

2016

Utah Stream Access Coalition, Plaintiff/ Appellee, v. Orange Street Development, Defendant/ Appellant, and State of Utah, by and Through Its Division of Forestry, Fire and State Lands, Defendant/ Appellee.

Utah Supreme Court

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IN THE
SUPREME COURT OF THE STATE OF UTAH

UTAH STREAM ACCESS COALITION,
Plaintiff/Appellee,

v.

ORANGE STREET DEVELOPMENT,
Defendant/Appellant,

and

STATE OF UTAH, BY AND THROUGH ITS
DIVISION OF FORESTRY, FIRE AND STATE LANDS,
Defendant/Appellee.

BRIEF OF DEFENDANT/APPELLEE STATE OF UTAH

On appeal from the Third Judicial District Court, Summit County,
Honorable Keith A. Kelly, No. 110500360

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- B Legal Analysis, Findings of Fact and Conclusions of Law dated April 10, 2015 (R. 867-92)
- C Amended Order and Final Judgment dated May 19, 2015 (R. 948-51)
- D Demonstrative map illustrating two methods of State riverbed ownership

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review final judgments pursuant to Utah Code section 78A-3-102(3)(j).

INTRODUCTION

In the 2010 General Session, the Utah Legislature passed the Public Waters Access Act, now codified at Utah Code section 73-29-101 through -208 (the “Act”). The Act outlines the public’s right to access public and private streambeds following this Court’s decision in *Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897. The Act grants the public a right to access the bed of a stream under four circumstances: if it is a “navigable water,” if it flows “on public land,” or, in the case of private riverbeds, with permission of the landowner or via prescriptive easement. Utah Code § 73-29-201.

This appeal focuses primarily on whether an approximately one-mile stretch of the Weber River (“One Mile Stretch”) is “navigable water” as defined by the Act and therefore accessible to the public. Below, the district court and the parties all agreed that the access-navigability test under the Act requires the same showing as the well-settled federal title-navigability test that controls whether a state took title to submerged lands as an incident

of statehood under the equal footing doctrine.¹ Applying that test, the district court ruled that the One Mile Stretch is “navigable”—and therefore accessible by the public under the Act. But then the district court also declared, unnecessarily, that “the State of Utah holds sovereign land title to the bed of the Weber” River. (R. 892, 949.)

Orange Street Development (“Orange Street”) raises four issues on appeal, only two of which the State will address. First, the State disagrees with Orange Street’s argument that the Act’s definition of “navigable water” differs from the federal title-navigability test applied by the district court. Aplt. Br. 33-38. Second, based on its reading of “navigable water,” the State agrees with Orange Street that the Coalition lacked standing to seek, and the district court lacked jurisdiction to make, unnecessary declarations determining title to the riverbed. *Id.* at 29-33.

The State does not respond to Orange Street’s third and fourth arguments regarding the proper application of the federal navigability test to the facts of this case (whether evidence of log drives confined to the spring runoff period, in the absence of evidence of boat travel, satisfies the test as to the One Mile

¹ Critically, however, the Act incorporates the elements of the federal test into state law for a different purpose—as a test for public *access*, not for state *title*. Accordingly, references in this brief to the federal title-navigability test, or its requirements, are references to the application of the elements of that test in this case *for access purposes* under the Act.

Stretch). At trial, the State briefed the law concerning these issues, but took no formal position on the ultimate question of navigability. Given this stance below, and the fact that it did not appeal, the State does not argue in favor of, or against, the district court's ultimate rulings on navigability and access.

STATEMENT OF THE ISSUES

Issue I: Does the Act's navigability-for-access test require the same showing as the federal navigability-for-title test?

Standard of Review: This Court "review[s] questions of statutory construction for correctness." *State in Interest of A.T.*, 2015 UT 41, ¶ 7, 353 P.3d 131.

Issue II: Did the district court err in declaring that the State of Utah owns the One Mile Stretch's riverbed where no party pleaded a cause of action for quiet title and where the Coalition lacked standing to request such relief?

Standard of Review: Standing is "generally a question of law," reviewed by this Court for correctness. *Mellor v. Wasatch Crest Mut. Ins. Co.*, 2009 UT 5, ¶ 7, 201 P.3d 1004.

DETERMINATIVE PROVISIONS

The following provisions of the Public Waters Access Act are attached hereto as Addendum A: Utah Code §§ 73-29-102, -103, -201, and -203.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On May 5, 2011, the Utah Stream Access Coalition ("Coalition") filed a complaint against Orange Street, and several other private landowners, who collectively claim to own the riverbed and adjoining lands within the One Mile Stretch of the Weber River. (R. 1-10.) The Complaint alleged that these landowners unlawfully interfered with public access to that river segment. (R. 5-6.) The Coalition also sued the Utah Division of Wildlife Resources, the Utah Division of Parks and Recreation, and the Summit County Sheriff, alleging improper law-enforcement action by these governmental entities in citing the public for trespassing in the One Mile Stretch. (R. 3-6.) The Coalition sought relief in the form of declarations regarding the navigability of the One Mile Stretch, and injunctive relief securing access. (R. 8-9.) It also sought a declaration that the "title to the bed of the One Mile Stretch is held by the State." (R. 9.)

Neither the landowner defendants nor the State asserted claims in this matter; they are defendants only. The suit concerns public access; it is not a quiet title case.

The parties stipulated to the substitution of the Utah Division of Forestry, Fire and State Lands in place of the originally named State actors. (R. 121-27.) The landowner defendants each answered the complaint, asserting their title to the riverbed and denying that the One Mile Stretch

qualifies as title-navigable and accessible by the public. (R. 53-60, 75-82, 83-87.)

Before this lawsuit was filed, the State had neither claimed the One Mile Stretch as navigable for title purposes, nor undertaken any formal study of the Weber River's navigability. In light of this fact, the State did not take any formal position below regarding the ultimate question of navigability, although it expressed some skepticism given the Weber River's relatively small size in relation to previously adjudicated rivers and other concerns. Instead, the State acted in an advisory role, addressing the elements of the legal test through briefing, and adducing expert opinion and other evidence at trial to shed light on the river's characteristics.

After a four-day bench trial and closing arguments, (R. 765-67, 771-78, 850, 974-78), the district court issued its Legal Analysis, Findings of Fact and Conclusions of Law on April 10, 2015. (R. 867-92, attached as Add. B.) Citing the Act, the district court ruled that the One Mile Stretch qualified as navigable under the federal test, and that Coalition "members and the general public are entitled to use the riverbed of the Weber River" at the One Mile Stretch "for lawful recreational purposes." (R. 892.) Going beyond these navigability and access pronouncements, the Court also declared that "the State of Utah holds sovereign land title to the bed of the Weber below the ordinary high water mark at the location of the Landowner Properties." *Id.*

The district court entered its final judgment on May 19, 2015. (R. 948-51, attached as Add. C.) Orange Street timely appealed. (R. 952-54.)

SUMMARY OF ARGUMENT

This appeal concerns whether the Act gives the public a right to access the One Mile Stretch. Orange Street asserts that the district court erred in applying the federal title-navigability test in resolving that question.² Specifically, Orange Street contends that the Act's "navigable water" definition differs from the federal test because it fails to specify *when* a river's navigability is to be assessed; whereas the federal test instructs courts to assess navigability as of the 1896 date of statehood, Orange Street contends that the Act looks at a river's navigability today. But Orange Street's reading of the Act's "navigable water" definition as creating a new and different test conflicts with the purpose and structure of the Act because it would allow public access to some closed private riverbeds with no showing of prior use.

² The parties below agreed that the federal title-navigability test was the operative rule. (R.561, 648, 739.) Because Orange Street itself argued and applied the federal test at trial, it relies upon the plain error and related doctrines in urging a different reading on appeal. Aplt. Br. 4, 33-38. The State leaves to the other parties the question of whether this Court should reach this issue. The State's primary interest is to ensure the correct test is applied, particularly because this is a case of first impression. Rather than devote space to an analysis of preservation, the State has instead addressed the merits of this question and the reasons the Act's "navigable water" definition mirrors the requirements of the federal navigability test.

Orange Street's reading also runs directly counter to legislative intent as evidenced by the Act's plain language and legislative history.

Because this is a case about access, and is not a quiet title case, the district court lacked jurisdiction to make ownership declarations constituting quiet title relief. The district court's title declarations should therefore be vacated. Striking the title pronouncements does nothing to undermine the ultimate relief granted—public access can be upheld based on the district court's independently significant navigability findings.

ARGUMENT

I. The District Court Applied The Correct Legal Standard For Stream Access Because The Act Adopts The Elements Of The Federal Title-Navigability Test For State Law Access Purposes.

The test for determining whether a river qualifies as “navigable water,” Utah Code section 73-29-201(1)(a)(i), to which the public has a right of access is the same as the federal navigability test that governs State ownership of submerged lands. The language of the Act itself, confirmed by its legislative history, compels this conclusion. These sources demonstrate the Legislature's central purpose was to provide for recreational access to *public* riverbeds, but restrict access to *private* riverbeds except in the limited circumstances where the owner gives permission to access the bed or where long-term public use establishes prescriptive rights. Reading the Act's

definition of “navigable water” to potentially allow public access to private riverbeds in other circumstances—as Orange Street’s construction necessarily does—violates the purpose and express language of the Act for three reasons.

A. The Act’s “navigable water” definition tracks the elements of the federal navigability test.

The Act’s “navigable water” definition for access cannot apply to private riverbeds because it restates the key elements of the federal navigability test for State (public) riverbed ownership. By following the federal title test, the Act’s definition avoids curtailing public access to any river that would qualify as state-owned and to which the public would already have access under existing law.

The federal title-navigability test is rooted in the seminal case *The Daniel Ball*, which articulated the classic formulation of the federal navigability standard. As Orange Street notes:

The parties agreed [at trial] that the basic formulation of the test . . . was articulated by the United States Supreme Court in 1870: “Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

Aplt. Br. 9 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

The Act's definition of "navigable water" contains a highly similar formulation: "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." Utah Code § 73-29-102(4). The Act's definition thus contains the *Daniel Ball* elements of: (1) river usefulness; (2) for commerce and transportation; (3) in its natural and ordinary condition. This parallel construction is persuasive evidence that the Act's navigability definition is the functional equivalent of the federal title-navigability test. This reading also makes the Act consistent with provisions found in other titles of the Utah Code, such as Utah Code section 23-21-4(1), which states: "there is reserved to the public the right of access to all lands owned by the State, including those lands lying below the . . . high water line of navigable waters, for the purpose of hunting, trapping, or fishing."

