

Courts reverse course on stream access: There is no public easement to beds crossing private land

New ruling in Provo River case upholds Utah’s restrictive access law passed in 2010.



(Trent Nelson | The Salt Lake Tribune) A section of the Provo River near Victory Ranch in Woodland Valley on Tuesday, Aug. 17, 2021. 4th District Judge Derek Pullan reversed course from his prior rulings and concluded the public has no right to walk or touch the bottoms of streams crossing private land, like this stretch of the river.

By Brian Maffly | Aug. 17, 2021, 5:05 p.m. | Updated: Aug. 19, 2021, 10:14 a.m.

A Utah judge waded deep into Mormon pioneer history to settle a long-simmering fight over stream access, this time in favor of riverside property owners.



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~~systems of streams crossing private land. This is because there was no formal public easements to non-~~

navigable streams at the time of Utah statehood, even though public access to the Provo and other Utah rivers “was at the time widely accepted and extensive.”

For more than a decade, the [Utah Stream Access Coalition](#) has contested a Utah law that enables property holders to deny public access to streams flowing through private land. Bringing suit against an exclusive resort on the banks of the upper Provo River, the coalition argued Utahns customarily accessed streambeds prior to statehood in 1896.

That argument carried the day in Pullan’s initial ruling six years ago, but on remand from the Utah Supreme Court, the judge drew a different conclusion.

“The Coalition has failed to produce any statute or other evidence of Congressional action granting a public easement in the beds of non-navigable rivers and streams in the Utah territory,” the Heber City-based judge wrote in a ruling released Monday. “Thus, because of the plenary power of Congress over lands in the Utah territory, public use of non-navigable river beds and stream beds in the territory between 1851 and 1869 could not create an easement dictated by law in the late 19th century.”

The historical significance of 1851 and 1869 is, respectively, the signing of the Treaty of Guadalupe Hidalgo ceding the Utah territory to the United States and the establishing of the first federal land office in Utah, which allowed settlers to acquire land for the first time.

In an email to its members Tuesday, the coalition board said it is “deeply disappointed by this decision” and it is meeting next week to determine its strategy moving forward.

What started this legal ball rolling was a [2008 state Supreme Court ruling](#) that, ironically in light on Monday’s ruling, recognized a public easement to Utah streams since those waters belong to the state.

Because that ruling suggested people could walk into private property as long as they stayed in a stream bed, property rights advocates pushed for a law that would enable owners to bar the public from touching privately owned streambeds.

In response to the controversy, Utah Legislature passed HB141 in 2010 and the state has been in court ever since.



of streams used for floating logs at the time of Utah statehood were sovereign state-owned land, under the logic that such streams were vital to commerce.

The other targeted a stretch of the Provo, a prized trout stream, that passes through a high-end fishing resort called Victory Ranch in Woodland Valley, where the river exits the Uinta Mountains. The stream access advocates claimed that historic public use of the Provo's streambed amounted to an easement.

Invoking the public trust doctrine, Pullan agreed and struck down Utah's stream-access law in 2015. Public trust is a centuries-old legal concept that maintains certain natural amenities — such as coastlines, lakes, rivers and their beds — remain public domain because of their importance to commerce.

His ruling pointed out that HB141 closed access to 2,700 of Utah's 6,400 miles of fishable streams, or 42% of the total.

But the Supreme Court remanded the case back to Pullan, instructing him to resolve a narrow “threshold question” overshadowing the entire case. Were there actual public easements to streambeds on the books at the time of statehood?



The answer is no, according to Pullan's ruling Monday.

The access coalition had argued that Utahns' customary use of streambeds back in 1896 should translate into a right of access decades later.

“Throughout history, until the advent of trespass laws in the mid-20th century, due to its unique religious and homogenous pioneer culture and history, Utahns freely, ubiquitously and, with few exceptions, without landowner objection or legal repercussion, touched and utilized the beds of . . . [Utah's rivers, streams, and

lakes],” wrote coalition attorney Craig Coburn in a brief, “whether navigable with publicly-owned beds or non-navigable with privately owned beds—for any lawful purpose (e.g., fishing, baptisms, washing, bathing, swimming, floating, wading, tie/log and similar drives, installation of irrigation and mill works).”

A property rights group argued the coalition's position — that the public enjoys free access to streambeds — represents a “wholesale deprivation” of property rights.

“Such a prescriptive right in the general public ignores the essential characteristic of private property — the right to exclude. For USAC to prevail, it must show that the right to exclude from private property did not exist prior to statehood. It has not done so,” wrote attorney Michael Zimmerman, himself a former Utah chief



their properties.”



An easement by custom may have been doctrine under English common law but that idea never took root in U.S. soil, Zimmerman observed.

“The Coalition is correct about state trespass laws in the late 19th century and early 20th century. These laws did not prohibit a member of the public from touching the privately owned bed of a non-navigable river or stream,” Pullan concluded in his ruling. “But the absence of civil or criminal liability for this public use does not mean that the use also gave rise to a public easement.”

Meanwhile, anglers may fish the lower 0.7-mile segment of the Provo on Victory Ranch property where the river crosses under State Road 32. This access was secured through the Division of Wildlife Resource’s [Walk-in Access Program](#), which works with private landowners to allow people to hunt and fish on their property.



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