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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.

ATC REALTY SIXTEEN, INC., a California
corporation; *et al.*,

Defendants.

**UTAH STREAM ACCESS COALITION'S
SUPPLEMENTAL MEMORANDUM:**

**IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

and

**IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Civil No. 100500558

Hon. Derek Pullan

The Utah Stream Access Coalition (“the Coalition”), by and through its counsel of record and pursuant to the Court’s *Ruling and Order on Cross Motions for Summary Judgment* dated May 21, 2012, submits this Supplemental Memorandum in Support of the Coalition’s Motion for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment.

INTRODUCTION – OVERVIEW

In its *Ruling and Order on Cross Motions for Summary Judgment* dated May 21, 2012 (“the *Ruling*”), the Court held that, under Art. XVII of the Utah Constitution, the public owns and has always owned the waters flowing in or impounded on Utah’s rivers and streams. The Court further held that the public has a constitutional right to lawfully access and use these public waters in place where they traverse private property and to reasonably touch the private beds of these waters in a manner necessary and incident to such use, defining said right as a ‘right to use’ under Art. XVII and as an ‘easement’ and ‘interest in land’ under Art. XX.¹ The Court also held that H.B.141 did not violate these constitutional protections because it did not dispose of or abrogate this public constitutional right in its entirety but, instead, regulated it. Finally, the Court held that because the State regulates the use of Utah’s waters as trustee for the benefit of the people, its regulation of the public’s constitutional right to use in place public waters that traverse private property must comport with Utah’s public trust doctrine. The Court reserved judgment on whether H.B. 141 violated public trust principles and requested further briefing on the issue.²

The Court’s *Ruling* coupled with the undisputed fact that H.B.141 severely restricts the public’s constitutional right to use in place public waters that traverse private property means that the State and ATC Realty now have the burden of proving that H.B.141 does not violate the

¹ For ease of reference, this right is hereinafter frequently referred to as “the public’s constitutional right to use in place public waters that traverse private property.”

² The Court further noted that whether H.B.141 violates the public trust doctrine may well turn upon disputed issues of material fact. By stipulation of the parties and, it is believed, concurrence of the Court, this issue is deferred pending a determination by the Court as to whether H.B.141 violates the public trust doctrine as a matter of law.

State's fiduciary duty to regulate this public right consistent with public trust principles. The State and ATC Realty have not and cannot meet this burden, for H.B. 141 on its face and in fact violates the State's public trust obligations in that it serves no public trust or greater public purpose and serves, instead, only private or special interests and, further, greatly impairs or encumbers the public's constitutional right to use in place the trust resource and thereby violates the public trust purpose.

THE LAW AND STATUS OF THE CASE

The salient elements of the Court's *Ruling* include:

Waters flowing in or impounded on Utah's rivers, streams, and other natural water courses, including such water courses if and to the extent realigned or channelized, are and have always been owned by the public, and as such are public waters. [Ruling at p.20]

* * * * *

The public has an easement to use these public waters that includes a right to engage in all recreational activities that use the waters. [Ruling at p.20]

* * * * *

The public easement recognized in *J.J.N.P.* and *Conaster* is a corollary right of use derived from public ownership of waters in the State, and was therefore recognized and confirmed by Article XVII, Section 1 of the Utah Constitution. [Ruling at p.20]

* * * * *

Article XVII ... recognize[d] and confirm[ed] the public's ownership of waters in the State, together with the public easement derived from that ownership. [Ruling at p.30]

* * * * *

[Because H.B. 141 did not transfer, abrogate or abandon the public easement to use public waters in place in its entirety], the challenged sections of H.B. 141 do not violate Article XVII, section 1 of the Utah Constitution. [Ruling at p.32]

* * * * *

[T]he public’s easement to utilize public waters in place is an interest land ... is included within Article XX, Section 1 ... [and] constitutes “public lands of the State; and shall be held in trust for the people.” [Ruling at p.35]

* * * * *

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 did not implicate the trust responsibilities imposed upon the State in Article XX, section 1. [Ruling at p.35]

