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Emigration Canyon Home Owners Association

IN THE THIRD DISTRICT COURT OF 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;
EMIGRATION IMPROVEMENT
DISTRICT, a special service district of the
state of Utah,

Respondents.

**PETITION FOR DE NOVO JUDICIAL
REVIEW OF INFORMAL
ADJUDICATIVE PROCEEDINGS RE:**

- (1) REJECTION OF REQUEST FOR
RECONSIDERATION;**
- (2) ORDER OF THE STATE ENGINEER
SUA SPONTE REINSTATEMENT OF
RIGHTS UNDER PERMANENT
CHANGE APPLICATION NO 57-8865
(A12710B);**
- (3) ORDER OF THE STATE ENGINEER
FOR EXTENSION OF TIME FOR
PERMANENT CHANGE APPLICATION
NO. 57-8865 (A12710B);**
- (4) FAILURE OF THE UTAH STATE
ENGINEER TO PROHIBIT ILLEGAL
WATER EXTRACTION AND USE IN
VIOLATION OF UTAH LAW; AND**
- (5) FAILURE TO ASSESS
ADMINISTRATIVE FINES AND
PENALTIES**

TIER 3

Case No.

Judge:

The Emigration Canyon Home Owners Association (“*The ECHO-Association*”) brings this action pursuant to Utah State Code §63G-4-402 for *de novo* judicial review of the Division Director of the Utah State Division of Water Rights’s (“State Engineer”) rejection of The ECHO-Association’s request for reconsideration, dated May 13, 2019, approval of Emigration Improvement District’s (“EID”) *sua sponte* reinstatement of water rights, dated January 18, 2019, extension of time for permanent change application Number 57-8865 (a12710b) (“Permanent Change Application”), dated April 23, 2019, the failure and/or refusal of the State Engineer to prohibit EID’s illegal water extraction and use, and the failure of the State Engineer to assess fines and penalties in violation of mandatory provisions of Utah statute.

The name and address of the respondent agency is: Kent L. Jones, Division Director of the Utah State Division of Water Rights, 1594 West North Temple, Suite 220, P.O. Box 146300, Salt Lake City, Utah 84114-6300.

INTRODUCTION

This matter concerns the illegal transfer of water rights from the Mount Olivet Cemetery Association (“Mt. Olivet Cemetery”), and the illegal diversion and use of water via two (2) large-diameter commercial wells designated as Boyer Well Nr. 1 (Well ID Nr. 10643, aka Freeze Creek Well #1) and Boyer Well Nr. 2 (Well ID Nr. 4677, aka Freeze Creek Well #2), from one of the most historically significant areas of the State of Utah.

In September 2018, for the first time in recorded memory, total depletion of the Emigration Canyon Stream was reported less than two miles from Utah’s Hogle Zoo. This is due to a water extraction method known as groundwater mining – a degenerative process of dewatering the Canyon’s aquifers. The results of this groundwater mining were predicted in 1966 by the State Engineer’s own Area Engineer for Emigration Canyon and documented in July

2000, in a study commissioned by EID's own hydrologist through EID's operation of Boyer Wells Nr. 1 and Nr. 2.

After 30 years of groundwater mining by EID and its predecessors, including The Boyer Company LC ("Boyer") and City Development Inc. ("City Development"), The ECHO-Association's perfected surface water right 57-8947 (a16183) suffered total impairment this past year. The total injury and present economic damage to property rights in Emigration Canyon is substantial, and may be permanent and irreversible in our lifetime. If allowed to continue, the total collapse of the surface and groundwater systems in Emigration Canyon can be reasonably expected.

The ECHO-Association seeks an order: (1) finding that The ECHO-Association's request for agency review, dated May 13, 2019, was timely and inappropriately rejected; (2) denying EID's *sua sponte* reinstatement of rights under the Permanent Change Application; (3) denying an extension of time for EID's rights under the Permanent Change Application; (4) prohibiting EID's illegal water extraction and use in violation of state statute; and (5) assessing administrative fines and penalties for illegal water extraction and use in violation of mandatory Utah statute.

PARTIES TO THE PRESENT ACTION

1. Petitioner The ECHO-Association is registered with the Utah Department of Commerce as a "dba entity" of Mark Christopher Tracy and is the owner of water right no. 57-8947 (a16183).

2. Respondent Kent L. Jones is the Division Director of the Utah State Division of Water Rights and is a professional engineer licensed to practice in the State of Utah.

3. Respondent Emigration Improvement District's ("EID") is a Special Service District created by the Salt Lake County Council in 1968.

JURISDICTION AND VENUE

4. The acts set forth herein occurred in Salt Lake County, State of Utah.

5. The final agency actions arose from informal adjudicative proceedings before the Utah State Division of Water Rights and occurred in Salt Lake County, State of Utah. *See* Exs. A and B.

6. Jurisdiction is appropriate pursuant to Utah Code Ann. § 63G-4-402.

7. Venue is properly laid before the Third District Court in and for Salt Lake County, State of Utah, pursuant to the provisions of Utah Code Ann. § 73-3-14(b).

