

RESPONSE TO PETITION FOR CONSISTENCY REVIEW

December 1, 2022

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Executive Director
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Director Ferry,

On November 16, 2022, Lake Restoration Solutions, LLC (“LRS” or “Petitioner”) submitted a timely Petition for Consistency Review (“Petition”) to Ms. Jamie Barnes, Director of the Division of Forestry, Fire and State Lands (“Division”) pursuant to Utah Admin. Code Rule R652-9-400. On November 22, 2022, Ms. Barnes determined the Petition satisfied the requirements in Utah Admin. Code R652-9-300 and, pursuant to R652-9-400, Ms. Barnes forwarded the Petition to you.

The Division now submits this Response to LRS’s Petition for Consistency Review (“Response”) in accordance with the Utah Administrative Procedures Act, Utah Code § 63G-4-301(2)(a), which allows any party to submit a response to the presiding officer within fifteen (15) days of the mailing date of the request for review.

ANALYSIS

1. The Division Did Not Act Arbitrarily by Omitting an Analysis of the Factors in Utah Admin. Code R652-80-200(2) Because the Application Does Not Contemplate an Exchange of Specific Sovereign Lands for Land and/or Assets.

Petitioner alleges the Division, in its Record of Decision (“ROD”), did not comply with its own rules by failing to analyze the following: how the Utah Lake Restoration Project (“Project”) would affect the value of the affected lands or other assets, how the Project would increase and enhance commerce, navigation, wildlife habitat, public recreation or other public trust value, or how the Project affects management costs and opportunities, pursuant to Utah Admin. Code R652-80-200(2).¹

The Division did not address the factors in Utah Admin. Code R652-80-200(2), but such omission was not arbitrary. The rule requires an exchange of specific land or other assets, and the

¹ In the Petition, LRS states the Division only analyzed the Application under R652-80-200(2)(d) and failed to analyze factors (a) through (c). Subsection (d) requires the Division to consider whether the land exchange promotes the interest of the public without any substantial impairment of the public interest in the lands and waters remaining. This factor is essentially a codification of the analysis required by the court in *Illinois Central*. See *Illinois Central Railroad*, 146 U.S. at 452. Yet, in a later argument, LRS is analytically inconsistent when it contends the Division is not in a position to make the constitutional based argument that the Project does not comply with Article XX § 1 of Utah’s Constitution. However, as stated in the ROD, the Utah Supreme Court has provided guidance in determining whether state lands are protected by Article XX, § 1 and whether a contemplated disposal of state lands would run afoul of the constitutional protections afforded. *Illinois Central* and the Subsection (d) analysis mentioned above is the lodestar in determining the scope of the public trust component of Article XX of the Utah Constitution.

Petitioner's land exchange application ("Application") did not contemplate either. Thus, the Division acted properly and in compliance with Utah law.

Petitioner filed its Application with the Division on November 13, 2017, prior to the enactment of the Utah Lake Restoration Act in 2018. As such, the Application was filed before the Utah Legislature deemed "comprehensive restoration" as a viable method of compensation for appropriately available land.

At the time the Application was filed, there was no statutory or regulatory framework addressing a project of the size and scope proposed by Petitioner. Notwithstanding, the Petitioner filed the Application as a land exchange, pursuant to Utah Admin. Code R652-80-100 et. seq ("Land Exchange Rules").

Under the land exchange framework, the Division may exchange sovereign land for *land or other assets*. Utah Admin. Code R652-80-200(1). Assets are defined as "personal property, including cash, which has a readily determined market value." Utah Admin. Code R652-80-200(1)(a).

However, Petitioner's Application did not specify the sovereign land to be exchanged but instead simply indicates "TBD." The Application also did not include a description of the private land or assets to be acquired by the Division in the proposed exchange. During the approximately five (5) years the Application was pending with the Division, the Petitioner never amended or augmented the Application to include the specific lands or assets to be exchanged. Without specific lands or other assets to be exchanged, the Division could not practically address and analyze factors 2(a) through (c).

Further, while the Application did include a four-page project description proposing the exchange of Utah Lake sovereign land for the comprehensive restoration of Utah Lake, under the Division's Land Exchange Rules, an "asset" is personal property or cash with a readily determined market value. Utah Admin. Code R652-80-200(1)(a). In other words, the proposed comprehensive restoration of Utah Lake is not an "asset" as the term is defined.

The Application and proposed Project do not fit squarely within the types of land exchanges the Division is authorized to complete pursuant to its own rules and statutes. After the Application was submitted to the Division, it became clear the Project was not a land exchange, but rather an exchange of sovereign land for services. An exchange of sovereign land for services is not contemplated nor authorized by R652-80-200.

Based on the nature of the Application, the Land Exchange Rules are not relevant to the proposal and was properly excised from the ROD's analysis. Moreover, the Application is materially deficient because it does not contain a description of specific lands to exchange. For these reasons, the Division did not act arbitrarily when it omitted the Utah Admin. Code R652-80-200(2) analysis in its ROD.

2. LRS Misinterprets the Structure of Utah Code Ann. § 65A-15-201 and Ignores the Division's Delegated Authority.

This Division was not required to analyze the thirteen (13) public benefit factors in deciding to cancel LRS's ROD. In its Petition, LRS argues the Division acted arbitrarily and

capriciously by ignoring the thirteen public benefit factors² when cancelling LRS's Application. In maintaining this position, LRS argues, "[t]he Division is not free to substitute its own view and interpretations in place of the state legislature's." Petition at 6.

