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IN THE FOURTH DISTRICT COURT IN AND FOR
WASATCH COUNTY, STATE OF UTAH

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

Plaintiff,

vs.

ATC REALTY SIXTEEN, INC., a
California corporation; UTAH DIVISION
OF WILDLIFE RESOURCES, an agency of
the State of Utah; UTAH DIVISION OF
PARKS AND RECREATION, an agency of
the State of Utah; SHERIFF TODD
BONNER, Wasatch County Sheriff; and
DOES 1-10,

Defendants.

**MEMORANDUM
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

Case No. 100500558

Judge Derek Pullan

The State of Utah, by and through its attorney of record, Thom D. Roberts, Assistant Utah Attorney General, hereby submits the following Memorandum in Support of Motion for Summary Judgment:

STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

1. There are approximately 6,300 miles of fishable rivers and streams in Utah, Exhibit 43, Dep. of Makenzie Skyles; that at least 3,584 miles traverse streambeds owned by the State of Utah, the federal government, or the tribes, Skyles Dep., p. 38 and Exhibit 43.
2. There are approximately 2,707 miles which traverse streambeds that are owned privately and by cities, counties, and other local governments within the State of Utah. Skyles Dep., p. 38, Exhibit 43.
3. The approximately 2,707 miles of streams which traverse streambeds owned privately and by local government also include streams where the State of Utah or the federal government has purchased public access rights or easements to the streams to allow public access and use.
4. H.B. 141 regulates and limits the public's exercise of the public easement only on streams that traverse over private, non-publicly owned property where the private property owner has not granted or allowed public use of the water, Utah Code § 73-29-201 and 206.
5. Many owners of private property allow full public access to the stream and streambed as it flows over their private property. Olsen Dep., p. 84.
6. There has been increased pressure on the use of the streams in Utah over the years based upon the increased number of anglers and people actually using the streams, Schmidt Dep. p. 105.

7. Notwithstanding the passage of H.B. 141, and after its passage, all recreational and fishing activities can be engaged in on the streams and waters in the State of Utah not limited in use by H.B. 141 and there is no recreational or fishing activities that cannot be engaged in on those waters, Olsen Dep. p. 88.

8. Notwithstanding the passage of H.B. 141, and after its passage, people can access the streams and waters in Utah not limited in use by H.B. 141 and have a good fishing experience in Utah, Schmidt Dep., p. 100.

9. Notwithstanding the passage of H.B. 141, and after its passage, Utah's streams and waters not limited in use by H.B. 141 provide people with access and the opportunity to engage in world class fishing and recreational activities and guides and others are able to provide world class fishing and recreational opportunities to their customers. Harwin Dep., p. 75-6, Olsen Dep., p. 88.

10. The private property provisions in H.B. 141 expand and create opportunities for people to engage in more private fishing and recreational experiences that may not be available on public waters, Schmidt Dep., p. 94.

ARGUMENT

The Court in its Ruling and Order of March 8, 2013, determined that the public trust doctrine may act to limit the State's authority to regulate use of the public's easement in waters of the State of Utah if it is the functional equivalent of the State disposing of the public's easement. Ruling and Order, p. 16. Under the public trust doctrine, the Court determined that

remaining issue was “whether the Act substantially impairs the public’s interest in the lands and waters remaining - in the Provo River itself or the public waters statewide” (i.e. where H.B. 141 does not limit their use) as that was a disputed issue of fact. *Id.* at 22. Plaintiffs have the burden of proof on that issue. *Id.* at 16.

The public trust doctrine stems from the case of Illinois Cent. R. Co. v. Illinois, 146 U.S. 387 (1892). The public trust doctrine:

is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, – a reason as applicable to navigable fresh waters as to waters moved by the tide.

