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

UTAH STREAM ACCESS COALITION, a Utah non-profit corporation, Plaintiff, vs. VR ACQUISITIONS LLC, a Delaware limited liability company; *et al.* Defendants.	**UTAH STREAM ACCESS COALITION'S:** **MEMORANDUM IN RESPONSE TO AMICUS CURIAE UAPPR's MEMORANDUM IN SUPPORT OF VR ACQUISITIONS, LLC's AND STATE'S MOTIONS FOR SUMMARY JUDGMENT** Civil No. 100500558 Hon. Derek Pullan

Plaintiff Utah Stream Access Coalition (USAC), by and through its counsel of record and pursuant to Rules 7 and 56, Utah Rules of Civil Procedure, submits this Memorandum in Response to Amicus Curiae Utah Alliance for the Protection of Property Rights' (UAPPR) Memorandum in Support of Motions for Summary Judgment filed by the State of Utah and VR Acquisitions, LLC (VRA).

ARGUMENT

I. H.B. 141 SUBSTANTIALLY IMPAIRS THE TRUST RESOURCE THAT REMAINS

UAPPR posits that "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." UAPPR Memorandum at p.6. Stated otherwise, UAPPR argues – as do the State and VRA – that so long as the State retains the right to 'undo' what it might choose to do to a constitutionally-protected public trust resource, it can do whatever it wants to that trust resource. They are wrong.

First, UAPPR's proposition is inconsistent with the Court's prior ruling wherein, based on a considered review of several public trust cases, it articulated a four-part inquiry to determine whether 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?

(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?

In short, the singular test that UAPPR posits as the sole test is but part (3) of the four-part inquiry enunciated by the Court. And while the Court has determined that the State retained its right of control over the public easement at issue, it has also determined that H.B.141 'regulates interests protected by the public trust' (part (1)), that H.B.141 disposed of the public easement for purposes unrelated to the purposes for which it was acquired (part (2)), and that H.B.141's

disposition of the public easement served no public interest (first subpart of part (4)). The only question left to be answered, as framed by the Court, is the second subpart of part (4), to wit: "Whether disposing of the public's easement … was accomplished without any substantial impairment of the public interest in the lands and waters that remain?"[1]

Second, the courts, not the legislature, have the final say as to whether legislation purporting to 'balance' a public trust resource against other interests comports with public trust principles and carefully scrutinize such legislation as they would any legislation impacting constitutional rights. As the Court recognized:

> Given the constitutional significance of this property interest, alleged public trust violations in relation to that interest do not present a circumstance in which "faithfulness to the public trust reposed in the members of the legislative body will be presumed ." * * * [L] legislatively imposed regulations which are illegal, arbitrary, or capricious, or enacted in clear violation of trust purposes must be subject to judicial review, or the public trust is meaningless.

May 21, 2012: *Ruling and Order on Cross Motions for Summary Judgment* at p. 38-39 [2]

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[1] Notably, while UAPPR references *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1087 (Idaho 1983) as an example of the types of inquiries a court might or should make in attempting to answer this question, it avoids altogether answering any of these inquiries, for doing so would not be helpful to its cause. UAPPR Memo at p. 5. As applied here, the inquiries listed in *Kootenai* would focus on H.B.141's: (a) direct and incremental impacts on the public trust resource; (b) direct and incremental impacts on public use of the trust resource (*e.g.*, fishing and recreation); (c) impact on the public trust resource viewed "in light of the primary purpose for which the resource is suited"; and (d) the degree to which H.B.141 sets aside "broad public uses … in favor of more limited or private ones." *Kootenai*, 671 P.2d at 1092-1093. Clearly, the answers to these inquiries would and should weigh heavily against enforcement of H.B.141.

[2] *See also*, *Weden v. San Juan County*, 958 P.2d 273 (1998) ("courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, as if they were measuring that legislation against constitutional protections"); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (1983) ("Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary"); *Arizona Ctr. For Law In Pub. Interest v. Hassell*, 172 Ariz. 356, 367, 837 P.2d 158, 169 (Ct. App. 1991) (concurring with *Kootenai*, n.6); *see*, *also*, *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981) (court will subject legislative dispensations of state natural resource holdings to a "high and demanding" standard of review).

