IN THE UTAH SUPREME COURT

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

BRIEF OF APPELLEE/CROSS-APPELLANT UTAH STREAM ACCESS COALITION

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

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

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

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

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

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

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

Additional Counsel

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Rules

Commented [CCC1]: Constitution separate

Other Authorities

JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(g).

ISSUES ON APPEAL

USAC takes exception to the standard of appellate review proffered on three issues identified by the State and VRA. Because the State and VRA have not set forth or clearly articulated the proper standard of appellate review on these issues and the proper standard is the same on all three issues, USAC lists the issues and standards as framed by VRA and the State, then addresses USAC's challenges to the same.

VRA

VRA's frames its first and fourth issues on appeal and the appellate standard of review for each issue as follows (VRA Brief at 1-2):

(1) Whether the trial court erred in concluding that Article XVII of the Utah Constitution confirmed an easement permitting the public to touch privately-owned non-navigable streambeds.

Standard of Review: This issue is reviewed for correctness. (citations omitted)

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(4) Whether the trial court erred in concluding that USAC met its burden to prove that the Public Waters Access Act … substantially impaired the public's interest in the lands and waters that remain thereby violating the public trust doctrine.

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

State

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

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

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

Because each of these issues present mixed questions of law and fact[1], USAC submits that the proper standard of appellate review on all three issues is not 'correctness" or "de novo', but something more deferential to the district court.

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

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

[1] *See* Points I.A. and IV, *infra*.

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

Id. at ¶26, 144 P.3d at 1103.

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

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

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

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

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

ISSUE ON CROSS-APPEAL

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

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

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

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES APPLICABLE TO APPEAL

Constitutional Provisions

Utah Const. art. I, § 25 (quoted in Argument)

Utah Const. art. XVII, § 1 (quoted in Argument)

Utah Const. art. XX, § 1 (quoted in Argument)

Statutes

(None)

Rules

Utah R. App. P. 24(a)(9) (quoted in Argument)

STATEMENT OF THE CASE

Nature of the Case

At issue in this matter is the public's easement to lawfully access and use its public waters in place for any lawful purpose, and to reasonably touch the beds of those waters in ways incident to that use, irrespective of bed ownership.

Throughout its history, this Court has held, as a matter of natural law, that the public owns and has always owned Utah's waters – that is, the waters in natural lakes and flowing in or impounded on Utah's rivers and streams. It has also consistently held that, as a corollary to the public ownership of water, the public has and has always had a right to lawfully access and use its public waters in place for any lawful purpose. Some 80 years ago, this Court held that this public right was recognized and confirmed in Article XVII of the Utah Constitution. And in 1982 and 2008, this Court further defined the

public's right as an easement that includes a right to reasonably touch the beds of public waters in ways necessary and incident to that use, irrespective of bed ownership (the Easement).[2]

In 2010, the Utah legislature passed the ill-named Public Waters Access Act (the Act. (VRA Addendum at A00001-06) The Act, purporting to legislatively overrule at least two of the referenced Court decisions on constitutional grounds (*Id.*), prohibits and criminalizes, absent landowner permission, virtually all otherwise lawful public access to and use of public waters where they traverse private streambeds. (*Id.)*.

In 2011, the Utah Stream Access Coalition (USAC) brought suit – against the State of Utah (the State) and the predecessor-in-interest of VR Acquisitions LLC (VRA), whose Victory Ranch property is traversed by four miles of the Provo River that was closed to the public after the Act – seeking declaratory and injunctive relief on the grounds that, *inter alia*, the Act violated the public's rights and the State's public trust duties under Articles XVII and XX of the Utah Constitution, respectively, and Utah's common law public trust.

Course of Proceedings

Relying on Court precedent and stipulated facts, the district court resolved several issues on motion as a matter of law, specifically:[3]

[2] For ease of reference, this easement was called the 'Conatser Easement' in the district court.in deference to this Court's most recent case addressing the issue presented. *Conatser v. Johnson*, 2008 UT 48, 194 P.3d 897. Here, it is simply called 'the Easement.'

