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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, and
EMIGRATION IMPROVEMENT
DISTRICT, a special service district of the
state of Utah,

Respondents.

**PETITION FOR DE NOVO JUDICIAL
REVIEW OF INFORMAL
ADJUDICATIVE PROCEEDING**

**RE: ORDERS OF THE STATE
ENGINEER FOR PERMANENT
CHANGE APPLICATION NOS. 57-7796
(a44045) AND 57-10711 (a44046)**

TIER 3

Case No. 190901675

Judge: Su Chon

The Emigration Canyon Home Owners Association (“*The ECHO-Association*”) brings this action under Utah State Code §63G-4-402 for *de novo* judicial review of (1) the Order of the State Engineer for Permanent Change Application Number 57-7796 (a44045), dated January 16, 2019, and (2) the Order of the State Engineer for Permanent Change Application Number 57-10711 (a44045), dated January 25, 2019 (collectively “the Orders”).

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 impairment and consolidation of senior water rights in Emigration Canyon (the “Canyon”), one of the most historically significant areas of the State of Utah by means of a water-extraction method known as “groundwater mining”. Groundwater mining is the removal of water in the natural ground over a period of time that exceeds the recharge rate of the supply aquifer, thereby depleting water resources. This action seeks to stop and prevent further groundwater mining by Emigration Improvement District (“EID”) and destruction of the Canyon’s water sources, including the Twin Creek, Nugget and Thaynes aquifers.

In September 2018, EID filed two 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 fragile Canyon drainage system. While EID has self-reported that it has twice the capacity of water needed for its current subscribers during summer months (via two wells operated under previously approved permanent change applications 57-7796 (a17510) and 57-8865 (a12710) in the Freeze Creek aquifer), EID’s Permanent Change Applications also seeks to continue water extraction from the same aquifer via the Brigham Fork Well and Upper Freeze Creek Well (operating under temporary change applications) and to drill five additional wells in the Nugget and Thaynes aquifers. This will

potentially cause catastrophic consequences to the aquifers, Canyon, Canyon Stream, existing Canyon residents, and the general public. *See* representative and hydrological maps attached as Ex. A.

The Utah State Engineer Kent L. Jones (the “State Engineer”) is required to comply with the mandatory provisions of Utah Code Ann. 73-3-8 in assessing change applications. For each application, Utah Code Ann. 73-38 requires the State Engineer to evaluate: (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 applicant has the burden of producing evidence sufficient to support a reasonable belief that the change applications can be made in compliance with **all** statutory requirements before the State Engineer may approve the application.

Utah Code Ann. 73-3-8 states:

(b) If the state engineer, because of information in the state engineer’s possession obtained either by the state engineer’s own investigation or otherwise, has reason to believe that an application will interfere with the water’s more beneficial use ... domestic or culinary, ..., or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, the state engineer shall withhold approval or rejection of the application until the state engineer has investigated the matter.

(c) If an application does not meet the requirements of this section, it shall be rejected.

Utah Code Ann. 73-38(b) and (c).

In the present case, the State Engineer 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, and the effects upon domestic and culinary water, public recreation and the natural stream environment, and detriment to the general public welfare. However, the State Engineer inappropriately reversed the mandatory burden of proof and failed to investigate substantial evidence supporting the denial of EID's Permanent Change Applications. *See* Utah Code Ann. §§ 73-3-3(5) and 73-3-8; *see also* Order, dated January 16, 2019, and the Order, dated January 25, 2019 (collectively "the Orders"), attached respectively as Exs. B and C.

The effect of the State Engineer's Orders would be to permit groundwater mining by EID in the Twin Creek aquifer and approval of future groundwater mining in two additional aquifers in the Canyon in an apparent water grab. The damage to both habitat and private property in the Canyon will be catastrophic to the Canyon and will be permanent and irreversible in our lifetime.

Petitioner, through *de novo* adjudication, seeks an Order from this Court denying EID's Permanent Change Application Nos. 57-7796 (a44045) and 57-7711(a44046).

PARTIES

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

2. Respondent EID is a Special Service District created by the Salt Lake County Council in 1968.

3. Kent L. Jones is the Division Director of the Utah State Division of Water Rights.

JURISDICTION AND VENUE

4. The acts set forth herein occurred in Salt Lake County, State of Utah.
5. The final agency actions resulting from informal adjudicative proceedings before the Utah State Division of Water Rights occurred in Salt Lake County, State of Utah. *See* Exs. B and C.
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 who submitted timely protests to EID's permanent change applications:
 - 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;
 - c. Salt Lake City, a municipal corporation, c/o Laura Briefer, 1530 South West Temple, SLC, Utah 84115;
 - d. Pinecrest Pipeline Operating Company, c/o Steve Moore, 6424 E. Lefthand Fork Ln, SLC, Utah 84108;
 - e. Tierra Investments, LLC, 6440 Wasatch Blvd Ste 340, SLC, Utah 84121;
 - f. Willy Stokman, 86 S Skycrest Lane, SLC, Utah 84108;

- g. Jack Samuel Plumb, 6378 E Emigration Canyon Road, SLC, Utah 84108;
- h. Margot McCallum, 1167 Pinecrest Canyon Road, SLC, Utah 84108;
- i. Larry and Susan Henchel, 3806 Sunnydale Ln, SLC, Utah 84108;
- j. Patricia [Pat] Sheya, 1111 Alvarado Ave., Apt. 116, Davis, California 95616-5919;
- k. Eric M. Simon, 6627 E. Emigration Canyon Rd, SLC, Utah 84108;
- l. Laura Gray, 1195 Pinecrest Canyon Road, SLC, Utah 84108;
- m. Daniel Walker, 3762 E Sunnydale Ln, SLC, Utah 84108;
- n. Michael Martin, PO Box 58602, SLC, Utah 84158;
- o. Brett Wheelock, 6571 East Quartermile Road, SLC, Utah 84108;
- p. Jamie White, c/o JAMIE WHITE, 7290 Las Vistas Drive, Las Cruces, New Mexico 88005;
- q. Robert Jordan, 749 N Emigration Canyon Rd, SLC, Utah 84108;
- r. Mary Jo Sweeney, Trustee for Michael James Ballantyne, 865 N Pinecrest Canyon Road, SLC, Utah 84108;
- s. Jessica Lucas, 4801 E Skycrest Park Cove, SLC, Utah 84108;
- t. Donald L. Clark, 100 South Skycrest Lane, SLC, Utah 84108;
- u. Lowell Miyagi, 6298 E Lefthand Fork Lane, SLC, Utah 84108;
- v. Melinda McIlwaine, 2148 N Pincrest Canyon Road, SLC, Utah 84108;
- w. Phil Davis, 1832 N. Pinecrest Canyon, SLC, Utah 84108;
- x. John Porcher, 2238 Pinecrest Canyon Road, SLC, Utah 84108;
- y. Dr. Jessica Kramer, 4801 E Skycrest Park Cove, SLC, Utah 84108;