Against this backdrop and as noted in USAC's *Memorandum in Opposition to Motions for Summary Judgment Filed by the State of Utah and VR Acquisitions LLC* (USAC's Memorandum in Opposition), it is clear that H.B.141 has had a substantial negative impact on the public trust resource – be it the *Conatser* Easement or the Broader Public Right – and on the trust resource that remains. Further, it has also effectively privatized much of Utah's public waters. On this front, the Alaska case of *Owsichek v. State* is instructive, for there the State of Alaska made and the Alaska Supreme Court rejected essentially the same argument the State, VRA and UAPPR champion here. 764 P.2d 488 (Alaska 1988). *Owsichek* involved a state regulation granting exclusive guiding privileges on public lands, and a corresponding prohibition against all others guiding in the area. The *Owsichek* court struck down this limitation on the use of public lands based on constitutional and public trust principles much the same as are in play here.

> [C]ommon law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people. * * *
>
> The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined. The state argues that it imposes no limit at all. While acknowledging that the common use clause constitutionalizes the state's trust duty, the state asserts, "The sovereign's power to allow and control use of the resources is broad, and restricted only by other constitutional limitations such as equal protection." This assertion clearly overstates the extent of the state's authority under the public trust duty and the common use clause. [W]e conclude that the common use clause was intended to engraft in our constitution certain <u>trust principles guaranteeing access to the fish, wildlife and water resources of the state</u>. * * *
>
> <u>[A] minimum requirement of this duty is a prohibition against any monopolistic grants or special privileges. Accordingly, we are compelled to strike down any statutes or regulations that violate this principle</u>.

Id at 495-96 (emphasis added). [3]

The same "monopolistic grants or special privileges" that concerned the *Owsichek* and other courts are present here. Again, with the exception of seasonally floatable waters, H.B.141 delegates to private landowners sole discretion and authority as to whether the public can exercise its constitutionally-recognized right to use public waters in place where those waters traverse private beds. This questionable delegation of the State's police power impacts some 2,722 miles of Utah's 6,360 miles of Utah's public waters. [4] Of these 2,722 miles, no more than 469 miles are floatable on a seasonal basis. Stated otherwise, under H.B.141, private landowners have sole authority to deny all public access to and use of at least 2,253 of the 2,722 miles of public waters ostensibly traversing private beds (*i.e.*, 83% of public waters traversing private beds and 35% of all public waters).[4]

In delegating private landowners authority to exclude all public uses of 2,253 miles of public water, H.B.141 has effectively granted those landowners and their invitees, licensees, etc., exclusive year-round privileges to use and recreate in those public waters including, *inter alia*, pursuing the public's wildlife (*e.g.*, sport fish) in those public waters. Landowners like VRA (where H.B.141 effectively privatized 49 miles (56%) of the Provo River's 88 miles) and their licensees are quick to trumpet their exclusive access to the public's waters and wildlife resources

[3] *See also, In re Water Use Permit Applications*, *supra*, 9 P.3d 409, 454 (Hawaii 2000))("[T]he public trust … effectively prescribes a "higher level of scrutiny" for private commercial uses such as those proposed in this case"); *Kootenai*, 671 P.2d at 1092-93 (review of legislation impacting public trust resource must consider "the degree to which broad public uses are set aside in favor of more limited or private ones").

[4] USAC's *Memorandum in Opposition to the Motions for Summary Judgment Filed by the State of Utah and VR Acquisitions LLC* – Supplemental Material Facts at ¶11.

to their prospective clientele.[5] But H.B.141's privatization of these waters goes even further. By limiting public use of the remaining 469 miles of waters that traverse private beds to seasonal floating, H.B.141 has granted the same exclusive privileges to these same private interests when those waters are not floatable as well as special privileges even when these waters are floatable.[6]

And again, as set forth in USAC's Memorandum in Opposition, H.B.141's disposition of some 43% of all public waters has had, predictably, a substantial negative impact on Utah's public waters traversing public beds (51% according to the State) by exacerbating already increasing significant fishing and other recreational pressure on these waters, especially during the winter when most of these remaining waters are inaccessible.

