. But I do have the book
23 with me, as does opposing counsel and I'd like just the--the
24 witness to identify it.

25 If your Honor would like one, we can leave this with

1 you.

2 THE COURT: Great.

3 MR. COBURN: Okay, Counsel?

4 THE COURT: Any objection?

5 MS. BUTLER: No objection.

6 THE COURT: Okay. Go ahead.

7 Q (By Mr. Coburn) Mike, you've been handed what's
8 been marked or at least has a placeholder as Exhibit 12 in
9 this matter. I'd like you to take a look at that and tell me
10 if you recognize it.

11 A I do.

12 Q And what is it?

13 A This is Gary Nichols' book, it's a River Runners'
14 Guide to Utah and it says descriptions of floatable rivers in
15 the State.

16 Q Okay. And how did you use this book in your efforts
17 to perform your assignment in this case?

18 A I went through the book and based on his
19 descriptions of each river and stream that he deemed floatable
20 and looked at his maps and his descriptions of access points
21 and take-out points and whatnot, then I compared it to GIS
22 data and topographic map layers and recreated that digitally
23 so I could move forth and map the rivers that were--

24 Q So when you said you re--you recreated it digitally,
25 but you recreate a GIS layer for the reaches of rivers and

1 streams in Utah that Mr. Nichols said were floatable?

2 A Yes.

3 Q Okay. So you basically digitized the information in
4 Mr. Nichols' book; correct?

5 A Yes.

6 Q And then you did what with that information?

7 A I then took that information based on his
8 descriptions in the book and overlaid it on the--the State's
9 land ownership layers, which I also got from A.G.R.C. and then
10 clipped out those segments as described by Gary Nichols. And
11 then used the measurement options in GIS to determine how long
12 those lengths were and whether they floated over private or
13 public waters.

14 Q Okay.

15 A Or land.

16 Q And you took that information that you generated and
17 included it in your report that you issued in this matter?

18 A Correct.

19 Q Would you take a look at Exhibit 16, please?

20 Are you familiar with Exhibit 16?

21 A I am.

22 Q And what does it show? What is in Exhibit 16?

23 A Witness report.

24 Q Are there two reports there?

25 That's a lot of pages, I don't know if you've gone

1 past Exhibit 16.

2 A Nope. Still in the others, the original and the
3 supplemental.

4 Q Okay. So you did issue two reports; correct?

5 A Correct.

6 Q Okay.

7 MR. COBURN: Your Honor, I would move to admit
8 Exhibit 16 into evidence.

9 MS. BUTLER: No objection.

10 THE COURT: 16 is received.

11 Q (By Mr. Coburn) What did your analysis show with
12 regards, first, to--and your final analysis in particular
13 because I think you changed some numbers between your original
14 report and your supplemental report; correct?

15 A Correct.

16 Q What did your supplemental report show as how many
17 miles of floatable water you found in the State of Utah,
18 according to Mr. Nichols' book?

19 A It was 1,760 miles of floatable water.

20 Q Okay. And how many miles of that water, according
21 to your analysis, flowed over publicly-owned streambeds as
22 identified by the State?

23 A It was 1,291 miles.

24 Q And how many flowed over private beds, again,
25 according to the data provided by the State?

1 A 469 miles.

2 Q And what are the percentages of those, if you will,
3 of those mileages compared to the total miles?

4 A 73 percent over public and 27 over private.

5 Q Okay.

6 MR. COBURN: That's all I have for this witness,
7 your Honor.

8 THE COURT: You may cross.

9 CROSS-EXAMINATION

10 BY MS. BUTLER:

11 Q Good afternoon, Mr. Eichorn.

12 A Hello.

13 Q You are a member of USAC: correct?

14 A Correct.

15 Q And when you were making your calculations regarding
16 floatable streams, you used data made available to you by the
17 State of Utah; is that correct?

18 A Correct.

19 Q And is it fair to say that you didn't make any
20 changes to the data you used from the State showing public or
21 private property?

22 A Correct.

23 Q Fair to say that when you were doing your analysis,
24 you didn't make any changes to the data you used from the
25 State regarding the navigability of streams?

1 A Correct.

2 Q Now, when you calculated what was floatable, you did
3 not use the State's data; is that correct? What a floatable
4 stream was?

5 A No. I used the book.

6 Q Do you know whether the State has a map layer that
7 reflects floatable streams?

8 A I do not know.

9 Q And you don't know if the State makes a
10 determination regarding floatable waters?

11 A I don't.

12 Q So the only basis for your determination of what was
13 floatable was Mr. Nichols' book and applying those
14 descriptions to the State's other mapping layers; is that
15 correct?

16 A Yes.

17 Q And you didn't make any changes to the data used
18 from Mr. Nichols' book as to what qualified as a floatable
19 stream?

20 A No.

21 So you took the beginning and ending points of what
22 Mr. Nichols deemed floatable in his book; correct?

23 A Correct.

24 Q And did he use GIS or exact points?

25 A I can't say with certainty that he did or didn't,

1 but it seems like it's all based off his experience on the
2 ground.

3 Q Okay. So in his description in his book of where a
4 stream starts and stops, are those based on GIS points or--

5 A No.

6 Q What are they based on?

7 A Typically, a description of a bridge or a parking
8 lot or some kind of landmark to identify an area.

9 Q And you didn't talk to Mr. Nichols about how he
10 determined what was floatable; is that correct?

11 A Correct.

12 Q You just relied on the book?

13 A Yup.

14 Q So you didn't do any independent manipulation of the
15 data; correct?

16 A Correct.

17 Q So if there are errors, inaccuracies in that data,
18 they would also show up in your analysis; is that correct?

19 A That's correct.

20 Q Are you familiar with H.B. 141?

21 A I am.

22 Q And what is your understanding of H.B. 141 with
23 respect to floating?

24 A It's my understanding that you can't--you can't
25 stop forward progress over private riverbed to get out and

1 fish, to get out, you can't anchor, you can't back paddle, you
2 can only move forward, you can't stop forward progress.

3 Q So it is fair to say that under H.B. 141, the public
4 can only access waters through public access points?

5 A Correct.

6 Q And is it fair to say that before H.B. 141, the
7 public could only access waters through public access points?

8 MR. COBURN: Objection. Foundation.

9 THE COURT: Sustained.

10 Q (By Ms. Butler) Do you float?

11 A I do.

12 Q And how long have you been floating?

13 A Six, seven years.

14 Q So since 2008-2009?

15 A Sure. Yeah.

16 Q When you were floating in 2008 and 2009, how did you
17 access the river?

18 A Typically through a boat ramp, access points.

19 Q Through a public access point?

20 A Uh-huh (affirmative).

21 MS. BUTLER: Give me one second.

22 I'll pass the witness, your Honor.

23 THE COURT: From the State?

24 MR. ROBERTS: Thank you, your Honor.

25 *

1 CROSS-EXAMINATION

2 BY MR. ROBERTS:

3 Q So you, in order to do your report, took the data
4 information that you took from the State and just used it;
5 correct?

6 A Yeah. I just--

7 Q You didn't--

8 A --used the data--

9 Q --you didn't go through and analyze and check out
10 what it meant or the parameters of what the different terms
11 meant?

12 A No.

13 Q So, for example, you talked about using the public
14 and private land designation, that came from the A.G.R.C.
15 overlay?

16 A Correct.

17 Q And you did not look to see what was meant by the--
18 the four terms that you used, public, private, tribal.

19 A Yes. I--Federal, State, tribal and private.

20 Q Okay. You did--you did not look to see what those
21 terms were--meant and how they were defined under the A.G.R.C.
22 database?

23 A No.

24 Q And you didn't analyze how the State had collected
25 or sorted its information in the database?

1 A No.

2 Q So you didn't know how the State, the DWR build up
3 their stream, rivers and stream layers?

4 A No. I don't know their exact methodology.

5 Q Referring to Exhibit 16, the initial report and the
6 supplemental report which is the last page, did you prepare
7 those documents?

8 A I aided in them, the verbiage isn't all mine
9 precisely but it's based on my reports and--

10 Q Okay. So someone else--

11 A --my analysis.

12 Q --someone else actually wrote this report for you
13 and you signed it?

14 MR. COBURN: Objection. Misstates the witness's
15 testimony.

16 THE COURT: Sustained.

17 Q (By Mr. Roberts) Okay. Who assisted you in the
18 preparation of that report?

19 A Mr. Coburn.

20 Q And how did he assist you?

21 A In the terminology you use, I don't--I'm not
22 familiar with witness reports or any of this.

23 Q So when you say the terminology, he assisted you
24 with the terminology, what do you mean?

25 A How to present my findings officially for a court of

1 law.

2 Q Okay. So did he prepare a draft of your report to
3 have you review it and edit? Is that how the process started
4 to generate this actual piece of paper?

5 A I provided the report and then it was typed up as
6 you see it to be ready for court.

7 Q Okay. So when you say you--you prepared the report,
8 what is it you gave Mr. Coburn?

9 A All the findings of my analysis.

10 Q The findings which are set forth here?

11 A Correct.

12 Q Okay. So you gave him that paragraph?

13 A Which one are you referring to?

14 Q Paragraph 3, findings and opinions.

15 A I gave him the numbers and the totals as to what
16 that paragraph was based on.

17 Q Okay. So you gave him the numbers and then he
18 prepared the verbiage for you?

19 A Correct.

20 Q In that, there is use of the word "ostensible" with
21 regard to--it says "ostensibly" publicly-owned streambeds or
22 "ostensibly" privately-owned streambeds. Is "ostensibly" your
23 word?

24 A I don't remember.

25 Q Okay. What is that--as part of your report, what

1 does ostensibly publicly-owned streambed mean?

2 A As it appears.

3 Q As it appears?

4 A Yeah.

5 Q And as it appears where?

6 A As it appears in the data.

7 Q Okay. Did you make--the difference between your
8 original witness report and the supplemental report basically
9 is about 48 miles, as I recall, of publicly-owned streams; is
10 that correct?

11 Well, let me--let me ask the--under--under (B), the--
12 -it changes from 1,242 miles to 1,291 miles.

13 A Yes.

14 Q Okay. And--but the amount of navigable streams at
15 764 stayed the same; correct?

16 A Correct.

17 Q Okay. And then in (C), it changed from 518 miles to
18 469 miles.

19 A Correct.

20 Q Did the--was that change based upon the change in
21 the State's database in the digital materials you took from
22 the A.G.R.C. with regard to land ownership?

23 A No.

24 Q No? Okay. So what--what did you use then besides
25 the State database with regard to ownership to determine where

1 these rivers flowed over ostensibly publicly-owned streambeds?

2 A The--those miles you're describing are in reference
3 to the Jordan River, which, based on another website, they are
4 under methodology, the www.ffso.Utah, that being that stretch
5 of water on the Jordan River as municipal, publicly-owned.

6 Q So did you independently go to that website to
7 determine whether or not to re-examine the Jordan River?

8 A I did look at the website, yes.

9 Q Okay. Did you do that on your own?

10 A It was referred to me.

11 Q Okay. Weren't questions raised with regard to the
12 Jordan River by Mr. Coburn in connection with your witness
13 report?

14 A Correct.

15 Q And so he talked to you about navigability of the
16 Jordan River and did he ask you to do further research on it
17 or what?

18 A He referred me to that website.

19 Q Okay. Did you check any other stretches of river
20 with regard to further analyzing the data?

21 A No.

22 MR. ROBERTS: That's all, your Honor.

23 MR. COBURN: No questions, your Honor.

24 THE COURT: Thank you. Mr. Eichorn, you may step
25 down.

1 Is he staying as well?

2 MR. COBURN: He may be excused, your Honor.

3 THE COURT: Any objection to that?

4 MR. THOMAS: No.

5 MS. BUTLER: No objection.

6 MR. ROBERTS: No objection.

7 THE COURT: Very good. You're free to go. Thank
8 you.

9 Where are we in terms of this? Are we caught up or
10 not caught up?

11 MR. COBURN: Your Honor, I guess a lot of it depends
12 on what Mr. Ogborn and Mr. Eastman have to say. I believe we
13 will finish Gary Nichols and--entirely, and Steve Schmidt's
14 direct today, maybe even get to some of the cross today, I'm--

15 THE COURT: So you have Steve Nichols and Schmidt to
16 go?

17 MR. COBURN: Yes.

18 THE COURT: And then you're done?

19 MR. COBURN: Yes, with Mr. Schmidt, yes.

20 THE COURT: Okay. That leaves you a day to put on
21 your case. Are you going to be done tomorrow?

22 MR. THOMAS: Barring anything unanticipated, your
23 Honor, I think we won't have a problem putting on our
24 remaining witness. I can't speak for the State, but I
25 understand there is one, possibly two, that--

1 MR. ROBERTS: One to two weeks of testimony?

2 MR. THOMAS: Yes.

3 THE COURT: You have two witnesses?

4 MR. ROBERTS: I have two witnesses, your Honor, yes.

5 THE COURT: How long will they take on direct?

6 MR. ROBERTS: The direct, I would think, hopefully,
7 a half hour each.

8 THE COURT: Do--do you want to take half an hour or
9 an hour for lunch? What would you like to do?

10 MR. COBURN: I guess in the interests of time, a
11 half hour, maybe even 45 minutes, but we ought to just use the
12 time we have to try the case.

13 THE COURT: I agree. Let's--let's reconvene at
14 12:45.

15 (Recess)

16 THE COURT: Be seated. We'll go back on the record
17 in the matter of Utah Stream Access Coalition vs. VR
18 Acquisitions. The parties are present with their attorneys.
19 You may call your next witness.

20 MR. COBURN: Thank you, your Honor. The Coalition
21 calls Gary Nichols.

22 THE COURT: Mr. Nichols, if you'll come up to the
23 clerk's desk, face the clerk, raise your right hand, take an
24 oath to tell the truth.

25 *

1 GARY NICHOLS,
2 called as a witness by and on behalf of the plaintiff in this
3 matter, after having been first duly sworn, assumed the
4 witness stand and was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. COBURN:

7 Q Good afternoon.

8 A Hi.

9 Q Will you spell your last name--or state your full
10 name for the record, first.

11 A Gary Nichols.

12 Q And spell your last name, please?

13 A N-i-c-h-o-l-s.

14 Q Okay. Mr. Nichols, you've been asked by the
15 Coalition to render an expert in this matter; is that correct?

16 A Correct.

17 Q And what is it you've been asked to give an opinion
18 on?

19 A I've been asked to give my opinion on the safety and
20 practical implications of H.B. 141 on the public using the
21 Provo River and other rivers and streams that--in Utah that
22 have public water flowing over private riverbeds.

23 Q Okay. Before we get to your opinion, let me just
24 provide a little background for the Court. You're a lifelong
25 Utah resident; correct?

1 A Correct.

2 Q What--give the Court a brief description of your
3 formal post-high school education.

4 A I got a Bachelor's degree from the University of
5 Utah in commercial recreation.

6 Q In what year?

7 A 1975.

8 Q And what is your occupation?

9 A I'm an associate instructor at the University of
10 Utah.

11 Q And what do you teach?

12 A Teach outdoor classes, so canoeing, kayaking, river
13 safety and rescue, backpacking, hiking.

14 Q And you have been doing that since 1979?

15 A That's correct.

16 Q And you continue to do so today?

17 A Yes.

18 Q All right. Give the--well, you also used to teach
19 similar classes for REI; correct?

20 A I told equipment for them and did clinics--

21 Q On?

22 A --on outdoor classes or canoeing, kayaking, where to
23 go floating, that type of stuff.

24 Q And you also did some of that similar work with the
25 Boy Scouts of America?

1 A Yes. I taught canoeing for them for a long time,
2 and for about 20 years, helped train their guides as far as
3 safety and rescue.

4 Q You helped trained whose guides? Whose guides?

5 A The Boy Scout guides.

6 Q Okay. They have guides?

7 A Yes. They have a base up on--near Jackson on the
8 Snake River.

9 Q And you would teach the people who were providing
10 instruction there?

11 A Yes.

12 Q Okay. How long have you been canoeing rivers and
13 streams?

14 A Since about 1967.

15 Q And kayaking?

16 A I didn't do that for a few years. Around 1974 or
17 '75.

18 Q Okay. And you have been canoeing and kayaking since
19 those years?

20 A Yes.

21 Q What about rafts?

22 A I own a couple rafts, I do some of that. I take my
23 wife and kids and grand kids.

24 Q Okay. So when you take them in a group, you're in a
25 raft, but if you're floating, boating, yourself, you're in a

1 canoe or a kayak?

2 A Usually.

3 Q Okay. Where have you--where have you kayaked, both
4 in the United States and around the world?

5 A All over Utah as much as possible, quite a bit of
6 the west, of the United States. I've done a little of padding
7 in Chile, Costa Rica, Argentina.

8 Q You say rivers all over the west. Provide a couple
9 of examples if you would, for the Court?

10 A Oh. Quite a few rivers in Colorado, Arizona, like
11 the Grand Canyon, Salt River, California, Oregon, lots in
12 Idaho, Wyoming.

13 Q Okay. And on these rivers, have you been primarily
14 canoeing, kayaking? What type of vessel?

15 A I'd say mostly kayaking.

16 Q Followed by, in frequency?

17 A Canoeing.

18 Q Okay. Are you a licensed river guide?

19 A Yes. Have been for at least 30 years.

20 Q Okay. And what rivers are you licensed on or do
21 they do it by river?

22 A It's mostly by the State and usually, it's for a
23 specific river, at least you have to get in a certain number
24 of trips on that river before you can guide for them.

25 Q Okay.

1 A So I've done trips on the Green and the Colorado.

2 Q You have on the counter in front of you a book.

3 A Yes.

4 Q Why don't you pick that up. That is your book, is
5 it not?

6 A Correct.

7 Q And why don't you read the title of the book into
8 the record, please?

9 A "River Runners Guide to Utah and Adjacent Areas."

10 Q Okay. And is that the first edition of your book?

11 A No. The first edition was 1982, I believe.

12 Q And what edition is that?

13 A This is the third main total change.

14 Q The third edition?

15 A Yes.

16 Q Okay. And what's the publication date of that
17 edition?

18 A 2002, with a minor update, probably 2006.

19 Q Okay. And what did you set out to do with this
20 book? What was your purpose of writing and publishing this
21 book?

22 A Well, originally, I didn't intend to publish it. I
23 just wanted to run as many rivers as I could, especially in
24 Utah and people just said, hey, you've got this information,
25 why don't you make it known to the rest of it and put it in a

1 book.

2 Q So you did?

3 A Yeah.

4 Q Okay. What's in the book? What's--the contents?
5 How do you approach the topic?

6 A I try to put in places to go and so I have put ins,
7 take outs, length of a section, gradient, best time of year to
8 go, flow levels. Usually, I--I didn't try to have like the
9 absolute lowest or the absolute highest because a lot of
10 that's just based on the skill of the person, but also general
11 characteristics of the river, hazards, whether manmade or
12 part--or natural. Grading on the river, difficulty on a one
13 to six international scale.

14 Q Okay. Well, we'll get to those details in a little
15 bit and I apologize, I should have asked the question a little
16 differently. How many river--rivers or river segments do you
17 identify and talk about in your book?

18 A I think there are about 90.

19 Q Okay. And where are those rivers or river segments
20 located?

21 A All over the State.

22 Q Of Utah?

23 A Yes.

24 Q You do have a handful in there that are in nearby
25 states; correct?

1 A Correct.

2 Q But they're--why did--why did you include those,
3 the handful of rivers or river segments from other states?

4 A These are flowed into or out of or were very popular
5 for Utah boaters to go to.

6 Q Okay. Have you floated or boated, I think that's
7 the term of art that kayakers and canoeists, et cetera, like
8 to use is a boater, not a floater; correct?

9 A Correct.

10 Q Okay. Have you boated all of the rivers or river
11 segments in your boat--or in your book?

12 A Almost all of them. There are one or two that I
13 list in the book that I haven't done and often, maybe a friend
14 had done it but it's--

15 Q And you got information from him?

16 A Yes.

17 Q Okay. Are there any rivers or river segments in
18 your book in Utah that you haven't boated?

19 A Yeah. There are one or two.

20 Q Okay.

21 A But they're very minor.

22 Q Okay. All right. Are you familiar with the Provo
23 River?

24 A Yes.

25 Q Have you floated the Provo River?

1 A Many times.

2 Q When was the last time you floated the Provo River?

3 A June of last year.

4 Q For what reason did you float the Provo River in
5 June of last year?

6 A I was curious about this section that was involved
7 with the lawsuit, hadn't run it for awhile so I wanted to run
8 that.

9 Q And what time of year did you run it? June?

10 A June

11 Q And what were the flows? Was it peak or pre-peak or
12 post-peak?

13 A I think this was probably post-peak.

14 Q Okay.

15 A And 650 cfs.

16 Q Okay. I'm going to hand you--

17 MR. COBURN: May I approach, your Honor?

18 THE COURT: You may.

19 Q (By Mr. Coburn) I'm going to show you what's been
20 marked as Exhibit P-21. And you've seen this before, have you
21 not?

22 A Yes.

23 Q Would you identify for the Court where the stretch
24 of the Provo River that you ran in June of 2014?

25 A Right here.

1 Q Where did you put in?

2 A At the bridge at Woodland.

3 Q Okay. Where's the bridge at Woodland?

4 A Oh. Right here.

5 Q So you put in at the bridge at Woodland.

6 A Yes.

7 Q Where did you float to?

8 To Jordanelle Reservoir, at the State park.

9 Q That would have included the Victory Ranch segment?

10 A Yeah.

11 Q Okay. Was that a yes?

12 A Yes.

13 Q Okay. What stretch or stretches of the river, the
14 Provo River that you've identified as being floatable in your
15 book?

16 A Oh. From up about Slate Gorge--

17 Q Why don't you put that out to us if you could,
18 please?

19 A I think that's somewhere up in, probably here.

20 And really, all the way down to Utah Lake.

21 Q Okay. But you would take out at the reservoirs and
22 put in below the reservoirs?

23 A Yes.

24 MR. COBURN: Give me just a second, your Honor.

25 I'm going to have the witness write Slate Gorge--

1 THE COURT: Good.

2 MR. COBURN: --on the exhibit.

3 THE WITNESS: You can--there are people who have run
4 above that, but I have not.

5 MR. COBURN: Thank you.

6 Q (By Mr. Coburn) How many times have you, if you can
7 remember or estimate, how many times have you floated or
8 boated one or more of the segments of a river?

9 A Probably close to a hundred.

10 Q Okay. Now, let me--let me ask you this. You
11 started going into the approach you took in your book. Why
12 don't you again walk the Court through that just briefly, how
13 you approached each river, in your book, and what you talked
14 about, what you were trying--the message you were trying to
15 convey to the reader.

16 A Well, where you could put in, where you could get
17 out, and often that's how I broke it into lengths. Some
18 places, it's just not easy or legal to get out. And then the
19 length of that section, the gradient, so how steep it is, the
20 kind of flows that were best for running it. General
21 characteristics, so is it a meandering stream, is it fast, is
22 it a steady gradient or does it have pool drop pool drop, is
23 it rocky, is it wooded? So if it's wooded, there's always a
24 chance of log jams and trees across the river.

25 Q Is there a term of art for a tree that extends all

1 the way across the river?

2 A I mean, it can be considered a sweeper, like stuck
3 on the outside. I don't know.

4 Q Have you heard the phrase strainer?

5 A Oh, yeah. Certainly. Yeah. There are many
6 strainers that could be anything that allows water to flow
7 through that would strain out a boat or a person.

8 Q What else in terms of, other than stream
9 characteristics, do you talk about hazards, and I think you
10 just mentioned some; correct?

11 A Yeah. So there are manmade ones like fences,
12 bridges, diversion dams, some places they have walls that have
13 built--been built up with stone or cement that make it
14 impossible to stop. So things like that. But then natural
15 hazards, from rocks to sweepers to strainers, natural falls.

16 Q Now, you make an effort, I know, to identify these
17 hazards, both natural and manmade, in a river, but do you also
18 caution your--your reader about those waters when they go
19 there?

20 A Sure. For one thing, a lot of hazards change. And,
21 in fact, they're continually changing, especially rocks and
22 trees and so yeah, you--people have to sometimes get out, walk
23 down and check if it's a blind spot. You can't get past some,
24 like a tree all the way across the river, you're going to have
25 to keep an eye out for it, see it in time to stop and get out

1 and walk around it.

2 Q Portage around it?

3 A Yes.

4 Q Okay. You also assign a rating or rating range to
5 each of these rivers or river segments in your book, don't
6 you?

7 A Yeah.

8 Q What rating system do you use to do that?

9 A It's an international scale of--or international
10 river difficulty scale.

11 Q Okay. Why don't you explain that, that scale, if
12 you will, or that rating system to the Court.

13 A So one is the easiest, six is the most difficult.
14 So it starts with something that just has, maybe, ripples on
15 up to Class 3 and 4, where you're getting intermediate, much
16 more challenging and often, in fact, by Class 4, almost always
17 you have to scout.

18 Q What do you mean by scout?

19 A Get out, walk down and see if you're able to get
20 through.

21 Q Or the best way to get through?

22 A Yes.

23 Q Okay.

24 A On up to Class 6, which kind of is the maximum that
25 you can actually run. So above that would be unrunable.

1 Q Okay. Do you have, as you sit here today, do you
2 have a memory of the rating that you have given to the Provo
3 River or various segments of the Provo River?

4 A Well, the--the Victory Ranch section would be 2 to
5 3. There are places above there up to Class 4, and actually
6 even, if you go above Slate Gorge, could be Class 5.

7 Q Okay. So is it a fair statement to say then that
8 from--and when you say go above Slate Gorge, are you talking
9 about up towards Provo River Falls?

10 A Yes. So the Falls are considered Class 5.

11 Q Okay. So between Provo River Falls down to
12 Jordanelle, is it fair to say that the river rating in there
13 ranges from a Class 3, 3.5 up to 5?

14 A Yes.

15 Q Okay.

16 A And maybe down to 2.

17 Q I'm sorry?

18 A Maybe down to a Class 2.

19 Q Above Jordanelle?

20 A Yes.

21 Q Okay. On certain stretches?

22 A Ratings are so subjective.

23 Q Okay.

24 A It's really hard to say, because flow levels effect
25 that, you know, from year to year it might change, sometimes

1 things become more difficult, rivers flood in different places
2 bringing new features. A flash flood can totally change it.

3 Q Okay. Do ratings, I mean, they--they try to provide
4 an objective indicator of a river's difficulty; correct?

5 A Correct.

6 Q But that can change based upon the perception of the
7 boater as well; correct?

8 A Correct.

9 Q Have you boated the section of the Provo between
10 Jordanelle and Deer Creek?

11 A Yes.

12 Q How many times?

13 A Twice.

14 Q Twice.

15 A Maybe three.

16 Q Okay. And when was the last time you boated that
17 section?

18 A Probably been eight or ten years.

19 Q Okay. And what rating would you assign to that
20 section of the Provo?

21 A Well, at--the last time I did it, they were starting
22 to eliminate some of the drops and things and they were making
23 the river meander a little bit more, which was making it
24 easier. And so it was probably Class 2.

25 Q Before or after those changes?

1 A After.

2 Q Okay.

3 A So it had Class--definitely some Class 3.

4 Q Before the changes?

5 A Yes.

6 Q But as far as you know, those--those are long--no
7 longer present, the hazards that created the Class 3 water?

8 A When I went there, some of them had been changed,
9 there were still a few of the drops that I would call Class 3.

10 Q Okay. What about the Provo below Deer Creek, have
11 you floated that before?

12 A Yes.

13 Q How many times?

14 A That's where I've done most; 50, 75.

15 Q Okay. When was the last time you boated the Provo
16 below Deer Creek?

17 A Probably six to eight years ago.

18 Q Okay. What rating do you assign that stretch? And
19 if it changes as you move down the canyon, that's fine, but
20 what rating do you assign that stretch of the Provo?

21 A So quite a bit of it is Class 1 and 2, with about a
22 three-mile stretch that's a Class 3 or 4.

23 Q Okay. Where is that stretch?

24 A That's between the two diversion dams; Murdock and
25 Olmstead.

1 Q Olmstead?

2 A Yeah. I think those are the names.

3 Q Okay. What about the stretch immediately below
4 Deer Creek, for the first few miles down there? How--what
5 rating would you assign or did you assign to that?

6 A Class 1 and 2.

7 Q Okay. There is--there is no white water in there?

8 A There's small waves and there are definitely a
9 couple hazards.

10 Q A couple what?

11 A Hazards.

12 Q Such as?

13 A There are a couple bridges that have trestles into
14 the water and they can be difficult to maneuver through. And
15 I've seen canoes get pinned and folded in half--

16 Q Okay.

17 A --pinned on those.

18 Q Can you encounter sweepers or strainers on that
19 stretch of the river?

20 A Yes.

21 Q As well as the other stretches that you've talked
22 about?

23 A Correct.

24 Q You've been kayaking and boating, I'll just use the
25 term boating, boating for 40-plus years; correct?

1 A Correct.

2 Q Why?

3 A It's fun. I enjoy it. I mean, there are hundreds
4 of reasons. I like the white water, I like flat water, I like
5 the scenery, it's therapeutic, you have a rough day, it's
6 great to go out and just get on the water, whether it's flat
7 water and you're relaxed or whether it's difficult white water
8 and you totally get your mind off whatever other problems were
9 'cause you're concentrating.

10 Q Because you don't want to die?

11 A Yeah.

12 Q Is that why you teach boating?

13 A I enjoy teaching, I enjoy seeing people have a
14 chance to get out and experience things I've experienced.

15 Q And you want to share those experiences with your
16 students?

17 A Yes.

18 Q Are you familiar with the H.B. 141?

19 A Yes.

20 Q What's your understanding of what H.B. 141 does?
21 Or did?

22 A Well, it, to me, took away some of the rights you
23 had before, it restricted--

24 Q As a boater?

25 A Yes. It restricted--gave a definition of where you

1 could boat, so how much water, roughly, it limited your
2 ability to touch anything. It defined more when you could
3 portage.

4 Q Defined more?

5 A It defined more than there had been before as far as
6 portages.

7 Q I don't understand that. Could you explain that,
8 please?

9 A I mean, before, it was totally up to you. If you
10 felt like you needed to portage. And their definition, to me,
11 just wasn't quite as clear. And it's still mainly if I feel
12 like I need to portage, I can, but it's not as clear. Before,
13 I knew I could portage anywhere.

14 Q Okay. And when you say H.B. 141 did these things,
15 did it do it on all floatable waters in Utah?

16 A It applies just to where the water goes, public
17 water goes over private beds.

18 Q Okay. Are you a member--are you familiar with the
19 Utah Stream Access Coalition?

20 A Yes.

21 Q Are you a member?

22 A I am.

23 Q When did you become a member?

24 A Probably 2011 or '12.

25 Q Okay. Why did you become a member?

1 A I'm very much for the public being able to use
2 public water and they seemed to be the agency that was
3 fighting for that.

4 Q Okay. Have you ever been an officer of USAC, the
5 Coalition?

6 A No.

7 Q A director?

8 A No.

9 Q Okay. Does your membership in USAC or your
10 sentiments about public access to public rivers in any way
11 affect your opinions in this matter?

12 A I don't think so.

13 Q Okay. We'll get into that a little bit more once
14 those opinion comes out--those opinions come out.

15 When you teach your students about boating, whether
16 it's kayaking, canoeing or rafting, do you talk to them pretty
17 much using the template that's set forth in your book? Is
18 that how you--

19 A I do.

20 Q --teach them?

21 A I mean, I talk about river characteristics, I talk
22 about safety. We talk a lot about skills, which the book
23 isn't designed to teach.

24 Q Okay. So there's only certain things you can teach
25 in a swimming pool up at the University and then things you

1 have to teach on the water or in a book?

2 A Correct.

3 Q Okay. I notice one of the first things that you
4 talk about in your book after you get past the acknowledgments
5 is you talk about how rivers and streams are dangerous.

6 A Yes.

7 Q Why don't you explain why you emphasize that or make
8 that point early on in your book?

9 A Well, I like to see the students keep living. They-
10 -water is, I mean, one of the challenges with water and one of
11 the fun things about water, it's a dynamic medium, it's
12 moving, it's changing, you can run the same spot ten minutes
13 later and it's not exactly the same and every day, it's a
14 little bit different, every water level's a little bit
15 different. You can't breathe it so it doesn't work well if
16 you're under water long, so you have to learn to stay upright
17 as much as you can.

