

2015

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff/ Appellee/Cross-Appellant,

vs.

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

Defendants/Appellants/Cross-
Appellees.

No. 20151048-SC

OPENING BRIEF OF THE STATE OF UTAH

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

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STATEMENT OF JURISDICTION

The Court has jurisdiction to review the district court's final judgment under Utah Code § 78A-3-102(3)(j).

ISSUES PRESENTED

Article XX, section 1 of the Utah Constitution, mandates that public lands can only 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.”

1. Did the district court err by holding that “dispose of” means any legislative action that merely orders, regulates, or manages public land?

Standard of review: The Court reviews for correctness issues of constitutional interpretation. *Summit Water Distribution Co. v. Utah State Tax Comm’n*, 2011 UT 43, ¶ 9, 259 P.3d 1055.

Issue preservation: This issue was preserved and addressed by the district court. *See, e.g.,* Ruling, Order and Final Judgment in Favor of Plaintiff Utah Stream Access Coalition (Final Judgment) at 40-43.

2. Did the district court err by holding that the Public Waters Access Act disposes of the public's easement over public waters contrary to the “purposes for which [the easement has] been . . . acquired.”?

Standard of review: The Court reviews for correctness constitutional challenges to statutes. *In re Baby Girl T.*, 2012 UT 78, ¶ 9, 298 P.3d 1251.

Issue preservation: This issue was preserved and addressed by the district court. *See, e.g.*, Final Judgment at 45.

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. *In re Baby Girl T.*, 2012 UT 78, ¶ 9.

Issue preservation: This issue was preserved and addressed by the district court. *See, e.g.*, Final Judgment at 45-59.

DETERMINATIVE CONSTITUTIONAL PROVISION

All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.

Utah Const. art. XX, § 1.

STATEMENT OF THE CASE

Nature of the Case: Utah Stream Access Coalition (USAC) challenges the Public Waters Access Act's constitutionality. USAC asserts that the Act violates various Utah constitutional provisions and the public trust doctrine. R. 50.

Course of Proceedings: The parties filed multiple motions for summary judgment and the district court ultimately conducted a trial on one issue: whether the Act substantially impaired the lands and water remaining. Final Judgment at 2-8.

Disposition Below: After a multi-day trial, the district court ruled that the Act violated article XX, section 1 because it (1) disposed of the public's easement over public waters (2) contrary to the purposes for which the easement was acquired, and (3) restricted the public's access to too much of the fishable cold-water streams and therefore substantially impaired the remaining public waters. *See generally* Final Judgment at 40-59.

STATEMENT OF FACTS

Legal background

More than thirty years ago, this Court recognized that a statute declaring public ownership of State waters created a public easement over the waters "regardless of who owns the water beds beneath the water." *J.J.N.P. Company v. State*, 655 P. 2d 1133, 1136 (Utah 1982). The Court also noted a "state policy,"

again derived from state statutes, that “recognizes an interest of the public in the use of state waters for recreational purposes.” *Id.* Accordingly, the public has a right to use State waters for recreational purposes if it can lawfully access the waters. *Id.* at 1137.

In 2008, the Court reiterated those principles: (1) by statute, the public owns all State waters; (2) this statutory-based public ownership created a public easement over those waters; and (3) state policy recognized a public interest in using these waters for recreational purposes. *Conatser v. Johnson*, 2008 UT 48, ¶ 8, 194 P.3d 897. The Court then announced the public easement’s scope as “the right to touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement.” *Id.* ¶ 19. As a practical matter, *Conatser* outlined broader easement rights than what the public had generally been exercising theretofore: floating on waters flowing over private land to recreate, but not stopping on or using the streambed for recreational purposes without approval from the property owner. Final Judgment at 19-20.

The Utah Legislature responded to *Conatser* by passing the Public Waters Access Act in 2010. The Act sets forth the public’s rights to recreate on public waters. It reflects the Legislature’s careful balance of competing public policies and interests at stake given the public’s easement on waters running over both public and private lands, *see, e.g.*, Utah Const. art. I, § 1 (“All men have the

inherent and inalienable right . . . to acquire, possess and protect property.”), and the State’s role as trustee of the public waters on behalf of all people.

For publicly-owned waters flowing over public land—which constitute the vast majority of publicly-owned waters—the Act essentially codified the so-called “*Conatser* easement” allowing the public to use and touch the streambed incidental to the recreational easement’s use. Utah Code § 73-29-201. For publicly owned waters over privately owned ground, the Act codified the public’s pre-*Conatser* customs, allowing floating (and fishing while floating) on public water with the right to incidentally touch the streambed as required for safe passage and continuous movement. *Id.* § 73-29-202. The public cannot stop on private property or use the streambed incidental to other recreational activities as in *Conatser*. But the Legislature did grant an extended and expanded right of portage, including necessary use of the private property. Utah Code § 73-29-202(2).

The Act also created a public recreational access right to use the full *Conatser* easement on waters running over private lands based on continuous adverse use for 10 years. This right is enforceable by individuals and the Utah Division of Wildlife Resources by a quiet title action, if necessary. Utah Code §§ 73-29-203 and -204.

The parties and the lawsuit

VR Acquisitions, LLC (Victory Ranch), owns land in Wasatch County over which an approximately 4-mile stretch of the Provo River flows. R. 2441.

Members of USAC wanted to fish or otherwise use the Provo River flowing over Victory Ranch's land. R. 54-57. After the Act's passage, disputes allegedly arose between USAC members and Victory Ranch about access to the river and permitted use of the bed. R. 53-57.

USAC brought this challenge under the Utah Constitution and the public trust doctrine. R. 49-50. SAC argued that the Act denied its members the ability to fly-fish on or otherwise use stretches of rivers and streams that flow over private property and limited their ability to engage in fly-fishing in waters flowing over public lands because of overcrowding.¹ R. 57-59; Final Judgment at 48-49.

Court proceedings

The parties filed several rounds of summary judgment motions. The Court made substantial written rulings after each round. *See generally* Final Judgment at 2-7. Ultimately, the Court ruled that fact issues concerning whether provisions of

¹ USAC initially named as defendants Victory Ranch's predecessor, landowners in Wasatch County, the Utah Division of Wildlife Resources, the Utah Division of Parks and Recreation, and Wasatch County Sheriff Todd Bonner. R. 48. The current Defendant VR Acquisitions substituted in as party Defendant after it purchased the property. R. 1005. The State of Utah intervened to be heard on the challenges to the Act and the two named state agencies and the Wasatch County Sheriff were then dismissed as parties. R. 144-46.

the Act impaired the public's interests in the lands and waters remaining precluded summary judgment and set that issue for trial. *Id.* at 7-8. The district court conducted a multi-day trial in August and September, 2015. R. 2445-2463. The Court issued its Final Judgment on November 4, 2015. R. 2602.

The trial court analyzed the case under Utah Constitution, article XX, section 1 as informed by the court's conception of a state public trust doctrine. The court determined that the Act "disposed of" public trust property, thereby subjecting it to article XX, section 1 analysis. Final Judgment at 40-44. Next, the court concluded that the Act did not dispose of the public's easement for the purposes for which the easement was acquired. *Id.* at 45. The court then turned to whether the Act's disposition substantially impaired the remaining lands and waters. The trial court found that USAC had not shown a substantial impairment based upon increased crowding on the waters flowing over publically owned land as a result of the Act, or any other specific negative impact of the Act on those waters. *Id.* at 48-49. Nonetheless, the Court concluded that the scope of the Act's restrictions on the *Conatser* easement (affecting 43 percent² of the State's fishable

² Prior to trial, the parties stipulated to various facts, including estimates of some waters covered by the Act. R. 2435-37. The State estimated there were 6,419 miles of fishable streams in Utah, approximately 2,738 miles of which flowed over privately owned beds, while USAC estimated 6,291 miles of fishable streams, approximately 2,770 miles of which traversed privately owned streambeds. *Id.*; *see also* Final Judgment at 7-12. The court recognized that these approximations

streams³) substantially impaired the waters remaining. *Id.* at 49-59. Therefore, the district court declared that specific provisions of the Act violated article XX, § 1 of the Utah constitution and enjoined any attempt to enforce them. *Id.* at 59; R. 4870.