* * * * *

[For this same reason], the public trust doctrine as defined in *Illinois Central R.R. Co.* is inapplicable. [Ruling at p.36]

The effect of ... [Utah] case law is to establish a state public trust doctrine which extends to both navigable and non-navigable waters [and governs the State’s regulation of the use of such waters]. [Ruling at p.37]

* * * * *

In sum, the Court held that the public’s right to use in place public waters that traverse private property is a constitutionally-protected right. It further held that because the State regulates the use of Utah’s public waters as trustee for the benefit of the people, H.B.141’s attempt to regulate this public constitutional right must comport with the trust purpose and public trust principles. Having so held, the Court requested further briefing on the issue remaining before the Court – that is, whether H.B.141’s regulation of the public’s constitutional right to use in place public waters that traverse private property comports with the public trust doctrine.

ARGUMENT

I. RESPONSES TO THE COURT'S QUESTIONS.

A. "What Are the Trust Purposes?"

In general, the public trust "protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large." *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 920 (Utah 1993) (emphasis added). More specifically:

The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles. This is an accepted process of in our law: Anglo-American jurisprudence is rife with judicially developed doctrines that reflect the deeply held convictions of our society. In natural resources law generally, the unique qualities of some resources have impelled courts to apply the public trust doctrine ... [to] allow maximum public utilization. * * * The focus of the doctrine is on the resources themselves. * * * The heart of the public trust doctrine ... is that it imposes limits and obligations on governments [when dealing with public trust resources].

Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis Law Rev. 269, 315-316, 284 (1980-81).

The trust resource at issue here is Utah's public waters. As this court recognized, the State regulates the use of this public resource "as trustee for the benefit of the people." *Ruling* at p.21, quoting *J.J.N.P. Co. v. Utah*, 655 P.2d 1133, 1136 (Utah 1982) (emphasis added). But what exactly is required of the State in this regard? Stated otherwise, what is the trust purpose to which the State is bound when regulating the use of Utah's waters? Former Chief Justice Larson of the Utah Supreme Court offered some insight.

Due to the limited supply of water and its importance to the people of this State, it has wisely been provided that this resource shall be so used as to best subserve the needs of the people ... to the end that no one shall acquire a dominating right to such use of water as will retard the maximum development of the state's resources, or curtail the

satisfaction of the people's needs in the things most important to their sustenance, development and happiness. * * * Where a matter is of such moment and serious public concern as water is in this state, and is property of the public, it properly is declared not subject to private rights or claims except to the limited extent provided by law, in the uses which shall be deemed most beneficial to the public welfare, as contradistinguished from the benefit of the individual. Since all waters flowing in natural streams in the state are the property of the public, no one has an inherent or vested right to appropriate it to a private use. * * * The state, as trustee for the people, must so administer its trust as not to permit its misuse, or its use in any way adverse to the interests of the public.

Tanner v. Bacon, 136 P.2d 957, 966-67 (Utah 1943) (Larson, J., concurring) (appeal from decision of state engineer rejecting application to appropriate waters for power generation).³

In short, from Justice Larsen's perspective, the purpose of the public trust with regard to Utah's public waters is to manage and regulate the use of those waters "so ... as to best subserve the needs of the people", to prevent private or special interests from acquiring "a dominating right to use public waters and [thereby] curtail the satisfaction of the people's needs in the things most important to their sustenance, development and happiness", and prevent use of water "in any way adverse to the interests of the public." *Id.* As trustee of Utah's public waters, the State owes a fiduciary duty to the trust beneficiaries, the public, to fulfill these trust purposes.

Focusing on the public's constitutional right to use in place public waters that traverse private property, multiple Utah Supreme Court decisions shed further light on both the resource; the constitutional *res*, and the trust purpose as applied to this right which the State, as trustee for the benefit of the public, has a fiduciary duty to protect.

³ *Cf., In re Water Use Permit Applications*, 9 P.3d 409, 445 (2000) (constitutional public trust requires the state to regulate use of waters for the benefit of the people).