PARTIES TO THE INFORMAL ADJUCIATIVE PROCEEDING

8. Pursuant to Utah Code Ann. § 63G-4-402, Petitioner identifies the following entities and individuals who were parties to the underlying informal adjudicative proceedings and those who submitted timely protests to EID's request for extension of time for rights under permanent change application 57-8865 (a12710b), filed request for agency action, and provided notice of illegal water extraction and use:

a. Emigration Improvement District;

b. Emigration Canyon Home Owners Association (representative Mark Christopher Tracy) c/o Scot A. Boyd, 257 East 200 South, Ste 1100, SLC, Utah 84111.

BACKGROUND

I. Water Rights in Utah.

9. In the State of Utah, all water is declared "property of the public" and is partitioned and controlled by the Utah State Division of Water Rights ("State Engineer's Office"). *See* Utah Code Ann. §§ 73-3-1(1) and 73-2-1.

10. Water use is apportioned among applicants as a “water right” and is a constitutionally protected property right once put to beneficial use (*i.e.*, “perfected”). *See* Utah Code Ann. § 73-1-1(3).

11. The State of Utah is a “first-in-right” jurisdiction, meaning that the first vested owner of a water right may enjoin subsequent conflicting users (so-called “quality or quantity impairment”) until the full amount of a water right is satisfied. *See* Utah Code Ann. § 73-3-21.1(2)(a).

12. Any change to the point-of-diversion (geographic point where water is extracted) or the point-of-use (geographic area where water may be used) of a previously established water right requires prior approval of the State Engineer’s Office in the form of either a temporary or permanent change application. *See* Utah Code Ann. § 73-3-5(2).

13. The lawful right to water diversion and use is a property right guaranteed by the United States Constitution and is therefore protected against any form of illegal taking to include taking under the color of state authority. *See e.g.* 42 U.S. Code § 1983.

II. The Priority and Scope of the Parties’ Rights to Water Appropriation.

14. EID is a Special Service District, created by the Salt Lake County Council in 1968 and the owner of record for segregated water appropriations claim 57-8865 (a12710b) (“Segregated Permanent Change Application”).

15. The ECHO-Association is a registered “dba” of Mark Christopher Tracy and is the lawful owner of surface water right 57-8947 (a16183) located directly on the Emigration Canyon Stream.

16. EID provides no water or sewage service in the areas of the Canyon known as Lower Emigration Canyon, Meyer and Little Oaks, Emigration Place, Badger Hollow, and Upper

Pinecrest Canyon, but taxes all real properties in the Canyon for the current operation of Boyer Wells Nr. 1 and Nr. 2.

17. EID currently purports to service 188 homes of the Oaks PUD under the Segregated Permanent Change Application.

18. There are currently approximately 415 homes in Emigration Canyon serviced by private water sources not connected to the EID water system.

19. The priority date of EID's unperfected Segregated Permanent Change Application is January 18, 2019.

20. The priority date of The ECHO-Association's perfected water right 57-8947 (a16183) is May 23, 1991.

21. To date, all perfected surface and underground water rights owned by private individuals in Emigration Canyon -- including The ECHO-Association -- are superior to the unperfected Segregated Permanent Change Application claimed by EID.

III. The Impairment of Senior Water Rights.

22. In the 1966 Master's Thesis for the University of Utah Department of Geology completed by Jack Barnett, Area Engineer for Emigration Canyon with the State Engineer's Office, Mr. Barnett warned that the construction and operation of large-diameter commercial wells in Emigration Canyon such as Boyer Wells Nr. 1 and Nr. 2 would impair perfected senior water rights "with almost certainty." See Barnett Thesis attached as Ex. C, at page 94.

23. On December 15, 1995, EID, through its hydrologist Mr. Jack Barnett, testified before the State Engineer that water extraction in the vicinity of Boyer Well Nr. 1 and Nr. 2 would impair both the Emigration Canyon Stream and surface water flow to the Mt. Olivet Cemetery "for decades – *twenty, fifty, seventy-five years*" (emphasis added).

24. In EID's own resolution from May 30, 1996, EID determined that the Emigration Canyon's hydrology could not support more than 98 homes in the Oaks PUD. *See* EID Newsletter identified as Vol. 1 Nr. 4, attached as Ex. D.

25. In a letter dated July 3, 1996, EID trustee David Crompton informed the State Engineer that Boyer and City Development had exceeded the volume of water allotted under 1983 Application and requested clarification regarding water use for the 155 domestic units of the Oaks PUD approved at that time [under Segregated Permanent Change Application 57-8865 (a12710b)]. *See* Crompton Letter attached as Ex. E.

26. The State Engineer failed to take action to prohibit illegal water use and did not provide clarification to EID trustees Crompton and William Bowen regarding illegal water use in the Oaks PUD.