[3] In making these rulings, the district court did not address USAC's arguments that, *inter alia*, the Act (a) violated Utah's common law public trust governing the State's regulation of the use of public waters and (b) constituted an unlawful delegation to private

- The public owns and has always owned the waters flowing in or impounded on Utah's rivers and streams ("public waters"). (VRA Appendix at A00091)

- The public trust resource is all public waters of the State. (*Id*. at A00092) In reaching this conclusion, the district court rejected USAC's argument that the public trust resource was only those public waters where access could be regulated by the State – that is, public waters traversing private or non-federal public streambeds. (*Id.* at A000096)

- The public has and has always had an easement – the Easement – to lawfully access and use its public waters in place for any lawful purpose, including but not limited to recreation. (*Id.* at A00092)

- The Easement includes a right to reasonably touch the streambed in ways necessary and incident to that use, irrespective of bed ownership. (*Id.*)

- The Easement was recognized and confirmed in Article XVII of the Utah Constitution. (*Id.*)

- As a constitutionally-recognized interest in land 'otherwise acquired', the Easement is encompassed by Article XX of the Utah Constitution. (*Id.* at A00093-95)

- Article XX requires the State, as trustee of the public trust, to hold and manage the Easement consistent with the purposes for which it was acquired – that is, to allow the public to lawfully access and use its public waters in place for any lawful purpose, including but not limited to recreation. (*Id.*)

- Utah has roughly 6,400 miles of fishable rivers and streams ("fishable rivers and streams"), some 2,700 miles of which traverse privately-owned streambeds and some 3,700 miles of which traverse public-owned streambeds. (*Id.* at A00100-106)

- The Act, in purporting to legislatively overrule at least two decisions of the Court on constitutional grounds, violated separation of powers under Article V of the Utah Constitution. (*Id.* at A000091)

- Per its express terms, the Act served only private interests, not any public trust or greater public purpose. (*Id.* at A000095)

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landowners of the State's authority and duties as trustee of the public trust.

- While the legislature has authority to regulate the Easement, the Act amounted to a disposition – akin to a regulatory taking – of the easement on the 2,700 miles of fishable rivers and streams that traverse private streambeds. (*Id.*)

- While the legislature retained authority to repeal or modify the Act, doing so was insufficient under its duties as trustee of the public trust if the Act substantially impaired the public's interests in the waters that remained. (*Id.*)

The parties then tried a single issue of fact to the district court: whether the Act substantially impaired the public's interests in the public waters remaining.

Disposition by District Court

Following a six-day trial, the district court found that the Act substantially impaired the public's interests in the public waters remaining. Based on that finding and its prior rulings, the district court concluded that the Act violated the State's public trust duties under Article XX and that its operative provisions were unenforceable. (*Id.* at A000148-49)

VRA appeals essentially all of the above-described adverse rulings of the district court. The State appeals the district court's adverse rulings related to Article XX. USAC cross-appeals from the district court's ruling defining the relevant trust resource as all public waters of the State, as opposed to the rivers and streams that traverse private beds. USAC also reasserts here arguments made to but not addressed by the district court that afford the Court alternative grounds to affirm the decision of the district court.

STATEMENT OF THE FACTS

Stipulated/Uncontroverted Facts re Historic Use of Public Waters

(R.0163-167)

1. Historically and currently, Utahn's understanding of Utah law regarding stream access has been unsettled, with some landowners allowing and other landowners, prohibiting access to rivers, streams and streambeds on their property. Similarly, some members of the public access their rivers, streams and streambeds only with landowner permission while others do so with or without landowner permission.

2. The Provo River and many other Utah rivers and streams were trapped for beaver and other pelts during the fur trade of the first half of the nineteenth century.[4]

3. Fur trapping is still permitted in Utah today, including trapping of beaver and mink, two species that are typically found in or in close proximity to rivers, streams and other natural waters.[5]

4. The Provo River was used during the 1880s and 1890s, to float timbers during high water from the Uinta Mountains to Utah Valley and points in between, where they were used for railroad ties, railroad trestle timbers, mine shoring timbers, cordwood or saw wood. Other Utah rivers and streams were used for this same purpose beginning in the late 1860s, with some being used for this purpose into the early 1900s.[6]

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[4] http://www.media.utah.edu/UHE/f/FURTRADE.html; http://historytogo.utah.gov/utah_chapters/trappers,_traders,_and_explorers/traderstrappersandmountainmen.html

[5] http://wildlife.utah.gov/guidebooks/2010_pdfs/2010-11_furbearer.pdf .

[6] http://historytogo.utah.gov/utah_chapters/mining_and_railroads/tieingutahtogether.html

5. The lower Provo River and Utah Lake were fished extensively for June Suckers during their annual spawning from pre-settlement days well into the 20th century for subsistence, sustenance or commercial purposes.[7]

6. The Provo River was fished commercially for mountain whitefish in the 1870's, with the product shipped to Salt Lake City markets.[8]

7. Other fish species were fished in the 1800s from other Utah rivers and streams, privately or commercially, for subsistence and sustenance purposes (*e.g.*, the Bonneville (or Utah) Cutthroat trout on Utah Lake tributaries). *Id.*, Wheeler Survey at 681-703 (1875) Utah.

8. Sustenance fishing is still permitted today on the Provo River and most other Utah rivers, streams and other natural waters.[9]

9. Flows in the Provo River are from time-to-time – typically on a seasonal basis – augmented by waters artificially diverted from the Weber River. Similarly, the flows of other Utah rivers and streams may, from time-to-time, be augmented by flows from other waters.