The district court amended its Final Judgment, R. 4846-55, and entered a final, formal Judgment, R. 4869. The State and VR Acquisitions, LLC timely appealed. R. 4873-74, 5122-23. USAC cross-appealed. R. 5126-27. This Court subsequently stayed the district court's decision pending this appeal's resolution. R. 5148.

SUMMARY OF ARGUMENT

The district court erroneously held that the Public Waters Access Act violates article XX, section 1 of the Utah Constitution.

As an initial matter, that constitutional provision doesn't apply here because the Act doesn't "dispose of" the public's easement. *Black's Law Dictionary*, a source this Court has repeatedly relied on to interpret the Constitution, has long

underestimated the amount of publically owned streambeds and overestimated those privately owned, for various reasons. Final Judgment at 12; R. 2435-36.

³ "Fishable streams" is a term adopted by the State and was defined as those portions of streams that had "fisheries" on them. "Fisheries" are defined to mean those portions of the streams that are sufficient to sustain significant public fishing on that portion of the stream, limited to fish species that most people desire to fish for. Final Judgment at 11-12; R. 235-36. The district court's subset of State waters thus excluded those portions of rivers and streams that did not contain fisheries (approximately 14,000 additional miles of rivers and streams) and also excluded "still water," meaning lakes and reservoirs. Final Judgment at 8; R. 2432.

defined “dispose” (or “dispose of”) as to alienate, or direct the ownership of, or transfer something to another’s care or possession. This definition makes particular sense in the article XX, section 1 context of land or property. Other constitutional provisions and state statutes concerning property use dispose and its variants in the same way. The district court erred in holding that “dispose of” means merely to manage, regulate, or control.

But even if article XX, section 1 applies, the Act comports with its requirements (and the public trust requirement the court grafted into the analysis). First, although the district court did not address this issue, the Act disposes of the public easement as “provided by law.” The Act itself is a law that provides for the regulation of the *Conatser* easement. The Legislature has the constitutional right to make laws and has long done so with respect to public waters, water rights, and water uses. Managing state waters, as the trustee for all of the people, involves important policy choices, and the Legislature may prescribe reasonable conditions. This is particularly true here because the Act regulates a public easement that arose from state statutes.

Second, to the extent that the Act “disposes of” the public easement, it does so “for the respective purposes for which” the easement was “acquired.” The district court incorrectly concluded that the easement was acquired for the narrow purpose of promoting public access, and that the Act was focused solely on the

contrary purpose of restricting public access. But that ignores the public easement's full scope and the Legislature's duties in passing laws related to the public waters.

The public easement arose from the public's ownership of state waters. Public ownership also means that the State assumes the responsibility to manage the waters for the welfare and benefit of all the people of the State. The easement and the State's duty as trustee to manage the public's waters on behalf of all people are thus integrally related. Consequently, the public easement and the State's trustee duties go well beyond mere access and use of the waters. The State must balance various policies and the needs and sometimes competing water rights and interests of all its citizens.

Similarly, the Act's purposes go well beyond the need to protect private property interests. Again, the State as trustee must act on behalf of, and manage the various interest of, all its citizens. These interests include recreation, conservation, ecology, private ownership, public welfare, and beneficial use, among others. Understanding the true scope of the public easement and the Act makes clear that the Act manages the easement consistent with the broad purposes for which it was acquired.

Third, the Act also passes the substantial impairment test the district court added to the article XX, section 1 analysis. The district court correctly held that

USAC failed to prove the Act caused overcrowding on the remaining publicly accessible waters. The best evidence showed that the vast majority of fishers still enjoyed their experience, and various other factors besides the Act could have caused any overcrowding.

Nonetheless, the district court still found that the Act's alleged scope—restricting access privately owned stream and rivers beds (approximately 43 percent of State's fishable streams and rivers)—substantially impaired the remaining publicly accessible fishable streams and waters. This is wrong for multiple reasons. The scope of the Act doesn't matter for purposes of substantial impairment; that focuses on the wrong end of the equation. The question isn't how much the Act disposed of (the scope), but whether what remains is substantially impaired. The inquiry looks forward, not back.

Moreover, even if the Act's scope provided a proper analytical framework, the court miscalculated the Act's impact. The district court considered only the Act's application to fishable streams and rivers over private land as a percentage of all fishable streams and rivers. But both the public easement and the Act cover far more than just the fishable streams and rivers preferred by USAC. The district court's calculation left out another 14,000 miles of rivers and streams—in addition to the large amount of still waters, including reservoirs and lakes—upon which and around the public recreates. And the district court did not consider, and indeed had

virtually no evidence to consider, how the Act affected other recreational pursuits aside from angling.

Finally, the examples the court provided to show how the Act's scope could impair the public easement are simply unproven overcrowding allegations. Surveys about where anglers prefer to fish, increased numbers of licensed anglers per river mile, fly-fishing's popularity, Utah's growing population, and the shorter and narrower nature of Utah streams do not prove that the Act has caused any actual negative impact on the remaining publicly accessible waters. This is especially true in light of the fact that the district court already concluded that USAC, using many of these same theories, had not proven the Act caused overcrowding. The district court erred in finding the Act substantially impaired the remaining waters.

STANDARD OF REVIEW

This Court presumes that Utah's statutes are constitutional and, wherever possible, construes them as complying with the state and federal constitutions. Any reasonable doubts about a statute's validity are resolved in favor of constitutionality, and a statute may not be declared invalid unless it clearly violates a constitutional provision. USAC bears the burden of proving the statutes are unconstitutional. *See generally State v. Angilau*, 2011 UT 3, ¶ 7, 245 P.3d 745;

Merrill v. Utah Labor Comm’n, 2009 UT 26, ¶ 5, 223 P.3d 1089; *In re Estate of S.T.T.*, 2006 UT 46, ¶ 26, 144 P.3d 1083.

ARGUMENT

I. The Trial Court Incorrectly Held That the Act Violates Article XX, Section 1.

The trial court erroneously concluded that the Act violates a state public trust doctrine outlined in article XX, section 1 of the Utah Constitution.⁴ Final Judgment at 59. That provision states:

All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.

Utah Const., art. XX, § 1.

The Act does not violate this provision. First, the Act never “disposed of” any lands, meaning the Act is not subject to scrutiny under article XX, section 1. Even if the provision applies, the Act still comports with it because any disposition was done as “provided by law” and “for the respective purposes for which [the public easement] ha[s] been or may be . . . acquired.” Final Judgment at 40.

⁴The State of Utah adopts the arguments presented in Appellant VR Acquisitions LLC’s opening brief but will not repeat them here. Utah R. App. P. 24(i). The State focuses on the district court’s article XX, section 1 holdings.

Moreover, even if the district court properly infused the constitutional analysis with elements of the public trust doctrine, the Act satisfies that test too because it does not “substantially impair the public’s interest in the lands and waters remaining.” Final Judgment at 48.

