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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 MEMORANDUM IN REPLY TO AMICUS CURIAE UTAH ALLIANCE TO PROTECT PROPERTY RIGHTS'** ***SUPPLEMENTAL BRIEF IN SUPPORT OF HB 141*** Civil No. 100500558 Hon. Derek Pullan

Plaintiff Utah Stream Access Coalition, by and through its counsel of record and pursuant to Rules 7 and 56, Utah Rules of Civil Procedure, hereby replies to Amicus Curiae Utah Alliance to Protect Property Rights' ("the Alliance") Supplemental Brief in Support of HB 141.

ARGUMENT

I. The Alliance, as Amicus, Is Not Entitled to Challenge USAC's Standing Where that Issue Has Not Been Raised by the Parties or the Court.

Preliminarily, the State and ATC informally conceded early on in this matter that the USAC likely had standing in this matter and agreed at that time that they would not challenge USAC's

standing, at least for purposes of the current dispositive motions. They have kept that agreement. Likewise, the court too has acknowledged that the USAC likely has standing and, like ATC and the State, it has not placed the USAC's standing in issue (though it has the right to do so *sua sponte*). In short, the USAC's standing has not been placed in issue by either the parties or the court.

Against this backdrop, it is a well-settled rule in Utah that "an amicus brief cannot extend or enlarge the issues … [courts] only consider those portions of the amicus brief that bear on the issues pursued by the parties." *Draughon v. Dep't of Fin. Institutions, State of Utah*, 1999 UT App 42, 975 P.2d 935, 936 n. 1; *Madsen v. Borthick*, 658 P.2d 627, 629 n. 3 (Utah 1983). "[Courts] review only those points raised by the litigants on appeal and not those urged by strangers thereto." *In re State in Interest of Woodward*, 14 Utah 2d 336, 384 P.2d 110, 111 (1963). The Tenth Circuit too does not address arguments that are only raised by amicus curiae, because those arguments "attempt to frame the issues on appeal, a prerogative more appropriately restricted to the litigants." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997).

Applied here, these principles preclude or should at least strongly discourage the court from considering the Alliance's arguments regarding the USAC's standing (as well as any other issue raised solely by the Alliance).

II. <u>The USAC Has Standing to Challenge H.B. 141 Under the Public Trust Doctrine.</u>

The Alliance's discussion as to whether a member of the general public does or doesn't have standing to challenge the regulation of a public trust resource is academic and, in any event, inapposite here, for the standing of USAC is not as a member of the general public, but rather

that of an association and as such, by virtue of the actionable claims of its members as well as on its own, it clearly has associational standing to challenge H.B. 141.

The most recent statement of Utah law regarding associational standing in public interest litigation is found in *Utah Chapter of the Sierra Club v. Utah Air Quality Board*, 2006 UT 74, 148 P.3d 960. There, the Sierra Club, a public interest environmental organization, sought to intervene in and appeal the Utah Air Quality Board's ("the Board") issuance of a permit impacting air quality. The Board denied the Sierra Club's petition for lack of standing. Reversing the Board on appeal, the Utah Supreme Court identified two (2) tests, one primary and one secondary, to determine whether a public interest organization such as the USAC has standing to challenge governmental regulatory action.

The first of these tests is the 'traditional test.' Under the traditional test, an association has standing if one or more of its individual members have standing. *Id.* ¶ 21. An individual has standing if s/he alleges that (a) s/he has been or will be harmed by the challenged action, (b) there is a causal connection between this harm, the challenged action and the relief requested, and (c) the relief requested is likely to redress the harm claimed. *Id.* ¶ 19.

Here, as alleged in the USAC's First Amended Complaint and as demonstrated in the declarations attached to and discussed in the USAC's principal memorandum in support of its motion for summary judgment, six (6) USAC members, having previously accessed and used the Provo River where it flows through Victory Ranch were, following passage of H.B. 141, prohibited by ATC from doing so. One of those members was cited by the State for criminal trespass. These same USAC members verify that, but for H.B. 141, they would have continued to access and use the Provo and would do so in the future. USAC's requested relief – that H.B.

141 be ruled unenforceable as, *inter alia*, a violation of the public trust – will if granted redress the harm to USAC's members by removing restrictions on the public's constitutional easement right to use its public waters in place. In short, the USAC members named in the USAC's pleadings would, if before the court as individual plaintiffs, have standing under the 'traditional test' to challenge H.B. 141. And, because they would, the USAC has standing.

The second test for associational standing – which comes into play only if associational standing is not found applying the 'traditional test' – is the 'alternative standing test.' *Id.* ¶ 36. Under this test, an association must demonstrate that (a) "it has 'the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions' and that the issues are 'unlikely to be raised' if the party is denied standing", *id.* (citations omitted), and (b) "that the issues it seeks to raise 'are of sufficient public importance in and of themselves' to warrant granting the party standing," *id.* ¶ 39 (citation omitted).

