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

UTAH STREAM ACCESS COALITION,

Plaintiff,

v.

VR ACQUISITIONS LLC, et al.,

Defendants.

AMICUS CURIAE UTAH ALLIANCE TO
PROTECT PROPERTY RIGHTS'
MEMORANDUM IN SUPPORT OF VR
ACQUISITIONS, LLC'S AND STATE'S
MOTIONS FOR SUMMARY JUDGMENT

Case No. 100500558

Honorable Derek Pullan

Amicus Curiae, Utah Alliance to Protect Property Rights (the "Alliance"), submits this memorandum in support of the motions for summary judgment filed by VR Acquisitions, LLC and the State of Utah.

The Alliance Is Allowed to Participate in this Briefing Because the Motions for Summary Judgment Involve the Question of H.B. 141's Constitutionality

The Alliance submits this memorandum pursuant to the court's October 25, 2011 Order, which grants the Alliance "permission to participate in any briefing that address[es] the

interpretation or constitutionality of H.B. 141.” (Order Granting Motion and Application of Utah Alliance to Protect Property Rights for Appointment as Amicus Curiae and Permission to Participate in These Proceedings, Oct. 25, 2011.) The motions for summary judgment address whether H.B. 141 is unconstitutional because it violates the public trust doctrine. The Alliance’s participation in this briefing is therefore appropriate.

Background and Scope of Motions for Summary Judgment

This court has enunciated a four-part test for determining whether legislation, like H.B. 141, violates the public trust doctrine:

- (1) Whether the statute regulates interests protected by the public trust?
- (2) Whether the public easement was disposed of for the purposes for which it was acquired?
- (3) Whether the state has given up its right of control over the public’s easement? [and]
- (4) “Whether disposing of the public’s easement promoted the interests of the public therein, or was accomplished without any substantial impairment of the public interest in the lands and waters that remain?”¹

(Ruling and Order on Cross Motions for Summary Judgment Re: Plaintiff’s Standing and the Public Trust Doctrine, Mar. 8, 2013 at 19-20 (“March 8, 2013 Ruling and Order”).)

¹ We note, however, that a “disposition” of a resource would appear to be a logical impossibility if the State retains the right to control the resource under the public trust doctrine and no vested interest arises from the allocation. A “disposition” of property is, as Black’s Law Dictionary defines it, “the relinquishing of property.” *Black’s Law Dictionary* (9th ed. 2009). This court has found that, with H.B. 141 “the state did not give up its right to control the public easement,” “did not transfer any property interest to private landowners,” (March 8, 2013 Ruling and Order at 22), and that “a future Legislature may strike a different balance,” (Ruling and Order on Cross Motions for Summary Judgment, May 21, 2012, at 31). Therefore, there has actually been no “disposition” of public trust property in H.B. 141.

This court resolved the first three questions in its March 8, 2013 Ruling and Order, but ruled that the fourth question involved a disputed issue of material fact. (*Id.* at 20-22.) The parties have completed discovery on the fourth question. Therefore, the motions for summary judgment address only the question of whether H.B. 141 “substantially impairs the public’s interest in the lands and waters remaining.” (*Id.* at 22.) This memorandum sheds light on that same narrow issue by clarifying the scope of the constitutional test.

H.B. 141 Does Not Substantially Impair the Public’s Interest in the Lands and Waters Remaining Because the Legislature Retains the Right to Rebalance Competing Constitutional Interests Regarding Public Waters in the Future

In evaluating whether a legislative act impairs the public’s interest in the lands and waters remaining, this court considers a number of factors. Those factors include, as set forth in the memorandum filed by VR Acquisitions, LLC, “what lands, waters, activities, and rights, remain after the disposition” and “whether the public may continue to engage in the activities for which the disposed property was previously used even after disposition.” (VR Acquisitions, LLC’s Memorandum in Support of Motion for Summary Judgment, Aug. 29, 2014, at 1.) Under this court’s standard, it also looks to the scope of legislative control that remains after the disposition because dispositions that eliminate *all* legislative control over a public trust resource are more likely to violate the public trust doctrine than those that allow future legislatures to alter or even reverse the disposition. In this memorandum the Alliance elaborates on this factor and argues that the Utah Legislature, in enacting H.B. 141, not only retained control of the public trust resource at issue—the public waters of the state—but struck a constitutionally appropriate, practical balance that protects both the rights of the public to that water *and* the rights of private property owners.

The extent to which a disposition of an interest in public trust property impairs the public's interest in what remains was analytically critical in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892). That case involved the transfer by the Illinois legislature to the railroad of over 1000 acres of land submerged under Lake Michigan. *Id.* at 452-53. In explaining its determination that this transfer was inconsistent with the legislature's responsibilities under the public trust doctrine, the court said that the state cannot "abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains." *Id.* at 453. There, the legislature had relinquished *all* control over the property. *Id.* at 439. As the court observed in finding the transfer invalid, "[t]he legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it." *Id.* at 460.