18 The trees change. Manmade things are put in and so
19 there--and there are just lots of hazards; I mean, they have
20 rocks, they have logs, they have water falls, so all those
21 things are something you have to be aware of and the more
22 aware you are of hazards, the better you can be at recognizing
23 them and avoiding them.

24 Q And this is the same thing you teach to your
25 students?

1 A Yes.

2 Q Okay. And would it be fair to say that your basic
3 message is rivers can be fun and they can be dangerous?

4 A Correct.

5 Q The--the water moving in the river, how would you
6 describe moving water when you encounter it or when you get
7 into it unexpectedly? Is it powerful, for example?

8 A It can be very powerful and be very deceptive, as,
9 where is it going to throw you? Is the water going to pull
10 the nose of your boat under water, what happens when you go
11 off a drop, because then you get into hydraulics, so there--
12 it--water's fascinating.

13 Q And dangerous?

14 A Yes.

15 Q And you repeat your message of safety and caution
16 even as you speak about the various rivers and river segments
17 in your book, don't you?

18 A Yes. I try to point out places where they need to
19 be extra careful.

20 Q What--what are some of the things that, as a boater,
21 either yourself or the boaters that you teach, what are some
22 of the things that a boater may want or need to do while on
23 the water, while floating a river?

24 A You want to dress properly for it and that changes
25 throughout the day, so you may be adjusting the clothing you

1 wear.

2 Q Why--what--what might make a change throughout the
3 day?

4 A Either it can get hot or you may find you tip over
5 more than you expected, water can be very cold, sucks heat out
6 of you 25 times faster than air does and so if you end up with
7 a day where you tip over a lot, you may have to dress a lot
8 warmer than the days you don't.

9 Q Or even if the weather changes?

10 A Yes. If it gets cloudy, you don't have that sun to
11 help heat you, it ends up being shadier than you expect with
12 all the trees, so everything. Adjusting clothing's important.

13 Q Okay. What are some of the other things a boater
14 may need or want to do while floating a river?

15 A You need to stay hydrated 'cause that affects your
16 ability to either cool off or warm up. You need to stay
17 energized with food, so you need to eat enough and eat
18 throughout the day, so you don't want to just stuff yourself
19 in the morning and try to go all day. You need energy, more
20 on a sustained basis. You need to rest, you get tired. Most
21 accidents that happen with boaters happen more often in the
22 afternoons when people are getting tired.

23 Q When they've been on the water most of the day?

24 A Yes.

25 Q Anything else?

1 A Well, there are a lot of things, like you need to
2 understand thunder storms and the danger they provide.

3 Q What kind of danger are presented by thunder storms?

4 A Two things, lightning and flash flooding.

5 Q Okay. Have you been caught on a river during a
6 flash flood?

7 A Yes.

8 Q Just briefly describe that, if you would?

9 A I got out really quick. You notice the water
10 starting to come up and in one particular instance, we
11 actually had gotten off because of that and we thought it was
12 pretty much over because the river started dropping. And then
13 we heard a huge roar and looked up and coming around a bank, a
14 bend in the river was about a six-foot wall of water. And we
15 ran very quickly.

16 Q It got your attention?

17 A Yes.

18 Q Okay.

19 A And it--it blew out a huge area, actually at a
20 public campground, it ripped out four or five camp sites and--

21 Q And I think you told me a car or two?

22 A Yeah. My car was one that I thought I'd moved
23 beyond where a flash flood could reach and I was so fascinated
24 watching it that I didn't think about my car. Then I looked
25 and saw the water had gotten to it and I ran and jumped in it

1 and drove it away and within probably 30 seconds, a probably
2 2,000-pound boulder came to rest right where my car had been.

3 Q And for clarity sake, this wasn't on the Provo?

4 A No.

5 Q This was on a river down south in the desert;
6 correct?

7 A Yes.

8 Q Okay. But while it may be perhaps less frequent,
9 you can still have flash floods on just about any river;
10 correct?

11 A Correct.

12 Q What about the lightning, what--what kind of risk
13 does that pose for a boater?

14 A When you're on water, which is a big conductor of
15 electricity, and depending on the size of the river,
16 especially a wide one, you become a sitting duck, a lightning
17 rod. And so the best thing to do is get off the water and get
18 away from the wet.

19 Q Might you also need to relieve cramping?

20 A Yeah. So kind of two areas tend to cramp,
21 especially in a kayak, your forearms get tired from paddling
22 and your legs are quite confined and so you can find you get
23 cramps in either of those. And so, I mean, if that's
24 happening, you need to get out and stretch or you may become
25 non-functional.

1 Q Just so you can be functional and comfortable again?

2 A Yeah. Get out, stretch, drink some water, maybe get
3 some electrolytes.

4 Q Have there been occasions when you've had to stop
5 and attend to injuries on the water?

6 A Yes.

7 Q Okay. Why don't you just give a couple of examples
8 to the Court, please?

9 A One time a person tried to avoid a log but they
10 missed and they caught it in their chest. And they were
11 having a hard time paddling, we got him to shore and at the
12 time, we didn't know, but it sounded like they had probably
13 cracked a couple ribs and it was painful. People have been
14 poked in the eye from a stick that's hanging out. Little,
15 lots of little things.

16 Q What about hypothermia? Is that a--an occurrence
17 that's not uncommon when floating a river?

18 A It's--it's probably the most common of the problems
19 because again, water strips heat away from your body extremely
20 fast. And a lot of people misjudge how much--or--to wear, or
21 conditions just change or they tip over many, many, many more
22 times than they expected.

23 Q Is the--is the--well, let me ask a couple more
24 questions, then I'll get to this. Are there instances where
25 it may be necessary to scout a stream?

1 A Often. So often you scout depends on the river
2 you're on, your ability. Is it a river with lots of blind
3 turns? Is it a river with lots of trees? Those are all
4 creating hazards or potential hazards. And so you need to
5 stop any time you're not sure, the saying is: If in doubt,
6 scout. And that means stop your boat and you need to stop it
7 early enough, if you are hesitant on when to stop and you get
8 too close to where your--the hazard is, you may not--you may
9 get to that point and think you're going to stop and find out
10 you can't. And so you want to err on the safe side, stop,
11 walk down and check out the hazard, see if there's a way
12 through and make your decision whether you walk or run.

13 Q When you say walk, you mean portage?

14 A Yes.

15 Q Are there instances where someone may need to get
16 out as a precaution to others in his group or her group that
17 might get in trouble--

18 A Well--

19 Q --while--while running a certain rapid or reach?

20 A --kind of the rule is, if you have to get out and
21 scout, you should get out with your throw rope, which is a
22 rescue rope, and walk down and look. And then if it--you,
23 depending again on your group ability level, you leave one or
24 two people there with their throw ropes in case someone has
25 trouble and ends up swimming. And then you can toss them a

1 rope to help pull them in.

2 Q Okay. So that requires you to get out of your boat
3 and walk down to where you're in a position to throw the throw
4 rope--

5 A Yes.

6 Q --to a boater who might be in trouble?

7 A Correct.

8 Q Okay. When a kayaker or a canoeist, or even a
9 rafter, when they tip over and go into the water, does the
10 boat also accumulate water?

11 A Yeah.

12 Q It can?

13 A Yeah.

14 So how do you go about taking care of that
15 particular issue?

16 A Well, self-bailing rafts, you can flip over and they
17 just bail.

18 Q They'll bail themselves?

19 A Yes.

20 Q Okay.

21 A But a canoe or a kayak, you're going to have to stop
22 and pick it up and empty the water out.

23 Q What are--what are some of the other things that a
24 boater may want to do, not so much--well, let me ask the
25 question I was going to ask earlier, I apologize. Let me back

1 up just a little bit.

2 Is the--is the intent for all this--these safety
3 issues that you address with your students and that you employ
4 yourself on the river, is the intent to respond to a safety
5 situation an unsafe situation, or is it more intended to
6 prevent?

7 A Well, most are for prevention and prevention's
8 certainly the best way to handle something, never let it
9 become a dangerous situation.

10 Q Are all boaters, do they all have the same
11 perspective as to what may be necessary in a certain situation
12 to prevent--

13 A No.

14 Q --that?

15 A I mean, it depends on their experience, their
16 ability. Something that might be very challenging to a
17 beginner, an advanced paddler might not think twice about it.

18 Q So there's a lot of judgment involved on the part
19 of each individual boater when they're going down the river?

20 A Correct.

21 Q What are some of the things that a boater might want
22 to do to simply enjoy the river that they're floating?

23 A Just be able to relax.

24 Q Meaning?

25 A Which may mean they stop and sit down. They may

1 want to take pictures, they may have to pee. They may want to
2 play, so--

3 Q What do you mean by play?

4 A Probably the most common play thing is to, where
5 there's a wave, to surf on it. So you slide down the face of
6 it just like a wave on the ocean, which means you're staying
7 still and the water's rushing by, but the wave stays in the
8 same spot.

9 Q So the water is going under the boat, but it's
10 going up the wave and down the backside and you're surfing
11 that wave?

12 A Yes.

13 Q It's a standing wave, correct?

14 A Correct.

15 Q And it's in a rapids?

16 A Yes.

17 Q And you're typically facing upstream and you're
18 surfing?

19 A Correct.

20 Q Are you doing stunts if you're a good boater?

21 A You can. So that may be, you can do flat spins,
22 whether it's 360, 720, 180 and then surf backwards. You can
23 also try cartwheeling where you're flipping the boat end over
24 end or sideways, end over end.

25 Q To do this, to play on a rapid, on a standing wave,

1 to surf it or do any of these stunts, you basically have to
2 stop going downstream?

3 A Correct.

4 Q And if you take a picture, do you have to stop?

5 A Stop and sometimes you can take it from your boat
6 but that tends to be a pretty shaky, blurry picture. And so--

7 Q Why is that?

8 A 'Cause the water's jiggling.

9 Q Water's not static, it's moving?

10 A Right.

11 Q Okay. And how would you go about taking a picture
12 while you're still in the boat? How would--what's the best
13 method or approach to doing that so the picture turns out?

14 A Well, you try to hang on to the bank and get your
15 picture (?) out and hope you don't drop your camera in the
16 water or you don't get swept on out into the river, so,
17 usually you're catching an eddy.

18 Q And if you do catch--you have to touch the bank, the
19 bed; right?

20 A Usually, yes.

21 Q And if you do get swept out on the river, what
22 happens?

23 A You've probably taken your spray skirt off so your
24 boat can fill up with water, you can then end up swimming,
25 having to rescue your boat.

1 Q Is it your understanding that H.B. 141 precludes--
2 well, let me ask you this: What is your understanding of what
3 H.B. 141 says about when a person can float a stream that
4 flows over a private streambed?

5 A I don't have the exact definition with me. You
6 probably have it there, but it's got to be sufficient width
7 and depth and I don't remember what all.

8 Q To allow free passage?

9 A Yes.

10 Q During the (inaudible)

11 A Uh-huh (affirmative). Yes.

12 Q Okay. What does that mean to you?

13 A Well, some of it makes sense, some of it's not
14 totally clear to me and it's totally subjective. I mean, what
15 you think that means may be totally different than me, and so
16 a landowner that saw me running the section might think, oh,
17 there's not enough water to do it, but if--it may be plenty
18 for me. Depends on the kind of boat. I've been in places
19 where I've taken beginners where I didn't hit a single rock
20 going down through a shallow place and they hit rock after
21 rock after rock. So it was tough for them, but I had no
22 trouble maneuvering. And if the landowner isn't familiar with
23 that, they might think it's not enough and try to have me
24 arrested.

25 Q Or cited?

1 A Yeah.

2 Q Right. What about, what's your understanding about
3 what H.B. 141 allows to a floater or boater with regards, and
4 doesn't allow, with regards to touching the bed?

5 A Well, again, it's kind of vague. It says something
6 like incidental touching. And what does that mean? Can I--

7 Q To allow continued movement?

8 A Yeah.

9 Q All right.

10 A So can I scrape over three rocks but not five? Can
11 I scrape over one but not hit one that actually stops me? It--
12 -it's just not clear and again, subject to somebody else's
13 judgment.

14 Q And that judgment could be a landowner?

15 A Could be a landowner or the sheriff and--

16 Q And the boater; correct?

17 A Correct.

18 Q What about--what's your understanding of what H.B.
19 141 says about portage?

20 A That you can do it for safety reasons as long as you
21 take the shortest route the closest to the river. Again, I
22 don't remember the exact wording.

23 Q And what do you understand that language to mean, to
24 you as a boater?

25 A Well, you do best to not cause any problem, but some

1 of those, what's shortest may not be safest, the shortest may
2 cause more damage. And so which do you pick? And again, do
3 you decide as the boater? Does the landowner decide? And you
4 have to make the decision then, you can't call the landowner
5 on the phone or the sheriff and say, how are you defining
6 this? And so it's--it's vague enough that you just don't know
7 if you're going to get ticketed or not.

8 Q What does--what's your understanding of what H.B.
9 141 says about stopping?

10 A It says you can't.

11 Q So you--you, I guess, implicitly might be able to
12 stop for safety reasons, for example; correct?

13 A Correct.

14 Q All right.

15 A But--

16 Q But as a general proposition, you can't stop?

17 A Yeah. So does that mean I can't catch an eddy to
18 rest?

19 Q What do you mean, catch an eddy?

20 A That's below an outcropping or a rock or something,
21 the water's flowing back upstream, they're great spots to stop
22 to either rest, to help you with your scouting or to, if you
23 have to stop for some reason to get out, you use those. But
24 that's stopping your downstream momentum.

25 If I am surfing on a wave, I'm not moving

1 downstream. Is that illegal? I don't know.

2 Q Okay. These things you've talked about, a lot of
3 it you've described as requiring at least a possible boater to
4 get out of the boat and walk on the streambed around the
5 stream banks such as in scouting; correct?

6 A Correct.

7 Q And there were, I believe you described possibly
8 taking a picture, by hanging onto the stream bank with one
9 hand, pulling your spray skirt up and pulling your camera out
10 and trying to take a picture.

11 What I'm--what I'm going at here, Gary, is, are some
12 of these things that aren't directly related to safety, are
13 some of these things possible to do without stopping?

14 A Again, depends how you define stopping, 'cause
15 almost always you have to do them by catching an eddy, which
16 means you're no longer going downstream. So it would be very
17 difficult. If that's allowed, some of the things might be
18 possible but they're usually less safe, more difficult and--
19 and may not be possible. But definitely, if you have to
20 continue downstream, you couldn't do them. And so, you know,
21 whether it's a picture, whether it's to rest, whether it's to
22 help somebody with some instruction so that they can be safer
23 or even just so they can get better, not necessarily even
24 safer.

25 Q That requires you to stop?

1 A Yeah.

2 Q And is it fair to say that oftentimes, it's at least
3 better, if not required, that you get out of the boat?

4 A Yes.

5 Q And it's your understanding that, is it not, that
6 H.B. 141, at best, casts a cloud over all those typical
7 activities that a boater would engage in on a river?

8 A Correct. That would make me have second thoughts
9 about whether I even wanted to go.

10 Q Because?

11 A It takes away the enjoyment, it leaves you wondering
12 am I going to get pulled over and dragged out and ticketed.

13 Q Okay. Now, you haven't--that hasn't happened to
14 you; correct?

15 A No.

16 Q Okay. It didn't happen to you when you floated the
17 Provo in June of last year.

18 A No.

19 Q Okay. But you are concerned that it might?

20 A Yes.

21 Q Okay. Let me--let me ask you this: I believe that
22 in your book you talk about floating the Bear River; correct?

23 A Correct.

24 MR. COBURN: May I approach, your Honor?

25 THE COURT: You may.

1 Q (By Mr. Coburn) What sections of the Bear do you
2 discuss in your book?

3 A Mostly not pictured on here, but I guess some of
4 the upper reaches are and then there's a little more you can
5 do down here.

6 Q So you're pointing to the--

7 A The edge of the Uintas.

8 Q Right. The edge of the Uintas where--right below
9 the word "Wyoming" on Exhibit 3.2; correct?

10 A Correct.

11 Q And as you understand the legend on this map, some
12 of those waters are private and some of those waters are on
13 public lands; correct?

14 A Correct.

15 Q Okay. The concerns you have about boating on
16 private lands or private beds, apply to the waters on the map?

17 A Yes.

18 Are there any other waters on this map besides the
19 Bear that you float and have talked about in your book?

20 A Yeah. I mean, there are parts of, like the Logan
21 River, the Blacksmith Fork, let's see here, it's hard to tell
22 where things are. The Upper Ogden, which I don't--

23 Q Well, that would be another hearing (inaudible)
24 we'll talk about that.

25 A Okay. Yeah, so--I guess some of the Bear River

1 where it comes back into the State.

2 Q You've floated up in there?

3 A I have not floated that part.

4 Q Do you talk about that in your book? If you know.

5 A I briefly do and mention there's a book that covers
6 all this part that's not in my book, so I--

7 Q Okay. You refer the reader to another book that
8 talks about floating the Bear River?

9 A Yes.

10 Q The section you pointed to on the Logan, those are
11 all shown in yellow; correct?

12 A All but this last little bit in town.

13 Q Okay. So you do float it all the way into town?

14 A Yes.

15 Q Have you floated down to the confluence with the
16 Blacksmith Fork?

17 A I have not, I've only floated into, just past
18 Highway 91.

19 Q Okay. And how far downstream do you float--or where
20 do you put in on the Blacksmith's Fork? (Inaudible) in your
21 book.

22 A You know, I don't remember exactly. There's a
23 couple places where bridges cross and--

24 Q Okay.

25 A --you can put in and get out where another bridge

1 crosses, so I think there's about maybe six miles, it could be
2 a little bit more on the Blacksmith Fork.

3 Q Do you--do you float the Blacksmith all the way down
4 into Cache Valley?

5 A I have not gone all the way in. Better white water
6 stretches where you have some access are up high.

7 Q Now, do you see that, the red sections or segments
8 immediately the confluence of the two forks.

9 A Right there?

10 Q Yeah. Do you (inaudible)

11 A I'd have to look in my book, I--it's hard to tell
12 exactly where they are.

13 Q Okay. Fair enough.

14 MR. COBURN: May I approach, your Honor?

15 THE COURT: You may.

16 Q (By Mr. Coburn) Talk about the Weber River drainage
17 next. You talk about the Weber, a lot in your book, don't
18 you, or the Weber drainage?

19 A Yes.

20 Q Okay.

21 A There's a lot of good paddling on it.

22 Q Okay. Why don't you just kinda start walking
23 through, walking the Court through the various stretches or
24 tributaries of the Weber that you've floated before. Let's
25 talk about those first.

1 A So pretty much from Holiday Park to where a bunch of
2 forks, middle fork, the main fork, Gardner Fork, come
3 together, it becomes big enough that you can paddle and really
4 all the way down to Wanship, Rockport Reservoir. And then
5 you--you can get out like at the State park just above and put
6 back in right below, there's another little State park and run
7 it down to Echo.

8 Q Just run it right down to where (inaudible) is?

9 A Yes.

10 Q Okay.

11 A There's a little piece right below the dam that
12 there's no access, so it's pretty hard to run that.

13 Q When you say run that, run the what?

14 A The--there's about, I don't know if it's even a mile
15 below the actual reservoir, let's see, so on--so anyway, right
16 in here.

17 Q Okay.

18 A But then you can run all the way down really pretty
19 much all--all the way through into Ogden.

20 Q And if you want, all the way out to the lake?

21 A Yes.

22 Q Okay. Let me grab a pen here, I'd like you, if you
23 would, to label Holiday Park for the Court. Let's see if I
24 can hold it steady.

25 Now, you've run all the stretches of the main stem

1 of the Weber that you just spoke about, haven't you?

2 A Yes.

3 Q How many times on one or more of the stretches have
4 you run the Weber?

5 A Hundred or more.

6 Q Which (inaudible)

7 A I have a piece of property up by Holiday Park and so
8 I get up in that area and then probably the most popular place
9 to go for people from Salt Lake and Ogden has already been
10 talked about, the Henefer to Taggart. And it's a great place
11 to take people to teach them and it's just one of the closest
12 places you can go that has kinda play spots, eddies to catch
13 and you can practice those skills and teach them to over
14 people. But it's readily accessible.

15 Q Talk about your property up in Holiday Park. That's
16 up just below the confluence of the three rivers you
17 mentioned; correct?

18 A Yeah. And it's just barely west of Holiday Park.

19 Q Okay. Does your property straddle the Weber River
20 there?

21 A It does.

22 Q Do you prohibit boaters--

23 A No.

24 Q --for accessing the Weber there?

25 A We do not. Or--or fishermen.

1 Q Or fishermen.

2 What--what are the ratings--what's the rating of
3 that upper stretch of the Weber, say from Holiday Park down to
4 Oakley, which I think is where the Weber crosses under Highway
5 32?

6 A It would be Class 2 and 3, but may require Class 4
7 skills to avoid log jams.

8 Q Okay. And that would be a stretch of river where
9 you--a boater would want or need to do all the things you
10 talked about earlier?

11 A Yes. Definitely lots of places you have to stop and
12 scout.

13 Q Okay. You may not have to stop and scout, but
14 another boater might?

15 A I stop and scout several places.

16 Q And you've floated that all the way down to
17 Rockport; correct?

18 A Correct.

19 Q Have you floated Beaver Creek?

20 A No.

21 Q And you've floated between Wanship and Coalville?

22 A Yes.

23 Q How many times?

24 A Three, maybe.

25 Q Okay. And what are the ratings, how do you rate

1 that water?

2 A It's 1 and marginally 2.

3 Q Okay. It's a slow, placid stretch?

4 A Yes.

5 Q Got a couple little flow overs, small flow overs?

6 A Yes. And some people portage those and some water
7 levels you can run them.

8 Q What about from Coalville down to, we don't have a
9 town here so let's go all the way down to Morgan, have you
10 floated that?

11 A I've floated that quite a few times and that
12 contains the Henefer to Taggart section and once you get past
13 there--

14 Q Past where?

15 A Past Taggart, there's--you starting running into
16 diversion dams and so you start losing water. And so it's
17 just not runnable for as long.

18 Q Because of irrigation draw-downs?

19 A Yes.

20 Q Okay. And what about from Morgan downstream, have
21 you run that stretch?

22 A I have a couple times. That's the hardest to find
23 water and it has much more private land and some places, you--
24 I mean, you can get to a spot and the water's gone. Not--

25 Q Just gone?

1 A Yeah. They may divert it, so, it doesn't get run as
2 often, but if you're going to do that, you have to check
3 everywhere you can to make sure there's still water. You
4 can't just go, put in and go for it.

5 Okay. Can you see Cottonwood Creek coming into the
6 Weber right here?

7 A Yes.

8 Q Have you run Cottonwood Creek?

9 A No.

10 Q Have you run the Weber below Cottonwood Creek?

11 A Yes.

12 Q How many times?

13 A Oh, five or six.

14 Q That's another place where boaters will go to play
15 and practice skills; correct?

16 A Yes.

17 Q And have you floated the Weber once it reaches the
18 Ogden Valley down here at Uintah, have you floated it down
19 into (inaudible)

20 A Yes.

21 Q What's that like?

22 A The top little bit actually has some pretty good
23 little drops but then it flattens out more and is mostly
24 pretty gentle. There are actually a couple play parks.

25 Q Play parks being constructed by the city?

1 A Yes.

2 Q Just out of curiosity, when you float these private
3 sections of the Weber, the sections that are shown in red, do-
4 -do you run into fences coming--going across the river?

5 A I have had.

6 Q And I don't mean literally, but--well, maybe you
7 have literally, I don't know.

8 A I barely survived a couple of them.

9 Q Really?

10 A Yeah. They're very difficult to see ahead of time,
11 you may come around a bend and there's a barbed wire fence
12 across the river.

13 Q And it may--may be too late to avoid it?

14 A Yes.

15 Q So it's not uncommon to encounter fences stretched
16 across the river?

17 A It used to be that way more. It seems like, I don't
18 know if the law now states that they can't do that, but there
19 are far fewer than there used to be.

20 Q You would agree, though, would you not, that the
21 vast majority of the water that's floatable on the main stem
22 of the Weber appears to traverse private streambeds?

23 A Yes.

24 Q And your testimony is is that H.B. 141's
25 restrictions at best limits your ability to float and enjoy

1 those sections of stream?

2 A Yes. I mean, the enjoyment's kind of gone when
3 you're, the whole time you're worrying about, am I going to
4 get arrested for being here.

5 Q Okay. Do you see Chalk Creek on this map?

6 A Let's see. It's right in here.

7 Q Have you floated Chalk Creek?

8 A I have floated a little piece at the bottom.

9 Q Okay. But not the entire stretch?

10 A No.

11 Q But you do talk about it in your--in your book, do
12 you not?

13 A Yes. I only talk in general terms above from what I
14 can see from the road and then specifically about what I've
15 learned.

16 Q Okay. What about Lost Creek, do you see that on
17 here?

18 A Yes. And I've driven up looking for whether it was
19 worth boating and it's pretty small. I--it would have a very
20 limited window and it looked like it had low bridges and
21 things that would make it probably unboatable.

22 Q What about the Ogden River? Have you floated that
23 before?

24 A Yes.

25 Q Where have you floated the Ogden River?

1 A Quite a bit in, well, maybe four or five times
2 through the canyon.

3 Q That's below Pineview Dam?

4 A Yes.

5 Q Okay.

6 A And it has one, the last two miles are very
7 challenging and then there's some partly constructed and I
8 don't know if it was just to slow the water or if it's for
9 kayakers to play, but right after it comes out in the valley,
10 it has a bunch of drops that can be very fun to play on.

11 Q Okay. And at least up in the canyon, a good portion
12 of that water is shown on it as traversing private beds, there
13 appears to be some walk-in access for angling, but otherwise,
14 most of that canyon section of the Ogden appears to be
15 private?

16 A Yeah.

17 Q And again, you'd have the same concerns about
18 floating that section where it's over private beds?

19 A Yes.

20 Q --you discussed earlier?

21 A And I've paddled a little bit up here on the south
22 fork.

23 Q Okay. And where did you paddle the south fork?

24 A I think we put in right below Causey, so this yellow
25 part and we may have gotten out before--

1 Q Before you got to the red?

2 A Yeah.

3 Q Why?

4 A We just didn't see any access points below there.

5 Q Until you got to the reservoir?

6 A Correct.

7 Q Any other streams on this map of the Weber, Exhibit
8 3.3, that you've floated?

9 A East Canyon, from Jeremy Ranch to Ec--or not Echo,
10 East Canyon Reservoir.

11 Q Okay. Can you see that on this map? Park City's
12 down on the center of there, to give you--

13 A Yeah. So--oh, okay. Yeah. So down through here to
14 East Canyon Reservoir and then there's a mile or two below the
15 dam.

16 Q Okay.

17 A Right there.

18 Q And again, that Exhibit 3.3 shows most of that
19 section or those sections of East Canyon Creek in red;
20 correct?

21 A Correct.

22 Q Meaning you'd have the same concerns about H.B.
23 141's effect on your ability?

24 A Yes. So we put in like right at the dam and got out
25 at a bridge.

1 Q Below East Canyon Reservoir?

2 A Correct.

3 Q Where did you put in down in Jeremy Ranch?

4 A It's kinda where the road goes from pavement to dirt
5 and there's a bridge there and we put in right there.

6 Q So right at the bottom end of Jeremy Ranch, the golf
7 course in there; right?

8 A Correct.

9 Q And when I say the bottom, the down stream there?

10 A Yes.

11 Q Okay. And you floated all the way or boated all the
12 way from there down to East Canyon Reservoir?

13 A Correct.

14 Q Have you also--you also talk in your book, do you
15 not, about the Duchesne and Strawberry Rivers?

16 A Yes.

17 Q Okay. What sections, let's talk about the
18 Strawberry first. What section or sections of the Strawberry
19 do you talk about in your book, floating?

20 A I've run from Strawberry Reservoir all the way to
21 Starvation.

22 Q Okay. And how many times? If you remember.

23 A Mainly just one time. It seems like we can a little
24 piece somewhere in here one other time.

25 Q Okay. And what--what grading do you assign to that

1 stretch of the Strawberry?

2 A There's some Class 3 and 4 in the upper part--

3 Q Okay.

4 A --and then it's pretty mellow all down through,
5 after the Strawberry Pinnacles.

6 Q Okay. Did you encounter barbed wire fences down
7 there?

8 A We did.

9 Q All right.

10 A And a couple low bridges before you got to where the
11 road from Strawberry Pinnacles came in.

12 Q Are there any others--is there any other sections of
13 the Strawberry that you floated besides that section from
14 Soldier Creek Dam down to Starvation?

15 A No. I've never done this last little piece.

16 Q What about the Duchesne River? Where have you
17 floated the Duchesne River?

18 A From--by where the--the tunnel comes from taking
19 water out of the Provo River, there is a--or is it the other
20 way around?

21 Q I think the town of Hanna?

22 A Yeah.

23 Q We're not on the Mirror Lake Road there.

24 A Yeah. So here's the Mirror Lake Road, there's a
25 road, a dirt road that takes you over to where the Duchesne

1 tunnel is and from there down to Hanna.

2 Q Okay. So that's mostly public?

3 A Yes.

4 Q And there's a CUP easement there on the west fork
5 and the main fork above Hanna, you see the pink?

6 A Yes.

7 Q Okay. But you floated all the way through to
8 Hanna?

9 A Yes.

10 Q So you didn't have, for most of that run, didn't
11 have concerns about what might happen if you were on a private
12 streambed?

13 A No. Although we weren't clear in here because some
14 of this was obviously ranch.

15 Q Okay. And you didn't know if you could float
16 through there?

17 A Right.

18 See anglers in there?

19 A I remember we saw some people but I don't remember
20 if they were fishing or not.

21 Q And they weren't writing you a citation in any
22 event?

23 A No.

24 Q Okay. Fair enough. Let's talk lastly about the
25 Sevier River. I believe you talk about the Sevier in your

1 book, do you not?

2 A Yes.

3 Q Okay. And you've seen Exhibit 3.5 before, at least
4 a smaller version; right?

5 A Yes.

6 Q Okay. Where, on the Sevier, have you floated? Or
7 where do you talk--what section of the Sevier do you talk
8 about in your book?

9 A There is a little piece, boy, I can't tell in here,
10 might be this little piece that is just a few miles long that
11 has enough water to boat, but probably the main section would
12 be where Big Rock Candy Mountain is. And I think this might
13 be Clear Creek and it ends a little before you get to Clear
14 Creek. And so it's somewhere right in here, but it's also
15 commercially done, there's a company by Big Rock Candy
16 Mountain that does raft trips, so...

17 Q Thank you.

18 A Oh, there are a couple parts further north.

19 Q My apologies.

20 A I think it's this part through here.

21 Q Below Yuba Dam?

22 A Yeah. And you can boat down--you can take out
23 there and you can come down somewhere in here, there's a place
24 you can take out.

25 Q What kind of water do you encounter down there in

1 terms of rating?

2 A Class 2 and 3, but there are a couple places that
3 might take Class 4 skills to stop, because there are a couple
4 big drops that are not natural.

5 Q Manmade drops, huh?

6 A Yes. And so you have to be able to recognize them
7 and stop and get out and so you're not swept over the dam and
8 they're not super obvious.

9 Q Okay. There's a lot of red on this section;
10 correct?

11 A Correct.

12 Q And if you float that, do you have the concerns
13 about possible landowner confrontations or trespass citations?

14 A Same concerns.

15 Q Same concerns. And the same concerns about ability
16 to use and enjoy the river?

17 A Yeah. Yeah. 'Cause you definitely have to get out
18 and walk around some dangerous spots, some of those drops and
19 then you have to make sure you put in at those places where
20 there's a bridge across.

21 Q Okay. And whether it's necessary to portage or not
22 can oftentimes depend upon who the boater is?

23 A Right.

24 Q Thank you.

25 A Do you want your pen?

1 Q Oh. Thank you.

2 You spoke earlier about at least convention for
3 boaters, typically a boater will get out of the water and do
4 something on the--walk the bed or get up on the stream bank or
5 something as a matter of preference or convention, but not
6 necessarily a need; correct?