- z. Barbara Babson and Ben Dobbin, 2230 Pinecrest Canyon Road, SLC, Utah 84108;
- aa. Dr. Sarah K. and Jason P. Hall, 1761 N. Pinecrest Canyon Road, SLC, Utah 84108;
- bb. David L. Phillips, 907 North Pinecrest Canyon Road, SLC, Utah 84108;
- cc. Andrew B. Walker, 6016 E. Red Hill Lane, SLC, Utah 84108;
- dd. Stephen B. and Michelle D. Andersen, 3980 E. Emigration Canyon Rd, SLC, Utah 84108;
- ee. Chris and Kirtly Jones, 3798 E Sunnysdale Lane, SLC, Utah 84108;
- ff. Ronald Hallett, 290 Margarethe Lane, SLC, Utah 84108;
- gg. Dinko Duheric, 6392 Emigration Canyon Road, SLC, Utah 84108;
- hh. Karen Penske, 1278 N Pinecrest Canyon Road, SLC, Utah 84108;
- ii. Caroline Biggs, c/o Caroline Biggs, 6740 E Emigration Canyon Road, SLC, Utah 84108;
- jj. Kate and James Bert Bunnell, 3962 East Emigration Canyon Road, SLC, Utah 84108;
- kk. Daniel Craig, c/o Daniel Boone Craig, 2137 N Pinecrest Canyon Road, SLC, Utah 84108;
- ll. Gregory Palis, 6771 E Emigration Canyon Road, SLC, Utah 84108;
- mm. Michael Terry, 6226 E Emigration Canyon Road, SLC, Utah 84108; and
- nn. Robert J. Reid IV, 6788 Emigration Canyon Road, SLC, Utah 84108.

STATEMENT OF FACTS

The following Statement of Facts are set forth to provide context demonstrating that Petitioner is entitled to obtain judicial review of EID's Permanent Change Applications.

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. A temporary change application may not vest and is inferior to both permanent change applications and perfected water rights should quantity impairment occur. *See* Utah Code 73-3-5.5(d)(i).

14. Unlike permanent change applications, temporary change applications expire automatically after one year and cancel pursuant to their own terms. *See* Utah Code 73-3-5.5(d)(i),(ii).

15. The lawful right to water 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. Procedural Background.

16. On September 10, 2018, EID filed the two subject change applications, Nos. 57-7796 (a44045) and 57-10711 (a44045).

17. On September 12, 2018, EID filed revised change applications to replace those filed on September 10, 2018 (the “Permanent Change Applications”). *See* Exs. D and E.

18. On October 17, 2018, The ECHO-Association filed its protest to both permanent change applications with two subsequent addendums. *See* Exs. F, G and H.

19. An additional 38 protests to EID’s permanent change applications were filed by other individuals and entities.¹

20. On December 19, 2018, the State Engineer held a hearing on EID’s Permanent Change Applications (the “Protest hearing”).

21. The Order of the State Engineer for Permanent Change Application Number 57-7796 (a44045) was issued on January 16, 2019. *See* Ex. B.

22. The Order of the State Engineer for Permanent Change Application Number 57-10711 (a44045) was issued on January 25, 2019. *See* Ex. C.

¹ *See* <https://www.waterrights.utah.gov/cgi-bin/docview.exe?Folder=57-7796&Key=Sort+by+Date>.

23. On February 5, 2019, Protestant Willy Stokman filed Motion to Reconsider regarding the Order of January 16, 2019 for permanent change application no. 57-7796 (a44045).

III. General Background.

24. EID is a Special Service District, created by the Salt Lake County Council in 1968, for the singular purpose of providing water and sewage service to the existing residents of the Canyon.

25. 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.

A. History of EID's water right claims in Emigration Canyon.

26. On August 11, 1923, the Utah Third District Court under, Civil Decree 25890, adjudicated $\frac{2}{3}$ of the surface water flow of the Emigration Canyon stream (the "Canyon Stream") as belonging to James E. Hogle, the Mount Olivet Cemetery Association ("Mt. Olivet"), and the Gordon Company with a total average flow adjudicated at **5.43 cubic feet per second ("cfs")**.

27. The remaining $\frac{1}{3}$ of the surface water flow of the Canyon Stream was claimed at that time by the Emigration Dam and Ditch Company (approximately **1.8 cfs**);

28. The findings and conclusions of the Third District Court were later affirmed by the Utah State Supreme Court in 1925. *See Mt. Olivet Cemetary Ass'n. v. Salt Lake City*, 65 Utah 193, 235 P. 876 (Sup. Ct. 1925) (the "Mt. Olivet Case").

29. On August 25, 1954, the Emigration Dam and Ditch Company deeded all of its vested water rights to the State Road Commission of the State of Utah ("State Road Commission") via Quit Claim Deed.

30. In turn, on January 24, 1971, the State Road Commission executed a Quit Claim Deed to the Utah State Division of Parks and Recreation "consisting of sufficient water from the Emigration Canyon Creek to supply irrigation of 100 acres of land, **not to exceed a flow of 10.00 cfs.**" (emphasis added).

31. The State Road Commission's Quit Claim Deed inexplicably deeded four times more than the entire water share adjudicated in the Mt. Olivet Case.

32. On November 17, 1975, the Utah State Road Commission executed a Quit Claim Deed to EID "to supply the needs for 26 families, 75 horses, 200 cattle, 400 sheep, and the irrigation of 150 acres of land **not to exceed 2.0 cfs**" (emphasis added).

