

REASONS TO REJECT H.B. 386

1. The amendment to Section 102(a)(4) of the Act confuses the definition of Navigability.

In the recent case involving the Weber River, the Utah Supreme Court held that the current language of the Public Waters Access Act (PWAA) incorporates a specific standard of navigability that has been in place for over a century and that has been used successfully by the State of Utah in litigation with the federal government to claim ownership of the beds of the Great Salt Lake, Utah Lake, and the Green and Colorado Rivers. Under this standard, rivers or lakes are navigable if “they are used, or are susceptible of being used, ... as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” (See *USAC v. Orange Street Development* 2017 UT 82 [Utah Supreme Court]; *United States v. Utah*, 51 S.Ct. 438 (1931) [U.S. Supreme Court])

At lines 33-37 H.B. 386 rewords this test, omitting crucial elements and adding others. Most importantly, it omits the terms “susceptible of being used” and “highways of commerce.” The effect will be to confuse the definition of navigability under the PWAA. Will we still follow the standard of navigability used to determine whether the State owns the river bed as our Supreme Court has said, or will we have a different standard for determining whether the public has access to the river bed?

And why would we want a different standard for public access than we have for public ownership? The only legitimate reason would be to allow access (without ownership) to a greater number of rivers, which many states have done. But that is assuredly not the intent of the sponsors here. Their intent is to confuse the definition and thereby limit the number of rivers to which the public has access.

2. The addition of Section 201(4) of the Act unfairly tilts the scales in favor of those who would claim Utah’s navigable waters and their beds for themselves.

Lines 102-109 would require someone claiming navigability to prove navigability by clear and convincing evidence – rather than a preponderance of the evidence – a burden found nowhere in navigability case law that tilts the scales in favor of those who would claim Utah’s navigable waters and their beds for themselves. These amendments would also impose a rebuttable presumption that a water is not navigable on anyone seeking to establish otherwise – a legal hurdle found nowhere in the navigability case law.

3. The amendment to Section 201(2) also unfairly tilts the scales against those seeking to establish a historical easement to use Utah’s rivers and streams.

One of the compromises in the original version of the PWAA was to allow the public, in very limited circumstances, to establish a right to use a non-navigable water based on a long history of public use. Lines 96-98 would add the requirement of proving the existence of this right by clear and convincing evidence, rather than a preponderance of the evidence. This change would further diminish the minimal concessions granted to the public in exchange for the loss of substantial access rights under the original PWAA.

To conclude, H.B. 386 is a thinly veiled effort to further privatize Utah’s public waters and beds – nothing more, nothing less – by making it more difficult for the State and its growing citizenry to use and enjoy their rivers, streams and lakes. The legislature needs to defend and protect these opportunities, not aid and abet private interests in their efforts to reserve these increasingly scarce and invaluable resources for a select few.