State of Vermont

Vermont Superior Court -- Washington Division

Standing Trees Inc.

v. Docket No. 25-CV-03722

The State of Vermont,
Julie Moore, Secretary of the Agency of Natural Resources, in her official capacity,
Danielle Fitzko, Commissioner of the Department of Forests, Parks, and Recreation, in her official capacity, and
Jason Batchelder, Commissioner of the Department of Fish & Wildlife, in his official capacity

PLAINTIFF'S SUR-REPLY MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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Pursuant to the Court's order dated February 2, 2026, Standing Trees, Inc. ("Plaintiff"), submits the following sur-reply memorandum in opposition to the motion to dismiss of Defendants State of Vermont et al., in specific response to Defendants' Reply to Plaintiff's Opposition to Motion to Dismiss ("Reply") and to further clarify the issues before the Court. The Reply inaccurately describes Plaintiff's positions and presents contradictory arguments for dismissal that the Court should reject. The Court should deny the motion.

I. THE COURT *SHOULD* CONSIDER DOCUMENTS CITED IN THE COMPLAINT AND *SHOULD* TAKE JUDICIAL NOTICE

The Reply suggests (pp. 2-4) that Plaintiff has asked the Court not to consider the contents of documents cited in the Amended Complaint ("Complaint") —but Plaintiff actually urged the Court to consider those documents. For example, pages 28-31 of Plaintiff's Opposition memorandum ("Opposition") quoted the 394-page long Worcester Range Management Unit Long Range Management Plan ("Worcester Plan") and asked the Court to rely on the quoted sections. At pages 11-13 of the Opposition, Plaintiff asked the Court to rely on the Worcester Plan at pages 328-329, where Defendants explicitly rejected the request that the Plan include consideration of the Public Trust. In its Opposition, Plaintiff argued that the factual statements in the Motion to Dismiss ("Motion") are *contradicted*, not supported, by the documents cited in the Complaint.

The Reply, at page 9, also asks the Court to judicially notice new evidence that was not cited in the Complaint and not cited in the Motion. The Reply asks that the Court rely on this new evidence to reject the factual allegation in ¶¶ 25-31 of the Complaint that critical decision-making that impacts Public Trust resources occurs behind closed doors. Plaintiff agrees that

judicial notice is appropriate at this stage,[1] and asks that the Court take judicial notice of other evidence that satisfies V.R.E. 201(b) and (d) and that directly contradicts Defendants' position.[2] Plaintiff asks that the Court judicially notice the testimony by Defendant Commissioner Fitzko, on January 23rd of 2026, before the House Environment Committee of the General Assembly. Commissioner Fitzko testified that the Department of Forests, Parks and Recreation provides *no further public process* in managing its lands after a management plan has been issued: "***[D]o we do public process after the plan is developed? No***, we implement.... If we were to go through a public process for all the projects that we're implementing, it would not be transparency. It would be, we'd be paralyzed to be honest" (emphasis added).[3]

Commissioner Fitzko's testimony was an admission that, if accepted as true, ultimately may dictate granting judgment to Plaintiff under Counts I and II. The Complaint at ¶¶ 25-26 alleged that the actual decision-making about which species to harvest, how much to harvest, where to harvest, and what protections of ponds, wetlands, seeps, brooks, rivers and lakes to impose, occurs behind closed doors. The Worcester Plan, for example, identifies discrete areas and states that these discrete areas are off-limits to harvesting; for the rest of the Management Unit, the Worcester Plan sets forth the detailed studies that "will" be prepared and "will" be reviewed before the site-specific harvesting decisions are made (which species to harvest, how

[1] Vermont precedents allow resort to evidence not cited in the Complaint if it qualifies for judicial notice. *Kaplan v. Morgan Stanley & Co. Inc.,* 2009 VT 78, ¶ 10, n.4, 186 Vt. 605, 987 A.2d 258.

[2] The fact that Commissioner Fitzko's testified, and the words she used, are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned—the public video of her testimony.

