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**IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH**

EMIGRATION CANYON HOME
OWNERS ASSOCIATION, a Utah
Corporation

Petitioner,

vs.

KENT L. JONES, Division Director, Utah
State Division of Water Rights, and
EMIGRATION IMPROVEMENT
DISTRICT, a Utah Special Service District

Respondents.

**MEMORANDUM IN OPPOSITION TO
RESPONDENTS' MOTIONS TO
DISMISS PETITION FOR DE NOVO
JUDICIAL REVIEW**

Case No. 190901675

Judge: Su Chon

Petitioner Emigration Canyon Home Owners Association ("The ECHO-Association"), through counsel of record, hereby submits this memorandum in opposition to both Respondent Emigration Improvement District's ("EID") Motion to Dismiss Petition for *De Novo* Judicial Review of Informal Adjudicative Hearing Re: Orders of the State Engineer for Permanent Change Applications Nos. 57-7796 (a44045) and 57-10711 (a44046), filed April 3, 2019 ("EID's

Motion to Dismiss”), and Respondent Kent L. Jones’s Motion to Dismiss and Joinder in Emigration Improvement District’s Motion to Dismiss (“Jones’s Motion to Dismiss”) (collectively hereafter referred to as “the Motions”), and states as follows:

INTRODUCTION

This action involves the impairment of water rights and destruction of water resources in Emigration Canyon (the “Canyon”). In September 2018, EID filed two permanent change applications, Nos. 57-7796 (a44045) and 57-10711 (a44045) (the “Permanent Change Applications”), seeking to move its previously approved single surface water point-of-diversion from the base of the Canyon to 51 underground sources located at higher elevations within the Canyon. The Permanent Change Applications seek to continue EID’s existing water extraction from existing wells and to drill five additional wells in underground water aquifers (the Nugget and Thaynes aquifers).

On September 27, 2018, The ECHO-Association purchased a water right from Nelson R. Mather. Since that time, The ECHO-Association has suffered total impairment of its water right and timely opposed EID’s Permanent Change Applications.

The Utah State Engineer, Kent L. Jones, is required to comply with mandatory provisions of Utah Code Ann. § 73-3-8 in assessing change applications. On December 19, 2018, Mr. Jones held an administrative hearing on EID’s Permanent Change Applications (the “Protest Hearing”). As set forth in The ECHO-Association’s Petition (the “Complaint”), Mr. Jones was presented with substantial evidence of existing harm caused by EID’s ongoing groundwater mining, destruction and contamination of the fragile groundwater system in the Canyon, the detrimental effects upon domestic and culinary water, public recreation and the natural stream environment,

and the general public welfare. Mr. Don Barnett, on behalf of EID, provided verbal opinions and data without supporting documentation.

Mr. Jones conducted no investigation to qualify the information that EID provided at the Protest Hearing, inappropriately reversed the mandatory burden of proof set forth in Utah Code Ann. § 73-3-8, and failed to investigate substantial evidence supporting the denial of EID's Permanent Change Applications. On January 16, 2019 and January 25, 2019, Mr. Jones granted EID's Permanent Change Applications (collectively "the Orders").

The ECHO-Association requests that the Court deny both EID's Motion to Dismiss and Jones's Motion to Dismiss on the grounds that The ECHO-Association has legal standing to bring the subject Petition for *de novo* Judicial Review (the "Action") because: (1) The ECHO-Association meets the traditional standard test for standing pursuant to Utah Code Ann. § 63G-4-402, and/or, in the alternative, (2) standing should be granted in this Action because The ECHO-Association raises issues that are so unique and of such great importance to the State of Utah that they ought to be decided in furtherance of public interest.

ARGUMENT

I. APPLICABLE LEGAL STANDARD FOR A 12(b)(6) MOTION TO DISMISS

Under Utah's liberal standard of notice pleading, a plaintiff need only submit a "short and plain ... statement of the claim showing that the party is entitled to relief." Utah R. Civ. Proc. 8(a). "[T]he fundamental purpose of [Utah's] liberalized pleading rules is to afford parties 'the privilege of presenting whatever legitimate contentions they have pertaining to their dispute,' subject only to the requirement that their adversary have 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" *Zoumadakis v.*

Uintah Basin Med. Ctr., 2005 UT App 325, ¶ 3, 122 P.3d 891 (quoting *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982)). “[T]hese principles are applied with great liberality in sustaining the sufficiency of allegations stating a cause of action or an affirmative defense.” *Id.* (quoting *Williams*, 656 P.2d at 971).