33. EID currently claims **33.0 cfs** of surface water flow under water shares 57-7796 and 57-10711.

B. History of the impairment and retirement of senior water rights in Emigration Canyon.

34. In 1966, Jack Barnett, the State Engineer Area Manager, and later EID hydrologist, completed his Master's Thesis for the Department of Geology, University of Utah (the "Barnett Thesis"). *See* Ex. G, at "Exhibit F." Therein, he concluded:

- a. Hydrology of the Canyon is not conducive to the operation of large-diameter wells (*Id.* at 94);

- b. Even if such wells were to successfully draw large quantities of water from the Canyon ground, impairment of private wells having superior water rights to clean, safe water “would be almost a certainty.” (*Id.*) (emphasis added);
- c. Because the Canyon Stream is in direct communication with ground water, impairment of one would negatively impact the other, resulting in the reduction in stream flow, and the substantial increase of bacterial levels of the stream and risk of contamination of private wells located and operated nearby (*Id.* at 96); and
- d. “[D]evelopment [in the Canyon] should be limited to small-diameter domestic wells” for single, one-family residence located on land previously used for agriculture. (*Id.* at 95).

35. On April 5, 1972, Mt. Olivet expressly cited the 1966 Barnett Thesis in its protest against EID’s permanent change application no. 57-7796 (a6538), moving surface water rights acquired from the Utah State Road Commission from the base of the Canyon to underground water sources at higher elevation within the Canyon.

36. Despite Mt. Olivet’s protest, on October 8, 1982, the State Engineer’s Office approved EID’s permanent change application no. 57-7796 (a6538), allowing construction of a single large-diameter commercial well for 300 homes “yet to be constructed,” but rejected two additional underground points-of-diversion due to possible impairment of “vested water shares.”²

37. On December 1, 1982, EID circulated a letter entitled “IMPORTANT NOTICE REGARDING YOUR WATER RIGHTS!” whereby for the “benefit of existing residents”

² The State Engineer’s Office approved the permanent change application, despite the fact that ten years had passed since the protest hearing of 51 Canyon residents and Mt. Olivet had occurred on January 17, 1972.

private well owners can exchange "the most recent water rights" for the "most senior or oldest water rights [owned and controlled by EID trustees]."

38. Sometime prior to 1982, land-developers acquired ownership rights to over 1,500 acres in the foothills on the north side of the Canyon for the Emigration Oaks development and submitted multiple permanent-change applications to the State Engineer for 1,385 new homes to be drawn exclusively from large-diameter commercial wells located at the north side of the Canyon in the Twin Creek Aquifer.

39. On March 9, 1983, The Boyer Company LC and Mt. Olivet filed permanent change application nos. 57-69 (a12710) and 57-2526 (a12711) for the construction of a large-diameter well to service 1,316 new domestic units of the affluent Emigration Oaks development. Water right 57-69 was later segregated and changed to water claim no. 57-8865 currently owned by EID.

40. On December 16, 1983, the State Engineer approved permanent change application no. 57-8865 (a12710).

41. On December 16, 1983, the State Engineer also approved permanent change application a12710b for the operation of the Boyer Well #1 in the Twin Creek Aquifer and water use for **188** new domestic units under Mt. Olivet's water right 57-8865 despite the fact that 0.75 acre feet was required for one domestic unit and the aforementioned water right was only 94.04 acre feet (188 new units x 0.75 acre feet = 141.0 acre feet).³

³ To date, a copy of the Memorandum Decision from December 16, 1983, necessary for the continued operation of the Boyer Well #1 in the Twin Creek Aquifer, has not been located and is unavailable at the State Engineer's Office.

42. One month later, the State Engineer rejected the same application for **658** new domestic units under 57-2526 (a12711) based expressly on the danger of impairing senior water shares held in the Canyon, although both 57-69 (a12710) and 57-2526 (a12711) were submitted on the same day.

43. On October 11, 1988, a letter to the Utah State Engineer stated that two Canyon residents located near the Main Canyon Road reported that the Freeze Creek had gone dry for the first time in recorded memory and water levels of two private wells had dropped 45 feet since construction and operation of Boyer Well #1 (at the time, Boyer Well #1 was servicing only three homes of the 229 parcels of the Emigration Oaks development located in the Freeze Creek, Pioneer Fork and Brigham Fork drainage systems under 57-8865 (a12710)).

44. On November 16, 1988, the Deputy State Engineer issued a memorandum titled “Freeze Creek and Boyer Well Investigation.” While generally citing the 1966 Barnett Thesis, it failed to consider its conclusions and recommendations and, without further investigation, concluded that “our opinion is that the probable cause of falling water levels is climatically controlled.”

45. In a letter dated September 28, 1992, Barnett Intermountain Water Consulting (“BIWC”), controlled by Jack and Don Barnett, stated to an undisclosed Canyon resident that “[we] are aware that over the last two years, many wells in the canyon have had to be renovated with either lowering the pumps or the deepening of wells because the wells have gone ‘dry’” (quote in the original).

46. In July 1993, BIWC submitted a “CONFIDENTIAL” study to EID trustees regarding all senior water rights held in the Canyon in order to “assess potential difficulties

which may present themselves should EID elect to file water right application for various spring sources” whereby areas of “potential conflicts with existing water right holders are identified” although at that time EID neither owned nor operated a water system.

47. On August 31, 1993, EID filed permanent change application no. 57-7796 (a1751) listing 41 points of diversion.

48. On August 17, 1994, the Salt Lake Tribune published a statement from the land developer, The Boyer Company LC, that it "no longer needs to spend millions of dollars [*i.e.*, \$42 million dollars] "to connect to the Salt Lake City water system” because "the company has dug a well capable of supplying all of its future water needs."

49. In 1995, Boyer Well #1 ran dry when the reserve capacity of the Boyer Reservoir was exhausted with less than half of the planned 229 domestic units built in the Emigration Oaks development.

50. On November 7, 1995, Canyon residents in a general referendum rejected EID's proposal to take over the Emigration Oaks water system (constructed by The Boyer Company LC in contradiction to the conclusions of the 1966 Barnett Thesis).

51. On December 15, 1995, during the protest hearing for permanent change application no. 57-7479 (a18651), EID reported that Boyer Well #2 was operational, despite the fact that the point-of-diversion for Boyer Well #2 had not been approved by the State Engineer.