While [] flowing naturally in the channel of the stream or other source of supply, [water] must of necessity continue common to all by the law of nature, and is therefore nobody's property, or property common to everybody. And while so flowing, being common property, everyone has equal rights therein or thereto, and may alike exercise the same privileges and prerogatives in respect thereto, subject at all times of course to the same rights in others.

Adams v. Portage Irrigation, 72 P.2d 648, 652-53 (Utah 1937).

It is settled law in Utah that one acquiring title to public lands does not also acquire title or interest in or to the water flowing upon that land. * * * [S]uch water is still unappropriated public water and we conclude that [the wool growers] have an equal right with all other members of the public, including the [landowner], to use the water as they desire until a superior right to such water is established.

Deseret Live Stock Co. v. Sharp, 259 P.2d 607, 611 (1953):

Irrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water.

J.J.N.P v. Utah, 655 P.2d 1133, 1136-38 (Utah 1982).

[T]he public owns state waters and has an "easement over the water regardless of who owns the bed beneath." [citations omitted] * * * [T]he scope of the easement provides the right to float, hunt, fish, and participate in all lawful activities that utilize the water ... [and] to touch the privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement, so long as they do so reasonably and cause no unnecessary injury to the landowner.

Conatser v. Johnson, 2008 UT 48, ¶¶ 3 and 30.

Simply stated, the trust purpose at issue here – the trust purpose that H.B.141 must serve – is the management of the public right at issue in a manner that, *inter alia*, best subserves the needs of trust beneficiaries, the public, and prevents private or special interests from acquiring a dominating right to use in place public waters that traverse private property to the detriment of the public. Similarly, the State's fiduciary duty is to manage the public right at issue consistent

with this trust purpose; to manage the public's constitutional right to use in place public waters that traverse private property in a manner that, *inter alia*, best subserves the needs of trust beneficiaries, the public, and prevents private or special interests from acquiring a dominating right to use in place public waters that traverse private property to the detriment of the public. As demonstrated below, H.B.141 does not fulfill this trust purpose and the State of Utah has breached its fiduciary duty as trustee of the public's rights, the people of Utah's rights, to use in place public waters that traverse private property.

B. “What Is the Burden of Proof and Who Shoulders It?”

While Utah law offers no guidance on this specific issue, several other jurisdictions have held that, given the nature of the public trust, the proponents of a government action disposing of or otherwise impairing a public trust resource have the burden of demonstrating that the action does not violate public trust principles, especially where it's been shown that the trust resource has been adversely impacted. *See e.g., Commonwealth Dep't of Env'tl. Resources v. Commonwealth Pub. Util. Comm'n*, 18 Pa.Cmwlth. 558, 335 A.2d 860, 865 (1975) (holding that, once adverse impact to the constitutional public trust is raised, “the applicant's burden is intensified,” and the reviewing court “must be satisfied that the [relevant constitutional test] is met”); *Marcon, Inc. v. Commonwealth Dep't of Env'tl. Resources*, 76 Pa.Cmwlth. 56, 462 A.2d 969, 971 (1983) (given the “special concerns” surrounding the public trust, those seeking to encumber the trust resource had a duty to justify their action); *Superior Public Rights, Inc. v.*

State Dep't of Natural Resources, 80 Mich.App. 72, 263 N.W.2d 290, 294 (1977) (party applying for use of public trust lands for private, commercial purposes bore the burden of proof).⁴

That a Utah court would and should follow this reasoning here, where a public constitutional right is in play, is apparent:

[O]nce it is shown that the enactment under scrutiny does, in fact, infringe upon the [constitutional] interests ... [t]he burden then is upon the proponents of the legislation's validity to demonstrate that its restrictions on those rights are carefully drawn and supported by weighty considerations.

Condemarin v. Univ. Hosp., 775 P.2d 348, 368 (Utah 1989).