“A motion to dismiss admits the truth of the facts alleged in the complaint but challenges the plaintiff’s right to relief based on those facts.” *Robinson v. Robinson*, 2016 UT App 33, ¶ 17, 368 P.3d 105. In considering a motion to dismiss, courts must “accept the factual allegations in the complaint to be true and consider them and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.” *Puttuck v. Gendron*, 2008 UT App 362, ¶ 8, 199 P.3d 971 (internal quotation marks omitted) (quoting *Hunsaker v. State*, 870 P.2d 893, 897-98 (Utah 1993)). A “court should only grant a motion to dismiss when a Plaintiff is not entitled to relief under the facts alleged or under any state of facts they could prove to support their claim. Accordingly, when determining whether to grant a Defendant’s motion to dismiss, a court must assume the truth of the factual allegations in the pleadings and draw all reasonable inferences from those allegations in favor of the Plaintiff.” *See Ashby v. Ashby*, 2010 UT 7, ¶ 9, 227 P.3d 246. (Internal quotation marks and citations omitted.)

The question of whether a plaintiff has standing to request a particular form of relief is primarily a question of law, although there may be factual findings that bear on the issue. *Wash. County Water Conservancy Dist. v. Morgan*, 82 P.3d 1125, 1131 (Utah 2003).

II. PETITIONER HAS LEGAL STANDING TO BRING THE PRESENT ACTION

The ECHO-Association has standing to seek *de novo* judicial review of the Orders of Mr. Jones, the Division Director of the Utah State Division of Water Rights, pursuant to Utah Code

Ann. § 63G-4-402 and Utah case law. The Supreme Court of Utah recognizes that a plaintiff may establish standing under one of three general rules. “[T]he first and most widely employed standard’ for establishing standing ‘requires a plaintiff to show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute.’” *Wash. County Water Conservancy Dist.*, 82 P.3d at 1131 (quoting *Nat’l Parks & Conservation Ass’n*, 869 P.2d 909, 913 (Utah 1993)). This is the “traditional” test for standing. *Id.* (citation omitted).

However, the Supreme Court of Utah case law recognizes additional methods to establish standing. Even if a plaintiff cannot meet the traditional test, a plaintiff may maintain a suit against governmental action in circumstances in which a case raises issues that are so “unique and of such great importance that they ought to be decided in furtherance of the public interest.” *Id.* at 913.

In the present case, the Court should deny EID’s and Mr. Jones’s Motions on the grounds that The ECHO-Association (1) meets the traditional standard test for standing, and/or, in the alternative, (2) the Court should grant standing because this Action raises issues that are so unique and of such great importance to the State of Utah that they ought to be decided in furtherance of public interest.

A. The ECHO-Association meets the traditional standard test.

The Motions argue that this Action should be dismissed with prejudice because, while The ECHO-Association did file a timely protest for the underlying administrative hearing, it was not the owner of water share 57-8947 (a16183) before the protest period on October 17, 2018. This argument is inaccurate and should be disregarded.

In *Washington County Water Conservancy District v. Morgan*, the Supreme Court of Utah determined that the mere fact that a water user files a timely protest to a permanent change application, does not alone confer legal standing to challenge the decision in court. However, the Court specifically noted that Utah Code Section 73-3-17(1) allows those persons who have a “genuine concern” about proposed changes in water rights “to voice those concerns before the State Engineer and as an important corollary, provide the State Engineer with all viewpoints relevant to any proposal.” An “interested party” however does not automatically become an “aggravated party” within the meaning of Utah Code Section 63G-4-402 by mere virtue of filing protest, due to the fact that legal standing requires that the jurisdiction requirement must be satisfied “before a district court may even entertain the question of whether the state engineer’s decision was consistent with the requirements of Utah State law” (emphasis added) quoting *Harris v. Springville City*, P.2d 188, 190 (Utah 1986).

