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IN THE UTAH COURT OF APPEALS

MARK CHRISTOPHER TRACY, dba EMIGRATION CANYON HOME OWNERS ASSOCIATION, Appellant, *v.* KENT L. JONES, the Utah State Engineer, and EMIGRATION IMPROVEMENT DISTRICT, a special service district of the State of Utah Appellees.	**APPELLANT RESPONSE TO SUA SPONTA MOTION FOR SUMMARY DISPOSITION** Case No.: 202002295-CA Trial Court Case No. 190901675

Appellant Mark Christopher Tracy dba Emigration Canyon Home Owners Association ("***Appellant***") filed Notice of Appeal regarding dismissal by the Third Judicial District Court, Salt Lake County, State of Utah ("***Third District Court***") of Appellant's petition for de novo judicial review of informal adjudicative proceedings under Utah Code §63G-4-402 concerning permanent changes to surface water rights previously located near Utah's Hogle Zoo and subsequently approved by the Utah State Engineer allowing for (a) continued groundwater mining of the Upper Twin Creek Aquifer via two large-diameter commercial wells already placed into operation in 2003 and 2013; (b) construction of five additional large-diameter commercial wells in the Nugget

and Thaynes Aquifers; (c) future water service for over 500 new residential units; and (d) water service for a "Gun Range and Wedding Resort" in Emigration Canyon, Utah under permanent change applications "a44045" (57-7796) and "a44046" (57-10711) filed by Emigration Improvement District on September 12, 2018.

In a *sua sponta* motion for summary disposition, this Court ordered the parties of the present action to file written response why the appeal should or should not be dismissed for lack of jurisdiction due to the fact that Appellant filed Notice of Appeal on January 29, 2020 while the "Memorandum Decision and Order" of the Third District Court dismissing Appellant's petition for de novo judicial review was executed on August 29, 2019.[1]

Appellant respectfully submits the following response.

ARGUMENT

Rule 3 of the Utah Rules of Appellate Procedure ("***URAP***") requires that Notice of Appeal must be filed within 30 days of the "entry of judgment", which in turn is determined by the Utah Rules of Civil Procedure ("***URCP***").

Rule 58A (a) URCP requires that "[e]very judgement must be set out in a separate document ordinarily titled 'Judgment' — or, as appropriate, 'Decree'" if an exception listed under subparagraph (b) is lacking.

Under subsection (e)(2) the judgement is "complete and is entered at the earlier of these events":

> (A) The *judgement* is set out in a separate document signed by the judge and recorded in the docket,

[1] Emigration Improvement District's alternative argument that the Emigration Canyon Home Owners Association as a DBA "assumed name" of Mark Christopher Tracy under Utah Code 42-2-5 (2) and registered with the Utah Department of Commerce "cannot represent itself *pro se* in the matter" falls outside the scope of this Court's *sua sponta* Motion and will be addressed by the Appellant at the proper stage of the proceedings.

(B) or 150 days have run from the clerk recording the *decision*, *however designated*, that provides the basis for the entry of judgement (emphasis added).

It is clear that both the form and content of the lower court's adjudication is determinative and not the document's date of execution alone. While a "judgement set out in a separate document" requires the judge's signature and docket entry, the Third District Court dismissed Appellant's petition for de novo judicial review in a "Memorandum Decision and Order" for purported lack of legal standing. *See* Memorandum Decision and Order of the Third District Court signed by Judge Su J. Chon attached as **Exhibit A**.

However, due to the fact that the lower court failed to record the final determination in a separate document recorded in the docket as mandated under Rule 58A (a) URCP, the disposition of Appellant's petition for de novo judicial review was not a "judgement" under subsection (e)(2)(A) but rather a "decision, however designated" under subsection (e)(2)(B).

As such, because the "Memorandum Decision and Order" executed by the Third District Court on August 29, 2019 was not a separate document signed and recorded in the docket, the dismissal of Appellant's petition for de novo judicial review was not "complete and entered" until 150 days had expired on January 26, 2020.[2] *See e.g. In re Cendant Corp.*, 454 F.3d 235, 242-244 (3d Cir. 2006).