The Division agrees it is required to follow its statutory mandates. In denying LRS's Application, the Division did exactly that – the Division adhered to its statutorily delegated authority and based its decision on a reasonable application of existing law.

3. The Decision to Deny or Recommend an Application and/or Restoration Proposal under Utah Code § 65A-15-201 is Within the Absolute Discretion of the Division.

LRS's Petition ignores the fact the Legislature clearly and plainly granted the Division discretion to recommend or deny applications submitted under the Utah Lake Restoration Act. The delegation language granting this discretion is found within the first sentence of the operative statute within the Act: "The division *may* recommend the disposal of appropriately available state land in and around Utah Lake. . . ." Utah Code Ann. § 65A-15-201(1)(a) (emphasis added).

Utah "[c]ourts have 'repeatedly affirmed [a] commitment to interpreting statutes according to the 'plain' meaning of their text,' as that is the 'best evidence of the legislature's intent.'" *S. Utah Valley Elec. Serv. Distr. v. Payson City*, 2021 UT 68, ¶ 20, 502 P.3d 272, 276 (internal citations omitted). Courts "do not interpret the 'plain meaning' of a statutory term in isolation," but against the "relevant context of the statute." *Id.* at ¶ 26. The plain language of a statute is to be read "as a whole and interpret[ed] . . . in harmony with other statutes in the same chapter and related chapters." *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780, 784. "Generally, when interpreting statutes we seek to avoid interpretations 'which render some part of a provision nonsensical or absurd.'" *Marion Energy Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 26, 267 P.3d 863, 869 (internal citations omitted). Finally, Utah courts strive to "avoid any interpretation which renders parts or words in a statute inoperative or superfluous in order to give effect to every word of a statute." *Monarrez v. Utah DOT*, 2016 UT 10, ¶ 11, 368 P.3d 846, 852.

In connection with these well-established statutory rules of statutory interpretation, the Legislature has codified certain statutory rules of construction to be followed when construing enacted statutes.³ The term "may" "means that an action is authorized or permissive." Utah Code § 68-3-12(1)(g). In contrast, the term "shall" "means than an action is required or mandatory." Utah Code § 68-3-12(1)(j).

In this case, the Legislature granted the Division absolute authority and discretion when evaluating applications and/or restoration project proposals to determine whether a restoration project proposal should be recommended. (*See* Utah Code §§ 65A-15-201 (1)(a)(i)-(xiii) and

² LRS mistakenly refers to the thirteen public benefit factors under Utah Code § 65A-15-201(1) as "Public Trust Factors" in its Petition. (*See* Petition, at p. 5.) The statute clearly describes the thirteen factors under (1)(a) as being "public benefits". *Id.* As detailed in the ROD, the public trust factors applicable to the LRS's cancelled application are tethered to navigability and public trust values prescribed specifically to sovereign and/or submerged lands. Under the authority cited by the Division in the ROD, "Public benefits" are subordinate to these public trust values. *See generally, National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909 (Utah 1993).

³ The statutory rules of construction have a caveat: "[i]n the construction of a statute in the Utah Code, the general rules listed in this Subsection (1) shall be observed, unless the construction would be: (i) inconsistent with the manifest intent of the Legislature; or (ii) repugnant to the context of the statute. Utah Code § 68-3-12(1)(a). The Division submits the general rules under Subsection (1) are applicable here.

201(2)–(3); *See also* Utah Code § 65A-15-201(b) (“The Division *may* recommend the disposal of appropriately available state lands ... *if* the Division finds the restoration will enhance the following public benefits ...”).

Since the Division determined the lands proposed by LRS to be permanently disposed of – approximately 15,000 acres of Utah Lake lakebed – were not “appropriately available” under the statute, it was within the Division’s delegated authority to choose not to make a recommendation to the Legislature and the governor.

Moreover, this interpretation is in harmony with the balance of the remaining operative provisions within Utah Code § 65A-15-201. In case there was any doubt as to the clear discretionary authority granted to the Division, the Legislature solidified its intent by also including this language: “[i]f the division chooses to make a recommendation under Subsection (1)(a), the division shall make the recommendation in writing to the Legislature and governor.” Utah Code § 65A-15-201(1)(b).

Here, the Division exercised its clear discretionary authority granted under Utah Code § 65A-15-201(1)(a) and elected to deny the application based on the legal reasoning contained in the ROD. As such, and contrary to LRS’s arguments, there was no statutory requirement to engage in any evaluation of the “thirteen public benefit” factors under Utah Code § 65A-15-201(1)(a) since the Division was not going to make a recommendation to the Legislature and governor.

4. In Exercising its Discretion, the Division Adhered to the Two-Part Test Established in Utah Code § 65A-15-201(1)(a).

The plain language of Utah Code § 65A-15-201(1)(a) establishes a two-part process for determining whether a restoration project should be recommended to the Legislature and the governor. First, the Division must determine whether the land to be exchanged is appropriately available. If the Division finds that the land is appropriately available, it must then undertake the analysis set forth in Utah Code §65A-15-201(1)(a)(i)-(xiii) to determine if the Project will enhance the identified public benefits.

Here, the Division determined the lands proposed for disposal by LRS did not meet the first part of the test because the proposed lands to be exchanged were not “appropriately available” since the project would not be in the best interest of the beneficiaries of those lands. Contrary to LRS’s arguments, the Division was well within its statutorily granted authority in choosing against making a recommendation.