52. While Boyer Well #2's point-of-diversion was not part of EID's permanent change application no. 57-7795 (a17521), the State Engineer inexplicably approved it on December 31, 1996.

53. On December 31, 1996, the State Engineer approved EID's application "to replace" permanent change application a6538 with permanent change application no. 57-7796 (a17521) even though the State Engineer rejected two of the three proposed points-of-diversion under the former application. The latter also listed 41 points of diversion for large-diameter commercial wells, which the State Engineers' Office failed to question or object to.

54. In August 1998, The Boyer Company "gifted" the Emigration Oaks water system to EID including water share 57-8865 (formerly belonging to Mt. Olivet), despite the general referendum's results (see paragraph 50) and EID's own hydrologist warning that construction of the water system was a dire threat to existing water users in the Canyon.

55. Despite having relinquished all water rights to EID, in September 1998, land-developers submitted an application to subdivide another 51 parcels of the Emigration Oaks development.

56. In a 2000 Barnett Study entitled "Geologic and Hydrologic Setting of the Upper Emigration Canyon Area" (the "Barnett Study"), EID hydrologist, Don Barnett, noted that in the year 1998 Boyer Well #2 had extracted more water than was replenished by natural groundwater recharge in a "good water year," resulting in groundwater mining. *See* Ex. G, at "Exhibit E."

57. The Barnett Study states: "The Freeze Creek and Western basin subunits of the Upper Twin Creek HSU are the sources of [Boyer] Wells 1 and 2, ... [d]evelopment of additional wells in these members [i.e., the Upper Freeze Creek and Brigham Fork Wells constructed in October 2003 and 2013] could cause well interference and **is not recommended**" (emphasis added). *Id.* at 46.

58. The 1999 Emigration Township General Plan limits total Canyon build-out to 725 domestic units from its existing number of approximately 600 Canyon homes (with only about 98 homes yet to be built in Emigration Oaks at the time); however, land-developers sought and obtained approval from the State Engineer to construct 1,146 new homes in the Canyon, including 51 additional homes to be built in Phases 4a, 6 and 6a of the Emigration Oaks development.

59. On January 3, 2001, EID secured a commitment of funds for federally-backed bonds at 2.01% in the amount of \$1,846,000.00 in order to construct two large diameter commercial wells (*i.e.*, Brigham Fork and Upper Freeze Creek Wells) in the Twin Creek Aquifer and a 1-million gallon reservoir (*i.e.*, Wildflower Reservoir).

60. On May 14, 2002, the State Engineer's Office approved EID's temporary change application no. 57-7796 (t26672) for the construction of the Brigham Fork Well, disregarding 60 well sites previously approved under permanent change application nos. 57-8865 (a12710) and 57-7796 (a17521).

61. On November 14, 2002, EID adopted the 2002 Water Conversation and Management Plan required for the receipt of federally-backed funds under the federally-mandated Environmental Assessment Report ("EAR") and Finding of No Significant Impact ("FONSI"), limiting total Canyon build-out to 700 domestic units (with approximately 98 homes yet to be built in Emigration Oaks development) and required EID to observe its monitoring wells, maintain minimum stream flow and adjust development limits based on data collected therefrom.

62. EID failed to comply with the EAR and FONSI.

63. In 2004, shortly after the Brigham Fork Well became operational, EID stopped monitoring its wells. EID did not resume any monitoring until October 2016, after both the Brigham Fork and Upper Freeze Creek Wells had extracted over a hundred-million gallons from the Twin Creek Aquifer.

64. Between June 2, 2006 (t31547) and October 24, 2011 (t37769), EID failed to file any temporary change application with the State Engineer's Office.

65. Despite the fact that temporary change application t31547 automatically expired on April 3, 2008, EID continued to operate the Brigham Fork Well, a statutory violation. *See* Utah Code 73-3-3(7).

66. With about 600 homes built in the Canyon, and over 112 homes yet to be built in Emigration Oaks, between January 1, 2002 and December 30, 2007, EID procured 132 "stand-by agreements," promising to provide future water service to 97 additional vacant lots, far exceeding the buildout limit of 700 Canyon homes established under the 1999 Emigration Canyon General Plan, the 2002 Water Conservation and Management Plan and the federally mandated EAR and FONSI.

67. On April 3, 2007, historically low stream levels were noted in the State Engineer's Memorandum Decision under t31547, but were omitted from later approvals of EID change applications.

68. On December 28, 2007, EID acquired an additional 52.56 acre feet to meet the "reasonable future requirements" of 69 new homes yet to be constructed in the Canyon under permanent change application no. 57-7479 (a18651), far exceeding the buildout limit of 700

Canyon homes established under the 1999 Emigration Canyon General Plan, the 2002 Water Conservation and Management Plan, and the federally mandated EAR and FONSI.

69. On December 29, 2010, EID management reported its plan to the State Engineer that **all Canyon residents** "will convert from a system of individual family wells to the canyon water system...as they are able to afford expansion."

70. On April 23, 2013, the State Engineer approved temporary change application t38434 for the construction of the Upper Freeze Creek Well on 20 acres of property belonging to land developers.

71. Sometime in 2013, EID began charging all residents of the Spring Glen Water Company a "fire hydrant rental fee" even though it constructed its fire hydrants within feet of the fire hydrants belonging to the Spring Glen community members.

72. Sometime in 2013, EID secured another \$2.46 million dollar commitment of funds to build yet another large-diameter commercial well in the Twin Creek Aquifer.

73. In June 2013, EID announced an assessment of a mandatory "fire-hydrant rental fee" for 86 households on private wells, in order to generate additional annual revenue of \$86,000.00, necessary to service its massive federally-backed debt of \$6.3 million.

74. On November 7, 2013, the State Engineer approved EID's extension request for 69 new homes yet to be constructed under permanent change application no. 57-7479 (a18651) despite the fact that the original approval of the permanent change application was limited to the inside domestic needs of two "part-time families."

75. In its 2013 Water Conservation and Management Plan, EID reported that it "regularly measures water levels [of its monitoring wells]" while in fact no measurements were taken between 2004 and October 2016.

