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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARK TRACY, dba as EMIGRATION CANYON HOME OWNERS ASSOCIATION, Plaintiff, v. KENT L. JONES, the Utah State Engineer, and EMIGRATION IMPROVEMENT DISTRICT, a special service district of the State of Utah, Defendants.	**MOTION TO DISMISS AND JOINDER IN EMIGRATION IMPROVEMENT DISTRICT'S MOTION TO DISMISS** **Tier 3** Case No.: 190901675 Judge: Su Chon

RELIEF REQUESTED AND GROUNDS FOR RELIEF

Defendant Kent L. Jones, acting in his capacity as Utah State Engineer and Director of the Division of Water Rights (Defendant Jones or State Engineer), by and through undersigned counsel, moves to dismiss Emigration Canyon Home Owners Association's Petition for De Novo Judicial Review of Informal Adjudicative Proceeding (Complaint).

For the reasons outlined in Emigration Improvement District's (EID) Motion to Dismiss (Motion), dismissal of the Emigration Canyon Home Owners Association (ECHO) Complaint is appropriate because the owner of Water Right No. 57-8947 (57-8947) did not participate in the State Engineer's administrative action. Mather's failure to raise before the State Engineer the issue of impairment to 57-8947 is dispositive.

The Complaint should be dismissed because ECHO cannot use alleged harm to 57-8947 as its basis for asserting the standing necessary to bring this action. ECHO acquired 57-8947 from Nelson Mather (Mather) in February of 2019, after the State Engineer had completed his administrative process and issued orders on EID's change applications. Exhibit A to EID's Motion. Mather did not raise issues regarding 57-8947 to the State Engineer, who did not consider such issues on Mather's behalf. Mather could not bypass his lack of participation before the

State Engineer, and his failure to exhaust his administrative remedies, by selling the right to ECHO. And, conversely, ECHO cannot, by acquiring the right, now ignore Mather's failure to protest nor can ECHO assert, for the first time on de novo review, that ECHO is injured by the Right's impairment.

RELEVANT FACTS

For the purpose of this memorandum only, the State Engineer adopts the "Pertinent Allegation of the Petition" outlined in EID's Motion to Dismiss, except the State Engineer specifically does not adopt ECHO's Paragraph 8 and subparagraphs 8a through 8nn.[1]

Further, and again for the purpose of this memorandum only, the State Engineer adopts EID's allegations A through D, with relevant attachments, in "The Report of Water Right Conveyance and Deed," p. 6.

I. Joinder in EID's Motion

Defendant Jones hereby joins in EID's Motion and adopts the arguments set forth therein. ECHO lacks standing to bring a suit for de novo review on EID's change applications.

[1] Utah Code § 63G-4-402(2)(a)(4), which requires plaintiffs to list all administrative parties, is explicitly superseded by Utah Code § 73-3-14(7)(b). No parties to the administrative proceeding need be identified, although each must be given notice under Utah Code § 73-3-14(3)(b) and (5).

II. Mather failed to exhaust its administrative remedies with respect to Water Right No. 57-8947 and cannot now bypass the State Engineer by selling it to ECHO as the basis for ECHO to gain access to this Court.

Plaintiffs bring lawsuits based on injuries plaintiffs seek to redress. Thus, all plaintiffs must have standing—a "distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute." *Haik v. Jones*, 2018 UT 39, ¶ 18. Here, however, ECHO[2] claims an injury to Water Right No. 57-8947 for purposes of standing, but that injury cannot be raised as part of ECHO's Complaint because *Mather* failed to argue to the State Engineer that approval of the EID change application would impair 57-8947. The State Engineer issued his orders on the EID applications in January 2019. ECHO acquired a water interest only in February 2019 when it purchased a share of stock in the Emigration Canyon Pipe Line Company, which is State Engineer file number 57-8947 (the "Right").[3] *See*

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[2] ECHO is actually "Mark Christopher Tracy," an individual, doing business as "Emigration Canyon Home Owners Association." *See* Complaint, ¶ 1. If there is an actual association of home owners who belong to ECHO, Mr. Tracy does not mention that in his Complaint.

[3] ECHO claims it owns a "water right," Complaint, ¶ 1, which is a term used loosely to refer to any interest in water. However, there is a difference between a primary water *right* obtained from the state and a *share* of company stock that entitles the holder of that share to water *via* the *company's* water rights. Thus, State Engineer file number 57-8947 represents a single water company share. At some time in the past the owner of the share filed a change application on the share, which resulted in the assignment of a file number. Apparently, the company is now defunct, leaving the status of the right to receive water under the company's shares in some confusion. Because a change application was filed and approved on 57-8947, it is now evidenced by a water certificate and must be transferred by deed. Utah Code §73-1-10(1)(a). This distinction is noted here but not addressed further because the date of the acquisition, and not the nature of the interest, is the important point in evaluating failure to exhaust and lack of standing.