On this point, Utah Court pronouncements as to the scope of discretionary authority provided to state agencies unequivocally support the Division’s decision to cancel LRS’s ROD. A recent decision from the Utah Supreme Court provides applicable case law outlining the contours of state agency discretionary authority. *See Graphic Packaging International Inc. v. Labor Commission*, 495 P.3d 228, ¶ 21 (Utah 2021).

In connection with a similarly situated state agency – the Utah Labor Commission – the grant of discretionary authority has been thoroughly evaluated. As applied to the Labor Commission, “the governing statute provides the Commission “may refer the medical aspects” of any case involving a claim for “disability by accident” “to a medical panel appointed by an [ALJ]”. *Graphic Packaging* 495 P.3d 228 at ¶ 21 (emphasis in original) (citation omitted). “The

statute's use of the word "may" is significant, and suggests that the legislature has granted the Commission discretionary power over the appointment of medical panels." *Id.* (citation omitted).⁴ According to the Utah Court of Appeals, "[t]hus, in light of the discretion afforded the Commission by statute, we review the Commission's decisions regarding appointment of medical panels for abuse of discretion." *Id.* (citation omitted).

Finally, and importantly, "a discretionary decision involves a question with a range of 'acceptable' answers, some better than others, and the agency . . . is free to choose from among this range without regard to what an appellate court thinks is the 'best' answer." *Id.* (citation omitted). When applying this standard, a reviewing Court, "will reverse only if there is no reasonable basis for the decision." *Id.* (citation omitted).⁵

Applying these concepts to the case at bar, the Division correctly followed its discretionary authority and appropriately analyzed the Legislature's intent. In enacting Utah Code § 65A-15-201, the Legislature was careful in including the phrase "appropriately available" when first determining whether a restoration project is suitable for a recommendation to the Legislature and governor. The Division interprets the inclusion of that phrase as a threshold factor in proceeding further within the balance of the statute.

As pointed out in the ROD, the Legislature has broadly granted the Division with management authority over all of Utah's sovereign lands, and has generally instructed the Division to only exchange, sell, or lease sovereign lands in the quantities and for the purposes as serve the public interest and do not interfere with the public trust. *See* Utah Code § 65A-10-1. The plain meaning of the term "appropriately" is: "in a way that is suitable, acceptable or correct for the particular circumstances."⁶ The plain meaning of the term "available" is: "present of ready for immediate use."⁷ The plain language of Utah Code § 65A-15-201(1)(a) requires the Division to make an initial determination of whether the proposed lands affiliated with any given restoration project are "appropriately available". Indeed, nowhere within the operative statute is there a designation that that determination is to be made by anyone other than the Division.

As thoroughly explained in the ROD, the proposal by LRS, in the discretion of the Division, violates the constitutional protections afforded to sovereign lands. That determination was properly made under the Division's discretionary authority. Since the first prong of the two-part test under Utah Code § 65A-15-201(1)(a) was not met, the Division properly exercised its authority to not proceed with a recommendation under the "public benefit" analysis under Utah Code § 65A-15-201(1)(a). As such, the Division acted consistently within its statutory and regulatory authority.

⁴ In *Graphic Packaging*, the Utah Court of Appeals was confronted with evaluating agency discretionary authority under the auspices of formal adjudications and Utah Code Ann. § 63G-4-403. Even though the case at bar may involve an informal adjudication, the Division believes the discretionary authority analysis contained within *Graphic Packaging* is applicable to informal adjudication as well.

⁵ *See also Murray v. Utah Labor Comm'n*, 308 P.3d 461, ¶¶ 31-32 (evaluating the discretionary authority of the Public Service Commission, the Court noted, "[t]here are a range of 'acceptable' fact scenarios that the PSC could either accept or reject as being expedient without risking reversal by an appellate court. And the appellate court will review the PSC's discretionary decision for an 'abuse of discretion' to ensure that it falls within the bounds of reasonableness and rationality. Reasonableness, in turn, is essentially a test for logic and completeness rather than the correctness of the decision.") *Id.* at ¶ 32.

⁶ *See e.g.*, <https://www.oxfordlearnersdictionaries.com/us/definition/english/appropriately>.

⁷ *See e.g.*, <https://www.merriam-webster.com/dictionary/available>.

5. Proceeding With the LRS' Application Would Violate Other Applicable Statutory Provisions, Further Running Afoul of Applicable Legislative Intent.

LRS's Petition opened the door as to evaluating whether the Division's ROD was in accord with established rules of statutory interpretation. Although this point was not elaborated in the ROD, the Division further points out that the Division's statutory interpretation must be in accord and/or harmony with other applicable statutory authority. *See State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780, 784. (The plain language of a statute is to be read "as a whole and interpret[ed] . . . in harmony with other statutes in the same chapter and related chapters.").

As established in the ROD, LRS's proposal required fee simple disposal of sovereign land to private interests. The Division rightly determined that fee simple disposal of sovereign land is precluded by operation of the Public Trust Doctrine. In further support of this premise, and the Legislature's understanding of the importance of the Public Trust Doctrine relating to public access to these natural resources, the Legislature clearly and unequivocally prohibits fee simple disposal of these resources in other portions of the Utah Code.