7 A Correct.

8 Q Right. And then in some instances, you need to do
9 that, for example, to portage around an unsafe hazard?

10 A Correct.

11 Q Okay. Are you familiar with the term "ordinary high
12 water mark?"

13 A Yes.

14 Q As a boater, what does the term ordinary high water
15 mark mean to you?

16 A Usually, you can see a pretty distinct spot, I mean,
17 the vegetation changes, so below that spot, you have maybe
18 grasses or things that either grow very quickly or survive
19 being underwater and above that, you get into the woodier
20 plants, the bushes, the trees that can't survive if they're
21 submerged for long.

22 Q Okay. Assuming you're not on a river when it is
23 flowing at a level that the water is at the ordinary high
24 water mark, are there situations where you may need to get out
25 of the boat or want to get out of the boat and not have to go

1 above the ordinary high water mark?

2 A Actually, most of the time, you don't have to.
3 Occasionally, you do and it--and flash floods would be an
4 example.

5 Q Lightning?

6 A Lightning, yeah. Or if you can't get to a scouting
7 point or you can't get to an injured person, you may have--by
8 staying below, so for--there are a bunch of safety reasons,
9 you might have to, but they're actually pretty rare. Most of
10 the time you can use below that, ordinary high water mark.

11 Q So what--what's your impression, if you will, or
12 your opinion as to H.B. 141's impact on the boating public, if
13 that's a fair term, kayakers and rafters and canoeists, where
14 they want to boat a river that flows over private streambeds?

15 A Well, to me, it significantly very negatively
16 affected that, it affects your use of the water, it affects
17 the safety, it affects the enjoyment.

18 Q Is it, I think you said earlier, it might even
19 discourage you from even going there; correct?

20 A Yeah. I mean, if you have a choice between a place
21 where you know for sure no one's going to come out and ticket
22 you and a place that there's a possibility, even if it's
23 somewhat remote, I mean, there aren't people watching every
24 section that's private, but you'--you're usually going to pick
25 the one that's safer as far as not being ticketed.

1 Q So that puts you back on the waters that traverse
2 public beds?

3 A Correct.

4 Q Right. And you--there's quite a bit of that water
5 in Utah; correct?

6 A Correct.

7 Q Okay. Just from a geographic standpoint, in Utah,
8 is most of that water in the southern half of the State?

9 A Yes.

10 Q Yeah, you do--as we discussed, there is a fair
11 amount or some of that water over public beds in the northern
12 half of the State, but most of it's on Federal land?

13 A Right.

14 Q Right. Okay. So you can go there?

15 A Right.

16 Q But if I'm right, if I heard you correctly, you're
17 likely to choose not to go where H.B. 141 theoretically says
18 you can go because of all the reasons you stated?

19 A Correct.

20 Q Okay.

21 MR. COBURN: Give me a moment, your Honor?

22 THE COURT: You can.

23 MR. COBURN: Pass the witness, your Honor.

24 THE COURT: All right. Why don't we take a recess?

25 We've been going for about an hour-and-a-half. Court's in

1 recess.

2 (Recess)

3 THE COURT: We're back on the record in the matter
4 of Utah Stream Access Coalition vs. VR Acquisitions, the
5 parties are present, counsel are present. Mr. Nichols is on
6 the stand. You may cross.

7 CROSS-EXAMINATION

8 BY MS. BUTLER:

9 Q Good afternoon, Mr. Nichols.

10 A Hi.

11 Q How are you doing?

12 A Good. Thanks.

13 Q So you said that you have boating since 1967; is
14 that correct?

15 A Correct.

16 Q And you are the author of the River Runners Guide to
17 Utah?

18 A Correct.

19 Q When did you say you first wrote that book?

20 A I believe 1982, it was first published.

21 Q And you've--you've had several re-writes, you said?

22 A Yes.

23 Q And the last one was in 2002?

24 A Correct.

25 And I believe you said you wrote this book by going

1 out and floating the rivers; is that correct?

2 A Yes.

3 Q And so as of 2002, you'd floated most of the rivers
4 but not all of the rivers in your book?

5 A Correct.

6 Q The purpose of your book was to give the public
7 information about where they could--what rivers they could go
8 and float; is that correct?

9 A Yes.

10 Q Did you revise the book in 2008 after the Conatser
11 decision was issued?

12 A No. The--I think the revisions were more in 2006.

13 Q And you didn't revise it in 2010, after H.B. 141 was
14 passed?

15 A I did not.

16 Q So is it fair to say in order to float a river, you
17 need sufficient water for your chosen vessel?

18 A Yes.

19 Q And you would need a sufficient width of the river
20 to support your vessel?

21 A Well, it--yeah, it's got to be wider than your
22 kayak.

23 Q Okay. And it would need to be sufficiently deep for
24 your chosen vessel?

25 A Yes.

1 Q So a--a stream that would be floatable is one that
2 has sufficient width, depth and flow to support your vessel?

3 A Yes.

4 Q Can you show up at a river and determine--and
5 observe its width, depth and flow?

6 A Yes.

7 Q So when you show up at a river, you can observe the
8 width, depth and flow and determine whether it will float the
9 vessel that you've brought with you; is that correct?

10 A At least the part you can see.

11 Q And some rivers might be floatable at some times and
12 not at others; is that correct?

13 A Correct.

14 Q So some rivers--this could--could this change over
15 the course of a day?

16 A Yes.

17 Q And so some months, a stream might be floatable and
18 others, it might not be and this would be primarily due to
19 water flow?

20 A Yes.

21 Q You spoke with Mr. Coburn a little bit about H.B.
22 141. You're aware that under H.B. 141, it allows the public
23 to float on waters that have a sufficient width, depth and
24 flow to allow free passage of the chosen vessel at the time of
25 floating; correct?

1 A Yes.

2 Q And you understand that the law permits you to--the
3 public to portage around obstacles?

4 A Yes.

5 Q Are you aware that H.B. 141 prohibits construction
6 of fences that create unreasonably dangerous conditions?

7 A No.

8 Q Are you aware that landowners are required by H.B.
9 141 to allow a ladder, gate or other facility to allow
10 portage?

11 A I didn't know they have to construct something.

12 Q Are you aware that they have to allow it?

13 A Yes.

14 Q So H.B. 141 makes it clear that you--you can float
15 on the waters that flow across private property; correct?

16 A Clear.

17 Q Of course, this is subject there--to there being
18 enough water there; correct?

19 A Correct.

20 Q And you spoke about streamers--strainers and
21 sweepers with Mr. Coburn; correct? And those--

22 A Yeah.

23 Q Is that what they were called? Yeah.

24 And there might be strainers and sweepers on water
25 that flows over private property just a there might be on

1 public property; is that correct?

2 A Correct.

3 Q You're aware that H.B. 141 permits you to touch the
4 streambed incidental to safe passage; is that correct?

5 A Yes.

6 Q You spoke with Mr. Coburn about a number of safety
7 concerns and how water is dangerous and unpredictable at
8 times; is that correct?

9 So starting with fatigue, is it fair to say that you
10 might need to get out of your boat to rest in order to safely
11 pass down the river?

12 A Yes.

13 Q And you've had to do this before; correct?

14 A Yes.

15 Q And you've never been cited for trespassing for
16 doing this?

17 A No.

18 Q And you might need to rest to relieve cramping
19 before you can safely pass; is that correct?

20 A Yes.

21 Q Have you had to do this before?

22 A Yes.

23 Q And were you cited for trespassing?

24 A No.

25 Q You might need to eat to maintain your energy for

1 safe passage; correct?

2 A Correct.

3 Q And you've had to do this before?

4 A Correct.

5 Q And you've never been cited for trespassing?

6 A No.

7 Q You spoke a little bit about thunderstorms and you
8 said they created two sort of--two risks, lightning and flash
9 floods; is that correct?

10 A Correct.

11 Q And I understand that the water is maybe one of the
12 worst places you can be during a thunderstorm.

13 A Correct

14 Q And you've had to get out of your boat and on to
15 land during a thunderstorm before?

16 A Yes.

17 Q Above the ordinary high water mark?

18 A Yes.

19 Q And you've had--you've had to get out of your boat
20 to avoid a flash flood before?

21 A Yes.

22 Q Above the ordinary high water mark?

23 A Yes.

24 Q And were you cited for trespassing on either of
25 those?

1 A No.

2 Q And it's fair to say that getting out of your boat
3 on the land to avoid a flash flood or lightning is necessary
4 for safe passage; is that correct?

5 A Correct.

6 Q And now placing someone on the bank with a rope,
7 that is necessary for safe passage; correct?

8 A Yes.

9 Q And you've had to do this before?

10 A Yes.

11 Q And have you had to do it above the ordinary high
12 water mark?

13 A Yes.

14 Q And you've never been cited for trespassing for
15 doing this?

16 A No.

17 Q And getting out of your boat to scout for safety
18 would also be necessary to safe passage?

19 A Yes.

20 Q And have you had to do this before?

21 A Yes.

22 Q Have you had to do it above the ordinary high water
23 mark?

24 A Yes.

25 Q And you were not cited for trespassing; correct?

1 A No.

2 Q And helping someone get back into their boat would
3 be necessary for safe passage; correct?

4 A Yes.

5 Q And you've had to do this before?

6 A Yeah.

7 Q And have you had to do it above the ordinary high
8 water mark?

9 A Possibly, but most of that can be done below.

10 Q And were you cited for trespassing?

11 A No.

12 Q You've asked to use private property before;
13 correct?

14 A Yes.

15 Q And have you been given permission before?

16 A Yes.

17 MS. BUTLER: Sorry. Just one second.

18 I'll pass the witness, your Honor.

19 THE COURT: Thank you.

20 From the State?

21 CROSS-EXAMINATION

22 BY MR. ROBERTS:

23 Q Mr. Nichols, what's now known as the Upper and
24 Middle Provo, did you float that before the Jordanelle Dam was
25 put in?

1 A Yes.

2 Q How was it?

3 A Great.

4 Q Did you complain about the Jordanelle proposal, to
5 build the Jordanelle dam, so--because they were taking away
6 some good floating?

7 A I don't know that I publicly complained. I'm sure
8 I grumbled to my wife.

9 Q And back before the Jordanelle, what was the middle-
10 -what was the float like on the Middle Provo? Let's say on
11 the Middle Provo.

12 A So that's the part--

13 Q Below the Jordanelle, where--below where the
14 Jordanelle Dam is now, Deer Creek.

15 A Before they put in all the changes, it had a lot of,
16 they had kind of straightened it and it had a lot of dams to
17 dissipate the energy. I think that's what--or before, and so
18 it had a bunch of drops that were very rocky that some, you
19 could run, some you couldn't, but it was still an interesting
20 section.

21 Q You're familiar with the Conatser decision?

22 A Yes.

23 Q Okay. Before that decision, what was the law that
24 governed whether you could portage on a stream that went over
25 private ground?

1 MR. COBURN: Objection. Legal conclusion.
2 Foundation.

3 THE COURT: Sustained as to legal conclusion and
4 foundation. He can testify to his understanding.

5 MR. ROBERTS: Okay.

6 Q (By Mr. Roberts) What was your understanding with
7 regard to what the law was with regard to when you could
8 portage in a stream that was flowing over a privately-owned
9 bed?

10 A Our understanding, as long as we stayed below the
11 ordinary high water mark, we were fine.

12 Q What about--what about for portage?

13 A Well, even there, you can, but if you needed to
14 portage, you could.

15 Q Okay. So the law was if you needed it for safety
16 reasons, you could do it?

17 A Yes.

18 Q Okay. What was your understanding with regard to
19 the ability to stop and walk in the streambed on a stream that
20 flowed over private property prior to Conatser?

21 A Again, this was a--I don't even know for sure where
22 it came from, but the people you talk to that have boated
23 longer than you, told everyone that you could do that as long
24 as you were below the high water mark. And a number--at the
25 time, a number of cases were going on throughout the country

1 were published by, like American Water and so everyone was
2 kind of getting the feeling for--that that was the basic law,
3 even though you were--each state had to make that decision.

4 Q In your report, you list a number of safety
5 concerns. A number of those appear to me would require you to
6 get--you would ordinary go beyond the high water mark,
7 minimizing risk--lightning risks, avoiding flash flooding,
8 assessing and treating injuries, hypothermia, et cetera,
9 putting someone on the stream bank with a rescue rope,
10 scouting risks, allowing a boater to re-enter a craft after
11 they've been jettisoned.

12 What was your understanding of the law with regard
13 to your ability to do that prior to Conatser?

14 A Well, a big number of those you could do below the
15 high water mark, but some of them, again, for your safety, you
16 could do that.

17 Q Okay. So what is your understanding of what the
18 law said, that you could it--if--if you needed to do it for
19 your safety, it was okay to do? Was that your understanding?

20 A Yes.

21 Q Okay. The H.B. 141, Section 73-29-202, Subsection
22 (2) talks about: it includes the right to incidentally touch
23 private properties required for safe passage and continued
24 movement.

25 So the law is--under H.B. 141 is, you can touch, go

1 on private property as needed for safe passage; correct?

2 A Correct. But it--

3 Q Okay. And--and pre-Conatser, the law was al--

4 THE COURT: I'm sorry. He hadn't finished. What--
5 correct, but what?

6 THE WITNESS: It left it open. You know, is it my
7 decision as the boater, is it the landowner, is it the
8 sheriff, so it became much more questionable.

9 Q (By Mr. Roberts) Okay. Well--

10 A Where before, it seemed like it was the boater's
11 choice.

12 Q And what do you base that understanding that it was
13 the boater's choice pre-Conatser?

14 A That just seemed to be what lawsuits throughout the
15 country were showing.

16 Q Okay. You--that's not based upon any understanding
17 of what was happening in the State of Utah?

18 A No.

19 Q Okay. You never talked to any police officers, any
20 prosecutors, any landowners?

21 A No. Because I don't think any of them had a ruling
22 yet on that either.

23 Q Okay. So H.B. 141 that says that you can touch
24 private property as necessary for safe passage is vague and
25 uncertain, but the prior law which everybody assumed you could

1 get out, touch private property if--as needed for safe passage
2 was not vague and was not problematic. Is that your
3 testimony?

4 A To me, it seemed again more--if the boater felt like
5 they needed to do it to be safe, they could do it, it wasn't
6 subject to two or three other different people's
7 interpretation.

8 Q Okay. Was it your understanding that what you could
9 be threatened with if you went on somebody's private property
10 was trespass?

11 A Yes.

12 Q Okay. Did you have any understanding of--with
13 regard to what constitutes a valid defense under Utah law with
14 regard to trespassing prior to Conatser?

15 A If it's not posted, if it doesn't have fences, if it
16 doesn't appear to be cultivated, things like that.

17 Q That's--that's before Conatser?

18 A Yeah.

19 Q So you could go into your neighbor's back yard if he
20 didn't post it and sit down in his--on his--

21 A No. Because--

22 Q --in his--sorry.

23 A Sorry. I interrupted you.

24 Q No. No. Okay. Now, why couldn't you?

25 A Because that, you can see that it's cultivated. You

1 know, there's some things that indicate it, where most of
2 these rivers looked--you could not tell the difference when
3 you went from public to private. Most of this was wild land.

4 Q Another concern in your report here with regard to
5 the impairment of use by 14--H.B. 141, about the boater's need
6 to occasionally exit the water to take a pee or to take a
7 picture. Do you think you have the right to go on someone
8 else's private property to pee or to take a picture?

9 A Again, kind--under Conatser and what we understood
10 before, we have a right to do that up to the high water mark,
11 but no above the high water mark. So--

12 Q Okay. So your--I'm sorry.

13 A --above that, you really don't have that right.

14 Q Okay. So your concern here with regard to the
15 impairment of use to take a picture or take a pee, you're
16 saying that only applies going up to the high water mark and
17 doesn't mean you can actually get on to the private property
18 outside that high water mark?

19 A I would say that's true, which I wasn't---when we
20 talked before, I wasn't very clear and was a little confused
21 of what we were talking about; but I don't think you can just
22 go up and use somebody's property above that line, except for
23 safety.

24 Q Except what?

25 A For safety.

1 Q Okay. And again, H.B. 141 allows you to get out in
2 the stream and do what's necessary with regard to safety;
3 correct?

4 A Correct.

5 Q Okay. And the law prior to Conatser with regard to
6 portage, getting out, going onto somebody's private property
7 completely out of the water, that wasn't--that right wasn't
8 spelled out anywhere in the law, was it?

9 A Not--

10 Q To your understanding?

11 A --that I'm aware of.

12 Q Okay. And H.B. 141 now explicitly gives you that
13 right to do that; correct?

14 A It does, without, again, really defining it where
15 you can have different opinions on, you know, did you follow
16 the--the landowner might say, well, you could have gone ten
17 feet closer and so you trespassed, where I might feel like,
18 well, I had to do that to be safe or to avoid trampling some
19 bushes. So again, it's just not--it didn't make it clear.

20 Q Okay. And it was clear before?

21 A It was at least as clear and maybe more so in the--
22 again, more of it was--

23 Q I mean, before--before there was--

24 THE COURT: I'm sorry. Let him finish.

25 MR. ROBERTS: Okay.

1 THE WITNESS: More of it was again left up to the
2 boater to make that decision.

3 Q (By Mr. Roberts) What do you base that
4 understanding on, that it was left up to the boater as opposed
5 to a police officer decided to arrest you or a prosecutor
6 decided to prosecute you?

7 A That just seemed to be the write-ups of lawsuits
8 from around the country.

9 Q Okay.

10 A Like I say, in publications like American White
11 Water, people in, like the Wasatch Mountain Club who were
12 boaters who said this is what you can do.

13 Q Okay. Do you know--have you sought any opinions by
14 sheriffs or other people about what this means?

15 A Only one time, maybe, where a sheriff talked to
16 us because a landowner complained and he wrote us a nice
17 little note saying this landowner thinks that you're
18 trespassing, but he hasn't put up any signs, in my opinion, he
19 has no right to do this, but he thinks I'm writing you a
20 ticket. So here's this note and next time, he'll probably
21 have signs up, but then it might be different. But he--he
22 gave his clarification of what his opinion was at the time.

23 Q Okay. You testified that you thought that H.B. 141
24 took away rights that you had before. What rights were you
25 talking about?

1 A Being able to use up to the high water mark.
2 Places I've boated like in Idaho where you have that right, we
3 let like we have that here until--and Conatser, I think,
4 showed that we actually did. And then this totally changed
5 that and gave us unauthorized to do that unless it was a
6 safety issue which again is a debatable thing.

7 Q But again, that ability to get out of the water pre-
8 Conatser was still a safety issue, but you thought you had the
9 right to determine rather than someone else?

10 A Yeah. We--we felt like we had that ability to do
11 it, with Conatser, we can't just do anything we want up to the
12 high water mark. And you--you haven't been able to do
13 anything you wanted, you could--still couldn't do things that
14 caused damage, like you can't tear people's fences down,
15 things like that, but it was much clearer, were more open to
16 use that water up to the ordinary high water mark.

17 Q Do you have an opinion whether it would be safe and
18 practicable to float, to begin floating on water that does not
19 have sufficient width, depth and flow to allow you to have
20 free passage?

21 A I don't know anyone that would want to do that.

22 Q Okay. Would that--wouldn't that be a safety issue
23 about trying to do that where you couldn't--there wasn't
24 enough water to float?

25 A Well, in a very short time, you'd walk back to your

1 car and go home. I mean, I don't think it would create the
2 hazard that going at higher water where you have some power
3 and the water's too low to float.

4 Q Okay. So the--so the restriction--

5 THE COURT: I'm sorry. I--he does speak softly, but
6 I thought--did you finish?

7 THE WITNESS: Yeah.

8 THE COURT: And the water's too low to float, what?

9 THE WITNESS: I don't think it creates that much of
10 a hazard because you would quickly realize you're not going
11 anywhere and you'd walk back to your car and go home.

12 THE COURT: Okay. Go ahead.

13 Q (By Mr. Roberts) So are you troubled by the law
14 that says that you shouldn't put in and start to try and float
15 where you don't have sufficient water, you don't have
16 sufficient width, depth and flow to allow the free passage?

17 A I'm--

18 Q Does that take away some right or ability?

19 A I'm only troubled in the sense that I might be able
20 to do it and someone else can't or the other way around, so
21 I've been places where I had no problem getting through but
22 other people were getting hung up on the shallows because they
23 just couldn't read the water. So again, it comes down to, if
24 I think I can do it, then I should be able to, it shouldn't be
25 based on a landowner thinking it's too shallow for you to do

1 it, if I really have that ability.

2 Q Well, but if--if you can sit in a boat and have free
3 passage, then you can--you can float. If you sit in the boat
4 and can't, then you can't.

5 A Yeah. And then why would you keep going?

6 Q Right.

7 A You would again, stop, get out of the boat, go home.

8 Q Do you ever have trouble with anglers when you're
9 floating on the rivers and streams?

10 A Not very many. I've had a few.

11 Q Okay. It's not always easy for anglers and boaters
12 to recreate at the same time in the same place?

13 A It can be a challenge, but with a boat, you can
14 usually paddle, stay away from them and a lot of fishermen
15 realize that a floating object rarely bothers the fish and so
16 they don't care. I've thanked by fishermen for the first fish
17 they caught all day was when I came, so it--you know, it's
18 just one of those things, some get mad, some are happy, some
19 don't care.

20 Q So when you put in to start a float, do you plan out
21 your--the float?

22 A Well, generally speaking, yes, but rivers are always
23 different, so you can't plan like every move you're going to
24 make.

25 Q Right. But I mean, you talked about--I forgot which

1 stretch, I believe it was down below Morgan, I think the
2 Morgan, down below Morgan, is--you didn't float that because
3 the areas where you could get out were too far--too--too far
4 away or not enough of them?

5 A Yeah. So I like to go to where I'm going to come
6 out and make sure there's still water in there and so I'm not
7 stopped halfway through and all of a sudden, the water's gone.

8 Q Okay. So you plan things like where you're going to
9 get out?

10 A Yes.

11 Q Okay. You--wouldn't you ordinarily want to plan
12 certain types of stops if you were on a river, you know, like
13 if you're going to be a couple hours, where you're going to
14 stop to eat, things like that?

15 A When you can, but you don't always know exactly
16 where you will be and it's pretty hard to memorize every bit
17 of the shoreline so you're not going to change this.

18 Q Okay. So if you were on a stretch that has both
19 public and private segments on it, you could attempt to do
20 those things where you needed to stop in the river on the
21 public sections--

22 A Yeah.

23 Q --rather than the private sections?

24 A On planable things, yes. Tip-overs, things like
25 that, they're hard to plan.

1 Q Right. But in all those things that come up with--
2 that don't have planning, that are safety issues, you're
3 authorized to stop and take care of those safety issues and do
4 what you need to do under H.B. 141?

5 A Correct.

6 Q You seemed to indicate that a lot of the problems
7 with H.B. 141 is really the attitude it creates in you because
8 of your uncertainty as to whether or not you might get
9 stopped, cuts down on the enjoyment and so that's a burden by
10 H.B. 141.

11 A Correct.

12 Q Okay. And one of the ones you mentioned was when
13 you were floating down toward Hanna and you got into a spot
14 that was--looked like it was people growing products and it
15 looked like a ranch or a farm. You indicated that was a
16 concern; right?

17 A I don't remember talking about that on that section.

18 Q You don't recall testifying about coming down here,
19 you were concerned before you weren't--this looked like farm
20 land and you weren't sure if you might get stopped.

21 A No. But I don't trust my memory. It--that's
22 certainly happened on places.

23 Q Okay. And there, with regard to Hanna, in fact,
24 that was publicly accessible and so you had the right to stop
25 in that stream, yet you were still worried.

1 A Yes. If that was the section. I still don't really
2 remember it on that section.

3 Q And pre-Conatser, you just felt more comfortable
4 thinking that you wouldn't get arrested for stopping or
5 getting out of the water or, you know, going up on the shore
6 to pee or to portage?

7 A Correct. Which Conatser then proved we thought
8 right.

9 MR. ROBERTS: That's all I have at this time, your
10 Honor.

11 THE COURT: Thank you.

12 Can I just--Mr. Nichols, let me ask you, is it your
13 testimony that--that the right recognized by the Utah Supreme
14 Court in Conatser confirmed the practice of the boaters in
15 Utah for the years that you've been on the streams and rivers
16 of Utah?

17 THE WITNESS: Yes.

18 THE COURT: Do you have a follow-up question, anyone
19 on that?

20 MR. COBURN: On that particular issue?

21 THE COURT: Or anything else. I didn't want--we're
22 in cross right now, any follow-up on that question? Doesn't
23 sound like it. Okay.

24 MR. ROBERTS: Well, I assumed that I would get back
25 to that but if we--

1 THE COURT: Well, let--let's do it now and then
2 redirect can be complete, so...

3 Q (By Mr. Roberts) So the law before Conatser was
4 really just everybody's understanding that this is the way it
5 worked; correct?

6 A Correct.

7 Q And you viewed that, everybody's understanding as
8 the law, I assume?

9 A Yes. Yes. And--

10 Q You think Conatser affirmed everybody's
11 understanding of what you could do in the river?

12 A Yes.

13 I mean, I don't know what everyone thought, but it
14 confirmed the things I had been taught.

15 Q Okay. Did Conatser, to your understanding, deal
16 with the issues of getting out of the streambed above the high
17 water mark?

18 A I don't remember if it does that or not.

19 MR. ROBERTS: Nothing further, your Honor.

20 THE COURT: Thank you.

21 You may redirect.

22 MR. COBURN: Thank you, your Honor.

23 REDIRECT EXAMINATION

24 BY MR. COBURN:

25 Q Gary, you testified during cross that you can put

1 in, for example, judge as an experienced boater, whether or
2 not the river at that point has sufficient width, depth and
3 flow to allow free passage; correct?

4 A Correct.

5 Q I think you also testified on cross that you've had
6 situations where you've part--part--excuse me, part of the way
7 through a float, you've run out of water.

8 A Correct.

9 Q Okay. So what do you do at that point if you're on
10 a private bed?

11 A We've usually found the shortest way to get out.

12 Q Yeah.

13 A And often, they've been at a diversion dam and we've
14 followed the road into the diversion dam out to the highway.

15 Q Okay. And then walked back to your car?

16 A Yes.

17 Q Either down to the take-out or back to the put in?

18 A Yes.

19 Q All right. All right. Is your ability to judge
20 whether or not a river has sufficient width, depth and flow to
21 allow free passage, is that a--an acquired skill?

22 A Yes.

23 Q Based upon many, many years of floating?

24 A Yes.

25 Q And have you been in situations where somebody who

1 does not, like a novice, misjudged that?

2 A Yes.

3 Q Okay. Is there--well, let me ask it this way. You
4 say that it's your practice to, when in doubt scout; correct?
5 On many occasions was scouting required, and I use the word
6 required because that's H.B. 141 uses, required for safe
7 passage as opposed to promoted safe passage?

8 Do you understand what I'm asking?

9 A Can you word it a little different?

10 Q Well, H.B. 141 allows you to get out and touch the
11 streambed, or even the uplands, 'cause it says private
12 property, to scout; correct?

13 A Correct.

14 Q And it says you can do that when it's required for
15 safe passage. Have there been situations where you've gotten
16 out of the boat and scouted and looked at what was around the
17 corner and said, no, that's no big deal?

18 A Yes. There have been a number times.

19 Q Right. So scouting wasn't required for safe
20 passage but it promoted safe passage.

21 MR. ROBERTS: Objection, your Honor, that
22 mischaracterizes the testimony as to the reason for doing the
23 scouting.

24 THE COURT: It's consistent with my memory. You can
25 re--recross on him if you'd like.

1 Q (By Mr. Coburn) Do you recall the question?

2 A Yeah. Yes, I mean, there--there are times like
3 that.

4 Q Times when you scouted and you saw, no big deal?

5 A Yes.

6 Q So scouting wasn't required for safe passage but,
7 for lack of a better term, it promoted or insured safe
8 passage.

9 A Yes.

10 Q Something like that? Okay.

11 What about posting somebody with a safety rope. Is-
12 -do you always throw the safety rope when you post somebody
13 with a safety rope?

14 A No. In fact, hopefully more often than not, you
15 don't.

16 Q Right. So when you don't have to throw the safety
17 rope, posting that person with a safety rope wasn't required
18 for safe passage, was it?

19 A Right.

20 Q Right. And again, your main concern, actually two
21 main concerns with H.B. 141 is, it's subject to interpretation
22 which in terms of a trespass issue can vary between the
23 boater, the landowner and law enforcement and a judge.

24 A Correct.

25 Q And the call of the land--each one of those

1 individuals may, particularly a boater, may depend upon the
2 skill and judgment of that boater?

3 A Correct.

4 MR. COBURN: Give me one--one moment, your Honor.

5 Q (By Mr. Coburn) You teach kayakers, canoeists,
6 rafters and have been for the better part of 40 years;
7 correct?

8 A Correct.

9 Q And do you teach them about scouting on the
10 water when you're on the river?

11 A Yes.

12 Q Why don't you explain that to the Court?

13 A So some--what you always try to do is have a
14 spot you can stop, in sight. And if you get to where you
15 can't see another spot from that spot, it's time to scout.
16 But if you can see another spot, then you can go down to that
17 and you can get closer and closer, and then maybe get close
18 enough to see without having to get out, but even that, I'm
19 not sure is allowed, because you're stopping. And the H.B.
20 141 says you can't stop.

21 Q When--when you do stop to scout and teach others
22 how to scout, when you're looking at the water to, quote,
23 Pocahantis and Disneyland are right--just around the river
24 bend, do you teach them how to read the water, ask them what
25 they're seeing, how--how--where they think the current's

1 going, how it's going to--how the boat's going to respond to
2 the current, that sort of thing?

3 A Yes.

4 Q Okay. And again, that's not required for safe
5 passage, but it certainly teaches about safe passage?

6 A Yes.

7 MR. COBURN: Thank you, your Honor.

8 THE COURT: Thank you.

9 MR. COBURN: Pass.

10 THE COURT: Anything else for this witness?

11 MS. BUTLER: Just a couple questions.

12 RECROSS-EXAMINATION

13 BY MS. BUTLER:

14 Q So you testified that your understanding of the--of
15 boating pre-Conatser was that it included the ability to walk
16 above the high water mark; correct?

17 A Only in situations where it couldn't be avoided.

18 Q And Conatser dd not confirm that right; is that
19 correct?

20 A I don't know that I remember. I'd have to read
21 Conatser again.

22 Q Is it fair to say that in order for safe passage,
23 you would need to stop in a place where you can still see the
24 river?

25 A Yes.

1 Q You mentioned to Mr. Coburn that you've seen a
2 novice who misjudged the width, depth and flow of the river;
3 is that correct?

4 A Correct.

5 Q Was that notice cited for trespassing?

6 A No. There was no one there to see them.

7 Q If a tree falls in the woods...

8 MS. BUTLER: Pass the witness.

9 RE CROSS-EXAMINATION

10 BY MR. ROBERTS:

11 Q So you're floating down a river and suddenly all
12 the water goes away and so all there is is dirt and rocks in
13 front of you in the river. Those--would those appear to be a
14 dangerous obstruction in the water so you'd need to portage
15 around them?

16 A It would depend. I mean, you could continue
17 walking down the river.

18 Q Okay.

19 A I mean, it sounds like you'd be walking.

20 Q Okay. So you could then, in order to make safe
21 passage since you can't float any more, you have to walk, so
22 touching the bed would be required for safe passage.

23 A Correct.

24 Q Okay. And so both of those would make it legal
25 for you to continue down the stream--streambed, even though

1 there was no more water; right?

2 A Yes. It--unless they got picky on where in the
3 bed you were.

4 Q Unless they got picky on what?

5 A Where in the bed.

6 Q Oh. But you have the right to incidentally touch
7 private property as required for safe passage and so if you're
8 required to walk on there for safe passage, then that's
9 allowed; right?

10 A Yes.

11 Q Okay. So you indicated that you always, in order
12 to have safe passage going down a river, you need to be able
13 to see a spot to stop.

14 A Correct.

15 Q And if you can't see it, I assume it's like a
16 sing song when you say it, if you can't see a spot to stop,
17 you scout.

18 A Correct.

19 Q And so that scouting is necessary because you
20 can't see the spot in order for there to be safe passage;
21 correct?

