STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 108-4-14 Oscv

Seymour Lake Association,
Plaintiff,

v.

State of Vermont, Agency of Natural Resources,
Department of Environmental Conservation,
Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR ALTERATION OR AMENDMENT OF THE MARCH 31, 2015 ORDER DISMISSING THE COMPLAINT

Pursuant to V.R.Civ.P. 59(a), Seymour Lake Association ("SLA") moves for alteration or amendment of the Court's March 31, 2015 order ("Order") dismissing its Complaint. Rule 59 is intended to prevent a miscarriage of justice and to allow prompt corrective action before appellate review. *Gardner v. Town of Ludlow*, 135 Vt. 87, 369 A.2d 1382 (1977). Reconsidering and reversing the Order, granting a writ of mandamus and/or reinstating SLA's nuisance claim will serve that purpose.

The Court may reconsider the Order for any of the reasons for which a new trial or rehearing has been granted, V.R. Civ. P. 59(a), including substantive legal error. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Munafo v. Metropolitan Transp. Auth.*, 381 F.3d 99, 105 (2d Cir.2004).

I. The Court Has Not Addressed Plaintiff's Central Claim

The crux of Plaintiff's case is the fact that the Vermont General Assembly has adopted 30 V.S.A. 401 and 402 which have established explicit maximum high and low water levels of Lake Seymour. The law establishes the "normal and natural" high and low levels leaving no room for

administrative discretion except within those levels. These Vermont statutes and the water levels they establish have been specifically and explicitly affirmed by the Vermont Supreme Court. The water levels may not be raised or lowered beyond those established levels by artificial means or by neglect. Those statutes have not been repealed.

A. There has been no preemption by virtue of federal license or law

There is no preemption by virtue of the license issued by the Federal Energy Regulatory Commission (F.E.R.C.) in this instance. Quite the contrary, at Section W of that license F.E.R.C. waives jurisdiction and:

*"…**returns jurisdiction over this matter to the Secretary of the Agency of Natural Resources** to assure project implementation...the Department may add or alter the terms and conditions of this amended Certificate **when authorized by law** and as appropriate to carry out its responsibilities with respect to the protection and enhancement of water quality during the license period." [emphasis added]*

By virtue of conditions H and W of the license at issue, F.E.R.C. has had nothing to do with the use of the gate or the management of water levels at Lake Seymour.

As Judge O'Connor makes clear in *P.U.D. No. 1 of Jefferson County v. State of Washington,* 511 U.S. 700, 114 S. Ct. 1900 at 1908 (1994) the Vermont statutes are not pre-empted by federal law. State laws are embraced by the Clean Water Act. Judge O'Connor points out that Section 401(d) of the CWA "allows the State to impose 'other' limitations on the project in general **to assure compliance with various provisions of the CWA and with 'any other appropriate State law.'"** (emphasis added). There is no preemption unless "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cippolone v. Liggett, Inc.,*505 U.S. 504, 516 (1992). Absent clear congressional intent there is a presumption against preemption. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996).

In this case, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources..." *33 U.S.C. 1251(b).* The federal law in this case embraces state law. It doesn't authorize Defendants to ignore, amend or repeal the acts of the Vermont legislature. State law is preeminent in the scheme of protecting and managing water quality: 30 V.S.A. 401 and 402 are the law of the State of Vermont. The law should be enforced.

B. The Court must accept as true the harms alleged in the Complaint

As the Order notes, because this is a Motion to Dismiss, the Court takes as a given that all of the allegations, harms and damages to water quality alleged in the Complaint are true. Therefore, the Court must recognize that the Defendants' failure to act and their willful disregard of the law and neglect of their ministerial duties is a failure to carry out their most basic responsibilities with respect to protecting and enhancing the water quality of the Lake. If, as alleged, the water quality and shore lands of the Lake are being harmed by Defendants failure to act and intentional disregard of the Vermont statutes, it is a plain violation of the Defendants' mandated duties as set forth in the 401 Certification itself and in the Vermont statutes, even regardless of the explicit water levels established at 30 V.S.A. 401 and 402. See *Condition W of the license.* See also *10 V.S.A. 1421 and 1423.*