Specifically, by way of example, and not limitation, the Legislature enacted a specific statute precluding fee simple disposition of sovereign lands in order to fully protect the public trust values of hunting and fishing on these lands:

- (1) Except as provided in Section 65A-2-5, there is reserved to the public the right of access to all lands owned by the state, including those lands lying below the official government meander line or high water line of navigable waters, for the purpose of hunting, trapping, or fishing.
- (2) When any department or agency of the state leases or sells any lands belonging to the state of Utah lying below the official government meander line or the high water line of the navigable waters within the state, the lease, contract of sale, or deed shall contain a provision that:
 - (a) the lands shall be open to the public for the purpose of hunting, trapping, or fishing during the lawful season, except as provided by Section 65A-2-5; and
 - (b) no charge may be made by the lessee, contractee, or grantee to any person who desires to go upon the land for the purpose of hunting, trapping, or fishing.
- (3) Lands referred to in this section shall be regulated or closed to hunting, trapping, or fishing as provided in this title for other lands and waters.

Utah Code § 23-21-4.⁸

In reconciling the Division's interpretation with other relevant statutory provisions, it is clear the legislative intent surrounding any disposal of sovereign lands in fee simple to a private party is precluded under Utah law. If the Division did not make the determination contained in the ROD, the Division would be improperly and unlawfully ignoring further and additional expressions of the Legislature. Utah Code § 23-21-4 clearly requires any deed or patent issued by

⁸ The exception discussed in Utah Code § 23-21-4 is not applicable to this fact pattern since the Project does not involve a lease of sovereign land.

the Division or Governor to contain a provision allowing for the disposed lands to be “open to the public for the purpose of hunting, trapping, or fishing.”

The Division respectfully submits the above-referenced statutory provision is a further example and justification as to why LRS’s application and proposal violate clear legislative intent to not have these lands passed to private interests in fee simple.

6. LRS’s Arguments Suggesting the Division Failed to Follow the Requirements of Utah Code § 65A-15-201(2) Suffer from the Same Analytical Flaws.

LRS argues the Division failed to follow its own statutory authority when failing to analyze LRS’s application and/or restoration project under Utah Code § 65A-15-201(2). The Division disagrees.

The plain language of the operative statute only “requires” the Division to perform the analysis set forth in Utah Code § 65A-15-201(2) if the Division finds the restoration project proposal satisfies both prongs of the two-part test set forth in Utah Code § 65A-15-201(1)(a) - as discussed *supra*.

It is only after the Division, exercising its discretionary authority, determines that all the requirements of Utah Code § 65A-15-201(1)(a) are satisfied, is the Division required to conduct the analysis set forth in Utah Code § 65A-15-201(2).

Since the Division determined the Project did not satisfy the requirements of the two-part test, there was no need to make any further evaluation under Utah Code § 65A-15-201(2).

7. The Division was Required to Assess the Constitutionality and Legality of the Proposed Land Exchange

The Petitioner’s contention that the Division should not have assessed the constitutionality or legality of the Project is flawed and ignores the Division’s controlling statutes and the Division’s role as trustee over Utah’s sovereign lands. As trustee of the State’s sovereign lands and the agency tasked with evaluating proposed land exchanges, the Division does not need explicit statutory authorization to analyze the legality or constitutionality of a proposed land exchange. Even if statutory authorization were required, the controlling statutes require the Division to consider the Public Trust Doctrine when evaluating land exchanges, which is rooted in Utah’s Constitution. If Petitioner’s reasoning were followed, it would force the Division to approve blatantly illegal proposals in violation of its administrative and fiduciary obligations.

The Utah Legislature has explicitly directed the Division to evaluate the legality of any proposed exchange of sovereign lands. The Legislature has delegated the management of sovereign lands to the Division. Utah Code § 65A-1-4(1)(b). As part of this management directive, the Legislature prohibits the Division from disposing of sovereign lands unless the disposal would “serve the public interest and do[es] not interfere with the public trust.” Utah Code § 65A-10-1. The Public Trust Doctrine is a constitutional doctrine established in Art. XX, sec. 1 of the Utah Constitution. In order to fulfill the legislative directive under Utah Code § 65A-10-1, the Division was required to determine whether the Project would violate the Public Trust Doctrine, and therefore, be unconstitutional.

Moreover, the Utah Lake Restoration Act necessarily requires the Division to conduct a legal and constitutional analysis of any restoration project proposed under the Act. Utah Code § 65A-15-201(1)(a) states the Division may dispose of *appropriately available* state land in and around Utah Lake. As stated previously in this Response, in making that initial determination whether state land is “appropriately available,” the Division has a fiduciary obligation to consider whether the proposed disposal comports with the Public Trust Doctrine, a doctrine enshrined in the Utah Constitution. Since the Division determined the lands proposed by LRS to be permanently disposed of were not “appropriately available” under the statute, it was within the Division’s delegated authority to not further pursue a recommendation and to take action on the Application.

Even if the Legislature had not given the Division an explicit directive to assess the constitutionality of land exchanges, the Division, as the administrative agency designated to evaluate land exchanges and serve as trustee over Utah’s sovereign has an inherent responsibility to evaluate the legality and constitutionality of proposed land exchanges. As explored in the ROD and in the section below, the Division serves as the trustee of Utah’s sovereign lands and owes the beneficiaries of the trust a fiduciary duty to act in the trust’s best interests. This fiduciary responsibility requires the Division to ensure any disposition from the trust is legal and constitutional.