27. In an extensive scientific study of the Emigration Canyon hydrology in July 2000, EID's own hydrologist Don Barnett and the Chairman of the Weber State University Department of Geology, Dr. Adolf Yonkee, concluded:

Sufficient historical data are not available for Well 1 [*i.e.*, Boyer Well Nr. 1] to track static and pumping water levels during this period, and Well 2 [*i.e.*, Boyer Well Nr.2] was not completed until 1994 [*i.e.*, March 22, 1994]. However, a review of 1998 data on water levels for Well 2 indicates that summer-time demand for water *exceeded natural recharge to the aquifer in this relatively good water year*. Thus if the aquifer does not recharge each spring, *then mining of water from the aquifer is likely to occur*, and similar considerations may apply to other potential aquifers in the study area (emphasis added).

See Barnett/Yonkee Study attached as Ex. F, at page 38.

28. Moreover, the 2000 Barnett-Yonkee Study expressly warned that “[o]ver pumping of a well that repeatedly produces excessive drawdown may also damage an aquifer as

some fractures that close down during over pumping *may not completely reopen once water levels recover*” (emphasis added). *See Id.*

29. Contrary to, and with knowledge of, the aforementioned, private land developers Boyer, City Development and EID continued to extract hundreds of millions of gallons from the Emigration Canyon Aquifers for water use in the Oaks PUD, by way of Boyer Wells Nr. 1 and Nr. 2.

30. Sometime in 2000, Boyer and City Development obtained approval for phases 4a, 6 and 6a of the Oaks PUD allowing yet further expansion of the development to 224 domestic units.

31. Sometime in 2002, EID promised future water service to the Walter J. Plumb and land-developer R. Steve Creamer for still yet further developments north and north-east of the Oaks PUD.

32. Contrary to the aforementioned studies and scientific conclusions and recommendations, EID failed to observe, measure, test, and document its own monitoring wells between 2003 and 2015 in what can only be described as “willful blindness” as to the indications and effects of groundwater mining in Emigration Canyon.

33. In a study commissioned by The ECHO-Association in April 2015, Dr. Hansen concluded that EID had failed to maintain minimum stream flow in eight of the previous 15 years in violation of EID’s own Water Conservation and Management Plans adopted in 2003 and 2012. *See Hansen Study attached as Ex. G, at page 1.*

34. It is estimated that groundwater levels in Emigration Canyon have dropped 40 feet through the operation of Boyer Wells Nr. 1 and Nr. 2 as predicted by the State Engineer’s own Area Engineer Jack Barnett and EID’s own hydrologist Don Barnett.

35. In a report prepared by Jim Riley P.E. for The ECHO-Association in April 2015, he opined that EID owned sufficient water rights for only 233 connections and not 300 connections reportedly serviced by the EID water system even if all points-of-diversion operated by EID were approved by the State Engineer. *See* Ex. H.

36. In a correspondence from April 20, 2017, The ECHO-Association informed the State Engineer and EID trustees that EID was providing illegal water service to at least ninety-seven (97) domestic units via Boyer Wells Nr. 1 and Nr. 2.

37. The State Engineer failed to take action to prohibit illegal water use.

38. In a correspondence from May 13, 2019, The ECHO-Association informed the State Engineer that EID was illegally extracting water from the Emigration Canyon Aquifers via Boyer Wells Nr. 1 and Nr. 2 at unapproved points-of-diversion.

39. The State Engineer failed to take action to prohibit illegal water extraction via Boyer Wells Nr. 1 and Nr. 2.

40. Since October 11, 1988, over forty private well owners, not connected to Boyer Wells Nr. 1 and Nr. 2, have reported quantity and/or quality impairment in Emigration Canyon.

41. In the summer and autumn of 2018, The ECHO-Association water right 57-8947 (a16183) suffered total impairment when the Emigration Canyon Stream went dry for the first time in recorded memory.

42. EID continues to collect monthly “stand-by fees” from the owners of 97 vacant parcels in consideration for EID’s contractual obligation to provide future domestic water service to 97 future homes in Emigration Canyon in violation of its own buildout limits established in May 30, 1996.

IV. Illegal Transfer of Mt. Olivet Cemetery Water Rights / Illegal Water Extraction and Use.

43. In 1909, the Congress of the United States of America authorized transfer of property “and all rights appurtenant thereto” to the Mt. Olivet Cemetery, located near the present day University of Utah Rice-Eccles Stadium, to be “permanently used as a cemetery for the burial of the dead” as an active federal military cemetery (the “Congressional Act”). *See* Sixtieth Congress, Sess. II., Chapter 37 (1909), attached as Ex. I.

44. Pursuant to the Congressional Act, should property controlled by the Mt. Olivet Cemetery Board be used for non-cemetery purposes, the same would revert back to the United States of America (the “Government”). *Id.*; *see also* *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 961 F. Supp. 1547, (D. Utah 1997) (discussing United State of America’s reversionary interest in the Mt. Olivet property).

45. Pursuant to the Congressional Act, the water rights were not transferrable and were required to revert to the Government if conveyed without the express authorization of the Congress of the United States. *See* Ex. I.

46. On December 11, 1922, Mt. Olivet Cemetery was issued a certification of appropriation thereby completing (*i.e.*, “perfecting” the water right application) by the State Engineer of 1/3 of the surface water flow of the Emigration Canyon Stream equal to 1.17 cubic feet per second “cfs” for water use on hollowed cemetery grounds.^{1,2,3}

¹ *See* *Mount Olivet Cemetery Assoc., et al. v. Salt Lake City*, Decree Nr. 25890, dated August 11, 1923 attached as Ex. J.