[3] Vermont House Committee on the Environment, *House Environment – 2026-01-23 – 1:15PM*, at 34:22. Commissioner Fitzko's testimony can be found at: https://www.youtube.com/watch?v=kisxojY2BW. A transcript of the relevant excerpt prepared by counsel is attached to this memorandum as Attachment A for the Court's convenience.

much to harvest, where to harvest, and what water quality protections to impose).[4] Commissioner Fitzko agrees with ¶¶ 25-26 that *these* post- management plan decisions are made behind closed doors. Her counsel goes further, and, despite the plain wording of the Worcester Plan, takes the extreme position that *nothing* is decided in a management plan. *See* Motion at 18-19. Regardless of whether the Court agrees with Plaintiff that some binding decisions are made within management plans, or agrees with Defendants' counsel that none are, Commissioner Fitzko has just admitted that the actual decision-making occurs without any public process, despite the effects on Public Trust resources.

Defendants' new judicial-notice evidence itself fails to support Defendants' argument. Reply at 9. One document, an Agency of Natural Resources (ANR) guidance on public participation is labelled "The Role of the Public," and is dated Fall 2019.[5] It states on page 2 that "in developing management plans," every effort will be made to include suggestions from the public. A second ANR document, titled "Agency of Natural Resources (ANR) Policy: Public Involvement in ANR Lands Management," states the same thing, that when preparing a management plan or an amendment to a management plan, public input must be sought. It also states that staff must allow opportunity to comment on annual work plans and changes to annual work plans. The reference to work plans appears to be a reference to what the Department of Forests, Parks, and Recreation ("FPR") currently describes as Annual Stewardship Plans. These

[4] As quoted in Plaintiff's Opposition (pp. 28-31), one section states: "This section describes the site-specific actions that will occur throughout the WRMU." It states that acres in the Highly Sensitive Management areas "will have no timber management, salvage harvest, or active wildlife habitat management." It states repeatedly that in specified areas ANR "will" "implement" harvesting. It states that each area to be harvested "will receive additional review and inventory." It states that the results of these studies "will be used" to develop the silvicultural prescriptions for each site.

[5] https://fpr.vermont.gov/sites/fpr/files/State_Lands_Administration/Lands_Management_Planning/Library/RoleofthePublic_2019.pdf.

are descriptions of the work each district of FPR plans for the coming year.[6] These documents support rather than contradict the Complaint, because they only require staff to involve the public when preparing management plans, and their annual list of projects.

In sum, the Reply claims broadly that the documents cited in the Complaint and the documents that the Court is asked to judicially notice prove that all of Defendant's decisions are based on "public input" (Reply, p. 9)— but the documents cited in the Complaint, and the evidence of which the Court can take judicial notice, raise reasonable inferences in Plaintiff's favor. *Mahoney v. Tara, LLC,* 2011 VT 3, ¶ 7, 189 Vt. 557, 15 A.3d 122 (courts "assume that all factual allegation pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiff's pleadings"). At a minimum, they present factual issues that cannot support dismissal on the pleadings. Therefore, the civil rules guarantee Plaintiff the opportunity to present its case and contest the Defendants' position, after opportunity for discovery, by way of Rule 56 or trial.

II. DEFENDANTS' VERSION OF THE PUBLIC TRUST DOCTRINE CONFLICTS WITH THE PRECEDENTS AND THE RECORD

Defendant's position on the substantive requirements of the Public Trust Doctrine is succinctly stated on page 5 of the Reply: "It would be redundant and inefficient" to require a separate process when other laws governing water quality already apply. To be clear, the Reply does not claim that Defendants actually consider the Public Trust Doctrine or perform a Public Trust weighing when meeting their other obligations. The Reply argues that they do not need to. The Reply cites no precedent from any jurisdiction that supports this argument. The Supreme Courts of Hawaii, Idaho, and California have explicitly rejected it. *In re Water Use Permit*

[6] https://fpr.vermont.gov/state_lands/lands-management-planning/implementation

Applications, 9 P.3d 409, 445, 454 (Haw. 2000); *Kootenai Envtl. All. v. Panhandle Yacht Club,* 671 P.2d 1085, 1091, 1095 (Idaho 1983); *Natl. Audubon Soc'y. v. Sup. Ct. of Alpine Cnty.,* 658 P.2d 709, 728 n. 27 (Cal. 1983) (hereafter, *Mono Lake*).