22 A Correct.

23 Q Right. So it doesn't matter whether or not you
24 see danger once you get up and look down, but getting out to
25 scout was necessary for safe passage because you could not see

1 that spot; correct?

2 A That would be correct, according to the boater,
3 but the landowner might not see that way.

4 Q Okay. You talk a lot--you spoke about teaching
5 various skills and techniques to students and people who hire
6 you.

7 A Correct.

8 Q And a lot of those would require being able to
9 stop in the water, being able to do various types of things.

10 A Correct.

11 Q Correct. Okay. Could you arrange to do that
12 type of teaching on waters that run over public property?

13 A We could and we usually do.

14 Q Okay. So--

15 MR. ROBERTS: That's all.

16 THE COURT: Very good. Thank you.

17 Are you done?

18 MR. COBURN: I have just one question, your Honor.

19 THE COURT: Okay.

20 MR. COBURN: One topic just very briefly.

21 FURTHER REDIRECT EXAMINATION

22 BY MR. COBURN:

23 Q So exiting a river that's now out of water halfway
24 through the float, walking down the now, empty riverbed, is
25 that required for safe passage or just passage?

1 A Passage because you--you're going to be safe.

2 Q Yeah. I'm tempted to ask you whether it's better
3 to be in the riverbed so you can stay out of the sight of a
4 gun-toting landowner, but I'm not going to ask that question.

5 THE COURT: All right. Thank you.

6 Mr. Nichols, thank you. You may step down.

7 THE WITNESS: Thank you.

8 THE COURT: May Mr. Nichols be excused?

9 MR. COBURN: He may, your Honor.

10 THE COURT: Any objection to that?

11 MR. ROBERTS: No objection.

12 MS. BUTLER: No objection.

13 THE COURT: All right. You're free to go. You may
14 stay, if you wish. Thank you.

15 Next?

16 MR. COBURN: The Coalition calls Steve Schmidt.

17 THE COURT: Mr. Schmidt, if you'll come up to the
18 clerk's desk, face the clerk, please raise your right hand and
19 take an oath.

20 STEVE SCHMIDT,
21 called as a witness by and on behalf of the plaintiff in this
22 matter, after having been first duly sworn, assumed the
23 witness stand and was examined and testified as follows:

24 THE COURT: Thank you. Would you be seated to my
25 right? Counsel, Mr. Roberts referred to Mr. Nichols' report,

1 I think, I don't know if that was ever offered.

2 MR. COBURN: It was not offered. I think by
3 stipulation, your Honor, it comes in because Mr. Nichols
4 testified, but I appreciate your reminder and I would move to
5 admit Exhibit 11, Mr. Nichols' report into evidence.

6 THE COURT: Any objection?

7 MS. BUTLER: No objection.

8 THE COURT: 11's received.

9 DIRECT EXAMINATION

10 BY MR. COBURN:

11 Q Would you state your full name for the record,
12 please?

13 A Steve Schmidt.

14 Q How do you spell your last name?

15 A S-c-h-m-i-d-t.

16 Q And where do you reside?

17 A Salt Lake City, Utah.

18 Q Are you a Utah native?

19 A I am not a Utah native.

20 Q Where did you move here from?

21 A I moved here from Dayton, Ohio, 1973.

22 Q Okay. You've been asked by the Coalition to provide
23 expert testimony on behalf of the Coalition in this case; is
24 that correct?

25 A That is correct.

1 Q And what is it you've been asked to do?

2 A To give my opinion on the impact of H.B. 141.

3 Q On?

4 A On the angling public and--angling public and
5 business, the angling businesses in Utah.

6 Q Okay. Before we get to your opinions, let's just
7 get a little bit of back--more background. You say you moved
8 here from Ohio in 1971.

9 A '3.

10 Q '73. Why did you move here from Ohio?

11 A I always wanted to come out west, I was fortunate,
12 as a kid, my parents brought me out west a couple of times
13 and--and I fell in love with it. And the first year I went to
14 college was in Ohio University in Athens and I was pretty
15 frustrated with it, sat through actually two viewings of
16 Jeremiah Johnson, called my parents and told them that I
17 needed to go west, that this would be my last year in Ohio.

18 Q Okay. Was that Jeremiah Johnson, the movie with
19 Robert Redford?

20 A Yes.

21 Q Okay.

22 A Didn't know it was in Utah.

23 Q Okay. You now know that?

24 A I now know that.

25 Q Yes.

1 A Now know where he was going.

2 Q What's your current occupation?

3 A I own Western Rivers Fly Fisher and have for the
4 last 28 years.

5 Q And where is Western located?

6 A Western is located in Salt Lake City.

7 Q And what is its business?

8 A Primarily, it's a retail business, but we also have
9 a guide service. We also do on-line sales and we do
10 destination travel services.

11 Q Okay. When you say the retail business, what do you
12 sell?

13 A We sell fishing equipment.

14 Q Any fishing equipment?

15 A Fly fishing equipment specifically. Rods, reels.
16 We also sell clothing, accessories to fly fish as well.

17 Q Okay. And then you also sell flies?

18 A Absolutely.

19 Q Equipment, that's included in there?

20 A Yes. Rods, reels, books, videos.

21 Q Anything to do with fly fishing?

22 A Yes.

23 Q Including art pieces, for example?

24 A On occasion, yes.

25 Q Okay. What about your on-line sales, are they any

1 different than your brick and mortar sales at your store in
2 Salt Lake City?

3 A They're very different. Most of those sales come
4 from out-of-state customers.

5 Q I'm talking about the products?

6 A Oh, no. The products are not any different, we
7 offer the same products, it's a much smaller sampling and
8 offering that we actually have in the store.

9 Q Okay. And you mentioned destination trips. What
10 are you talking about there?

11 A We take people to various places throughout the
12 world, Bahamas, Mexico, British Columbia, Alaska, a variety of
13 different places around the world.

14 Q And those are--do those include salt water trips?

15 A They do include salt water trips.

16 Q And steel head trips, as in British Columbia and
17 Alaska?

18 A Steel head trips, actually steel head trip was the
19 very first destination travel trip we ever did.

20 Q And that was in British Columbia?

21 A That was in British Columbia.

22 Q Okay. And then you also mentioned guiding locally,
23 guiding business locally?

24 A We have a very small guide service. We run about,
25 on average, two guides that help us facilitate those trips out

1 of the store. We used to own a Green River guide permit, we
2 sold it this year in January in 19--or--or this January, 2015.

3 Q But Western was one of the original angling permit
4 holders or outfitters on the Green River; correct?

5 A That is correct.

6 Q Okay. And when did you acquire that permit? When
7 did Western acquire that permit?

8 A 1986, I believe. Either '86 or '87.

9 Q And you would guide anglers down the Green River
10 below Flaming Gorge?

11 A Yes.

12 Q And how big is that river? How long?

13 A It's approximately 35 miles long.

14 Q Okay. And it includes, I guess depending on who you
15 talk to, either three or four sections; correct?

16 A It--it's known for three rather distinct sections
17 and those are determined by access points; Section A, Section
18 B and also Section C.

19 Q Okay. But Section C traditionally ends, at least in
20 most anglers' mind, prior to the Colorado border?

21 A That is correct.

22 Q Okay. Describe a typical trip down the Green that
23 Western conducted before they gave up the--the outfitters
24 permit.

25 A So we--our guides do not--they live on the river,

1 they don't--they aren't in Salt Lake City, so our guides live
2 in Dutch John, Utah. Our clients, we arrange for customers to
3 meet those guides over there. After the guides meet them,
4 they then take them down various, whatever section of the
5 river they determine fishes the best, return them at their
6 vehicle at the end of the day.

7 Q And how do the--how do the customers and the guides
8 get down the river?

9 A In a boat. So that's--

10 Q (Inaudible)

11 A --yes, that's the only floatable river that we
12 provide or use dories in, on the Green River, it's the only
13 one, really, I think, that's large enough to accommodate such
14 a service.

15 Q So I understand your testimony, is it that the
16 Green River is the only river in Utah, this is below Flaming
17 Gorge, that is big enough to accommodate drift boats?

18 A That is correct.

19 Q Okay. Do you--do you and your customers just float
20 through Section A, B and/or C, without stopping?

21 A No. We stop frequently, whether it's to fish a
22 particular run, might miss a fish and want to go back and have
23 an opportunity to catch that fish, to stop for lunch, take a
24 break, so we stop frequently.

25 Q Okay. And you said you found it--when you stop to

1 fish, you wade fish; right?

2 A That is correct.

3 Q Okay. So you get out of the boat, wade into the
4 stream and fish a run or a hole or something?

5 A Yes.

6 Q Okay. You say you founded Western in 1986. Was
7 that your first venture or experience in the fly fishing
8 industry?

9 A Yes and no. I worked for Anglers Inn and also Snug,
10 but Anglers Inn was a general fishing business, it wasn't fly
11 fishing specific. When I worked for Snug the year before I
12 opened western Rivers, that was a specific fly fishing
13 business.

14 Q Okay. But when you worked for Anglers, did you have
15 a particular specialty that you handled for Anglers?

16 A Definitely fly fishing, but I was also called upon
17 to do other duties as well that dealt--that dealt with general
18 fishing.

19 Q But you were the fly fishing specialist for Anglers?

20 A I was one of them, yes. There were others that were
21 adept.

22 Q Now, you--you named your shop Western Rivers Fly
23 Fishing. Why did you do that?

24 A 'Cause I realized early on that in Utah, we had
25 limited waters. I was also very familiar with waters in other

1 parts of the west, especially in Idaho and Montana and I knew
2 that they would play a vital role in our ability to service
3 our customers and be successful.

4 Q So you basically wanted a brand, if you will, that
5 was broader than just Utah?

6 A Yes. I thought it was very important.

7 Q Okay. Are you familiar with the Blue Ribbon
8 Fisheries Advisory Council?

9 A I am.

10 Q And how is it that you're familiar with that
11 council?

12 A I was an original member of that council.

13 Q A charter member?

14 A Charter member, yes.

15 Q And who appointed you to that council?

16 A Governor Huntsman.

17 Q Huntsman?

18 A Yes.

19 Q Jon Huntsman, Jr.

20 A Yes.

21 Q What year?

22 A 2005.

23 Q And how many terms did you serve on--

24 A I served two two-year terms so until 2009.

25 Q Okay. And what is the responsibilities, as you

1 understood it, at least while you were serving of the Blue-
2 Ribbon Fisheries Advisory Council? What did they do?

3 A Our job was to identify the State's fishable waters
4 that provided a quality angling experience. And as a charter,
5 in order to do that we--we actually had to create the criteria
6 by which those fisheries were identified, so that was one of
7 the first things that we did.

8 Q Okay. And did you do that, and when I say you, I'm
9 speaking to the council, and--and let's just take a little
10 side trip here and just identify or describe for the Court,
11 who sat on that council when you served? Just the type of
12 individuals or the backgrounds and if you--if you remember
13 names and can tie them to the backgrounds, please do so.

14 A It was a very diverse group, Division of Wildlife
15 Resources obviously played a big role, a lot of the regional
16 biologists were very active and I think we've already heard
17 some testimony to that fact. Other shop owners, Byron
18 Gunderson, who owns Fish Tech Outfitters was also a charter
19 member. George Summers, who specialized in warm water, he was
20 also a member. We also had various people from various
21 organizations that also participated, so it was a very diverse
22 group.

23 Q When you say various organizations, can you give an
24 example? And you've talked about basically people who have a
25 specialty in some form of angling or fisheries.

1 A Correct. The only one I really remember is George
2 Summers and his warm water experience. He was with a bass
3 organization, I don't remember the exact name of it.

4 Q Were there any conservation organization members on
5 that?

6 A No.

7 Q Okay. You mentioned DWR, did they actually have
8 representatives on the council?

9 A They did.

10 Q Okay.

11 A Yes.

12 Q And who--who were those individuals or the
13 individual?

14 A I don't remember their names specifically, they were
15 mostly from the central region, although members from every
16 region in the State would come to represent to the council, so
17 we were very, you know, very familiar with other members from
18 other regions. Mr. Hepworth, who testified earlier, he was
19 frequently part of the council and made presentations.

20 Q Mr. Hepworth?

21 A Yes.

22 Q I think Mr. Hepworth was Ms. Hepworth, Trena--
23 MS. BUTLER: No.

24 THE WITNESS: No.

25 MR. COBURN: Am I think--am I messing that up?

1 THE WITNESS: Yeah.

2 MR. THOMAS: It was Richard Hepworth and Trena
3 Hendrick.

4 THE WITNESS: Yeah. Richard Hepworth.

5 MR. COBURN: Oh. Thank you very much. Appreciate
6 that. My bad.

7 THE WITNESS: It's usually the other way around.

8 Q (By Mr. Coburn) Okay. So you--you said that one of
9 the first tasks for the council was to develop the criteria by
10 which DWR and the council would judge or determine whether a
11 water in fact qualified or didn't qualify for--

12 A Correct.

13 Q --as a blue ribbon fishery; correct?

14 A Yes.

15 Q Okay. And just to be clear, blue ribbon fisheries,
16 even then when it started out, it wasn't limited to rivers and
17 streams, it included flat water.

18 A That is correct.

19 Q Okay. And it included gold water and warm water
20 fisheries?

21 A That--that is also correct.

22 Q Okay. So what were the criteria as you understood
23 them and as the council applied them during your tenure on the
24 council?

25 A It's been awhile now, it's obviously a lot more

1 refined with the current council, but for us, access was
2 obviously very high priority. Also, the aesthetic value of
3 the fishery, the quality of the fishery, also, and that may
4 pertain to not only numbers of fish but also size of fish.
5 Those are different qualities that we would take into
6 consideration.

7 Also, whether a fishery could sustain, in the
8 State's view, significant angling pressure.

9 Q And those are the criteria that that original
10 advisory council developed with the assistance of DWR?

11 A Yes.

12 Q Okay. Once the council had those criteria in
13 place, what was its next task, if you remember, what did it
14 do?

15 A The next thing that we did, this is one of the more
16 enjoyable aspects of the council was, we literally visited
17 every region in the State and with the biologists and DWR
18 personnel in those regions, we looked at, you know, a lot of
19 their fisheries, just to get an idea of what was in those
20 regions not only potential and--and waters that they thought
21 would qualify for blue ribbon, but we looked at others waters
22 as well, too.

23 Q Okay. You were quite familiar with the waters in
24 northern Utah; correct?

25 A Yes. Northern, central.

1 Q So, the Provo, the Weber, Logan, Blacksmith's Fork,
2 maybe the Duchesne and Strawberry, too?

3 A Very much so.

4 Q Yeah. You'd fished those quite a bit and you were
5 familiar with those?

6 MR. LEE: Objection, your Honor. He's leading the
7 witness.

8 THE COURT: He is. It's foundational, I'll allow
9 it.

10 Q (By Mr. Coburn) Okay. So you were familiar with
11 these--these waters in the central and northern regions of
12 Utah at the time; right?

13 A That is correct. All except, I would say, the main
14 Duchesne.

15 Q Okay. You were not familiar with that one?

16 A No. West fork of the Duchesne, I was, but not the
17 main Duchesne.

18 Q Okay. But how about the waters down south?

19 A I--I was very unfamiliar with the waters down south,
20 that was the area probably I had the least amount of
21 experience and actually had never fished there.

22 Q Okay. What are some of those waters, as you now
23 know them?

24 A On the east fork of the Sevier, you have Kingston
25 Canyon. Also further up the drainage, you have the Black

1 Canyon also on the east fork of the Sevier. Asay Creek,
2 Mammoth Creek. There's also Antimony Creek down there which
3 is a fishery that's--passes through Forest Service lands and
4 also the Sevier River.

5 MR. COBURN: May I approach, your Honor?

6 THE COURT: You may.

7 Q (By Mr. Coburn) If you would, Steve, would you just
8 identify for the Court, first off, where Kingston and Black
9 Canyons are and then I believe there's some suggestion from, I
10 believe, Mr. Hepworth, that is not shown on this map?

11 A Yeah, it is not shown on this. This is Kingston
12 Canyon right here.

13 Q Uh-huh (affirmative).

14 A This is part of the--the east fork of the Sevier.
15 You have the Black Canyon down in this drainage, in this
16 region right here.

17 Q Would you label those, please? How's your
18 handwriting?

19 A According to my employees, it looks good, you just
20 can't read it.

21 Q Okay. Would you--did you put in Kingston Canyon?

22 A I'm working on it. Okay.

23 Q Would you draw arrows from the Black Canyon to where
24 it's located if you haven't already (inaudible)

25 A Yeah.

1 Q Okay. So just point to the Black Cany--on the
2 Black Canyon road to where it is. Okay.

3 You also mentioned Mammoth Creek and Asay Creek.
4 Would you label those for the Court, please?

5 A They're right down in here.

6 Q And what is this drainage right here? Is that
7 (inaudible) Creek?

8 A I believe it is. I' not--we didn't look at that,
9 I'm not familiar with it.

10 Q Okay. All right. And Mammoth Creek and Asay Creek
11 are waters that the advisory council looked at as candidates
12 for blue ribbon designation when you were on the council?

13 A That is correct.

14 Q And the same with Kingston and Black Canyon?

15 A That is correct.

16 Q And do you know what the word "Panguitch" means?

17 A I do and I learned it on that trip. I knew it was
18 native for big fish and then later, I found out it was Paiute
19 for big fish. After going there, I have a better
20 understanding why.

21 Q Okay. Big fish on--on those streams you looked at?

22 A On some of them, especially the Sevier drainages,
23 they have some nice trout in there, both rains and--rainbows
24 and browns, both.

25 Q Okay. Were there other rivers down south other

1 than those in the Sevier drainage that you became familiar
2 with by virtue of your time on the advisory council?

3 A UM Creek and also Antimony.

4 Q Okay. Do you know or can you show--I think you told
5 me you don't know where UM Creek--

6 A No, I can't--I--UM Creek. I can--I know where
7 Antimony is.

8 Q Okay. Well, why don't--why don't we look at that?
9 Is that in the Sevier drainage as well?

10 A Yeah. And it's not listed.

11 Q When you say it's not listed, what--

12 A I mean it's not on the map.

13 Q It's not labeled on the map?

14 A No. It's not.

15 I mean, I'm guessing here kind of, but it's--it
16 feeds right into the--comes out of Dixie National Forest--

17 Q And feeds Black Canyon?

18 A Yeah. All through a little town there called Emery,
19 also.

20 Q Are you familiar with the--is it Huntington Creek?

21 A Very much so.

22 Q Were you familiar with that before you were on the
23 advisory council?

24 A Yes. I was.

25 Q Okay. And the same for the Price River?

1 A Yes.

2 Q Okay. So those weren't rivers you became familiar
3 with due to your service on the--or by virtue of your service
4 on the advisory counsel

5 A That is correct.

6 Q Were there waters that you hadn't heard of or didn't
7 even know existed until you served on the advisory council?

8 A Yes, there were.

9 Q Have we talked about some of those waters?

10 A We have not talked about some of those waters.

11 Q What are those waters?

12 A actually, we may have in one of the discussions, I
13 may have missed it, though, in this morning, up in the very
14 northern part of Utah, actually in the very northwest quadrant
15 of the State, where were some small streams that we looked at
16 and also, a pond or a lake that was on some private property.

17 Q Okay. When you talk about the streams up in the
18 northwest corner, are you talking about these up here on the
19 map?

20 A Yes. Yes. Yeah.

21 Q All right.

22 A I had no idea, I was pretty--

23 Q Did you know of Mammoth or Asay Cree before you went
24 down there?

25 A I did not.

1 Q Okay. So those were waters that you learned about
2 through your service--

3 A Yes.

4 Q --on the advisory council?

5 A Yes.

6 Q What about the east fork of the Sevier?

7 A That also.

8 Q That also being one of the waters that you learned
9 about through the advisory council service?

10 A That is correct.

11 Q You were on that council for four years and is it
12 fair to say that that council, with DWR's assistance,
13 identified and designated several blue ribbon fisheries around
14 the State?

15 A Yes. It did.

16 Q Okay. Do you, as you sit here today, do you have
17 any memory of some of the blue ribbon fishers, the rivers and
18 streams, particularly cold water rivers and streams that the
19 advisory council designated while you were on the advisory
20 counsel?

21 A I do.

22 Q What are some of those rivers?

23 A The Provo River, obviously, the Lower and Middle
24 Provo River. Logan River, Green River, the east fork of the
25 Sevier, the two canyons we mentioned, those were early on

1 streams that we designated as having blue ribbon qualities.
2 West Fork of the Duchesne was another one. Not sure about the
3 main Duchesne, the access there is angler access permit
4 secured by the DWR, I wasn't--I'm not sure that that was in
5 place at the time, but I do know the west fork was qualified
6 as a blue ribbon fishery.

7 Q Okay. What about the Strawberry, either sections
8 of the Strawberry?

9 A The Pinnacle section, the nature conservancy had
10 purchased that and turned it over to the DWR for management
11 and so the Pinnacle section of the Strawberry.

12 Q Okay. And just as a refresher for the Court, I'm
13 showing you Exhibit 3.4, will you just point out the section
14 which we're calling the Pinnacles section?

15 A This section right here.

16 Q Downstream?

17 A Yeah. Yeah.

18 Q To the Starvation?

19 A Yeah. Right there.

20 Q What about--

21 A Or I'm sorry, this section right here.

22 Q So between the label Pinnacles on Exhibit 3.4 up
23 to--

24 A Right.

25 Q --Starva--or Strawberry?

1 A Yeah. From the Strawberry Reservoir downstream to,
2 there's a little development there called Camelot.

3 Q Okay. Is that where Red Creek comes in?

4 A Yes. Red Creek's a little bit further downstream
5 there, but close to that.

6 Q So just to be clear--

7 A It's the yellow section.

8 Q The--

9 A Right through here.

10 Q --Strawberry River--or Reservoir down to Pinnacles?

11 A Yes.

12 Q And that was a river you believe was designated a
13 blue ribbon fishery while you were on the council?

14 A Yes.

15 Q Okay. Were there rivers or streams that the council
16 looked at during your tenure that you thought would have
17 qualified for blue ribbon designation but for lack of public
18 access?

19 A Yes.

20 Q Okay. What were some of those rivers?

21 A I think the one in particular for the council was
22 Chalk Creek.

23 Q Okay. Chalk Creek's a tributary of the Green--or
24 excuse me--

25 A The Weber.

1 Q --the Weber River?

2 A Yes. It is.

3 Q And showing you Exhibit 3.3, the blown up version,
4 can you identify Chalk Creek on that map?

5 A Chalk Creek up here.

6 Q Was all of that under consideration for blue ribbon
7 designation while you were on the council?

8 A There's a diversion dam that's up the canyon going
9 upstream from Coalville about two miles, from there upstream.

10 Q Were there other rivers or streams in the Weber
11 drainage that were under consideration for blue ribbon
12 designation but did not get it during your tenure because--

13 A Lost Creek was another one that quali--that was
14 considered.

15 Q Can I finish my question?

16 A Yes. Sorry.

17 Q Okay. That didn't get that designation due to lack
18 of public access?

19 A Yes. Lost Creek.

20 Q Lost Creek. And would you point to that, please,
21 on Exhibit 3.3.

22 A I believe that's Lost Creek right there.

23 Q Okay. And was--was Lost Creek in its entirety being
24 considered for blue ribbon designation or just certain points
25 of it?

1 A Its entirety, up to--there's a reservoir up there, I
2 think, up to the reservoir.

3 Q Okay. So its confluence with the Weber upstream to
4 the reservoir?

5 A Yes, sir.

6 Q Any other streams under consideration on the Weber
7 drainage?

8 A That--that I recall, no. Again it was awhile ago,
9 but those primarily were two--well, the Upper Weber, I would
10 also say was, above Rockport Reservoir was also considered for
11 blue ribbon designation, but--and that is--where's Rockport?

12 Q Can you see Wanship there?

13 A Yeah. I see Wanship, so it would be upstream here.
14 That was also for designation as well.

15 Q How far upstream from Rockport would the Weber River
16 be considered for blue ribbon designation but didn't get it
17 because of access or the lack of it?

18 A I mean, you could go all the way up through Peoa, I
19 mean, I think you could consider it all the way Thousands Peak
20 Ranch.

21 Q So all the way to Holiday--towards Holiday Park?

22 A Yes, sir.

23 Q Now, when you say you could consider it, was it
24 considered?

25 A Yes.

1 Q So you do recall that being discussed while you were
2 on the council?

3 A Yes. Especially in the Thousand Peaks area, I mean,
4 that was so, yes.

5 Q You're familiar with the Thousand Peaks area and
6 that stretch of the Weber, aren't you?

7 A Yes. I used to own four permits to guide on
8 Thousand Peaks.

9 Q Have you guided up there yourself?

10 A I have.

11 Q And how would you characterize the fishery up
12 there?

13 A There's a reason that they have a waiting list for
14 those permits and those permits are \$1,200 apiece. It's a
15 good fishery.

16 Q What about Beaver Creek?

17 THE COURT: Can you just have him label Thousand
18 Peaks or has someone already done it?

19 MR. COBURN: I don't think it has been.

20 THE COURT: Okay. I think I know where it is but
21 I'd just like to get it on there.

22 Okay. Thank you.

23 Q (By Mr. Coburn) Do you have an estimate of that,
24 the length of that reach, the Thousands Peak reach--the
25 Thousand Peaks reach of the Upper Weber?

1 A I'd be guessing. It was--

2 Q Give us an estimated guess?

3 A It's a--it's an educated guess, I--you know.

4 Q If it's not educated, we don't--

5 A It--I--you know, I'd say it was four to five miles.

6 Q How long?

7 A Four to five miles.

8 Q Are you familiar with the middle section of the
9 Weber between Wanship and Coalville?

10 A Yes.

11 Q Was that under consideration for a blue ribbon
12 designation while you were on the council?

13 A To be honest, I don't recall.

14 Q Okay. What about the Provo River? You mentioned
15 the Lower and Middle Provo, I believe, were designated blue
16 ribbon while you were on the council?

17 A Yes.

18 Q Were there other reaches of the Provo River that
19 were under consideration for blue ribbon designation but did
20 not get it due to lack of public access?

21 A Those waters above Jordanelle Reservoir were
22 definitely considered for blue ribbon status.

23 Q Is that the Victory Ranch reach?

24 A That would include the Victory Ranch reach.

25 Q Would you identify the reach of the Provo that was

1 being considered for blue ribbon status while you were on the
2 council that did not get it because of lack of access?

3 A It's marked here as the Upper Provo here.

4 Q Okay. How far upstream does it go from Jordanelle
5 does that reach goes that was under consideration--

6 A Oh, I think--

7 Q --for blue ribbon?

8 A --I think you could go all the way up through
9 Woodland.

10 MR. LEE: Objection, your Honor. Not answering the
11 question that was asked.

12 THE COURT: Sustained. It--can you rephrase the
13 question.

14 Q (By Mr. Coburn) I just--I want you, Steve, if you
15 would, to identify the reach, that portion of the Upper Provo
16 above Jordanelle that was under consideration for blue ribbon
17 designation but did not get it because of public access while
18 you were on the council?

19 A Again, I would say this entire reach, all the way up
20 here through, to Woodland.

21 Q To Woodland? 'Cause your finger went past Woodland,
22 that's--

23 A You could--you could go to the forks right here, at
24 least up to the forks here.

25 Q Okay.

1 MR. LEE: Same objection, your Honor.

2 THE COURT: Yeah. And that--I think the distinction
3 is just was that what the council was considering or is that
4 what you thought should be considered?

5 THE WITNESS: That's what the council was
6 considering.

7 THE COURT: Above Woodland?

8 THE WITNESS: Yes.

9 THE COURT: How many miles above Woodland?

10 THE WITNESS: I'm not sure how far it is from
11 Woodland to the confluence there of the two forks.

12 THE COURT: Okay.

13 Q (By Mr. Coburn) Were there sections of rivers or
14 streams in the Sevier drainage that were also being considered
15 by the council during your tenure for blue ribbon designation
16 that did not get it because of lack of public access?

17 A The only one I recall is Mammoth Creek.

18 Q Okay. And you labeled that previously for the
19 Court.

20 A I labeled that previously.

21 Q And the reason it did not get blue ribbon
22 designation 'cause it didn't have access?

23 A It does not have access.

24 Q Okay. Were there any sections of the Sevier itself,
25 the Upper Sevier itself, besides Black Canyon and Kingston

1 Canyon that were under consideration but did not get blue
2 ribbon designation during your tenure because of lack of
3 access?

4 A A short section that we looked at, actually the--
5 there's a ranch down there called Panguitch Ranch, and that
6 section was a very good fishery, but it was all on private
7 property.

8 Q Okay. Was that being considered for blue ribbon
9 designation around the time that you left the council?

10 A Again, I don't recall the specific time frame there.

11 Q Just for the Court's benefit, can you point
12 generally where that section was? Panguitch is down here.

13 A It was above the reservoir, it was right in here.

14 Q Downstream from the reservoir?

15 A (Inaudible) that.

16 Q So again, was it downstream from that reservoir or
17 upstream from the reservoir?

18 A I thought it was--I mean, I--again it's been a long
19 time, but I recalled it being up in that area there.

20 Q Okay. And how much water was--

21 A That was only a half of mile of water that we were
22 able to look at.

23 Q Okay. Now, I want to just touch on a couple of
24 other experiences or assignments, if you will, that you've had
25 related to fly fishing and the fly fishing industry, we're

1 just going to touch on those for the benefit of the Court.
2 But you're familiar with the Governors Outdoor Recreation
3 Council?

4 A Yes. I am.

5 Q And how is it that you're familiar with that
6 council?

7 A I'm a member of that counsel.

8 Q And were you appointed by somebody?

9 A I was appointed by--I wasn't appointed by the
10 governor, I was asked to join the council by Allen Matheson.

11 Q Who's Allen Matheson?

12 A He worked for the governor at the time and he was
13 in charge of assembling the council.

14 Q And who is on the council, just by background, by
15 way of background?

16 A You have outdoor industry manufacturers that are
17 part of the council, Forest Service, state parks, BLM. You
18 also have various people from media, mostly outdoor magazines
19 participate in it.

20 Q Hunting organizations?

21 A There are clubs, hunting clubs that are member of
22 it, Sportsmens for Fish and Wildlife have a member on the
23 board. I'm the only retailer.

24 Q Conservation organizations?

25 A And they would call themselves a conservation

1 organization as well, too, so yes, Sportsmens for Fish and
2 Wildlife.

3 Q Okay. What is the function of the council, the out-
4 -Governor's Outdoor Recreation Council?

5 A The function of the council is to grow the outdoor
6 industry in the State of Utah.

7 Q And you're--sit on that counsel to bring a
8 retailer, a fly fishing retailer's perspective to that
9 mission?

10 A I think it's a little broader than that. I think as
11 a retailer's perspective, I'm also a member of the Outdoor
12 Industry Association as well, too, and have participated in
13 that for a long time, so--

14 Q That's the group that comes to Salt Lake City twice
15 a year?

16 A Yes.

17 Q Okay. For their convention at the Salt Palace?

18 A Yes.

19 Q Are you familiar with the American Fly Fishing Trade
20 Association? AFFTA?

21 A Yes. I am.

22 Q And what is AFFTA?

23 A AFFTA is an organization whose goal it is, is to
24 grow the fly fishing industry.

25 Q Sustainably?

1 A Sustainably, yes.

2 Q Okay. And how is it that you're familiar with
3 AFFTA, aside from being a member and your shop's a member?

4 A Western Rivers is a member and I was also a board
5 member.

6 Q For--from when to when?

7 A I don't know the exact dates, some time in the
8 middle 2000s.

9 Q Okay. And for how many years were you a board
10 member?

11 A I was a member for two terms in six years.

12 Q Okay. Is access an issue with AFFTA?

13 A Yes. It is an issue. In fact, they have helped
14 raised money for USAC and made contributions to USAC. It's
15 an--a very important part of what they do.

16 Q And the mission of the--of AFFTA is to grow,
17 sustainably grow the industry?

18 A Yes. And without access, that's a challenge.

19 Q As a board member, do you know whether AFFTA has
20 taken up that challenge, if you will, in states other than
21 Utah?

22 A I don't know specifically, but the challenge, they
23 did a matching grant at some time, so--for all their members,
24 so it's a nation--obviously, they--they shared that with all
25 their members throughout the nation.