76. On December 31, 2013, EID allowed permanent change application "a12710b" for Boyer Well #1 to lapse thereby reducing the March 9, 1983 priority date of **188** existing Canyon residents to January 30, 2014.

77. Between October 1982 and November 2013 the State Engineer's Office approved permanent change applications from land-developers for 1,284 homes "yet to be constructed" in the Canyon to be drawn entirely from large-diameter commercial wells in the Twin Creek aquifer.

78. In September 2014, EID filed property liens on 46 Canyon residents for EID's mandatory fire-hydrant rental fee.

79. In an open community letter, dated June 2013, EID conceded that it was only providing water service to **273** Canyon residents instead of **345** connections required under federally-backed loan requirements.

80. Independent review of EID filings with the State Engineer, reveals that EID is providing water service for free to 40 domestic units without explanation.

81. In the EID Trustee meeting of March 12, 2015, EID revealed a formula whereby it will collect increased impact fees from an additional **517** new homes "yet to be constructed" in the Canyon, far exceeding the buildout limit of 700 Canyon homes established under the 1999 Emigration Canyon General Plan, the 2002 and 2013 Water Conservation and Management Plans, and the federally mandated EAR and FONSI.

82. In April 2015, with approximately 680 homes built in the Canyon and 97 homes yet to be built on vacant parcels promised future water service by EID, a report by water expert Dr. Hansen concluded that current levels of development in the Canyon had already severely impaired the Canyon Stream. *See* Ex. I.

83. During the EID Trustee Meeting on August 20, 2015, EID's hydrologist Don Barnett voiced no objection to the construction of an additional **2,000** homes in the Canyon because he "knows no limit [as to the number of homes the Canyon's hydrology can support]".

84. In the EID Trustee meeting from June 18, 2015, EID hydrologist Don Barnett reported that the stream flow of Emigration Creek had diminished by 75% of its normal capacity. EID Trustee Chairman Hughes responded that the diminished flow of the Canyon stream is "not EID's problem" and concerned Canyon residents should "take that up with the [Utah State] legislature".

85. In November 2015, multiple Canyon residents with perfected water shares report quantity and quality impairment directly to the State Engineer.

86. The State Engineer approved temporary change applications 57-7796 (t42153) (2015) and 57-7796 (t41129) (2016) without public notice or hearing.

87. In March 2015, EID trustees announced that eight households with water rights "leased" from EID were required to connect to the EID water system by August 2016 or face "criminal charges."

88. On December 15, 1995, EID's own hydrologist Jack Barnett protested against the construction of the very same large-diameter commercial wells in the same locations as the Brigham Fork and Upper Freeze Creek Wells, citing impairment of the Emigration Canyon

Stream “for decades – twenty, fifty, seventy-five years” due to predicted interruption of with groundwater movement supporting the surface water flow and delivery of water to the base of the Canyon (groundwater mining).

89. On May 5, 2016, EID trustees refused to place the issue of quantity impairment on the EID trustee meeting agenda for open and public discussion.

90. On August 18, 2016, EID reported that the Upper Freeze Creek Well had extracted over 15 million gallons from the Canyon Aquifer since placed into operation in 2013.

91. On December 29, 2016, the State Engineer rejected the application of Canyon resident White to change the point-of-diversion of 0.45 acre feet a few yards from its previous source for the benefit of a neighbor who was being forced to abandon a private well and connect to the EID water system - because the applicant "had failed to submit additional information to give a reason to believe the change would not impair existing rights [*i.e.*, temporary change applications filed under EID's water share 57-7796]".

92. However, one-and-a-half months later, the State Engineer approved EID’s application no. 57-7796 (t42153) for the movement of 97.75 acre feet from a surface water source located eight miles away at the base of the Canyon for unspecified "municipal purposes" because the temporary change application allegedly "could be approved without adversely affecting existing rights".

93. In an unannounced meeting on January 3, 2017 and without public notice or hearing, the Emigration Township Council abolished the build-out limit of 700 homes established under the 1999 General Plan and the 2002 and 2013 Water Conservation and

Management Plans, and the federally mandated EAR and FONSI, with the enactment of a new land-use ordinance for the Canyon.

94. On February 13, 2017, the State Engineer approved EID's temporary change application no. 57-7796 (t42153) despite knowledge that (i) EID violated the conditional terms of the previous temporary change application to meter all water sources, (ii) the previous change application lapsed on October 26, 2016 (iii) EID failed to file another temporary change application until November 22, 2016, (iv) EID failed to maintain adequate stream flow in 8 of the past 14 years in violation of federal funding requirements, (v) multiple Canyon residents, possessing senior water rights, reported quantity impairment directly to the State Engineer, (vi) The Salt Lake Tribune reported on June 18, 2015 that private wells were experiencing quantity impairment, and (viii) EID had been extracting water, from the Upper Freeze Creek Well and Brigham Fork Well, without approval of the State Engineer from October 26, 2016 through February 2017, a statutory violation (*see* Utah Code Ann. §§ 76-10-201 and 76-10-202).

95. On September 8, 2018, The Salt Lake Tribune reported total depletion of the Emigration Canyon Stream less than two miles from Utah's Hogle Zoo for the first time in recorded memory.

96. The next business day, EID filed the subject Permanent Change Applications for **28 cfs.** (57-7796) and for **5.0 cfs** (57-10711), effectively allowing for the construction of 568 new domestic units in Emigration Canyon Applications, and filed addendums on December 5, 2018 and January 7, 2019. *See* Exs. F, G and H.

97. On January 16, and 25, 2019, respectively, the State Engineer entered Orders approving the Permanent Change Applications. *See* Exs. B and C.

98. On February, 5, 2019 Canyon resident Stokman timely filed a Request for Reconsideration for State Engineer Jones Order of January 16, 2019.

99. To date, over 40 Canyon residents have reported substantial impairment of private wells possessing superior water shares as reported to the State Engineer Jones by The ECHO-Association and published by The Salt Lake Tribune and Desert News.

100. The percentage of *e coli* bacteria contamination of the 400+ private wells currently operated near the.

101. On October 17, 2018, The ECHO-Association filed a timely protest to EID's Permanent Change Canyon Stream is currently unknown.