Petitioners are effectively asking the Division to approve all land exchanges, even if they are obviously illegal and/or unconstitutional. Even without any direct statutory authorization or fiduciary responsibility, it would be against public policy to require executive branch agencies to approve obviously illegal or unconstitutional proposals. The efficiency of state government requires executive branch agencies to make determinations of legality and constitutionality, and the Utah Constitution and Legislature have assigned the Utah Attorney General to serve as legal counsel in making these determinations. *See* Utah Const. art. VII, § 16; Utah Code § 65A-1-5.

While it is true only a court can determine the ultimate constitutionality of a statute or application under a statute, the Division is obligated to conduct a legal and constitutional analysis of all of its actions concerning sovereign lands management. As a result, LRS’s argument should be disregarded.

8. The Division Appropriately Interpreted and Applied the Public Trust Doctrine

The existence of the Public Trust Doctrine is settled law in Utah, which the Division was required to consider when evaluating the Application. While the Utah appellate courts have not announced an explicit test to determine whether a disposition of sovereign lands would violate the Public Trust Doctrine, the Utah Supreme Court has looked to the United States Supreme Court’s seminal *Illinois Central v. Illinois* case when examining the State’s duties to protect the State’s submerged sovereign lands. *See Utah Stream Access Coalition*, 439 P.3d at 606–611. The Division, as the trustee of Utah’s submerged sovereign lands, analyzed the Application according to this same legal framework. Based on this analysis, the Division determined that permanently disposing of approximately 15,927.30 acres of sovereign lands to the hands of a private party would be a violation of the Public Trust Doctrine.

A. The Division had an affirmative duty to analyze disposals of sovereign lands under the Public Trust Doctrine, even if the Utah Courts have yet to articulate a clear test

It is true that the Utah Courts have yet to announce a clear test to determine whether a disposition of sovereign lands violates the Public Trust Doctrine, but this does not prevent the Division from determining whether a proposed disposition of sovereign would violate the Public Trust Doctrine. In fact, the Division's unique position as trustee for sovereign lands, paired with the Legislature's directive to ensure disposals of sovereign lands do not interfere with the public trust⁹, required the Division to take affirmative action to determine whether the Project would violate the Public Trust Doctrine.

LRS agrees that the Division acts as the trustee for Utah's submerged sovereign lands.¹⁰ As trustee for Utah's sovereign lands, the Division was required to take affirmative action to protect the trust resources. Without a clearly established test, the Division was required to look for other guidance from the Utah courts and other persuasive tribunals, notably the United States Supreme Court. Simply approving the Application without doing an analysis under the Public Trust Doctrine would have been a violation of the Division's duty of loyalty to the people of Utah, which requires the Division to exercise prudence and skill in administering the trust in a way that benefits the beneficiaries' interests.

Additionally, the Utah Legislature and Division regulations specifically require the Division to evaluate the Public Trust Doctrine when considering disposals of sovereign lands. First, the Utah Legislature prohibits the Division from disposing of sovereign lands unless the disposal would "serve the public interest and do not interfere with the public trust." Utah Code § 65A-10-1. Additionally, the Division's administrative rules, which carry the force of law, require the Division to cancel a permit to dispose of sovereign lands if cancellation is "in the best interest of the beneficiaries of that land." Utah Admin. Code R652-3-400. These mandates impose an additional affirmative duty upon the Division to consider the Public Trust Doctrine.

These trustee, statutory, and administrative mandates required the Division to consider whether the Project would violate the Public Trust Doctrine. If the Division failed to consider the Public Trust Doctrine, they would violate the law and their trust obligations, which would be a disservice to the beneficiaries of the trust and would expose the Division to potential litigation for breaching these fiduciary duties and obligations.

B. The Division relied on guidance from the Utah and United State Supreme Court in determining whether the Project would violate the Public Trust Doctrine

LRS is correct in pointing out that the Utah Courts have not established a clear test for determining whether a disposal of sovereign lands would violate the Public Trust Doctrine; therefore, to fulfill their trust obligation, the Division relied on analysis from the Utah Supreme Court and seminal holdings from the United States Supreme Court.

⁹ See Utah Code § 65A-15-103(5).

¹⁰ See Petition at 8 ("In its capacity as trustee, the state must meet its duty of loyalty to the trust beneficiaries, exercising prudence and skill in administering the trust in ways that benefit the beneficiaries' interests." (citing *Nat'l Parks and Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 918 (Utah 1993)).

The Division relied heavily on analysis from the Utah Supreme Court in the recent *Utah Stream Access Coalition* case. While the *Utah Stream Access Coalition* case did not have an explicit holding regarding a Public Trust Doctrine analysis, the Utah Supreme Court extensively analyzed the district court’s treatment of the United States Supreme Court’s seminal *Illinois Central Railroad* case. The Division, like the District Court, chose to rely on *Illinois Central Railroad* because, as recognized by the Utah Supreme Court, “[a]s a decision handed down just three years before the ratification of the Utah Constitution, we think that *Illinois Central* may help inform the search for the historical understanding of the public trust principles embedded in the Utah Constitution.” *Utah Stream Access Coalition*, 439 P.3d 593 at ¶ 73, n. 5. Additionally, *Illinois Central Railroad* has been recognized as the “lodestar” of American public trust jurisprudence and has been cited by many state courts.¹¹ Based on these facts, the Division felt it appropriate to rely on the seminal case in analyzing the Application.