In short, the Supreme Court of Utah delineates two distinct points of time – the fact-finding stage of the state engineer’s inquiry, where a protestant need only be an interested party, and judicial review of the state engineer’s decision, where, in order to invoke the jurisdiction of the district court, a petitioner must fulfill the requirements of legal standing prior thereto.

In the present case, The ECHO-Association became the sole owner of water right 57-8947 (a16183) prior to the expiration of the protest period, prior to the Protest Hearing on December 19, 2018, and prior to commencement of this Action. On September 27, 2018, The ECHO-Association purchased Mr. Mather’s interest in water right 57-8947 (a16183). See Declaration of Nelson R. Mather, attached as Exhibit A, at ¶ 8; see also Declaration of Mark Christopher Tracy, attached as Exhibit B at ¶ 3. This occurred several weeks before The ECHO-

Association filed its initial protest to EID's Permanent Change Applications with the State Division of Water Rights. *See* Complaint, at ¶¶ 97 and 101. Upon purchasing Mr. Mather's water right, The ECHO-Association acquired a constitutionally protected property right to water use in Emigration Canyon and thereby legal standing to contest Mr. Jones's Order permitting EID's continued operation of large-diameter commercial wells in the Freeze Creek Aquifer and the further exploitation of groundwater in the Nugget and Thaynes Aquifers.

Mr. Mather executed the title transfer documents on February 11, 2019, and The ECHO-Association recorded the same on February 21, 2019. By recording transfer of title to water right 57-8947 (a16183) prior to filing this Action, The ECHO-Association secured any remaining formal requirements of legal standing under the Utah Rules of Civil Procedure applicable in the present case.

As the owner of surface water share 57-8947 (a16183)¹, The ECHO-Association has suffered total depletion of its water right during the summer, autumn and winter of 2018. Based upon Mr. Jones's Orders, EID is permitted to extract groundwater via the Upper Freeze Creek and Brigham Fork Wells in the Freeze Creek Aquifer at a quantity greater than can be replenished through the natural recharge rate during spring run-off (*i.e.*, groundwater mining).² The ECHO-Association suffers not only potential but actual injury through the deprivation of water use in accordance with its water right.

¹ Surface water share 57-8947 (a16183) is approved for water use from a surface point-of-diversion located on the Emigration Canyon Stream.

² As noted by the Area Manager of Respondent Jones and EID's own hydrologist during the hearing on December 15, 1995, interference with surface water flow from the same large-diameter commercial wells in the present Action may "*last decades – twenty-five, fifty, seventy-five years*" (emphasis added). *See* Complaint, at ¶ 88. This fact has been admitted by EID and Mr. Jones for purposes of the Motions.

Accordingly, The ECHO-Association has legal standing to contest Mr. Jones's Orders, allowing continued groundwater mining of the Twin Creek Aquifer and additional exploitation of the Nugget and Thaynes Aquifers by EID.

B. In the alternative, the Court should grant The ECHO-Association standing because the issues in this Action are important public issues.

The ECHO-Association should be granted standing to bring the present Action, regardless of whether it owned water right 57-8947 (a16182) or not, because the issues raised that are “so ‘unique and of such great importance that they ought to be decided in furtherance of the public interest.’” *Wash. County Water Conservancy Dist.*, 82 P.3d at 1133 (citation and quotation omitted).

Pursuant to Utah case law, even if a party cannot establish standing pursuant to the traditional test for standing, standing may still be established if the issues raised by the plaintiff are of sufficient public importance in and of themselves to grant him standing. *Jenkins v. Swan*, 675 P.2d 1145, 1150-51 (Utah 1983)

[A] plaintiff may maintain a suit against governmental action in those limited circumstances in which a case raises issues that are so “unique and of such great importance that they ought to be decided in furtherance of public interest.” This standard recognizes the need to have issues of great public importance resolved in compliance with the law when a court can within its institutional and constitutional limitations.