² The Utah State Engineer retains jurisdiction only over incomplete water-right applications. Once put to beneficial use and certified as “perfected” by the Utah State Engineer, only a court may declare a water-right null and void. *See* Utah Code Ann. 73-1-4 (2)(c).

³ In the present case, although the base water right 57-69 was perfected in 1922, the Permanent Change Application is incomplete until EID provides proof that water works altering nature-of-use, point-of-use and points-of-diversion are built and operational.

47. In violation of the Congressional Act and the Government's right of reversion, on March 9, 1983, Mt. Olivet Cemetery executed multiple deeds of conveyance⁴ and certified to the State Engineer that it would "retire from irrigation *all of its water rights*" previously perfected and "any other water rights it may now have for use on the cemetery grounds" for the benefit of Boyer, a land-development company in the State of Utah. *See* Application for Permanent Change of Point of Diversion Place and Nature of Use of Water, 57-69 (a12710) (the "1983 Application"), attached as Ex. K.

48. That same day, Mt. Olivet Cemetery and Boyer submitted permanent change application 57-2526 (a12711) altering the nature-of-use, point-of-diversion and point-of-use in order to construct **1,316** affluent private homes in the Oaks PUD, thereby transferring the surface point-of-diversion from the base of the Canyon to numerous underground points-of-diversion at higher elevations in the Emigration Canyon drainage system, for private development and substantial profit. *See Id.*; *see also* Notice to Water Users attached as Ex. L.

49. For reasons unknown, the State Engineer approved 57-69 (a12710) but then rejected the exact same application under 57-2526 (a12711) one month later because "Emigration Creek is fully appropriated".

50. The 1983 Application allowed for water diversion from 19 identified underground points-of-diversion with a deadline to complete the massive land-development project in Emigration Canyon by April 30, 1987.⁵

⁴ For reasons unknown, Boyer executed a single deed for the conveyance of 5/7 of water rights to Mt. Olivet Cemetery, although on the same, date Mt. Olivet executed three separate warranty deeds for the conveyance of 1/3 of its water rights to Boyer.

⁵ Despite numerous requests by the ECHO-Association, the Utah State Engineer Kent L. Jones and Deputy Utah State Engineer Boyd Clayton failed to produce a copy of the Memorandum Decision dated December 16, 1983, approving the 1983 Application filed by Mt. Olivet Cemetery and Boyer on March 9, 1983.

51. Although the 1983 Application was protested by Salt Lake City Corporation on September 30, 1983 due to impairment of stream flow, for reasons unknown, the State Engineer failed to record the protest in its record of endorsements, failed to notify the Protestant of its approval on December 13, 1983 and failed to provide public notice and hearing prior to granting approval.

52. Pursuant to Utah Code Ann. § 73-3-3(4)(a), the failure to complete construction of the necessary water-delivery infrastructure and certifying proof of beneficial use would automatically return the perfected water right to its original nature-of-use, point-of-use and point-of-diversion on hollowed cemetery grounds.

A. Boyer Well No. 1.

53. Boyer failed to locate a reliable underground water source, after drilling at three of the 19 separate locations approved by the Utah State Engineer, at substantial cost.

54. Having sold numerous parcels to unsuspecting buyers, Boyer constructed a fourth large-diameter well designated as Boyer Well Nr. 1 immediately adjacent to the Freeze Creek stream.

55. The location of Boyer Well Nr. 1 was not identified in the 1983 Application and was not approved by the Utah State Engineer.⁶

56. The new location proved successful and Boyer began water extraction from Boyer Well Nr. 1 well sometime after June 15, 1986, for water use in the Oaks PUD.

57. Boyer Well Nr. 1 remains in operation to this day.

⁶ In the Well Drillers Report filed on January 28, 1987, Boyer Well Nr. 1 was reported as drilled at N 1290 E 990 SW Sec. 28 TN1, 2E SLBM under 57-69 (a12710). However, in the permanent change application 57-7796 (a44045) Boyer Well Nr. 1 was reported by EID as approved at N 1200 E 800 SW Sec 28 TN1, 2E. However, Boyer drilled and EID currently operates Boyer Well Nr. 1 at N 1300 E 950 SW Sec 28 TNI, 2W SLBM at an unapproved location.

58. On May 23, 1988, Boyer segregated 94.04 acre feet underwater right 57-8865 (a12710b) from base water right 57-69 (a12710) in order to retain the option of developing 658 units under the later instead of being confined to only developing 125 units under the former.

59. For unknown reasons, the State Engineer approved 188 units under the segregated application 57-8865 (a12710b), although 94.04 acre feet was sufficient for only 125 domestic units.

60. Boyer and Mt. Olivet Cemetery failed to file proof of beneficial use for Boyer Well Nr. 1 with the Utah State Engineer on or before the deadline of April 30, 1987, and instead submitted repeated extension requests under both the 1983 Application filed jointly with Mt. Olivet Cemetery and Segregated Permanent Change Application 57-8865 (a12710b) controlled solely by Boyer.⁷

61. In August 1998, Boyer and City Development “gifted” EID the Segregated Permanent Change Application transferring the operating costs and liability of Boyer Well Nr. 1 to Emigration Canyon taxpayers.