C. The Project would be a categorical violation of the Public Trust Doctrine

Based on the guidance of the Utah and United States Supreme Court, the Division determined for the Application to divest the public of approximately 15,927.30 acres of sovereign lands for private benefit would be a violation of the Public Trust Doctrine and the Division’s role as trustee over the lands required cancellation the permit. The United States Supreme Court in *Illinois Central Railroad* recognized submerged sovereign lands were to be “held in trust for the people and thus was ‘different in character from that which the state holds in lands intended for sale.’” *Utah Stream Access Coalition*, 439 P.3d 593 at ¶ 73 (quoting *Illinois Central Railroad* 146 U.S. at 452). The state holds these lands “in trust for people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.” *Illinois Central Railroad* 146 U.S. at 452.

Under *Illinois Central Railroad*, a state can dispose of “land under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, *do not substantially impair the public interest in the lands and waters remaining.*” *Id.* (emphasis added). The Division determined that divesting the people of Utah of the beds of Utah Lake by authorizing the dredging of 62,400 acres of lakebed and granting 17,988.56 acres of newly created artificial islands, including 15,927.30 acres of “development islands” in fee simple to a private party, would substantially impair the public interest in the lands. Any perceived aid in commerce would come at the primary benefit of LRS.

The Utah Supreme Court has recognized that the historical context of *Illinois Central Railroad* “may help inform the search for the historical understanding of the public trust principles embedded in the Utah Constitution.” The Division believes the large development proposal brought by LRS does not align with the “foundation for wharves, piers, docks, and other structures in aid of commerce” imagined as valid dispositions of sovereign lands by the framers of the Utah Constitution. *Id.* The Project would occupy a large percentage of the navigable waters of Utah Lake for the benefit of a private party, which would be a categorical violation of the Public Trust Doctrine. Therefore, the Division believes it’s analysis and

¹¹ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 474 (1970).

application of the Public Trust Doctrine was appropriate and required the cancellation of the Application.

9. LRS' Alleged Injury and Request for Relief

LRS requested relief in the form of remand with instruction to the Division to evaluate the Application under Utah Admin. Code R652-80-200(2) and R651-15-201, promulgate standards under Utah Code § 65A-15-201(a), and refrain from cancelling the Application until receipt and evaluation of a United States Army Corps of Engineers (“Corps”) Environmental Impact Statement (“EIS”).

The first injury alleged by LRS is material financial harm as a result of the Division’s cancelling of the application. Additionally, LRS alleged injury in the sense of deteriorating financial relationships and, thus, a potential lack of private funding for the project. The latter ‘injury’ is no injury at all. The harm alleged has either not yet occurred or, at least, LRS has provided no concrete evidence of such injury. As such, the Division will only address the former.

A. Asserted Injury and Irreparable Harm

LRS asserts they were forced, because the Division cancelled the application, to put their EIS process with the Corps “on hold.” However, the available correspondence between the Corps and LRS elucidates a different timeline.

In January of 2022, the Corps received an application from LRS for the “Utah Lake Restoration Project.” *See* Petition at 3. Upon review of the application, the Corps determined two things.¹² First, the proposed project under the application would trigger NEPA. Specifically, it would require the Corps to prepare an EIS. Second, the application was devoid of necessary information.

In response to this determination, it appears LRS did submit additional information to the Corps.¹³ During this time, it also appears the Corps began preparing an EIS. However, even after the additional submissions, LRS’ Corps application remained incomplete. Of interest, the Corps identified the following as missing information that would prevent the completion of LRS’ application: “relevant peer reviewed science data, studies, literature, and reports;” “the type, composition, and quantity of the material(s) to be dredged, and the method of dredging, and the site and plans for disposal of the dredged material;” “sufficient information, such as lotting, infrastructure location[,] and design, for us to evaluate the development.” *Id.*¹⁴ Additionally, the

¹² Department of the Army U.S. Army Corps of Engineers, Sacramento District, Memorandum for Record Subject: Determination an Environmental Impact Statement (EIS) Needed for the Utah Lake Restoration Project (Regulatory Division SPK-2018-00503), March 2022.

¹³ “...August 20, 2022 submittal of additional information.” Department of the Army U.S. Army Corps of Engineers, Sacramento District, Response (Regulatory Division SPK-2018-00503), September 2022.

¹⁴ The Corps provided a list of additional required information, as well as a list of recommended information, that LRS’ Corps permit application lacked. This list included the following: ”Complete written description of the proposed project; All activities which you plan to undertake which are reasonably related to the proposed project and for which a Department of the Army Permit is required, including associate access, disposal, and stockpile areas; Dimensions of proposed structures/fills and the types of material proposed to be used in construction; For dredging activities[:] Type, composition, and quantity of material to be dredged [and] Method of dredging, equipment used, method used to transport and site and plans for disposal; Purpose and Need of the Proposed Project[:] What will the proposed project be sued for and why? What is the need for the proposed project?

Corps was still unclear of “how [LRS’] proposed activities, specifically dredging, would improve or solve” the identified issues. *Id.*

As a result, the Corps determined LRS’ permit must be administratively withdrawn for incompleteness on September 23, 2022.¹⁵ *Id.* The Corps notified LRS the EIS Process remained in motion, “for purposes of NEPA compliance;” however, that the Corps would not continue to process LRS’ permit request unless and until LRS provided the Corps with a significant list of requested information. *Id.*

The Corps withdrew LRS’ Permit Request in September 2022. The Division issued its ROD on October 27, 2022. All actions taken by the Corps regarding LRS’ permit request took place before, and without the influence from, the issuance of the Division’s ROD. LRS’ alleged injury misstates the timeline of communications, events, and decisions that transpired among the Division, LRS, and the Corps. The Division’s actions did not precipitate action by the Corps. Instead, a lack of action by LRS itself led to its current status with the Corps.