[2] The Advisory Committee notes that "[t]he 2015 amendments to Rule 58A adopt the requirement, found in Rule 58 of the Federal Rules of Civil Procedure, that a judgment be set out in a separate document. In the past, problems have arisen when the district court entered a decision with dispositive language, but without the other formal elements of a judgment, resulting in uncertainty about whether the decision started the time for appeals. This problem was compounded by uncertainty under Rule 7 about whether the decision was the court's final ruling on the matter or whether the prevailing party was expected to prepare an order confirming the decision. The 2015 amendments of Rule 7, Rule 54 and Rule 58A are intended to reduce this confusion by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment."

As per Rule 3 URAP, the Notice of Appeal was filed within the 30-day period due to the fact that Memorandum Decision and Order of the Third District Court was not a "judgement" under Rule 58A (e)(2)(A) URCP set forth in a separate document recorded in the docket, but it was in fact a "decision, however designated" and was not "complete and entered" under Rule 58A (e)(2)(B) URCP until January 26, 2020.

CONCLUSION

Because the Notice of Appeal was filed within 30 days of the entry of the Third District Court's Memorandum Decision and Order as per Rule 3 URAP and Rule 58A (e)(2)(B) URCP, the Appellant respectfully requests that the case proceed to briefing.

DATED this 11th day of May, 2020.

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Appellant

EXHIBIT A

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

EMIGRATION CANYON HOME OWNERS ASSOCIATION, Petitioner, vs. KENT L. JONES, Division Director of the Utah State Division of Water Rights, and EMIGRATION IMPROVEMENT DISTRICT, Respondents.	**MEMORANDUM DECISION AND ORDER** Case No. 190901675 Judge Su Chon

This matter is before the Court on Defendants' Motions to Dismiss. Oral arguments were held July 9, 2019. The parties submitted additional briefing and a renewed notice to submit on July 29. In addition, Plaintiff filed a Motion for Leave to Submit Additional Briefing in which it requests leave to brief the issue of "backdating," as it claims it has been denied the opportunity to make that defense. Contemporaneously, however, Plaintiff filed the supplemental brief requested by the Court, in which it squarely addresses backdating. The Court therefore considers Plaintiff's motion for additional briefing moot and denies the same. However, the Court also believes that it gave the parties the opportunity to address that issue after the hearing, and there was no further need for additional briefing.

This case is a petition for de novo judicial review of the State Engineer's issuance of change applications for water usage. As background, Nelson Mather, who is not a party in this case, owned water right # 57-8947. The protest period for a change application regarding that water right ran from September 10, 2018 through

January 25, 2019. Mr. Mather did not file a protest. On October 17, ECHO did file a timely protest, although at the time it did not own any water rights of record. On either September 27 or November 8, 2018, ECHO claims it purchased the water right from Mr. Mather by quitclaim deed. During the hearing, ECHO stated that the sale had occurred earlier, but Mr. Mather was not in town to sign the documents. On February 11, 2019, the quitclaim deed was signed by Mr. Mather, notarized, and conveyed to ECHO. The quitclaim deed states: "On November 08, 2018 THE GRANTOR(S)... conveys, releases and quitclaims to the GRANTEE(S)...." On February 21, 2019, ECHO recorded the quitclaim deed.

Defendants move the Court to dismiss the petition, arguing that plaintiff ECHO lacks standing, both individualized standing and the public policy exception. They first argue that ECHO was not an "aggrieved" party who participated in the administrative proceeding and exhausted its administrative remedies.

> (1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.
> (2) A party may seek judicial review only after exhausting all administrative remedies available, except that:
> (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;
> (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:
> (i) the administrative remedies are inadequate; or
> (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Utah Code § 63G-4-401(1) and (2). Standing requires a palpable ad particularized injury that gives rise to a personal stake in the outcome of the dispute. *Washington Cty. Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 14, 82 P.3d 1125 ("The commonly

understood meaning of the term "aggrieved" is consistent with our traditional standing requirement that a plaintiff show particularized injury."). Without ownership of a water right affected by the change applications, a party generally does not have standing in a dispute.