Nat'l Parks & Conservation Ass'n, 869 P.2d at 913 (quoting *Terracor v. Utah Bd. of State Lands*, 716 P.2d 796, 799 (Utah 1986)); *see also Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978); *Wash. County Water Conservancy Dist.*, 82 P.3d at 1132-33; *Haik v. Jones*, 2018 UT 39, ¶¶ 23-25, 27 P.3d 1155 (Utah 2018);

In order to establish standing under this alternative standard, the dispute must (1) raise a statutory or constitutional issue of substantial public import, (2) be presented by adverse parties, and (3) otherwise be suitable for resolution by the courts. *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 913.

1. The present Action raises a statutory and constitutional issue of substantial public import.

The Supreme Court of Utah has left open to the possibility that some issues concerning water rights might present questions of great public importance where a large number of people would be affected by the outcome. *Wash. County Water Conservancy Dist.*, 82 P.3d at 1133.

We remain open to the possibility that some issues concerning water rights might present questions of great public importance. That importance, however, likely would be found in a case where a large number of people would be affected by the outcome.

Id.

The Court should take judicial notice that the Canyon is one of the most historically significant areas in modern Utah history. It was a decisive obstacle of the Donner-Reed Party in 1846, as well as the last resting place of the Mormon Pioneers before entering the Salt Lake Valley on July 24, 1847. The Mount Olivet Cemetery Association ("Mt. Olivet"), the only active military cemetery commissioned by an Act of Congress and signed into law by United States President Ulysses S. Grant in 1874, is maintained from the Canyon's surface water sources. The Canyon is also the location of Utah's Hogle Zoo, a public retreat, which is reliant upon the sustained flow of the same surface water source. Moreover, and equally significant, more than 415 private wells are reliant on the same water source as Mt. Olivet and Utah's Hogle Zoo.

To date, over forty (40) Canyon residents have reported substantial impairment of private wells possessing superior water shares, including total impairment. *See* Complaint, at ¶ 99. Many public wells have and likely will suffer further impairment in stream flow and contamination with *e coli* bacteria if the artesian pressure in the valley floor of Emigration Canyon collapses with the deteriorating water-table caused by groundwater mining. e.g. *Id.*, at ¶¶ 34(b)-(c); 43, 94, 99, 100, 111, and 156. With substantial quality and quantity impairment and the Canyon stream suffering total impairment less than 2 miles from Utah's Hogle Zoo, there is a significant public interest in preventing further destruction of the Canyon aquifers as petitioned by The ECHO-Association.

In the present case, Mr. Jones had a duty to comply with Utah statutory law to comply with Utah Code Ann. § 73-3-3 to investigate permanent change applications and to reject them if "approval would interfere more beneficial use, public recreation, the natural stream environment, or the public welfare." *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989); *see also* Utah Code Ann. § 73-3-3.

Utah Code Ann. §§ 73-3-3(5) and 78-3-8 establish seven inquiries upon which the State Engineer is required to consider in order to support a "reasonable belief" that a change application can be made to grant a permanent change application. These inquiries include: (1) whether there is unappropriated water in the proposed source; (2) whether the proposed water will impair existing rights and interfere with more beneficial use of the water; (3) whether the proposed plan is physically and economically feasible; (4) whether the plan will prove to be detrimental to public health, welfare and safety; (5) whether the applicant has shown that it has the financial ability to complete the proposed work; (6) whether the applications are for the

purpose of speculation or monopoly; and (7) whether the applications are filed in good faith. The burden is on the applicant to produce evidence sufficient to support a reasonable belief that the change can be made in compliance with Utah Code Ann. §§ 73-3-3(5) and 78-3-8.