102. As of October 2013, EID has promised future water service to the owners of 97 vacant lots in Emigration Canyon.

103. The ECHO-Association has suffered total impairment of its water right.

IV. EID Failed to Meet the Requirements of Utah Code Ann. §§ 73-3-3(5) and 73-3-8.

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

105. 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.

106. 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. *Id.*

107. The Protest Hearing on EID's Permanent Change Applications was held on December 19, 2018.

108. EID provided no expert report to support its Permanent Change Applications. Mr. Don Barnett, on behalf of EID, provided verbal data without supporting documentation.

109. The State Engineer conducted no investigation to qualify the opinions that Mr. Barnett's provided at the Protest Hearing.

110. The State Engineer apparently and inappropriately shifted the burden to those that filed protests in violation of Utah Code Ann. §§ 73-3-3(5) and 78-3-8.

111. Contrary to EID's presentation at the Protest Hearing, EID's past and present hydrologists, in written reports and in presentation to the State Engineer's Office, have concluded that large-diameter wells are harmful 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 Ex. G*, at "Exhibit E" and "Exhibit F"; *see also* Statement of Fact, at ¶ 88.

A. There is no unappropriated water in the proposed sources.

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

113. To date, there are an estimated 286 domestic units currently connected to the EID water system and 685 United States postal mailboxes in the Canyon.

114. EID's permanent change applications for 649.99 acre feet, requests approval for an additional estimated 568 new domestic units to be serviced by numerous surface and underground points-of-diversion.

115. EID's applications seek approval of 649.99 acre feet for "municipal purposes" and as approved, permits legal authority to connect 886 water users (580 new connections above its current subscriber base of 285 domestic units – calculated at 0.75 per acre feet per connection as required by the Utah State Engineer).

116. A similar application was denied by the prior state engineer under permanent change application a6538 to the very same subject water right.

117. EID has provided no evidence that there are any water sources available beyond the amount that they and the other users in the Canyon have been diverting to date.

118. On May 30, 1996, EID itself stated that "consistent with public health and general welfare" the hydrology of Emigration Canyon could not support "more than 185 future allocations of water rights... [above] the 417 current homes and the 98 approved lots on property in the Emigration Oaks Subdivision [subtracted from the maximum number of 700 sustainable homes in the Canyon]."

119. There are now approximately 160 domestic units built in the Emigration Oaks and EID has promised future water service for another 97 vacant lots, far exceeding the buildout limit of 700 domestic units established under EID's own Water Management Plans from 1996, 2002

and 2013 (700 = 185 “future allocations” minus 98 “approved lots” in Emigration Oaks - minus 417 “current homes”).⁴

120. By extracting water volumes far exceeding EID’s allotted surface water rights (pursuant to the Mt. Olivet Case) at higher elevations, the Canyon Stream has dried up at EID’s original point-of-diversion, in several sections less than two miles from Utah’s Hogle Zoo. This has never before occurred in the memory of Canyon residents living near the Canyon Stream.

B. The proposed water use will impair existing rights and interfere with more beneficial use of the water.

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

122. Quantity impairment is defined in Utah Code Ann. § 73-3-3(1)(c)(i) as “any reduction in the amount of water a person is able to receive in order to satisfy and existing right to the sue of water that would result from an action proposed in a change application, including: (A) diminishing the quantity of water in the source of supply for the existing right; (B) a change in the timing of the availability of water from the source of water for the existing right; or (C) enlarging the quantity of water depleted by the nature of the proposed use when compared with the nature of the currently approved use.”

123. EID’s own former hydrologist, Jack Barnett, P.E., P.G., recommended against the construction of the very same large-diameter commercial wells in the Canyon now operated and proposed by EID. *See* Ex. G, at “Exhibit F”. He concluded:

- a. Hydrology of the Canyon is not conducive to the operation of large-diameter wells (*Id.* at 94);

⁴ *See* https://echo-association.com/?page_id=1184.

- b. Even if such wells were to successfully draw large quantities of water from the Canyon ground, impairment of private wells having superior water rights to clean, safe water “would be almost a certainty.” (*Id.*) (emphasis added);
- c. Because the Canyon stream is in direct communication with ground water, impairment of one would negatively impact the other, resulting in the reduction in stream flow, and the substantial increase of bacterial levels of the stream and risk of contamination of private wells located and operated nearby (*Id.* at 96); and
- d. “[D]evelopment [in the Canyon] should be limited to small-diameter domestic wells” for single, one-family residence located on land previously used for agriculture. (*Id.* at 95).

124. These conclusions were later confirmed by EID’s current hydrologist Don Barnett in the Barnett Study. He reasoned that because “[t]he Freeze Creek and Western basin subunits of the Upper Twin Creek HSU are the sources of [Boyer] Wells 1 and 2, ... [d]evelopment of additional wells in these members [i.e., the Upper Freeze Creek and Brigham Fork Wells constructed in October 2003 and 2013] could cause well interference and **is not recommended.**” (emphasis added). *See* Ex. G, at “Exhibit E”, at 46.

125. Insofar as EID’s proposal a44045 includes points-of-diversion for large-diameter commercial wells and not smaller-diameter, individual, domestic wells currently approved and in use, EID application a44045 necessarily enlarges the rate and quantity of water depleted in the Twin Creek aquifer.

126. During a public hearing at the State Engineer’s Office on December 15, 1995, EID’s own hydrologists, Jack and Don Barnett, protested against allowing the construction of the very same large-diameter commercial wells now owned, operated and proposed by EID under permanent change application a44045, citing impairment of the Emigration Canyon Stream “for decades – twenty, fifty, seventy-five years” due to predicted interruption of with groundwater

movement supporting the surface water flow and delivery of water to the base of the Canyon (groundwater mining).

127. The dramatic shift in purported scientific analysis or “change of heart” of EID’s hydrologist at the Protest Hearing was neither justified to nor investigated by the Utah State Engineer.

128. EID’s hydrologists have stated that water treated in individual septic systems in the area of Brigham Fork, Upper Freeze Creek and Pioneer Fork (*i.e.*, the entire boundary of the then existing and proposed expansion of Emigration Oaks at that time) would impair the Canyon stream and senior water rights for “decades – twenty, fifty, seventy-five years” due to the displacement of ground water at great depths and slow percolations rates for water recharging back into the lower areas of the valley floor.