A. Article XX, section 1 does not apply because the Act does not “dispose of” any public land.

The district court applied Article XX, section 1 to the Act based on the erroneous premise that the Act “disposed of” the public’s easement. *See, e.g.*, Final Judgment at 41. The court misinterpreted the term “dispose of.”

To interpret the constitution, the Court first looks to the relevant text, informed—as needed—by (1) the historical evidence of the state of the law when it was drafted, and (2) any of the State’s relevant, particular traditions at the time of drafting. *Am. Bush v. City of South Salt Lake*, 2006 UT 40, ¶¶ 10-12, 140 P.3d 1235; *see also Proulx v. Salt Lake City Recorder*, 2013 UT 2, ¶ 8, 297 P.3d 573 (“In interpreting the state constitution, we look primarily to the language of the constitution itself . . . as it would be understood by persons of ordinary intelligence and experience.” (internal quotation marks omitted)); *Grand Cty. v. Emery Cty.*, 2002 UT 57, ¶ 29, 52 P.3d 1148 (the Court’s “starting point in interpreting a constitutional provision is the textual language itself” and the Court “need not inquire beyond the plain meaning of the [constitutional provision] unless we find it ambiguous.” (internal quotation marks omitted)).

And in defining relevant constitutional text, the Court has repeatedly turned to *Black's Law Dictionary*. See, e.g., *Smith v. U.S.*, 2015 UT 68, ¶ 19, 356 P.3d 1249; *Proulx*, 2013 UT 2, ¶¶ 8-9; *T-Mobile USA, Inc. v. Utah State Tax Comm'n*, 2011 UT 28, ¶ 31, 254 P.3d 752; *Grand Cty.*, 2002 UT 57, ¶ 30; *Romney v. Barlow*, 469 P.2d 497, 498 (Utah 1970).

At the time Utah's constitution, including article XX, section 1, was ratified, *Black's Law Dictionary* defined "dispose" as "[t]o alienate or direct the ownership of property, as disposition by will." Dispose, *Black's Law Dictionary* (1st ed. 1891), available at <http://blacks.worldfreemansociety.org/1/D/d-0376.jpg>. Subsequent editions have maintained the same (or a virtually identical) definition. See, e.g., Dispose, *Black's Law Dictionary* (2nd ed. 1910), available at <http://blacks.worldfreemansociety.org/2/D/d0378.jpg> ("To alienate or direct the ownership of property, as disposition by will."); Dispose of, *Black's Law Dictionary* (5th ed. 1983) ("[t]o alienate or direct the ownership of property; as disposition by will. . . . To exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away."); Dispose of, *Black's Law Dictionary* (6th ed. 1990) (same). And the current version of *Black's* likewise defines "disposition" (including the cognate verb form "dispose") as "[t]he 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).⁵

Likewise, in explaining the public trust doctrine in 1892—four years before article XX, section 1 was ratified—the United States Supreme Court used “disposed of” to mean transferring control over. The High Court explained that “[t]he control of the state for purposes of the trust can never be lost, except as to such parcels as . . . can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.” *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892). The Court then reiterated that “[t]he 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 . . . when parcels can be disposed of

⁵ Case law from the founding era also appears to have used “dispose of” in this same sense of terminating or finishing with something. See, e.g., *Stand. Steam Laundry v. Dole*, 58 P. 1109, 1110 (Utah 1899) (“A judgment, to be final, must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case.” (internal quotation marks omitted)). In the article XX, section 1 context, the Court has also used “dispose of” the same way. *Van Wagoner v. Whitmore*, 58 Utah 418, 199 P. 670, 675 (1921) (in context of an adverse possession claim for state school lands, the Court stated that article XX, section 1 “is an absolute limitation upon the power of the state to dispose of the lands, or permit them to be disposed of, except for the purpose for which they were granted by Congress”).

without impairment of the public interest in what remains.” *Id.*; *see also* Br. of Aplt. VR Acquisitions LLC at 33-39.

While admitting that “dispose of” can mean ““get[ting] rid of” or ““part[ing] with . . .by way of sale or bargain,”” the court opted to use a broader, more general dictionary definition: ““to order, control, regulate, manage.”” Final Judgment at 41 (quoting Oxford English Dictionary Online). Under that interpretation, any legislative act “ordering, controlling, regulating, or managing public lands” necessarily disposes of those lands and triggers article XX, section 1 analysis. *Id.*

The court opined that “dispose of” should be given this broader meaning based on context and case law. *Id.* at 41-42. Neither one supports the trial court’s construction. First, the court reasoned that in context of article XX, section 1, which requires public lands to be held in trust for the people, “dispose of” must mean any legislative act using, managing or regulating the land (i.e., any conceivable legislative action regarding public lands), otherwise public trust duties would only apply once the “State[] deci[ded] to sell the public lands.” Final Judgment at 41. But that misreads the relevant text.

In reality, the provision states that the public lands “acquired” as described therein “shall be held in trust for the people to be disposed of as may be provided by law, for the respective purposes for which they have been or may be . . . acquired.” Properly read, the section mandates that once “acquired,” public lands

are held in trust for the people. Acquisition triggers that initial trust obligation, not disposition. The provision then goes further to require that if these public lands are ever “disposed of,”—e.g., sold or otherwise alienated—it must be done as “provided by law” and “for the respective purposes for which the[lands] have been or may be . . . acquired.”

Article XX, section 1’s context doesn’t justify the trial court’s decision to give “dispose of” such a broad meaning. Rather, the provision’s context, dealing with public lands (real property) supports the *Black’s Law Dictionary* definition. When one speaks about disposing of property or related interests, one typically and ordinarily means selling, ceding control, or otherwise transferring some meaningful interest, not merely managing or regulating the property. For example, the Utah Constitution states “[n]o municipal corporation, shall directly or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned or controlled by it.” Utah Const., art. XI, § 6. Obviously, the provision prohibits only getting rid of the specified water rights; it does not prohibit managing or controlling a city’s water interests. The Federal Constitution grants Congress “the power to dispose of and make all needful rules and regulations respecting a territory or other property belonging to the United States....” U.S. Const., art. IV § 3, cl. 2. If “dispose of” also meant to

manage and regulate the land, the additional language authorizing Congress to make rules and regulations would be superfluous.

Furthermore, state statutes concerning property commonly use “dispose of” or “disposition” to mean sell or otherwise transfer an interest in property. *See, e.g.,* Utah Code § 53C-4-101(1)(a) (within the School and Institutional Trust Lands Management Act, stating “[t]he director shall establish criteria by rule for the sale, exchange, lease, or other disposition or conveyance of trust lands”); Utah Code § 53C-4-102(2)(a) (“The director shall determine whether disposal or retention of all or a portion of a property interest in trust lands is in the best interest of the trust.”); Utah Code § 57-11-2(1)(a) (defining “Disposition” in the Utah Uniform Land Sales Practices Act as “includ[ing] sale, lease, assignment, award by lottery, or any other transaction concerning a subdivision, if undertaken for gain or profit.”); Utah Code § 65A-4-1(1) – (2) (“All state agencies may acquire land . . . and are authorized to sell, lease, or otherwise dispose of land no longer needed for public purposes. . . . [And] the proceeds from the sale, lease, or other disposition of land shall go to the state agency . . .”).