B. Boyer Well Nr. 2.

62. Boyer Well Nr. 1 ultimately proved grossly deficient for Boyer’s and City Development’s massive development plans for Emigration Canyon.

63. With only three of the proposed 658 homes in the Oaks PUD connected to this single unapproved water source, Boyer Well Nr. 1 pumped dry sometime in or about January 1993.

⁷ Although, Boyer owned and controlled the Segregated Permanent Change Application 57-8865 (a12710b), on April 26, 1990, Mt. Olivet Cemetery filed a Request for Extension of Time to perfect the 1983 Application for the benefit of Boyer and for reasons unknown did not formally withdraw the 1983 Application until December 17, 1997.

64. Facing potential economic devastation from its land-development investment, Boyer and City Development turned to EID to construct another large-diameter commercial well, designated as Boyer Well Nr. 2, at a location recorded under EID's water right 57-7796 (a17521).

65. This created several insurmountable problems:

a. The chosen point-of-diversion identified was not listed in EID's original August 3, 1993 application (the "1993 Application") (published between December 7 and 14, 1995).

b. On or in 1994, Boyer and City Development illegally drilled Boyer Well Nr. 2 and put it into operation without approval from the State Engineer.

c. For reasons unknown, the State Engineer approved EID's well location on December 31, 1996, although it was not identified in EID's 1993 Application and was already illegally drilled and had been in operation for two years.⁸

d. Boyer Well Nr. 2 was constructed on property belonging jointly to Boyer and City Development, at a location that was not identified or approved by the Utah State Engineer, in order to maximize development and value of the parcel north-east of Boyer Well Nr. 2, owned by Walter J. Plumb III.^{9,10}

⁸ In EID's Request for Extension of Time dated January 17, 2019, EID falsely certified that both Boyer Wells Nr. 1 and Nr. 2 "contemplated by this change application have been drilled and are presently in use by the District [EID]". The Well Driller's Report from March 22, 1994, however identified base water right 57-69 (a12710) belonging to Mt. Olivet Cemetery and Boyer although the point-of-diversion was only originally recorded under EID's water right 57-7796 (a17521) but drilled in an unapproved location.

⁹ In the Well Drillers report filed on March 23, 1994, Boyer Well Nr. 2 was reported as drilled at N 150 W 850 SW Sec. 20 TN1, 2E SLBM under 57-69 (a12710). However, in the permanent change application 57-7796 (a44045) Boyer Well Nr. 2 was reported by EID as approved at N 1200 W 800 SE Sec 29 TN1, 2E. It appears that Boyer drilled and EID currently operates Boyer Well Nr. 2 at N 1375 W 800 SW Sec 28 TN1, 2E SLBM at an unapproved location,

66. The State Engineer approved 188 domestic units of the Oak PUD development under the Segregated Permanent Change Application although the 94.09 acre feet purportedly acquired, segregated and controlled by Boyer (from Mt. Olivet Cemetery's and Boyer's original permanent change application 57-69 (a12710)), was sufficient for only 125 homes.¹¹

C. Lapse and *Sua Sponta* Reinstatement of Segregated Permanent Change Application.

67. By August 1998, numerous multi-million dollar homes were built in the Oaks PUD, a now established community nicknamed the "Belair of Salt Lake City."

68. In order to facilitate further expansion of the Oaks PUD, Boyer and City Development "gifted" the Segregated Permanent Change Application to EID on August 4, 1998, thereby transferring the operational expenses and financial risk posed by the operation of two unapproved water sources sufficient for only half of the Oaks PUD to Emigration Canyon taxpayers.

69. On December 16, 1983, the State Engineer approved the Permanent Change Application under "certain conditions" currently unknown.¹²

70. Between April 1990 and August 1998, Boyer and Mt. Olivet Cemetery filed multiple extensions of time requests under 57-69 (a12710) although both Boyer Wells Nrs. 1 and Nr. 2 were placed into operation thereby perfecting the Permanent Change Application and were

approximately 1 mile from the point-of-diversion reported to the Utah State Engineer under the Well Driller Report filed on March 23, 1994.

¹⁰ While multiple points-of-diversion for Boyer Well Nr. 2 were identified in the Permanent Change Application, the plat plan for phase 4a of the Oaks PUD wasn't completed until sometime prior to September 10, 1993 when the location of Boyer Well Nr. 2 was identified for Sierra Drilling Inc.

¹¹ The State Engineer requires 0.3 acre feet for indoor water use and 0.45 acre feet for exterior irrigation for each domestic unit of the Oaks PUD.

¹² To date, neither the Utah State Engineer nor EID has produced the Memorandum Decision of the State Engineer from December 16, 1983 approving 19 points-of-diversion for water use in the Oaks PUD

purported placed into operation under the authority of segregated water claim 57-8865 (a12710b).