It would be difficult to conclude that the federal Clean Water Act, which gave birth to the Defendants' 401 Certification authority, and which embraced State water quality laws, somehow authorized the Defendants to overturn or ignore the acts of the Vermont Legislature. Likewise, it would be equally difficult to conclude that F.E.R.C., by waiving their own jurisdiction over issues of water quality, and leaving that jurisdiction with the State, somehow empowered the

Defendants, subordinate arms of the executive branch commissioned with *implementing* the Vermont statutes, with the authority to amend, alter or repeal the Vermont statutes. Plaintiff is unaware of any legal authority that would justify such an outcome.

Since all of the harms alleged in the Complaint must be taken as true in a Motion to Dismiss, it is a given at this point that Defendants' actions or inactions are causing pollution and erosion. It is hard to imagine how the Agency, entrusted with protecting and enhancing water quality, could claim authority (and immunity), for doing the opposite of the clearly expressed intent of the law and the license at issue herein and for dictating that a dam be used in direct contravention of the Vermont statutes.

Plaintiff is unaware of any authority granted to Defendants that would entitle them to renegotiate or modify the mandates of these, or any other statutes adopted by Vermont's General Assembly. Plaintiff is unaware of any authority supporting the proposition that these Vermont laws do not have to be obeyed. Defendants have a duty to comply with 30 V.S.A. 401 and 402. The F.E.R.C. license included provisions for a gate with the clear intention of it being used for the purposes at issue here and for avoiding these harms.

C. Defendants lack authority to amend the Vermont statutes

Plaintiff is unaware of any authority that grants Defendants the power to "decide" to neglect the Vermont Statutes. The fact that Plaintiff asked Defendants to respect the statutes, and Defendants "decided" to ignore and disregard those statutes, is like asking a driver not to exceed the speed limit and the driver deciding to exceed the speed limit anyway. The driver isn't authorized to ignore the legislative mandate. Plaintiff was under no obligation to ask the Defendants to comply with the law. Likewise Plaintiff should not be obligated to appeal a

decision when public officials decide not to comply with the law. Where the law allows no room for discretion, compliance is mandatory.

The law found at 30 VSA sections 401 and 402 is very specific and is not merely enabling legislation or a permitting statute. Unless a law is repealed, preempted or struck down by the Supreme Court, the explicit mandates of the General Assembly are not optional on the part of those hired to administer them. Defendants do not have the prerogative to amend, modify, renegotiate, neglect or ignore explicit mandates of the elected representatives of the people of the State of Vermont. On the contrary, they are employed to administer and to assure compliance with those mandates.

Lake Seymour is a public trust water--every citizen of the State has a vested interest in the Lake. *10 V.S.A. Section 901.* Every citizen is an owner of the Lake. Every citizen is entitled to the enforcement of laws adopted by the General Assembly to protect the Lake. The statutes weren't meant to benefit the Seymour Lake Association alone. They were meant to benefit every citizen of Vermont. Each and every one of us is entitled to enforcement of the law. No one has to ask drivers not to drive under the influence of alcohol. The law mandates that we don't. By the same token, no one should have to go to the public servants who control the dam at issue, entreating that they not allow erosion of the shoreline or pollution of Lake Seymour by allowing an artificial impoundment to be the cause of water levels exceeding the natural and normal levels established and mandated by State law.

People are entitled to prompt enforcement of the law and compliance with the law--especially by public officials. They should not have to spend years asking public officials to comply with the laws adopted by the Vermont Legislature. *Roy v. Farr,* 128 Vt. 30 at 37, 258 A.2d 799 (1969). The fact that Plaintiff has spent years asking for compliance with the law is no

grounds to dismiss their case. On the contrary, when a State agency refuses to obey laws intended to protect public property, each and every citizen has a right to seek immediate compliance with the law's mandate. The water levels for Lake Seymour, very explicitly directed by Vermont law, are fixed and certain. There are no issues of science to be litigated. They have been litigated and resolved before the Vermont Supreme Court.