II. THE UTAH CONSTITUTION AND RELATED CASE LAW STRIKE THE BALANCE BETWEEN THE PUBLIC'S RIGHT TO USE PUBLIC WATERS IN PLACE AND ALLEGEDLY COMPETING PRIVATE INTERESTS

UAPPR (as well as the State and VRA) characterizes H.B.141 as the legislature simply ''balancing" competing public and private constitutional interests with the implication that such an effort is entirely permissible under the public trust doctrine. Notably, UAPPR cites no authority for either proposition. More importantly, UAPPR ignores the basic principles in play as established by the Court, all of which demonstrate the fatal flaws in this position.

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[5] *See e.g.*, http://victoryranchutah.com/amenity/the-river/ ("Fed by mountain runoff and natural springs that flow freely through Victory Ranch, this private four-mile stretch of the Upper Provo River is a true freestone river … . * * * A fly fisherman's paradise, our private stretch of the Upper Provo River is home to an abundance of wild German brown trout, rainbow, brooks and cutthroats. "); *see also*, http://www.northfortyescapes.com/fishing.php; http://www.flyfishingsouthernutah.com/private-waters/; http://www.utflyfishing.com/utah-fly-fishing-trips/private-waters/; http://www.crystalranchlodge.com/; http://www.whitesranch.com/fly-fishing-club.

[6] Specifically, landowners and their invitees, licensees, etc., have unfettered access to and use of floatable public waters while the public may only float them and, if feasible, fish them while floating.

First, the public trust resource at issue – be it the *Conatser* Easement or the Broader Public Right – always existed as a matter of natural law and was recognized and confirmed in Article XVII of the Utah Constitution. The nature and scope of this trust resource are defined by the Utah Constitution and Utah case law interpreting the same, to wit: whether the *Conatser* Easement or the Broader Public Right, the public is allowed to lawfully access and use its public waters in place for any lawful purpose where those waters traverse private beds and to reasonably touch and use those beds up to the ordinary high water mark in any manner necessary and incident to that use. *See e.g.*, *Conatser v. Johnson*, 2008 UT 48 at ¶¶ 20-30, 194 P.3d 897.

This view is entirely consistent with basic easement law wherein the *Conatser* Easement is the dominant estate, while the private bed up to the ordinary high water mark is the servient estate. As owner of the dominant estate, the public is entitled to reasonably use and enjoy its easement to access and use its public waters in place where they traverse private beds. As owners of the waters' bed up to the ordinary high water mark – the servient estate – private landowners must allow and not interfere with the public's lawful access to and reasonable use and enjoyment of its easement. These same principles apply if the trust resource is the Broader Public Right, for regardless of how one defines the trust resource, the public's use of its waters in places where they traverse private beds must be lawful and reasonable and the owners of the bed must allow and not interfere with the public's right to reasonably use and enjoy its public waters.

This said, be it the *Conatser* Easement or Broader Public Right, the constitutionally-recognized public trust resource is clearly limited to protect the servient estate and the private landowner. First, the public use must be of the water. *Id*. Use of a stream or its bed for other

purposes (*e.g.*, to wade along a private bed to access public lands beyond or to get a closer look at private upland property or events) is impermissible. Second, public use is confined to the bed up to the ordinary high water mark. *Id*. Private uplands are off-limits, except perhaps as necessary for the public to get around an unsafe obstacle, and trespass laws remain in place to protect landowners' upland interests. Third, the public's touching of the private bed up to the ordinary high water mark must be reasonable as well as necessary and incident to the use of the water. *Id.* Unreasonable, unnecessary or abusive touching or use of the bed is impermissible. Fourth, littering laws, fishing regulations and similar laws remain in full force and effect throughout the entire stream corridor to protect both public and private interests. Simply stated, the Utah Constitution and related case law have already 'balanced' the competing public trust and private interests and H.B.141 impermissibly alters this constitutionally-established balance.

Further, the underlying premise of UAPPR's argument (and those of the State and VRA) – that premise being a need to protect the 'private constitutional interests' supposedly at odds with the *Conatser* Easement (or Broader Public Right) to prevent a taking or damaging of private property without just compensation – is fundamentally flawed. Again, neither the *Conatser* Easement nor the Broader Public Right 'took' or 'damaged' anything. To the contrary, the public trust resource, be it the *Conatser* Easement or the Broader Public Right, has always existed as a matter of natural law, was recognized and confirmed in Article XVII of the Utah Constitution, and defined in related case law. As such, just as the water itself, the public's right to use that water was in place and encumbered the beds of those waters up to the ordinary high water mark when the predecessors of current landowners first took title to those lands.