10. Flows in the Provo River are from time-to-time – typically on a seasonal basis – diminished by waters artificially diverted for irrigation, municipal, industrial and

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[7] https://ojs.lib.byu.edu/ojs/index.php/gbnmem/article/viewFile/2947/3295; http://www.utahlakecommission.org/Utah_Lake_Legacy.pdf

[8] http://babel.hathitrust.org/cgi/pt?id=njp.32101076035672;page=root;view=image;size=100;seq=7;num=637

[9] Utah Division of Wildlife, *2011 Utah Fishing Guidebook*, http://wildlife.utah.gov/guidebooks/2011_pdfs/2011_fishing.pdf .

other uses. On some Utah streams, flows are diminished to where the water is not practicably usable.

11. The Provo River has long been one of Utah's leading sport fishing streams. The State of Utah has designated portions of the Provo River as a "Blue Ribbon" fishery, meaning that it is a recreational fishery of extremely high quality.

12. The Provo River's predominant sport fish species are non-native rainbow trout and brown trout. Populations of these fish were introduced and have been sustained by natural propagation and public fish-stocking programs. The Provo River also supports a substantial native population of mountain whitefish and some non-game species (*e.g.*, sculpin).

13. Portions of the Provo River are frequently floated by recreationists in canoes, rafts, whitewater kayaks and inner tubes. It is considered a recreational resource by river runners in Utah.

14. Wilford Woodruff, fourth President of The Church of Jesus Christ of Latter Day Saints and an avid and accomplished fisherman, wrote extensively of his many experiences fishing many Utah rivers and streams from 1847-1887 *(e.g.*, the Bear, Duchesne, Green, Provo, Strawberry, and Blacks Fork Rivers, and Mill, East Canyon, Currant, Deep, and Big and Little Cottonwood Creeks) for both sustenance and recreation. (R.0171)

15. Similarly, in the 1930's and 40's, Thomas S. Monson, current President of The Church of Jesus Christ of Latter Day Saints and also an accomplished fisherman,

spent much of his childhood and adolescence fishing (for sport and sustenance), floating and swimming in the Provo River and its tributaries. (R.0171)

Stipulated and Other Facts re Mileage of Fishable Rivers/Streams

Utah Stream Access Map

16. The State estimated that there are 6,419 miles of "fishable" rivers and streams in Utah. According to the State, of these 6,419 miles, the State estimated that 2,738 miles (43%) ostensibly traverse privately-owned streambeds and 3,681 miles (57%) traverse publicly-owned streambeds, including 407 miles that traverse adjudicated sovereign lands (i.e., streambeds of rivers adjudicated to be navigable-for-title). (R.2435-36, 4440-42)

17. Using the State's data, USAC estimated that the Utah Stream Access Map has identified 6,291 miles of "fishable" rivers and streams in Utah. Of these 6,291 miles, USAC estimated that 2,707 miles (43%) ostensibly traverse privately-owned streambeds and 3,584 miles (57%) traverse publicly-owned streambeds, including segments of some rivers adjudicated or claimed by the State to be navigable-for-title. (R.2436-37)

18. According to Gary Ogborn, the Utah Division of Wildlife Resources employee responsible for preparing the State's Utah Stream Access Map:

a. The map shows most of the 6,419 miles of fishable rivers and streams in Utah as well as most of the 2,738 miles of fishable rivers and streams that traverse private beds.

b. While he believes that the Map shows as 'private' fishable rivers and streams where a municipality owns the bed and may allow access, he does

not know how many or if any miles of such water exist or whether they're publicly accessible.

c. After originally testifying that the Map showed fishable waters acquired for public access as part of the Central Utah Project as 'private,' he admitted that those waters were shown as public.

d. Adding or deleting rivers or streams from the Map that were determined to be fishable or non-fishable subsequent to the Map's preparation would "not change the overall picture."

(R.4440-46)

19. Hearing this, the district court found that the State's Stream Access Map and its mileages was "the best source of information about the effect of the Act on public access to rivers and streams flowing over private lands" despite its deficiencies. (R.2645)

Walk-In Access Waters (Stipulated)
(R.2437-38)

20. The State operates a Walk-In-Access (WIA) program whereby it leases wildlife habitat and public access to that habitat for hunting and/or fishing. Leases with private property owners for the WIA program may be terminated for any reason by either party upon 30 days written notice.

21. An estimated 50 miles of "fishable" streams and rivers traversing ostensibly private beds are enrolled in the State's WIA program.