The Clean Water Act embraces State water quality statutes, and the F.E.R.C. license waives F.E.R.C. jurisdiction with respect to those issues. In fact, it would make no sense for F.E.R.C. to issue a license that contradicted Vermont water quality laws when the federal law creating the 401 certification process embraced those State laws. Furthermore, this Court should read any authority vested in Defendants so as to harmonize with duly adopted federal and State law. Administrative agencies are not empowered to re-write or amend unambiguous laws of a legislative body. *Levine v. Wyeth,* 2006 VT 107.

II. Sovereign Immunity Does Not Bar Plaintiff's Claim of Nuisance

In Vermont, the doctrine of sovereign immunity is "substantially limited." *Stoneman v. Vergennes Union High School Dist. No. 5*, 139 Vt. 50, 421 A.2d 1307 (1980). Sovereign immunity is subject to substantial exception in Vermont.[1] As the Ohio Supreme Court has written, citing *Wayman v. Bd. of Edn.,* 5 Ohio St. 2d 248 (1966): "It is a generally recognized exception to the rule of sovereign immunity from suit that injunction will lie against the sovereign for creating or maintaining a nuisance." *Shopping Cen. v. Masheter,* 6 Ohio St. 2d 142 (Ohio 1966). See also annotations, 52 ALR 2d 1134 et seq.; 75 ALR 1196, 1202; 56 A.L.R. 2d 1415, 1417; 86 A.L.R. 2d 489, 521.

1 In *Stoneman t*he Vermont Supreme Court refers to the doctrine of sovereign immunity as the "'[o]nce venerated, recently vilified, and presently substantially limited' doctrine of sovereign immunity," citing Board of Trustees v. John K. Ruff, Inc., 278 Md. 580, 584, 366 A.2d 360, 362 (1976) and a wealth of other cases.

The Court's Order in this matter is based entirely on federal case law. While the Order accurately recites federal law, it mistakenly applies that law to the circumstances of the instant matter. Federal cases holding that the Federal Tort Claims Act ("FTCA") does not waive claims for injunctive relief do so because the federal statute makes "money damages" the exclusive remedy. The Vermont Tort Claims Act ("VTCA") has no such exclusivity provision. Accordingly, a different result is warranted where, as in this case, we have a nuisance caused by a willful disregard of Vermont statutes and seek only injunctive relief.

A. Vermont authority expressly excepts Plaintiff's claims for prospective injunctive relief from sovereign immunity

According to the Order, SLA's nuisance claim is not subject to the exception to sovereign immunity recognized by both *American Trucking Associations, Inc. v. Conway*, 152 Vt. 363, 5667 A.2d 1323 (1989) and *Lyndonville Savings v. Sec'y of Vt. Agency of Natural Res.,* 141-3-99 Wncv, both of which held that sovereign immunity does not bar prospective injunctive relief.

Plaintiff believes the Order misconstrues both cases. The Order asserts that *American Trucking* "builds on a long line of" federal cases allowing claims for injunctive relief against state officials but not against the State itself. In fact, *American Trucking* neither cited those decisions nor that federal doctrine. On its face, *American Trucking* allowed prospective relief not because the defendants were state officials but because "sovereign immunity precludes the maintenance of actions for the recovery of money against the state," and "this is not a suit for money damages against the state." 152 Vt. at 376, 566 A.2d at 1331.

SLA's nuisance claim does not request money damages. Hence, under *American Trucking*, it is exempt from sovereign immunity.

