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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 MOTION FOR RECONSIDERATION Case No. 100500558 Honorable Derek Pullan

Amicus Curiae, Utah Alliance to Protect Property Rights (the "Alliance"), submits this memorandum in support of the motion for reconsideration filed by VR Acquisitions, LLC ("VRA").

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 Mot. and Appl. of Utah Alliance to Protect Property Rights for Appointment as Amicus Curiae and Permission to

Participate in These Proceedings, Oct. 25, 2011.) The VRA motion asks this court to reconsider its formulation of the public trust doctrine and its rulings on the parties' past motions for summary judgment. Necessarily, this involves the "interpretation or constitutionality of H.B. 141." The Alliance's participation in this briefing is therefore appropriate.

Introduction

The Alliance joins in VRA's request that this court reconsider its prior rulings that a revocable governmental regulation of the use of a public trust asset can constitute a violation of Article XX, Section 1 of the Utah Constitution. If this court reconsiders that issue and decides as VRA and the Alliance suggest, then it should also revisit its decision refusing to grant VRA's motion for summary judgment. (*See* VR Acquisitions, LLC's Mem. in Supp. of Mot. for Recons., May 19, 2015, at ii, 6-10.)

It is the Alliance's view that in attempting to create a test for the relatively undeveloped Utah public trust doctrine, this court has overreached. With all deference, the standard the court has developed is a balancing test grounded on an amalgam of regulatory takings case law and dictum from Utah Supreme Court opinions, blended together and finished with language from the "substantial impairment" of the "remaining resource" element of the public trust doctrine announced in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-53 (1892). However, that "substantial impairment" language is stripped of *Illinois Central*'s limitation of its application to situations where the public resource has been entirely disposed of. As a result, the court's balancing test lacks settled legal meaning and analytical clarity.

VRA's papers demonstrate that the standard created is incapable of providing any predictability as to whether any particular regulatory government activity will be found to violate

it. It likely will give rise to fact-intensive challenges to many state efforts to regulate the use of public resources, from elk permits to land leases. Also, in very concrete terms, as VRA has shown, the ramifications of the ruling of Judge Kelly in the related *Utah Stream Access Coalition v. Park* litigation over the navigability of the Weber River (a copy of which ruling is Exhibit A to VRA's Memorandum in Support of Motion for Reconsideration) demonstrate the inability of this court's analytical model to produce an answer as to the constitutionality of H.B. 141 due to the operation of the "substantial impairment" element in the uncertain world of what is a "navigable" water.

The Alliance urges this court to retreat from its novel model and to proceed cautiously by adopting the settled standard the Utah Supreme Court has clearly endorsed for application of the public trust doctrine: the standard announced in *Illinois Central*. Under that standard, violations of the public trust doctrine can occur only when state control of a public trust resource is completely lost. *See Illinois Central*, 146 U.S. at 452-53. As this court found in its May 21, 2012 Ruling and Order, H.B. 141 does not finally dispose of trust property and on that ground does not violate Article XX, Section 1. (Ruling and Order on Cross Mots. for Summ. J., May 21, 2012 ("May 21, 2102 Ruling and Order"), at 36.)

When reflection suggests that a non-final ruling in a case may have been incorrect, a trial court is free to revise that ruling "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Utah R. Civ. P. 54(b); *see Ron Shepherd Ins. Inc. v. Shields*, 882 P.2d 650, 654 (Utah 1994) ("It is settled law that a trial court is free to reassess its decision at any point prior to entry of a final order or judgment.").

This Court Should Reconsider the Impractical Rule It Announced for Evaluating Possible Violations of the Public Trust Doctrine and Instead Apply the *Illinois Central* Rule

This court's May 21, 2012 Ruling and Order concluded that H.B. 141 did not violate *Illinois Central* or Article XX, Section 1. (May 21, 2012 Ruling and Order at 35-36.) However, the court invited the parties to address in additional briefing the sources of a broader Utah-specific public trust doctrine and how this court might articulate such a standard. This court recognized that this task presented "a host of issues of first impression." (*Id.* at 38.) Following briefing and argument, this court issued its March 8, 2013 Ruling and Order. There, the court sought to articulate a Utah public trust doctrine broader than the *Illinois Central* rule. (Ruling and Order on Cross Mots. for Summ. J. Re: Pl's Standing and the Public Trust Doctrine, Mar. 8, 2013 ("March 8, 2013 Ruling and Order"), at 6-22.)