Mr. Jones held a Protest Hearing. Prior to and after the Protest Hearing, The ECHO-Association provided substantial evidence to Mr. Jones to deny EID's Permanent Change Applications, pursuant to Ann. §§ 73-3-3(5) and 78-3-8. *See generally*, Complaint and Exhibits. EID provided no report and only provided verbal data without support documentation. Mr. Jones conducted no investigation to qualify the opinions and verbal data provided by EID, particularly in light of contradictory evidence presented by The ECHO-Association, including some of EID's own documentation.³ For example, EID's past and present hydrologists, in written reports and in prior presentation to the State Engineer's Office, concluded that large-diameter wells are harmful

³ For example, although a 1966 Barnett Thesis, completed by the State Engineer's own former area engineer and EID's own expert hydrologist, expressly warned against the operation of large-diameter commercial wells in the Canyon, both Mr. Jones and EID failed to investigate or collect critical data and reports regarding groundwater mining and the destruction of the Canyon's underground water systems. *See* Complaint, at ¶¶ 34, 35, 131, 133, 146, 171(f). One day after the EID Permanent Change Applications were submitted Mr. Jones, EID reported that the Brigham Fork Well had failed federal drinking water standard for sulfates and turbidity based upon iron bacterial contamination. However, during the Protest Hearing, EID testified to Mr. Jones that the Brigham Fork Well was not currently in operation due to "mechanical issues." Mr. Jones failed to investigate this issue of public health, welfare and safety. *Id.* at ¶ 158. In a 2000 Barnett Study entitled "Geologic and Hydrologic Setting of the Upper Emigration Canyon Area," EID hydrologist, Don Barnett, noted that in the year 1998 Boyer Well #2 extracted more water than was replenished by natural groundwater recharge in a "good water year," resulting in groundwater mining. *Id.* at ¶ 56 and Ex. G, at "Exhibit E", attached thereto. While EID verbally referenced and relied upon the 2000 Barnett Study at the Protest Hearing in support of their applications, it did not produce a copy and Mr. Jones did not request it. When a copy of the 2000 Barnett Study was subsequently found and provided by The ECHO-Association the next day, showing evidence contrary to EID's representation, Mr. Jones made no further investigation and simply accepted EID's false representation of the study made during the Protest Hearing.

to the ecosystem of the Canyon and the Canyon Stream and will cause impairment in quality and quantity of water to private wells in the Canyon. *See* Complaint, at ¶ 111.

The failure of Mr. Jones to comply with statutory duties is of substantial public import, as his Orders, based on a lack of mandatory investigation, directly affects over 415 individuals with private wells in the Canyon, Hogle Zoo and Mt. Olivet. Moreover, the harm to the ecosystem of the Canyon shall be directly affected by the Orders and continued groundwater mining by EID. Accordingly, the Court should grant standing to The ECHO-Association in the present Action.

2. The ECHO-Association is an appropriate adverse party.

An “appropriate party” to bring a claim on behalf of the public interest “has the interest necessary to effectively assist the court to developing and reviewing all relevant and factual questions.” *Gregory v. Shurtleff*, 2013 UT 18, ¶ 28, 299 P.3d 1098, 1109 (quotation and citation omitted). “[A]n appropriate party . . . has the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions . . .” *Id.* (citing *Utah Chapter of the Sierra Club v. Utah Air Quality Bd*, 2006 UT 74, ¶ 36, 148 P.3d 960). “The ‘appropriateness’ of a party under the public interest doctrine is a question of *competency*.” *Id.* (emphasis in original). For example, in the *Sierra Club*, The Supreme Court of Utah determined that the club “would have standing under the alternative [public-interest] test” due to its policy concerns and status as an “entity focused on protecting the environment.” *Sierra Club*, 2006 UT 74, ¶ 42.

The ECHO-Association is a legal entity, sufficiently situated with an administrative structure, financial resources and legal counsel. *See e.g.* Complaint, at ¶ 1, and Exhibits F, G and H, thereto. It owns a water right which has suffered total impairment. *Id.* at ¶ 103. The ECHO-

Association has collected and reviewed thousands of pages of documents related to the Canyon and its water-related issues, spanning over a period of one-hundred and forty-five (145) years, has researched the Canyon's water right issues and EID's historical water rights, has researched EID's historical applications and historic representations to the State Engineer, has reviewed hundreds of hours of meetings related to EID's alleged water rights, has interviewed numerous witnesses and subject-matter experts. *See* Ex. B, at ¶ 5-7. The ECHO-Association is further represented by legal counsel with applicable knowledge and means to address the subject issues in this Action.