71. On April 29, 2007, EID filed an Extension of Time Request under the Segregated Permanent Change Application 57-8865 (a12710b) although both Boyer Wells Nrs. 1 and 2 were already in operation.

72. On April 20, 2017, The ECHO-Association informed the State Engineer that EID had oversubscribed its water rights by circa 100 domestic units.

73. On October 31, 2018, the State Engineer provided EID notice that Segregated Permanent Change Application 57-8865 (a12710b) would lapse on December 31, 2018 if EID failed to provide proof of beneficial use for Boyer Wells Nr. 1 and Nr. 2 or failed to file an extension request prior thereto.

74. On December 5, 2018, The ECHO-Association informed the State Engineer that, pursuant to the Congressional Act, EID's water right to operate Boyer Well Nr. 1 required authorization of the U.S. Congress and had reverted back to the Government in 1983 with the transfer from Mt. Olivet Cemetery.

75. On January 15, 2019, the State Engineer informed EID that 57-8865 (a12710b) had permanently lapsed, because EID had failed to file proof of beneficial use for Boyer Wells Nr. 1 and Nr. 2 and failed to file a timely request for an extension of time.

76. On January 18, 2019, EID filed an untimely request for extension of time with the State Engineer for segregated water claim 57-8865 (a12710b) and failed to file a request for reinstatement of the same.

77. EID also failed to inform the State Engineer that both active wells were being operated at unapproved locations and could not be certified for beneficial use.

78. For unknown reasons and without a mandatory application for reinstatement or a showing of good cause (*see* Utah Code 73-3-13(3)), the State Engineer reinstated the Permanent Change Application that same day without public notice or hearing.

D. The ECHO-Association's Protest and Request for Public Hearing.

79. On March 6, 2019, The ECHO-Association filed protest against the State Engineer's *sua sponte* reinstatement and extension of time. Therein, The ECHO-Association informed the State Engineer that (1) EID had falsely reported that Boyer Well #2 was being operated under Segregated Permanent Change Application 57-8865 (a12710b), (2) the underlying Mt. Olivet water rights utilized by Boyer Well Nr. 1 had reverted back the Government in 1983 when Mt. Olivet "transferred" it rights to Boyer in violation of the Congressional Act, and (3) the continued operation of Boyer Well Nr. 1 was a violation of the Congressional Act. The ECHO-Association requested a public hearing.

80. On April 23, 2019 the State Engineer approved EID's request for extension of time without public notice or hearing. Pursuant thereto, The ECHO-Association had 20 days to submit a request for reconsideration. *See* Memorandum Decision, attached as Ex. B.

81. While the State Engineer had The ECHO-Association's accurate address on file, it mailed a copy of the Memorandum Decision to an inaccurate address for The ECHO-Association.

82. On May 2, 2019, the State Engineer received the returned envelope containing its Memorandum Decision sent to the wrong mailing address intended for The ECHO-Association.

83. On May 8, 2019, the Utah State Engineer resent a copy of its April 23, 2019 Memorandum Decision to The ECHO-Association's correct mailing address. *See* return envelope, attached as Ex. M.

84. On May 13, 2019, The ECHO-Association sent a request for reconsideration, petition for a declaration of forfeiture of all rights under 57-8865 (a12710b), and notice of illegal water extraction via Boyer Wells Nr. 1 and 2 and illegal water use in the Oaks PUD, pursuant to the State Engineer's resent Memorandum Decision from May 8, 2019 ("Request for Reconsideration"). *See* Ex. N.

85. On May 16, 2019, the Utah State Engineer rejected The ECHO-Association's "correspondence" as "untimely" failing to address the petition for declaration of forfeiture and notice of illegal water extraction and illegal water use in their entirety. *See* Ex. O.

86. EID's Segregated Permanent Change Application 57-8865 (a12710b) acquired from Boyer's and Mt. Olivet Cemetery's 1983 Application is invalid.

87. The two points-of-diversion for water use in the Oak PUD were not approved, rendering water extraction via both Boyer Wells Nrs. 1 and 2 illegal. Moreover, as the water share only allowed for diversion of 94.04 acre feet, water use for approximately half of the 224 parcels of the Oaks PUD sold to unsuspecting buyers was not allowed *even if* all points-of-diversion operated by EID were approved.¹³

V. The Utah State Engineer's has Refused to Comply with Utah Law to Prohibit Illegal Water Extraction and Use Re: Boyer Well Nrs. 1 and 2.

88. Petitioner, by and through this reference, hereby incorporates the preceding paragraphs as though set forth verbatim herein.

89. Neither Boyer Well Nrs. 1 nor 2 were drilled or operated at any location approved by 1983 Application or the 1988 Segregation Application and are illegally operated and extracting water from Emigration Canyon's underground aquifers.

¹³ As the State Engineer requires a minimum of 0.75 acre feet for each domestic unit built in the Oaks PUD development and only 94.04 acre feet may be legally diverted under 57-8865 (a12710b), only 125 units of the 224 parcels of the Oaks PUD may be serviced by EID.