1 Q Okay. You're also--you've worked with the Henry's
2 Fork Foundation time--from time to time over the years;
3 correct?

4 A Since pretty much the infancy of that group.

5 Q Which was when?

6 A Back in the '70s.

7 Q Okay. What is the Henry's Fork Foundation?

8 A To protect and enhance the Henry's Fork drainage.

9 Q This is up in Idaho?

10 A This is in Idaho.

11 Q All right.

12 A It's--if you go to Yellowstone, it's--you pass it
13 on your way to Yellowstone from Salt Lake City.

14 Q All right. If you're going to west Yellowstone?

15 A Yes.

16 Q Yeah. You encounter it somewhere around Rexburg
17 and you basically follow it all the way to Island Park?

18 A That is correct. It's also the--known as the
19 north fork of the Snake.

20 Q Okay. Very famous fishery?

21 A It is very famous fishing. Originally, the
22 organization mission was just to take care of a very small
23 section of it and since then, they've broadened their scope
24 significantly.

25 Q And have you been asked to serve on their board?

1 A Many times.

2 Q You've declined?

3 A I have declined.

4 Q Because?

5 A I know the commitment it takes to be a board member
6 and I simply don't have the time.

7 Q You have enough going on in Utah?

8 A I do.

9 Q Okay. Obviously, you're a fly fisherman?

10 A Yes, sir.

11 Q How did you, or when did you learn to fly fish?

12 A I really learned to fly fish when I moved to Utah.
13 I mean, that's where I fell in love with fly fishing and
14 that's where I really got exposed to it. I first picked up a
15 fly rod, though, when I was ten or 11 years old, we had some
16 friends that had a bass and bluegill pond and I used to ride
17 my bike out to it frequently during the week and one day, I
18 showed up and they had a fly rod there. I didn't know it was
19 a fly rod, it was just a way to go fishing and once I picked
20 that up and--and cast it, I was so enthralled with--with the
21 challenge and the visual part of--of casting that rod versus
22 conventional, you know, fishing rods, that's all I ever did.

23 I didn't learn to fly fish when I was ten or 11--

24 Q I'm sorry?

25 A I didn't learn. I was fascinated.

1 Q So this was in Ohio?

2 A The seed was planted, I would say.

3 Q This was back in Ohio, then?

4 A This was in Ohio, that's correct.

5 Q Okay. And you came out to Utah and this is where
6 you learned to fly fish?

7 A Yes.

8 Q Since you picked up fly fishing in Utah, have you
9 done any other kind of fishing?

10 A Yes. I--I also fish for steel head, it's one of
11 my passions. I've also had the opportunity to salt water fish
12 in a number of places in the tropics.

13 Q But you're fly fishing in all those instances, are
14 you not?

15 A I am fly fishing.

16 Q So my question was, do you do any other kind of
17 fishing other than fly fishing?

18 A Oh. No, I do not.

19 Q Okay. So wherever you fish, whatever your--whatever
20 fish you're pursuing, you're casting a fly rod?

21 A Yes.

22 Q Okay. Do you have a preference for what species of
23 fish that you pursue?

24 A I do. Trout definitely is one of my priorities and
25 one of my favorite fish to fish for.

1 Q And steel head?

2 A And steel head, definitely.

3 Q Yeah. Why trout and steel head?

4 A Mostly the environments they live in. I mean, when
5 the fishing's not good, I like to be in places that I'm
6 comfortable with, I like mountains, I like cold rivers and
7 streams and steel head and trout, both of them live in those
8 environments.

9 Q And you're not going to get that on a tidal flat
10 down in the Bahamas?

11 A I am not. I don't like heat, either. Not that it's
12 not fun fishing for those fish, but I'm not a heat person.

13 Q So if I understand your testimony, you prefer, or
14 your preference is to pursue trout and steel head on rivers
15 and streams?

16 A Yes.

17 Q Are trout and steel head cold water species or warm
18 water species?

19 A They are definitely cold water species.

20 Q Just--don't take too long, but just take a few
21 minutes to--to explain to the Court why it is that you, for
22 lack of a better term, love to fly fish on rivers and streams.

23 A Well, coming from Ohio, I think I have a little bit
24 of a different perspective compared to someone else that was
25 born and raised here. Obviously, I was--I was fascinated and

1 enthralled by the mountains that we have and the scenery that
2 we have here in the State of Utah and throughout the west, but
3 mostly what I like about rivers and streams is when you stand
4 in them, the--that feeling of water running around your legs,
5 it's--it's something that I had never experienced before until
6 I came out here. Makes me feel like I'm--I'm a part of them,
7 like I'm apart of the process, I'm more involved and--and
8 that's what I love about fly fishing and especially for trout
9 and steel head.

10 Q Being on a river?

11 A Yes.

12 Q And being in the mountains?

13 A Being where it's beautiful and it's vertical.

14 Q Okay. What makes a good fishing trip for you, a
15 good fishing experience, not necessarily the trip itself, the
16 whole thing, but when you're on the water, what makes a good
17 fishing experience?

18 A A good fishing experience for me is--is when I get
19 to a stream or a river, that I have an opportunity to actually
20 fish the water and sometimes in Utah, that's a challenge, so a
21 preferred fishing experience is when I get to a river, I find
22 open water, then--and I'm able to move around rather freely
23 and select different places to fish on the river, don't feel
24 confined by other people who are there. Ideally, I like to
25 fish--well, I only fish dry flies, so if--if I get to a river

1 or stream and trout are rising, that's a preferred fishing
2 experience for me.

3 Q Okay. You mentioned dry flies, what's a dry fly?
4 I'm not sure the Court's had a clear definition or explanation
5 of what a dry fly is.

6 A So trout feed on two types of insects and I think
7 this was talked about briefly, they feed on aquatic insects
8 that live in the water and they feed on terrestrial insects
9 that live on the land.

10 Q And land on the water?

11 A And land on the water, yes; grasshoppers, ants,
12 beetles get blown into the water. Aquatic insects are born
13 initially, start their life out living in the water,
14 underwater, so to speak, we call it sub-surface. They then
15 migrate to the surface, the larvae or the nymph that they live
16 in, an adult insect emerges and it flies away and lands in the
17 bushes or in the trees. Comes back at another time and lays
18 its eggs and begins the cycle all over again.

19 Q Okay. And so when they come back and--so when--when
20 do you fish a dry fly, the adult stage of one of these aquatic
21 insects?

22 A So when they're in that transition, when they're
23 going from larvae or nymph to an adult, they're at the surface
24 of the water, generally. So that's your first opportunity.
25 Then as the adult emerges, many of the insects, it takes

1 awhile for their wings to be able to form and dry out and--in
2 order for them to fly from the river's surface and that's
3 another opportunity and then when they come back and lay their
4 eggs, that's again a third opportunity.

5 Q Okay. Okay. And that's what you prefer to do?
6 Fish dry flies?

7 A That's all I do.

8 Do you hunt fish?

9 A Yes. I do.

10 Q Describe for the Court what it means to hunt a fish.

11 A So I'm pretty picky about the rivers or the fish
12 that I fish to and to be honest, a lot of this has come from
13 the pressure that our rivers receive. A lot of our fish are
14 caught over and over again.

15 For a number of years, I've been much more selective
16 about the fish that I fish to, so obviously, I try to focus on
17 larger fish, if given that opportunity. So I--there are times
18 where I'll go to a river where I won't fish, my intention is
19 to scout and actually go look for a fish to fish to. If I
20 find a fish and he's active, I may fish to that fish, but
21 those trips are when I don't have a lot of time and I'll
22 actually physically go out and hunt fish, so to speak.

23 There was one fish on the Middle Provo, for example,
24 a long time ago, in its infancy, I--it took me three weeks to
25 catch the fish.

1 Q Was it a good fish?

2 A It was a really good fish.

3 Q A pig or a toad?

4 A It--it would qualify as a pig or a toad.

5 Q A fish that left an impression?

6 A From the first time I saw it, it left an impression.

7 Q Again, when you caught it and released it, that
8 sealed the deal?

9 A It sealed the deal, but there's also--you know, for
10 me, there's a little bit of sadness to it, it's kinda--you
11 know, the game's over with, so to speak. I mean, it's almost
12 like you have a relationship with these fish after awhile, you
13 respect them, they're beautiful and--

14 Q Okay. When do you go fishing?

15 A When I have time. Pretty much like anybody else and
16 so when I have the time to do it.

17 Q Okay. And what defines when you have the time and
18 how much time you have?

19 A Well, given we have some streams that are rather
20 close to Salt Lake City, we can get up for an evening, so to
21 speak, or we can go for a morning. So that affords some
22 opportunities that I might not have if the streams are a
23 little bit further away. Generally, most of my fishing trips
24 that take place here in Utah are mornings and evenings. I
25 rarely get the opportunity to fish full days and if I do,

1 usually a full day of fishing involves a lot more travel, I'll
2 try to actually get away from those waters that are close to
3 the Wasatch Front and a little more crowded and hopefully,
4 have a better fishing experience or an experience where I'm
5 not going to run into as many people.

6 Q But if you can't travel to those destinations to get
7 you away from the crowds, what do you do?

8 A It depends on the time of the year. A lot of times
9 of the year during the certain peak hatches of certain
10 insects, I don't even bother to fish.

11 Q Because?

12 A It's so crowded, I just--it's not going to be an
13 enjoyable fishing experience, so I'd rather not fish.

14 Q You fish in the winter, don't you?

15 A I do fish in the winter.

16 Q Why?

17 A As I said, I like it's cold out.

18 Q You like what?

19 A It's cold out. And I can also find hatches in the
20 winter and I can also find fish rising to those hatches.

21 Q Is there a particular type of weather you look for
22 to fish in the winter?

23 A Not only in the winter, but throughout the year.
24 Especially again when I'm in Utah, I prefer--people that know
25 me well, if it's snowing or raining out, I want to go fishing.

1 Q Why?

2 A It really cuts down on the number of people that
3 you're going to find on the water, regardless if it's close to
4 the Wasatch Front or even further away. I mean, it really has
5 a significant impact on the number of people that you're going
6 to find out there.

7 And also in general, the fishing with certain
8 insects can be quite a bit--can be much better, so you have
9 better hatches on cloudy days. Mayflies, for example, which
10 was one type of aquatic insect, they hatch best on overcast,
11 cloudy days.

12 Q Okay. What about the fish themselves?

13 A They feel more secure on a cloudy day. Clouds, as I
14 like to tell people that are new to the sport, are like a
15 security blanket, they don't see the shadows from their
16 predators, they don't see shadows from people walking up and
17 down the stream as much, so they're a little more aggressive,
18 especially bigger fish are a little more willing to come out
19 and feed in those situations in the middle of the day, where a
20 bright sunny day, it's really hard to find a bigger fish
21 especially, that's active.

22 Q Have you fished or do you fish high mountain
23 streams in Utah?

24 A In--when I first moved here, I did, but not anymore.
25 It's been a long time.

1 Q Describe your experience, what it's like to fish a
2 high mountain stream, to get there and to be able to fish it,
3 et cetera.

4 A High mountain streams especially in Utah--well, in
5 Utah and throughout the west, one, they have a very limited
6 season. A lot of times throughout the year, they're covered
7 in snow, you can't even get to them, so it makes the overall
8 time period where you can actually get them, that window,
9 pretty small.

10 It also requires a lot more planning to get to those
11 waters, they're further away, you usually have to hike to
12 them. There's some you can drive to, but the vast majority of
13 them, you have to hike to.

14 They're also small, they have quite a bit of
15 gradient to them. For new people especially, they have a lot
16 of vegetation that surrounds them, makes it very hard and can
17 be very challenging to fish, especially if you're not a good
18 fly caster.

19 Q How about, and do you understand the term flat
20 waters?

21 A Yes. I do.

22 Q What is a flat water?

23 A Flat water is a lake, reservoir, pond.

24 Q Could be the ocean, too, right?

25 A Could be the ocean.

1 Q If you're fishing salt water?

2 A If it--if the wind's not blowing.

3 Q Okay. So do you fish flat waters in Utah?

4 A I have. It's been over a decade since I have.

5 Q Okay. And what flat waters have you fished in Utah?

6 A Strawberry Reservoir, really, that's the only one
7 that's open to the public. We also, a number of years had a
8 piece of private property that had ponds on it called the LC
9 Ranch. John Jackson, who testified, that's primarily where he
10 guided for us was on that property.

11 Q That would have been Harley Jackson?

12 A Yes.

13 Q Okay. And that--those are small ponds that you
14 would fly cast for trout?

15 A Those are small manmade ponds, yes.

16 Q Okay.

17 A That had trout in them. They were cold water
18 fisheries. And so Strawberry is as well. I've never fished a
19 warm water fishery in this state.

20 Q Okay. You haven't fished a flat water in Utah for
21 over a decade. Why?

22 A The experience is not what I look for when I go
23 fishing. You know, I don't like fishing out of a boat, even
24 on rivers, if I'm given the option, I would rather wade a
25 river than I would float a river. I don't like motor boats in

1 particular. When I go steel head fishing, there's occasions
2 where I have to use motor boats and it really detracts from
3 the experience. I'd much rather use a dory or a raft. So I
4 don't like motorboats, I don't like jet skis at all, they--
5 yeah, that's something I find very offensive when I'm out
6 fishing, so between that and what flat water fly fishing has
7 to offer, I just do not find very entertaining.

8 Q So you're happy to leave the flat water to the--the
9 motorized boats and the jet skis and go fish a river?

10 A It's all theirs.

11 Q Let's talk some stream access now. You're familiar
12 with H.B. 141, are you not?

13 A I am.

14 Q What is your understanding of H.B.--of what H.B.
15 141 says?

16 A H.B. 141 denied the public the right to access
17 unless they had landowner permission, Utah's rivers and
18 streams that flowed through posted property.

19 Q Okay. Flow over private beds?

20 A Yes. Over private beds.

21 Q Are you aware that H.B. 141 allows floating on those
22 streams or rivers that flow over private beds under certain
23 conditions?

24 A Yes. I am. And I believe that condition is that
25 you may incidentally touch the streambed, but only to continue

1 your journey downstream.

2 Q You were sitting--

3 A You cannot stop.

4 Q You were sitting here when Gary Nichols talked about
5 H.B. 141; correct?

6 A Yes. I was.

7 Q Right. In fact, you've been sitting through the
8 whole trial?

9 A Yes. I have.

10 Q Okay. Was there anything that Gary Nichols said
11 about what H.B. 141 allows or doesn't allow, generally, that--
12 that you would differ with?

13 MR. THOMAS: I'll object, your Honor, having him
14 characterize his class of opinions with regard to somebody
15 else's testimony is improper.

16 THE COURT: What's the problem? What's the
17 evidentiary rule that's breached by that question?

18 MR. THOMAS: Relevance with regard to his opinion
19 about someone else's testimony, also testifying as to, in
20 essence, the character and competence of that evidence.

21 THE COURT: Sustained to the extent that it's
22 bolstering but I don't know that it is. I'm concerned about a
23 wholesale stamp of approval, so--

24 MR. COBURN: Okay. I'm just trying to move it
25 along--

1 THE COURT: --if there's--

2 MR. COBURN: --so, it--

3 THE COURT: I mean, I don't know that it matters
4 that he agrees with him or disagrees with him.

5 MR. COBURN: Okay. That's--that's fair, your Honor,
6 thank you.

7 THE COURT: Sustained as to relevance.

8 MR. COBURN: Okay.

9 Q (By Mr. Coburn) So what's your understanding of
10 what H.B. 141 does or doesn't allow with regards to floating
11 on rivers or streams that flow over private streambeds?

12 A You are allowed to float on those rivers and
13 streams; however, you must access down through a public access
14 point. You cannot stop. Again, you may incidentally touch
15 the streambed, but only to continue your journey downstream.

16 Q Do you have any understanding of what H.B. 141
17 allows by way of--excuse me, safety?

18 A More so from the testimony that I just heard, that
19 you are allowed to get out and portage around obstructions for
20 your safety, the quickest way possible.

21 Q Or touch the bed for safety reasons?

22 A Or touch the bed for safety reasons.

23 Q Okay. Do you have a--an understanding--well,
24 first off, when did H.B. 141 become law?

25 A It was May of 2010.

1 Q Okay. Prior to that, there was a decision called
2 the Conatser decision, do you know when that was?

3 A That was July of 2008.

4 Q Did you fish--do you understand what I mean by
5 Conatser waters or H.B. 141 waters?

6 A I believe I do.

7 Q What do you--what's your understanding of the
8 term H.B. 141 waters?

9 A H.B. 141 waters are the waters that flow over
10 private streambeds or posted lands that the public does not
11 have access to.

12 Q As you just described?

13 A That is correct.

14 Q But those waters were open to the public during the
15 Conatser window, after the Conatser decision but before H.B.
16 141?

17 A Until May of 2010, yes, that's correct.

18 Q Okay. Did you fish any of those H.B. 141 or
19 Conatser waters during that time frame between the Conatser
20 decision and H.B. 141?

21 A I did not.

22 Q Did you fish much at all?

23 A I did not.

24 Q Why not?

25 A As I'm sure we all recall, that was the second

1 greatest recession in the history of this country and I was
2 trying to keep my business open and so obviously, my focus was
3 not on fishing, but simply surviving.

4 Q What--tell me what the--describe for the Court
5 what the situation was, really, as a nervous fly fisher, what--
6 what you did to keep the business open.

7 A I think the thing that sticks with me the most,
8 other than I worked a lot was, I remember in 2008, sitting on
9 the back steps of the store, after having gone to the bank to
10 see what kind of financial options I may have, not knowing
11 what the extent or length of the recession was going to be,
12 but I was fearful enough that I went and talked to my bank to
13 see if I had opportunities to loan money and--and when I found
14 that wasn't a possibility, I remember calling my father, it
15 wasn't a phone call that I liked making, and talking to him
16 about the situation to see if there was an opportunity where
17 he may be able to help me out if--if it came to that.

18 Q And--and your dad said?

19 A He'd help me, yeah, he'd help me.

20 Q And they were living in Florida at the time;
21 correct?

22 A Yes.

23 Q Okay. You learned something more about your dad
24 during that window; correct?

25 A Yes.

1 Q What did you learn about your dad?

2 A He was diagnosed with Stage 4 cancer.

3 Q Okay. And he died right around that time.

4 A 2010.

5 Q Okay. So you had other things on your mind rather
6 than going fishing?

7 A I did.

8 Q Let alone going fishing on waters that hadn't been
9 open previously?

10 A That is correct.

11 Q Okay. Have you, other than a drift boat, have you
12 tried to--well, let me back up. What does the term float fish
13 mean to you?

14 A Float fish is the way we guide the Green River; so
15 in other words, we use a dory and we have someone, a guide--
16 rows the dory and two anglers fish out of the dory, so you can
17 float a river, stop in a river, anchor in a river, you can
18 float from the vessel that you're using, could be a pontoon
19 boat, could also be a float tube.

20 Q Okay. Let's stick with the drift boat. I think
21 you mentioned already that you believe that the Green River
22 below Flaming Gorge is the only river or stream in Utah where
23 you can float fish from a drift boat; correct?

24 A That is correct.

25 Q Okay. Have you tried to float fish any other river

1 in Utah using any vessel?

2 A Yes. Yes, I did.

3 Q And why don't you tell the Court about that
4 experience.

5 THE COURT: I'm sorry. He just said, so that we're
6 clear, he said float fishing includes a drift boat or a float
7 tube.

8 MR. COBURN: Right.

9 THE COURT: And then he said the Green River is the
10 only place that you can do that? Either of those things?

11 MR. COBURN: No. I thought--I thought I said from a
12 drift boat.

13 THE COURT: Okay. I just wanted to make sure we're
14 using that term--so when you say float fish, do you mean a
15 drift boat?

16 THE WITNESS: No. You can float fish from a float
17 tube, you can also float fish from a pontoon boat and you can
18 also float fish from a dory, you can float fish from a raft,
19 any of those vessels you can float fish from.

20 THE COURT: All right.

21 Q (By Mr. Coburn) When you use the term "dory,"
22 that's the same as a drift boat; correct?

23 A That is correct.

24 Q Okay. And these are the kind of banana-shaped boats
25 that are pretty common in photographs and that if somebody's

1 angling on a trout stream?

2 A That is correct.

3 Q Bigger trout stream?

4 A Yes.

5 Q Okay. So other than from a drift boat or a dory on
6 the green, have you tried to float fish any other river in
7 Utah from some other type of vessel, like a float tube or a
8 pontoon boat?

9 A I did the lower--the Lower Provo, I tried to float
10 tube it and--

11 Q When was that

12 A --the first time--

13 Q --when was that?

14 A That was probably, it was before I opened the store
15 so I would say it was in the early to mid-'80s.

16 Q And this was below Deer Creek?

17 A That--it was below, this was before the Middle Provo
18 and Jordanelle was in place.

19 Q Okay. So you're down below Deer Creek.

20 A I'm down below Deer Creek. And the first time I
21 tried to stop, I--and fish, I flipped in my float tube. I
22 wasn't smart enough to not try it again, so I got over to the
23 bank, I got bank into my float tube and went a little further
24 down and again tried to stop and fish and I flipped a second
25 time. And at that point, I decided that there was a better

1 way to fish the Provo.

2 Q Okay. Which was?

3 A To wade fish it.

4 Q Is there any river in Utah, cold water streams now,
5 other than the Green where you think it's feasible to both
6 float and effectively fish that stream from like a float tube
7 or a pontoon boat?

8 A No. I do not. And I mean, if you could reasonably
9 fish other streams and rivers in Utah, everybody would be
10 doing it, especially the guide services and it just doesn't
11 happen.

12 Q Okay. When you say--you're talking about float--
13 float fishing those streams?

14 A Yes.

15 Q Okay. As opposed to just fishing the streams?

16 A Yes.

17 Q So the Weber would not be one of the rivers where
18 you think that would be feasible?

19 A It is not feasible. I don't believe it's feasible.

20 Q On any stream in Utah other than the Green?

21 A Other than the Green River, yes.

22 Q Okay. Are you familiar with the Utah Stream Access
23 Coalition?

24 A Yes. I am.

25 Q Are you a member?

1 A I am a member.

2 Q What is the--what is your understanding of the
3 Coalition's mission?

4 A They're to restore and protect public access to
5 public rivers and streams in Utah.

6 Q Okay. And is it your understanding it was formed
7 in response to H.B. 141?

8 A It was formed shortly after H.B. 141 became law,
9 yes.

10 Q Okay. And you've been a member--you are a member.
11 How long have you been a member of H.B. 141--or excuse me, of
12 USAC?

13 A They want checks, too?
14 Since the organization started.

15 Q So you're one of the early members of the
16 organization?

17 A Yes. I am.

18 Q Okay. Do you give money to the organization? USAC?

19 A I give money, I've donated trips to help them raise
20 funds, I also have given them merchandise as well.

21 Q What do they do with the donated merchandise and
22 trips?

23 A They give them away.

24 Q They just give them away?

25 A They--at times, they give them away, we--they have

1 rallies where they try to raise money and--and they do
2 raffles, so there's--it's up to their discretion to use them
3 how they think is best to--to help further the cause of USAC.

4 Q They--they use the donated merchandise and trips as
5 sort of an inducement to raise money?

6 A Yes.

7 Q Why did you become a member of USAC?

8 A You know, probably personal reasons more than
9 anything else, for my kids, for future generations. I've
10 caught all the fish in my lifetime that I probably deserve to
11 catch and I'm worried about the experience that those after me
12 are going to have.

13 Q And do you believe public access to rivers and
14 streams is a key part of at least increasing the chances of
15 them having that experience?

16 A Yes. I do.

17 Q Let's talk about your opinions, at least start
18 talking about them in this matter. As I understand it, you've
19 been asked to offer an opinion on H.B. 141's impact on the
20 fishing public and on the fly fishing, guiding industry and
21 businesses in Utah.

22 A Yes.

23 Q Okay. And have you reached that opinion?

24 A Yes.

25 Q What is that opinion?

1 A I believe that H.B. 141 has substantially and
2 negatively impacted the public's and angling businesses use
3 and enjoyment of public rivers and streams in Utah, especially
4 those waters, I think, around the Wasatch Front.

5 Q And what do you mean by that?

6 A Those waters that, as I stated earlier, that I get
7 an opportunity to fish for an evening or a morning that are
8 within close proximity to Salt Lake City, and actually up and
9 down the Wasatch.

10 Q What are some examples of those rivers?

11 A Middle Provo, Lower Provo, for me anyway, those two.
12 Also, the what we--you referred to as the Middle Weber.

13 Q Okay. Are there other rivers and streams beyond
14 those you've just mentioned or other than those you just
15 mentioned where you believe you have observed the impacts of
16 H.B. 141?

17 A Almost all the waters that I've fished I've noticed
18 impacts and the growing number of people fishing those waters,
19 whether it's Huntington, Strawberry, although Huntington
20 burned down and it obviously is not what it used to be, but
21 Strawberry River, in particular. Also Current Creek, that's
22 another one.

23 Q Okay. Let's talk about Huntington Creek. You said
24 Huntington Creek burned down, what in fact, happened is the
25 Huntington Creek drainage was the victim of a wild fire.

1 A That is correct.

2 Q Okay. And what did that do to the stream?

3 A Both the left-hand fork, which was a blue ribbon
4 fishery and also the main fork, which is a blue ribbon
5 fishery, between the ash and the mud slides, we, for the most
6 part, we lost that fishery.

7 Q Okay. There's one fork that's still fishable; is
8 that correct?

9 A There's a small section right below the reservoir.

10 Q What reservoir?

11 A The--oh, what's the name of the reservoir?

12 Q Electric Lake?

13 A Yeah. Electric Lake. Thank you. I was thinking
14 blue, I don't know why I was thinking blue. But Electric
15 Lake, there's a--the small section that you can fish there,
16 it's only about a mile long. I believe it's the north fork is
17 still fishable and does have some fish in it.

18 Q Okay. So the north fork in a small section below
19 Electric Lake didn't get taken out by the forest fire?

20 A No. Nobody fishes the north fork. I mean, that's a
21 long hike to get in there and you've got to know where it is.
22 The left-hand fork was a very popular fishery and was on the
23 blue ribbon and we did lose that.

24 Q Okay. You mentioned Current Creek. Could you--

25 MR. COBURN: May I approach, your Honor?

1 THE COURT: You may.

2 Q (By Mr. Coburn) Okay. Would you identify and label
3 Current Creek on this map for the benefit of the Court?

4 A I believe it's that right there. Should I label it?
5 Oh. No, it's that one.

6 Q Okay.

7 A Sorry. Yeah, it's that one.

8 I didn't get the red, I got to put--can I get my
9 glasses on? Help.

10 Q Okay. Current Creek is, at least the lower reach
11 of it, is shown in red; correct?

12 A That is correct.

13 And at least according to the legend on the map,
14 that means it's traversing a private bed?

15 A That is correct.

16 Q But is much of that reach accessible to the public?

17 A Not the section that it's in red. The yellow, it
18 is, up by the dam here.

19 Q Okay. So you don't believe any of this down here is
20 accessible?

21 A Not to my knowledge.

22 Q You just fished that recently, did you not?

23 A Yes.

24 Q Okay. When did you fish it?

25 A It was about two weeks ago, three--three weeks ago.

1 Q And you fished that with Bill Young?

2 A I did.

3 Q Who's Bill Young?

4 A Bill Young has opened the door with me since the day
5 that I began my business and I knew him from Anglers Inn.
6 He's 84 years old, I believe, he used to fish this fishery
7 with his father, so it was a real treat to have the
8 opportunity to go out and--and fish that with him.

9 Q Okay. And as far as you know, the only part that
10 was open or accessible to the public was that shown in yellow?

11 A Yes.

12 Q Is Bill one of the individuals known as the coffee
13 crew or the shop rats?

14 A He's the original.

15 Q So I'm clear, you believe you've seen the impacts
16 of H.B. 141 beyond just the rivers close to the Wasatch Front,
17 but going over into the Duchesne drainage, Strawberry
18 drainage; correct?

19 A Yes. I have.

20 Q Okay. And you've also--have you seen it down in
21 the--the Price River, Huntington drainage?

22 A Huntington, yes, before it turned down--or, was
23 impacted by the fire, sorry, that's probably a better way to
24 put it. Well, I was there the day of the fire, I mean, and it
25 was burn--it burned down.

1 Q It was a hard burn, wasn't it?

2 A It was a hot burn, yeah. Actually, we had to be
3 evacuated.

4 Q Have you been back since the burn?

5 A No. I have a friend that lives down there and he's--
6 --that was one of my favorite places to fish in Utah, he's--he
7 reports to me frequently throughout the summer on what's going
8 on and--and it's just not fishing.

9 Q Okay. Do you know when that fire was?

10 A I don't know the exact date. It was about three
11 years ago.

12 Q Did you fish Huntington Creek before the fire but
13 after H.B. 141?

14 A Yes.

15 Q Okay. How many times?

16 A Two to three times a year at the most.

17 Q Okay.

18 A Usually, it was twice a year. I used to fish it a
19 lot before, with my kids, but after H.B. 141, two or three
20 times.

21 Q What did you--what did you notice, if anything,
22 different about your experience on H.B. 1--excuse me, on
23 Huntington Creek after H.B. 141?

24 So I'm--I'm assuming you went down there maybe two
25 to four times, maybe five?

1 A Yes. And--and to kind of clarify, I took people
2 there on most of those trips, again, throughout that, I didn't
3 fish it all that often, but it was one of the places I like to
4 share with people, good friends that hadn't been there. So
5 like I said, two or three times a year, I would--I would go
6 there and after H.B. 141, it was, again, like on other rivers,
7 it was harder to find water, there were more people fishing
8 the Huntington, also the main Huntington and the left-hand
9 fork.

10 Q More than? Compared to what?

11 A Again, I mean, if you look at during the Conatser
12 window or even before then, but definitely after H.B.--you
13 know, 141 became law, there were more people there.

14 Q What about the Price River?

15 A The Price as well; however, the last few years,
16 chub population in there has really decimated that fishery, so
17 if you went in there today, you would hardly see anyone, but
18 you'd be really hard-pressed to catch a trout, too.

19 Q What is a chub?

20 A A chub is a trash fish; in fact, the State's spent a
21 considerable amount of money to pretty decimate Strawberry
22 Reservoir and rid of it all fishes because of the chub
23 population. So they take over a fishery, they compete with
24 trout for space, they're a very invasive species. And the
25 impacts have been significant.

1 Q Let's--let's shift gears just a little bit. You
2 mentioned the Lower and Middle Provo, you've fished those
3 rivers.

4 A Yes.

5 Q Regularly?

6 A Yes.

7 Q Okay. Over the years since before Conatser, since
8 Conatser, before H.B. 141, since H.B. 141, you've fished those
9 rivers?

10 A Yes. I learned to fish, fly fish on the Lower Provo
11 River.

12 Q Who taught you?

13 A I taught myself.

14 Q Okay. What about the Middle Weber, do you know
15 where the Middle Weber is?

16 A Yes. I do.

17 Q Where is it?

18 A It's between Rockport and Echo Reservoir.

19 Q Okay. Is that a river that you have fished for some
20 time regularly?

21 A More so in the last decade, not so much when I first
22 moved to Utah.

23 Q So when you say the last decade, basically 2005 or
24 '06 to the present?

25 A Correct.

1 Q Okay.

2 A It wasn't accessed when I first got here.

3 Q Okay. And you've--we've talked about the
4 Strawberry, you've fished the Strawberry, the Pinnacles
5 section, which is from Soldier Creek down to the Pinnacles as
6 shown on that map; correct?

7 A Correct.

8 Q But you haven't fished the lower Strawberry below
9 Starvation much, if at all, have you?

10 A I fished it one day.

11 Q When did you fish it?

12 A Probably five years ago.

13 Q Was that before or after H.B. 141?

14 A It was before H.B. 141.

15 Q And what was that experience like?

16 A It was a good experience, again, it's--it's--you're
17 looking for one big fish, it's not a place you go to catch a
18 lot of fish. We didn't catch any.