Floatable Waters
(R.2438-39)

22. USAC estimates that 1,760 miles of rivers and streams in Utah are "floatable" as defined by the Act. Of these 1,760 miles, USAC estimates that 469 miles (27%) traverse privately-owned streambeds and 1,291 miles (73%) traverse publicly-owned streambeds, including rivers and streams that are adjudicated or claimed by the State to be navigable-for-title.

23. These "floatable" rivers and streams include waters that are "floatable" only on a seasonal basis (*e.g.*, during spring runoff), waters that may or may not be "floatable" during irrigation season and waters that are "floatable" year-round.

Stipulated/Other Facts not Marshaled by the State and VRA re:
Act's Substantial Impairment of Waters Remaining

24. Prior to the Act, anglers had more river and stream angling opportunities. After the Act, it's challenging to have a good fishing experience. (R.4258-59)

25. The State estimates that 204 miles of the Provo River and its tributaries are 'fishable.' Of these 204 miles, the State estimates that 108 miles (53%) traverse privately-owned streambeds and 96 miles (47%) traverse publicly-owned streambeds. (R.2618, 2440-41)

26. USAC estimates that the State has identified some 88 "fishable" miles on the Provo River's main stem. Of these 88 miles, USAC estimates that 49 miles (56%) ostensibly traverse privately-owned streambeds and 39 miles (44%) traverse publicly-owned streambeds. (*Id.*)

27. Absent landowner permission, all public access to and use of 2,231 of the 2,700 miles of fishable rivers and streams traversing private streambeds (*i.e.*, 35% of all fishable rivers and streams) is prohibited absent landowner permission, as only 469 miles (at most) of the 2,700 miles are floatable (R.2615), and then only seasonally, and few if any of these 469 miles can be fished while floating without stopping or touching the streambed. (R.2626, 2644)

28. Seventy-three percent (73%) of Utah *resident* anglers (242,000 anglers) fished Utah's streams between January-October 2009. (TE 8 at 4) Forty-five 45% of these anglers (109,000 anglers) knowingly fished streams that traversed private streambeds. (*Id.*)

29. Several anglers noticed definite increases in angling pressure on streams traversing public beds following the Act. (R.1803-04, 2983-88, 3010, 3019-20, 3027-32, 3178, 3182, 3230-35, 3276, 4083, 4136)

30. In 2011-12, angling pressure on some streams averaged from 215 to 596 anglers/day, 365 days a year. (R.3499-3504; Trial Exhibit ("TE") 10.1 at Table 4-4) Depending on the stream, this translates to an average of 13 to 31 anglers/mile/day, 365 days a year. (R.3628-3633)

31. While not all of these anglers were on the stream all day every day, angling pressure was likely higher when fish were feeding and lower when they were not, and higher during warmer months. (R.3030, 3202-04, 3232)

32. VRA closes the Provo River where it flows through Victory Ranch to fishing by its owners/guests in July-August each year and limits owner and guest anglers to 18 anglers/day or five anglers/mile the other ten months. (R.3628-29, 4365)

33. Most Utah anglers (*i.e.*, 61% or 259,000 anglers) prefer solitude when fishing and have "a substantial aversion ... to fishing in crowded settings." (R.3397-98, TE 9 at Fig. 3-43; *see also* R.2948, 2954, 2966, 3231, 3257, 3279, 3640, 4230, 4271)

34. Half of Utah anglers (212,000 anglers) prefer to fish only where they can have the fishing experience they prefer. (*Id.*; R.3394-95)

35. VRA markets Victory Ranch as a place where its owners/guests can find solitude while fishing for trophy trout. (R.4401-07; TE 7.1-7.2)

36. Among anglers who prefer river and stream fishing, Utah had 25 anglers/mile before the Act and 44 anglers/mile after the Act. (R.2656)

37. Among anglers who fish both flatwater and rivers and streams, Utah had 34 anglers/mile before the Act and 59 anglers/mile after the Act. (*Id.*)

38. Utah had at 60-66 anglers/mile of fishable river or stream prior to the Act and 105-115 anglers/mile after the Act. (VRA Brief at 11; TE 8 at 5)

39. Montana and Idaho, which have more, larger and longer fishable rivers and streams, have 13 and 17 licensed anglers/mile, respectively. (R.4109, TE 14 at 5)

40. Many of Montana's and Idaho's cold-water streams can be effectively fished from a drift boat or similar craft, while only one Utah river can. (R.4097-4110; TE 14 at 4-6)

41. Utah's streams, being substantially smaller and shorter than those in Montana and Idaho, have substantially less carrying capacity – that is, a typical river and stream in Montana and Idaho can handle substantially more anglers per mile than a typical river or stream in Utah. (*Id.*)

42. Many anglers fishing streams still publicly-accessible after the Act (*i.e.*, 21% to 65% of anglers, depending on the river or stream) reported that crowding negatively impacted their angling experience. (R.3424-3480; TE 10.1 at Tables 5.2, 5.6 and 5.10)