Federal riverbed title cases decided after *The Daniel Ball* specify that this test is to be applied to river conditions as of the date of statehood. *See, e.g., United States v. Utah*, 283 U.S. 64, 74 (1931) (noting title passed to Utah in 1896 "if the rivers were then navigable"). Orange Street argues that the Act's definition of "navigable water" is worded in the present tense and does not specify the statehood-era timing element applied by the district court. Appt. Br. 36. To be sure, viewed in isolation the Act's "navigable water" definition does not expressly limit its application to the statehood timeframe.

But, as discussed below, statutory provisions are not read in isolation, and consideration of the Act's broader context confirms it follows the federal title-navigability test.

Indeed, the *Daniel Ball* formulation itself lacks any reference to a statehood element, but it is nevertheless universally cited as the classic statement of the title-navigability test (which applies only to the date of statehood).³ Moreover, some of this Court's own statements referencing federal title-navigability, which served as the model for the Act's definition, are similarly phrased in the present tense and lack any explicit references to the statehood element. *See, e.g., Conatser*, 2008 UT 48, ¶ 9 ("If a body of water is navigable—that is, if it is useful for commerce and has a practical usefulness to the public as a public highway—then the state owns the water's bed") (internal quotations omitted).⁴ Thus, the Act's "navigable water" definition sufficiently states the elements of the federal title-navigability test

³ *The Daniel Ball* was not a title case, but its language is recognized as providing the classic articulation of the test and operates within this area of the law as a kind of shorthand reference to federal title-navigability. *See Oregon by & Through Div. of State Lands v. Riverfront Prot. Ass'n*, 672 F.2d 792 (9th Cir. 1982) (noting "*The Daniel Ball* sounded in admiralty, but the Supreme Court has adopted the same definition in 'navigability for title' cases") (citing *Utah v. United States*, 403 U.S. 9 (1971)).

⁴ This statement is a clear reference to the federal title-navigability test but lacks any statehood-era reference. *Conatser* and other Utah Supreme Court cases, in restating the federal title test, appear to have served as the model for the Act's "navigable water" definition (see footnote 9, below).

(and this Court's restatements of that test) for the two to be treated as the same test.

B. The Act read as a whole confirms that its “navigable water” provision requires the same showing as the federal test for state riverbed title, and does not extend to private riverbed land.

The Act's overall scheme confirms that section 201(1)(a)(i)'s “navigable water” provision does not create a new public-access test capable of affecting private riverbed land. The Legislature instead avoided that result by incorporating the elements of the federal title test governing state ownership into the “navigable water” definition.

In interpreting a statute, this Court reads the “language of the statute as a whole, and interpret[s] its provisions in harmony with other statutes in the same chapter and related chapters.” *LeBeau v. State*, 2014 UT 39, ¶ 20, 337 P.3d 254 (internal quotation marks omitted). “[T]he general purpose, intent or purport of the whole act shall control, and . . . all the parts [shall] be interpreted as subsidiary and harmonious to its manifest object.” *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592 (internal quotation marks omitted). This Court sometimes alters its construction of statutory terms in the interest of statutory harmony. *See Carter v. Univ. of Utah Med. Ctr.*, 2006 UT 78, ¶ 13, 150 P.3d 467 (reading “may” as mandatory—not permissive—where necessary to harmonize provision with both legislative intent and the

statute as a whole). Indeed, even when “[Appellant’s] interpretation has logical appeal when we view the language of [the relevant subsection] in isolation, the canons of statutory construction mandate that we do not read particular statutory language in isolation and that we instead construe that language in light of the legislature’s general purpose as reflected by the statute as a whole.” *Eaquina v. Allstate Ins. Co.*, 2005 UT 78, ¶ 9, 125 P.3d 901. Here, both the Act’s purpose statement, and its overall scheme, confirm that the “navigable water” public access test excludes private riverbeds and tracks the federal test for state title.

1. Orange Street’s reading cannot be reconciled with the Act’s express declarations of legislative purpose.

Orange Street reads the Act’s definition of “navigable water” as a newly-created test for access-navigability, divorced from the federal navigability test for public ownership. Appt. Br. 33-36. Orange Street’s reading of the test as one concerned with navigability as measured today, rather than at statehood, is in many respects more forgiving than the federal test. Regarding boat travel, for example, modern watercraft such as metal canoes and plastic whitewater kayaks can more safely and easily navigate small streams than could larger statehood-era boats of wood and canvas.⁵

⁵ The defendants’ boating expert spoke about differences between historical watercraft and those in use today, (R.975 at 209-10.), and the

Thus, a river that does not qualify under the federal statehood-era test for title might still qualify as a “navigable water” under Orange Street’s modern test. This reading would mean the Legislature created a new species of public access right capable of encumbering *private* riverbeds even where no prior history of public use is shown. All a claimant need show is usefulness for commerce and floatability today regardless of who actually owned the land. This reading, however, runs counter to the Act’s express declaration of legislative purposes.

This Court’s “primary objective in construing enactments is to give effect to the legislature’s intent.” *Gohler v. Wood*, 919 P.2d 561, 562-63 (Utah 1996). The Court will construe the act “in light of the purpose the act was meant to achieve.” *Wilcox v. CSX Corp.*, 2003 UT 21, ¶ 8, 70 P.3d 85 Here, the Act contains an unusually detailed legislative purpose statement.⁶ Although such statements do not themselves confer substantive rights, they

Coalition’s boating expert mentioned improvements in watercraft such as rafts over time. (R.975 at 187.)

⁶ The section 103 purpose statement, as well as subsections 201(2) and (3) discussed below, have been declared unconstitutional in a district court Ruling, Order and Final Judgment dated November 4, 2015 in *Utah Stream Access Coalition v. VR Acquisitions, LLC*, No. 100500558, Fourth Judicial District Court, Utah. That decision has been stayed by this Court pending appeal in Case No. 20151048-SC. These decisions do not affect the purpose for which the State is citing these provisions (as evidence of the legislature’s intent in passing the Act, including its subsection 201(1)(a)(i) “navigable water” provision).

nevertheless “provide guidance to the reader as to how the act should be enforced and interpreted,” *Price Development Co. v. Orem City*, 2000 UT 26, ¶ 23, 995 P.2d 1237 (citing Norman J. Singer, Sutherland Statutory Construction §§ 20.03, 20.12 (5th ed.1993)), and may be viewed as evidence of legislative intent. *De Baritault v. Salt Lake City Corp.* 913 P.2d 743, 745 (Utah 1996). The Act’s purpose statement characterizes legal recognition of a public right to occupy a private riverbed without landowner permission as a “real and substantial invasion of private property rights.” Utah Code § 73-29-103(5). Critically, it identifies only prior “adverse use” as a “constitutionally sound and manageable basis for establishing a limited right of public recreational access on private property” where landowner permission has not been given. *Id.* § 73-29-103(6). The purpose statement also warns against “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.” *Id.* § 73-29-103(2).

Taken together, these statements declare the clear legislative purpose of restricting public access to closed, private riverbeds except in the sole circumstance where prior adverse use by the public establishes prescriptive rights. Given this purpose, Orange Street’s assertion that the Legislature nonetheless created a new navigability test for public access that can apply to

private riverbeds makes no sense. These purpose statements leave no room for Orange Street's interpretation. Reading the "navigable water" definition as tracking the federal title-navigability test avoids this conflict and brings the provision in line with the Act's purpose statement by limiting the grant of access to riverbeds that qualify as public.

2. The Act's central provision governing stream access confirms that the "navigable water" access provision excludes private riverbeds and applies only to rivers that would qualify as publicly owned under the federal test.

Orange Street's argument conflicts not only with the Act's purpose statement, but with its operative provisions. The Act's central provision governing access, section 73-29-201, divides Utah's riverbeds into two categories, publicly owned or privately owned, and establishes different access rules for each. The only way to harmonize the individual parts of section 201 is to treat the term "navigable water" as tracking the federal title-navigability test.

When the definition of "navigable water" is interpreted in this way, it becomes clear that subsection 201(1)(a) describes the two distinct ways in which the State may own riverbed. First, if a river was navigable at statehood the State owns the riverbed itself as sovereign land under federal law. *Conatser*, 2008 UT 48, ¶ 9. This is true even if the State does not own the adjoining upland (*e.g.*, where a navigable stream like the Green River

flows through private property). See demonstrative illustration attached as Add. D. This navigability-basis for state ownership is accounted for in the Act's reference to "navigable water." Utah Code § 73-29-201(1)(a)(i).

Second, the State owns the bed of a river *regardless of navigability* if the river flows over a larger underlying tract of state land (e.g., where a small non-navigable river flows through a block of state school trust land). In contrast to a title-navigable river, such a small stream would be accessible only where it crosses public land, and not where it crosses private land. This second, public-land-basis for ownership is captured in the Act's reference to a river located "on public property." Utah Code § 73-29-201(1)(a)(ii); see demonstrative illustration attached as Add. D. When "navigable water" is read to track the requirements of the federal navigability test, romanettes (i) and (ii) logically form two halves of a whole, and describe the two distinct methods of public riverbed ownership.⁷

By contrast, subsections 201(2) and 201(3) both address access to "public water on *private* property." Utah Code §§ 73-29-201(2), (3) (emphasis added).

⁷ Reading romanette (i) as tracking the federal title-navigability test does not render the "on public land" provision of romanette (ii) redundant, because that provision refers to a distinct basis for ownership. The Legislature's accounting for both methods of public ownership achieves clarity and avoids any potential ambiguity (referencing rivers "on public land" alone might lead a reader to assume the river had to flow through a publicly-owned tract, excluding navigable streams flowing through an area of private land ownership).

Those subsections prohibit public use of private streambeds except under two enumerated circumstances: with landowner permission, or where prescriptive access rights are established by prior adverse use. Utah Code §§ 73-29-201(2), (3). Because subsections (2) and (3) set forth the only two ways that the public can use a private streambed, the “navigable water” access allowed under subsection (1) must necessarily be constrained to embrace only streambeds qualifying as public.