19 Q Okay.

20 A That's not unusual for the way I fish.

21 Q Because you're hunting one fish?

22 A Yeah.

23 Q And your task is to get that one fish to take the
24 fly?

25 A Yes. That's the fun part.

1 Q Generally speaking and I know we've delved into
2 your opinions a little bit, but I want to--I want to circle
3 back here and explore the bases for your opinions a little
4 more. What is your opinion regarding the substantial negative
5 impact H.--of H.B. 141? What is that generally based on?

6 A It's based on a couple of things. All my
7 experience, especially my four years of fishing in Utah, what
8 I've seen, what I've heard from others, what I've experienced
9 when I'm fishing, especially on the Lower Provo where I
10 learned to fish, but obviously, since then, you know, that's
11 broadened and I've fished a number of the State's waters.

12 Q Okay. When you talk about what you've heard, you're
13 talking about shop talk?

14 A But even prior to shop talk, the shop talk then
15 would have taken place at Anglers Inn. I mean--

16 Q Okay. We'll get back to that.

17 A Okay.

18 Q Let's, in addition to the rivers you've mentioned
19 that you've fished in Utah, the Green, the Upper, Middle
20 Provo, the Middle Weber, the Upper--the Middle Strawberry,
21 Huntington Creek, Price Creek--Price River, you've also fished
22 creeks on the south slope of the Uintas?

23 A That is correct.

24 Q Okay. And that would be--

25 MR. COBURN: May I approach, your Honor?

1 THE COURT: You may.

2 MR. COBURN: I think this map would be better.

3 Q (By Mr. Coburn) Showing you what's been marked as
4 Exhibit 3.4, and this map shows the south slope of the Uinta
5 creeks, at least some of them, does it not?

6 A It does.

7 Would you put to those, please, for the benefit of
8 the Court?

9 A So the west fork, this part of the Duchesne right
10 here--

11 Q Do you want to label the west fork of the
12 Duchesne?

13 A Yeah.

14 Q For the benefit of the Court.

15 A Right there.

16 Q And why don't you label the north fork while you're
17 there?

18 A Can I put just NFD?

19 Q You can put NFD. Okay.

20 A Do you want the main Duchesne?

21 Q I think--well, we could--if the Court would like
22 that, you certainly may.

23 THE COURT: Sure. Go ahead.

24 Q (By Mr. Coburn) It's your understanding that the
25 main Duchesne eventually drains into the Green River?

1 A That is correct.

2 Q Okay. So let's look at these drainages coming off
3 the south slope of the Uintas. Would you just point to those
4 so the Court can see them and understand where they are?

5 A These right here or these--

6 Q Well, the Duchesne.

7 A --these as well?

8 Q Yes.

9 A Yeah. So all these up here.

10 Q Okay. What are the names of some of those drainages
11 up there, those creeks that you have fished?

12 A You've got Rock Creek, Lake Fork, Yellowstone, I'm
13 not familiar with what these ones are clear to the--these--

14 Q Okay. So what--what--which of those drainages, just
15 by name unless you can identify them by where they are on the
16 map, which drainages by name of those south slopes have you
17 fished?

18 A Rock Creek in here and also Lake Fork below Moon
19 Lake.

20 Q Okay. Why don't you label those again for the
21 Court?

22 Okay. You described earlier what it's like to fish
23 the high mountain streams on the north slope of the Uintas.
24 Are these different?

25 A Those are far enough down that where it's a little

1 flatter, up above the reservoirs, especially on Moon Lake,
2 then, you--the streams are much smaller, they're very similar
3 to what you encounter on the north slope of the Uinta.

4 Q Okay. Are the south fork streams, the Lake Fork
5 and Rock Creek, are those a littler easy to access than the
6 high mountain streams on the north slope?

7 A They definitely are. The other ones, you have to--
8 it's a long hike or you can take a boat across the reservoirs
9 to access the upper parts of those drainages.

10 Q But in terms of the size of the fishery or the
11 stream, how do they compare with the north slope creeks?

12 A They're very small as well and oftentimes, they're
13 covered in snow and again, their season is very short, so
14 access is very limited. And when you do access them, they're
15 a pretty good gradient, so they're kinda hard to hike up and
16 around. They're also very brushy, so they're tough to fish, a
17 lot of overgrowth and once you're in them, because of the
18 vegetation, unless you're a good caster, it's a challenge to
19 fish them.

20 Q Okay. Do you know what an archery cast is, a bow
21 cast?

22 A Bow and arrow cast, yes. Last time I used that was
23 on Parley's Creek between I-80 and I-15.

24 Q Okay. Is bow cast a technique that an angler, an
25 experienced angler will use on a small stream like that?

1 A Yes.

2 Q Or an arch--or a bow and arrow cast?

3 A Yes.

4 Q I'm not thinking--I'm not thinking I'm going to
5 have you describe for the Court, it's just a rather
6 complicated technique to master.

7 A It's kind of a hail Mary.

8 Q You use it to see if you can fly where you want it
9 to go?

10 A Yeah. It's like your only--that's your only chance.

11 Q You have fished in states, western states other than
12 in Utah, haven't you?

13 A Yes.

14 Q What states primarily, western states primarily have
15 you fished in for trout?

16 A Idaho and Montana. I'm very familiar with both
17 those states' waters.

18 Q Okay. 'Cause you've fished them quite a bit over
19 the years?

20 A I've fished them a lot.

21 Q Okay. What are the rivers that you have fished in
22 Idaho?

23 A The Henry's Fork.

24 Q That's the north fork of the Snake?

25 A Yes.

1 Q We talked about that earlier, coming out of the Iron
2 Park area of Yellowstone and--

3 A Correct.

4 Q --coming in towards Rexburg?

5 A Correct.

6 I've also fished Silver Creek. The Big Wood River
7 as it passes through Bellevue, Hailey, out of Ketchum area
8 there in Sun Valley. South fork of the Boise, fished the
9 Salmon. Those are primarily the rivers that I've fished in
10 Idaho.

11 Q Okay.

12 A Also the south fork of the Snake, I should say that
13 as well.

14 Q The south fork of the Snake comes out of Palisades
15 Reservoir?

16 A Comes out of Palisades Reservoir and into Idaho
17 Falls and then joins the Snake.

18 Q Okay. And what rivers in Montana have you fished?
19 Just some of them.

20 A Well, the Madison, Missouri, Beaverhead, the Big
21 Hole River, Clark Fork River, so a number of the major rivers.
22 Used to spend a lot of time in Yellowstone.

23 Q Okay. When you say the Missouri, you mean the
24 upper Missouri?

25 A Below Holter Dam out of Craig, in that area there.

1 Q That's in the Helena region; right?

2 A That is correct. That's in the Helena region.

3 Q All these rivers are cold water fisheries, whether
4 they're in Idaho or Montana?

5 A They are all definitely cold water fisheries

6 Q And just as a general proposition, how do these
7 rivers that you've fished in the other states compare to
8 rivers in Utah?

9 A It--

10 Q Cold water rivers now.

11 A Yes.

12 If you take the Provo River, for example, if you
13 take a mile of the Provo River and a mile of the Madison
14 River, their ability to handle or their carrying capacity to
15 handle anglers, it's must greater on the Madison than what you
16 would find on the Provo River.

17 Q But just as a general proposition, the rivers that
18 you've fished in Idaho and Montana, how do they compare as a
19 general proposition to the rivers in Utah?

20 A They're bigger.

21 Q Okay. Is there any river in Utah that compares to
22 most of these rivers that you described in Idaho and Montana?

23 A The Green is the only one in Utah that is comparable
24 in some regards.

25 Q Some regards?

1 A Yes.

2 Q Are there rivers that you mentioned in these other
3 states, Idaho and Montana, that are considerably bigger than
4 the Green?

5 A The Yellowstone River's much bigger than the
6 Green, the Missouri is much bigger than the Green.

7 Q South fork of the Snake?

8 A South fork of the Snake is much bigger than the
9 Green. Big Hole, when it's in season is bigger than the
10 Green.

11 Q What do you mean, it's in season?

12 A It has--irrigation demands on that are--are rather
13 significant, so usually by July, it doesn't have enough water
14 in it that it's--it--people fish it that much.

15 Q Okay.

16 A It's hard to--hard to access and hard to fish.

17 Q Are some of the rivers in Idaho and Montana that you
18 mentioned comparable to the Green in terms of size?

19 A You know, I'd probably say the closest of the
20 waters that I've fished would be the Madison.

21 Q Okay. But the rest of the rivers you've mentioned
22 are bigger than the Green?

23 A The Henry's Fork's--it's--it's wider, but water
24 volume, I'd say is comparable to the Green.

25 Q Okay.

1 A It's also a very shallow--the Henry's Fork is a
2 very unique, it's a--it's a very shallow fishery.

3 Q At that top where you typically fish it up in the
4 ranch area, up towards Highland Park?

5 A Yes.

6 Q Okay. It gets bigger as you get downstream?

7 A Right. And I would say actually as you get
8 downstream and I don't fish those waters very often, it's--it--
9 --it's comparable in size and carrying capacity to--that the
10 Green is.

11 Q Okay. Now, you mentioned carrying capacity. What
12 do you mean by carrying capacity?

13 A Well, for example, the Green which I think most
14 people here are familiar with, at least those that fish, we've
15 talked about how you can float fish the Green and you can--and
16 you can do it very well, in fact, that's one of the best ways
17 to fish it. But in any given length of water, whether you
18 call it a hole or a run or a section, you can not only have
19 anglers fishing from a boat but you can also have wade
20 fishermen in that same section. And none of those will impact
21 each other's fishing experience, so it has room to handle not
22 only a variety of anglers but a number of anglers in one piece
23 of water.

24 Q Okay. So carrying capacity is a function of the
25 size of the river?

1 A It's definitely a capacity of--or a function of the
2 size of the river, yes.

3 Q Okay. And when you say the drift fishermen won't
4 impact the wade fishermen, that can happen but there's less
5 chance of that happening?

6 A It--it can and it does happen, but there is room
7 for everybody. I mean, there is room for a number of anglers
8 to enjoy a river in any one piece of it.

9 Q Okay. And do the rivers you mentioned in Idaho and
10 Montana have, how would you characterize their carrying
11 capacity? And if you want to identify specific rivers by way
12 of example, that's fine.

13 A They're all comparable to the Green or they have
14 greater, a lot of them have greater carrying capacity. You
15 know, the Missouri, for example, again much bigger, it can
16 support several boats in any given section and wade fishermen
17 all at the same time without im--encumbering or--

18 Q Fishing the same water?

19 A --affecting--yeah. Fishing the same water without
20 affecting people's fishing experience. The Henry's Fork,
21 which I--where I spend most of my time, you can have boats
22 floating down the river at the same time you have lots of
23 anglers and yet, there's plenty of room in most instances, for
24 people to enjoy their fishing experience and find their
25 preferred fishing experience.

1 Q When you say lots of anglers on the Henry's Fork
2 other than the fishermen, drift fishermen in boats, are you
3 talking about wade fishermen or bank fishermen?

4 A Yes. I'm talking about--people don't float that as
5 much as they walk and wade it. Again, it's a very shallow
6 fishery and the ideal way to fish it is wade fish, the ramp
7 section, which is the fishing that I fish the most. Down in
8 the lower section, which you just brought up earlier, most
9 people float that and you have less wade fishermen down there.

10 Q Okay. That's down towards Ashton's?

11 A Yes. St. Anthony's and Ashton's.

12 Q Okay. All right. How do these other rivers in
13 Montana and Idaho that you mentioned, how do they compare to
14 the Green River in terms of length? Just give some examples.

15 A Yeah. The--you know, and probably my best example
16 is the Madison 'cause I know the Madison well, my old partner
17 has a cabin on the Madison. So the Green River, after it
18 leaves Flaming Gorge and through its lengths until it enters
19 Colorado is 35 miles.

20 The Madison, after it leaves Yellowstone Park and
21 it's 16 miles long in Yellowstone Park, but after it leaves
22 Yellowstone Park, it's 160 miles long.

23 Q Okay. So much longer than the Green?

24 A Much longer.

25 Q And does that influence its carrying capacity?

1 A It definitely influences its carrying capacity. I
2 mean--

3 Q It's got more miles?

4 A I mean, if I have 160 miles to fish versus 35
5 miles, it's obviously--it obviously can support many more
6 anglers.

7 Q Okay. And would your testimony be similar for
8 rivers like the Big Hole or the Beaverhead or some of those
9 others that you mentioned?

10 A Yes. Also, like I said on the Henry's Fork, South
11 Fork also.

12 Q Longer river?

13 A Very long rivers. Also wider, much larger carrying
14 capacity.

15 Q Okay. And clearly, the rivers like the Upper
16 Missouri and the Yellowstone, which are hundreds of miles
17 long--

18 A Yes.

19 Q --and much bigger, have much bigger carrying
20 capacity?

21 A They do.

22 Q Okay. So how do Utah's other rivers and streams
23 other than the Green, how do they compare with the waters that
24 you've mentioned in other state--states?

25 A They're much smaller. And we've alluded to that

1 already to some degree, but when you talk about it in terms of
2 carrying capacity, all the other rivers and streams that we
3 fish in Utah for the most part, any given run, piece of water,
4 section, in my mind, can--can comfortably have one or two
5 anglers at the very most in those pieces of water, without
6 impacting your fishing experience.

7 Q Okay. Are those pieces of water, the run or the
8 hole that you refer to, are they comparable in size to what
9 you see on the Madison, the Henry's Fork?

10 A In length, they could be, but in actual width, no.
11 And again, you can't float them, 'cause again, if you just
12 take the mile analogy, it's--the carrying capacity of the
13 Provo is much less than it would be on the Madison.

14 Q And to be clear, there are a lot of streams in
15 Idaho and Montana that are comparable to the Provo or the
16 Weber or Strawberry; correct?

17 A There are.

18 Q There just aren't the kind of rivers, the big rivers
19 that you were mentioning in Utah that are in the--those states
20 as well?

21 A That is correct.

22 Q What is your understanding in terms of H.B. 141's
23 impact on the mileages of fishable waters in Utah? Do you
24 understand my question?

25 A I'm going to have you ask it again just to be clear.

1 Q Well, do you have an understanding as to how many
2 miles of fishable waters there are in Utah?

3 A I do.

4 And what is that understanding?

5 A It's approximately 6,400 miles.

6 Q Okay. And where did you gain that understanding?

7 A Numbers from the State that I've become familiar
8 with.

9 Q Through the course of this lawsuit?

10 A Yes.

11 Q Okay. And do you have an understanding as to the
12 number of miles that are, to one extent of another, no longer
13 accessible to the public, as a result of H.B. 141?

14 A It's roughly 2,700 miles or 40 percent of all the
15 waters that we have that are fishable in the State of Utah.

16 Q The fishable rivers and streams?

17 A Yes.

18 Q Both warm water and cold water?

19 A Yes.

20 Q Okay. So that leaves, if you do the math, that
21 leaves roughly 3,700 miles of fishable waters that are still
22 accessible to the public?

23 A That is correct.

24 Q Do you have an understanding as to year in and year
25 out how many fishing licenses are sold in Utah?

1 A Roughly, yes.

2 Q What is that?

3 A Around 400,000. Usually a little greater than
4 400,000 licenses are sold a year to resident and non-resident
5 anglers in the State of Utah.

6 Q Okay. So how many--you say 400,000 licensed
7 anglers on average, at least that number year in and year out
8 in Utah, what does that translate into in terms of licensed
9 anglers for every mile of fishable streams in Utah prior to
10 H.B. 141?

11 MR. THOMAS: Well, I'll object, your Honor.
12 Relevance with regard to just that number in terms of how to
13 provide that unrelated to use of the streams or being on the
14 streams.

15 MR. COBURN: It goes to the weight, your Honor.

16 THE COURT: It does--has some tendency to make a
17 fact of consequence to the determination more likely. I'll
18 receive it.

19 Q (By Mr. Coburn) So, did you understand the
20 question?

21 A I believe you want to know during the Conatser
22 window, so to speak,--

23 Q Give me just the Conatser window.

24 A Yeah. Yeah. So if you take the 6,400 fishable
25 miles and divide that by the number of licenses sold, you

1 roughly have around 60--

2 Q It's just the other way around.

3 A Divide 6,400 into 400,000?

4 Q Divide 400,000 by 6,400?

5 A Yes. Yeah. And you get roughly 60--for every 60
6 license holders in the State of Utah, you have one mile of
7 river.

8 Q Okay. And then after H.B. 141, I believe you
9 said there's roughly 3,700 miles--

10 A Correct.

11 Q --or publicly-accessible fishable waters in Utah;
12 correct?

13 A Yes.

14 Q And what's the math figure on that calculation and
15 those mileages?

16 A For every 105 license holders in the State of Utah,
17 you have one mile of river.

18 Q Okay. Now, you've done similar calculations, have
19 you not, for Montana and Idaho?

20 A That is correct.

21 Q Where did you get your information, what was the
22 source of your information for the number of licensed anglers
23 in Idaho and Montana?

24 A The census bureau, I think it was since 1990, posts
25 the number of licenses each state, that all 52 states sells.

1 Q Fifty-two states?

2 A Yeah. All 52 states, so I just went and looked it
3 up for--

4 Q Is it more--are there two states I don't know
5 about?

6 A Or 50 then, whatever. Yeah.

7 Q So I was going to say--

8 A That's where my private fishing is.

9 Q You cite--you cite those--those sources in your
10 report, do you not?

11 A Yes.

12 Q Okay. Would you turn, if you would, to Exhibit 14,
13 please?

14 A My report.

15 Q Is that your report?

16 A Yes. It is.

17 Q And that contains the opinions as of the time that
18 that report was issued?

19 A Yes.

20 Q Okay.

21 MR. COBURN: I would move to admit Exhibit 14, your
22 Honor.

23 MR. THOMAS: No objection.

24 THE COURT: 14's received.

25 Q (By Mr. Coburn) Okay. Would you just identify in

1 that report where the--the source, I believe it's in a
2 footnote, where the source of your license holder information
3 was contained for the States of Idaho and Montana?

4 A Census Gov.

5 Q Census.gov.

6 A Yes. It's on--I can't read the page here, I think
7 it's on Page 4, 2 3, yeah, Page 4, at the bottom of Page 4.

8 Q Okay. And that's, actually when you go to that
9 link, is it not the survey data gathered by the U.S. Fish and
10 Wildlife Service?

11 A Yes.

12 Q Okay. And that's where you obtained your license
13 holder information for the States of Idaho and Montana;
14 correct?

15 A That is correct.

16 Q Where did you obtain--go to obtain the mileages of
17 fishable rivers and streams in the States of Idaho and
18 Montana?

19 A Each of the state's fish and wildlife sites.

20 Q Okay.

21 A Usually boast the mileage that they have.

22 Q Okay. And did you run similar calculations with
23 regard to the number of license--license holders--fishing
24 license holders in Montana and Idaho for every mile of
25 fishable river and stream in those states?

1 A Yes. I did.

2 Q Okay. What did you determine for the month--or for
3 the State of Idaho?

4 A Idaho, for every 17 license holders, they had one
5 mile of river.

6 Q Okay. That's compared to 105 license holders per
7 mile--per mile of river in Utah?

8 A Under the current law today, yes.

9 Q Okay. Yeah. And 60 before H.B. 141?

10 A And 60 before, correct.

11 Q Okay. What about for the State of Montana?

12 A For every 13 license holders in the State, there is
13 one mile of river.

14 Q Okay. And that's a function of the mileages of
15 rivers in those states divided the number of license holders,
16 obviously?

17 A Yeah. That is correct.

18 Q They have a lot more miles of rivers up in Idaho
19 and Montana, do they not?

20 A Yes. Montana has 21,000 and Idaho has 26,000 miles
21 of fishable waters--rivers and streams, I should say.

22 Q And I believe you testified earlier that the
23 carrying capacity of many of the rivers and streams in Idaho
24 and Montana are bigger than--or are--is greater than any other
25 river in Utah--any river or stream in Utah, save perhaps the

1 Green River below Flaming Gorge; is that correct?

2 A That is correct.

3 Q Okay. So even if you had 17 anglers, licensed
4 anglers for every mile of stream in Utah, that's not the same
5 as having 17 licensed anglers for every stream in Idaho, is
6 it?

7 A That is not--yes, that is correct.

8 Q Okay.

9 A Yeah.

10 Q And the reason they're not the same is because of?

11 A The carrying capacity. I mean, again, Utah rivers
12 are very small, so if you put 17 people on a mile of river in
13 Utah, it's going to be a lot more crowded than those 17 people
14 on the Madison, the Missouri, Jefferson, you can go down the
15 list.

16 Q And it's not your testimony that these numbers we've
17 just ran are--actually reflect the actual number of anglers on
18 every mile of stream in Utah; correct?

19 A That is correct.

20 Q It's a relative thing?

21 A It's a measurement is all it is, it's a relative
22 number, yes.

23 Q Okay. What do these numbers, and I understand
24 they're relative numbers, what do these numbers suggest to you
25 about the fishing pressures that one might encounter in

1 certain times a year, that may be true of a specific part of
2 the river, but again, that year--that varies year to year on
3 water volume, weather, lots of factors influence not only
4 entire rivers, but given sections or pieces of river.

5 Q Okay. So but I mean the--for example, the Oasis,
6 which I think is down below Starvation Dam, is it?

7 A Yes.

8 Q That's a good place to fish; correct?

9 A Definitely not for everybody.

10 Q Okay. But in terms of your experience for most
11 fly anglers, portions of that--

12 A Go ahead.

13 Q Oh, I was just going to say that that spot is
14 probably better than 50 miles down that river; right?

15 A I've never fished below the U.S. 40 bridge, so I
16 don't know that as fact. Also, don't have access to that
17 water, so...

18 Q Okay. Some stretches of the Strawberry River are
19 better than others; right? For fly fishermen?

20 A Again, that varies from year to year on--

21 Q Okay. In a particular year, is it true that some
22 parts of the Strawberry River are better for fly fishing than
23 other parts of the Strawberry River?

24 A I would say that's true.

25 Q Okay. And more experienced and knowledgeable fly

1 fisher--I'm going to say fly fisher people--anglers.

2 A Fly fisher is a good word.

3 Q Fly fisher. They would learn and maybe know or
4 have a better idea of which stretches of, say, the Strawberry
5 River, was better that particular year; right?

6 A I would say that's accurate.

7 Q Okay. And so those people would have a tendency to
8 go to that part of the river rather than a different part of
9 the river; correct? Or want to go to that part of the river
10 rather than--

11 A Again, there's a lot of factors that go into where
12 you fish. I mean, when insects hatch, for example, they--they
13 generally hatch starting in the lower reaches of the river
14 'cause it's warmer and then the hatch progresses upstream and
15 so when you get to--I know, for example, when I go to the
16 Strawberry and there's stoneflies out, I actually drive up and
17 down the river to see where the stoneflies are, so I don't
18 exactly know where I'm going that particular day until I find
19 what I'm looking for.

20 Q So but based upon that knowledge, you have a general
21 sense of where you're going to go?

22 A I'm going to a river.

23 Q Okay.

24 A It's--I don't have a favorite fishing hole.

25 Q You don't--okay. And--and--

1 A I mean, when I drive up the Lower Provo, for
2 example, I try to find a--I really don't have an opportunity
3 to focus on specific areas where insects may be hatching.
4 It's more, is there a piece of open water where I can actually
5 get in and fish.

6 Q Okay. Let's talk about guides. Guides, when they
7 are taking people out, they are working at hav--providing an
8 excellent fishing experience for their customer; right?

9 A That's what they hope for, yes.

10 Q And that's what they're going to try and provide; is
11 that correct?

12 A Yes.

13 Q And so they will use their knowledge with regard to
14 river conditions, weather, insects, fishing conditions, all
15 those things in terms of attempting to find a good place to it
16 take their customer; is that correct?

17 A Yes.

18 Q Part of the guiding, what you do is--is educating
19 the anglers; right? The fisher--the--

20 A Depends on if that's something that the angler
21 wants.

22 Q Okay.

23 A It's not always true.

24 Q All right. But guides will frequently talk about,
25 to the customers about where they're going and why, to fish?

1 A There is a discussion before they actually start on
2 the trip, as to fishing options and travel may be a part of
3 that, how a particular river's fishing, what the experience is
4 going to be like on different waters that may be fishing well
5 at any given time, and then let the angler kind of decide on,
6 you know, what they prefer.

7 Q Okay. So that angler, after the guiding experience,
8 might know whether or not they want to go back to that spot
9 and might now the reasons why, some of the reasons why?

10 A If they have a good experience, it would--there is
11 a possibility that they may go back.

12 Q Okay. Are there more guide services now than there
13 were ten years ago?

14 A Yes.

15 Are they taking more people on guided trips than
16 they were ten years ago?

17 A I don't know each--

18 Q Oh, in total?

19 A I don't know that as fact.

20 Q Okay. Do the different guide companies ever take
21 their customers to the same place on the same day?

22 A Yes.

23 Q Okay. Why do they do that? Why do they end up
24 doing that? They don't call ahead and talk to each other
25 about it, I assume.

1 A Sometimes they do.

2 Q Call up and say, hey, let's all go out to the
3 Strawberry?

4 A Not, oh, let's go out, but they share experiences
5 and stuff, I mean, it's a pretty friendly community as far as
6 so there is communications, but you know, for example, I mean,
7 the best way to answer that question is that those waters that
8 are close to Salt Lake City give us an opportunity to do trips
9 for a half day. John Jackson mentioned they do trips, two-
10 hour trips. And so the Middle Provo is one of those rivers
11 where we can provide a half-day trip, for example, you can't
12 do the Strawberry as a half-day trip because it's a four-hour
13 drive. So you're going to see a number of different guide
14 services on the Middle Provo on any given day.

15 Q And those guide services will make a determination
16 based upon a certain time and maybe money that this would be
17 the place where they could give a good experience to their
18 customer, good fishing experience?

19 A Yeah. That's part of the equation. Again, they're
20 going to look at the customer's ability before they take them
21 out and that--that also is a part of the equation.

22 Q Okay. And anglers, themselves, when they think
23 about where they want to go, they might go through some of
24 that same thought process as the guides--as the guide with
25 regard to where they might want to go that day?

1 A That's true, yes.

2 Q Okay. And the more knowledgeable and more into fly
3 fishing, the more they'd probably know and be able to do that
4 type of analysis; right?

5 A Yes.

6 Q And so if, you know, 20 guide services and, you
7 know, 100 people said, you know, today is the perfect day
8 because of the flies and the weather and everything to go out
9 to the Middle Strawberry, a lot of them might go that day;
10 right?

11 A Yeah. Again, I think they're going to have a
12 discussion with their customers and their customers are going
13 to be more involved with that process than--than the guides
14 are and I think that--if the Strawberry's fishing good at that
15 particular time where they have clients, that may be an option
16 that they offer.

17 Q Okay. And so if the Strawberry, say, the Strawberry
18 or probably any river, I guess, was fishing really good that
19 day, it's probably to get a lot more pressure than those days
20 when it's not a good day and it's not fishing well.

21 A Don't always know that.

22 Q Right. You don't know that, but--

23 A I mean, you're tak--whenever you go out, you're
24 taking a calculated guess at best and I mean, a perfect
25 example, there could be, like the flash flood we had in Lehi

1 the other day, that could happen on the Strawberry and you
2 have no idea until you drive in there and there's chocolate
3 milk coming down the river. So any of those are a calculated
4 guess.

5 Q Right. And--and you sort of learn some of those
6 things, like, you talked about one place where after the
7 salmon fly, wasn't worth fishing there because nobody knew
8 where the fish all went or nobody knew where the fish were.

9 A That was more on Diamond Fork. Yes.

10 Q But so there are things that will make you realize
11 that fishing in this section of this particular river might
12 not be as good today as it was the week before; right?

13 A All of--yeah, those things create opportunities and
14 obviously, as an angler, you're--you want to have success so--

15 Q Right.

16 A --yes.

17 Q And so all those little factors will be driving
18 people in terms of going or not going to different sections of
19 the river, that knowledge and experience of--in fly fishing?

20 A In all fishing.

21 All fishing?

22 A Yeah. It's not just fly fishermen that think that
23 way, we all want to catch fish or have a good angling
24 experience.

25 Q And the ability to increase the odds of having one

1 of those things, those--those are a lot of factors that people
2 can discover and act on to try and improve the likelihood of
3 having a good fishing experience?

4 A What do you mean by things?

5 Q You talked about the different fly hatches up on
6 the Strawberry, talking about how, you know, very--I think
7 there were large flies and it was--you know, so you have a
8 short period of time during that hatch when the fishing was
9 really great. So that would be one of those factors; right?

10 A You mean short period of time as in days, hours?

11 Q I don't--you were the one who talked about there
12 was this--there was a hatch that ha a limited window and the
13 fishing--

14 A Okay.

15 Q --was really good during that window; right?

16 A So limited windows could be weeks, months.

17 Q But those are factors that drive people to or away
18 from different sections of streams?

19 A But also may drive away.

20 Q Right. I said, but I mean, those types of factors
21 are things that direct people to go or not go to a particular
22 stretch of river?

23 A Yes.

24 Q And there--there are other factors or reasons to
25 go to different stretches of the river, I think you testified

1 to, some of the aesthetics.

2 A Yes.

3 Q So that the appearance of the river, other
4 wildlife, all the other flora and fauna?

5 A Yes.

6 Q That would drive people to go to a particular
7 stretch of river as opposed to a different one, possibly?

8 A Yes.

9 Q And as people learn that that stretch of river has
10 that particular aesthetics and that's important to them, then
11 they would be more likely to go to that particular stretch?

12 A And also seek out other rivers that gave them that
13 same experience.

14 Q What was your understanding with regard to the
15 ability to access fishing on streams that flowed over private
16 land prior to Conatser?

17 A That the public did not have access to waters that
18 flowed over private streambeds and through posted properties.

19 Q So basically the same as it is now under H.B. 141?

20 A Generally, yes.

21 Q The numbers that you utilized with regard to number
22 of license holder per mile, Utah's never going to catch up or
23 get close to Idaho or Montana; right?

24 A I used it just as a gauge, I didn't look at it in
25 any other way.

1 Q Right. But Idaho and Montana, I think you
2 indicated, have 26--over 26,000 miles of fishable streams and
3 21,000, respectively?

4 A They do.

5 Q Okay. Utah, at the most, has 6,400, roughly?

6 A That's correct.

7 Q Okay. We're not going to grow any more fishable
8 streams, you think?

9 A Last I checked, he's not making any more.

10 Q So we're never going to catch up in terms of amount
11 of--amount of water or streams?

12 A That's correct.

13 Q So Utah's always going to be a lot more crowded than
14 Idaho and Montana in terms of anglers per mile?

15 A I don't know that, I can't predict the future.

16 Q Okay. In order for that to happen, since Utah's
17 not going to get any more streams, either going to have to
18 have a lot--a large decrease in the number of license holders
19 in Utah or a very large increase in the number of license
20 holders in Idaho or Montana; isn't that right?

21 A Which is happening, so that's a possibility, yes.

22 Q Okay. So Idaho and Montana might catch up to Utah
23 because the number of anglers there is going to increase so
24 dramatically that--that licensee per mile will match up?

25 A That's a possibility.

1 Q You talked about how H.B. 141 reduced the mileage
2 or the number of anglers per mile from 66 during Conatser to
3 115 afterward; right?

4 A Yes.

5 Q Okay. So that--and that 115, you view that as
6 indicative of being far too crowded?

7 A I didn't say that it was the number of anglers per
8 mile, I said for every 115 license holders, you have one mile
9 of river.

10 Q Right. Okay. But that--but that number, which is--
11 is just a relationship between number of license holders and
12 miles of stream.

13 A Total miles of stream--

14 Q Okay.

15 A --or remaining miles in those two figures.

16 Q Yeah. So that 115 is evidence or indicative that
17 the waters are too crowded?

18 A I think you can read that into those numbers, yes.

19 Q Okay. So prior to Conatser, you would have had that
20 same number; correct?

21 A If the number of licenses that were sold is the
22 same, that's correct.

23 Q Okay. So--

24 A I don't know that, though.

25 Q All right. So--so prior to Conatser, was--were the

1 waters of Utah so crowded that it was negatively impacting the
2 anglers and the angling business?

3 A I think in my testimony, I answered that yes.

4 Q Okay. And so pre-Conatser then, the guiding
5 industry couldn't grow and develop because it's limited by all
6 these waters and being so negatively impacted.

