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May 14, 2015

Penelope Carrier, COM
Vermont Superior Court
Orleans Unit – Civil Division
247 Main Street
Newport, VT 05855

Re: *Seymour Lake Assoc. v. State*
Docket No.: 108-4-14 Oscv

Dear Ms. Carrier:

Enclosed please find State of Vermont's Memorandum in Opposition to Plaintiff's Rule 59 Motion for Alteration or Amendment of Dismissal Order for filing in the above-referenced matter.

Sincerely,

Ruth A. Hooker

Ruth A. Hooker
Administrative Assistant

Enclosure

cc: David Kelley, Esq.

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 108-4-14 Wncv

Seymour Lake Association,
Plaintiff

v.

State of Vermont, acting by and through its Agency ofNatural Resources, and its Department of Environmental Conservation,
Defendants

STATE OF VERMONT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RULE 59 MOTION FOR ALTERATION OR AMENDMENT OF DISMISSAL ORDER

The State of Vermont opposes Plaintiff's Rule 59 motion to alter or amend the Court's March 31, 2015 Order dismissing Plaintiff's Complaint ("Motion"). The Court's Order should be upheld because: (1) the Environmental Division, not this Court, is the jurisdictional forum to dispute ANR's decision; and (2) this Court is unable to grant either a writ of mandamus or an injunction against the State in this case.

Although Plaintiff Seymour Lake Association ("SLA") purports to seek reconsideration of the Court's dismissal of its Complaint pursuant to V.R.C.P. 59(a), this provision concerns motions for new trials and is therefore inapplicable. Rather, SLA appears to seek alteration or amendment of the dismissal Order under Rule 59(e). Although Rule 59(e) gives the Court broad power to alter or amend its judgment, *In re SP Land Company, LLC*, 2011 VT 104 ¶ 16, 190 Vt. 418, 426, 35

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A.3d 1007, 1013 (2011), four principal reasons have been identified for granting a Rule 59(e) motion: (1) to correct manifest errors of law or fact; (2) to allow a moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) to respond to an intervening change in the controlling law. *See Madden v. Town of New Haven*, Docket No, 49414, 2014 WL 6600135, at *1 (Vt. Super. Ct. Env'tl. Div. Oct. 28, 2014). SLA has failed to identify any manifest errors in the Court's legal reasoning, intervening changes in the law, or new jurisdictional facts that should cause the Court to reconsider its Order. Further, there is clearly no injustice in the Court's dismissal because SLA could have presented its claims against the State to the Environmental Division, but failed to do so. SLA's Motion must therefore be denied.

The Court's Order properly dismissed the Complaint for lack of jurisdiction and failure to state a claim. For the reasons the Court explained in the Order (and discussed further below), SLA's Complaint cannot be brought in this Court. The Court did not err and SLA's Motion should therefore be denied.

I. The Court's Dismissal Based on Lack of Jurisdiction Should Be Upheld

The Court correctly determined that it did not have jurisdiction to entertain the merits of Plaintiff's Complaint.

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SLA first argues that the Court did not address "Plaintiff's Central Claim" regarding the water levels at Seymour Lake and the water level standards that apply. *See* Mot. at 1. This is true – the Court did not address the merits of SLA's central claim, and that is the correct decision. The State's motion was jurisdictional

under Rule 12(b)(1) (and for failure to state a claim under Rule 12(b)(6)). The Court properly held that it "lacks jurisdiction to entertain SLA's complaint." Order at 11. In other words, "Plaintiff's central claim" is not resolvable by this Court. As the Court held, SLA's claim properly belongs in the Environmental Division. That is the appropriate forum to resolve the merits of SLA's "Central Claim," particularly because the Environmental Division has the "acknowledged expertise" to address such issues. Order at 11.

SLA also argues that federal preemption does not apply. However, this Court did not make any finding or ruling on preemption. *See* Order at 7 (Court did not resolve argument regarding federal preemption). But the Court did acknowledge that SLA's Complaint could implicate preemption issues and the intersection of state and federal environmental laws. Order at 11. Again, the Court noted these issues are also better suited to the Environmental Division's expertise. *Id.*

Importantly, SLA does not dispute the Court's conclusion that ANR's decision not to require gate manipulation under Condition H was an agency "act or decision" pursuant to 10 V.S.A. § 8503. That is now the law of the case and it should be followed. *Gardner v. Jefferys*, 178 Vt. 594, 598, 878 A.2d 259, 266 (2005) ("The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (internal quotations omitted).

As the Court held, ANR's decisions under 10 V.S.A. § 8503 do not need to be "written or formal." Order at 9 (citing cases). Nonetheless, in this case, ANR did provide (more than once) a written decision to SLA. SLA had ample opportunity to

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challenge ANR's decision at the appropriate time in the appropriate forum. SLA now bears the consequences of its decisions and cannot ask this Court to find jurisdiction where none exists. *See Miller v. Miller*, 184 Vt. 464, 491, 965 A.2d 524, 542 (2008) (denying relief for party's "tactical decisions"). SLA's Motion to alter the Court's Order should be denied.

