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

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

Plaintiff,

v.

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

Defendants.

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

Civil No. 110500360

Judge Keith A. Kelly

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

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

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

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

I. Legal Analysis:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Findings of Fact:

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

a. Background to the Dispute

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

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

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

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

6. In the past, the Coalition's members and the public at large used the streambed of the Weber at this location for fishing and other recreational purposes.

(Stipulation of Facts for Purposes of Trial, dated January 21, 2015.)

7. The Landowner Defendants assert ownership of the bed of the Weber where it passes through the Landowner Properties. Currently, "no trespassing" signs prohibit public recreational use of the riverbed at this location. As a result, the Coalition's members have stopped using the riverbed at this location. (*Id.*)

8. The Coalition asserts that the Weber River is navigable where it passes through the Landowner Properties and that the riverbed is state sovereign land open to public recreational use under state law. The Landowner Defendants assert that the Weber is not navigable, that they consequently own the riverbed adjacent to their properties, and that they are entitled to restrict or exclude public use of the riverbed under state law. (*Id.*)

9. The Coalition's members desire to resume their use of the riverbed of the Weber at this location for fishing and other lawful recreational purposes. If allowed by a ruling of this court, they would do so immediately. (*Id.*)

b. Physical Characteristics of the Upper Weber River

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

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

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

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

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

(Hasenyager testimony; Exhibit 128.)

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

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

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

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

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

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

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

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

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

c. Statehood Era Commercial Uses of the Weber River

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

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

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

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

i. Railroad Tie Drives on the Upper Weber

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

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

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

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

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

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

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

ii. Railroad Ties Drives on Nearby Rivers

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

iii. Mining Timber and Cordwood Drives

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

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

(Exhibit 32.)

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

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

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

iv. Log Drives to Saw Mills

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

80. The shortest route between Peoa and Park City during the early 1890s was via the Browns Canyon Road, which crosses the River at the Landowner Properties, making them an ideal location for one or more of the Peoa saw mills. (Exhibit 121; Rodgers testimony.)
81. Any log floats to the Browns Canyon Road could have passed through some of the Landowner Properties. At the very least, log floats to any saw mills located in Peoa would demonstrate the susceptibility of the Upper Weber to float logs where it passes through the Landowner Properties.

d. Ultimate Findings Regarding Navigability in Fact

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

82. Based on the facts set forth above, from the late 1870s to 1896, the Upper Weber was used as a highway of commerce in transporting railroad ties for local and regional railroad lines. It is likely that most of this commerce passed through the Landowner Properties.
83. During the 1880s and 1890s, the Upper Weber was used as a highway of commerce in transporting mining timbers and cordwood to the major mining center in Park City. It is likely that a large portion of this commerce passed through the Landowner Properties.
84. During the same period, the Upper Weber served as a highway of commerce in transporting saw logs to various sawmills located on the river at Wanship and above. Some of this commerce passed through the Landowner Properties.
85. Log or tie drives passing through the Landowner Properties are known or are

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

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

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

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

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

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

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

vii. Customary Modes of Trade and Travel

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

viii. Natural Condition

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

(Dant testimony; Rodgers testimony.)

ix. Ordinary Condition

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

x. Useful Commerce

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

xi. Navigability in Fact

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

III. Conclusions of Law:

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

1. Under applicable federal law, a river that is navigable in fact is navigable in law. *The Daniel Ball*, 10 Wall. 557, 563, 19 L.Ed. 999 (1871); *United States v. Utah*, 283 U.S. 64, 76 (1931).
2. Based on the above findings of fact, the Weber River is navigable in law where it passes by and through the Landowner Properties.
3. Because the Weber River is navigable in law where it passes through the Landowner Properties, the State of Utah holds sovereign land title to the bed of the Weber below the ordinary high water mark at the location of the Landowner Properties.
4. Under Utah law, the Coalition's members and the general public are entitled to use the riverbed of the Weber River at the above locations for lawful recreational purposes. Utah Code §73-29-201(1).
5. The Coalition is entitled to a declaratory judgment consistent with the foregoing. It is further entitled to an injunction requiring the Landowner Defendants to remove any no trespassing signs from their properties that that are inconsistent with the public's rights as stated above, and to take no further actions interfering with such public rights.

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

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