The ECHO-Association has previously retained the supporting expertise of hydrologist Dr. David Hansen in 2015. *Id.* at ¶ 5. He determined that EID failed to maintain minimum stream flow in 8 of the foregoing fifteen (15) years, demonstrating that EID has already far exceeded the hydrological limits of the Canyon's groundwater system. *See* Complaint, at ¶ 82, and Exhibit I attached thereto.

While thirty-seven (37) filed written protests to EID's Permanent Change Applications, The ECHO-Association stands as the only to party to timely file and Action related to the Mr. Jones's Orders. Upon information and belief, numerous protestants lacked the financial means, historical knowledge, and otherwise the ability to pursue *de novo* judicial review of the Orders. If the Court were to grant the Motions to dismiss due to lack of standing, no other party would be able address the great public interests at issue in this Action, to the detriment to the public at large, Canyon residents, and the Canyon environment.

3. The Action is suitable for resolution by the Court.

This Action is properly before the Court. Utah Code Ann. § 63G-4-402(1)(a) provides that “[t]he district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings.”

In the present Action, the legal issues regarding Mr. Jones’ Order and underlying issues, including EID’s groundwater mining and consolidation of senior water rights are “sufficiently crystalized to be subject to judicial resolution.” *Nat’l Parks & Conservation Ass’n*, 869 P.2d at 913. Either EID will be permitted to continue groundwater mining to the detriment of the Canyon, its residents and the general public (via the operation of large-diameter commercial wells, thereby exceeding sustainable water supply and permanently damaging the remaining aquifer systems) or this Court will reject the approved changes to EID’s water rights.

CONCLUSION

The groundwater mining in the Canyon by EID is an important public interest issue addressed in the Complaint, supported by substantial facts and evidence, to support this Court to afford The ECHO-Association legal standing to contest Mr. Jones’s Orders and EID’s Permanent Change Applications. For the foregoing reasons, The ECHO-Association respectfully requests that the Court deny EID’s motion to dismiss and order EID and Respondent Jones to Answer the Petition without further delay.

DATED this 29th day of April, 2019.

CHRISTENSEN & JENSEN, P.C.

/s/ Stephen D. Kelson
Scot A. Boyd
Stephen D. Kelson
Bryson R. Brown
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of April, 2019, I caused a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTIONS TO DISMISS PETITION FOR DE NOVO JUDICIAL REVIEW** to be filed electronically via Greenfiling, which sent notification of such filing on the following:

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EXHIBIT A

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**IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH**

EMIGRATION CANYON HOME
OWNERS ASSOCIATION, a Utah
Corporation,

Petitioner,

vs.

KENT L. JONES, Division Director of the
Utah State Division of Water Rights and
EMIGRATION IMPROVEMENT
DISTRICT, a Utah Special Service District;

Defendants.

**DECLARATION OF
NELSON R. MATHER**

Case No. 190901675

Judge: Su Chon

I, Nelson R. Mather, hereby declare and state the following:

1. I am over the age of eighteen and competent to testify as to the matter set forth herein.

2. On September 12, 2018 – at the time EID submitted permanent-change applications “a44045” (57-7796) and “a44046” (57-10711) – I was residing with my daughter, grandson and son-in-law Dinko Duheric at 6392 Emigration Canyon Road (previously identified as 5328 Emigration Canyon Road), Salt Lake City, Utah 84108.

3. Prior to September 27, 2018, I was the owner of surface water share 57-8947 (a16183), which enjoyed a priority date of May 23, 1991.

4. For unknown reasons, I have been informed that in permanent change application 57-7796 (a44046) Emigration Improvement District ("**EID**") reported to the Utah State Division of Water Right to have leased me water right at the same location under surface point-of-diversion Nr. 2.

5. To the best of my knowledge, I have never signed a lease agreement for a water share from EID nor rendered payment, due to the fact that prior to September 27, 2018, I was already the owner of a surface water right used for exterior irrigation of my private residence via a pump placed in the Emigration Canyon Stream.

6. Sometime in the summer of 2015, EID General Manager Eric Hawkes demanded that my family connect to the EID water system "or face criminal charges" if we continued drawing water from our private well after August 12, 2016 (*see* EID letter attached as **Tab A**).