Here, it is undisputed that H.B.141 severely restricts the trust resource, the public's constitutional right to use the trust resource, Utah's public waters, in place where they traverse private property. This being a given, the Court – having concluded that any State regulation of this right, including H.B.141, is subject to and limited by public trust principles – has shifted the burden of proof from the Coalition to the State and ATC Realty. Specifically, the State and ATC Realty have the burden of proving that H.B.141 does not violate the public trust.

C. “What Degree of Deference Should Be Given to a Legislative Regulation Limiting the Public Use of Waters in Place?”

Courts reviewing legislative enactments or other regulations affecting public trust interests view them much the same as they would legislation impacting constitutional rights and they accord little deference to legislative authority. As the Washington Supreme Court observed:

Due to the “universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands,” courts review legislation under the

⁴ “[A]ny balancing between public and private purposes begins with a presumption in favor of public use, access and enjoyment.” *In re Water Use Permit Applications*, 9 P.3d 409, 454 (Haw. 2000)

public trust doctrine with a heightened degree of judicial scrutiny, “as if they were measuring that legislation against constitutional protections.” [citation omitted]

Weden v. San Juan County, 135 Wash. 2d 678, 958 P.2d 273, (1998). Appellate courts in, *inter alia*, Hawaii⁵, Idaho⁶ Arizona⁷ and Alaska⁸ share this view.

Once again, is it apparent that a Utah court should and would follow this reasoning where, as here, a public constitutional right is in play.

Because the interests at stake are specifically protected by the constitution, the presumption of validity that normally attaches to legislative action must be reversed once it is shown that the enactment under scrutiny does, in fact, infringe upon the [constitutional] interests”

Condemarin, 775 P.2d at 368.

Again, it is undisputed that H.B.141 severely restricts the public’s constitutional right to use in place public waters that traverse private property. As a result, “the presumption of validity” that normally attaches to legislative action does not attach to H.B.141 and the State and ATC Realty must demonstrate that H.B.141’s severe restrictions on this constitutional right have been “carefully drawn and [are] supported by weighty considerations.” *Id.*

⁵ *In re Water Use Permit Applications*, *supra*, 9 P.3d at 454 (“[I]nsofar as the public trust, by nature and definition, establishes use consistent with trust purposes as the norm or “default” condition, we affirm ... that it effectively prescribes a “higher level of scrutiny” for private commercial uses such as those proposed in this case.”)

⁶ *Kootenai*, *supra*, 671 P.2d at 1092 (“Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. This is not to say that this court will supplant its judgment for that of the legislature or agency. However, it does mean that this court will take a “close look” at the action to determine whether it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.”).

⁷ *Arizona Ctr. For Law In Pub. Interest v. Hassell*, 172 Ariz. 356, 367, 837 P.2d 158, 169 (Ct. App. 1991) (concurring with *Kootenai*, *supra*, 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).

⁸ *Owsichek*, *supra*, 764 P.2d 488 (“[G]rants of exclusive rights to harvest natural resources listed in the common use clause should be subjected to close scrutiny.”)

D. “What Factors Should Be Considered in Determining Whether a Regulation Violates the Public Trust?”

The Utah Supreme Court’s decision in *National Parks, supra*, offers valuable insight as to what is and isn’t a legitimate government action where, as here, a general public trust purpose is at issue. In *National Parks*, the State Land Board approved an exchange with Garfield County of school trust lands that lay within the boundaries of Capitol Reef National Park. Garfield County sought these lands in an effort to pave a road (the Burr Trail) through the Park. The plaintiff environmental groups, who opposed the County’s paving plan, challenged the land exchange on the grounds that the Board had failed to take into account the lands’ “scenic, aesthetic and recreational values.” The issue before the court was whether the Board had to or even could give priority to such general public values or benefits, or whether it could look only to the financial return to the state school system generated by the exchange.