Moreover, due to the nature of LRS’ project – comprehensive environmental restoration – LRS needed to present the Division with scientific grounds to support their claims. LRS chose to employ the Corps to obtain such science, under the NEPA process. In September 2022, the Corps stated a now familiar position – LRS did not present enough science and project specifics to move forward. The EIS is a tool meant “to ensure agencies consider the environmental impacts of their actions in decision making.” 40 CFR § 1502.1. To evaluate impacts, an agency needs sufficient details about the project under review. It is the burden of the applicant to submit those details.

As the applicant, it was LRS’ burden to provide the Division with sufficient information for the Division to make its findings under 1(a). As evidenced by the Corps’ correspondence, LRS not only failed to supply the Division with the appropriate peer reviewed information regarding the 1(a) factors, but also failed to provide the Corps with such information.

Conscientious predictions of impacts result from sufficient and clear proposals, not applications full of unknowns. To this end, the Division asserts that any road bumps LRS encountered with the Corps were a result of their own actions.

B. Request for Relief

LRS requests that the Division refrain from cancelling the Application until receiving and evaluating a completed EIS from the Corps. This request is not only unfounded but could tie up the restoration of Utah Lake for years to come. Granting LRS’ requested relief would work against the Division’s prerogatives to pursue “all reasonably available solutions to accelerate

Description of any related activities to be developed as a result of the proposed project; Projects involving the discharge of dredged and/or fill material into waters of the United States[:] Reasons for the discharge (specific purpose of the placement of material)[,] Type of material being discharged and the amount of each type in cubic yards[.] Source of the material to be discharge[d] (e.g., on-site, commercial source, specific off-site location)[,] Surface area of wetlands or other waters proposed to be filled, include type of waters to be filled and linear distance of waterway proposed to be impacted[,] Means by which the discharge is proposed to be done (backhoe, dragline, etc.)[,] Dredged material discharged at an upland site (description and map of the disposal site and steps taken to prevent runoff into any adjacent water(s)[]).”

¹⁵ Corps letter attached hereto as Exhibit A.

comprehensive and lasting restoration of Utah Lake.” Petition at 1 (citing H. Con. Res. 26, 62d Leg. Gen. Sess., 2018 Utah (March 22, 2017)).

The average EIS completion time, from Notice of Intent to Record of Decision, is 4.5 years.¹⁶ For the Corps, specifically, the average EIS completion time is 6.04 years. *Id.* If, as LRS asserts, the only way to obtain the science necessary to move forward with the Division is through the EIS process, this request could leave Utah Lake in limbo for years to come. For this reason, the Division asserts it would be unreasonable to change course and refrain, for an undetermined length of time, from cancelling LRS’s application.

C. LRS Lacks Vested Rights

Finally, the Application contains no vested rights. Until the Division executes and delivers an “instrument of conveyance, lease, permit or right... to the successful applicant,” an application “for the purchase, exchange, or use of sovereign lands or resources shall not convey or vest the applicant with any rights.” Utah Admin. Code R652-3-400.

Without vested rights, LRS has no claim to detrimental reliance. Additionally, LRS acknowledges their use of the EIS process to gather data as to the merits of their project. The EIS process could show that LRS’ project does not support, for example, “littoral zone” improvement, thus defeating the project, anyway.

LRS’ alleged injuries are either improperly asserted or too speculative in nature to support a viable injury claim. For this reason, the Division asserts that LRS did not suffer a specific injury arising from division action. Additionally, the Division believes a decision to refrain from cancelling LRS’ Application would work against any “acceleration” of Utah Lake’s restoration.

CONCLUSION

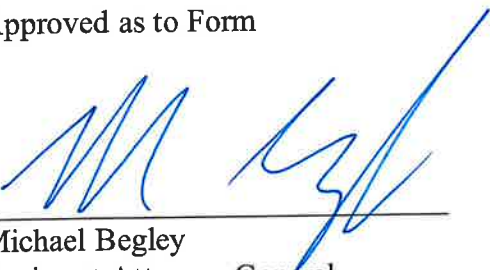
For the reasons stated above, the Division respectfully requests the relief requested by Petitioner be denied.

¹⁶ Council on Environmental Quality, Environmental Impact Statement Timeline (2010-2018) (June 12, 2020).



Jamie Barnes
Director, Division of Forestry, Fire and State Lands

Approved as to Form



Michael Begley
Assistant Attorney General
Counsel for Division of Forestry, Fire and State Lands



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922

September 23, 2022

Regulatory Division (SPK-2018-00503)

Lake Restoration Solutions, LLC
Attn: Mr. Scott Peters
3300 N Triumph Boulevard, Suite 100
Lehi, Utah 84043
scottpeters@lakerestorationsolutions.com

Dear Mr. Peters:

We are responding to your August 20, 2022, submittal of additional information for the *Utah Lake Restoration Project*. The proposed project would result in the discharge of dredged and/or fill material into approximately 18,000-acres of waters of the United States subject to Section 404 of the Clean Water Act. The approximately 153,000-acre (239 square miles) project site is located on Utah Lake, Latitude 40.1992°, Longitude -111.8250°, in Utah County, Utah.