As with the 'traditional test,' it is clear that the USAC has standing to challenge H.B. 141 under the 'alternative standing test.' Specifically, with 2,800 members and growing, the USAC has the requisite interest to effectively assist this court in identifying, developing and resolving the factual and legal issues before the court and, as evidenced by the proceedings and filings to date, the USAC has been and is doing so. Further, given that the Alliance essentially argues that no member of the public has standing to challenge H.B. 141, irrespective of whether they have sustained injury due to H.B. 141, it is unlikely that the legislature's breach of the public trust will be challenged if the USAC is denied standing. Finally, as the present dispute involves the public's constitutional easement right to use its public waters in place, it is clear that the issues presented are of significant public importance to grant the USAC standing to raise them.

III. H.B. 141 Violates the Public Trust.

The Alliance echoes the refrain of the State and ATC in characterizing the public trust – that is, that so long as the State simply 'holds' and retains ultimate control of a trust resource, it can do as it will with the resource to the sole benefit of private interests (*i.e.*, with no public interest served). It also echoes the State's and ATC's refrain as to 'who' has the burden to prove 'what' at this juncture. This being the case, the USAC herein incorporates its Reply to those State and ATC arguments here and adds only a couple of observations.[1]

First, while the Alliance suggests that the USAC's take on the public trust is "unworkable," it utterly fails to explain why it is that the State, in regulating the use of a public trust resource, cannot do so in a manner that principally benefits the public as opposed to benefitting only private interests as with H.B. 141. Indeed, what is "unworkable" or at least untenable here is the argument that the State, so long as it retains title to and ultimate control of a public trust resource, can do what it will with that resource, whether in the form of regulation or otherwise, even where the trust resource and the right to use it are both rooted in the Utah Constitution. If retention of title and control is all that is required of the State as trustee of a public resource for the benefit of the people, then the public trust is little more than a shell, an illusion, and the Utah Supreme Court's view that the State's public trust duties are like those of any other trustee is simply wrong and misguided.[2]

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[1] The Alliance also echoes the State's and ATC's refrain that H.B.141 merely 'restricts' certain uses of public waters that flow across private land. In fact, H.B. 141 effectively prohibits <u>all</u> public uses of such public waters traversing private beds but one – floating of floatable waters – and does so solely to benefit of private interests.

[2] "The duties of a trustee apply to the state in administering … trust lands. * * * The fiduciary duties imposed on the state by virtue of the … [public] trust are "the duties of a trustee and not simply the duties of a good business manager." * * * All trustees owe fiduciary duties to the beneficiaries of the trust. <u>The duty of</u>

Second, the Alliance (like the State and ATC) essentially ignores the 'non-alienation' public trust cases cited by the USAC – that is, the public trust cases wherein disposition of the trust resource is not the issue, but government regulation or other action impairing the trust resource is. Instead, again like the State and ATC, it tries to redirect the court's attention away from this body of public trust case law and to Utah cases addressing the State's regulatory authority where the public trust, let alone a constitutional public trust, is not at issue. As discussed in the USAC's reply to the State's and ATC's supplemental briefs on this point, this comparison is not helpful to defendants or amicus as any regulation must generally be for the greater good to be enforceable and not, as is the case with H.B. 141, for the sole benefit of private interests.

The USAC encourages the court to study, in the context of the *National Parks* decision[3] and the other authority cited by the USAC – in its initial supplemental brief and in its Reply to the State's and ATC's supplemental briefs – wherein other jurisdictions have addressed the public trust doctrine in non-alienation (*e.g.*, regulation) cases.[4] Doing so will provide a framework for the court to determine what the public trust requires of the State in regulating the public's constitutionally-recognized easement right to use public waters in place and whether H.B. 141 comports with those principles. More importantly, this framework will lead the court to

loyalty requires a trustee to act only for the benefit of the beneficiaries and to exercise prudence and skill in administering the trust." *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918 (Utah 1993) (emphasis added). Contrary to the Alliance's suggestion, the court in *National Parks* did not limit this assessment of government's public trust duties to school trust lands, but to the state's public trust obligations in general.

[3] In addition to holding that the state's public trust duties are like that of private trustees, including a duty of undivided loyalty to the trust beneficiaries (*i.e.*, the public), *National Parks* stands for the proposition that any state regulation of a public trust resource must principally benefit the public and its interests in the resource, not some other constituency or private interests.

[4] *See, also*, Ivan M. Stoner, *Leading a Judge to Water: In Search of a More Fully Informed Washington Public Trust Doctrine*, 85 Wash. L. Rev. 391, 419 (2010) (copy attached).

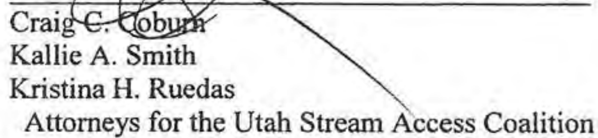
conclude that H.B. 141 – which rejects any public right to use public waters in place, whether constitutional or otherwise, and which benefits only private interests – violates the public trust and is unenforceable.

CONCLUSION

H.B. 141 violates the public trust doctrine as a matter of law and judgment in favor of the USAC should be granted as moved.

DATED this 3 day of December, 2012.

RICHARDS BRANDT MILLER NELSON



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of December, 2012, I served the foregoing **Utah Stream Access Coalition's Memorandum in Reply to Amicus Curiae Utah Alliance to Protect Property Rights** ***Supplemental Brief in Support of H.B. 141*** on the persons listed and in the manner indicated below:

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