II. The Court is Unable to Grant Mandamus or an Injunction against the State

Although SLA argues that the Court's Order did not address its "Central Claim," SLA fails to dispute the Order's central conclusion: that this Court, as a threshold matter, lacks subject matter jurisdiction over this entire action since all of SLA's claims arise out of an Agency of Natural Resources "act or decision" that must be appealed to the Superior Court's Environmental Division, pursuant to 10 V.S.A. §§ 8503, 8504. As a result, the Court lacks jurisdiction to even consider SLA's requests for a writ of mandamus and/or an injunction against the State. *See Patch's Petroleum Co. v. Exxon Corp.*, Docket No. S0062-01-RcC, 2006 WL 4959278, *1 (Vt. Super. Ct. Feb. 22, 2006) (holding that since "this Court lacks jurisdiction because the sole route of appeal from an ANR decision is to the Environmental Court" it therefore "must dispose of the declaratory and injunctive claims" against ANR employee; noting further that "Plaintiffs' complaint for declaratory relief is thus nothing more than an end-run around the exclusive avenue of appeal provided" in the Environmental Court).

Second, SLA does not disagree with the Court's conclusion that a writ of mandamus is unavailable to it because SLA's foregone right of appeal in the

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Environmental Division offered an adequate remedy at law. For the same reason, SLA cannot be awarded an injunction because SLA had an adequate remedy at law. The Environmental Division could have ordered the very same relief -- installation of a dam gate to actively manage Lake Seymour's water levels – that SLA now seeks by way of a nuisance injunction. *See Roy v. Woodstock Community Trust, Inc.*, No. 678-10-07, 2011 WL 8478131, at *2 (Vt. Super. Ct. Dec. 30, 2011) ("A permanent injunction requires proof that the plaintiff has suffered an irreparable injury, that the remedies available at law are inadequate to compensate the plaintiff for that injury, that a balancing of the hardships between the plaintiff and the defendant warrant the issuance of an injunction, and that the public interest would not be disserved by the proposed injunction") (emphasis added), *aff'd and rev'd on other grounds*, 2013 VT 100A, 195 Vt. 427, 94 A.3d 530 (2014).

Third, SLA has failed to demonstrate that the State has, through the Vermont Tort Claims Act ("VTCA"), 12 V.S.A. § 5601 *et seq.*, expressly waived its sovereign immunity with respect to common law nuisance claims seeking injunctive relief. *See Kane v. Lamothe*, 2007 VT 91 ¶ 6, 182 Vt. 241, 244, 936 A.2d 1303, 1306 (2007) ("Under the doctrine of sovereign immunity, claims against the State are barred 'unless immunity is expressly waived by statute.'") (citation omitted). SLA argues that because Vermont law recognizes nuisance *per se* and public nuisance claims against private persons and the State, under the VTCA, "shall be liable for injury to persons or property . . . in the same manner and to the extent as private person would be liable to the claimant," 12 V.S.A. § 5601(a), that therefore the "VTCA waives immunity for SLA's claim." Mot. at 10.

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SLA's argument ignores the Supreme Court's guidance that "[t]his [private analog] approach bars negligence actions against the State in connection with purely 'governmental functions' so as to avoid imposing 'novel and unprecedented liabilities' on the State." *Kane*, 2007 VT 91, ¶ 6, 182 Vt. at 245, 936 A.2d at 1307 (citations omitted). Here, because SLA's nuisance claims arise from the State's inherently governmental functions of regulating stream flows through a privately-owned dam and managing the water levels and quality of a publicly-owned lake, such claims are fundamentally different from a claim that could be maintained against a private person for creating or maintaining a nuisance through their own activities or the use of their own property.

Without such a private analog, the State retains its sovereign immunity against SLA's nuisance claims. *See Disappearing Lakes Ass'n v. Dep't of Natural Res*, 328 N.W.2d 570, 572, 576 (Mich. App. 1982) (holding that state's issuance of the dredging permits to private developer, whose dredging plaintiffs alleged had caused water levels in plaintiffs' lakes to drop, was discretionary and inherently governmental function and state therefore retained sovereign immunity against plaintiffs' nuisance *per se* and public nuisance claims), *aff'd sub nom. Ross v. Consumers Power Co.*, 363 N.W. 2d 641, 654-57 (Mich. 1984).[1] The authorities that

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[1] *See also Andrew v. State*, 165 Vt. 252, 260, 682 A.2d 1387, 1392 (1996) (holding that "plaintiffs' cause of action amounts to a claim of negligent enforcement of safety standards under a regulatory statute. There is no private analog for such an action" and to hold otherwise would impermissibly impose "'novel and unprecedented liabilities'" upon the State) (citations omitted); *cf. Stoneman v. Vergennes Union High Sch. Dist. No. 5*, 139 Vt. 50, 53, 421 A.2d 1307, 1309 (1980) ("[A]n action against the state cannot be maintained without the state's consent for injuries resulting from the exercise of essentially governmental functions . . . .").