Second, the district court also erred in claiming *Colman v. Utah State Land Bd.*, 795 P.2d 622, (Utah 1990), supports its overbroad “dispose of” interpretation. Though recognizing that *Colman* involved only the public trust doctrine, not article XX, section 1, the district court nonetheless found support in the fact that *Colman*

ordered a remand to determine whether leasing part of the Great Salt Lake's bed impaired the public's interest. Final Judgment at 42. According to the trial court, *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." *Id.* But that reads too much into the opinion. Neither the parties nor the Court raised or specifically addressed whether a lease (or any other legislative act) "disposed of" property for public trust purposes. At most, the Supreme Court assumed a disposition occurred and remanded the substantial impairment question. And even if *Colman* had held that the lease in question "disposed of" a public interest, it still wouldn't justify the district court's much broader view of the term as mere management or regulation. As *Colman* itself held, the lease at issue conveyed an easement, which is a constitutionally protected property interest. 795 P.2d at 625. And even normal leases "for years or from year to year" create a protected property interest for the lessee. *Id.* That is a significantly different situation than the one presented by the Act, which doesn't convey a constitutionally protected property interest to anyone.

Finally, the district court decided that the Act closed "43% of Utah rivers and streams to almost all public recreational use." Final Judgment at 44. "This sweeping regulation of the public's easement constitutes a disposition for purposes of article XX, section 1." *Id.* The district court offers no support for this

proposition, and the State is not aware of any. It is difficult to see how the mere quantitative scope of a statute can change it qualitatively from a non-disposal to a disposal.

In sum, the district court erroneously held that to dispose of land under article XX, section 1 means to control, regulate, or manage it. In ordinary usage, especially in the land context, “dispose of” means to sell or otherwise transfer material, protected interests.

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

Even if the Act “disposed of” a public easement within the meaning of article XX, section 1, the Act would not automatically be unconstitutional. Rather, article XX, section 1’s plain text establishes that dispositions of public land pass constitutional muster if two requirements are met: the dispositions occur (1) “as may be provided by law” and (2) “for the respective purposes for which [the public lands] have been or may be . . . otherwise acquired.” Final Judgment at 40; Utah Const. art. XX, § 1. The Act’s treatment of public-water easements over private lands satisfies both requirements. The Act is thus constitutional.

1. The Act does not dispose of any public land contrary to law.

The district court did not address—and therefore did not determine—whether the Act disposed of land “as . . . provided by law.” But the Act, by definition, satisfies this requirement: It is “law” that “provide[s]” for the alleged

disposition of an interest in land. And there can be no question that the Legislature has the authority to pass laws regulating public waters or the statutorily derived public easement.

The Utah Constitution expressly separates government powers into three distinct branches. Utah Const., art. V, § 1. Absent a constitutional proscription, “the legislative branch should make the law [and] the judicial branch should be confined to interpreting it.” *Rampton v. Barlow*, 464 P.2d 378, 383 (Utah 1970); *Kimball v. City of Grantsville City*, 57 P. 1, 5 (Utah 1899) (“in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government.”).

Accordingly, the Legislature has long governed and regulated water, water rights, and the uses of water, dating back to Utah’s territorial days. “The right to use water in Utah has been governed by statute since 1888.” *Green River Canal v. Thayn*, 2003 UT 50, ¶ 28, 84 P.3d 1134. Even before that, in 1867 the Legislature gave the Jordan Irrigation Company rights to construct dams, take waters on both sides of the Jordan River, and otherwise modify the body of water. 1867 Laws of Utah 177. And the Legislature in 1903 declared that “All waters in the state, whether above or under the ground are hereby declared to be property of the public, subject to the existing rights and the use thereof.” Utah Code § 73-1-1(1) (which gave rise to the public easement recognized *J.J.N.P.* and *Conatser*).

Managing the state's waters "involves questions of policy, and the Legislature, in the interest of public welfare, may prescribe reasonable conditions." *Tanner v. Bacon*, 136 P.2d 957, 963 (Utah 1943) (internal quotation marks omitted). Indeed, "[t]he State, acting as trustee rather than owner, has assumed the responsibility of allocating the use of the water for the benefit and welfare of *all the people*." *In re Uintah Basin*, 2006 UT 19, ¶ 34, 133 P. 3d 410.

The Legislature has plenary power to establish policy and positive law in the State of Utah. This includes regulating the use and appropriation of the State's waters. The Act resulted from the State's political branches properly exercising their constitutional authority to make "law" respecting a specific portion of the State's public lands—just as the Utah Constitution and this Court's precedent contemplates.

2. The Act does not dispose of the public easement contrary to the respective purposes for which the easement was acquired.

The district court erred in holding that "the Act disposes of the public's easement for reasons unrelated to the purpose for which that easement was acquired." Final Judgment at 45. According to the court, "the public's easement on state waters traversing or impounded upon private property was acquired for the purpose of promoting the public access to and use of the waters"; but "[t]he Legislature adopted the Act not to promote this purpose but rather to protect

against the ‘real and substantial invasion of private property rights.’” *Id.* (quoting Utah Code § 73-29-103(5)). This unduly narrow understanding of the public easement and the Act’s purposes led the district court to the wrong conclusion.

A correct view of the public easement starts from the premise that the public owns the waters. *J.J.N.P.*, 655 P.2d at 1136 (citing Utah Code § 73-1-1). Consequently, “the State must . . . assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole.” *Id.*

The public easement on water flowing over private lands stems from the public’s ownership of those waters and the State’s duty to manage the public waters for all. “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.” *Id.* That public easement—the public right to be on, and use, the water for recreational purposes—is not defeated just because the water passes over privately owned land. “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.” *Id.* at 1137.

Thus, the public easement was acquired—if acquired is the right word—not just to promote access to *use* of the waters, but rather as part and parcel of the State’s right and duty to regulate the use of the water *to the benefit and well being*

of all of the people. And, as this Court noted in *J.J.N.P.*, it also stemmed from the Legislature having made recreational uses a consideration for regulating the State's waters. *Id.* at 1136.

The State acts as a trustee over *all* the public's interests and rights in the waters in the State of Utah—including recreational uses, appropriation of waters, diversion of waters, and other uses of the waters. To balance those competing interests, the State has inherent authority to allocate the “*use of the water* for the benefit and welfare of all the people.” *In re Uintah Basin*, 2006 UT 19, ¶ 34 (emphasis in original). In other words, the State acts as trustee over those waters for all the people—recreational users, property owners, and others. And in discharging its trustee duties, the Legislature, as the entity charged with adopting policies on behalf of the State, balances all of the competing interests and rights that are affected by, and that affect, the waters in the State of Utah. Those competing interests are not limited to only promoting access to, or use of, the water, either as to appropriators, diverters, or recreational users. Rather, the State's regulations must take into account the broad range of interests and rights of all people. The trial court incorrectly tried to limit the State's purposes and interests in regulating the use of the waters, including regulating the use of the public's easement, to providing just access.

Similarly, the trial court misunderstood the Act’s purpose as solely to “protect against the real and substantial invasion of private property rights.” Final Judgment at 45. The court failed to take into account the other purposes set forth in the statutes, the case law with regard to the purposes of water regulation and the public easement, and the Act’s purposes that the State described at trial.

In analyzing how the Court should determine the purposes of legislation, this Court has stated that the question is not one of specific proof, but rather of imputing possible reasonable purposes:

[I]n ascertaining the underlying legislative purpose, while this court should not indulge highly speculative hypotheses as to a statute’s purpose in applying the presumption of constitutionality, neither are we limited to those purposes that can be plainly shown to have been held by some or all legislators. We will make our determination on the *basis of reasonable or actual legislative purposes*. Thus, we do not require exact proof of the legislative purposes; *it is enough if a legitimate purpose can be reasonably imputed* to the legislative body.

Utah Safe to Learn, Safe to Worship Coalition, Inc. v. State of Utah, 2004 UT 32, ¶ 36, 94 P.3d 217 (internal citations and quotations omitted) (emphasis added).

Thus, the Court should look to the various sources of legislative purposes, including statutory provisions, judicial analysis, and the purposes as proffered by the State.