7. During this past summer, for the first time in memory, the Emigration Canyon Stream went dry in back of our home rendering my surface water right useless and our private underground well can no longer support the small family living at our private residence.

8. On September 27, 2018 I transferred ownership of my surface water right to the Emigration Canyon Home Owners Association

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I declare under criminal penalty under the law of the State of Utah that the forgoing is true and correct as to the best of my knowledge.

Signed on this ___ day of April, 2019, at Salt Lake City, Salt Lake County, State of Utah.


Nelson R. Mather (Printed Name)


Nelson R. Mather (Signature)

TAB A

Emigration Improvement District
PO Box 58945, Salt Lake City, UT 84158

August 23, 2016

Dinko Duheric
6392 Emigration Canyon Rd
Salt Lake City, UT 84108

Dear Water Right Lessee:

The deadline for compliance to connect to the District's water system is quickly approaching. A letter dated May 4, 2015 was sent to all of the Water Right Lessees providing notice of requirements. Below is a copy of the content of the letter that may help answer any questions you may have. Please contact the District Manager by August 30, 2016, if you haven't already regarding connection to the water system, or if you have acquired private water rights, please provide the necessary documentation from the State Engineers Office to ensure there are no concerns when the District removes the leased water rights.

1. When is the deadline to be connected to the District's water system?
 - a. The deadline is Thursday, August 30, 2016.
2. What is the requirement for connection?
 - a. You have a choice to connect both culinary and irrigation to the District's system, or you may choose to connect your inside water use to the District's system and keep your personal well or spring for irrigation purposes.
 - b. If you choose to use your well for irrigation, there must be no cross connection. The District's connection and system must be physically separated from any private water system to ensure there is no cross contamination.
3. What options do I have to continue using my current water source and not connect to the District's water system?
 - a. If you are able to obtain the necessary .75 ac/ft of private water rights, then the District can remove the leased water rights and will no longer need to file the temporary change application each year.
4. What is the penalty for noncompliance in connecting to the District's water system?
 - a. The District will remove its water right, which allows you the right to the water, and it will be left up to the Utah State Division of Water Rights on how they choose to proceed and enforce such issues.
5. How much does it cost to connect to the District's water system?
 - a. The main expense is the impact fee. The impact fee is split in two portions. The first portion of \$5500.00, which can be financed through the District at a low interest loan or paid in full at the time of connection. The interest rate is based upon the Utah Public Treasury Investment Fund (UPTIF) rate. The interest rate varies slightly from year to year. (The current rate is .07% and the highest it has been over the past 10 years is 2%) The current monthly standby payments go towards the second portion of the impact fee of \$7500.00 and will continue until the debt service has been paid off (Approximately 14 years).
 - b. The cost of the meter is based upon the size. A 3/4" meter is \$750.00 or \$900.00 for a 1" meter.
 - c. The water right fee was paid when the Water Right Lease was set up (a \$6,000.00 value) and the \$750.00 application fee.
 - d. The property owner will be responsible for the costs to bring the water line from the meter to the home and make the connections. A representative from the District will inspect the piping and connections to ensure they meet District standards.
6. Does the District have a list of preferred contractors?