43. Increased angling pressure on rivers and streams that remain publicly-accessible after the Act is causing significant 'wear and tear' on the resource. (R.3182; 4133-36)

44. A substantial majority of Utah anglers (*i.e.*, 70%, 297,000 anglers) reported that private property restrictions limited access to their preferred fishing locations. (R.3402-3405; TE 9 at Figs. 3-92 and B-141)

45. The 0.7 miles that VRA has enrolled in the state's Walk-in-Access Program, like the rest of the Provo River traversing VRA's property, is difficult to access and wade fish. (R2993-94, 3104-05, 3246-48)

SUMMARY OF ARGUMENT

The State and VRA fail to meet their burden on appeal. First, they fail to marshal and distinguish all record evidence that supports the district court's two key factual findings: (a) Utah history demonstrating the existence and exercise of the public's right to lawfully access and use their public waters in place; and (b) the Act's substantial

impairment of the public's interests in the public waters that remain. Second, they ask the Court to overturn Court precedent spanning more than a century on key legal principles – chief among them, the doctrine of public ownership of water (*i.e.*, that the public owns and has always owned public waters) and the public's corollary right to use public waters in place – yet fail to demonstrate, under principles of *stare decisis*, that that precedent should be overturned.[10]

Turning to the substance of the State and VRA appeals, the Opposition claims that the Easement is a 'recreation easement' 'to touch private beds.' According to this Court they are wrong, as the Easement allows the public to lawfully access and use its public waters in place *for any lawful purpose*, including recreation, and to reasonably touch the streambed *in ways incident to that use*, irrespective of bed ownership.

They further claim that the Easement is but a recent judicial creation rooted solely in statute. Again they are wrong. According this Court, the Easement is rooted in Utah history (which VRA and *amicus* ignore), the doctrine of public ownership of water (which the Opposition ignores and/or rejects), and in the plain language of Article XVII of the Utah Constitution (which VRA and *amicus* also ignore).

VRA claims that Utah's public trust applies only to beds of navigable-for-title waters, not to non-navigable waters and private streambeds. On its face, the public trust in Article XX, Section 1 of the Utah Constitution encompasses far more than just the beds of navigable waters and, according to the State and the district court, encompasses

[10] *See e.g.*, *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158, 1162-63 (appellate court can affirm judgment on any ground or theory apparent on the record).

public easements. Further, again per this Court, Utah's public trust encompasses all public waters, not just public lands, and public recreational rights in public lands and waters.

The Opposition claims that, under the seminal public trust case of *Illinois Central* and this Court's opinion in *Colman*, the public trust is invoked only when the State disposes in fee or abdicates control of the trust resource and, because the Act supposedly did neither, the trust was not violated. In fact, *Illinois Central* says only that public trust is invoked and violated when the State disposes in fee or abdicates control of the trust resource, while *Colman* involved neither a disposition in fee nor an abdication of control. Further, per this Court and others, the public trust is not limited solely to situations involving a disposition or abdication. Still further, the Opposition ascribes to the word 'disposed,' as used in Article XX of the Utah Constitution, a definition not commonly used for that word in 1896 and wholly inconsistent with public trust principles of holding and managing trust resources for the benefit of the people.

Consistent with their misreading of *Illinois Central* and Article XX, the Opposition suggests that the district court manufactured a public trust test out of whole cloth when in fact it applied *Illinois Central* to Article XX's plain language and ruled, correctly, that the Act effectively disposed of the Easement on almost half of Utah's fishable rivers and streams for purely private purposes, and turned basic easement principles on their head in the process. In doing so, the Act unlawfully delegated and ceded to landowners the State's authority and control, as trustee, to regulate public access to public waters.

Finally, the State and VRA suggest that USAC did not meet its burden as to whether the Act substantially impaired the angling public's interests in the trust resource that remains. Here, while the district court with the State and VRA, it erred in ruling that the relevant trust resource was all public waters, as the State did not and does not have authority to regulate access to public waters traversing or located on federal beds and, consistent with this concept, the Act as applied affected only public waters traversing private streambeds. In this context, having 'disposed' (as the Opposition defines it) of the Easement on those waters, the Act clearly and substantially impairs what little remains of the public's right to access those waters – a right to float only 469 of the 2,700 miles, if and when floatable, without stopping or touching the streambed except as required for safe passage.

Even if the trust resource is all public waters, here again the Act only impacted Utah's fishable rivers and streams, all of which have limited carrying capacity, and the interests of hundreds of thousands of Utah anglers who fish or prefer to fish such waters, including the 2,700 miles (42%) of those waters where they traverse private streambeds. When the Act's impact is weighed in the context of the angling public's interests in these public waters, forcing hundreds of thousands of anglers onto 42% less water of limited carrying capacity, thereby increasing fishing pressure by 73% on those waters, again paints a clear picture of substantial impairment, even if the Act is but one cause of the increase in angling pressure.