The trial court found a single, limited purpose based solely on Utah Code § 73-29-103(5), part of the Act’s declarations. To be sure, those declarations establish at least part of the Act’s purpose—they are the Legislature’s assessment

of policy problems it saw in the *Conatser* decision. But nowhere does section 73-29-103(5) purport to establish that specific declaration constitutes the Act's sole (or even main) purpose. Other provisions of the Act, plus other statutory provisions, show a broader purpose in connection with the Legislature's trustee obligations to regulate the use of waters.

The Legislature adopted the Act in accordance with its responsibility to allocate the water for the use and welfare of all people and competing uses. *In re Uintah Basin*, 2006 UT 19, ¶ 34, *J.J.N.P.*, 655 P.2d at 1136. The Legislature in the Act determined that regulations governing the recreational use of public waters should vary when those waters flow over privately owned land as opposed to publicly owned land because such land-ownership differences implicate different competing-use concerns. The Legislature has greater control over actions and activities of public entities, as opposed to private property owners, and can impose greater burdens on public owners than on private owners to improve ecological conditions on the land over which the water flows—or to take other actions concerning use of or access to the waters.

Various Utah statutory provisions point to broader purposes for the statutory provisions adopted or amended in the Act. Utah Code § 73-29-103(6) indicates a purpose to accommodate the competing interests between recreational users of the waters and private property owners over whose land the water runs. Section 79-

29-203 also supports the Act’s recognition that the public can establish through adverse use an individual right of public recreation on water flowing over private property. Section 73-1-1 recognizes public ownership of the waters in the State, but requires the Legislature to govern the use of public waters for beneficial purposes. “Beneficial use” is then established as the “basis, measure, and limit of all rights to the use of water.” Utah Code § 73-1-3. In addition, the Utah Code requires the state engineer—the executive officer who licenses and approves appropriative uses of public waters—to consider whether an application to appropriate public waters would unreasonably affect public recreation on the natural stream environment, or would prove detrimental to public welfare. Utah Code § 73-3-8(1)(b). Those provisions set forth express statutory purposes for regulating public waters in the State of Utah, including use of any public easement. These purposes are far broader than the limited purpose the trial court analyzed—just providing access.

This Court’s precedent further demonstrates that in regulating uses of the State’s waters, including use of the public easement, the Legislature is not limited solely to “promoting public access to and use of the waters.” Rather, the Legislature may take into account not just those persons attempting to access the waters for recreation, but *all* persons and *all* of their uses. In *National Parks and Conservations Association*, this Court stated that among the State’s general trust

duties over public lands is the duty to “protect” the ecological integrity of public lands and their public recreational activities for the benefit of *the public at large*.” *Nat’l Parks and Conservation Ass’n v. Bd. of State Lands*, 869 P.2d 909, 919 (1993) (emphasis added). The Legislature has the “responsibility of allocating the use of the water for the benefit and welfare of *all of the people*.” *In re Uintah Basin*, 2006 UT 19, ¶ 34 (emphasis added). Thus “the Legislature, in the interest of public welfare, may prescribe reasonable conditions” on the use of the water. *Tanner*, 156 P. 2d at 963.

Finally, the State proffered that the Act was adopted to increase and improve overall water resources, to provide incentives for stewardship over the waters, and to enhance the development of and access to the streams. R. 340. At the trial the State presented evidence of efforts to improve the streams and habitats on both public and private reaches of the streams. R. 3722. Other evidence established efforts by public and private owners to improve the streams and recreational opportunities. Final Judgment at 26.

Thus, the purpose of the Act was not merely to promote public access to and use of the waters in connection with the *Conatser* recreational easement. Rather it resulted from the Legislature’s exercising its trust duties to regulate the use of and access to all the State’s waters to benefit all the State’s people. The Act embodies a classic legislative policy judgment about how to best balance all competing

interests in and claims to the State's waters—not just, as the district court reasoned, the interest in merely promoting recreational uses.

With a proper understanding of the public easement and the Act's purposes, it becomes clear that the Act manages the easement consistent with the broad purposes for which it was acquired. The Act thus comports with article XX, section 1, and is constitutional.

C. The Act does not substantially impair the remaining waters, assuming that test even applies.

Infusing article XX, section 1 with the common law public trust doctrine, the district court concluded that the Act was unconstitutional because its scope substantially impairs the lands and waters remaining. Final Judgment at 45-48. Even assuming this issue properly informs the relevant constitutional analysis, the district court erred for several reasons.

1. The district court correctly held that the Act does not result in overcrowded publicly accessible waters.

Notably, the district court correctly rejected the only concrete argument supporting impairment. USAC argued that by restricting access to 2,700 miles of streams flowing over privately owned lands, the Act caused overcrowding on the remaining publicly accessible, fishable streams and substantially impaired the public's interest in them. Final Judgment at 48. The district court determined that USAC failed to prove the Act caused overcrowding. The court found that the

anecdotal evidence of crowding was evenly balanced and subjective; surveys of anglers showed that the “majority of anglers were mostly or completely satisfied with their fishing experience,” even on the Lower and Middle Provo Rivers; and witnesses on both sides all agreed that any crowding had causes independent of the Act, including population growth, the growing popularity of fly-fishing and the increased number of guide services, and the State’s promotion of Blue Ribbon Fisheries. *See* Final Judgment at 49.

Further, regional managers of the Department of Natural Resources testified that all recreational experiences were available on the remaining publically accessible fishable streams and that there was no recreational activity that could be done before the Act that could not also be done after the Act on publically accessible waters. *See, e.g.,* R. 3720. Even USAC members who testified about their “preferred experience”⁶ and fishing guides called by USAC said they could still obtain that great fishing experience on publicly-accessible waters after the Act but that it may take a little more time. R. 2990, 3071-72, 3256-57, 4229-31. And the fishing guides testified that even after the Act, Utah had publicly accessible world-class fishing. *See, e.g.,* Final Judgment at 23.

⁶ The anglers testified that their “preferred experience” was to be able to fly fish a stretch of a river without other anglers so that they could experience a “period of solitude” on the river. R. 2954, 2996-97.

USAC's failure to prove the Act caused overcrowding, combined with the fact that all recreational activities that could have been performed before the Act could still be and continued to be performed on the publicly accessible waters, forecloses any finding that the Act substantially impaired the remaining waters. The district court should have ended its substantial impairment analysis upon rejecting the over-crowding argument.

2. The district court incorrectly held that the "scope" of the Act meant remaining waters were substantially impaired.

Despite rejecting USAC's over-crowding argument, the court concluded that "the Act results in substantial impairment by virtue of its scope." Final Judgment at 49. In the district court's view, 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 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." Final Judgment at 53-54 as amended at R. 4854. The Act's scope was evidently more than the constitution could bear. Final Judgment at 58. The district court's analysis is legally and factually wrong.

(i). The mere scope of water affected by the Act does not determine whether unaffected remaining waters are substantially impaired

As a matter of law and logic, the Act's scope—the percentage of water it affects—says next to nothing about the dispositive issue: whether the remaining—unaffected—waters are substantially impaired. In other words, the substantial impairment analysis doesn't focus on what was lost; it focuses on what's left. The relevant cases put this point beyond debate, thereby highlighting the district court's error.

This Court recognized *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), as the “controlling case” regarding the public trust doctrine, *Colman*, 795 P.2d at 635, which includes the substantial impairment element the district court grafted into article XX, section 1. *Illinois Central* stated that trust property can be ““alienated”” when, in relevant part, ““parcels can be disposed of without detriment to the public interest in the lands and waters remaining.”” *Colman*, 795 P.2d at 635 (quoting *Illinois Central*, 146 U.S. at 455-456).