- a. You can contact the District for contractors who are licensed and have experience working in the canyon. However, the District does not take any responsibility for those you hire and their work.
7. What are the next steps to get connected?
 - a. The first step in this process is to consult with a contractor to understand costs and timeframe to complete the work of installing the line from the meter box to the connection to the home. If you choose to do some or all of the work yourself and save on some of the expenses, consult with the District early on to ensure the right materials are being used and connections are done properly to help avoid future problems.
 - b. Second step is to contact the District manager on the anticipated work schedule and go over any details such as the size of the meter being installed, costs and/or financing available.
8. When I am connected to the District's water system, what flat fees will I continue to pay and how much will the water cost?
 - a. You will continue to pay the same quarterly flat fees (\$40 per month or \$120 per quarter). Remember, the \$25 per month pays towards the \$7500.00 impact fee and the remainder \$15 per month is the water base fee or formerly called the hydrant fee.
 - b. The cost of the water greatly depends on how much is used. The average home in the main canyon uses approximately 5,000 gallons for culinary or inside use per month. The cost for that 5,000 gallons of water would be \$18.50. During the summer months, when irrigation is added to the water usage it may increase 3 to 4 times. A property owner that uses 15,000 gallons in a month would pay \$63.00 for the water.
 - c. Excess water fees begin when a property owner uses more than 40,000 gallons in a given month. Those fees are tiered for every 10,000 gallons afterwards. For a detailed list of the water-rate schedule costs, you can find it on the District's website or contact the District manager for a copy.
9. How often does the District send out bills?
 - a. The District sends billing statements 7 times a year. January (1st QTR Flat Fees), April (2nd QTR Flat Fees + 6 months of water usage Oct - Mar), June (2 months of water usage Apr-May), July (3rd QTR Flat Fees + June water usage), August (July water usage), September (Aug water usage), October (4th QTR Flat Fees + Sept water usage).
10. What's the quality of the District's water?
 - a. The District's water is tested 3 times a week to ensure the water is safe to drink. Chlorine is the only thing added to the water, which is required for public water systems. The water hardness varies depending on the primary source of water being pumped between the four wells. The new (upper freeze creek) UFC well has a hardness of 18 grains or particles per million (ppm), which is currently the main source of the water supply. If you are after a setting for your water softener, the District recommends setting it between 30-35 grains.

If you have any further questions or concerns or would like to discuss any of these items in more detail, please contact the District manager.

Emigration Improvement District
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EXHIBIT B

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**IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH**

EMIGRATION CANYON HOME
OWNERS ASSOCIATION, a Utah
Corporation,

Petitioner,

vs.

KENT L. JONES, Division Director of the
Utah State Division of Water Rights and
EMIGRATION IMPROVEMENT
DISTRICT, a Utah Special Service District;

Defendants.

**DECLARATION OF
MARK CHRISTOPHER TRACY**

Case No. 190901675

Judge: Su Chon

I, Mark Christopher Tracy, hereby declare and state the following:

1. I am over the age of eighteen and competent to testify as to the matter set forth herein.

2. In January 2014, The Emigration Canyon Home Owners Association ("The ECHO-Association") was formed as a collective remedy to perceived gross mismanagement of public funds by the Emigration Improvement District's ("EID") trustees, managers and private consultants.

3. On September 27, 2018, The ECHO-Association purchased surface water right 57-8947 (a16183) located directly on the Emigration Canyon Stream from Mr. Nelson R. Mather.

4. The transfer deed was recorded on February 21, 2019.

5. Since January 2014, I have personally reviewed all EID meeting minutes published on EID's former website, began collecting voice recordings of EID trustee meetings and telephone calls supported by questions prepared by me and asked by anonymous Canyon residents on my behalf, reviewed permanent and temporary change applications filed by EID and private land-developers, compared approved point-of-diversion with change applications, public notices, and well-driller reports, commissioned expert witnesses such as expert hydrologist Dr. Hansen and former project manager Dr. Steve Onysko with the Utah Division of Drinking Water, collected and reviewed thousands of pages of documents, and electronic mail distributed by EID managers, trustees and consultants to Canyon residents spanning a period of thirty-seven (37) years, reviewed historical aerial photographs in order to track Canyon development changes, and to include collection of evidence related to ground subsidence.

6. During this time, I have collected documents and evidence supporting the allegation that over forty (40) private wells and at least four (4) surface water springs under artesian pressure have been impaired since 1988, and I have worked closely with the spouse of former EID trustee Leon Sheya and former EID trustee William Bowen to verify the factual allegations contained in the subject Petition for De Novo Judicial Review of Informal Adjudicative Proceeding.

7. Since August 2015, I have been a point-of-contact for current Canyon residents and have received numerous unsolicited phone call and emails reporting impairment and dramatic changes to the Canyon's hydrology.

I declare under criminal penalty under the law of the State of Utah that the forgoing is true and correct as to the best of my knowledge.

Signed on this 29 day of April, 2019, at Salt Lake City, Salt Lake County, State of Utah.

Mark Christopher Tracy
Mark Christopher Tracy (Printed Name)

[Signature]
Mark Christopher Tracy (Signature)