Ultimately, the Opposition claims that as long as the State does not dispose in fee or cede control of a public trust resource, it can do what it will with that resource. Thus,

according to them, the public trust allows the State, as trustee, to 'regulate' the public off the trust resource for no public trust or greater public purpose, to subordinate public trust interests to private interests, and to let private interests – who owe no duty to the public and need act only in their own best interest – decide whether the public can use its public waters.

In stark contrast, according to this Court, the public trust means that the State, as trustee, owes the same fiduciary duties to the public, the beneficiaries of the public trust, as any trustee owes to trust beneficiaries. It means that the State, if it does anything with a public trust resource, must do so in the interests of the public. It means, in short, that the Act clearly and undeniably violates the public's constitutional Easement to access and use its public waters in place and, in doing so, violates Utah's public trust doctrine.

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE EASEMENT IS BASED IN THE UTAH CONSTITUTION AND PROTECTED BY UTAH'S PUBLIC TRUST, AND THAT THE ACT VIOLATED UTAH'S PUBLIC TRUST

I. THE EASEMENT IS FIRMLY ROOTED IN UTAH HISTORY, UTAH LAW AND THE UTAH CONSTITUTION

The Opposition claims that the Easement is (a) a recreation easement, (b) to touch private streambeds (c) grounded solely in statute and (d) recently created by this Court. (State Brief at 2-4, VRA Brief at 17-19, *Amicus Brief at* 9-14) Claims (a) and (b) are easily discredited. As defined this Court, the Easement allows the public to lawfully access and use its public waters in place *for any lawful activity, including recreation*, and to reasonably touch the streambed *in ways incident to that use*, irrespective of bed

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

A. The Easement is Rooted in Utah History

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

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

[11] *See*, Point V.A., *infra.*

[12] VRA at p.26, n.7.

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

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

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

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

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

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

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

"Let George Do It" – Salt Lake Telegram, July 7, 1950, p.10, quoting Assistant Attorney General Mark Boyle)
https://newspapers.lib.utah.edu/details?id=17573714#t_17573714

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

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

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

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

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

[17] Hutchins at p. 14.

[18] One year later, the Utah legislature would also 'declare' that the public owned Utah's

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

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

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waters.

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

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

> Public waters … are the gift of Providence: they belong to all as nature placed them or made them available. They are the waters flowing in natural channels or ponded in natural lakes and reservoirs. *** While it is flowing naturally in the channel of the stream or other source of supply, it must of necessity continue common to all by the law of nature ***
>
> [N]o title to the corpus of the water itself has been or can be granted, while it is naturally flowing, any more than it can to the air or the winds or the sunshine. *** While it is flowing naturally in the channel of the stream or other source of supply, [water] must of necessity continue common by the law of nature … or property common to everybody. And while so flowing, being common property, everyone has equal rights therein or thereto, and may alike exercise the same privileges and prerogatives in respect thereto, subject at all times of course to the same rights in others … . *** And so, while water is still in the public, everyone may drink or dip therefrom or water his animals therein, subject to the limitations above noted … .

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

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

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

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

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

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

> Although 'navigability' is a standard used to determine title to waterbeds … it does not establish the extent of the State's interest in the waters of the State. *See* Comment, *Basis for the Legal Establishment of a Public Right of Recreation in Utah's Non-Navigable Waters*, 5 J. Contemp. L. 95 (1978). ***
>
> The doctrine of public ownership is the basis upon which the State regulates the use of water for the protection of the people. *** A corollary of the proposition that the public owns the water is the rule that there is *a public easement* over the water regardless of who owns the water beds beneath the water. Therefore, public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters. ***
>
> *Irrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water.* *** The right to use public waters for pleasure purposes is no less a right just because some landowners, for reasons sufficient to themselves, prohibit public access over their land to reach those public waters.[n6]
>
> [n6] As to whether the public has an easement in the beds of streams and lakes, we express no opinion.

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

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

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

> An easement gives rise to two distinct property interests: a 'dominant estate,' that has the right to use the land of another and a 'servient estate,' that permits the exercise of that use. ***
>
> [A]n easement holder has the right to make incidental uses beyond the express easement and does not exceed the easement's scope if those uses are made in a reasonable manner and they do not cause unnecessary injury to the servient owners. ***

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

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

Id. at ¶30.