The court held that because the express purpose of the trust was to benefit public schools, the Board could not give priority to general public values. In reaching this conclusion, the court relied primarily on the fact that the lands had originally been granted to the state “for the support of common schools.” *See* Utah Enabling Act, §6. The court also looked to Utah Const. Art. XX and to case law from other jurisdictions in concluding that “school trust lands cannot be used to further other legitimate governmental objectives, even if there is some indirect benefit to the public schools.” 869 P.2d at 918. The court further stated that, in the context of school trust lands, the “trust beneficiaries do not include the general public or other governmental institutions, and the trust is not to be administered for the general welfare of the state.” *Id.* at 919.

Even though *National Parks* involved a limited or specific express public trust as opposed to the implied general public trust at issue here, its lessons regarding trust purposes and related government action are instructive. First and foremost, the purpose of any action involving the trust must principally benefit the beneficiaries of the trust, not some broader, or more narrow, constituency. Second, an indirect or incidental benefit to the trust's beneficiaries does not validate a trust purpose if the primary benefits flow to some other group. Thus, in a case of the general public trust like that at issue here, government action benefitting private or special interests at the expense of the public at large would not represent a valid trust purpose, any more so than the general public benefits did in *National Parks*.

The Coalition has found two cases addressing whether a use regulation (as opposed to a disposition or other impairment of trust property) violates the public trust doctrine. *Weden, supra*, involved a county ordinance prohibiting jet-skis from operating on certain navigable waters within the county. In considering whether the ban violated access rights under the public trust doctrine, the court considered the following factors:

- (1) whether the State, by the questioned legislation, has given up its right of control over the *jus publicum* and
- (2) if so, whether by doing so the State
 - (a) has promoted the interests of the public in the *jus publicum*, or
 - (b) has not substantially impaired them.

958 P.2d at 283.

Essentially, the *Weden* court was asking whether any substantial impairment of the public's right of access is outweighed by other public interests. The court noted the ordinance was

intended to address several harms to the public interest caused by jet-ski use – primarily noise, safety and wildlife disturbance. Applying these criteria and finding that the ordinance prohibited only one of many public uses of public waters, the Washington court rejected a public trust challenge to the ordinance and upheld the use restriction under the public trust doctrine. *Id.* at 283-84.

The second case, *Owsichek v. State*, 764 P.2d 488 (Alaska 1988), involved a state regulation granting exclusive guiding privileges on public lands, and a corresponding prohibition against all others guiding in the area. The court struck down this limitation on the use of public lands. Although based on the “common use” clause in Alaska’s constitution, the court’s ruling is relevant because it relies on public trust principles in its analysis:

[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 trust principles guaranteeing access to the fish, wildlife and water resources of the state.

.....

[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.

764 P.2d at 495-96.

Three key points emerge from *Weden* and *Owsichek*. First, both cases stand for the proposition that any regulation of a general public trust resource must be consistent with the trust purpose or serve a broader public interest. Second, *Weden* stands for the proposition that the public trust doctrine does not guarantee the public unrestricted access to trust resources and, when public use is reasonably restricted in order to protect public safety, to prevent a public nuisance, or to protect the resources themselves, the restriction will be upheld. Third, *Owsichek* stands for the proposition that when a restriction on the public trust does not advance public interests and instead confers special privileges upon persons who are not the trust beneficiaries, the restriction will be overturned.

Finally, other cases involving disposition or other impairment of trust resources, while not directly responsive to the Court's question, provide further guidance on what this court should closely examine in determining whether H.B.141 comports with public trust principles. In *State v. Public Service Commission*, 275 Wis. 112, 81 N.W.2d 71, 74 (1957), the court weighed several factors in considering a public trust challenge to a municipality's proposal to dredge and fill part of a public lake to create parks and other public facilities, to wit:

- Whether public bodies will control the use of the area;
- Whether the area will be devoted to public purposes and open to the public;
- Whether the diminution of lake area will be very small when compared with the whole of the lake;
- Whether any public uses of the lake as a lake will be destroyed or greatly impaired; and

- Whether the disappointment of those members of the public whose interests are impaired by the regulation is negligible when compared with the greater convenience afforded members of the public benefitted by the proposed changes.