Quitclaim Deed, Exhibit A to EID's Motion. Thus, ECHO obtained the Right after the State Engineer issued the orders granting EID's change applications. *See* Exhibits B and C to Complaint. Although ECHO mentioned in its protest that Mather's right "suffered total impairment," ECHO Protest, Exhibit F to Complaint, p. 5 (emphasis omitted), ECHO could not raise this issue on behalf of someone wholly unknown to the State Engineer's administrative process. Mather could not seek de novo review of the orders directly. He therefore cannot seek it indirectly through ECHO, and ECHO cannot claim standing based on an injury to 57-8947 when it could not raise, or seek redress, for someone else's injury before the State Engineer. ECHO simply had no personal stake in the outcome of EID's applications before the State Engineer.

Both the Utah Administrative Procedures Act (UAPA) and specific State Engineer statutes limit those seeking de novo review of a State Engineer order to plaintiffs who were "aggrieved" by the order and who participated in the administrative proceeding. Utah Code §63G-4-401(2) ("[a] party may seek judicial review only after exhausting *all administrative remedies* available, except [in circumstances inapplicable here]") (emphasis supplied); Utah Code §63G-4-401(1) ("[a] *party* aggrieved may obtain judicial review..." where party is defined as a participant in the administrative action) (emphasis supplied); *see also* Utah Code §73-3-14(1)(a) ("[a] person aggrieved by an order of the state engineer may

obtain judicial review in accordance with [UAPA] and this section"). In *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 11 the Supreme Court stated that although any "interested" person may protest a change application to the State Engineer, only a person "aggrieved" "may obtain judicial review of that order." *Washington County Water Conservancy Dist.*, ¶ 11, (citing Utah Code Ann. ¶ 73-3-14) (internal quotation omitted). And, indeed, UAPA requires that only a "party" aggrieved may seek such review. Utah Code § 63G-4-401(1).

Before the State Engineer, ECHO was merely "interested." It cannot now become "aggrieved" *via* purchase of an after-acquired water interest. Indeed, ECHO's participation in the State Engineer's administrative process was very much like Haik's participation in the administrative process that led to the approval of Salt Lake City's change application. The Supreme Court held that Haik lacked standing to bring that suit and, further stated, "without a personal stake in the outcome or a particularized injury, the courts might permit themselves to be drawn into disputes that are not fit for judicial resolution or amount to generalized grievances that are more appropriately directed to the legislative and executive branches of state government." *Haik v. Jones*, 2018 UT 39, ¶ 18 (internal quotations and citations omitted). And, Haik was at least a landowner in the relevant area, Mr. Tracy, dba ECHO, seems to lack even that connection.

Further, the Supreme Court has clarified that, while any interested person may protest a change application, protestants bear the burden to specifically identify their allegedly impaired water rights. *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 848 (Utah 1998) ("general and vague allegations cannot satisfy the requirement that the ... plaintiffs make known the nature of *their* rights and raise *them* before the State Engineer.") (Emphasis supplied). The Court said, "[i]t is not the role of the State Engineer to divine the source of a protester's claim by sifting through his/her records." *Badger*, at 849. Such "would eviscerate the requirement that it is the protesters' responsibility to make known the nature of their protest before the State Engineer." *Id.* Mr. Mather did not participate in State Engineer proceedings below and therefore failed to exhaust his administrative remedies there. Mr. Tracy, dba ECHO, participated but could not, before the State Engineer, base a protest on an injury to himself, his property, or his legal interests.

A. Mather's Failure to Exhaust Administrative Remedies and waiver of injury thwarts any claim to standing to seek de novo review.

Badger v. Brooklyn Canal Co. presented the Utah Supreme Court with a case where Company shareholders protested a change application filed by the Company. Those shareholders participated in a hearing before the State Engineer based on their status as shareholders. However, they were also entitled to water from their own private wells *via* state-granted, primary water rights. In their

written protest, and at the hearing, however, the private-well protestants failed to mention such an injury to their independently owned water rights. The Court found they therefore essentially waived their opportunity to claim their individual water rights as the basis for their injury. *Badger*, at 847 (the protestants failed even the less strict "level of consciousness" test imposed by the Court). The well-owners offered several arguments for why they should, regardless, be allowed to seek review of the Company's approved change application; the Court rejected each argument, saying:

> It is well settled that "persons aggrieved by decisions of administrative agencies 'may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine ... matters properly determinable originally by such agencies.'"