In *Colman*, this Court reiterated that if there is a disposition of public trust assets, the proper focus turns to the substantial impairment test: “a state can grant certain rights in navigable waters if those rights can be disposed of without affecting the public interest in what remains.” 795 P.2d at 635-36. Given the preliminary posture of the *Colman* case, the Court couldn't apply the test. Instead

the Court remanded, noting that “[a]t this point in the litigation, there is nothing to show that Colman’s canal [i.e., the lease/easement in part of the Great Salt Lake’s bed] impaired the public interest in any way at the time the State granted him the right to conduct his operation.” *Id.* at 636. Again, the focus was on any impairment to the remaining public interest, not on the scope of Colman’s lease.

As a matter of law, the district court’s scope analysis misses the mark. The only relevant question is whether the Act substantially impaired the public easement in the public waters unaffected by the Act. It is undisputed that the remaining waters could still be used for the full range of recreational purposes, were and are being used for recreational purposes, and there has been no reduction in the ability to engage in those activities. Thus, the Act’s alleged disposition of the *Conatser* easement did not “substantially impair” the use of the land and waters remaining because the public can still fully enjoy the easement.

(ii). Even if scope were material, the district court used the wrong percentages based on an incorrect view of the relevant waters.

Even if the district court’s scope analysis were legally permissible, it’s factually incorrect and overstates the Act’s actual scope. As noted, the district court focused its attention on the limitations the Act placed on approximately 2,700 of fishable streams flowing over private lands as a percentage of the approximately 6,400 total miles of “fishable streams” on the State of Utah’s Stream Access map.

Final Judgment at 11-13, 53-54. Thus, the court calculated, the Act affected 43% of all fishable streams in the state. *Id.* at 53-54. But neither the Act nor the public's easement (recreational or otherwise) is limited to fishable streams.

The Act addresses the use of all “public waters,” defined to include streams, rivers, and lakes and natural reservoirs (whether fishable or not).⁷ Similarly, the recreational easement defined in *Conatser* applies to all “state waters” or public waters, not just cold-water fishable streams preferred by USAC. And the easement involves far more than just fishing. *Conatser*, 2008 UT 48, ¶ 14 (public's easement includes “the right to float leisure craft, hunt, fish, and participate in any lawful activity when *utilizing* that water.” (internal quotation marks omitted)).

Thus the district court's scope analysis fails on the facts in two ways. First, it fails to consider all of the public waters, including at least another 14,000 miles of rivers and streams, R. 2432; Final Judgment at 8, not to mention the vast amount of waters in the state's lakes and reservoirs. The district court had no evidence of the latter number, and thus could not have possibly assessed the Act's true scope.

Second, the trial court failed to meaningfully consider the Act's scope on any recreational pursuits other than fly-fishing. The court couldn't accurately

⁷ “Public water” is defined as “all waters in the State, whether above or underground,” Utah Code § 73-1-1 (1), that are “flowing or collecting on the surface: (A) in a natural or realigned channel; or (B) in a natural lake, pond, reservoir on a natural or realigned channel,” *id.* § 73-29-102 (8).

gauge the Act's scope without knowing (indeed without having any evidence of) how it affected the full range of the public easement in question.

In short, the trial court's analysis clearly under-estimated the scope of the waters of the State of Utah and the recreational easement throughout the State, both as to the type of waters that it applies to as well as the type of recreation, e.g. hunting, swimming, wading, etc.

(iii). The district court's scope analysis relies on unproven overcrowding assumptions.

Having concluded that the Act did not cause overcrowding, Final Judgment at 54, the district court found itself in a predicament: how else to explain why its scope conclusions impaired the public easement. The court resorted to unproven overcrowding theories.

For example, the Court cited a survey in which 70 percent of the anglers surveyed reported that they were likely to fish on waters that flowed over private ground and would now, because of the Act, have to fish on publically accessible streams. Final Judgment at 54. Similarly, the court concluded that the Act increased the number of licensed anglers per river/stream mile. *Id.* at 55. And the court also determined that Utah streams were generally shorter and narrower and therefore had reduced carrying capacity for recreation use. *Id.* at 54-55. Moreover, the court worried that fly-fishing was growing in popularity at the same

time Utah's population is rising. *Id.* at 55. To top it all off, the court expressed its policy concerns that the State promotes its Blue Ribbon Fisheries, "increasing the number of people who use these waters," while the Act restricted public access to areas that would otherwise qualify as Blue Ribbon Fisheries. *Id.* at 55.

These "scope" arguments are simply re-packaged overcrowding theories and still do not prove that the Act substantially impaired the remaining lands and waters. Indeed, the district court already rejected the express arguments that overcrowding substantially impaired the public's use of the remaining lands and waters. Final Judgment at 49. Again, according to the district court, "the best evidence" showed that a vast majority of anglers "reported that crowding did not reduce or slightly reduced the quality of their fishing experience." Final Judgment at 49. And, as the court found, "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." Final Judgment at 49. It is internally inconsistent, and wrong, for the district court to find that the same type of evidence that failed to prove the Act caused overcrowding can somehow still prove overcrowding under the guise of "scope."

Finally, the trial court indicated that “every parcel and public land, every reach of public water is unique” and that the Act impairs the public’s interest in waters remaining because what remains is so “drastically diminished.” Final Judgment at 58. Again, the trial court made this conclusion in the absence of any demonstrated negative effect. It apparently adopted the theory that since every stretch of public water is unique, anytime any public waters are restricted the remaining lands and waters will always be inadequate. But such a “not-one-foot-loss-of-stream-access” is not and cannot be the law. First, it wrongly focuses on the restricted waters, rather than any impairment on the remaining waters. Second, it would invalidate many water laws and projects. Every time a dam is built, the recreational opportunities in the streambed that gets covered up by the dam water are destroyed as people can no longer fly-fish, walk or wade, hunt, or fish, in the streambed. Based upon the diversion of appropriated uses of waters, various stretches of the rivers and streams in Utah are diminished or have no water-flow and the recreational opportunities cease. In various streams, recreational activity is based upon stream-flow that is dependent upon appropriated uses—some uses allow recreational fishing activities to occur while other diversions end recreational activities.

The district court’s scope analysis simply repackages unproven overcrowding theories. Nothing about the Act’s scope proves a substantial

impairment to the remaining waters. The district court's contrary conclusion should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court holding that provisions of the Public Waters Access Act violate article XX, section 1 of the Utah Constitution, and judgment should be entered in favor of the State of Utah.

Respectfully submitted,



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

1. This brief complies with the type-volume limitations of Utah R. App. P. 24(f)(1) because:
 - this brief contains 9,263 words, excluding the parts of the brief exempted by Rule 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:
 - this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2016, a true, correct and complete copy of the foregoing Opening Brief of the State of Utah was filed with the Court and served via United States mail as follows:

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A handwritten signature in blue ink, appearing to read "Eric P. Lee", is written over a horizontal line.

ADDENDUM

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NOV 04 2015

IN THE FOURTH JUDICIAL DISTRICT COURT

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

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>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 style="text-align: center;"><u>RULING, ORDER</u> <u>and</u> <u>FINAL JUDGMENT</u></p> <p style="text-align: center;">IN FAVOR OF PLAINTIFF UTAH STREAM ACCESS COALITION</p> <p style="text-align: center;">Case No. 100500558</p> <p style="text-align: center;">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. *MD1*, 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. *MDI*, 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.ffa.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.