129. Dozens of Canyon homeowners have reported quality impairment and/or total impairment to the State Engineer’s Office since October 11, 1988.

130. EID’s application a44045 in regard to all surface water points-of-diversion must yield to senior water sources currently approved and in use and must be rejected as statutory impairment under Utah Code Ann. § 73-3-3(1)(c)(i)C).

131. As stated in the 1966 Barnett Thesis, impairment of substantially more surface and underground sources will occur “**with almost certainty**” should the State Engineer approve twice the amount of the current build-out as proposed in areas not traditionally used for agriculture, located at high elevations in the Canyon’s drainage areas serviced by large-diameter commercial wells.

132. There are other water rights to the Canyon Stream at the mouth of the Canyon, including Utah's Hogle Zoo, the historic Mt. Olivet Cemetery and This is the Place State Park which will be affected by the groundwater mining permitted by EID's Permanent Change Applications.

133. The only available scientific reports of the Canyon hydrology – *i.e.*, the 1966 Barnett Thesis and 2000 Barnett Study – expressly warn against quantity and quality impairment of existing and superior water shares if large-diameter commercial wells were to draw large quantities of water from the Freeze Creek Aquifer (*i.e.* **all four** EID wells are drilled and operational). EID has provided no scientific reports to the contrary.

C. EID's proposed plan is physically and economically unfeasible.

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

135. EID's plan to move 649.99 acre feet of water up the Canyon is not physically or economically feasible.

136. Point-of-diversion No. 3, under a44045, appears to be located on property belonging to private land developers Emigration Estates LLC and Butler, Crocket & Walsh Development Corp. EID has not demonstrated that it has secured easements for the maintenance of water diversion and delivery infrastructure or even the verbal consent of land-developers.

137. While point-of-diversion No. 3 and proposed point-of-diversion No. 4, under a44045, appear to be located on property owned by EID, a previously recorded conservation easement with Utah Open Lands prevents water infrastructure development. It does not appear

that Utah Open Lands is aware of EID's proposal or has consented to removing the land-conservation easement.

138. EID's plan to divert a total of 649.9 acre-feet of water in Emigration Canyon will cost current Canyon residents on private wells millions of dollars. For example, in order to connect points-of-diversion Nos. 1-5 proposed under a44045, EID will be required to construct **2.5 miles** of appropriate sized water lines at an estimated cost of over **\$3 million** dollars.

139. EID has failed to present the feasibility to obtain the funding.

140. EID already owes many millions of dollars on existing loans, and upon information and belief, lacks sufficient finances to support its planned expansion except through further residential and/or commercial development of the Canyon. In June 2013, EID announced a resolution charging **86** Canyon households on private wells (constructed in accordance with Mr. Barnett's hydrological analysis) a "fire-hydrant rental fee" because EID was unable to service its massive debt burden needing "about \$86,000.00 more money [*sic*] each year."

141. Upon information and belief, EID cannot presently continue servicing its current massive debt without further development and/or from existing private well owners connecting to the system.

D. The plan will prove to be detrimental to public health, welfare and safety.

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

143. In October 2003, EID completed an Environment Assessment Report concerning the impact of the Brigham Fork and "Nugget Well" (renamed and relocated to the Upper Freeze Creek) and the Wildflower Reservoir on the Emigration Canyon Stream as habitat to the

Bonneville Cutthroat Trout – a federally protected “pure species” and official symbol of the State of Utah.

144. By 2015, EID failed to maintain minimum stream flow in eight of the prior fourteen 14 years (with only 685 homes in the Canyon at the time).

145. The net effect of approving these change applications for 649.9 acre-feet will likely dry up Emigration Creek and almost all of the small-diameter domestic wells located near the valley floor.

146. In the 1966 Barnett Thesis, EID’s own hydrologist warned that “**any reduction in stream flow** will increase the concentration of bacteria in the stream and increase the opportunity for bacteria to contaminate existing water supplies.”

147. Upon information and belief, bacterial contamination of drinking water also appears to be occurring in the water system operated by EID, and supporting information is being withheld from the public.

148. Since the Brigham Fork Well was placed into operation back in October 2003, numerous Canyon residents connected to the EID water system have complained of foul and reddish colored water evidencing water quality deficiency for sulfate and turbidity contamination.

149. In May 2014, the Utah State Division of Drinking Water reported that EID failed to test the Upper Freeze Creek Well (proposed point-of-diversion No. 6) for radionuclides.

150. In October 2018, EID general manager reported that the Brigham Fork Well (proposed point-of-diversion No. 7 under a44045) failed water quality tests for sulfate and turbidly.

151. The Wildflower Reservoir has been operating since October 2003 without a valid operating permit and appears to suffer from substantial structural defects, and it appears that Boyer Well #2 may not be issued an operating permit at all.

152. The Bonneville Cutthroat trout, which once spawned in the Emigration Stream are now gone.

153. Upon information and belief and based upon representations by EID's Trustee Chairman on February 16, 2017, EID has been leaking **1 million gallons** of chlorinated water into the Canyon Aquifer every month since October 2003, representing approximately 1/3 of its entire water extraction during the winter season. The State Engineer's Office has failed to investigate this issue of public health, welfare and safety.

154. EID's water system in the Emigration Oaks development, and core to the entire EID water infrastructure, consists of 4" and 2" water lines to service fire hydrants and individual homes and cannot maintain adequate household and emergency water pressure, and is a direct threat to public health and safety. The lines will likely have to be replaced at substantial cost to EID.

155. Because all EID water lines will likely have to be replaced at an uncalculated and substantial cost, it is not feasible or practical for homes with superior water shares, suffering quantity or quality impairment, to connect into the EID system.

156. Upon information and belief, the EID water system is unfit for public drinking water consumption due to sulfate and turbidity contamination, cannot provide for adequate fire-flow protection to existing Canyon homes, has devastated the Canyon stream as habitat to a federally protected species, most likely is contaminating small domestic wells adjacent to the

Canyon stream with coliform bacteria, may be dumping 1 million gallons of chlorinated water into the Canyon Aquifer every month since October 2003 to the detriment of public health, safety and welfare.

157. EID water users have complained of foul and stained water since the Brigham Fork Well was first placed in operation back in October 2003.