The court first explained that the public trust doctrine "is established in Article XX, Section 1 of the Utah Constitution," (*id.* at 6), which provides that public lands "shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired," Utah Const. art XX, § 1. It explained that "Article XX, Section 1 is implicated when the State 'disposes' of public lands." (March 8, 2013 Ruling and Order at 7.) And it noted that no such disposition was made by the statute under challenge here: "In adopting [H.B. 141], the Legislature did not 'dispose' of or transfer title to all or part [of] the public's easement in waters of the State of Utah. In fact, the easement exists in public ownership today. Rather, in adopting [H.B. 141] the Legislature regulated use of the public's easement." (*Id.* at 7-8.)

This court could—and should—have ended its analysis there. It could have reasoned that because H.B. 141 does not dispose of the public's easement in Utah's waters, it does not

implicate Article XX, Section 1, and, therefore, does not implicate, much less violate, Utah's public trust doctrine. To do so would have been consistent with the court's conclusions in an earlier order,[1] consistent with Utah case law as described below, and would have resulted in a final, appealable order that would present the Utah Supreme Court with an opportunity to clearly address the content of Utah's public trust doctrine.

But this court did not end its analysis there. Rather, it redefined the "issue" to be "whether the public trust under Article XX, Section 1 of the Utah Constitution limits the Legislature's authority to regulate use of the public's easement in waters of the State of Utah," (March 8, 2013 Ruling and Order at 8), or, stated differently, "[w]hether a statute can so narrowly limit public use of waters in place as to be the functional equivalent of the state 'disposing' of the public's easement in violation of the public trust recognized in Article XX, Section 1 of the Utah Constitution," (*id.* at 16). The court determined that this could occur, and it articulated a new standard for determining whether regulatory legislation, like H.B. 141, violates the public trust doctrine. That standard requires a court to address the following questions:

(1) Whether the statute regulates interests protected by the public trust?

(2) Whether the public easement was disposed of for the purposes of which it was acquired?

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[1] In its May 21, 2012 Ruling and Order, this court offered the following opinions:

• H.B. 141 did not dispose of all or part of the public's easement in waters of the State. Rather, it regulated the lawful use of those waters. Therefore, H.B. 141 does not implicate the trust responsibilities imposed upon the State in Article XX, section 1. (May 21, 2012 Ruling and Order at 35.)

• Because H.B. 141 did not dispose of the public's interest in land, Article XX, Section 1 has no application to this case. (*Id.* at 36.)

(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?

(March 8, 2013 Ruling and Order at 19-20.)

This test appears to be a logical set of questions, each one of which has to be answered "yes" or "no" before proceeding to the next question. In its ruling, the court addressed the first three questions. First, it concluded that H.B. 141 does regulate an interest protected by the public trust. (*Id.* at 20.) Second, it concluded that H.B. 141 does not promote the interest at issue, "public access to and use of state waters." (*Id.* at 21.) As to the third issue, this court *again* asserted that H.B. 141 did not dispose of anything: "By enacting the Public Waters Access Act, this state did not give up its right to control the public easement. Rather, the Act constitutes an assertion of that right. . . . As stated in the [May 21, 2012 Ruling and Order], the Act did not transfer any property interest to private landowners. 'The public's easement in its full scope . . . has not been transferred to private parties, abrogated, or abandoned and remains in public ownership today.'" (*Id.* at 22.) Perplexingly, even though this court answered its own third question in the negative, which logically would suggest the end to the analysis, it nevertheless stated that a disputed issue of material fact as to the fourth question precluded summary judgment on the question of whether H.B. 141 violates the public trust doctrine.[2] (*Id.* at 22-23.)

[2] Following discovery, the fourth question was again addressed in motions for summary judgment brought by VRA and the State. The court denied those motions in its January 21, 2015 Ruling and Order and set the matter for trial in August 2015, again because of disputed issues of material fact. (*See* Ruling and Order Denying VRA's Mot. for Summ. J. and Denying the State's Mot. for Summ. J., Jan. 21, 2015, at 8.)