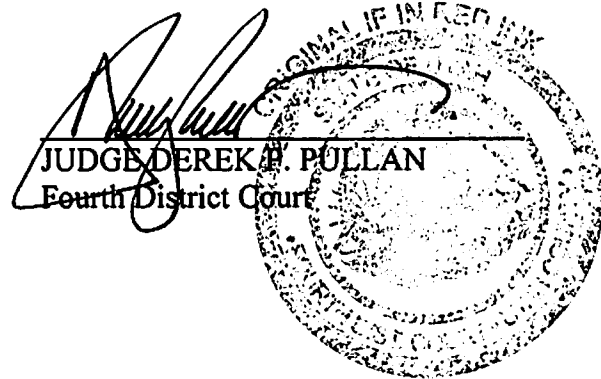
The State of Utah, its agencies, and divisions are enjoined from enforcing the Act.

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.



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



Deputy Court Clerk

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 forth 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."

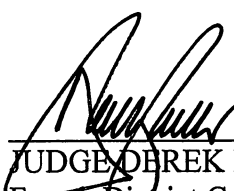
This is the final order of the Court as to motions decided herein. No further order of the Court is necessary.

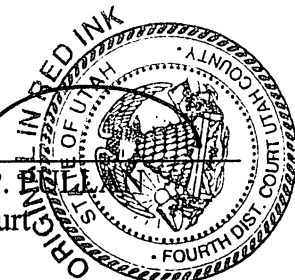
ORDER TO PREPARE JUDGMENT

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. PELT
Fourth District Court



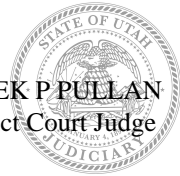
CERTIFICATE OF NOTIFICATION

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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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.

JUDGMENT

Civil No. 100500558

Hon. Derek Pullan

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, Craig C. Coburn and John L. Young. Defendant VR Acquisitions, LLC (“VRA”) was represented by its counsel, Eric P. Lee, Nathan D. Thomas, and Elizabeth M. Butler. Defendant State of Utah (“the State”) was represented by Assistant Attorney General Thomas D. Roberts.

On November 4, 2015, the Court issued a Ruling, Order and Final Judgment in favor of

the Coalition. On December 10, 2015, on motions filed by the Coalition and the State, the Court amended in part its Ruling, Order and Final Judgment and directed Coalition counsel to prepare this Judgment, for review and approval by counsel, consistent with the Court’s Ruling, Order and Final Judgment, as amended.

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 chose vessel at the time of floating” such that touching the privately owned bed is prohibited;
- Utah Code § 73-290-202(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 those provisions of the Act held to be unconstitutional in the Court’s Ruling, Order and Final Judgment, as amended, and again here.

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 Order and Judgment.

This is the final order and judgment of the Court. No further action or order is necessary.

-----**END OF ORDER**-----

***EXECUTED AND ENTERED BY THE COURT AS INDICATED
BY THE DATE AND SEAL AT THE TOP OF THE FIRST PAGE***

APPROVED AS TO FORM:

JONES WALDO HOLBROOK & McDONOUGH

ATTORNEY GENERAL

/s/ Nathan D. Thomas (w/permission)
Eric P. Lee
Nathan D. Thomas
Elizabeth Butler
Attorneys for VR Acquisitions, LLC

/s/ Thomas D. Roberts (w/permission)
Thomas D. Roberts
Attorneys for State of Utah

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of December, 2015, I served, for purposes of review and approval by party counsel, a true and correct copy of the foregoing ***Judgment*** on the following individuals by the means indicated below:

Thomas D. Roberts	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
Attorney General	<input type="checkbox"/>	Overnight Mail
160 East 300 South, 5 th Floor	<input type="checkbox"/>	Hand Delivery
P. O. Box 140857	<input type="checkbox"/>	Facsimile
Salt Lake City, UT 84114-0857	<input checked="" type="checkbox"/>	Electronic Mail
thomroberts@utah.gov		

Nathan D. Thomas	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
Elizabeth Butler	<input type="checkbox"/>	Overnight Mail
JONES WALDO HOLBROOK & McDONOUGH	<input type="checkbox"/>	Hand Delivery
170 S. Main Street, Suite 1500	<input type="checkbox"/>	Facsimile
Salt Lake City, UT 84101-1644	<input checked="" type="checkbox"/>	Electronic Mail
nthomas@joneswaldo.com		
ebutler@joneswaldo.com		

Eric P. Lee	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
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1441 W. Ute Boulevard, Suite 330	<input type="checkbox"/>	Hand Delivery
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<u>Amicus Curiae</u>		
Michael D. Zimmerman	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
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/s/ Lenora G. Spencer

Chapter 29 Public Waters Access Act

Part 1 General Provisions

73-29-101 Title.

This chapter is known as the "Public Waters Access Act."

Enacted by Chapter 410, 2010 General Session

73-29-102 Definitions.

As used in this chapter:

- (1) "Division" means the Division of Wildlife Resources.
- (2) "Floating access" means the right to access public water flowing over private property for floating and fishing while floating upon the water.
- (3) "Impounded wetlands" means a wetland or wetland pond that is formed or the level of which is controlled by a dike, berm, or headgate that retains or manages the flow or depth of water, including connecting channels.
- (4) "Navigable water" means a water course that in its natural state without the aid of artificial means is useful for commerce and has a useful capacity as a public highway of transportation.
- (5) "Private property to which access is restricted" means privately owned real property:
 - (a) that is cultivated land, as defined in Section 23-20-14;
 - (b) that is:
 - (i) properly posted, as defined in Section 23-20-14;
 - (ii) posted as described in Subsection 76-6-206(2)(b)(iii); or
 - (iii) posted as described in Subsection 76-6-206.3(2)(c);
 - (c) that is fenced or enclosed as described in:
 - (i) Subsection 76-6-206(2)(b)(ii); or
 - (ii) Subsection 76-6-206.3(2)(b); or
 - (d) that the owner or a person authorized to act on the owner's behalf has requested a person to leave as provided by:
 - (i) Section 23-20-14;
 - (ii) Subsection 76-6-206(2)(b)(i); or
 - (iii) Subsection 76-6-206.3(2)(a).
- (6) "Public access area" means the limited part of privately owned property that:
 - (a) lies beneath or within three feet of a public water or that is the most direct, least invasive, and closest means of portage around an obstruction in a public water; and
 - (b) is open to public recreational access under Section 73-29-203; and
 - (c) can be accessed from an adjoining public access area or public right-of-way.
- (7) "Public recreational access" means the right to engage in recreational access established in accordance with Section 73-29-203.
- (8)
 - (a) "Public water" means water:
 - (i) described in Section 73-1-1; and
 - (ii) 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.
- (b) "Public water" does not include water flowing or collecting:
 - (i) on impounded wetland;
 - (ii) on a migratory bird production area, as defined in Section 23-28-102;
 - (iii) on private property in a manmade:
 - (A) irrigation canal;
 - (B) irrigation ditch; or
 - (C) impoundment or reservoir constructed outside of a natural or realigned channel; or
 - (iv) on a jurisdictional wetland described in 33 C.F.R. 328.3.
- (9)
 - (a) "Recreational access" means to use a public water and to touch a public access area incidental to the use of the public water for:
 - (i) floating;
 - (ii) fishing; or
 - (iii) waterfowl hunting conducted:
 - (A) in compliance with applicable law or rule, including Sections 23-20-8, 73-29-203, and 76-10-508; and
 - (B) so that the individual who engages in the waterfowl hunting shoots a firearm only while within a public access area and no closer than 600 feet of any dwelling.
 - (b) "Recreational access" does not include:
 - (i) hunting, except as provided in Subsection (9)(a)(iii);
 - (ii) wading without engaging in activity described in Subsection (9)(a); or
 - (iii) any other activity.