Badger, 966 P.2d 844, 847 (quoting *S & G, Inc. v. Morgan*, 797 P.2d 1085, 1087 (Utah 1990)). Even where the private well owners, in their written protest, claimed the change would injure them by depriving them of well water, they "[did] not identify the wells the protesters allege would be impaired, nor do they identify what rights *they* may have in those wells." *Id.*, at 848 (emphasis supplied). "Such general and vague allegations cannot satisfy the requirement that the private well plaintiffs make known the nature of *their rights* and raise them before the State Engineer [to his 'level of consciousness']." *Id.* (emphasis supplied).

Similarly, here, the State Engineer could not and did not consider whether Mather, who was not before him, held rights that would be impaired by the change. And because Mather failed to raise such impairment under the criteria in Utah Code §73-3-8, he did not exhaust his administrative remedies on this point and could not seek de novo review under Utah Code §63G-4-401(2), which requires plaintiffs exhaust administrative remedies before bringing suit. If Mather was barred from seeking de novo review *via* 57-8947, ECHO, cannot, by purchase of Mather's water right, revivify Mather's dead opportunity.

At the administrative proceeding, ECHO did not own any interest in water and did not allege an injury to itself or Mr. Tracy due to impairment. Complaint, *passim*. And, it could not convincingly raise the impairment of a party not present in the administrative action. Yet ECHO seeks to somehow create "anticipatory standing" by raising the impairment of a stranger to the action, and then acquiring that right to attempt to claim a new "injury" to itself. Mather failed to preserve arguments concerning impairment of 57-8947 and waived the ability to raise related issues on de novo review. ECHO cannot now substitute itself after Mather is already barred. *See also* Utah Code §63G-4-401(2) (which requires exhaustion of administrative remedies). Because Mather failed to exhaust his administrative remedies concerning Water Right No. 57-8947, alleged impairment of that Right cannot serve as the basis for ECHO's standing to bring this suit. ECHO cannot

raise, for the first time on de novo review, issues that Mather did not raise regarding 57-8947, and this Court cannot consider alleged impairment of the right as the basis for ECHO's "injury" in need of redress.

B. Lack of Standing

Because ECHO has no other property or interest that qualifies to claim an injury, and indeed no such injury seems apparent from ECHO's Complaint, ECHO lacks standing to bring this suit for de novo review. Whether viewed through the lens of failure to exhaust administrative remedies, the statutory requirement that a person be "aggrieved" to seek de novo review under Utah Code §73-3-14(1)(a), or common-law standing, ECHO is not an appropriate party to seek the de novo review of EID's change application approvals. Thus, ECHO lacks standing to seek de novo review under Utah Code §73-3-14(1)(a) and §63G-4-401(1).

III. Allowing ECHO to seek de novo review of EID's change applications is contrary to the public's interest in the stability of water rights.

If this Court allows ECHO to proceed, claiming injury to 57-8947, when ECHO could not have raised related issues on its own behalf in State Engineer proceedings, change applicants such as EID would be exposed to unpredictable, and therefore unmanageable, risks regarding State Engineer administrative decisions related to their water rights.

The purpose of litigation is to redress injuries caused to the rights of plaintiffs who have standing to bring legal actions. *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 73, ¶ 12 ("the requested relief must be substantially likely to redress the injury claimed.") (internal quotations and citations omitted). ECHO's approach turns that proposition on its head—ECHO claims as the basis for its standing an injury to Mather which the court cannot entertain or redress because Mather was not a protestant in, and did not timely seek de novo review of, the State Engineer's decision on EID's change applications. ECHO simply cannot claim standing based on a harm that this Court cannot entertain. To allow alleged impairment of 57-8947, which this Court cannot address, to provide the basis for ECHO's standing to challenge EID's change application approval would create tremendous uncertainty in State Engineer proceedings by allowing "interested persons" to become "aggrieved parties" by seeking de novo review based on issues unrelated to the claims of the interested protestants in the State Engineer's administrative proceedings. This Court should reject recently alleged harm to Water Right 57-8947 as the basis for ECHO's standing to bring a suit requesting de novo review of the administrative orders granting EID's change applications.

CONCLUSION

Utah State Engineer, Kent Jones, joins in Emigration Improvement District's Motion to Dismiss. For reasons stated there, and for the reasons contained herein, ECHO's Complaint should be dismissed with prejudice.

DATED this 15th day of April, 2019.

SEAN REYES
UTAH ATTORNEY GENERAL

/s/ Julie I. Valdes .
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FILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing **MOTION TO DISMISS AND JOINDER IN EMIGRATION IMPROVEMENT DISTRICT'S MOTION TO DISMISS** to be filed with the Court *via* the ECF this 15th day of April, 2019. The following attorneys who have appeared in this case have been appropriately notified by the ECF.

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