Any construction of the “navigable water” public access provision that potentially allows public use of closed, private riverbed—as Orange Street’s interpretation does—creates an irreconcilable statutory conflict. Orange Street’s argument must therefore be rejected. *Anadarko Petroleum Corp. v. Utah State Tax Comm’n*, 2015 UT 25, ¶ 11, 345 P.3d 648 (“We also construe terms in each part or section of a statute in connection with every other part or section so as to produce a harmonious whole. The meaning of seemingly unclear or ambiguous provisions is often clear when read in context of the entire statute.” (internal quotation marks omitted)).

Here, the Legislature drafted subsection 201(3), in accord with the purpose statement of the Act, to set forth the exclusive means of overcoming the general prohibition on public access to closed, private riverbeds (i.e., via prescriptive rights). To read the “navigable water” access provision as not

being limited to rivers qualifying as title-navigable places section 201's subparts into irreconcilable conflict.

C. The legislative history reinforces that the Act's "navigable water" definition mirrors the federal title-navigability test.

The foregoing analysis of the Act's text and structure resolves the question in the State's view. But even if some ambiguity still remained, it is resolved by the legislative history. *See State v. Watkins*, 2013 UT 28, ¶ 34, 309 P.3d 209 ("Where [statutory] text leaves room for more than one interpretation . . . , the legislative history may be consulted to the extent it informs the prevailing understanding of the ambiguous words of the statute at the time of its enactment" (alterations in original)).

First, in remarks to the House, the bill's sponsor explained that prescriptive rights are indeed the exclusive means recognized in the Act by which the public may access closed, private riverbed. *See* http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=17412&meta_id=513882 ("Day 28") at 153:20 through 157:10 (describing the Act as embracing prescriptive rights and stating the Act does not allow access to private riverbed with no history of public use); *id.* at 158:45 – 159:15 (stating that recognition of any easement, other than by prescription, would require payment of just compensation); *id.* at 203:08 – 203:53 (noting the

bill recognizes a limited public right of access on closed private riverbeds based on history of use); *see also* http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=17416&meta_id=513927 (“Day 29”) at 1:08:20 – 1:08:44 (speaking of access by landowner permission and by prescriptive rights as the means recognized in the Act for public access to private riverbed).⁸ Nowhere in his remarks does the sponsor mention creating a new species of access right applicable to private riverbeds via a “navigable water” test divorced from the test for public ownership.

Orange Street’s reading of “navigable water” as different from the federal title-navigability test (and therefore capable of embracing private riverbeds) would do precisely what the sponsor stated the bill does not do—recognize an additional basis, beyond prescriptive rights, for the public to access closed private riverbeds.

Most important, the sponsor then addressed the “navigable water” definition directly, stating that it was borrowed from existing Utah Supreme Court cases. Day 28 at 208:10 - 208:51. This Court indeed used the very language adopted by the Legislature in the Act’s “navigable water” definition

⁸ Other legislators made similar statements. The Senate sponsor stated the prescriptive rights recognized in section 203 “will be a new right that isn’t in the law now,” not mentioning any second “new right” to access private riverbed through a “navigable water” definition not restricted to rivers qualifying as publicly owned. *See* http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=8906&meta_id=427888 at 1:12:45 - 1:13:35.

in prior cases discussing federal title-navigability.⁹ He then indicated that few water bodies in Utah meet this test, specifically listing as examples Utah waters previously recognized as title-navigable under the federal test.¹⁰ *Id.* Critically, the sponsor then spoke of the Act's "navigable water" definition as corresponding to the test for ownership, stating "most of the rest of the waters we have [beyond the title-navigable examples listed] are considered non-navigable waters, where the streambed is owned by the private property owner." *Id.* He again directly equated navigability under the Act with the test for ownership, stating "the law recognizes that the bed of a non-navigable stream is in fact private," *id.* at 210:20 - 210:36, and further stated "if it's not navigable, then it is restricted because it is privately owned." *Id.*

⁹ Although the sponsor's remark regarding Utah Supreme Court cases, and a similar one made at 2:01:30 – 2:01:48, does not cite to specific cases, he presumably references this Court's decisions in *State v. Monroe*, 175 P.2d 759 (Utah 1946), and *Conatser*. The phrases "natural state without the aid of artificial means" and "useful capacity as a public highway of transportation," employed in the Act's definition of "navigable water," appear in this Court's decision in *Monroe*, which concerned title-navigability. *See Monroe*, 175 P.2d at 761. The phrase "useful for commerce," appears in *Conatser's* restatement of the federal title test. *Conatser*, 2008 UT 48, ¶ 9 (citing *Monroe*, 175 P.2d at 761). The sponsor's comments indicate the Act's definition is not a new creation of the legislature, but represents adoption of this Court's formulation of the existing federal test for access purposes.

¹⁰ The sponsor specifically lists the Green River, Bear River, Great Salt Lake, Utah Lake and the Jordan River as examples. Each of these waterbodies is claimed by the State as title navigable (and many have been judicially determined as such). *See Utah Admin. Code R652-70-100* (referencing the waterbodies the State of Utah claims as title-navigable and to which the State asserts ownership of the bed as sovereign land).

at 2:15:11 – 215:23. Again, for the sponsor in explaining the bill to equate “navigable water” under the Act with riverbeds meeting the test for state ownership makes no sense if the Act’s definition was not intended to track the federal title-navigability test.

In later remarks, the sponsor even more clearly stated that “navigability” under the Act tracks the federal test for public ownership. He states that inclusion of the ‘navigable water’ definition in the Act “is important because waters that are navigable—and I identified those yesterday as the Green River, the Bear River, Great Salt Lake, Utah Lake, and apparently the Jordan River in between—the State owns the beds of those waters, all other waters not navigable are privately owned.” Day 29 at 13:12 – 13:41. He thus treats the “navigable water” definition under the Act as precisely coextensive with the federal test for state ownership.

The plain language of section 201(3), as well as the legislative history, confirm that prescriptive rights are the sole means of establishing public access to closed, private riverbed. “Navigable water” cannot be read, consistent with the language of the Act and its legislative history, as being divorced from the federal test for ownership and creating a new public access right that can encumber private riverbeds that qualify as navigable under a present-day analysis. Moreover, the Act’s language and legislative history directly confirm that the “navigable water” definition was drawn from this

Court's restatements of the federal test for ownership and was intended to function as the equivalent of that test. The district court therefore applied the correct test in resolving the access question below.¹¹

II. The District Court Lacked Jurisdiction To Adjudicate Title To The One Mile Stretch.

The district court ruled that the One Mile Stretch was navigable and therefore publicly accessible under the Act. (R. 892.) But then it went further and also declared that “the State of Utah holds sovereign land title to the bed of the Weber” River at that location. *Id.* The district court lacked jurisdiction to render a title determination, and, in any event, such a finding is unnecessary to the district court’s actual holding. Although the State concedes the obvious title implications of the district court’s navigability findings, and does not intend to ignore those implications, the presence of an unnecessary direct title declaration is of concern to the State because it may lead to future confusion regarding who may quiet title to State land.

The State agrees that the Coalition has standing to seek a navigability determination in support of access relief under section 201(1)(a)(i). The parties also agree that this is not a quiet title case. The primary

¹¹ If this Court rejects the State’s arguments and holds that the “navigable water” test of section 201(1)(a)(i) is a newly-created test requiring a different showing than, and not necessarily encompassing, the federal title navigability test, this Court should remand to the district court to consider application of this new test to the facts.

disagreement between the State and Coalition is in whether the district court's title declaration constituted quiet title relief. The State contends it did, and under the State's reading of the Act's "navigable water" definition discussed above, the district court's pronouncement quieting title was unnecessary to the granting of access relief and therefore improper.

Although the Act's "navigable water" definition incorporates the elements of the federal title-navigability test, it operates within the Act not as the test for title, but as the state law test for access. *See* Utah Code § 73-29-201. In this way the legislature ensured that the Act, in delineating public stream access rights, did not purport to bar access to any riverbed that would qualify as publicly owned.

Adoption of the federal test solely for access purposes places important limits on the proper scope of the findings and relief that may be granted under the Act. Findings regarding *navigability*, and subsidiary *natural condition* and *highway of commerce* findings supportive thereof, directly support access relief under the Act. And because navigability equates with access under section 201(1)(a)(i), a finding of *navigability* ends the inquiry and permits access. Therefore, additional declarations concerning title and ownership are not necessary or proper. In fact, such title declarations constitute quiet-title relief not at issue in this matter. Thus, the district court strayed impermissibly into issuing quiet title relief when it declared

that “the State of Utah holds sovereign land title to the bed of the Weber” River. (R. 892, 949.)

A quiet title case would require a different plaintiff, a different cause of action, and a different form of relief. This is why the parties agree that the present matter is not a quiet title case, and quiet title relief would only be possible in the context of a different case. As the Coalition itself stated:

The Coalition is not seeking to quiet title to the streambed. It seeks a right of access and use only. Depending on the ultimate determination of navigability in this case, the State may in the future decide to bring quiet title actions against the Landowner Defendants and other riparian landowners; however, neither the Coalition nor the State is attempting to assert such claims here.

(R. 337.): *see also* Appellee Br. at 26 (noting the Coalition “is not seeking to quiet title”). For this reason, the State requested that the district court make findings concerning *navigability* for purposes of access relief only, but refrain from making direct title pronouncements unnecessary to resolving the controversy:

The State reiterates that this is not a quiet title case. Only the State and private landowner claimants have standing to quiet title to the subject riverbed land, and no quiet title cause of action has been pled. Instead, the Coalition’s claims seek injunctive relief for access. This claim, given the wording of the controlling statute, implicates the navigability test. For this reason, the State’s proposed findings and conclusions, although they touch upon navigability, do not include direct statements regarding ownership.

(R. 861.)

This connection between the type of relief at issue (public access) and the limited findings necessary to support that relief under the Act (navigability) is also important from a jurisdictional standpoint. Standing in quiet title actions “is limited to parties who could acquire an interest in the property created by the court’s judgment or decree.” *Elder v. Nephi City ex rel. Brough*, 2007 UT 46, ¶ 20, 164 P.3d 1238. Here, the State and private landowner defendants are the only parties who may hold a *title interest* in the riverbed, and are accordingly the only parties with standing to place title directly at issue. Members of the public (including Coalition members) possess an *access interest* in the riverbed, and therefore have standing only to seek the navigability findings necessary to access relief.