In *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 629, 671

P.2d 1085 (1983), the Idaho Supreme Court examined two similar criteria when reviewing a public trust challenge to a government proposal to grant a 10-year, renewable permit to operate a private yacht club in one bay of a large public lake, to wit:

- Whether the challenged action serves a public purpose.
- Whether the challenged action substantially impairs the public interest in the lands and water that remain.

Id. at 1092.

Collectively and almost uniformly, the cases discussed in this section establish the following criteria for determining whether H.B.141 – the State’s attempt to regulate the public’s constitutional right to use in place public waters that traverse private property – comports with the State’s fiduciary duty to manage that right to use the trust resource for the benefit of the public, the trust beneficiaries:

- H.B.141 must serve the public trust purpose or a greater public purpose;
- H.B.141 must principally benefit the trust beneficiaries, the public, not private or special interests;
- H.B.141 must not destroy or greatly impair public access to or use of the trust resource;
- H.B.141 must not substantially impair access to or use of the trust resource that remains; and
- The State must retain the right of control over the trust resource.

As demonstrated below, H.B.141 utterly fails to meet all but the last of these criteria⁹ and, as a result, violates the public trust and is void and unenforceable.

II. H.B. 141 VIOLATES THE PUBLIC TRUST DOCTRINE.

A. The Impact of H.B.141.

Again, the trust resource at issue – and the trust resource which the State has a fiduciary duty to manage for the benefit of the people – is Utah’s public waters. Similarly, the trust purpose and the State’s fiduciary duty here is the management, for the benefit of the trust beneficiaries, the public, of the public’s constitutional right and easement to lawfully access and use in place public waters that traverse private property for any lawful purpose and to reasonably touch the private beds of such waters in any manner incident or necessary to such use. At issue is H.B.141’s regulation of that public constitutional right in the following manner:

- H.B.141 prohibits any and all lawful public uses of public waters in place where those waters traverse private property save one, perhaps two – the floating of ‘floatable’ waters and fishing while doing so. Utah Code Ann. §73-29-202(2) (2010). As a practical matter, because H.B.141 prohibits touching of private beds while floating except as necessary to continue floating or to safely portage around obstacles, it effectively prohibits fishing while floating unless two or more people are in the same craft, for one person cannot effectively operate a raft, kayak, canoe or other craft so as to avoid touching the bed except as allowed and fish at the same time. Notably, in prohibiting floaters from touching the bed except as noted, H.B.141 even prohibits ‘floaters’ from getting out of their craft and scouting waters

⁹ A largely meaningless criterion here, where H.B.141 excludes the public from all ‘non-floatable’ public waters that traverse private property and thereby obviates much of the need, if any, the State might have to control such waters.

for safety reasons before proceeding, increasing the risk of injury or death to all ‘floaters’, especially inexperienced floaters such as minors.

- H.B.141 prohibits the public from making any and all other otherwise lawful uses of public waters in place where they traverse private property (*e.g.*, wading, swimming, bank fishing, wade fishing, waterfowl hunting, waterfowl watching, fur trapping, aquatic entomology and other water-related science or education). Utah Code Ann. §73-29-201(3) (2010)

Applying the public trust criteria identified in point I.D., *supra*, H.B.141 clearly and unmistakably violates the public trust.

B. H.B.141 Serves No Trust Purpose or Greater Public Purpose.

As discussed *supra*, H.B.141 must generally protect or promote the trust purpose at issue – the public’s constitutional right to use in place the public trust resource, Utah’s public waters, where they traverse private property – or serve a greater public purpose. In stark contrast to this mandate, H.B.141 on its face and in fact serves no public purpose, let alone the trust purpose at issue or a greater public purpose. *See* Utah Code Ann. §73-29-103 (2010). It does not even pretend to do so. *Id.*

To the contrary, it defiantly declares itself to be what it is: a legislative adjudication, subordination and all-but-complete abrogation of the public trust purpose at issue in deference to a supposedly competing private constitutional right and to private and special interests and economic benefit of those who own or control access to private property traversed by and as a

matter of law encumbered by public waters, the public trust resource, and the trust purpose.¹⁰

H.B.141 is, in short, a blatant and egregious breach of the public trust; of the State's fiduciary duty "as trustee for the benefit of the public" to regulate the public's constitutional right to use in place public waters where they traverse private property. It is, in short and for these reasons alone, void and unenforceable.