7 A It--I mean, it can definitely grow. It depends on
8 how you feel about the impact that you're having on your
9 resources. Our business, in particular, it's one of the few
10 that realizes that as a--our guide business does have an
11 impact on the resource and we've chose not to grow that guide
12 business.

13 Q I thought you indicated, though, that you know,
14 the levels of crowding were impacting--negatively impacting,
15 causing problems for the guiding industry; right?

16 A It definitely creates challenges, yes.

17 Q And so assuming that the same, roughly the same
18 number of permits, say, in 2007, with the same number of
19 limited fishable miles that were accessible, the 3,700 figure
20 you were using, were those--all those impacts that you
21 testified about H.B. 141 were fully engaged in 2007.

22 MR. COBURN: Objection, vague, your Honor. I--I
23 don't understand, for beginners, what he means by permits.

24 THE COURT: Sustained. If you can clarify.

25 Q (By Mr. Roberts) So with that limitation on the

1 amount of mileage of fishable streams being about the same in
2 '07 as it is now, and assuming the same number of fishing
3 permits, or roughly the same number, were all the impacts,
4 negative impacts and disabilities that you opined that have
5 been caused by H.B. 141, were they fully also being
6 experienced in Utah in 2007?

7 A Those impacts did exist. I don't think they're the
8 same as they are today as they were in 2007.

9 Q Okay. So how are they different? Those impacts.

10 A It seems, from my experiences on the water, also
11 from our guides, that it is more crowded now than it has been
12 and in some instances, substantially more crowded, therefore
13 not only to provide a good angling experience or--also for the
14 public to have a good angling experience, that's more
15 challenging today than it was in 2007.

16 Q That's because there are more people on those
17 particular stretches of river?

18 A Yes.

19 Q Part of that, I assume you would allow is because
20 there are increased population?

21 A That--

22 MR. COBURN: Objection--

23 THE WITNESS --doesn't really--

24 MR. COBURN: --speculation, foundation, your Honor.

25 THE COURT: Sustained as to increases in population

1 generally.

2 Q (By Mr. Roberts) Okay. Do you have an opinion
3 with regard to whether or not the population has an effect on
4 the impacts that you claim that H.B. 141 has on the waters of
5 the State of Utah?

6 MR. COBURN: Same objection.

7 THE COURT: Will you re-state the question? I'm
8 sorry.

9 MR. ROBERTS: Okay.

10 Q (By Mr. Roberts) Do you have an opinion whether or
11 not the population of the State of Utah affects the impacts
12 that you note in your report that are--you say are due to H.B.
13 141?

14 THE COURT: Overruled. It's the--as to the increase
15 in population in Utah, he may answer, if he--

16 MR. COBURN: Could I--

17 THE COURT: --if he knows.

18 MR. COBURN: Could I register an objection for the
19 record, your Honor?

20 THE COURT: Go ahead.

21 MR. COBURN: I don't think increases in population
22 are relevant to angling pressure, I suspect that increase in
23 licensed anglers might be and those numbers aren't before the
24 Court.

25 THE COURT: Thank you.

1 He may answer.

2 THE WITNESS: I don't know.

3 THE COURT: Some people fish who aren't licensed.

4 MR. COBURN: True.

5 THE WITNESS: A good source of revenue.

6 Q (By Mr. Roberts) I believe you testified that one
7 of the impacts of crowding is that you'd have to go to a
8 particular stretch of river earlier than you used to have to
9 in order to increase your likelihood of being able to find
10 water to fish on?

11 A Again, I think it's the entire river, not just a
12 specific piece of the river, that we would leave earlier for a
13 fishing trip. Again, we don't know a specific destination
14 that--or piece of water we're going to fish.

15 Q Okay. But I think--didn't--all right, but--

16 A We leave--

17 Q --didn't you testify that--

18 A Yes.

19 Q --one--okay. One of the effects of crowding is
20 that you need to leave earlier to increase your chance--

21 A Yes.

22 Q --of finding water to fish?

23 And that was in--I wrote it down the quote here,
24 you thought people had to leave earlier than they would like
25 to.

1 A I'd say that's true.

2 Q And again, that is sort of the--the--can't think of
3 the word, depends on the person, earlier than would have like
4 to, sort of--some people like to get up early, some people
5 don't.

6 A Correct.

7 Q You'd like to go back to the old days where you can
8 get to the water later and be the first one there?

9 A Me, personally?

10 Q Yes.

11 A I'll get there when I feel I'm going to have the
12 best fishing experience and sometimes that's waking up at 4:00
13 o'clock in the morning and other times that, you know,
14 sleeping in.

15 Q Okay. But--and that's fine by you; right? The
16 times you get up at 4:00 o'clock to get that good fishing
17 experience?

18 A If that's my decision to do. If I'm forced to do
19 that because of river conditions, that's a little bit
20 different, so--

21 Q Well, but aren't you always subject to the river
22 conditions with regard to weather and fish and--and hatching
23 and all of that and you--and including the people who might be
24 wanting to go there, those all factor into your fishing
25 experience; right?

1 A If I have to get up early for the specific reason to
2 avoid the crowds, then that decision really doesn't factor
3 into how the fishing is, it's in order to find a piece of
4 water to fish and--

5 Q Those--

6 A --at a later--you know, at a later time. It is not
7 always desirable, you're just getting there to try to beat the
8 crowds.

9 Q Okay. But getting there and finding a place to
10 fish really doesn't effect your fishing experience, doesn't
11 it?

12 A A lot of time sin those situations, you're there
13 when the--the fishing is not productive; again, you're getting
14 there to beat the crowds and--

15 Q But my question is merely getting to a place and
16 being able to get onto the water to fish affects your
17 experience; yes--

18 A Yes.

19 Q --or not? Okay.

20 And also getting there at the right time with
21 regard to if there's a particular hatch going on would affect
22 your--the fishing experience; right?

23 A Yes.

24 Q So you might have to get up or go at a different
25 time based upon that hatch, either time of day or different

1 day to take advantage of that particular hatch; right?

2 A Again, I think you have to look at the body of
3 water you're going in in order to experience a particular
4 hatch. Sometimes you have to arrive before that occurs so
5 that you can be there when it happens and find water to fish.

6 Q Right.

7 A So--

8 Q What I'm saying is, is you have---you tailor your
9 behavior to take advantage of that particular circumstance,
10 there at the hatch; right?

11 A Correct.

12 Q Okay. And similarly with regard to people and
13 crowd you tailor your behavior in order to take--to take into
14 account that particular circumstance.

15 A They affect my behavior, yes.

16 Q Carrying capacity of--of the rivers here in Utah,
17 would that be easy to increase?

18 A If--yes, by adding additional miles or waters.
19 You can increase some--you know, we have total miles is 6,400
20 miles, past that, we can't increase them, but the only way we
21 could do--you can't physically change the carrying capacity of
22 a specific section or piece of water.

23 Q Okay.

24 A The only way we can is by adding additional waters.

25 Q Okay. I thought--okay. So I thought the carrying

1 capacity of the rivers and streams, I thought you described
2 that as the ability to handle people in a particular area.
3 And I assumed that was a function of water, space and fish.

4 A That's one way to look at it.

5 Q Okay. What's the--what's the right way to look at
6 it?

7 A Well, I mean, the other way is I talked about the
8 Madison, I mean, it's 160 miles and compared to the Green and
9 so obviously, 160 miles can handle a lot more people than 35.

10 Q Okay. But I thought also you indicated that on an
11 individual per mile basis, the carrying capacity of the
12 streams in Idaho and Montana was generally greater than that
13 in Utah.

14 A And you can break it down into that as well.

15 Q Okay. But is that true?

16 A Yes.

17 Q And that would be difficult to change here in Utah
18 in terms of making the streams and rivers bigger to handle--to
19 wider and deeper and to handle more anglers at a particular
20 spot?

21 A It is. We actually did it on the Middle Provo, we
22 increased habitat there by 500 percent in the mitigation
23 project, so it can be done.

24 Q You increased habitat or size of the river?

25 A Did a little bit of both.

1 Q (Inaudible) you've fished what is known as the
2 Upper Provo and Middle Provo before Jordanelle Dam?

3 A I fished one day in that Jordanelle section--two
4 days that I can recall.

5 Q Before the Jordanelle Dam went in?

6 A Yes.

7 Q Did you raise any objections or qualms about the
8 dam going in because it was taking out the streams to fish?

9 A I don't recall. I wasn't active in any kind of
10 participation to keep the dam out.

11 Q I think you indicated in passing that you--in your
12 opinion, H.B. 141 had no impact on flat or warm water reaches
13 in Utah?

14 A Yes. That's correct.

15 Q In your report or your, I guess your wit--rebuttal
16 witness report on Page 5, I'll read what you said. Said:
17 When H.B. 141 passed, the public lost access to 2,707 miles
18 some of which had been fished by the public for generations.

19 Did you write that?

20 A I did.

21 Q Okay. So what waters would H.B. 141 take away the
22 access to that people had been fishing for generations?

23 A I mean, before H.B. 141, I mean, it was common for
24 people to fish--

25 Q What--

1 A --large sections of the Weber, Provo, Current Creek.
2 Whether that was through landowner permission, I do not know
3 but there were large pieces of water the public fished back in
4 those day that--

5 Q How--

6 A --they can no longer fish today.

7 Q Okay. How did H.B. 141 deny access to rivers and
8 streams that had been fished for generations? And which
9 stream and river did H.B. 141, by itself, deny access to that
10 had been fished for generations?

11 A I think a lot of those waters that H.B. 141's
12 generat--you know had been fished for generations, whether
13 again, it's the Provo, the Weber, Current Creek, those have
14 been--those sections of those rivers have been fished for--for
15 decades by people.

16 Q Those portions of the rivers that have been fished
17 for quite--for generations--

18 A Right.

19 Q --with landowner consent, that's what you mean;
20 right?

21 A Yes. Correct.

22 Q Okay. Did H.B. 141 prohibit landowners from giving
23 that consent?

24 A I think it--

25 Q Yes or no.

1 A Yes.

2 Q It did?

3 What particular--to your understanding, what
4 particular provision of H.B. 141 prohibits landowners from
5 allowing people to fish, to have access to the rivers?

6 A I believe it's not the--the provision as it is the
7 attitude that's out there these days.

8 So it was the actions of people responding--it was
9 the actions of people, not H.B. 141 that might have withdrawn
10 this access?

11 A I'd say it was the process and not so much the
12 actions of people.

13 Q The process of H.B. 141?

14 A Uh-huh (affirmative).

15 Meaning the legislature adopted a law--

16 A The legislative process.

17 Q --and the governor signing it that caused people to
18 withdraw their permission.

19 A I think it pitted sides against each other and we
20 saw a lot more landowners that once had granted public
21 permission to fish waters, we saw those opportunities go away
22 and those opportunities decreased significantly after H.B.
23 141.

24 Q Okay. But the actions of the legislature in
25 adopting the law, the actions of the governor in signing that

1 law, that did not cause people or force them, require them, to
2 withdraw access; is that correct?

3 A That is correct.

4 MR. ROBERTS: That's all I have, your Honor.

5 THE COURT: Do you have redirect?

6 MR. COBURN: Yes, your Honor.

7 The first thing I'd like to do, your Honor, is renew
8 my request for leave of the Court to ask this witness about
9 the Southwick report. As your Honor noted, the purpose of
10 Rule 26 was full disclosure, early disclosure and seasonably
11 supplemental disclosure. That did not occur with the
12 Southwick report, it was not available to Mr. Schmidt when he
13 did his report or when he was deposed and it's prejudicial to
14 the plaintiff not to be able to question this witness about
15 what he's learned from that report and when it affects his
16 opinions.

17 THE COURT: Thank you. I've ruled.

18 MR. COBURN: Okay.

19 THE COURT: Do you need to make a--

20 MR. COBURN: Then I would like to make a proffer if
21 I could, your Honor.

22 THE COURT: Yes. Why don't we do it at a break?

23 MR. COBURN: Okay.

24 THE COURT: And I will allow you to make that
25 proffer.

1 MR. COBURN: Thank you.

2 REDIRECT EXAMINATION

3 BY MR. COBURN:

4 Q Mr.--Steve--Mr. Steve--Mr. Lee asked you some
5 questions about your marketing statements, if you will, on
6 your web page. Do you recall that testimony?

7 A Yes. I do.

8 Q What do you think would have happened to your
9 business, if anything, if you had said all the rivers in Utah
10 are over-crowded.

11 A I don't think it would have had a very positive--
12 leave a very positive impression on--for those that read that.
13 Had a negative impact on our business.

14 Q Would have hurt your business?

15 A It would.

16 So would it be fair to say you were trying to put
17 the best spin you could on the fishing conditions and--and the
18 crowding and fishing pressure in Utah?

19 MR. LEE: Objection. Leading.

20 THE COURT: Sustained. It is leading.

21 Q (By Mr. Coburn) Okay. What were you--what were
22 you trying to do in--on your web page, when you were telling
23 your customers that there's good fishing to be found in Utah,
24 given what you knew about the fishing conditions in Utah?

25 A I was trying to attract them and--and make the

1 State and its fisheries attractive to them, hopefully again so
2 they'd use our guide services and visit our store.

3 Q Mr. Lee asked you about your book, Fly Fishing in
4 Utah. I believe he was looking at the 24--2004 edition; is
5 that correct?

6 A Correct.

7 Q Are there any rivers in that book and I know you
8 don't have it in front of you, but they're all Utah waters;
9 correct?

10 A They are all Utah waters.

11 Q Any rivers in that book that you would give the
12 same rating to today that you did in 2004?

13 A I'd say the majori--

14 MR. LEE: Your Honor, object to that question. It
15 lacks foundation. He testified he doesn't even recall giving
16 ratings to rivers in the book.

17 MR. COBURN: Actually, he did testify to that
18 effect, your Honor, Mr. Lee asked him and he said yes, I did
19 rate the rivers.

20 THE COURT: Yeah. But then the factors, he said he
21 couldn't remember what factors he used to do it. Sustained as
22 to foundation. If you can help him remember, the--the--or
23 refresh his recollection.

24 Q (By Mr. Coburn) Can you remember what factors you
25 used to rate the rivers, in that book?

1 A Thinking, looking back, it's very similar to what
2 you read in the marketing aspect on our website and similar to
3 what you'd find in the blue ribbon fisheries; quality,
4 quantity, aesthetic values, crowding, all those factors go
5 into play in the rating.

6 Q Okay. So with those factors in mind, are there any
7 rivers in your book that you would give the same rating today
8 as you did in 2004?

9 A Those that I'm most familiar with, I would change
10 the rating.

11 Q From what to what?

12 A I would decrease the rating on most of those and
13 again, mostly because of crowding.

14 Q Fishing pressure?

15 A Yes, fishing pressure.

16 Q Mr. Lee also asked you about your business growth
17 and have you been able to grow your business based upon gross
18 revenue measurements, you've been able to grow your business
19 steadily since the 2008 recession. Do you recall that?

20 A Yes. I do.

21 Q Did your business go down, decrease, was it hurt
22 during the 2008 recession?

23 A Very much so.

24 Q Okay. And then gross revenue is one measure of
25 growth on a business, growing a business, isn't it?

1 A Yes.

2 Q And net revenue is another, is it not?

3 A That's an indication of your health.

4 Q Right. And how do you calculate net revenues?

5 A Gross profits less expenses.

6 Q Okay. You're talking costs?

7 A Yes.

8 Did your costs remain static between 2008 and today?

9 A Definitely not.

10 Q Have they gone up?

11 A They have definitely gone up.

12 Has your net revenue changed over the last seven-
13 eight years, since the recession?

14 A It's been very flat.

15 Q And in fact, last year, have you lost money?

16 A We lost money last year.

17 Q Mr. Lee also talked to you at some length about the
18 licensed anglers for every mile of stream numbers that you
19 calculated for Utah, Montana and Idaho. Do you recall that
20 testimony?

21 A I do recall.

22 We talked about that yesterday as well.

23 A We did.

24 Q Okay. What was the purpose of those calculations?

25 A Again, they're relative numbers and it was just to

1 compare available waters to licensed anglers in Idaho, Utah
2 and Montana, more specif--more specifically Utah to Idaho and
3 Montana.

4 Q Okay. So they're relative numbers, they're not
5 literal or absolute numbers in terms of licensed anglers on a
6 mile of stream or river at any one time?

7 A I never looked at it that way, yes.

8 Q You were present during Dr. Krannich's testimony;
9 correct?

10 A I was.

11 Q Was there anything dr. Krannich said that changed
12 your opinion?

13 A No.

14 Q Then you've testified yesterday and again today
15 about carrying capacity. And most of the time, it--the
16 discussion has been about a particular river or the carrying
17 capacity of a particular river and an angler per mile
18 calculation. Do you understand that?

19 A Yes. I do.

20 Q Okay. Is it true that you can also get an idea of
21 about a state's--the carrying capacity of a state's cold water
22 rivers and streams by doing a similar analysis?

23 A Yes.

24 Q Okay. What impact has H.B. 141 had on the State of
25 Utah's cold water rivers and streams to accommodate anglers

1 who fish those rivers and streams?

2 A It's taken away roughly 40 percent of the State's
3 fishable rivers and streams, so it has significantly impacted
4 the carrying capacity of our waters that are fishable in Utah.

5 Q So if I understand your testimony, it's that Utah's
6 remaining rivers and streams do not have the same capacity to
7 accommodate anglers now as opposed to during the Conatser
8 window?

9 A It--in their entirety, yes, that's accurate.

10 Q How serious of an impact is that in your opinion?

11 A I mean, it's very serious. I mean, 40 percent's a
12 big number, 2,700 miles of fishable water is a significant
13 portion of rivers and streams for the public to be able to
14 spread out on and relieve pressure on some of the more crowded
15 that we have here in the State. So, it's--it's a lot of
16 water.

17 Q Mr. Roberts asked you about--questions along the
18 line, did you have to leave earlier now than you used to to go
19 find water to fish. Do you recall that?

20 A Yes.

21 Q Does leaving earlier guarantee that you'll find
22 water to fish?

23 A No, sir.

24 Q Just increases your chances?

25 A Yes.

1 Q Are you familiar with a gentleman named Mel Brown?

2 A Oh. Yes.

3 Q Representative Mel Brown?

4 A Yes. Yes. That was--

5 Q You had a conversation with him one-on-one did you
6 not about what's happened to his ability of his and his family
7 to go where they used to go to fish?

8 A Yes. I did.

9 Q When did that occur?

10 A During the legislative session when H.B. 141 was
11 being discussed.

12 Q Are you sure it was H.B. 141?

13 A Or, no. I'm sorry. 37.

14 Q Okay. It was during a legislative session, in any--

15 A Right.

16 Q --event?

17 A Right. Yeah.

18 Q And you've known Mel--Mel Brown for some time;
19 correct?

20 A I've had discussions with Mel Brown for awhile.

21 Q Okay. What did Representative Brown tell you during
22 that particular discussion?

23 MR. LEE: I think I'll object, your Honor, basis of
24 hearsay.

25 THE COURT: Is there an exception? Are you offering

1 it for its truth?

2 MR. COBURN: I'm not offering it for its truth, I'm--
3 -just the fact that it was--

4 THE COURT: And why would that be relevant? If it's
5 not offered for its truth, why is it relevant?

6 MR. COBURN: It's relevant in the notion that he was
7 asked, the witness was asked whether or not he was aware of
8 waters where people could no longer go wherein they had fished
9 there for generations.

10 THE COURT: Isn't that for its truth?

11 MR. COBURN: It's just the fact that he said it.

12 THE COURT: Yeah. Sustained.

13 MR. COBURN: Give me a moment, your Honor.

14 THE COURT: Okay.

15 Anything else of this wit--

16 MR. COBURN: Yeah. I'm just checking--

17 THE COURT: Oh. I'm sorry. I thought you were
18 done.

19 MR. COBURN: Pass the witness, your Honor.

20 THE COURT: Anything else?

21 MR. LEE: Just one question.

22 RECROSS-EXAMINATION

23 BY MR. LEE:

24 Q You talked about your website again, you said it
25 would have hurt business to talk about crowding and you said

1 you were trying to attract customers with the language you
2 used in the website; right?

3 A Correct.

4 Q Let's just--I just want to be clear about what was
5 said on the website.

6 MR. LEE: May I approach, your Honor?

7 THE COURT: You may.

8 Q (By Mr. Lee) Let me show you what's marked as
9 Exhibit 32--

10 THE COURT: Have you seen this, Mr. Coburn?

11 MR. COBURN: I don't think so.

12 Q (By Mr. Lee) Mr. Schmidt, Exhibit 32, that's a copy
13 of a page from your website; is that right?

14 A Yes. It is.

15 MR. LEE: Your Honor, we'd move admission of Exhibit
16 32.

17 MR. COBURN: No objection.

18 THE COURT: 32 is received.

19 Q (By Mr. Lee) Just so we're clear, Mr. Schmidt, the
20 statements on this page from your website are, as of today,
21 true statements?

22 A From a marketing standpoint, yes.

23 Q From a marketing standpoint, yes? Are you saying
24 when you're doing marketing that there's a difference between
25 truth when you're doing marketing as opposed to other times?

1 A Again, the intent of the content here is to attract
2 anglers, so I'm going to paint a rosier--a more rosy picture
3 of the fishing experiences in Utah.

4 Q Right. We--we all get that, you're trying to
5 attract customers.

6 Right.

7 Q My question is, are the facts stated in Exhibit 32
8 true statements as of today?

9 A Yes.

10 MR. LEE: Thank you.

11 RECROSS-EXAMINATION

12 BY MR. ROBERTS:

13 Q So Mr. Coburn asked you the question about--he
14 asked you the question, why did you tell people there's good
15 fishing in Utah and you talked about the marketing aspect.
16 It's true there's good fishing in Utah?

17 A You can have good fishing in Utah.

18 Q Okay. You talked about withdrawal of 2,700 miles of
19 streams accomplished by H.B. 141 as being significant.
20 Correct?

21 A Yes.

22 Q Okay. H.B. 141 actually returned publicly-
23 accessible rivers back to what they were prior to July, 2008;
24 correct? Before Conatser.

25 A Generally, yes.

1 Q And the impact of 141, as you indicate, you know, is
2 because those waters have been withdrawn and what's left is
3 more crowded because people can't fish that other 2,700 miles.

4 A After the 2,700 miles were no longer accessible,
5 conditions became more crowded.

6 Q Okay. And that's the impact of 141 that you've
7 opined about; correct?

8 A Yes.

9 Q Okay. Are all those 2,700 miles of withdrawn--so-
10 called withdrawn waters equally significant?

11 A That's a matter of personal opinion, I believe.

12 Q Okay. So in terms of your fishing experience, if
13 there were some withdrawals of warm water fisheries in
14 southern Utah, that wouldn't affect your fishing experience up
15 in northern Utah, would it?

16 A I think it definitely would. I mean--

17 Q So the withdrawal of a warm water fishery
18 accomplished by H.B. 141 in southern Utah, it's your testimony
19 that the withdrawal of that particular warm water fishery, has
20 lessened, had an impact on your ability to fly fish in
21 northern Utah?

22 A It hasn't lessened, but it would impact my
23 experience possibly.

24 Q How--how would it impact your experience?

25 A People that fished that particular fishery that

1 you're pointing to or describing no longer have that, so
2 they're forced onto the remaining waters that are less, which
3 then creates a crowd--more crowded situation as a result.

4 Q Do you have any reason to suspect that someone who
5 is wanting to fish some warm water fishery in southern Utah
6 would say, I can't do that now, so now I'm going to go up on
7 the middle Duchesne where Mr. Schmidt is fly fishing?

8 A It--it simply--

9 Q It could happen?

10 A --it simply takes an opportunity away from them and--
11 --and it's going to change their behavior and one of their
12 behavior choices may be to travel to northern Utah to fish a
13 water that I fish.

14 Q Okay. So it's--

15 A I don't know that that's not true.

16 Q So it's the lack of opportunity--never mind.

17 MR. ROBERTS: That's all, your Honor.

18 MR. COBURN: No questions, your Honor.

19 THE COURT: Mr. Schmidt, thank you very much.

20 THE WITNESS: Thank you.

21 THE COURT: You may step down.

22 MR. COBURN: We will reserve Mr. Schmidt for
23 rebuttal.

24 THE COURT: Very good. What would you like to do
25 about lunch?

1 MR. COBURN: Eat.

2 THE COURT: Okay. How--how was 45 minutes for you
3 yesterday? Is that okay?

4 MR. LEE: It's tight, but we made it work.

5 THE COURT: Okay. Let's reconvene at about 12:45
6 then.

7 (Recess)

8 THE COURT: --the record in the matter of Utah
9 Stream Access vs. VR Acquisitions.

10 MR. COBURN: We're still missing counsel from the
11 State, your Honor.

12 THE COURT: Oh. We are. I'm sorry. I thought you
13 were all here.

14 Can you check for him to see if he's outside?

15 THE BAILIFF: He's not out in the hall.

16 THE COURT: Okay. Let me know when he gets here.

17 (Off the record)

18 THE COURT: We're back on the record in the matter
19 of Utah Stream Access vs. VR Acquisitions. Parties are
20 present, counsel are here.

21 Do you rest?

22 MR. COBURN: No, your Honor, we'd like to make our
23 proffer before we rest.

24 THE COURT: Oh. Thank you. Please do that.

25 MR. COBURN: Thank you.

1 I note, your Honor, we do have a fact witness of
2 ours in the room right now and--

3 THE COURT: Would you have him step out for the
4 proffer?

5 MR. COBURN: Your Honor, the proffer would be based
6 on Exhibit 8 that you have before you.

7 THE COURT: Okay.

8 MR. COBURN: The proffer begins with the notion,
9 your Honor, that had Mr. Schmidt had this report, he would
10 have been asked if he had had it, would he have used it and
11 incorporated it into his opinion when he was rendering his
12 written report, and he said--he would have said he would have
13 and he would have relied on it as support for his report and
14 his testimony here today.

15 And the main focus of that reliance would be on the
16 four tables and the narrative in the report regarding those
17 tables.

18 The first one begins on Page 4 of the report and Mr.
19 Schmidt would have been asked a series of questions about the--
20 the report's content regarding the number of anglers who had
21 fished both rivers and streams and flat waters in 2009 and the
22 report suggests that two-thirds of anglers fished rivers and
23 streams in 2009--and I probably should back up just a bit and
24 say this whole report, this whole survey was conducted at the
25 behest of DWR, when you read the narrative, to basically gauge

1 the public anglers access issues during the Conatser window,
2 after Conatser and before H.B. 141 and that's obvious from
3 reading the narrative in the report.

4 But the first statement in--pertains to Table 4,
5 two-thirds of anglers had fished both rivers and streams and
6 lakes, ponds or reservoirs in 2009 as of the date of this
7 survey while only 7.3 percent had only fished in rivers or
8 streams. And then it refers to Table 4 and Mr. Schmidt would
9 have been asked and would have commented that the--or answered
10 that 73.4 percent of anglers fishing rivers and streams would--
11 -told him--would have told him at the time of his report that
12 there are a lot of anglers in Utah who prefer to fish rivers
13 and streams.

14 The second statement pertains to Table 5 and it's on
15 Page 4. It says Table 5 shows that 45 percent of anglers who
16 fished rivers and streams fished waters that they knew flowed
17 over private property. And when you crunch the numbers in the
18 report, that runs into well over a hundred and some-odd
19 thousand anglers who knowingly fished private property during
20 the Conatser window.

21 Of those who knowingly fished--the next narrative
22 goes to Table 5--6, and the statement in the survey is: Of
23 those who knowingly fished rivers or streams flowing over
24 private property, 45 percent of those anglers knew that the
25 section of water had been previously closed to angler access.

1 Meaning prior to Conatser.

2 And then the--the report goes on to say that this
3 translates into an estimated 48,571 anglers fishing waters
4 that had been off-limits prior to the court's decision. And
5 when asked about that, Mr. Schmidt would have said he was
6 surprised that the number was that high. And that it also in
7 his--in his report, he said it indicated to him that people
8 wanted to fish those rivers, they went there when they could
9 go there.

10 And then finally, he would have been asked about
11 Table 7, the narrative in the report says that Table 7 shows
12 how likely anglers are to fish rivers and streams flowing over
13 private land in the future given that they are aware of the
14 Supreme Court decision, and I'll go--not speak to the
15 parenthetical reference there and go on to the next sentence:
16 Less than a quarter are not at all likely to do so, while 69.7
17 percent are either likely or very likely to fish these waters
18 in the future. This works out to an estimated 232,000 anglers
19 who are at least likely to fish rivers and streams flowing
20 over private property.

21 And when asked about that contents of the report and
22 that table, Mr. Schmidt would have testified that again that
23 number, surprisingly, was that high, but it's a strong
24 indication as to how badly anglers want to spread out to find
25 more water to fish and how, if they were allowed to do so, if

1 they had the 2,700 miles back, that it would relieve pressure
2 on all of the State's rivers and streams.

3 THE COURT: Okay. Thank you.

4 For the record, the Court has sustained the
5 objection to Mr. Schmidt expanding the scope of his expert
6 opinions to comment on the Angler Access Survey prepared by
7 Southwick & Associates. I believe that that's a proper ruling
8 under Rule 26, it's been equally applied to expert witnesses
9 in the case, I don't intend to State or VR Acquisition experts
10 to similarly expand their opinions to comment on the survey.
11 The Angler Access Survey was not disclosed by the State of
12 Utah until just weeks prior to trial, for reasons that aren't
13 really relevant or particularly clear to me at this point.

14 Moreover, I--I do find that the Coalition is not
15 prejudiced in any way by not allowing Mr. Schmidt to comment
16 on the content of the report, because the report's been
17 received into evidence, so the--the numbers are what they are
18 and Mr. Schmidt's surprise or support of conclusions in that
19 report is really immaterial. The report has been received and
20 so I--I don't believe the Coalition has been prejudiced in any
21 way.

22 That's how I view it. Would you like to take any
23 further exception to the ruling?

24 MR. COBURN: No, your Honor, I think the record's
25 made. Thank you.

1 THE COURT: Very good.

2 MR. COBURN: Coalition rests.

3 THE COURT: Thank you.

4 VR may call its second witness.

5 MR. THOMAS: Your Honor, actually prior to that if I
6 may address a couple of issues, at the risk of making the
7 Court think this is never going to end.

8 Over the course of the last several years, we've
9 filed several motions for summary judgment, a number of which
10 have been denied. By way of example, the first motion for
11 summary judgment that was filed in this action, the Court
12 requested supplemental briefing after which the Court
13 articulated the test, which includes the question we are here
14 addressing today on which the Court found then there was a
15 dispute of material fact.

16 Thereafter, VRA and the State brought a second
17 motion for summary judgment on that, which was also denied on
18 the basis of disputed material fact and then reconsideration
19 was sought, which was also denied.

20 As the Court is likely aware, the precedent from the
21 Supreme Court, specifically Normandell, required that if
22 certain issues are raised in a motion for summary judgment
23 that is denied on the basis of a dispute of fact, in order to
24 preserve those issues for appeal, they must be re-raised at
25 trial. The issue that was raised in several of those motions

1 was the question of disposition and whether a session of
2 control was a gatekeeper function to the remainder of a public
3 trust test, including analysis of public benefit or the degree
4 of impairment. That was raised in that first motion on the
5 supplemental briefing, in the second motion for summary
6 judgment and in the motion for reconsideration.

7 I understand that the Court's denial of those
8 motions with respect to that point was an issue that was
9 decided as a matter of law and does not require us to re-raise
10 that at trial; however, I did want to raise this now in the
11 event there's any uncertainty as to the nature of that ruling
12 so that we can preserve that in the event of an appeal by
13 either party in this case.

14 So with that, to the extent it is necessary, I would
15 ask the Court for a judgment as a matter of law on that issue.
16 That being said, to the extent it's not necessary and the
17 issue is already preserved, I need not make that motion.

18 THE COURT: Do you wish to be heard at all?

19 MR. ROBERTS: For the record, your Honor, I think
20 the State would therefore join in those motions and similarly
21 make the same motion with regard to that.

22 THE COURT: Thank you.

23 MR. COBURN: The Court has ruled, as Mr. Thomas has
24 indicated, three different times on this point as a matter of
25 law and we think that it is the law of the case and that's how

1 the case should go forward.