This is true under either the traditional or alternative tests for standing. The traditional test requires the plaintiff to show “a causal relationship between the injury to the party, the [challenged] actions and the *relief requested*.” *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 19, 148 P.3d 960 (emphasis added). Here, while the link between the injury and challenged actions is clear, access relief under the Act based on a navigability finding is all that is necessary to redress the Coalition’s injury. Quiet title relief is not. The analysis under the alternative standing test is similar. That test requires a plaintiff to raise issues of “sufficient public importance” to justify recognition of standing where the traditional test is not

met. *Id.* ¶ 39. While stream access may be a matter of public importance, again, stream access relief under the Act requires only navigability findings, not title pronouncements.

This lack of necessity of a title declaration is critical to the standing analysis. Orange Street has argued the One Mile Stretch may not qualify as a “navigable water” under its modern-day reading of the Act’s romanette (i) test. *Aplt. Br.* At 36-37 (discussing Utah Code § 73-29-201(1)(a)(i)). The Coalition notes Orange Street’s argument leaves the public no avenue for relief except proving the river is “on public property” under romanette (ii), which would require a title finding. *Appellee Br.* at 18-19. The Coalition thus argues it “has standing to seek a declaration that the bed of the Weber is on public property *if that is what is necessary* to establish its members’ rights of use under the Act.” *Id.* (emphasis added). But as noted above, Orange Street’s modern-day reading of the test is incorrect, and a title finding is *not necessary* to access relief under romanette (i). Only a navigability finding is required. Because a direct title pronouncement is not necessary to redress the Coalition’s injury and resolve this access case, the traditional and alternative standing tests are not met as to quiet title relief, and the district court lacked jurisdiction grant it.

The positions of the State and Coalition are not entirely at odds. The State agrees that the Coalition had standing to litigate the elements of the

federal title-navigability test, because the Act incorporates the elements of that test into state law for access purposes. The State also agrees the Coalition had standing to seek navigability findings necessary to access relief under romanette (i), and, contrary to Orange Street's position, a showing of federal title-navigability meets that test. But there is therefore no necessity for (and no standing to seek) title declarations to aid in invoking the romanette (ii) "on public land" provision. See Utah Code § 73-29-201(1)(a)(ii).

The State also disagrees with the Coalition's apparent conclusion that the district court's declaration that "the State of Utah holds sovereign land title to the bed of the Weber" River, (R. 892, 949.) does not constitute "a judgment quieting title in the State." Appellee Br. at 30. Quiet title actions are essentially declaratory in nature, 22A Am. Jur. 2d *Declaratory Judgments* § 151 (2016), and the above-quoted statement of the district court declaring the status of title and ownership unavoidably constitutes quiet title relief.¹²

¹² A title declaration need not specify the legal description of the boundaries of a disputed parcel (or how a river boundary might have been affected by accretion, erosion and avulsion as referenced by the Coalition, Appellee Br. at 30-31) to constitute quiet title relief. In *Utah v. United States*, 482 U.S. 193 (1987), for example, the Supreme Court resolved a quiet title action concerning the bed of Utah Lake, but held only that the lakebed was owned by the State of Utah. *Id.* at 209. The case did not resolve the boundary of the State's lakebed ownership (a question not litigated until years later). Similarly in *United States v. Utah*, 283 U.S. 64 (1931), the Supreme Court quieted title to the beds of certain sections of the Green and

To be sure, application of the elements of the federal title-navigability test for access purposes under the Act has obvious implications for State title given that this same showing would control in a quiet title case. The State does not intend to ignore the import of any court findings regarding navigability under the elements of the federal test. Such findings will certainly affect the State's analysis of its own title. But as noted by the Coalition itself, any quieting of title would require the State to take subsequent action by filing a suit of its own. This distinction concerning the type of relief at issue (access vs. quiet title) based on application of the Act's navigability test, although nuanced, is important. The State urges the Court to observe this distinction to maintain future clarity regarding who may quiet title to state land under this Court's precedent.

Where the Coalition states it "is not seeking to quiet title" but "seeks only to vindicate its members' rights of use," Appellee Br. at 26, it has standing to seek the navigability finding necessary to access relief under section 201(1)(a)(i), but no need, or standing, to request title declarations.¹³ The

Colorado rivers, holding only that title was vested in the State of Utah, but not describing the shoreline boundaries of that ownership. *Id.* at 89.

¹³ If this Court accepts Orange Street's argument that the showing required under the "navigable water" test of section 201(1)(a)(i) is different, and in any way narrower, than the federal title-navigability test, it should remand this case for application of that test. Should the One Mile Stretch fail to meet that test on remand, the district court can analyze whether any

district court therefore lacked jurisdiction to grant such relief. *See Gregory v. Shurtleff*, 2013 UT 18, ¶ 9, 299 P.3d 1098.

But this error does not alter the stream access relief granted below. The district court's conclusion that the One Mile Stretch is navigable provides sufficient grounds on its own under the Act to grant the Coalition access. Utah Code § 73-29-201(1)(a)(i).

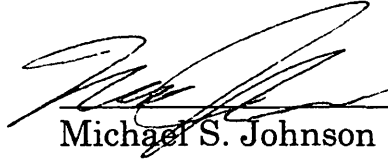
CONCLUSION

The Legislature adopted the elements of the federal title-navigability test in the “navigable water” access provision of the Act in order to protect private landowners, and this Court should therefore affirm the district court's decision to apply the elements of that test in analyzing public access to the One Mile Stretch. This Court should vacate the district court's pronouncements concerning ownership of the riverbed because those declarations constitute quiet title relief the court lacked jurisdiction to grant. The district court's navigability findings, however, should they survive Orange Street's challenge, are sufficient on their own to support the access relief granted below.

resulting necessity of the Coalition to rely upon the “on public land” provision of section 201(1)(a)(ii) establishes standing to seek a direct title declaration.

Respectfully submitted on April 18, 2016.


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CERTIFICATE OF COMPLIANCE

I certify that in compliance with Rule 24(f)(1) this brief contains 7,662 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with Rule 27(b) that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 13 point.



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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf) will be filed and served within 14 days.



Addendum A: Utah Code sections 73-29-102, -103, -201, and -203

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

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

73-29-203 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

Addendum B: Legal Analysis, Findings of Fact and Conclusions of
Law dated April 10, 2015 (R. 867-92)

The Order of Court is stated below:

Dated: April 10, 2015
02:02:23 PM

/s/ Keith Kelly,
District Court Judge



IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

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

Plaintiff,

v.

JAMES FULLER PARK As Trustee of the
Revocable Trust Of James Fuller Park; ORANGE
STREET DEVELOPMENT, A Utah limited
partnership; WENDELL J. STEMBRIDGE and ILA
D. STEMBRIDGE, as Trustees of the Wendell J.
Stembridge Intervivos Revocable Trust dated the 29th
day of November 1988; VERN G. STEMBRIDGE
and DOROTHY MECHAM STEMBRIDGE, as
Trustees of The Vern G. Stembridge And Dorothy M.
Stembridge Trust dated December 7, 1989; UTAH
DIVISION OF WILDLIFE RESOURCES, an agency
of the State of Utah; the UTAH DIVISION OF
PARKS AND RECREATION, an agency of the State
of Utah; and SHERIFF DAVID A. EDMUNDS, in
his official capacity as Summit County Sheriff,

Defendants.

**LEGAL ANALYSIS,
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 110500360

Judge Keith A. Kelly

This matter came before the Court for a bench trial on February 6 and 9-11, 2015.

Closing argument was held on March 4, 2015. W. Cullen Battle and Craig C. Coburn appeared as counsel for Plaintiff Utah Stream Access Coalition (the "Coalition"). Anthony W. Schofield and Peter C. Schofield appeared as counsel for Defendant Orange Street Properties. Michael S. Johnson and Douglas J. Crapo appeared as counsel for the State of Utah, Division of Forestry, Fire & State Lands, having been substituted for the Utah Division of Wildlife Resources and the Utah Division of Parks and Recreation. Jared G. Parkinson, as counsel for Defendant Park, and Scott A. Dubois, as counsel for the Stembridge Defendants, were excused by stipulation.

Defendants Orange Street, Park and Stenbridge will be referred to as the “Landowner Defendants.”

Having received, heard and considered the pleadings, evidence, testimony and arguments of counsel, the Court issues the following legal analysis, findings of fact, and conclusions of law.

I. Legal Analysis:

The issue in this case is whether members of the public may use for recreation – including fishing – the riverbed on the “one-mile stretch” of the Weber River adjacent to the Landowner Defendants’ properties.

This question requires the Court to determine whether the Weber River in this stretch is “navigable” under the applicable legal definition. The Plaintiff Coalition asserts that the Weber is navigable under federal law where it passes through Landowner Defendants’ properties. If the Weber River is considered navigable at that location, then the riverbed is state sovereign land and members of the public have the right under state law to use it for recreation. *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 919-20 (Utah 1993) (state has a public trust obligation to protect “public recreational uses [of sovereign lands] for the benefit of the public at large”); Utah Code §73-29-201(1) (“[t]he public may use a public water for recreational activity if the public water ... is a navigable water”).¹

The issue of State ownership of the bed of the Weber River is based upon whether it was considered navigable at statehood on January 4, 1896. At statehood, Utah gained sovereign title to the beds of all waters in the State then navigable. *PPL Montana, LLC v. Montana*, 132 S.Ct.

¹ In *Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897, the Utah Supreme Court held that the public has a right to use the beds of all waters in the state. But this ruling, based on the public ownership of waters, and not on their capacity for navigation, appears to have been overruled in 2010 when the Utah Legislature passed the Public Waters Access Act, Utah Code §73-29-101, *et seq.* As state law stands today, Utahans are allowed to use the beds of rivers where they cross private lands only if the rivers are navigable for title purposes under federal law.

1215, 1227 (2012). Under the equal footing doctrine, title passed automatically at statehood. *Id.*, see also *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987); *National Parks and Conservation Association*, 869 P.2d at 917.

There was no enumeration of which waters in the State were navigable at statehood. Instead, navigability must be determined case by case under the following test articulated by the United States Supreme Court in *The Daniel Ball*, 10 Wall. 557, 563, 19 L.Ed. 999 (1871):

The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact. Rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The *Daniel Ball* test, sometimes referred to as the “navigability-in-fact” rule, continues to apply today in navigability cases brought to determine riverbed ownership, and must be applied to the Weber River in this case. See *PPL Montana*, 132 S.Ct. at 1228.