Other courts considering whether a statute authorizing disposition of some interest in a public resource substantially impairs the public trust resource that remains have similarly evaluated whether the legislature has given up permanent control over a public trust resource. The California Supreme Court upheld a statute authorizing the surveyor general to lease tidal, submerged, trust lands for drilling. *Boone v. Kingsbury*, 273 P. 797, 817 (Cal. 1928). In so

doing, the court evaluated whether “the uses to be made of the tide lands . . . in extracting oil minerals from the ocean beds . . . would substantially impair the public interest in or use of the vast remaining area of the ocean.” *Id.* at 815. The court determined that the waters would still be available for navigation and commerce, and that “no harm can come to fisheries under the protective provisions of the act.” *Id.* at 816. But, importantly, the court also observed that “[n]o part of the lands . . . is alienated into private ownership. . . . The state may at any time remove structures from the ocean erected by its citizens, even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce.” *Id.*

Likewise, the Supreme Court of Idaho considered it important that the legislature had retained control over a public trust resource in determining the degree of impairment of the public’s interest in what remains. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, involved the question of whether the public trust doctrine precludes the state from permitting the construction of docking facilities on a navigable lake and leasing those facilities to a private party. 671 P.2d 1085, 1087 (Idaho 1983). In evaluating the effect of the lease on the public’s interest in the public trust property remaining—that is, the public’s access to and use of the lake waters—the court carefully considered factors such as “the degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited . . . ; and the degree to which broad public uses

are set aside in favor of more limited or private ones.” *Id.* at 1092-93. The court held that there was no substantial impairment, *id.* at 1095-96, but acknowledged as analytically important the fact that “[t]his case involves the granting of a permit for an encroachment, and not the grant of property in fee simple, to private parties. The property has not been placed entirely beyond the control of the state and the legislature has not given away or sold the discretion of its successors,” *id.* at 1094. The court also acknowledged, “the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance.” *Id.*

H.B. 141 does not violate the public trust doctrine because the legislature retains the ability to amend—or even repeal—the legislation at any time in the future. Indeed, this court has already found that H.B. 141 does not *permanently* dispose of any property right: “The public’s easement [in public waters] . . . has not been transferred to private parties, abrogated, or abandoned and remains in public ownership today.” (Ruling and Order on Cross Motions for Summary Judgment, May 21, 2012, at 31 (“May 21, 2012 Ruling and Order”).) In other words, the public trust property remains subject to the public trust and the legislature’s ongoing responsibilities as trustee of that trust “to assess the relative importance of competing water uses, and then to enact policies which favor one or more uses over others.” (March 8, 2013 Ruling and Order, at 13.)

With H.B. 141, the legislature has found the proper balance between public and private interests. The legislature considered the rights of the public in public waters under Article XX, Section 1 of the Utah Constitution and those of private property owners to not have their property “taken or damaged for public use without just compensation” under Article 1, Section

22 of the Utah Constitution. And while the balancing of those rights was admittedly difficult, H.B. 141 ultimately represented a proper compromise on a “difficult, intricate, and emotional topic.” Recording of Utah House Floor Debates, H.B. 141 First Substitute, 58th Leg., 2010 Gen. Sess. (Feb. 23, 2010) (statement of Rep. Sheryl L. Allen). As the sponsor of the bill explained, he tried “to draft something that truly would harmonize constitutional protections [of private property] with trying to give as much access to the fishermen as we could without violating those principles.” *Id.* (statement of Rep. Kay L. McIff).

H.B. 141 is intended to both protect the rights of private property owners and recreational uses of public waters. Recording of Utah House Floor Debates, H.B. 141 Second Substitute, 58th Leg., 2010 Gen. Sess. (March 10, 2010) (statement of Rep. Ben C. Ferry) (explaining that H.B. 141 was an attempt to be a “win-win . . . so that we do both, protect the private right and public right at the same time”); *see generally* Recording of Utah House Floor Debates, H.B. 141 First Substitute, 58th Leg., 2010 Gen. Sess. (Feb. 23, 2010) (statements of Rep. Carol Spackman Moss and Rep. Kay L. McIff). On the one hand, the legislation recognizes that private property owners have the right to keep anglers and floaters off of their streambeds, but the owners must actively assert their right, or lose it. Utah Code §§ 73-29-203, -205 And on the other hand, the legislation allows anglers and floaters to touch—under certain conditions—privately owned streambeds, but also provides the public a means to secure and protect the right to access those streambeds if it can show it is entitled to access. *Id.* §§ 73-29-201 to -204, -206. Another arrangement, including allowing the public unrestricted access to privately owned streambeds, or restricting entirely public use of waters that flow over such streambeds, would have tipped the balance in favor of one constitutional right over another.

As this court has recognized, “[a] future Legislature may strike a different balance between public recreational users and private land owners,” (May 21, 2012 Ruling and Order at 31), but what is important here is the fact that a future legislature *has* that opportunity unfettered by H.B. 141. For the now, H.B. 141 strikes a permissible and appropriate balance of constitutional rights. When and if the day comes that the balance is judged to be inappropriate, the legislature may act and again “weigh the competing interests in Utah’s natural waters, and . . . regulate the scope of the public’s use.” (*Id.*)

Conclusion

The Alliance respectfully submits that H.B. 141 does not substantially impair the public’s interests in the land and waters remaining. The motions of VR Acquisitions, LLC and the State for summary judgment should be granted.

DATED this 22nd day of September, 2014.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of September, 2014, I caused the foregoing to be electronically filed and served on the following via a court-approved e-filing service provider:

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