90. The Utah State Engineer is required under Utah statutory law to prohibit illegal water use and extraction by EID.

91. Utah Code Ann. § 73-3-3 states:

(7) Any person who makes a permanent or temporary change without first filing and obtaining approval of a change application providing for such change:

- (a) obtains no right by the change;
- (b) is guilty of an offense punishable under Section 73-2-27 if the change is made knowingly or intentionally; and
- (c) shall comply with the change application process.

92. Utah Code Ann. § 73-2-1, regarding the enforcement and prevention of illegal water extraction and use provides:

(4) The state engineer shall make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, regarding:

...

(f) enforcement orders and the imposition of fines and penalties;....

93. In turn, R655-14-12, Administrative Penalties and Administrative Costs enacted by the Utah State Engineer provides:

(1) Pursuant to §§ 73-2-1 and 73-2-25 and these rules, the Enforcement Engineer *shall assess the initial administrative penalties*, which may include an administrative fine, a requirement to replace water and the reimbursement of enforcement costs to which the respondent may be subject for any violation as set forth in Subsection 73-2-25(2)(a).

...

(3) *Each day* a violation is repeated, continued or remains in place, constitutes a separate violation (emphasis added).

94. Moreover, Utah Code Ann, § 73-2-26(1) states:

(a) As part of a final order issued under Section 73-2-25, the state engineer may order that a person to whom an order is issued:

- (i) pay an administrative fine not to exceed:
 - (A) \$5,000 *for each knowing violation*; or
 - (B) \$1,000 for each violation that is not knowing ;

...

(2) Before imposing a fine or ordering replacement under Subsection (1), the state engineer *shall consider*:

(a) the value or quantity of water unlawfully taken, *including the cost or difficulty of replacing the water*;

(b) the gravity of the violation, *including the economic injury or impact to others*;

(c) whether the person subject to fine or replacement attempted to comply with the state engineer's orders; and

(d) the *violator's economic benefit* from the violation. (emphasis added).

95. On April 20, 2017, The ECHO-Association provided legal notice to the State Engineer that EID had oversubscribed its water rights by circa 100 domestic units *even if* all points-of-diversion had been approved by the State Engineer.

96. On May 13, 2019, The ECHO-Association reported to the State Engineer that EID was operating Boyer Well Nrs. 1 and 2 at locations that were not identified or approved by the State Engineer.

97. To date, EID continues water diversion via both Boyer Well Nrs. 1 and 2 for over 300 homes with the knowledge that the subject water rights have been illegally transferred and have reverted, as a matter of law, to the Government.

98. Since October 11, 1988 over 40 private-well owners in Emigration Canyon have reported quality and/or quality impairment to include total depletion due to groundwater mining being conducted through EID's continued operation of Boyer Well Nrs. 1 and 2.

99. The ECHO-Association's water right has been impaired and is actively being impaired by EID's operation of Boyer Well Nrs. 1 and 2 during autumn and winter months.

100. Petitioner seeks an Order from this Court declaring all rights under Permanent Change Application No. 57-8865 (a12710b) forfeited to include an Order forbidding further water extraction via Boyer Well Nrs. 1 and 2 by EID or any other person.

Request for Relief No. 1.
(Acceptance of The ECHO-Association's Request for Agency Review)

101. Petitioner, by and through this reference, hereby incorporates the preceding paragraphs as though set forth verbatim herein

102. On April 23, 2019 the State Engineer approved EID's request for extension of time without public notice or hearing. Pursuant thereto, The ECHO-Association had 20 days to submit a request for reconsideration.

103. The State Engineer had The ECHO-Association's accurate address on file, but still mailed a copy of the Memorandum Decision to an inaccurate address for The ECHO-Association.

104. On May 8, 2019, the Utah State Engineer resent a copy of its April 23, 2019 Memorandum Decision to The ECHO-Association's correct mailing address.

105. The ECHO-Association did not receive notice of the Memorandum Decision until sometime after May 9, 2019.

106. On May 13, 2019, The ECHO-Association sent its Request for Reconsideration to the State Engineer.

107. On May 16, 2019, the State Engineer rejected the Request for Reconsideration in its entirety as "untimely."

108. The alleged untimeliness of The ECHO-Association sent its Request for Reconsideration was a result of the State Engineer's failure to timely serve a copy of the Memorandum Decision to The ECHO-Association's address of record.

109. But for State Engineer's failure to timely serve a copy of the Memorandum Decision to The ECHO-Association's address of record no issue of timeliness would have occurred in this matter.

110. The Court should enter an order finding that The ECHO-Association's Request for Reconsideration, dated May 13, 2019, was timely as a result of the State Engineer's error.

Request for Relief No. 2.
(Termination of EID's Operation of Boyer Well Nrs. 1 and 2)

111. Petitioner, by and through this reference, hereby incorporates the preceding paragraphs as though set forth verbatim herein.

112. EID's water right to operate Boyer Well Nrs. 1 and 2 are invalid and in violation of the Congressional Act.

113. Neither Boyer Well Nrs. 1 nor 2 were drilled or operated at any location approved by 1983 Application or the 1988 Segregation Application and are illegally operated and extracting water from Emigration Canyon's underground aquifers.