SLA has cited at page 6 of its Motion for the proposition that a governmental body may be held liable for creating or maintaining a nuisance are inapposite since they concern instances is which the nuisance-producing property or instrumentality was owned and operated by the government defendants. Here, in contrast, the State does not own or operate the Lake Seymour dam and may not be held liable in tort for the way in which it carries out its governmental functions of regulating the Lake Seymour dam's private owner and managing a public lake.

Even if the State could somehow be construed to have waived its sovereign immunity as to nuisance claims seeking money damages, the VTCA, like the Federal Tort Claims Act that it was modeled after, has not expressly waived the State's sovereign immunity against the prospective injunctive relief that SLA's nuisance claims request. Contrary to SLA's suggestion that, unlike the VTCA, the FTCA's statutory language expressly bars injunctive relief, Mot. at 10-11, money damages are merely "the only form of relief provided" in the FTCA's Section 1346(b), thereby supporting the widely-accepted implication that injunctive relief is not available under this statute. *Birnbaum v. United States*, 588 F.2d 319, 335 (2d Cir. 1978).

It is just the same under the VTCA, whose only form of relief provided against the State is money damages. *See* 12 V.S.A. § 5601 (providing that the State "shall be liable" and that "the maximum liability of the State" shall be $500,000 to any one person and $2 million in the aggregate to all persons arising out of each occurrence). Thus, although injunctive relief is not explicitly barred by either the VTCA or the FTCA, it need not be to preserve the State and federal government's

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sovereign immunity against such relief, since money damages are the only remedy made available under either statute.

For an additional reason, SLA is mistaken that the VTCA has waived the State's sovereign immunity as to its nuisance injunction claims. The VTCA provides that the State does not waive its immunity as to "[a]ny claim for which a remedy is provided or which is governed specifically by other statutory enactment." 12 V.S.A. § 5601(e)(7); *see also Libercent v. Aldrich*, 149 Vt. 76, 83-84, 539 A.2d 981, 985 (1987) (explaining for example that, under this section of the VTCA, "a claim alleging injury incurred in the course of state employment would be barred by the doctrine of sovereign immunity, if that claim were brought against the state, because a remedy is provided for such claims by the workers' compensation statutes."). In this case, the Court has found, and SLA does not meaningfully dispute, that its challenge to ANR's decisions concerning the Lake Seymour dam are "governed specifically" by 10 V.S.A. §§ 8503, 8504, under which "a remedy is provided" in the Environmental Division. The VTCA cannot be deemed to have waived the State's sovereign immunity as to SLA's nuisance claims or request for an injunction when SLA was afforded an equivalent statutory remedy in the Environmental Division.

Finally, SLA can point to no decision of a Vermont court entering an injunction against the State or a State officer to restrain commission of a common law tort, such as SLA's nuisance claims. Rather, the handful of Vermont decisions permitting the pursuit of injunctive relief against a State official in his official capacity have all concerned the State official's enforcement of an allegedly

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unconstitutional statute. *See, e.g., Badgley v. Walton*, No. 538-11-02 Wmcv, 2006 WL 6047600, at *2 (Vt. Super. Ct. Aug. 3, 2006) (allowing former state troopers to pursue injunctive relief against commissioner of state police to restrain enforcement of allegedly unconstitutional mandatory retirement statute and noting that "[i]nterested parties can challenge the constitutionality of State statutes or acts by bringing an action for declaratory or injunctive relief"). These suits against State officers to enjoin their constitutional violations may proceed, notwithstanding sovereign immunity, according to an established exception under Vermont law that "suits challenging the constitutionality of a state statute or its enforcement are not considered suits against the state for purposes of sovereign immunity." *American Trucking Ass'ns, Inc. v. Conway*, 146 Vt. 579, 587, 508 A.2d 408, 413 (1986).

Aside from this exception, the general rule is that "[l]awsuits against the State are barred unless the State waives its sovereign immunity," *Earle v. State*, 2006 VT 92 ¶ 9, 180 Vt. 284, 289, 910 A.2d 841, 846 (2006), and the VTCA should be narrowly construed as "a limited waiver of the State's immunity from suit." *Johnson v. Agency of Transp.*, 2006 VT 37 ¶ 5, 180 Vt. 493, 493, 904 A.2d 1060, 1063 (2006). SLA has shown no express waiver of the State's sovereign immunity from tort claims founded upon the exercise of discretionary and intrinsically governmental functions, such as regulating dam owners and lake levels. SLA has also failed to demonstrate that the VTCA expressly waives the State's immunity from injunctive relief, given that the VTCA only provides for monetary damages and does not apply to claims for which another statutory remedy is provided, in this case, an appeal to the Environmental Division.

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SLA's Motion to alter or amend the Court's March 31, 2015 Order dismissing Plaintiff's Complaint should be denied.

Dated: May 14, 2015

STATE OF VERMONT

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