158. One day after the permanent change applications were submitted to State Engineer 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 hearing on December 18, 2018, EID testified to the State Engineer that the Brigham Fork Well was not currently in operation due to “mechanical issues.” The State Engineer’s Office has failed to investigate this issue of public health, welfare and safety.

E. EID cannot show that it has the financial ability to complete the proposed work.

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

160. EID has presented no evidence that it has the financial ability to take on the monumental task of providing 649.9 acre-feet to up to 568 future residential units in Emigration Canyon. They have not even proffered an amount of money that it would take to develop the sources, provide water lines and water tanks and the other infrastructure needed to deliver this amount of water but simply reports that it has authority to issue “public bonds” at the protest hearing.

F. The applications are for the purpose of speculation or monopoly.

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

162. EID has filed 59 temporary change applications with the State Engineer's Office over the past 30 years.

163. EID's temporary change applications have concealed the fact that there is neither sufficient water for the vacant parcels sold to buyers of the Emigration Oaks development nor to develop over 1,400 acres currently owned by land-developers and EID itself.

164. It is not the policy of the State Engineer's Office to permit drilling and/or operation of large-diameter commercial wells under temporary change applications.

165. Temporary change applications do not establish a water right priority date.

166. EID is not allowed to provide water service to new homes in the Canyon without prior approval of the State Engineer's Office (Utah Code Ann. § 76-10-202), and its Permanent Change Applications amount to an attempt to retroactively cure prior residential unit constructed in excess of the **188** domestic units approved under a12710, and will affirm and encourage EID's ongoing practice of indiscriminately handing out water letters for new construction, thereby providing impermissible water service at the cost – and substantial economic damage – of current residents on private wells with superior water rights.

167. EID is attempting to monopolize the water in the Canyon through groundwater mining upstream and impairing superior water rights, thus drying out downstream wells and forcing the owners to connect into its defunct water system, in an attempt to become the sole water provider in the Canyon.

168. To date, EID has failed to publically disclose the actual priority date of the points-of-diversion for operation of the Brigham Fork and Upper Freeze Creek Wells (September 12, 2018), and has claimed to be the superior water right holder in the Canyon to mislead those on private wells to connect into its defunct water system.

169. EID water rights, that have been moved from the mouth of the Canyon, are junior to all perfected water shares in the Canyon. By filing 59 temporary change applications, EID is attempting to monopolize water for the benefit of private land-developers who both directly participate in the decision making process of EID serving as “EID Advisory Committee Members.”

G. EID’s permanent change applications are not filed in good faith.

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

171. EID’s applications are inaccurate and were not filed in good faith as shown by the following:

a. Contrary to the representations of EID, Freeze Creek Well #1 (aka Boyer Well #1) *is not* a point-of-diversion for “individual small domestic wells... authorized for a number of years under temporary change application for individuals who have been leasing the District s [*sic*] water right and diverting water from their own private sources” **but is** a large-diameter commercial well approved for “**188 families**” under “a12710b” for 94.04 acre feet, and EID’s own hydrologists Jack and Don Barnett of BIWC, previously argued against such a well, during a public hearing on December 15, 1995;

b. According to the 1996 Sanitary Survey and letter dated September 20, 1995 from the Utah Division of Drinking Water, Well #2 (aka Boyer Well #2) cannot be issued an operating permit as a public drinking water source.

c. Pursuant to permanent change application no. 57-7796, EID is required to monitor its wells, and has failed to comply with the mandatory requirement for the Brigham Fork and Upper Freeze Creek wells.

d. On August 18, 2016, EID revealed that it failed to abide by the express terms of the temporary and permanent change applications filed for 57-7796, thereby voiding its legal right to extract water from the Brigham Fork and Upper Freeze Creek wells.

e. On September 13, 2018, EID reported that the Brigham Fork Well (underground point-of diversion Nr. 7) failed water quality tests for both sulfate and turbidity, and it is unsuitable for “municipal purposes” within the EID’s service area as proposed under a44045;

f. Prior to the Protest Hearing, EID refused to release the 1966 Barnett Thesis or 2000 Barnett Study to Canyon residents while the State Engineer’s Office referred questions regarding the priority date of EID water rights back to EID trustees and managers when Canyon residents reported impairment or total depletion of senior water shares to the State Engineer’s Office;

g. During the Protest period, and prior the Protest Hearing, the State Engineer’s Office actively discouraged Canyon residents from filing protest stating that “the issue has already been decided”;

h. To date, and with the positive knowledge of the State Engineer, EID continues to falsely maintain that it holds “holds one of the most senior water rights in the canyon” and “[a]s canyon residents join to the community water system, the homeowners, can choose to purchase the District's water right or exchange their water right for the District's senior water right” although all EID large-diameter commercial wells enjoy a priority date of September 12, 2018 – the most junior date in the Canyon;

i. To date, the State Engineer has failed to take action to prevent illegal water extraction and use at 40 locations identified in the ECHO-Association correspondence from April 20, 2017;

j. According to EID’s own federally mandated 2017 Customer Confidence Report and 2018 Sanitation Survey, EID has twice the water production capacity to service its current residents in summer months should this Court set aside the State Engineer’s Orders and order termination of the Brigham Fork and Upper Freeze Wells;

k. On January 21, 2019, in possible retaliation for filing lawful protest against EID permeant change applications, as well as to service EID’s current massive federally-baked debt, EID ordered the tax-foreclosure sale of private property belonging to retired protestants McCallum and Penske in order to collect a “fire-hydrant rental fee” although both Canyon homes are serviced by private wells constructed in accordance with the 1966 Barnett Thesis and 2000 Barnett Study, are operated with superior water rights to that owned by EID near the Canyon Stream, both reported quality impairment directly to the State Engineer, and both fear total and possibly permanent exhaustion of the Twin Creek Aquifer on a daily basis.

REQUEST FOR RELIEF

Petitioner requests this Court enter the following relief:

1. An Order denying EID's Permanent Change Application Number 57-7796 (a44045).
2. An Order denying EID's Permanent Change Application Number 57-7711(a44046).
3. 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 25th day of February, 2019.

CHRISTENSEN & JENSEN, P.C.

/s/ Stephen D. Kelson

Stephen D. Kelson

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