2 THE COURT: Thank you.

3 For the reasons stated in the Court's prior rulings,
4 the motion for judgment as a matter of law on the question of
5 whether or not the public trust is violated when there is no
6 complete cessation of--of control by the State of Utah over
7 the trust property is denied.

8 MR. THOMAS: Thank you, your Honor.

9 THE COURT: Thank you.

10 MR. THOMAS: I appreciate you accommodating that.

11 The other thing and I--about you--would ask the
12 Court to take judicial notice of some facts, I've yesterday
13 disclosed these to opposing counsel and counsel for the State
14 and I had it written down, I don't have it signed because I'm
15 going to be making the request orally, but if I may approach--

16 THE COURT: You may.

17 MR. THOMAS: --it may be easier to take a look at
18 the facts.

19 Specifically, the facts that we are asking the Court
20 to take judicial notice are as follows: The population of
21 Utah increased from 1,722,850 in 1990 to 2,763,885 in 2010.

22 The next fact is that the population of Salt Lake
23 County from 725,956 in 1990 to 1,029,655 in 2010.

24 That the population of Summit County increased from
25 263,590 in 1990 to 516,564 in 2010.

1 That the population of Wasatch County increased from
2 10,089 in '8--in 1990, to 23,530 in 2010.

3 And in 2014, the population of Utah was estimated as
4 2,942,902.

5 These facts are all derived from U.S. Census Bureau
6 publications which are available on the website set forth in
7 the document I just handed to the Court. I believe that they
8 fit within the scope of Rule 201, which is facts that are
9 readily ascertainable from materials that have been provided
10 to the Court and whose accurate can't be--can't, in any real
11 sense be disputed. In fact, I noted that Mr. Schmidt's
12 testimony relied on certain census data as well.

13 There's also precedent cited in our document for the
14 Seventh Circuit taking judicial notice of certain other facts
15 based upon the similar Federal rule.

16 And finally, I would note that with respect to a
17 judicial notice, I read Rule 201 as mandatory, the court shall
18 take judicial notice when presented with adequate information
19 and on that basis request judicial notice be taken of those
20 population figures.

21 MR. COBURN: Your Honor, we object to this request
22 that the Court take judicial notice of these figures for a
23 number of reasons.

24 First off, it's irrelevant. The number of people in
25 the State of Utah five years ago, ten years ago, today, is not

1 relevant to the fishing pressure that's occurring on the
2 streams, particularly in light of some of the evidence that
3 the Court has before it regarding licensed anglers in the
4 State of Utah. In Exhibit 10, which is the Krannich 2011-2012
5 report, Mr. Krannich and his team, on Page 30, in Figure 4.1--
6 do you want to look at it?

7 THE COURT: I'll go there. Hold on just a second.

8 MR. COBURN: Thank you.

9 THE COURT: 10, you said?

10 MR. COBURN: It's Exhibit 10 on Page 30, your Honor.

11 THE COURT: Okay.

12 MR. COBURN: There's a table there where Dr.
13 Krannich's team report on the license sales in the State of
14 Utah from 1977 all the way up to 2011. As the Court can see
15 from that table, it reports on licensed anglers, which is the
16 number of people who would likely to fishing--to be fishing
17 rivers and streams in Utah over the relevant time period as
18 opposed to simple population growth and the general
19 population.

20 And I will note that the Court, in this morning's
21 session, made reference to people who fish without licenses.
22 I think that's rather an inconsequential number when you're
23 looking at the numbers on Table--or Figure 4.1 in the Krannich
24 report. I mean, you certainly don't have any numbers on that,
25 as to how many people fish without licenses.

1 The other thing I would reference in terms of the
2 population growth statistics, if you will, that are being
3 offered by Victory Ranch, is that they only go through 2010.
4 And of course, we're talking about the impacts of H.B. 141
5 after 2010.

6 So the information is, frankly, just irrelevant for
7 the reasons stated.

8 THE COURT: Can I just ask you whether or not taking
9 judicial notice is appropriate is a separate question to
10 relevance and so is there any reason I would not be able to
11 take judicial notice of census bureau information?

12 MR. COBURN: No, there is not, your Honor.

13 THE COURT: Okay. So you wouldn't be objecting
14 under Rule 201--

15 MR. COBURN: I would not.

16 THE COURT: --that it would be inappropriate for
17 some reason?

18 Why don't you address the relevance of this.

19 MR. COBURN: Okay. On a number of factors, this--
20 throughout the course of this trial, we've heard about the
21 impact on streams due to crowding, this goes to the number of
22 people in the State, including licensed and unlicensed
23 anglers. That's one point.

24 No. 2, we've had Mr. Schmidt on the stand today
25 talking about population figure and talking about the increase

1 in potential sales and talking also about the development of
2 Salt Lake County. These are included in the numbers that we
3 have.

4 THE COURT: But he really has talked about licensed
5 anglers, his numbers arise out of that--

6 MR. COBURN: He did, but he--

7 THE COURT: --figure.

8 MR. COBURN: --also--he also talked about the
9 degree of the increase in retail sales and increased
10 population in Salt Lake City. Mr. Lee, on his cross-
11 examination, did that.

12 I think also importantly, your Honor, what we're
13 looking at in this case involves the public of the State of
14 Utah, this is the public of the State of Utah, we're not
15 looking solely at anglers. The question that the Court had
16 put to us as counsel is whether the public's interest has been
17 impaired; that includes tubers, it includes hunters, it
18 includes a variety of people who are not necessarily licensed
19 anglers. I think that is important to this case, to recognize
20 what the State of Utah had looked like and how it is changing
21 as well.

22 And--and so those numbers, I think that is a place
23 for argument. But we also have to look at, under the Rule 401
24 standard, is this evidence probative of whether something is
25 likely or not. One of the questions before the Court is

1 whether the act substantially impairs. One of the claims of
2 impairment is the degree of crowding. The amount of people
3 that live in a particular area is probative of whether it is
4 the act or it is some other reason, on that basis, I'd submit
5 that it is relevant, your Honor.

6 THE COURT: From the State, anything on the question
7 of relevance?

8 MR. ROBERTS: We would agree that it's relevant with
9 regard to the number of people available to use the waters.
10 There has also been evidence presented regarding conflicting
11 uses by non-anglers that conflict with the use and cause
12 problems. And so therefore, I think the population is
13 relevant and may be probative.

14 THE COURT: Okay. Anything else?

15 MR. COBURN: The conflicting uses, your Honor, I
16 think we can all agree are largely relegated to the Lower
17 Provo. The other uses on the water, we have no numbers
18 regarding that, although bird hunters, water fowl hunters who
19 might use these rivers and streams to hunt water fowl, that
20 data is presumably available by those who buy migratory bird
21 stamps through the State of Utah.

22 And the thing I think is most important here, your
23 Honor, is the data that's being offered stops at 2010 and all
24 of the impairment we're talking about occurred after 2010.

25 MR. THOMAS: In response to that, your Honor, the

1 data does stop at 2010 because the census--the last official
2 census was done in 2010. There is a projected number for the
3 population of Utah in 2014 that's also derived from it. The
4 fact that they believe it's incomplete, they could add
5 different numbers or seek other information in rebuttal.

6 I also could say that to the extent this is even
7 marginally relevant, it's something that does go to the weight
8 of all the figures that are before us.

9 THE COURT: Do you agree that--I mean, we--we really
10 are talking about impairment to the public's interest after--I
11 can't remember the dates--

12 MR. COBURN: May 11th, 2010.

13 THE COURT: --May 11th, 2010. And so do you know
14 when the census is taken?

15 MR. THOMAS: Every ten years, your Honor.

16 THE COURT: I knew that, but I mean when, in the
17 year? So that are we talking about figures that existed after
18 May of 2010 or are we--is the--are the census people
19 collecting demographic information January through the end of
20 the year?

21 MR. THOMAS: I believe that they are, but I can't
22 speak to that. I have a father-in-law that works for the
23 census bureau and I could call him, but I--but what I would
24 also say, your Honor, is 2010, that goes to weight. And part
25 of what we've heard is that there's also been increasing

1 pressure on the streams since 1986, since 1990, that there's
2 been increasing pressure throughout the course of this period
3 and this demonstrates or has the tendency to demonstrate
4 subject to the weight that the Court wants to give it, that
5 increasing population since 1990 is a substantial factor.

6 It also shows that there's been a change in the
7 population in the counties that are surrounding the areas that
8 we've been talking about most; the Lower Provo, the Middle
9 Provo, that we're talking about the Weber. We look at the
10 population statistics for Utah County and how that has
11 increased, yes, that's going to show that there's an increase
12 in tubing usage as well as there is potentially in fishing
13 usage. It's going to show that there is a higher population
14 for which after work, there is a location more close where
15 they can go and access fishing and that's where maybe end up
16 going. That's how this is probative.

17 I'm not suggesting that this is probative of exactly
18 what's happened after 2010, but it's probative to whether a
19 question is over-crowding is solely attributable or even
20 mostly attributable to H.B. 141, when we have growth factors
21 such as these in the State.

22 THE COURT: Okay.

23 MR. THOMAS: And I do note that the population of
24 2014 estimated by the census bureau is there and I think it's
25 important to use that as a contrast with what it was in 1990.

1 THE COURT: It's your--it's your objection. Go
2 ahead.

3 MR. COBURN: Yes.

4 THE COURT: Why don't you finish up?

5 MR. COBURN: Two final--two final points, your
6 Honor. Number one, two of the State's most populous counties
7 in the north are not included, Weber and Davis Counties.

8 Secondly, if this has any probative value at all, it
9 would be as to what happened up and prior to H.B. 141. It has
10 no probative value and is irrelevant to anything that happened
11 after H.B. 141.

12 THE COURT: Does it--does your material include the
13 projections for 2015 or '14?

14 MR. THOMAS: 2000--you mean, on a county-by-county
15 basis? It does not. We have the State data that is on the
16 final, that is taken from a separate source, so that's
17 attached, I think, as Exhibit B to your document, which is the
18 last three pages.

19 The prior document does, I believe, go to every
20 county by changes in growth and if--and to the extent that the
21 Coalition wants to add those other counties, I have no
22 objection to that.

23 THE COURT: The last three pages is also census
24 data?

25 MR. THOMAS: Yes.

1 THE COURT: Everything you've provided me is census
2 data?

3 MR. THOMAS: Yes.

4 THE COURT: Right?

5 MR. THOMAS: You can reference at the bottom of the
6 page, it's quickfacts.census.gov.

7 THE COURT: Okay.

8 MR. THOMAS: That's where that last came from,
9 that last--

10 THE COURT: Point me to the projections.

11 MR. THOMAS: The projection, if you look at the
12 first two lines, this is the State of Utah, it says population
13 2014, estimate, 2,942,000, 2013 estimate, population 2010
14 estimate's base.

15 THE COURT: Okay.

16 MR. COBURN: One last comment, your Honor.

17 THE COURT: Yeah. Go ahead.

18 MR. COBURN: That's a state-wide population
19 projection--

20 THE COURT: Yeah.

21 MR. COBURN: --projection, that is not specific to
22 any county or area in the State.

23 THE COURT: Thank you.

24 MR. THOMAS: But we were also talking about the
25 State, your Honor.

1 THE COURT: VR Acquisitions moves the Court to take
2 judicial notice of census bureau data related to population
3 growth in various counties of the State of Utah and projected
4 population figures for the State generally. Rule 201 provides
5 that the Court may judicially notice a fact that is not
6 subject to reasonable dispute because it can be accurately and
7 readily determined from sources whose accuracy cannot
8 reasonably be questioned.

9 And the rule further provides the Court must take
10 judicial notice if a party requests it and the Court is
11 supplied with the necessary information and I can do that at
12 any stage of the proceedings, provided that the parties have
13 an opportunity to be heard, which they have.

14 The Coalition does not object to the propriety of
15 taking judicial notice of the material, but contends that it's
16 not relevant under Rule 401. Relevant evidence is any
17 evidence that has any tendency to make a fact more or less
18 probable than it would be without the evidence and the fact is
19 of consequence in determining the action. Clearly, the thumb
20 is on the scale of admissibility under Rule 401.

21 The Court finds that the material--the census data
22 is relevant under Rule 401. It does have some tendency and
23 all the rule requires is any tendency to make a fact more or
24 less probable and that can be true, even by inference under
25 Rule 401.

1 I will tell you that I think the most probative
2 figure for determining fishing pressure on rivers and streams
3 in Utah is the licensure numbers. And what I would be
4 receiving this other population evidence for is to draw an--a
5 reasonable inference that is that population has increased in
6 the State of Utah, other recreational use of public waters may
7 have also increased.

8 I will only receive it upon it being complete,
9 though, and you had some counties you wanted to add and I
10 think they should be added.

11 MR. COBURN: I think the numbers are in the tables
12 attached to the exhibits, your Honor, and they can be readily
13 pulled out.

14 MR. THOMAS: We--we can just stipulate to admission
15 of these documents as exhibits, if you prefer.

16 MR. COBURN: If they're coming in, that probably
17 works.

18 THE COURT: Okay. So I can just receive the census
19 bureau data as an exhibit?

20 MR. THOMAS: Yeah. And then you can go into the
21 tables behind the request to take judicial notice and you will
22 find numbers in there for the same time period for Davis and
23 Weber Counties and all counties.

24 THE COURT: Very good. Okay. Thank you.

25 MR. THOMAS: Maybe we should just mark it as--

1 THE COURT: It will be 33--

2 MR. COBURN: Or mark it as Exhibit 33.

3 MR. THOMAS: It's two separate documents, so--

4 THE COURT: Defendant's 33 and 34.

5 MR. THOMAS: Okay. Your Honor?

6 THE COURT: Yeah.

7 MR. THOMAS: What have you marked?

8 THE COURT: I marked A, Exhibit A-33 and--

9 MR. THOMAS: Okay.

10 THE COURT: --Exhibit B-34.

11 MR. THOMAS: Okay.

12 THE COURT: Is that okay?

13 MR. THOMAS: That works great.

14 THE COURT: For the record, I'm going to direct that
15 the clerk file the request for judicial notice that's been
16 filed in open court, made a part of the docket and Exhibits A
17 and B, which were attached to that request for judicial notice
18 will be marked as Exhibits 33, Defendant's Exhibits 33 and 34,
19 respectively, and received into evidence.

20 MR. THOMAS: Thank you, your Honor.

21 May I approach (inaudible)

22 THE COURT: You may.

23 MR. THOMAS: Also, would you like me to sign my
24 request for judicial notice?

25 THE COURT: Yeah. Why don't we do that quick?

1 MR. THOMAS: Thank you, your Honor, I'm ready to
2 proceed when you are.

3 THE COURT: Very good. Go ahead.

4 MR. THOMAS: VR Acquisitions calls Matt Eastman.

5 THE COURT: Mr. Eastman, would you come forward here
6 to the clerk's desk? If you'll just face the clerk, raise
7 your right hand, take an oath to tell the truth.

8 MR. EASTMAN: Okay.

9 MATTHEW BRENT EASTMAN,
10 called as a witness by and on behalf of the defendant in this
11 matter, after having been first duly sworn, assumed the
12 witness stand and was examined and testified as follows:

13 THE COURT: Thank you. Would you be seated here to
14 my right and respond to Mr. Thomas's questions?

15 DIRECT EXAMINATION

16 BY MR. THOMAS:

17 Q Good afternoon, Mr. Eastman.

18 A Good afternoon.

19 Could you please state your name and spell it for
20 the record?

21 A Yes. Matthew Brent Eastman. Matthew,
22 M-a-t-t-h-e-w, Brent, B-r-e-n-t, Eastman, E-a-s-t-m-a-n.

23 Q And what was your birth date?

24 A March 6th, 1973.

25 Q Okay. And where do you currently live?

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IN THE FOURTH DISTRICT COURT IN AND FOR
WASATCH COUNTY, STATE OF UTAH

<p>UTAH STREAM ACCESS COALITION, a Utah non-profit corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>VR ACQUISITIONS, LLC, a Delaware limited liability company; et al.</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;"><u>STATE OF UTAH:</u></p> <p style="text-align: center;">REQUEST TO SUBMIT FOR DECISION STATE’S MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR STAY PENDING MOTION TO ALTER OR AMEND JUDGMENT</p> <p style="text-align: center;">(Oral Argument Requested)</p> <p style="text-align: center;">Case No. 100500558</p> <p style="text-align: center;">Judge Derek Pullan</p>
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The State of Utah, through its counsel, Thom D. Roberts, Assistant Utah Attorney General, hereby request the clerk of the Court to schedule oral argument and submit for decision to the Hon. Pullan, District Court Judge, the State of Utah’s Motion to Amend or Alter Judgment and its Motion for Stay Pending Motion to Alter or Amend Judgment. The pleadings and papers filed in connection with the Motions are as follows:

1. Motion to Alter or Amend Judgment:

- a. Motion to Alter or Amend Judgment, filed November 16, 2015;
 - b. Utah Stream Access Coalition Objection and Response to State of Utah Motion for Stay, filed November 24, 2015;
 - c. State of Utah Reply Memorandum Supporting Motion to Alter or Amend Judgment and for Stay, filed December 4, 2015.
2. Motion for Stay Pending Motion to Alter or Amend Judgment:
- a. Motion for Stay Pending Motion to Alter or Amend Judgment, filed November 16, 2015;
 - b. Utah Stream Access Coalition Objection and Response to State of Utah Motion for Stay, filed November 24, 2015;
 - c. State of Utah Reply Memorandum Supporting Motion to Alter or Amend Judgment and for Stay, filed December 4, 2015.

No other pleadings or papers have been filed with the Court regarding the above Motions and the time for filing any such pleadings has passed. The matter is fully briefed and ready for the Court's ruling and determination. The State of Utah requests that these Motions be scheduled for oral argument.

DATED this 9th day of December, 2015.

**OFFICE OF THE ATTORNEY GENERAL
SEAN D. REYES**

/s/Thom D. Roberts
THOM D. ROBERTS
Assistant Utah Attorney General

CERTIFICATE OF MAILING

This is to certify that copies of the foregoing **REQUEST TO SUBMIT FOR DECISION STATE'S MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR STAY PENDING MOTION TO ALTER OR AMEND JUDGMENT** was served by electronically filing the foregoing on this 9th day of December, 2015 with the Clerk of the Court using the CM/ECF system which will send notification of such filing and by electronically sending a copy to the following:

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Legal Secretary

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR WASATCH COUNTY, STATE OF UTAH

<p>UTAH STREAM ACCESS COALITION, a Utah non-profit corporation,</p> <p>Plaintiff,</p> <p>v.</p> <p>VR ACQUISITIONS, LLC, a Delaware limited liability company, et. al.,</p> <p>Defendants.</p>	<p><u>RULING AND ORDER RE:</u></p> <p>UTAH STREAM ACCESS COALITION'S MOTION TO AMEND RULING, ORDER, AND FINAL JUDGMENT</p> <p>STATE OF UTAH'S MOTION FOR STAY PENDING MOTION TO ALTER OR AMEND JUDGEMENT</p> <p>STATE OF UTAH'S MOTION TO ALTER OR AMEND JUDGMENT</p> <p>and</p> <p><u>ORDER TO PREPARE JUDGMENT</u></p> <p>Case No. 100500558</p> <p>Judge Derek P. Pullan</p>
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Plaintiff Utah Stream Access Coalition ("the Coalition") moves the Court to amend its
Ruling, Order, and Final Judgment entered on November 4, 2014 ("the Ruling") pursuant to Rule

52(b) of the Utah Rules of Civil Procedure.¹ VR Acquisitions, LLC (“VRA”) and the State of Utah (“the State”) oppose the motion in part.

The State moves the Court to alter or amend the Ruling pursuant to Rule 59(e). The State moves to stay the Ruling pursuant to Rule 62(b) until the State’s motion to alter or amend is decided. The Coalition does not object to the State’s motion to alter or amend, but contends that a stay is unnecessary.

Having carefully considered the papers filed in support of and in opposition to these motions, the Court now enters the following:

RULING

The Coalition’s Motion to Alter or Amend

In its motion to alter or amend the Ruling, the Coalition asks the Court to do the following:

- Define the physical scope of the public’s easement on state waters “to include the streambed up to and including the ‘ordinary high water mark.’” *Coalition Memo.*, at 2;
- Amend the Ruling to clarify that in three specific paragraphs referencing Utah’s rivers and streams, the Court meant “fishable” rivers and streams; and
- Amend Finding of Fact 40 to include the following underlined language:

¹ The motion was initially styled as a motion to amend the judgment under Rule 59(e). The motion asks the Court to make additional findings and to amend the Judgment. Therefore, in substance the motion is one to alter or amend the Ruling under Rule 52(b).

By current or recent custom, members of the recreating public (1) floated on and fished while floating on public waters flowing over private land without obtaining permission from the landowner; and (2) did not touch the beds of public waters flowing over private land unless the landowner gave permission, or the land was historically open to public use. Earlier custom may have included touching of the streambed more or less as described in *Conatser*.

The Physical Scope of the Public's Easement

The Coalition contends that the public's easement includes the bed of the river or stream up to and including the ordinary high water mark. After trial, the Coalition submitted two proposed Findings of Fact to this effect—proposed Finding 22 and 23—which were not incorporated into the Ruling.

The Coalition relies on the testimony of trial witnesses who confirmed that before and after *Conatser* members of the fishing and boating public used river and stream beds up to the ordinary high water mark, and that the Public Waters Access Act (“the Act”) made this practice unlawful. *Coalition Memo. in Supp. of Amended Motion*, at 2 (citing trial testimony of Kris Olson, Ryan Houk, Gary Nichols, and Matt Eastman).

The Coalition contends that defining the scope of the public's easement to include the bed of the river or stream up to the ordinary high water mark is consistent with (1) VRA's and the State's interpretation of the Ruling, (2) the public's use of the easement during the *Conatser* window, and (3) Utah case law and the law in sister states. As to the last point, the Coalition cites the Court to both case law and statutes addressing the question. *See, Knudsen v. Hull*, 148 P. 1070, 1070-71 (Utah 1915), *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d

163, 172 (Montana 1984); *Southern Idaho Fish and Game Ass'n. v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1296-98 (Idaho 1974); Idaho Code 58-1202(2); Mont. Code Ann. 23-2-301(9).

Finally, the Coalition contends that the scope of the public's easement is a question of law to be determined by the Court. *Conatser v. Johnson*, 2008 UT 48, ¶ 10, 194 P.3d 897 (2008) ("Determining the scope of an easement is a question of law.").

VRA concedes the physical scope of the public's easement on state waters is a question of law. However, VRA argues that the question was not presented in this action for decision. Moreover, the testimony of fact witnesses concerning their "understanding" of the easement's scope is not an appropriate basis on which to resolve a question of law. *VRA Memo. in Opp.*, at ii-iii. The State echoes VRA's arguments. *State Memo. in Opp.*, at 2-3 (physical scope of the public's easement on state waters "was neither a point of contention nor a focus of the litigation, and was not significant or necessary for the Court's decision.").

In paragraph 19 of the First Amended Complaint, the Coalition made the following allegation:

With said public ownership [of state waters] the public has an easement...held in trust by the State for the benefit of the people, to lawfully access and use Utah's public waters and related public resources for recreational or other lawful purposes and ***to reasonably touch and use the privately- or publicly-owned beds of such waters up to and including the ordinary high water mark ("bed" or "beds") when doing so.***

First Amended Complaint, at ¶ 19 (emphasis added). The Coalition went on to allege the public's right to "reasonably touch and use the beds of [State] waters" when engaged in

recreation utilizing the water, and sought declaratory relief to that effect. *See, First Amended Complaint*, at ¶¶ 23, 31-33, 35, 37-38, 39a-e, 40.

In answering the First Amended Complaint, ATC Realty—VRA’s predecessor in interest—(1) asserted that paragraph 19 contained legal conclusions which required no response; and (2) denied any factual allegations in paragraph 19. *ATC Realty Answer to First Amended Complaint*, at ¶ 19.

In answering the First Amended Complaint, State defendants² admitted that the public had a qualified right under section 23-21-4 of the Utah Code to access “all lands owned by the state, including lands lying below the official government meander line or high water line of navigable waters, for the purpose of hunting, trapping, and fishing.”³ *Utah Div. of Parks and Rec. Answer to Amended Complaint*, at ¶ 19; *Utah Div. of Wildlife Resources Answer to Amended Complaint*, at ¶ 19. The State defendants denied the remaining allegations in paragraph 19. *Id.*

But pleading a legal conclusion is not the equivalent of presenting the issue for decision. In this case, the Coalition sought specific declaratory and injunctive relief related to the public’s ownership of State waters, the public’s easement on those waters, and the constitutionality of the

² At first, the Coalition named and served the Utah Division of Parks and Recreation (“DPR”) and the Utah Division of Wildlife Resources (“DWR”) as defendants. On June 10, 2011, the Court granted the State of Utah’s motion to intervene and to be heard on the constitutionality of the Act. After the State intervened, the Coalition agreed to dismiss the case against DPR and DWR. *See, Stipulated Motion and Order of Dismissal* (8/24/2011).

³ This statute provides that “lands of the state” includes lands “below the official government meander line or high water line” of navigable waters, and reserves to the public the right of access to these lands for the purpose of hunting, trapping, or fishing. Utah Code § 23-21-4(1). Thus, in the context of navigable waters where the State owns the bed, the Legislature has determined that the bed includes land below the high water line. In effect, the Coalition argues that the same policy should apply to the public’s easement on all State waters regardless of navigability.

Act. Granting this relief did not require the Court to decide the physical scope of the public's easement.

Accordingly, no party moved for summary judgment on the physical scope of the public's easement. The Coalition dropped a footnote once citing cases addressing the issue. *Coalition Memo. in Opp. to Mot. for Summ. Judgment Filed By the State of Utah and VR Acquisitions, LLC*, at n.1 (dated 10/6/14). But no party presented the question for decision, in dispositive motions or at trial. Trial focused exclusively on one unrelated issue important to the Coalition's constitutional challenge—whether the Act substantially impaired the public's interest in the lands and waters remaining. This was the only issue remaining in the case, and the one question that turned on disputed issues of material fact.

The Coalition's belated decision to request a ruling on the physical scope of the public's easement appears to be an afterthought. While plead, the issue was not litigated in this case in any meaningful way. While the Utah Supreme Court may deem the question important to resolving the issues presented on appeal, this Court declines to address it for the first time in the context of a post-trial motion.

Finally, the fact that some trial witnesses understood the public's easement to include land below the ordinary high water mark, or themselves fished below the ordinary high water mark, or used land below the high water mark while boating, is irrelevant. The physical scope of the public's easement is a legal, not a factual question. *Conatser*, 2008 UT 48, ¶ 10, 194 P.3d 897 (2008) (“Determining the scope of an easement is a question of law.”).

For the reasons stated above, the Motion to Amend to define the physical scope of the public's easement on state waters to include the streambed up to and including the ordinary high water mark is DENIED.

Amendments Related To "Fishable" Rivers and Streams

The Coalition moves to amend the Ruling to clarify that in three specific paragraphs referencing Utah's rivers and streams, the Court meant "fishable" rivers and streams. VRA and the State do not object.

As set for the in the Order below, the Court GRANTS IN PART this portion of the Coalition's Motion to alter or Amend.

Amending Finding of Fact 40

The Coalition moves the Court to amend Finding of Fact 40. The Coalition contends that the custom referred to is a "current or recent" one, and that "earlier custom may have included touching of the streambed more or less as described in *Conatser*." *Coalition Memo. in Supp.*, at 2. VRA and the State oppose the proposed amendment.

Finding of Fact 40 is consistent with the evidence presented at trial. The Coalition's Motion to Amend this finding is DENIED.

The State's Motion For Stay

For the reasons stated in the Court's prior ruling and order denying VRA's motion to stay the Ruling, the Court concludes that the State's Motion for Stay is without merit and is therefore DENIED.

The State's Motion to Alter or Amend

The State moves the Court to amend the injunction to clarify that the State is enjoined from enforcing only those provisions of the Act held to be unconstitutional.⁴ The Coalition does not object to this clarification, but proposes additional language enjoining the State from enforcing the Act in any manner inconsistent with the Ruling.

The Ruling clearly states which provisions of the Act are unconstitutional. The injunction was intended to enjoin the State from enforcing only the unconstitutional provisions of the Act, which provisions are severable. Utah Code § 73-29-208 (“If any of this chapter’s provisions, or the application of any of this chapter’s provisions, is held to be unconstitutional, the provision is severable and this chapter’s other provisions and applications remain effective.”).

The Court GRANTS the State’s Motion to Alter or Amend. The fifteenth line of the section titled “Order and Judgment” on page 59 of the Ruling is amended to read: “The State of Utah, its agencies, and divisions are enjoined from enforcing those provisions of the Act held to be unconstitutional in this Ruling, Order, and Final Judgment.”

⁴ In the State’s motion and initial memorandum, the State contends only that the injunction is overbroad. However, in its reply memorandum, the State challenges for the first time the legality of the injunction itself and moves the Court to strike the injunction from the Judgment. This new legal argument and the corresponding motion to strike are not properly before the Court, and the Court declines to address them. *See*, URCP 7(b) (a request for an order must be made by motion); URCP 7(e) (reply memorandum must be limited to rebuttal of new matters raised in memorandum opposing the motion). *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 31, 183 P.3d 1059 (“The principal reason we do not allow an issue to be first raised in a reply memorandum is because it is unfair to the opposing party to have no opportunity to respond Where a party first raise[s an] issue in his reply memorandum, it i[s] not properly before the trial court....”) (citations omitted).

ORDER ON MOTIONS

The Court GRANTS IN PART and DENIES IN PART the Coalition's Motion to Alter or Amend Ruling, Order, and Final Judgment. Specifically:

- The Court DENIES the Coalition's Motion to Amend the Ruling to define the physical scope of the public's easement on State waters.
- The Court GRANTS the Coalition's Motion to Alter or Amend the Ruling to clarify that in three specific paragraphs referring to Utah's rivers and streams, the Court meant "fishable" rivers and streams. Specifically:
 - The third sentence in the last paragraph on page 44 of the Ruling is amended to read: "This represents closure of 43% of Utah's fishable rivers and streams to almost all public recreational use."
 - The second sentence in the last paragraph beginning on page 53 of the Ruling is amended to read: "This represents the closure of 43% of Utah's fishable rivers and stream miles to nearly all fishing, and to all hunting, wading, swimming, bird-watching, and any other recreational activity utilizing the water."
 - The third sentence in the last paragraph on page 54 of the Ruling is amended to read: "The infusion of more than 230,000 people onto 43% fewer miles of fishable rivers and streams constitutes substantial impairment to the public's interest in the lands and waters remaining."
- The Court DENIES the Coalition's Motion to Amend Finding of Fact 40 in the Ruling.

The Court DENIES the State's Motion For Stay Pending Motion to Alter or Amend Judgment.

The Court GRANTS the State's Motion to Alter or Amend Judgment. The fifteenth line of the section titled "Order and Judgment" on page 59 of the Ruling is amended to read: "The State of Utah, its agencies, and divisions are enjoined from enforcing those provisions of the Act held to be unconstitutional in this Ruling, Order, and Final Judgment."

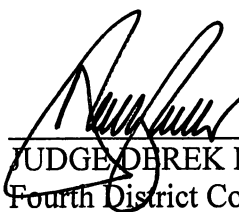
This is the final order of the Court as to motions decided herein. No further order of the Court is necessary.

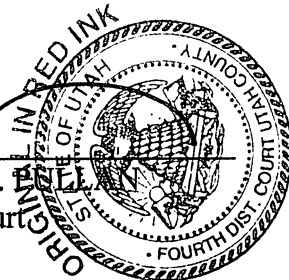
ORDER TO PREPARE JUDGMENT

Within 14 days of the date of this Ruling, counsel for the Coalition shall prepare and serve on the other parties a separate document entitled "Judgment" for review and approval as to form. The Judgment shall accurately reflect the Court's decision in the Ruling, Order, and Final Judgment entered on November 4, 2015, as amended, and shall otherwise conform to the requirements of Rule 58A of the Utah Rules of Civil Procedure.

Any objections to the form of the Judgment shall be filed within 7 days after the Judgment is served.

DATED this 10 day of December, 2015.


JUDGE DEREK P. BELL
Fourth District Court



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100500558 by the method and on the date specified.

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Date: _____

Deputy Court Clerk