Two additional elements are added to the *Daniel Ball* test to determine whether a water body is navigable for title purposes. First, under the equal footing doctrine, navigability is determined at the time of statehood, when title is deemed to have passed. *Id.* This means that a waterway navigable at statehood will always remain so, regardless of post-statehood changes in conditions. See *id.* Second, navigability for title is based on the “natural” and ordinary condition of the water. *Id.* (quoting *Oklahoma v. Texas*, 258 U.S. 574, 591 (1922)). This element eliminates waters that are made navigable only by artificial improvements.

Thus, the *Daniel Ball*/navigability-for-title test consists of five elements:

1. Use or susceptibility of use of a waterway;
2. In its natural and ordinary condition;

3. As a highway of commerce;
4. At statehood; and
5. In the customary modes of trade and travel over water.

If the Weber River meets this test where it passes through the Landowner Defendants' Properties at the one-mile stretch, then the riverbed at that location is state sovereign land and the public has the right to use it for recreation.

Determining navigability is not limited to considering whether ships or boats can pass through the Weber River at the one-mile stretch. Navigability can be based upon proof of use of the river for other forms of commerce at the time of statehood. The United States Supreme Court explains that navigability depends on whether "the stream in its natural and ordinary condition affords a channel for useful commerce." *United States v. Utah*, 283 U.S. 64, 76 (1931) (quoting in *United States v. Holt State Bank*, 270 U. S. 49, 56 (1926)). The Court adds that "'the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation,' and that 'it would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.'" *Id.* (quoting *The Montello*, 20 Wall. 430, 441-442 (1874)²).

Consistent with this authority, two state supreme courts and one federal appellate court have ruled that log drives are a basis for establishing navigability in a title case. *State v. Bunkowski*, 503 P.2d. 1231, 1233-36 (Nev. 1972); *Montana Coalition for Stream Access v.*

² The recent decision of *PPL Montana* distinguished *The Montello* decision, explaining that it did not address navigability "for title purposes," but dealt with navigability for purposes of determining federal government regulation of boat travel. See *PPL Montana*, 132 S.Ct. at 1231-22. The *United States v. Utah* decision quoted in the preceding paragraph, however, addressed the issue of navigability for purposes determining title. 270 U.S. at 71 (the United States sought to quiet title to the beds of portions of the Green, Colorado and San Juan rivers within Utah).

Curran, 682 P.2d 163, 166-68 (Mont. 1984); *Oregon Division of State Lands v. Riverfront Protection Association*, 672 F.2d 792, 794-96 (9th Cir. 1982).

The *PPL Montana* case is the most recent case from the United States Supreme Court addressing navigability for title. *See* 132 S.Ct. at 1226-29. In the *PPL Montana* case, however, the United States Supreme Court did not discuss the issue of log drives and did not rule out the potential for finding navigability based upon log drive evidence. *See id.* at 1236 (remanding for consideration of navigability issues).³ Thus, the *PPL Montana* decision does not overrule earlier authorities that based navigability determinations on evidence of log drives, and it does not bar a determination of navigability of the one-mile stretch of the Weber River based upon log-drive evidence.

The Court has also considered arguments concerning the seasonality of log drives or other navigational uses. The fact that, during certain seasons of a year, a waterway may not be useful for commerce or trade should not bar a finding of navigability. Some navigable waterways may not be passable due to ice or freezing during winter seasons. Others may not be useful for commerce during high runoff periods, while others may not be useful for commerce during low runoff periods. This Court concludes that evidence of seasonality of commerce on a waterway should not bar a finding of navigability, provided that the waterway was regularly used for commerce on a seasonal basis, and was not dependent on unusual conditions for use in commerce. *See PPL Montana*, 132 S.Ct. at 1234 (“While ... a river need not be susceptible of navigation at every point during the year, neither can that susceptibility be so brief that it is not a

³ The Montana Supreme Court decision in *PPL Montana* mentioned log drive evidence, *see PPL Montana, LLC v. State*, 229 P.3d 421, ¶ 27 (referencing log drives on the Madison River), *reversed by PPL Montana*, 132 S.Ct. 1215, but in reversing the state court decision, the United States Supreme Court decision did not discuss this evidence. Rather, it remanded to the Montana state courts for consideration of the evidence – presumably including log drive evidence – in light of the Court’s decision. *PPL Montana*, 132 S.Ct. at 1236.

commercial reality.”) Evidence of regular seasonal commerce can satisfy the *Daniel Ball*/navigability-for-title test.

In hearing the evidence in this case, the Court was presented with evidence that federal surveyors in the 19th Century did not “meander” the Weber River by establishing boundaries based upon the edge of the river. This is not persuasive to this Court. A decision to meander a river in a survey may indicate that the surveyors thought the river was navigable for practical purposes. But a failure to meander a river could be based upon any number of reasons, including budget constraints or a desire to complete the survey without the complexity of determining meander lines. More importantly, in this case there is no evidence that the surveyors of the Weber River basin were aware of the legal standards for navigability as laid out in the *Daniel Ball*/navigability-for-title test. Thus their failure to meander the Weber River is not relevant to this Court’s decision.

Under the applicable authorities, the Court considers both pre-statehood and post-statehood evidence of commercial use of the Weber River, provided that such evidence is probative of conditions and commercial uses, or susceptibility of commercial uses, at statehood. *PPL Montana*, 132 S.Ct. at 1233; *Utah v. United States*, 403 U.S. 9, 11 (1971); *United States v. Utah*, 283 U.S. at 76, 82-83.

II. Findings of Fact:

Based upon the preceding legal analysis, the Court has weighed the evidence and makes the following findings of fact.

a. Background to the Dispute

1. Defendant James Fuller Park is the trustee of the Revocable Trust of James

Fuller Park ("Park"), which owns real property abutting the Weber River in Summit County, Utah, more specifically described as Parcel No. CD-33 in the tax records of Summit County ("the Park Property").

2. Defendant Orange Street, a Utah limited partnership, owns real property abutting the Weber River in Summit County, Utah, more specifically described as Parcel No. CD-32 in the tax records of Summit County ("the Orange Street property").
3. Defendants Wendell J. Stembridge and Ila D. Stembridge are the trustees of the Wendell J. Stembridge Intervivos Revocable Trust dated the 29th day of November 1988, which owns real property abutting the Weber River in Summit County, Utah, more specifically described as Parcel No. CD-161 in the tax records of Summit County.
4. Defendants Vern G. Stembridge and Dorothy Mecham Stembridge are trustees of the Vern G. Stembridge and Dorothy M. Stembridge Trust dated December 7, 1989, which owns real property abutting the Weber River in Summit County, Utah, more specifically described as Parcel No. CD-99 in the tax records of Summit County. The properties identified in paragraphs a and a are referred to as the Stembridge properties.
5. Orange Street, Park, and the Stembridges are collectively referred to as the "Landowner Defendants" and their properties as the "Landowner Properties." The "One Mile Stretch" consists of the course of the Weber River adjacent to the Landowner Properties. The Landowner Properties are a group of parcels

along a three mile stretch of the Weber River, but which together are approximately one mile in length.

6. In the past, the Coalition's members and the public at large used the streambed of the Weber at this location for fishing and other recreational purposes. (Stipulation of Facts for Purposes of Trial, dated January 21, 2015.)
7. The Landowner Defendants assert ownership of the bed of the Weber where it passes through the Landowner Properties. Currently, "no trespassing" signs prohibit public recreational use of the riverbed at this location. As a result, the Coalition's members have stopped using the riverbed at this location. (*Id.*)
8. The Coalition asserts that the Weber River is navigable where it passes through the Landowner Properties and that the riverbed is state sovereign land open to public recreational use under state law. The Landowner Defendants assert that the Weber is not navigable, that they consequently own the riverbed adjacent to their properties, and that they are entitled to restrict or exclude public use of the riverbed under state law. (*Id.*)
9. The Coalition's members desire to resume their use of the riverbed of the Weber at this location for fishing and other lawful recreational purposes. If allowed by a ruling of this court, they would do so immediately. (*Id.*)

b. Physical Characteristics of the Upper Weber River

10. The Weber River's headwaters lie high in Utah's Uintah Mountains. (Exhibits 1, 100.) From there the river winds for 125 miles, west to Oakley, Utah, then northwesterly through Summit (approximately 70 miles), Morgan (25 miles),

and Weber (30 miles) counties to its final destination in the Great Salt Lake. (Exhibits 1, 100.) The major tributary is the Ogden River, which joins the Weber River approximately twelve miles upstream from the mouth. (Exhibit 100.) Other tributaries such as Cottonwood, East Canyon, Lost, Echo, Chalk, Silver and Beaver creeks also augment the Weber's flow along its course. (Exhibit 100.)

11. For purposes of this case, the Weber River can be divided into two sections -- the Upper Weber from its headwaters near Holiday Park to Echo, Utah (approximately 40 miles, which includes the Landowner Properties) and the Lower Weber from Echo to the Great Salt Lake (approximately 80 miles).
12. The most useful stream gauge for measuring the flow of the Upper Weber is the Oakley Gauge located approximately 6 miles upstream of the Landowner Properties near Oakley, Utah. This gauge has been in operation since 1905, nine years after statehood. Although some upstream irrigation diversions and one impoundment reduce the flows measured at the Oakley Gauge, this gauge is the best available source of natural stream flow data on the Upper Weber River. (Hasenyager testimony.)
13. The Oakley Gauge is located above the confluence with Beaver Creek, a significant tributary that joins the Upper Weber before it reaches the Landowner Properties. (*Id.*)
14. Since 1905, the average mean annual flow of the Upper Weber recorded at the Oakley Gauge is 216 cubic feet per second ("cfs"). Mean annual flow is the

average flow of the river for the entire year. (Exhibit 101.)

15. Like many mountain rivers in the West, the bulk of the Weber's flow comes in the spring runoff season, typically during the months of May and June.

(Hasenyager testimony; Exhibit 128.)

16. Since 1905, the average of the highest mean flow for any two-month period at the Oakley Gauge is 783 cfs. Mean monthly flow is the average flow of the river for the entire month. (Exhibit 101; see also Exhibit 128.)

17. Since 1905, annual peak flow of the Upper Weber at the Oakley Gauge has averaged 1889 cfs. Annual peak flow is the highest flow in the river in a given year. (*Id.*)

18. Since 1905, mean daily spring flows at the Oakley Gauge have exceeded 500 cfs an average of 44 days per year, 800 cfs an average of 26 days per year, and 1,000 cfs an average 18 days per year. Mean daily flow is the average flow of the river for the entire day. (Exhibit 128, p. 1.)