114. Boyer Well Nrs. 1 and 2 were constructed without approval or knowledge of the State Engineer.

115. The continued operation of Boyer Well Nrs. 1 and 2 is in violation of Utah statutory law.

116. Boyer Well Nrs. 1 and 2 are the proximate cause of impairment to the ecosystem of Emigration Canyon and impairment of property owner water rights, including that of The ECHO-Association through groundwater mining.

117. The ECHO-Association requests an order terminating EID's use of Boyer Well Nrs. 1 and 2.

Request for Relief No. 3.
(State Engineer's *Sua Sponte* Reinstatement of EID's Segregated Permanent Change Application and Extension of Time)

118. Petitioner, by and through this reference, hereby incorporates the preceding paragraphs as though set forth verbatim herein.

119. The Segregated Permanent Change Application 57-8865 (a12710b) lapsed on December 31, 2018, when EID failed to provide proof of beneficial use for Boyer Well Nrs. 1 and 2, and failed to file an extension request prior thereto.

120. EID's request for extension of time, dated January 18, 2019, was untimely and failed to request for reinstatement of the Segregated Permanent Change Application.

121. The State Engineer lacked a timely mandatory application from EID for reinstatement and a showing of good cause to reinstate EID's Permanent Change Application. *See Utah Code § 73-3-13(3).*

122. The State Engineer's *sua sponte* reinstatement of EID's Permanent Change Application is unsupported, contrary to Utah law and invalid.

123. The ECHO-Association requests an order denying Permanent Change Application and Extension of Time.

Request for Relief No. 4.
(Illegal Water Extraction and Use Re: Boyer Well Nrs. 1 and 2)

124. Petitioner, by and through this reference, hereby incorporates the preceding paragraphs as though set forth verbatim herein.

125. EID's water right to operate Boyer Well Nrs. 1 and 2 is invalid and in violation of the Congressional Act.

126. Neither Boyer Well Nrs. 1 nor 2 were drilled or operated at any location approved by 1983 Application or the 1988 Segregation Application and are illegally operated and extracting water from Emigration Canyon's underground aquifers.

127. Boyer Well Nrs. 1 and 2 were constructed without approval or knowledge of the State Engineer.

128. The continued operation of Boyer Well Nrs. 1 and 2 is in violation of Utah statutory law.

129. Boyer Well Nrs. 1 and 2 are the proximate cause of impairment to the ecosystem of Emigration Canyon and impairment of property owner water rights, including that of The ECHO-Association through groundwater mining.

130. The State Engineer has repeatedly been informed of EID's illegal water extraction through use of Boyer Well Nrs. 1 and 2.

131. The State Engineer has taken no action to prevent the illegal water extraction by EID and to the harm of Emigration Canyon ecosystem and impairment of property owner water rights, including that of The ECHO-Association.

132. The ECHO-Association requests an order terminating EID's use of Boyer Well Nrs. 1 and 2.

Request for Relief No. 5.
(Fines and Penalties)

133. Petitioner, by and through this reference, hereby incorporates the preceding paragraphs as though set forth verbatim herein.

134. The State Engineer has repeatedly been informed of EID's illegal water extraction through use of Boyer Well Nrs. 1 and 2.

135. The State Engineer has taken no action to prevent the illegal water extraction by EID to the harm of Emigration Canyon and impairment of property owner water rights, including that of The ECHO-Association.

136. The State Engineer has failed to comply with R655-14-12 and assess mandatory fines and penalties against EID for its illegal water extraction, spanning decades, through unauthorized use of Boyer Well Nrs. 1 and 2.

137. The ECHO-Association requests that the Court assess mandatory fines and penalties against EID for its illegal water extraction through unauthorized use of Boyer Well Nrs. 1 and 2.

REQUEST FOR RELIEF

Petitioner requests this Court enter the following relief:

1. Finding that The ECHO-Association's Request for Reconsideration, dated May 13, 2019, was timely as a result of the State Engineer's error.
2. Finding that the State Engineer has failed to comply with mandatory Utah statutory law to prohibit illegal water use and extraction by EID.
3. Finding that the State Engineer has failed to present justification not to assess mandatory administrative penalties and fines related to EID's non-compliance since April 20, 2017 for illegal water use in the Oaks PUD.
4. An Order denying EID's Reinstatement of Segregated Permanent Change Application, 57-8865 (a12710b);
5. An Order denying EID's request for extension of time for Segregated Permanent Change Application 57-8865 (a12710b), dated January 17, 2019;
6. An Order declaring all rights under Segregated Permanent Change Application 57-8865 (a12710b) forfeited;
7. An Order prohibiting water extraction via Boyer Well Nr. 1 and Boyer Well Nr. 2;
8. An award reasonable attorney fees to the petitioner for the costs and fees of this action. *See Cabrera v. Cottrell*, 694 P.2d 622, 624-25 (Utah 1985).

DATED this 11th day of June, 2019.

CHRISTENSEN & JENSEN P.C.

/s/ Stephen D. Kelson

Stephen D. Kelson

Scot A. Boyd

Bryson R. Brown

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Owners Association*

Plaintiff's address
Contact thru counsel