C. H.B.141 Greatly Impairs the Public Trust Resource.

Unlike the cases from other jurisdictions discussed *supra*, the Coalition does not here challenge the regulation or other impairment of an isolated portion of a public trust resource such as a lake. Nor does it challenge the prohibition of one of many public uses of all public waters within a county. Instead, it challenges a law that not only serves no trust purpose or a greater public purpose but a law that serves only private or special interests who or which are not beneficiaries of the public trust. It challenges a law that subordinates and all-but-totally abrogates, statewide and to the direct benefit of these private and special interests, a trust purpose applicable to a statewide trust resource –the public's constitutional right to lawfully access and use in place public waters where they traverse and, like the right itself, encumber private property. In short, it challenges a law that all but 'regulates' out of existence a public constitutional right to use a public trust resource, public waters that traverse private property, a law that violates the State's fiduciary duty to the public and the public trust, and a law that is for these reasons void and unenforceable.


¹⁰ The Coalition here reaffirms without restating in detail its contention that H.B.141 turns basic easement law on its head, subordinating the dominant estate to the subservient estate and precluding reasonable use of the public's constitutional right to use in place public waters where they traverse private property to the interests and benefit of those who own or control access to that property; property which as a matter of law is encumbered by those public waters, the trust resource, and the public's right to constitutional right to use those waters in place, the trust purpose.

CONCLUSION

H.B.141 on its face and in fact violates the State's public trust responsibilities and, as such, is void and enforceable, entitling the Coalition to judgment as moved on the public trust principles set forth in its motion.

DATED this 3 / day of August, 2012.

RICHARDS BRANDT MILLER NELSON



~~Craig C. Coburn~~
Kallie A. Smith
Attorneys for Utah Stream Access Coalition

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August, 2012, I served the foregoing **Utah Stream Access Coalition’s Supplemental Memorandum: in Support of the Coalition’s Motion for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment**, including exhibits and attachments, on the persons identified below as indicated below:

Thomas D. Roberts	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
Office of the Utah Attorney General	<input type="checkbox"/>	Overnight Mail
160 East 300 South, 5 th Floor	<input type="checkbox"/>	Hand Delivery
P. O. Box 140857	<input type="checkbox"/>	Facsimile
Salt Lake City, UT 84114-0857	<input checked="" type="checkbox"/>	Electronic Mail
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Eric P. Lee	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
JONES WALDO HOLBROOK & McDONOUGH	<input type="checkbox"/>	Overnight Mail
1441 W. Ute Blvd., Suite 330	<input type="checkbox"/>	Hand Delivery
Park City, UT 84098	<input type="checkbox"/>	Facsimile
elee@joneswaldo.com	<input checked="" type="checkbox"/>	Electronic Mail

Nathan D. Thomas	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
JONES WALDO HOLBROOK & McDONOUGH	<input type="checkbox"/>	Overnight Mail
170 South Main Street, Ste. 1500	<input type="checkbox"/>	Hand Delivery
Salt Lake City, UT 84101	<input type="checkbox"/>	Facsimile
nthomas@joneswaldo.com	<input checked="" type="checkbox"/>	Electronic Mail

Michael D. Zimmerman	<input type="checkbox"/>	U.S. Mail – Postage Prepaid
Troy L. Booher	<input type="checkbox"/>	Overnight Mail
ZIMMERMAN JONES BOOHER LLC	<input type="checkbox"/>	Hand Delivery
Kearns Building, Suite 721	<input type="checkbox"/>	Facsimile
136 South Main St.	<input checked="" type="checkbox"/>	Electronic Mail
Salt Lake City, UT 84101		
mzimmerman@zjbappeals.com		
tbooher@zjbappeals.com		