Simply stated, condemnation and related principles are irrelevant here and other courts dealing with such claims have so held. *See e.g.*, *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Montana 1984); *Montana Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Montana 1974). At issue in *Curran* was whether the public had a right to lawfully access and use the waters and bed of the Dearborn River, up to the high water mark, for recreational purposes where it traversed Curran's property. While the public owned all waters of the state under Montana's Constitution, Curran claimed ownership of the Dearborn's streambed and banks and argued, *inter alia*, that recognition of a public right to use the Dearborn where it traversed his property would constitute inverse condemnation of his property. Affirming the trial court's ruling recognizing the public's right to use the Dearborn for recreational purposes and rejecting Curran's inverse condemnation claims, the Montana Supreme Court stated:

> [U]nder the public trust doctrine and the … Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. * * * The counterclaim for inverse condemnation was based on Curran's claim of ownership of the riverbed of the Dearborn. However, the question of title to the bed is irrelevant to determination for navigability for use, and Curran has no claim to the waters. Since there is no claim to the waters, there is no taking and, therefore, no grounds for an inverse condemnation.

Stream access was again the issue in *Hildreth*, this time on Montana's Beaverhead River. Much as Curran had done previously, Hildreth (the landowner) claimed ownership of the Beaverhead's streambed and banks and argued, *inter alia*, that recognition of a public right to use the Beaverhead where it traversed his property would constitute inverse condemnation of his property. Rejecting this argument, the Montana Supreme Court stated:

[N]o owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property. The public has the right to use the waters and the bed and banks up to the ordinary high water mark. [citing *Curran*] Further, as we held in *Curran,* in case of barriers, the public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the adjacent owner's property and his rights. * * *

We held in *Curran,* supra, that the question of title to the underlying streambed is immaterial in determining navigability for recreational use of State-owned waters. This holding applies equally to the case now before us.

Further, other jurisdictions have determined recreational use without regard to the question of ownership of the underlying bed. As in the matter now before us

"Respondents have devoted a substantial portion of their argument on appeal to the matter of title to the stream bed, asserting that a finding of navigability will result in a taking of private land. As in both the *Bohn* [*Bohn v. Albertson* (1951), 107 Cal. App.2d at 749, 238 P.2d 128] and *Mack* [*People Ex Rel. Baker v. Mack* (1971), 19 Cal.App.3d 1040, 97 Cal.Rptr. 448] cases, however, the question of title to the bed of a navigable stream is not raised in this action to determine public use rights, nor is it relevant to the issues herein presented for decision. (*People Ex Rel. Baker v. Mack, supra,* 19 Cal. App.3d at p. 1050, 97 Cal.Rptr. 448; *Bohn v. Albertson, supra,* 107 Cal. App.2d at p. 749, 238 P.2d 128.) The ownership of the bed is not determinative of public navigational rights, nor vice versa. (*Forestier v. Johnson,* 164 Cal. 24, 31-32, 39, 127 P. 156; *Bohn v. Albertson, supra,* 107 Cal. App.2d at pp. 742-743, 752-753, 238 P.2d 128; *Southern Idaho F. & G. Ass'n v. Picabo Livestock, Inc., supra,* 528 P.2d [1295] at p. 1298, [96 Idaho 360]; *Wilbour v. Gallagher,* 77 Wn.2d 306, 462 P.2d 232, 238; 55 Ops.Cal.Atty.Gen., *supra,* at p. 294; 36 Ops.Cal.Atty.Gen. 20, 26.)"

Hitchings v. Del Rio Woods Recreational Park District (1976), 127 Cal.Rptr. 830, 55 Cal.App.3d 560.

Simply stated, regardless of label or form, the public's right to use its public waters in place has always encumbered the beds of those waters up to the ordinary high water mark and constitutional or other condemnation principles regarding have no application.

CONCLUSION

UAPPR's arguments are without merit and the State and VRA motions for summary judgment should be denied.

DATED this 22nd day of October, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of October, 2014, I electronically filed the foregoing ***Utah Stream Access Coalition's Memorandum in Response to Amicus Curiae UAPPR's Memorandum in Support of VR Acquisitions, LLC's and State's Motions for Summary Judgment*** with the Clerk of the Court and notification of such filing was sent to the following by the means indicated below:

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