Based upon our review of the information you provided, we have determined that your Department of the Army (DA) permit application is still incomplete. The following information will be required for us to complete our evaluation:

1. **Project Need.** The need is typically quantified or measured and includes identification of a problem or opportunity. The information must include relevant peer reviewed science data, studies, literature, and reports to substantiate the need for the proposed activities and how much is needed.
2. **Project Purpose.** The purpose statement must identify how to address the problem/opportunity through the identification of purposes, goals, and/or objectives and can be for single or multiple purposes. The information must be concise, based on scientific data, and focused on the action to be permitted. To define the project purpose, appropriate substantiation of need is critical.
3. **Project Description.** The project description must describe the type, composition, and quantity of the material(s) to be dredged, the method of dredging, and the site and plans for disposal of the dredged material. The description must include the type, composition, and quantity of the fill material; the method of transportation and disposal of the material; the location of the disposal site(s); the source of the fill material; and the purpose of the discharge. The information must also describe the use of the fill, including specific structures to be erected on the fill.

EXHIBIT A

Secondly, the thirteen elements identified by FFSL have been described as "public benefits," and thus, would not be included in the overall project purpose because they are a desirable outcome of the proposed project. During our development of the Environmental Impact Statement (EIS); however, we may determine that some, or all, of the thirteen public benefits identified by FFSL above may be appropriate to be used as screening criterion for the identification and evaluation of practicable alternatives under the Section 404(b)(1) Guidelines, and a reasonable range of alternatives under NEPA.

For project goals and objectives, you state the purpose of the project is to improve water quality; reduce energy of wind and wave action; increase water storage capacity; re-establish submerged aquatic vegetation (SAV); improve lake circulation; sequester nutrient loaded sediments; conserve billions of gallons of water; improve visitor safety, recreation, and navigation; remove invasive fish and plant species; and restore and increase littoral zones; however, it is unclear why these are issues or problems, what's causing them, and how your proposed activities, specifically dredging, would improve or solve these issues. For example, one of the goals of the project is to improve water quality by deepening Utah Lake; however, no data has been provided to demonstrate that deepening Utah Lake would improve water quality.

Furthermore, you state eutrophication of Utah Lake is caused by several factors, including land use in the watershed, point and non-point pollution, atmospheric deposition of nutrients, and sediment resuspension by carp, wind, and wave action; however, it is not clear how dredging Utah Lake would solve these problems. We need additional information on how dredging would be enough to address these outside sources of nutrients.

For project funding, you are proposing to construct community development that would provide a wide variety of housing options, including affordable and market-rate housing, which you say is needed to offset the cost of dredging operations for the proposed project. According to 33 C.F.R. 320.4(q), when private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the marketplace. To that end, we assume that you have completed the appropriate economic evaluations to ensure your proposed activities are economically viable. If the proposed dredging operation would not be economically viable without construction of community development, then dredging may not be a viable alternative. Additionally, based on the needs assessment, it is unclear how community development is needed to restore and enhance Utah Lake.

Lastly, the information provided regarding the proposed community development is not of sufficient detail for us to adequately evaluate its effects on the aquatic ecosystem; thus, we have determined that the community development portion of the project is speculative at this point in the review process. As a result, the community development portion of the proposed project will not be included as part of the proposed action evaluated in the EIS.

LIST OF ADDITIONAL INFORMATION

- X Required Additional Information for Complete Individual Permit Application
 - X Complete written description of the proposed project
 - X All activities which you plan to undertake which are reasonably related to the proposed project and for which a Department of the Army Permit is required, including associated access, disposal, and stockpile areas
 - X Dimensions of proposed structures/fills and types of material proposed to be used in construction
 - X For dredging activities
 - X Type, composition, and quantity of material to be dredged
 - X Method of dredging, equipment used, method used to transport and site and plans for disposal
 - X Purpose and Need of the Proposed Project
 - X What will the proposed project be used for and why? What is the need for the proposed project?
 - X Description of any related activities to be developed as a result of the proposed project
 - X Projects involving the discharge of dredged and/or fill material into waters of the United States
 - X Reasons for the discharge (specific purpose of the placement of material)
 - X Type of material being discharged and the amount of each type in cubic yards
 - X Source of the material to be discharge (e.g., on-site, commercial source, specific off-site location)
 - X Surface area of wetlands or other waters proposed to be filled, include type of waters to be filled and linear distance of waterway proposed to be impacted
 - X Means by which the discharge is proposed to be done (backhoe, dragline, etc.)
 - X Dredged material discharged at an upland site (description and map of the disposal site and steps taken to prevent runoff into any adjacent water(s))

- X Recommended Additional Information for Expediting Permit Evaluation
 - X A preliminary description of alternatives to the proposed project
 - X Current water and sediment chemistry data
 - X Current bathymetry of the lake compared to the proposed bathymetry after dredging
 - X Specific engineering measures to be used to ensure avoidance and minimization of shaking, liquefaction, and subsidence of the containment areas
 - X Copies of engineering reports and data from previous surveys and attempts to build on Utah Lake
 - X Copies of peer reviewed science data, studies, literature, and reports that substantiate or back-up the statements made in your permit application
 - X Locations of planned upgrades to waste treatment facilities around the lake. Will they result in a discharge of fill material into the lake? How do they play into the overall project and alternatives analysis?
 - X Locations of biofiltration systems. Will they result in a discharge of fill material into the lake? How do they play into the overall project and alternatives analysis?