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

C. The Easement is Rooted in the Utah Constitution

1. <u>The Easement is Rooted in Article XVII, Section 1</u>

Article XVII, Section 1 of the Utah Constitution reads as follows:

> *All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.*

In *Adams*, this Court held that the public's right to use its public waters in place – the Easement – was recognized and confirmed in Article XVII:

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

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

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

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

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

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

Utahn's historic public uses of public waters in place – fur trapping, railroad tie drives, fishing for food or fun, stock watering, floating, swimming and wading – were "useful or beneficial use(s)" of water in their day and in 1896. Are not those uses that continue today still "useful or beneficial?" Or is the issue – as the Act essentially states and this Court said in *J.J.N.P.* – "because some landowners, for reasons sufficient to themselves," don't want the public accessing and using their public waters where those waters traverse private beds? *J.J.N.P.*, 655 P.2d at 1138.[21]

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

"All" – "Every one;, the whole number; the whole quantity" https://archive.org/stream/websterscomplete00webs#page/36/mode/2up

"Any" – "One out of many, indefinitely; an indefinite number or quantity" https://archive.org/stream/websterscomplete00webs#page/60/mode/2up

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

"Useful" – "Full of use, advantage or profit, power to produce good, helpful towards advancing any purpose" https://archive.org/stream/websterscomplete00webs#page/1456/mode/2up

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

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

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

excluded from Article XVII, as the framers did not mention 'domestic' uses during the Convention. And so were water rights to use water for "power generation", which also were never mentioned during the Convention. *See e.g.*, *Salt Lake City Water & Elec*, 67 P. 672.

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

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

Article I, Section 25 of the Utah Constitution reads:

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

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

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

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

II. THE EASEMENT IS A PUBLIC TRUST RESOURCE

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

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

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

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

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

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

- Sovereign and other lands acquired by the State. Article XX, Section 1 of the Utah Constitution; *Colman v. Utah State Land Board*, 795 P.2d 622, 634 (Utah 1990).
- School trust lands. Article XX, Section 2 of the Utah Constitution. *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918 (Utah 1993)
- Public waters. *Uintah* Basin, 2006 UT 19 at ¶34 ("The State, acting as trustee rather than owner, has assumed allocating the use of the water for the benefit of all the people."); *see also, J.J.N.P.*, 655 P.2d at1136; *Tanner v. Bacon*, 136 P.2d 957, 966 (Utah 1943) (Larson, J., concurring).
- "[T]he ecological integrity of public lands *and their public recreational uses* …" *National Parks*, 869 P.2d at 919 (internal citation omitted; emphasis added).

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

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

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

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

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

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

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

Stated otherwise, the relevant trust resource at issue here is, by definition, the resource as to which the State has authority to regulate and does regulate as to access[26] –

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

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

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

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

Article XX, section 1 of the Utah Constitution reads as follows:

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

The district court ruled that the Easement, as an interest in land "otherwise acquired," was subject to Article XX, Sect. 1's public trust requirements.

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

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

waters which are "*navigable in fact for any purpose.*"[27] *Id.* at ¶¶ 72-77 (citations and internal quotations omitted; emphasis in original). Stated otherwise, Wisconsin's public trust is not limited to waters that are navigable-for-title. *Id.* at ¶ 76 ("any stream is 'navigable in fact' which is capable of floating any boat … of the shallowest draft used for recreational purposes"). In short, Wisconsin, like Utah, applies the public trust to public waters that are navigable-for-title as well as waters that are not. They are not alone.[28]

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

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

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

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

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

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

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

Article XX, Section 1. In short, as the State acknowledges, the district court's ruling that the Easement is encompassed by Article XX, Section 1's broad language was correct.

D. The Easement, as a Right to Use Public Waters in Place, is Subject to Utah's Common Law Public Trust[29]

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

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

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

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

[30] *See also*, Pt. III., *infra*.

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

III. THE DISTRICT COURT CORRECTLY APPLIED THE PUBLIC TRUST

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

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

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

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

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

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

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

(VRA Addendum at A0000071-72)

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

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

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

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

But in fact, neither *Illinois Central* nor *Colman* say what they claim. Specifically, *Illinois Central* says that the public trust is invoked when – but not *only* when – the State disposes in fee or abdicates control of the trust resource. *Illinois Central* 146 U.S. at 458. Similarly, this Court did not as the Opposition claims invoke the public trust in *Colman* because the State, in granting the lease at issue in *Colman*, had 'disposed' or 'abdicated control' of the trust resource. State Brief at 33-34; VRA Brief at 36-37. This Court simply did not characterize the lease in *Colman* as a disposition or alienation of the resource. Further, neither the word 'abdicate' nor any of its derivatives or synonyms can be found in *Colman*; and nowhere is 'control' used in the context that the Opposition suggests. Instead, this Court invoked the public trust in *Colman* because the State had leased a trust resource and remanded the case to determine whether the lease "rights" granted by the State impaired the public's interests in that resource. *Colman*, 795 P.2d at 635-636.[32]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What the Act Does