19. During its site visit to the Upper Weber on June 9, 2014, the Court observed the Weber River at various locations when the flow at the Oakley Gauge was approximately 530 cfs. (Hasenyager testimony.)

20. In addition, the Court viewed a video of flows taken at the same locations on May 28, 2014, when flows were approximately 1450 cfs at the Oakley Gauge. (Exhibit 63.)

21. Mean annual flow during 2014 was 177 cfs, approximately 82% of normal. (Exhibit 35; Hasenyager testimony.)

22. The above-referenced data from the Oakley Gauge quantifies flows and describes flow regimes on the Upper Weber from 1905 to present. The only evidence of differences between statehood and post-statehood conditions on the Upper Weber consists of dams, reservoirs and diversions, mostly constructed since the 1930s, that diminish present-day flows below the Oakley Gauge. (Hasenyager testimony; Dant testimony.) Accordingly, the Court finds that present-day flows on the Upper Weber above the Oakley are not materially different than they were at statehood, and that conditions at statehood below Oakley were more favorable than present-day flows for the commercial uses at issue in this case.
23. The Court finds the expert testimony of the Coalition's expert witness Gary C. Nichols to be persuasive on the present-day conditions and characteristics of the Upper Weber and the flows at which it is capable of floating small recreational boats and cut logs 8-10 ft. long during normal spring flows.
24. The average and generally continuous gradient of the Upper Weber from Holiday Park to Wanship is 65 feet per mile. (Stipulation Concerning River Gradients & Federal Survey Facts ¶ 13; Exhibit 113; Nichols Testimony.) That is, the river falls vertically 65 feet for every mile it runs horizontally. The Weber River's overall gradient is approximately 47 feet per mile. (*Id.*)
25. From Holiday Park to Wanship, the character of the Upper Weber during spring flows is fast and continuous small Class 1-3 rapids. The riverbed is comprised of cobbles/river-rock. While there is some braiding, there are no

waterfalls, impassable gorges or other permanent natural obstacles to navigation by small recreational boats or cut logs 8-10 ft. long during normal spring flows. (Nichols testimony.)

26. From Wanship to Echo, the character of the Upper Weber during spring flows is similar, albeit somewhat slower and deeper Class 1-2 rapids. Again, the riverbed is comprised of cobbles/river-rock and, while there is some braiding, there are no waterfalls, impassable gorges or other permanent natural obstacles to navigation by small recreational boats or cut logs 8-10 feet long during normal spring flows. (*Id.*)
27. Presently, the Upper Weber can easily float small recreational boats and cut logs 8-10 ft. in length at flows above 500 cfs. (*Id.*)
28. The only evidence of differences between statehood and present-day conditions on the Upper Weber consists of the dams, reservoirs and diversions mentioned above. In the absence of evidence suggesting otherwise, and given the history of documented statehood-era log drives on the Upper Weber, the Court finds that general conditions and characteristics on the Upper Weber during the statehood era or in 1896 were not materially different than present-day conditions and characteristics.
29. No portion of the Upper Weber was meandered in the original federal land surveys of the area. (Stipulation Concerning River Gradients and Federal Land Survey Facts.)

c. Statehood Era Commercial Uses of the Weber River

30. The Court finds the expert testimony of the Coalition's expert witness Dr. Sara Dant to be persuasive on the history of statehood era commercial uses of the Weber River and other rivers in the region.
31. In 1852, Robert Gardner, a prominent early pioneer sawmill operator, surveyed the Weber River for "timber and floating purposes" from the mouth of lower Weber Canyon to the headwaters, including the section passing through the Landowner Properties. He found the River generally to be good for log floating. (Exhibit 2.)
32. In the 1850s and 1860s, logs were floated down the Lower Weber to sawmills at Morgan and Uintah, Utah. The historical record does not indicate how far up the River these log floats started, or whether they passed through the Landowner Properties. (Exhibits 3-6.)
33. In 1868, the Transcontinental Railroad brought the railroad tie industry to the Central Rockies and the Intermountain West. Men called "tie hacks" cut and hewed millions of railroad ties in the high mountains and transported them by river for the building and maintaining of the western railroads. (Exhibit 12; Dant testimony.)
34. River drives were a critical component of the railroad and railroad tie industries. Rivers that connected the timber forests in the mountains with a railroad line were chosen for these drives. (*Id.*)
35. During the fall and winter, tie hacks cut and hewed ties in the forest and

skidded or hauled them by sled to the streamside. During spring runoff, the ties were released into the river and driven downstream to the rail connection. On most rivers, tie drives could dependably occur during spring runoff, although normal flows at other times of the year might be insufficient for drives. (*Id.*)

36. Tie drives first occurred in northeastern Utah in 1868 on the Bear and Blacks Fork Rivers. (*Id.*)

37. In 1869, the Union Pacific extended the Transcontinental Railroad to Echo, Utah, and established a connection between the railroad and the Upper Weber River. (Dant testimony.)

i. Railroad Tie Drives on the Upper Weber

38. The first documented tie drive on the Upper Weber occurred in the spring of 1877. This drive started in the headwaters of the Weber near Holiday Park, proceeded downstream to the rail line at Echo, Utah, and along the way it passed through the Landowner Properties. (Exhibits 8-11; Dant testimony; Rodgers testimony.)

39. This drive was conducted by Coe and Carter, a primary provider of railroad ties to the Union Pacific Railroad. (Exhibit 9; Exhibit 11, p. 89; Exhibit 12, pp. 22-26.) Henry Somsen was the foreman of the crew, and a tie hack named George Carter drowned during the drive a short distance above the confluence with Smith and Morehouse Creek. (*Id.*)

40. The ties were likely used for Union Pacific branch lines in the area. (Dant testimony.)

41. A news report from Peoa stated that "large numbers" of ties were transported during this drive. (Exhibit 8.)
42. Another tie drive occurred in 1879, starting in upper Weber canyon and passing through the Landowner Properties. (Exhibit 20, pp. 194-95; Exhibit 11, p. 5; Exhibit 81; Dant testimony; Rodgers testimony.)
43. At least one and probably two documented drives occurred in the spring of 1880 to supply ties for two competing rail lines under construction from Echo to Park City. These lines were the Union Pacific's broad gauge Summit County Railway, and the locally owned narrow gauge Utah Eastern Railway. Each line required at least 60,000 railroad ties. These drives originated at the "head of Weber River" which came to be known as Holiday Park. The drives went to Echo, passing through the Landowner Properties. (Exhibits 13-15; Dant testimony; Alexander testimony; Rodgers testimony.)
44. After the completion of the two rail lines to Park City, Samuel Liddiard constructed a log boom on the Weber River at Wanship, where the new rail lines crossed the river on their way to Park City. (Exhibit 14.)
45. In 1881, "a Peoa man" drove at least 42,000 ties from the upper Weber canyon, passing through the Landowner Properties to Wanship, where Samuel Liddiard removed them from the river at the boom. (*Id.*; Dant testimony; Alexander testimony; Rodgers testimony.) This drive supplied ties to the Union Pacific Railroad, probably for the Oregon Short Line, a major regional line then under construction. (Dant testimony.)

46. During the winter of 1881-82, the Union Pacific ran newspaper ads seeking 100 woodchoppers to cut ties on the Weber River and its branches. (Exhibit 16.)
47. In the spring of 1882, Henry Goddard, working for the Johnson and Liddiard Company, drove railroad ties from the “head of Weber River” to Wanship for the Union Pacific Railroad, probably for the Oregon Short Line. This drive also passed through the Landowner Properties. (Exhibit 17, p. 2; Dant testimony; Rodgers testimony.)
48. The fact that the Union Pacific sought 100 tie cutters that winter suggests that the 1882 drive contained a very large number of railroad ties. (Dant testimony.)
49. During the winter of 1882-83, the Union Pacific ran a newspaper ad seeking 25 woodchoppers to cut ties on the Weber River and its tributaries. (Exhibit 18.)
50. Given what happened during the previous years, this ad suggests a strong possibility that a tie drive occurred in the spring of 1883, passing through the Landowner Properties. (Dant testimony.)
51. In the spring of 1896, the Salt Lake Tribune reported that the Salt Lake & Pacific Railroad was “getting out a large number [of railroad ties] in Weber canyon.” (Exhibit 21.)
52. At the time, a reference to “Weber canyon” in the context of railroad tie cutting was a reference to the upper Weber canyon above Oakley. (Dant testimony; see Exhibit 20, p. 194; Exhibit 22, p. 104; Exhibit 43; Exhibit 46, p. 79.)
53. There is no record at any time of large quantities of railroad ties or other raw

timber products having been hauled overland from upper Weber canyon. (Dant testimony; Rodgers testimony.)

54. Given the high cost of overland hauling versus river driving, such an endeavor would have been economically infeasible. (Exhibit 3, p. 189; Exhibit 12, p. 9; Exhibit 52, pp. 24-25, 50)
55. Accordingly, it is more probable than not that the Salt Lake & Pacific ties were driven down the Upper Weber past the Landowner Properties to Wanship about 1896. (Dant testimony.)
56. It is likely that other tie drives occurred on the Upper Weber during the 1870s through the 1890s that would have passed through the Landowner Properties, although exact dates and circumstances are not specifically documented in the historical record. (Dant testimony.) The likelihood of these additional drives is demonstrated by the following:
 - a. A 1914 news article containing a regional forester's reflections on the history of logging in the Kamas area states that 25 or 30 years earlier "Keefer & Thompson drove ties down Beaver Creek to Wanship five or six times..." (Exhibit 19.) These drives would have passed through the Landowner Properties. (Id.)
 - b. The biography of Henry Somsen, the foreman of the 1877 Coe and Carter drive, states that he worked at least three years on the Weber River. (Exhibit 11, p. 5.)

ii. Railroad Ties Drives on Nearby Rivers

57. From the late 1860s until the 1930s railroad tie drives were a common practice on rivers in northeastern Utah, and across the Intermountain West and the Central Rocky Mountain Region. (Exhibit 12, p. 264; Dant testimony.)
58. Numerous tie drives occurred on the Provo River from the late 1870s to the early to mid-1890s, on the Upper Bear River (from its headwaters in Utah to Evanston, Wyoming) and on the Blacks Fork River (from its headwaters in Utah to Granger, Wyoming) from 1868 until the 1930s. (Dant testimony; Exhibits 17, 53-58.)
59. For instance, tie drives have been documented on the Provo River in 1879, 1881, 1882, 1888, 1890, 1891, 1893, and 1894. (Dant testimony.)
60. As with the Upper Weber, the tie drives on these rivers were performed during spring runoff conditions. (Dant testimony; Exhibits 17, 53-58.)
61. Like the Weber, these rivers originate in the western Uinta Mountains. They are similar in size and flow to the Upper Weber, and have similar characteristics in terms of seasonal runoff, bed composition, some braiding, continuous steep gradients, Class 1-3 rapids and no permanent obstacles to navigation by small recreational boats or cut logs during normal spring flows. (Exhibit 1; Exhibit 59; Nichols testimony.) In the absence of evidence to the contrary, and given the history of documented statehood-era drives on these rivers, the Court finds that these similarities also existed in the statehood era.