Regarding *Lyndonville Savings Bank*, this Court's Order states that constitutional claims

like those asserted in *Lyndonville Savings* are excepted from sovereign immunity but SLA's claim, which seeks to enjoin a nuisance caused by the State's failure to comply with a statute, is not. *Lyndonville Savings* itself, however, makes no such distinction. Indeed, citing *American Trucking Ass'ns. v. Conway*, 146 Vt. 579, 587, 508 A.2d 408 (1986), it included both constitutional claims and statutory enforcement claims among those not considered suits against the state for purposes of sovereign immunity. Whether sovereign immunity applies, *Lyndonville Savings* explained, turns on the type of relief sought: "The defense of sovereign immunity is applicable 'in an action to recover money which would be payable from state funds.'" Accordingly, sovereign immunity bars relief in the form of "money from the state coffers," but not "declaratory judgment and injunctive relief."[2] Again, under *Lyndonville Savings*, SLA's

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2 Courts in other states agree with *American Trucking* and *Lyndonville Savings* that sovereign immunity does not bar suits for prospective injunctive relief. *See e.g. Landfill, Inc. v. Pollution Control Board*, 387 N.E.2d 258, 261 (1978) (sovereign immunity did not bar action in circuit court seeking declaration that state agency was acting beyond its delegated authority); *Rockford Memorial Hosp. v. Department of Human Rights*, 651 N.E.2d 649 (Ill. App. 1995) (sovereign immunity does not bar claim against the State seeking only prospective injunctive relief); *Wellman v. Department of Human Services*, 574 A. 2d 879, 884 n. 11 (Me. 1990) (prospective relief not precluded by sovereign immunity); *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 342 (Me. 1973) ("defense of sovereign immunity has not generally been held to cover situations of legally unauthorized physical invasion of property or of serious impairment of property use and enjoyment."); *Greyhound Welfare Foundation v. Mississippi State University*, 736 So.2d 1048 (Miss. 1999) (lower court, which barred the injunctive relief requested, "extended the doctrine of sovereign immunity beyond its intended scope and restricted the rights of citizens to challenge allegedly improper acts of the State."), *State v. Hinds County Bd. of Sup'rs.*, 635 So.2d 839, 842 (Miss. 1994) (there is no sovereign immunity when the relief sought is a declaration that a particular statute or action of the State is unconstitutional); *Project Extra Mile v. Nebraska Liquor Control Comm'n.*, 810 N.W.2d 149, 158 (Neb. 2012) (state sovereign immunity does not bar actions to restrain state or to compel it to perform legally required act); *West Park Shopping Center, Inc. v. Masheter*, 216 N.E.2d 761, 765 (Ohio 1966) ("It is a generally recognized exception to the rule of sovereign immunity from suit that injunction will lie against the sovereign for creating or maintaining a nuisance."); *Mega Outdoor, L.L.C. v. Dayton*, 878 N.E.2d 683, 692 (Ohio App. 2007) ("Sovereign immunity applies to money damages, not to claims for equitable relief, such as injunctive relief."); *Portage Cty. Bd. of Commrs. v. City of Akron*, 808 N.E.2d 444, 478 (Ohio App. 2004) (because "claims were for injunctive and declaratory relief, rather than tort damages, the trial court properly concluded that appellant was not statutorily immune"); *City of Rocky River v. City of Lakewood*, 2008-Ohio-6484 ¶ 13 ("We agree with the overwhelming weight of authority that sovereign immunity applies only to an action for damages."); *Yoder v. Givens*, 18 S.E.2d 380, 382 (Va. 1942) (state court has power to "interfere by

nuisance claim is exempt from sovereign immunity**.**

B. Federal case law excepting claims for injunctive relief against state officials -- but not against states themselves -- are inapplicable

Plaintiff believes the Order wrongly applies federal constitutional law to this state dispute. The "long line of decisions" that, the Order asserts *American Trucking* builds on, concern claims against states or state officials for federal constitutional or federal law violations. Under the Eleventh Amendment, states may not be sued in federal court. *Green v. Mansour*, 474 U.S. 64, 68 (1985). The cases cited by the Order are the progeny of *Ex parte Young*, 209 U.S. 123 (1908), which created an exception to the Eleventh Amendment prohibition for claims seeking prospective injunctive relief against state officials.