The proof of the pudding is the Worcester Plan. The Worcester Range Management Unit includes boatable ponds, brooks. and streams that are tributaries of lakes outside of the Unit. Standing Trees urged Defendants to consider the Public Trust as part of the Plan, and they explicitly refused to do so. Worcester Plan pp. 328-329. Regardless of whether the Plan uses the Public Trust label, Defendants have not pointed to any sentence, paragraph, or section of the Plan that actually weighs the public interest in protecting the State's water resources against the costs and benefits of timber harvesting. Doing so, they believe, is redundant and inefficient.

The Reply also wrongly argues that the Public Trust Doctrine is limited to private encroachments into public waters. Reply at 6-7. One of the leading decisions on the Public Trust Doctrine, the *Mono Lake* decision, applied the doctrine to a decision to allocate to a government body, the Los Angeles water department, rights to use the waters that flowed into Mono Lake. *Mono Lake,* 658 P.2d at 719. No private encroachment and no private interest was at issue. The Vermont Supreme Court relied upon *Mono Lake* in *State v. Cent. Vt. Ry., Inc*., 153 Vt. 337, 342 (1989). The Court quoted *Mono Lake* to describe the core purpose of the doctrine: "[T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters...." *Cent. Vt. Ry.,* 153 Vt. at 345-46 (quoting *Mono Lake,* 658 P.2d at 712). The core purpose of supervision and control would not be served if the doctrine were limited to private encroachments. If it were, the outcome in *Mono Lake* would have differed.

The Reply is remarkable in one respect—after denying ANR has the independent Public Trust obligations described in the Complaint, the Reply engages, for the first time in the history of ANR management of state forests, parks and wildlife management areas, in Public Trust weighing of public benefit versus the costs and benefits of timber harvesting. The Reply uses the Water Resources Board's formulation of this weighing. Not surprisingly, the Reply finds that Defendants' decisions pass muster. (Reply pp. 7-8). Such *post hoc* rationalizations by counsel generally are rejected. *In re Tru Connect Commc'ns, Inc*., 2021 VT 70, ¶ 25, 215 Vt. 422, 263 A.3d 770 (declining to review Commission order using rationale raised by appellate counsel for first time on appeal). This is especially true here where the underlying statutes, regulations, and policies, cited by Defendants, contain no express public trust considerations whatsoever. *Cf. Conservation Law Found. v. Burke*, 162 Vt. 115, 128 (1993) ("Agency decision must stand or fall on the reasons given contemporaneously with the decision."). The Complaint seeks a Declaratory Judgment that ANR must consider the Public Trust as part of its management of state-owned forest lands. Compl at ¶ 100(i). Counsel's weighing has no place in a Motion to Dismiss. If the Court is to engage in that weighing, it must do so based on an evidentiary record.

The Reply is also remarkable for what it does not say about the Public Trust Doctrine. Plaintiff pointed out that even if management plans do adequately address the Public Trust Doctrine, Defendants conduct timber harvesting on lands that have never been the subject of management plans. Opposition at 3. The Reply was Defendants' opportunity to argue, with support from judicially noticeable documents, that all of their lands are governed by management plans, with their supposedly curative public input processes. They have not.

3. DEFENDANTS MISUNDERSTAND THE COMMON BENEFITS CLAUSE

The Reply argues (pp.15-16) that Plaintiff's Common Benefits clause argument should be dismissed because it is nothing more than "a dispute over Defendants', and the Legislature's, policy decisions on use of state forests." *Ludlow Supermarkets* was a dispute over the Legislature's policy decision to support small businesses, based on the Legislature's belief that doing so benefited all of Vermont. 141 Vt. 261, 448 A.2d 791 (1982). *Baker* was a dispute over the Legislature's policy decision that marriage should be limited to heterosexual couples. 170 Vt. 194, 744 A.2d 864 (1999). The constitutional issue is not whether the Legislature or the Defendants are making a policy decision, it is whether that policy decision has the effect of diverting common benefits for the benefit of the few. *In re Property of One Church Street City of Burlington*, 152 Vt. 260, 565 A.2d 1349 (1989). The Complaint alleges that it does.