Thus, despite repeatedly finding that H.B. 141 does not dispose of a public trust resource, a consideration explicitly set out in this court's test for evaluating whether H.B. 141—a revocable regulation—violates the public trust doctrine, the court has proceeded to indicate that even if no disposition occurs, the public regulation may still be unconstitutional if it is weighed and found wanting in some balancing of the factors listed, which appears to come down to whether the *Illinois Central* "substantial impairment" test is satisfied. 146 U.S. at 452-53. Rather than a linear analytical test, the court has actually created a multi-factorial balancing test, the quintessential part of which is the fourth element—the "substantial impairment" language from *Illinois Central.*

Although the court seems to have returned to the language of *Illinois Central* as the key test, the court has not used that language as it was originally intended. On its face, *Illinois Central*'s "without any substantial impairment of the public interest in the lands and waters remaining" test is vague, lacks analytical clarity, and is subject to all the evils of any balancing test; however, it is cabined by the requirement of *Illinois Central* that the public asset in question has been *disposed of* before the regulatory measure challenged is subject to the "substantial impairment" test. *Id.* That limitation prevents the *Illinois Central* test from realizing its potential of being an unpredictable tool to be broadly wielded by litigants against any government regulatory measure addressing public trust assets. It cannot be invoked absent disposition of the asset, something this court has found has not occurred here.

But because this court's multi-factorial public trust doctrine test is *not* limited to measures that dispose of a public asset, the final "substantial impairment" element of that test has no boundaries. It is hard to foresee it permitting the grant of a summary judgment in any case

because ordinarily a fact question will be presented as to whether a regulation that does not dispose of a public trust asset restricts that asset impermissibly, and therefore violates Article XX, Section 1. In grafting the "substantial impairment" test onto its Utah public trust doctrine test, this court has unnecessarily complicated not only this matter, but introduced a legal standard that is incapable of predicting with any precision when any particular court will find that any particular public measure to regulate the use of a public resource will be found to violate Article XX, Section 1.

The Alliance suggests that this court should retreat from its March 8, 2013 ruling and settle on the standard for applying the public trust doctrine that has been explicitly used in other Utah cases, one that is sufficient to address the issues in this case. In *Colman v. Utah State Land Board*, Utah adopted the public trust doctrine as defined in *Illinois Central*. 795 P.2d 622, 635 (Utah 1990). And that test revolves on whether the public trust asset has been disposed of. This court has held repeatedly that H.B. 141 has not met that test. Therefore, under *Illinois Central*, H.B. 141 is not violative of Article XX, Section 1. Under *Illinois Central*, the question of whether a state action impairs the public trust resource is a nonissue unless and until it is determined that the resource has been alienated by the state.

As noted above, this court has already found as follows:

• "The public's easement in its full scope as defined in *J.J.N.P.* and *Conaster* has not been transferred to private parties, abrogated, or abandoned and remains in public ownership today." (May 21, 2012 Ruling and Order at 31.)

• "Article XX, Section 1 is implicated only if H.B. 141 'disposed of' the public's easement in State waters. . . . [T]he Court holds that H.B. 141 did not dispose of all or part of the public's easement in waters of the State. Rather, it regulated the lawful use of those waters. Therefore, H.B. 141 does not implicate the trust responsibilities imposed upon the State in Article XX, section 1." (May 21, 2012 Ruling and Order at 35.)

- "In adopting [H.B. 141], the Legislature did not 'dispose' of or transfer title to all or part [of] the public's easement in waters of the State of Utah. In fact, the easement exists in public ownership today." (March 8, 2013 Ruling and Order at 8.)

- "A future Legislature may strike a different balance between public recreational users and private land owners." (May 21, 2012 Ruling and Order at 31.)

Given these findings, this court should simply conclude that because the legislature has not disposed of any public trust property, it has not wholly abandoned the public trust resource at issue. And because it retains control of the property and can revoke H.B. 141 at any time, it has not violated the public trust doctrine.

The *Illinois Central* standard has the advantage of simplicity in application because it requires disposition before it comes into play. In contrast, the fact-intensive inquiry this court seeks to undertake with respect to the question of whether a regulation—which can be revoked at any time—"substantially impairs the public's interest in the lands and waters remaining" leads only into an unpredictable morass of fact finding and balancing, producing no replicable result and hobbling governmental regulation of the public's assets. As VRA thoroughly explained, this court's test "opens to litigation *any* exercise of the Legislature's authority to regulate natural resources." (VRA's Mem. in Supp. of Mot. for Recons., May 19, 2015, at 2-6.) For these reasons, this court should reconsider the test to be applied to the determination of whether H.B. 141 violates the public trust doctrine.

Conclusion

The Alliance joins VRA in asking this court to reconsider its prior rulings and endorse the *Illinois Central* test as the proper measure for application of the public trust doctrine under

Utah law. Applying the *Illinois Central* test here, this court should conclude that summary judgment in favor of VRA and the State is appropriate.

DATED this 3rd day of June, 2015.

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Certificate of Service

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