Since the instant action was filed in state court and asserts state law claims, the Eleventh Amendment jurisprudence -- with its federalism concerns -- cited by the Order has no bearing and provides no basis for limiting the *American Trucking* and *Lyndonville Savings* prospective relief exception to sovereign immunity.

C. The VTCA waives State immunity from SLA's nuisance claim

Plaintiff believes the Order ignores the plain terms of the VTCA. The VTCA waives state sovereign immunity for actions claiming injury to property caused either by negligence or by "wrongful act or omission" to the same extent as a private person would be liable. 12 V.S.A. 5601(a). The Order notes that common law nuisance, including claims against private persons, is a cognizable cause of action under Vermont law. Since nuisance concerns wrongful conduct, *see e.g. State v. Walter A. Malmquist*, 114 Vt. 96, 104, 40 A.2d 534, 539 (1944), and prospective

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injunction with the performance of a ministerial act of a public officer under a valid statute [when] the manner of performance is in violation of the law or is contrary to plain, official duty.")

injunction is a remedy available for nuisance, *id.*, *Roy v. Woodstock Community Trust, Inc.*, 2013 VT 100 ¶ 73, the VTCA, § 5601(a), VTCA waives immunity for SLA's claim.

Section 5601(e) identifies several specific claims for which sovereign immunity is not waived under the Act. Because nuisance claims for injunctive relief are not among the claims exempt from waiver, the Court must conclude that the Act waives sovereign immunity for such claims. *See Grenafege v. Dep't. of Employment Sec.*, 134 Vt. 288, 290, 357 A.2d 118, 120 (1976) (recognizing "the time-honored precept of '*expressio unius est exclusio alterius*,'" -- the expression of one thing is the exclusion of another).

D. Unlike the FTCA, the VTCA does not make money damages the exclusive remedy

According to the Order, because federal courts have construed the FTCA, 28 U.S.C. §§ 2670-2680, to waive claims for money damages but not claims for injunctive relief, the VTCA is similarly restricted. The Order's reliance on federal case law is misplaced. While our Supreme Court has looked to federal court decisions construing the FTCA, it has also recognized that there are "important relevant" differences between the statutes. *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 486, 622 A.2d 495, 498 (1993). Because of these differences, the Vermont Supreme Court has not always followed federal jurisprudence and has only used it as a "guide." *LaShay v. Department of Social and Rehabilitation Services*, 160 Vt. 60, 625 A.2d 224 (1993).

In this instance, the difference between the VTCA and FTCA is pronounced and warrants a different result. Under the FTCA, § 2679, plaintiffs are limited to the remedy provided by §1346(b), which makes "money damages" the sole remedy available under the FTCA.[3] In

3 See e.g. *Talbert v. United States*, 932 F.2d 1064, 1065-66 (4th Cir. 1991) ("Section 1346(b) directs that 'the district courts ... shall have exclusive jurisdiction of civil actions on claims

contrast, VTCA has no such express limitation. Accordingly, the basis for adopting the federal case law on this issue is absent.

Conclusion

The Seymour Lake Association respectfully requests that the Court alter and amend the Order, grant a writ of mandamus ordering compliance with Vermont law and/or reinstate Plaintiff's nuisance claim, and conduct further proceedings accordingly.

Dated this ___ day of April, 2015, at Greensboro, Vermont.

SEYMOUR LAKE ASSOCIATION

By: _____

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against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government....' The only relief provided for in the Act is 'money damages.'"); *Birnbaum v. United States*, 588 F.2d 319, 335 (2nd Cir. 1978) ("money damages" is "the only form of relief provided in the Act. 28 U.S.C. § 1346(b)."); *Frankel v. Heym*, 466 F.2d 1226, 1228 (3rd Cir. 1972) ("section 2679(b) of Title 28, makes the remedy provided in section 1346 of Title 28 the exclusive resort of such claimants as the plaintiffs. Among other things, section 1346(b) authorizes district courts to entertain 'civil actions on claims against the United States, for money damages. . . .' Arguably, this language at least implies that primary awards in such civil suits must take the form of common law money judgments, the only form of "money damages'").