iii. Mining Timber and Cordwood Drives

62. In the 1880s, the mining boom in Park City led to the depletion of local supplies of mining timbers and cordwood. After the success of the Upper Weber tie drives, news accounts predicted that the Park City mines would draw upon the "vast the forests at the head of the Weber River" for their supply of mining timbers and cordwood "for years to come," and that these products would be floated down the Weber River to the boom at Wanship and then shipped by rail to Park City. (Exhibits 26, 27.)
63. The first documented drive of mining timbers and cordwood started in the summer of 1888. The previous winter and spring George Kidder had cut 1000 railroad cars worth of mining timbers at the headwaters of the Weber for the Ontario and Daly mines. (Exhibit 30.)
64. According to a report from Peoa, dated July 26, 1888, Kidder's log drive was "tied up here owing to low water." (Exhibit 31.)
65. There is no record of flows on the Upper Weber during 1888. However, low water and snowpack conditions were also reported on the Provo River that year, although a tie drive was successfully completed on that river in June. (Exhibits 117, 118.)
66. The date of the report of Kidder's 1888 drive (July 26) indicates a possibility that the drive hung up because of a late start. (Dant testimony.)
67. Kidder resumed the drive the following spring. According to a report from Peoa dated May 4, 1889, workers were driving logs "now on the river" to

Wanship, but “the water in the Weber is very low for this time of year, and it will be almost impossible to drive the logs that are now cut in the canyon.” (Exhibit 32.)

68. The logs that Kidder put in the river in 1888 passed through the Landowner Properties either in 1888 in 1889, depending on where in Peoa they were hung up. (Dant testimony; Rodgers testimony.)
69. There is no precise record of flow conditions on the Upper Weber during the spring of 1889. However, an irrigation article reported that drought conditions existed on the Lower Weber in 1889. (Exhibit 80.)
70. Drought conditions were also reported on the Provo River in 1889, where a tie drive failed that year. (Dant testimony.)
71. The difficulties associated with the Kidder drive in 1889 were likely the result of extreme drought and were not reflective of normal conditions on the Upper Weber. (Dant testimony.)
72. Normal river conditions returned in the spring of 1890. (Exhibits 80, 127.)
73. Kidder succeeded that year in driving the rest of his mining timbers and cordwood to Wanship, passing through the Landowner Properties. (Exhibit 33.)
74. The wood from Kidder’s drive supplied the mines in Park City for at least two years. (Exhibits 37, 38.)
75. It is likely that other drives of mining timber and cordwood occurred on the Upper Weber that would have passed through the Landowner Properties during

the 1880s and 90s, although exact dates and circumstances of the drives are not specifically documented in the historical record. The likelihood of these additional drives is demonstrated by the following:

- a. News accounts in 1892, 1893 and 1894 continued to refer to large quantities of mining timber coming to Park City from mills on the Weber River above Wanship. (Exhibits 40-42.)
- b. Family histories from families living along the Weber in Wanship report "regular drives" or drives "each year" of mining timbers and cordwood during this period. (Exhibits 47-48.)

iv. Log Drives to Saw Mills

76. In the 1880s and 1890s, logs were floated down the Weber River from the upper Weber canyon to various sawmills located along the river to be processed into lumber. (Exhibits 43-44; Exhibit 46, p. 79.)
77. At least one mill to which logs were floated was located north (downstream) of Wanship. (Exhibit 20, pp. 194-95.) Logs floated to this mill would have passed through the Landowner Properties.
78. Several saw mills were located at Peoa in the early 1890s. (Exhibit 78, p. 201.)
The historical record does not reveal whether these mills were located above or below the Landowner Properties.
79. At these mills, logs were milled into lumber, shingles and other milled products that were then hauled overland to Park City. (Dant testimony; Alexander testimony.)

80. The shortest route between Peoa and Park City during the early 1890s was via the Browns Canyon Road, which crosses the River at the Landowner Properties, making them an ideal location for one or more of the Peoa saw mills. (Exhibit 121; Rodgers testimony.)

81. Any log floats to the Browns Canyon Road could have passed through some of the Landowner Properties. At the very least, log floats to any saw mills located in Peoa would demonstrate the susceptibility of the Upper Weber to float logs where it passes through the Landowner Properties.

d. Ultimate Findings Regarding Navigability in Fact

v. Actual Use as a Highway of Commerce Over Which Trade and Travel Were Conducted

82. Based on the facts set forth above, from the late 1870s to 1896, the Upper Weber was used as a highway of commerce in transporting railroad ties for local and regional railroad lines. It is likely that most of this commerce passed through the Landowner Properties.

83. During the 1880s and 1890s, the Upper Weber was used as a highway of commerce in transporting mining timbers and cordwood to the major mining center in Park City. It is likely that a large portion of this commerce passed through the Landowner Properties.

84. During the same period, the Upper Weber served as a highway of commerce in transporting saw logs to various sawmills located on the river at Wanship and above. Some of this commerce passed through the Landowner Properties.

85. Log or tie drives passing through the Landowner Properties are known or are

likely to have occurred during the following years: 1877 (known), 1879 (known), 1880 (known), 1881 (known), 1882 (known), 1883 (likely), 1888 or 1889 (known), 1890 (known), and 1896 (likely). (Exhibit 64.)

**vi. Susceptibility of Use as a Highway of Commerce
Over Which Trade and Travel May Have Been
Conducted**

86. Apart from the difficulties associated with the Kidder drive(s) in 1888-89, there is no evidence suggesting that absence of documented drives on the Upper Weber during other years leading up to statehood was due to unfavorable river conditions. It is more probable than not that factors unrelated to river conditions account for the absence of documented drives during such years, including:

- a. Depletion of timber supplies in Upper Weber canyon (Dant testimony; Exhibit 21);
- b. Competition from timber supplies on other rivers, such as the Provo (Dant testimony);
- c. Financial crises affecting the Railroad industry and lumber markets, such as the Panic of 1893 and the bankruptcy of the Union Pacific (Dant testimony);
- d. Lack of news sources in the area (Dant testimony); and
- e. Increasing lack of newsworthiness of river drives over time (Exhibit 12, p. 81; Dant testimony.)

87. The documented log and tie drives on the Upper Weber between 1877 and

1896, coupled with the lack of any evidence suggesting that the natural and ordinary condition of the Upper Weber at statehood differed materially from what it was leading up to statehood or from what it is today, establishes that the Upper Weber was susceptible of being used for log and tie drives under normal conditions throughout the statehood era, including in 1896.

88. The documented drives on the Provo, Upper Bear and Blacks Fork during the statehood era further indicate that the Upper Weber was used for log and tie drives under normal conditions throughout the statehood era, including in 1896.

vii. Customary Modes of Trade and Travel

89. The log and tie drives on the Upper Weber were conducted in the customary modes of trade and travel over water, as evidenced by the widespread use of seasonal log and tie drives on other rivers in the region.

viii. Natural Condition

90. The log and tie drives occurred on the Upper Weber in its natural condition. The only evidence of stream alterations to aid drives consists of occasionally building up banks to prevent logs from floating into low lying meadows, winging off side streams and channels, and/or digging out the riverbed to prevent log jams. (Exhibits 48, Exhibit 17, p. 1.) These alterations did not substantially alter the natural character of the stream channel.
91. There is no evidence on the Upper Weber of splash dams or other techniques used to drive logs down small streams otherwise incapable of floating logs.

(Dant testimony; Rodgers testimony.)

ix. Ordinary Condition

92. The log and tie drives on the Upper Weber were usefully and dependably performed during ordinary spring runoff conditions, and even though occasional droughts or other factors may have interfered with the progress of the drives.

x. Useful Commerce

93. The log and tie drives on the Upper Weber represented useful commerce and played a significant role in developing the railroad and mining industries in northern Utah and the surrounding region.
94. The log and tie drives on the Upper Weber were useful in providing wage-paying employment for the men of Wanship, Peoa, Oakley and other communities along the River. This work included not only the running of the river drives in the spring, but cutting and hauling ties and timbers in the Uinta Mountains throughout the fall and winter and preparing them for the spring drives. These activities added significant value to local economies.

xi. Navigability in Fact

95. Where it passes by and through the Landowner Properties, the Weber River was, at the time of statehood, used and susceptible of being used, in its natural and ordinary condition, as highway of commerce, over which trade and travel were conducted in the customary modes of trade and travel over water. Thus, it is navigable in fact.

III. Conclusions of Law:

Based upon the preceding legal analysis and findings of fact, the Court enters the following conclusions of law.

1. Under applicable federal law, a river that is navigable in fact is navigable in law. *The Daniel Ball*, 10 Wall. 557, 563, 19 L.Ed. 999 (1871); *United States v. Utah*, 283 U.S. 64, 76 (1931).

2. Based on the above findings of fact, the Weber River is navigable in law where it passes by and through the Landowner Properties.

3. Because the Weber River is navigable in law where it passes through the Landowner Properties, the State of Utah holds sovereign land title to the bed of the Weber below the ordinary high water mark at the location of the Landowner Properties.

4. Under Utah law, the Coalition's members and the general public are entitled to use the riverbed of the Weber River at the above locations for lawful recreational purposes. Utah Code §73-29-201(1).

5. The Coalition is entitled to a declaratory judgment consistent with the foregoing. It is further entitled to an injunction requiring the Landowner Defendants to remove any no trespassing signs from their properties that are inconsistent with the public's rights as stated above, and to take no further actions interfering with such public rights.

Based upon the foregoing, the Court directs counsel for Plaintiff to prepare a proposed form of Order and Final Judgment consistent with these findings and conclusions, and to file it with the Court after serving it on opposing counsel pursuant to Utah R. Civ. P. 7(f).