4. THE COMPLAINT ALLEGES RETALIATORY MOTIVE

The Reply (p. 17) faults Plaintiff for arguing on page 25 of the Opposition that claims for declaratory and injunctive relief need not allege improper motive. But it is correct that only damage claims require proof of improper motive, and it is also true that the Complaint alleges improper motive even though no money damages are sought. Paragraph 67 of the Complaint expressly alleges that the motive was retaliation against Standing Trees for its public advocacy.

5. DEFENDANTS' REPLY RE COUNT 5 CONFLICTS WITH THE DOCUMENTS DEFENDANTS CITE AND QUOTES THE STATUTE OUT OF CONTEXT

In seeking to explain denial of Plaintiff's well-grounded rulemaking petition, the Reply gives examples of FPR documents that contain requirements, and argues that the Worcester Plan, by comparison, contains none. The two cited documents, however, disprove the Defendants' theory.

The first document, "Department's Procedure for Timber Harvest Marking and Estimation,"[7] states on page 1 that it is merely guidance. It states: "the purpose of this document is to provide guidance…." The 9-page, single-spaced guidance uses the word "shall" once and the word "must" twice. The second document, "Boundary Line Blazing Procedures for Contracted Surveyors,"[8] is even less directive. Its first sentence states that it too is merely guidance. It states: "The following are general guidelines…" In this document, neither the word "shall" nor the word "must" appear anywhere.

In contrast to these two guidance documents that qualify as procedures, the Worcester Plan is highly directive. As quoted in Plaintiff's Opposition, one section states: "This section describes the site-specific actions that will occur throughout the WRMU." Opposition at 29. It states that acres in the Highly Sensitive Management areas "will have no timber management, salvage harvest, or active wildlife habitat management." *Id.* It states repeatedly that in specified areas ANR "will" "implement" harvesting. *Id.* It states that each area to be harvested "will receive additional review and inventory." *Id.* at 30. It states that the results of these studies "will be used" to develop the silvicultural prescriptions for each site. *Id.* at 31. This is not mere guidance. Importantly, the reviews and inventory that "will" occur and then "will" be used to develop the silvicultural prescriptions all will occur out of the public's eye.

The Reply also quotes the governing statute out of context. The Reply ignores the "shall" in § 831(c), which states that an agency *shall* initiate rulemaking when 25 persons petition that a procedure undergo rulemaking. The Reply relies on § 832(d), which uses the word "may"; it says in response to a petition an agency *may* elect to issue a declaratory ruling that disposes of the

[7] https://anr.vermont.gov/content/timber-harvest-marking-and-estimation
[8] https://anr.vermont.gov/content/boundary-line-blazing-procedures-contracted-surveyors

question presented rather than initiate rulemaking. Reply at 22. Read together, the agency must either initiate rulemaking or issue a declaratory ruling. Here, the agency has done neither. Its position was that the Plan was not a procedure. Complaint at ¶ 89.

6. THE COMPLAINT IS BEING AMENDED TO EXPLICITLY STATE THAT PLAINTIFF'S MEMBERS' USE OF FISH CONSISTS OF FISHING

Contrary to Defendants' flyspecking of Amended Complaint (Reply p. 14), it is a reasonable inference that when a person alleges that they "use, enjoy and rely upon… fish" in Vermont waters, they are alleging that they go fishing in Vermont waters. However, to avoid any concern about this issue, Plaintiff is filing a motion to amend the complaint to state that Plaintiff's members' use of fish in Vermont consists of fishing.

CONCLUSION

The Motion to Dismiss should be denied.

Respectfully submitted,

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This brief reflects the valuable contributions of Vermont Law and Graduate School Environmental Advocacy Clinic student-attorneys Madeleine DeMoranville and Alexander Jones.