The issue here is when ECHO acquired the water rights. "The rule is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate therein, must be delivered." *Wiggill v. Cheney*, 597 P.2d 1351, 1351 (Utah 1979) *See* Utah Code Ann. § 73-1-10 ("[a] water right ... evidenced by ... a certificate of appropriation ... shall be transferred by deed").

ECHO claims the transfer of the water right occurred in either September or November 2018 when Mr. Mather conveyed the water right to ECHO. ECHO relies on non-Utah cases that retroactively applied ownership of deeds of trust out of equity. *See Deutsche Bank Nat'l Trust Co. v. Burke*, 655 Fed. App'x. 251, 254 (6th Cir. 2016), *Baird v. Comm'r of Internal Revenue*, 68 T.C. 115 (1977). But these cases cited by ECHO are distinguishable as not dealing with foreclosures and outside of Utah's jurisdiction, which is clearly delineated by statute.

The conveyance in this case occurred on February 11, after the protest period expired. "In Utah, a quitclaim deed has the effect of a conveyance only when executed as required by law. This has been interpreted to mean that a deed must be in writing, signed by the creator, supported by consideration, and delivered to the grantee." *Julian v. Petersen*, 966 P.2d 878, 881 (Utah App. 1998) (cleaned up). *See Wiggill v. Cheney*, 597 P. 3d 1351 (Utah 1979) ("It is well settled that a deed, to be operative as a transfer of the ownership of land, or an interest or estate therein, must be delivered.") A quit

claim deed "when executed as required by law shall have the effect of a conveyance of all right, title, interest and estate of the grantor in and to the premises therein described and all rights, privileges and appurtenances thereunto belonging, at the date of such conveyance." Utah Code Ann. § 57-1-13. Here, ECHO did not own the water right when it protested the change applications, and therefore it is not an aggrieved party.

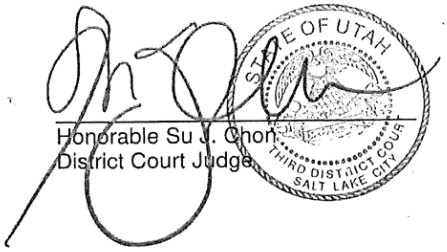
Second, Defendants argue that ECHO is not a valid corporation or dba and thus cannot own a water right or sue and be sued. It appears that on May 23, 2018, Mark Christopher Tracy registered "Emigraiton" Canyon Home Owners Association as a dba of himself. Clearly there was a typo, and Defendant's argument isn't well taken.

Lastly, ECHO claims it has standing under the public interest exception. But the issues here are not "so unique and of such great importance to Utah that they ought to be decided in furtherance of public interest." Utah Code Ann. § 63G-4- 402. "A party can acquire standing to litigate an important public issue if no one else has a greater interest in the outcome, the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issues, and the legal issues are sufficiently crystallized to be subject to judicial resolution." *Washington Cty.*, 2003 UT 58, ¶ 27 (citations omitted, cleaned up). ECHO argues that the impact of the change applications could impact 415 private wells, the Hogle Zoo, and Mount Olivet Cemetery. It claims that over 40 residents of the canyon have reported substantial impairment of their water rights, and the change applications could have catastrophic consequences to the aquifers in the area. But under *Washington County* and *Haik v. Jones*, it is clear that the instant case is not the type of situation to invoke public interest exception to standing. The Utah Supreme Court has stated: "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." *Washington County*, 2003 UT 58 at ¶ 27. If anything, ECHO has even fewer grounds to assert the public interest exception than the parties in *Washington County* and *Haik*.

In sum, ECHO does not have standing to challenge the change applications because he was not an aggrieved party at the time, given that he did not acquire the water right until after the protest period. The Court grants the Defendants' motions. No further order is needed.

DATED this 29th day of August, 2019.



Honorable Su J. Chon
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of May, 2020, I caused a true and correct copy of the foregoing **APPELLANT RESPONSE TO SUA SPONTA MOTION FOR SUMMARY DISPOSITION** to be sent via electronic mail to the following:

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