SIGNED ABOVE PURSUANT TO UTAH R. CIV. P. 10(i)

Addendum C: Amended Order and Final Judgment dated
May 19, 2015 (R. 948-51)

The Order of Court is stated below:

Dated: May 19, 2015
05:58:16 PM

/s/ Keith Kelly
District Court Judge



IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

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

Plaintiff,

vs.

JAMES FULLER PARK As Trustee of the
Revocable Trust Of James Fuller Park; ORANGE
STREET DEVELOPMENT, A Utah limited
partnership; WENDELL J. STEMBRIDGE and ILA
D. STEMBRIDGE, as Trustees of the Wendell J.
Stembridge Intervivos Revocable Trust dated the 29th
day of November 1988; VERN G. STEMBRIDGE
and DOROTHY MECHAM STEMBRIDGE, as
Trustees of The Vern G. Stembridge And Dorothy M.
Stembridge Trust dated December 7, 1989; UTAH
DIVISION OF WILDLIFE RESOURCES, an agency
of the State of Utah; the UTAH DIVISION OF
PARKS AND RECREATION, an agency of the State
of Utah; and SHERIFF DAVID A. EDMUNDS, in
his official capacity as Summit County Sheriff,

Defendants.

**AMENDED ORDER AND FINAL
JUDGMENT**

Civil No. 110500360

Hon. Keith A. Kelly

This matter came before the Court for trial on February 6, and February 9-11, 2015.

W. Cullen Battle and Craig C. Coburn appeared as counsel for Plaintiff Utah Stream Access Coalition (the "Coalition.") Anthony W. Schofield and Peter C. Schofield appeared as counsel for Defendant Orange Street Development ("Orange Street"). Michael S. Johnson and Douglas J. Crapo appeared as counsel for the State of Utah, Division of Forestry, Fire & State Lands, having been substituted for the Utah Division of Wildlife Resources and the Utah Division of Parks and Recreation. Jared G. Parkinson, as counsel for Defendant James Fuller Park as Trustee of the Revocable Trust of James Fuller Park ("Park"), and Scott A. Dubois, as counsel

for Defendants Wendell J. Stembridge and Ila D. Stembridge as trustees of the Wendell J. Stembridge Intervivos Revocable Trust dated the 29th day of November 1988, and Vern G. Stembridge and Dorothy Mecham Stembridge, as trustees of the Vern G. Stembridge and Dorothy M. Stembridge Trust dated December 7, 1989 (collectively "Stembridge") were excused from appearing at trial by stipulation. Defendants Orange Street, Park and Stembridge will be referred to as the "Landowner Defendants."

The properties of the Landowner Defendants referred to in this Order and Final Judgment (the "Properties") consist of the following:

Summit County Parcel No. CD-33, owed by Defendant Park;

Summit County Parcel No. CD-32, owned by Defendant Orange Street; and

Summit County Parcel Nos. CD-161 and CD 99, owned by Defendants Stembridge.

On April 10, 2015, the Court entered its Legal Analysis, Findings of Fact and Conclusions of Law (the "Findings and Conclusions"), resolving all claims in favor of the Coalition. Based on the Findings and Conclusions, the Court now enters a Final Judgment in favor of the Coalition and against all remaining Defendants declaring that:

1. the Weber River is navigable in fact and navigable in law under federal law where it passes through the Properties;
2. the State of Utah holds sovereign land title to the bed of the Weber River below the ordinary high water mark at the location of the Properties; and
3. the Coalition's members and the general public are entitled to use the streambed of the Weber River at the above locations for lawful recreational purposes.
4. because the flows of the Weber River at statehood were more favorable (greater)

but not materially different than current flows, (Findings ¶ 22), the current ordinary high water mark of the Weber River shall be used for determining the river bed title held by the State of Utah at statehood in 1896.

The Court further enters a Final Judgment ordering Defendants Park and Orange Street to remove any no trespassing signs from their properties that that are inconsistent with the public's rights as stated above, and to take no further actions interfering with such public rights.

Objections to this form of order have been considered, but are hereby overruled.

END OF DOCUMENT

Submitted by:

FABIAN & CLENDENIN
A Professional Corporation

/s/ W. Cullen Battle
W. Cullen Battle

RICHARDS BRANDT MILLER NELSON

/s/ Craig C. Coburn
Craig C. Coburn
Attorneys for the Plaintiff

I hereby certify that this **AMENDED ORDER AND FINAL JUDGMENT** was served via the Court's e-filing system or by first-class U.S. mail, postage prepaid, on this 14th day of May, 2015, upon the following::

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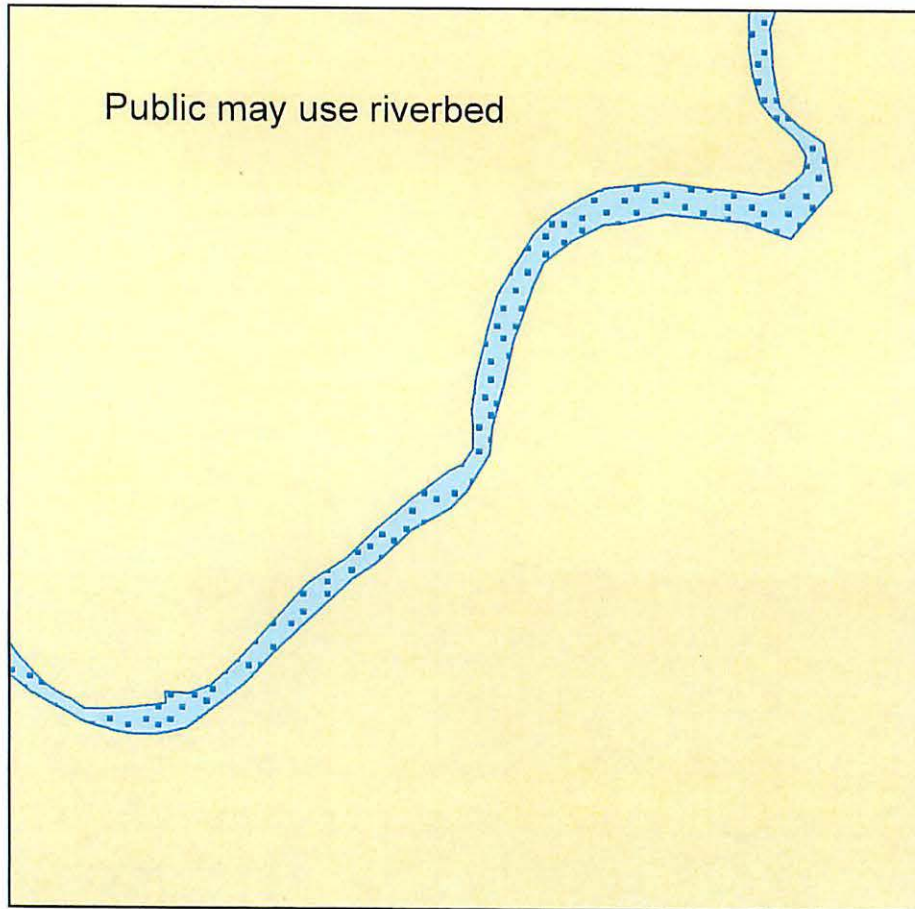
/s/ W. Cullen Battle_____

Addendum D: Demonstrative map illustrating two methods of State
 riverbed ownership

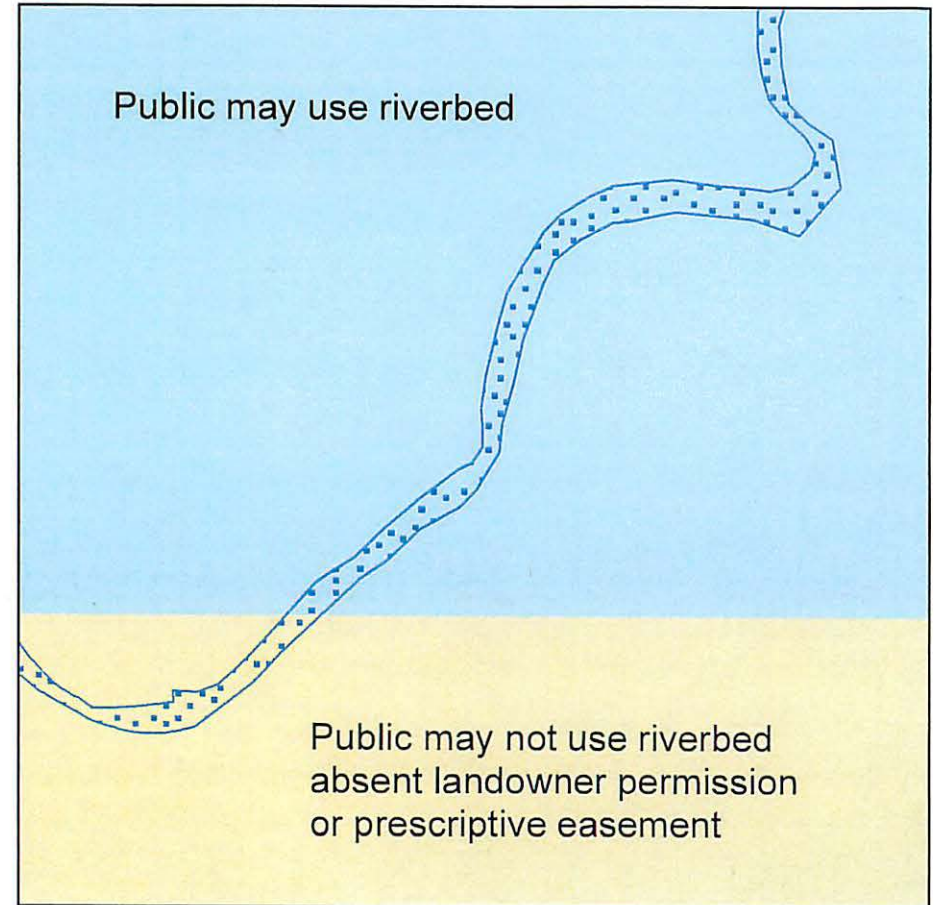
Two Methods of State Ownership

(Navigability basis vs. ownership of underlying tract basis)

Title-navigable stream located on private property (State owns the riverbed only). State title shown in blue, private title shown in light green/yellow.



Non-navigable river located on public property (public owns riverbed and adjoining uplands). Bottom third of image depicts non-navigable river crossing onto private land (landowner owns both riverbed and adjoining land).



-  Riverbed
-  State Land
-  Private Property