Enacted by Chapter 410, 2010 General Session

73-29-103 Declarations.

The Legislature declares:

- (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 compensation, protect against government's broad recognition or grant of a public recreation easement to access or use public water on private property;
- (2) 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 and 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 the conditions required to support recognition under this chapter;
- (3) whether, or to what extent, a public easement exists for recreational use of public waters on private property is uncertain after judicial decisions in the cases of *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982) and *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008), which decisions did not address the constitutional prohibition on taking or damaging private property without just compensation;
- (4) legislative failure to provide guidance before, coupled with legislative inaction after the 1982 decision in *J.J.N.P. Co. v. State* form a compelling foundation for the Legislature to affirm a limited right to float on the water without violating the constitutional protections of the underlying private property;

- (5) 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 *Conatser 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;
- (6) its intent to foster restoration of the accommodation existing between recreational users and private property owners before the decision in *Conatser v. Johnson*, affirm a floating right recognized by the court in *J.J.N.P. Co. v. State*, 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.

Enacted by Chapter 410, 2010 General Session

Part 2

Recreational Access to Public Water

73-29-201 General access provisions.

- (1) The public may use a public water for recreational activity if:
 - (a) the public water:
 - (i) is a navigable water; or
 - (ii) is on public property; and
 - (b) the recreational activity is not otherwise prohibited by law.
- (2) A person may access and use a 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.

Enacted by Chapter 410, 2010 General Session

73-29-202 Public right to float on public waters.

- (1) There is a public 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.
- (2) Subsection (1) includes the right to:
 - (a) incidentally touch private property as required for safe passage and continued movement;
 - (b) portage around a dangerous obstruction in the water, if portage is made in a manner that is:
 - (i) most direct;
 - (ii) least invasive; and
 - (iii) closest to the water; and
 - (c) fish while floating.
- (3) A person exercising the right that this section recognizes:
 - (a) shall enter and exit the water at a point on public property or private property with permission of the owner; and
 - (b) may not stop on private property.
- (4)
 - (a) The right this section recognizes does not prevent the establishment of broader public recreational access in accordance with this chapter.

- (b) Notwithstanding Subsection (4)(a), the right this section recognizes does not establish broader public recreational access.

Amended by Chapter 340, 2011 General Session

73-29-203 Establishment of public recreational access.

- (1) Public recreational access is established 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.
- (2) The permissive use of a public water on private property granted by the owner is not an adverse use.
- (3)
 - (a) A property owner's overt act intended to interrupt uninvited recreational access is a sufficient interruption to restart any period of use that may have already begun under Subsection (1) if the evidence, taken as a whole, shows that the act came to the attention of the public or resulted in actual interruption.
 - (b) If an overt act is established in a final judgment to have interrupted recreational access, no other person may challenge the existence of the overt act in a subsequent action.
- (4) The extent and nature of the public recreational access permitted under Subsection (1) is determined by the nature of the historical recreational access during the 10 consecutive years required under Subsection (1).
- (5) When a public water is a lake, pond, or reservoir located on a natural stream and on private property, any portion that has been developed or protected for private hunting is not subject to public recreational access even though the remainder of the public water qualifies for public recreational access under this section.
- (6) A right of public recreational access on private property, established in accordance with this section, may not be closed without authorization of other law.

Enacted by Chapter 410, 2010 General Session

73-29-204 Quiet title action.

- (1)
 - (a) A person, including the division, may file a quiet title action in accordance with Title 78B, Chapter 6, Part 13, Quiet Title, to obtain a judicial declaration of the existence of a right to public recreational access under Section 73-29-203.
 - (b) The division may intervene in a quiet title action filed in accordance with Subsection (1).
 - (c) The division may not be compelled to:
 - (i) file a quiet title action; or
 - (ii) join a quiet title action filed by another person.
- (2) The claimant in a quiet title action under Subsection (1) shall:
 - (a) name the property owner of record as a party; and

- (b) notify the division of the suit by certified mail no later than 20 days after the day on which the quiet title action is filed.
- (3) Within five days after receiving notice in accordance with Subsection (2)(b), the division shall post notice of a quiet title action under this section on its Internet website.
- (4) A quiet title action under this section shall be commenced within four years after the day on which a period of prescriptive use ceases.
- (5) The burden of proof for a quiet title action under this section is on the claimant to prove the existence of a right to public recreational access or floating access under Section 73-29-203 by clear and convincing evidence.
- (6) A quiet title action under this section is limited to a declaration concerning the property and property owner joined in the action.
- (7)
 - (a) Multiple claimants and multiple property owners may be included in a quiet title action concerning public water common to the property owners.
 - (b) In a case with multiple property owners, the court shall make a separate finding concerning each property owner included in the action.
- (8) A final judgment on the merits that a piece of private property is not subject to public recreational access:
 - (a) is binding; and
 - (b) may not be challenged in subsequent litigation.
- (9) The court may award attorney fees and costs in an action under this section if the court finds that the losing party's arguments lack a reasonable basis in law or fact.

Enacted by Chapter 410, 2010 General Session

73-29-205 Injunctive relief.

- (1) The owner of private property may obtain injunctive relief against a person who, without permission, enters, remains, or persists in an effort to enter or remain on the owner's property for recreational use of public water other than use in accordance with Sections 73-29-202 and 73-29-203, when effective.
- (2) An injunction under this section is in addition to any remedy for trespass.
- (3) The existence of an easement under Section 73-29-203 is a defense in an action for injunctive relief under this section or a claim of trespass under other law.
- (4) If a person against whom an injunction is sought, or a person charged with trespass, establishes by clear and convincing evidence the existence of an easement for defense purposes, as described in Subsection (3), the establishment of the existence of the easement applies only to the defense and does not constitute a judicial declaration of the easement's existence for another purpose.
- (5) If an owner obtains an injunction against a person under this section, the injunction does not serve as a declaration that there is no public easement on the owner's property.
- (6) The court may award attorney fees and costs in an action under this section if the court finds that the losing party's arguments lack a reasonable basis in law or fact.

Enacted by Chapter 410, 2010 General Session

73-29-206 Effect of chapter on other uses and restrictions -- Required acts.

- (1) Nothing in this chapter affects the right of the public to use public water for public recreational access, including the touching of the bed beneath the public water if:

- (a) the bed beneath the public water is public property; or
- (b) the bed beneath the public water is private property to which access is not restricted.
- (2) A person using a public water for public recreational access is subject to any other restriction lawfully placed on the use of the public water by a governmental entity with authority to restrict the use of the public water.
- (3) Nothing in this chapter limits or enlarges any right granted by express easement.
- (4) When leaving a public access area, a person shall remove any refuse or tangible personal property the person brought into the public access area.

Enacted by Chapter 410, 2010 General Session

73-29-207 Fences across public water.

- (1) The owner of a public access area adjacent to and lying beneath a public water may place a fence or obstruction across a public water for agricultural, livestock, or other lawful purposes.
- (2) A fence or other obstruction shall:
 - (a) comply with an applicable federal, state, or local law; and
 - (b) be constructed in a manner that does not create an unreasonably dangerous condition to the public lawfully using the public water.
- (3) The owner of a public access area shall allow the placement of a ladder, gate, or other facility allowing portage around a fence or obstruction if:
 - (a) the owner places a fence or obstruction across a public water in accordance with Subsection (1); and
 - (b) the water is open to public recreational access by permission or under Section 73-29-203.

Enacted by Chapter 410, 2010 General Session

73-29-208 Severability.

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.

Enacted by Chapter 410, 2010 General Session