On Its Face

On its face, the Act:

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

As Applied – According to Record Marshaled by the Opposition

According to the record evidence cited by the State and VRA, the Act prohibits and criminalizes, absent landowner permission and except for floating, access to and use of some 2,700 miles (42%) of Utah's estimated 6,400 miles of fishable rivers and streams ("fishable rivers and streams"). (R.2654, 2659) In short, based on available miles, angling pressure on the remaining 3,700 miles of fishable rivers and streams traversing public beds increased 73% (*i.e.*, 6,400/3,700 = 1.73). The 73% increase in angling pressure is likewise reflected in the number of licensed anglers per mile of fishable river and stream (*i.e.*, 60 to 105[34]) and licensed anglers who prefer stream fishing per mile (*i.e.*, 25 to 44; 161,000/3,700 = 44). (VRA Brief at 11)

[34] *Cf*, Facts at 38.

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

As Applied – Balance of Record not Marshaled by the Opposition[36]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, contrary to VRA's assertion, the mileage figures used did not come from USAC alone. The State and USAC both calculated mileages based on mileage estimates generated by the State for public consumption and by USAC *using the State's data*. (R.2613-14) Further, while the State and VRA claim that the estimated 2,700 miles of fishable rivers and streams traversing private beds supposedly included waters traversing

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

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

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

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

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

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

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

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

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

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

Further, as this Court has noted:

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

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

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

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

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

Conatser, 2008 UT 48, ¶¶ 20-21.

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

B. The Act Violates the Public Trust as It 'Disposed' of the Easement in Violation of Article XX and Utah's Common Law Public Trust Doctrine

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

> All lands of the State … that may otherwise be acquired, are hereby accepted … and shall be held in trust for the people, *to be disposed of* as may be provided by law, *for the respective purposes for which they have been* or may be granted, donated, devised or *otherwise acquired*.

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

[42] https://archive.org/stream/websterscomplete00webs#page/390/mode/2up

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State v. Nielsen, 2014 UT 10, ¶41, 326 P.3d 645, 651-52(emphasis added) (Rule 24(a)(9) 'failure to marshal' challenge in appeal from criminal conviction).

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

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

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

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

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

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

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

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

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

good than harm will come by departing from precedent." *Id.* at 399. Though cloaked as arguments that seek to distinguish rather overturn this Court's precedent – and in adopting this tact being more subtle than the 2010 Legislature – the State and VRA (and *amicus*) nonetheless ask this Court to overturn several of its prior decisions, including, *inter alia*: *Adams*, *Deseret*, *J.J.N.P.* and *Conatser*.[45]

While the Opposition's attempt to 'distinguish' these decisions from the case at bar fails, it is nonetheless important that the Court recognize and resolve these Opposition arguments for what they are. To that end and as demonstrated *supra*, the Opposition has failed to meet their "substantial burden of persuasion" in asking the Court to overturn the referenced decisions. *Id.* More specifically, they have failed to "clearly convince[]" that the rule of law established in those decisions was erroneous or is no longer sound because of changing conditions, and that more good than harm will come by departing from that precedent.. *Id.* Having failed in this burden, their appeal fails.

CONCLUSION

For the reason stated herein, USAC respectfully request that the Court affirm the district court's judgment and either designate the ordinary high water mark as the extent of the Easement or remand that issue to the district court for determination.

DATED this _____ day of July, 2016.

RICHARDS BRANDT MILLER NELSON

Craig C. Coburn
Zachary E. Peterson

[45] *See* Opposition arguments discussed *supra* at Points I. and II.

YOUNG HOFFMAN, LLC

_____
John L. Young

FABIAN VAN COTT

_____
W. Cullen Battle
Attorneys for Plaintiff/Appellee/Cross-Appellant Utah Stream Access Coalition

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

I, Craig C. Coburn, certify that the Brief of Appellee/Cross-Appellant complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure and the typeface requirements of Rule 27(b) of the Utah Rules of Appellate Procedure Rule 27(b). Specifically, the Brief of Appellee contains 15,972 (according to the word count feature in Microsoft Word 2013), exclusive of the cover page, table of contents, table of authorities and the addendum.

DATED this _____ day of July, 2016.

RICHARDS BRANDT MILLER NELSON

_____
Craig C. Coburn
Zachary E. Peterson

YOUNG HOFFMAN, LLC

_____
John L. Young

FABIAN VAN COTT

_____
W. Cullen Battle
Attorneys for Plaintiff/Appellee/Cross-Appellant Utah Stream Access Coalition

CERTIFICATE OF SERVICE

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

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

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

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

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

_____

ADDENDUM