Id. at 436. The doctrine also stems from the federal interest and authority over foreign and interstate commerce and the centrality of navigable waters for conducting commerce. That interest in all of the waters and their inter-connected use required that:

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Id. at 453. The public trust doctrine thus barred disposing of the lands or the waters that would render the navigable waters, or the lands and waters remaining, unusable or that substantially impaired their use. In Illinois Cent. the Legislature had granted lands and waters of the harbor of Chicago to a private entity. This rendered the other remaining navigable waters unusable for commercial purposes as well as restricting access to the harbor in the city.

The Utah Supreme Court in Colman v. Utah State Land Board, 795 P.2d 622 (Utah 1990), recognized the public doctrine and its reasoning from the Illinois Cent. case, but also that the bar on disposing waters was not absolute:

The [U.S.] Supreme Court made clear that a state can grant certain rights in navigable waters if those rights can be disposed of without affecting the public interest in what remains.

Colman, 795 P.2d at 635-6. This Court in its Ruling and Order left that as the last remaining issue - whether H.B. 141 substantially impairs the public's interest in the lands and waters remaining (i.e. where H.B. 141 does not limit their use) and whether the Plaintiffs can meet their burden to demonstrate that.

H.B. 141 only applies and limits the exercise of any public easement or right of use on waters that flow over private, non-publicly owned land where the private land owner has not allowed access to the public. Utah Code § 73-29-201 and 206. The lands and waters remaining, i.e. that H.B. 141 does not limit the use of, are at least 3,584 miles of stream, and undoubtedly more. That mileage does not include stream stretches that are owned by cities, counties and other local governmental entities, where state or federal government has purchased or obtained easements and public rights to the water (such as the middle fork of the Provo River), and where the private property owners allow public access.¹

¹Or where the basis for public recreational access exists. Utah Code § 73-29-203.

It is undisputed that world class fishing and recreational opportunities are available and can be fully utilized on those streams and waters that H.B. 141 does not limit use on. There are no recreational opportunities or uses of the water that can no longer be engaged in on those streams. Guide services can still ply their trade and provide world class fishing and recreational opportunities. The public's interests in those streams and waters and the public's ability to engage in recreational fishing and other attributes of the easement recognized in Conaster v. Johnson, 208 Ut. 48, 194 P.3d 897, have not been limited or burdened. This is not a situation like in Illinois Cent. where the remaining waters were rendered if not useless substantially impaired because they could not be used for the intended purpose (commerce and access to Chicago). Use of these "remaining land and waters" here does not rely on access or use of waters that flow over privately owned land, nor is the efficacy of the use of those stream burdened by only being able to recreate and fish while floating on water that traverses privately owned ground (the allowable use of streams subject to H.B. 141).

The State recognizes that H.B. 141 affects the public's ability to use the waters that flow over privately owned property. But it is not a complete disposition of the public's interests and easement rights in the use of the water, but rather merely regulation of those interests and rights. Further, a future Legislature may alter and/or expand the public's use of the waters as it balances competing interests and rights and sets regulations on the use of the waters. Plaintiffs must demonstrate that H.B. 141 "substantially impairs the public's interest in the lands and waters remaining," i.e. those unaffected by H.B. 141, to show a violation of the public trust doctrine.

That would require proof and demonstration of the general inability to use or the uselessness of an attempt to use those waters for easement purposes, that access or opportunities are so limited that the easement rights cannot be exercised in a meaningful or significant way on the waters remaining, or that the exercise of the public easement on the streams and waters requires the ability to use the waters flowing over private land on an equal basis in order to make use of the other waters meaningful or beneficial. This Plaintiffs have not and cannot demonstrate that.

CONCLUSION

Plaintiffs have not and cannot demonstrate that the application of the provisions of H.B. 141 to the waters and streams in Utah that flow over privately held land substantially impairs the use of the waters not subject to H.B. 141. Plaintiffs therefore cannot demonstrate a violation of the public trust doctrine by the provisions of H.B. 141. This Court should therefore grant the State's Motion for Summary Judgment and deny relief to the Plaintiff.

Dated this 29th day of August, 2014.

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